

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLIE LEE FLOYD,

Defendant-Appellant.

UNPUBLISHED

January 15, 2008

No. 272425

Macomb Circuit Court

LC No. 2005-001604-FC

Before: Whitbeck, C.J., and White and Zahra, JJ

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(c) (sexual penetration during commission of a felony), second-degree criminal sexual conduct, MCL 750.520c(1)(c) (sexual contact during commission of a felony), breaking and entering a building with intent to commit a felony or larceny, MCL 750.110, five counts of breaking and entering a coin-operated device, MCL 752.811(a), first-degree home invasion, MCL 750.110a(2), two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, and kidnapping, MCL 750.349. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 62 to 80 years for all of his convictions. He appeals as of right. We remand for resentencing on defendant's convictions of breaking and entering a coin-operated device and felonious assault, but affirm in all other respects.

Defendant's convictions arise out of a string of criminal offenses occurring on Thanksgiving Day in 2004. "AP" was employed at Raybestos in Sterling Heights as a security guard. Shortly after 10:00 a.m., defendant charged toward her while she was sitting in a cafeteria and asked her "where the money was." He then pulled down her pants and underwear, and tied her hands and ankles together with her bootlaces. She attempted to push him away, but he grabbed the back of her head and slammed her face onto a table. He then sexually assaulted her. Thereafter, AP heard defendant pounding on the vending machines in the cafeteria and heard coins from the machines spill onto the floor. She was able to untie her hands and ankles and run outside into traffic. She used the cell phone of a passing motorist to call the police.

Meanwhile, defendant had crossed the street and forced himself inside Constance Belcher's home. He repeatedly struck her with a hammer, which she was ultimately able to seize from his grasp. He then held her hostage in the home until she was able to run outside when he appeared to be asleep. While Belcher was inside the home, a police negotiator attempted to

persuade defendant to surrender and allow Belcher to leave the home, but he refused. The jury convicted defendant as charged.

Defendant first argues that he is entitled to a new trial because the trial court denied his request to represent himself. We disagree. When assessing the validity of a defendant's waiver of the right to counsel, we engage in a de novo review of the entire record, but will not disturb a trial court's factual findings regarding whether a waiver is knowing and intelligent unless clearly erroneous. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). The meaning of "knowing and intelligent" is a question of law that we review de novo. *Id.*

Before granting a defendant's request to represent himself or herself, the trial court must determine that the three factors set forth in *People v Anderson*[, 398 Mich 361, 367-368; 247 NW2d 857 (1976),] have been met: (1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. [*People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005).]

In addition, a trial court must satisfy the requirements of MCR 6.005(D), which provides that a trial court may not allow a defendant to waive the right to representation without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

See also *Willing*, *supra* at 219-220. In determining whether these requirements were met, this Court should "indulge every reasonable presumption against the waiver of fundamental constitutional rights." *Williams*, *supra* at 641 (internal quotation marks and citations omitted).

In *People v Russell*, 471 Mich 182, 191; 684 NW2d 745 (2004), our Supreme Court reaffirmed that the scope of judicial inquiry required under *Anderson* and MCR 6.005(D) is one of "substantial compliance":

"We hold, therefore, that trial courts must substantially comply with the aforementioned substantive requirements set forth in both *Anderson* and MCR 6.005(D). Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures. The nonformalistic nature of a substantial compliance rule affords the protection of a strict compliance rule with far less of the problems associated with requiring courts to engage in a word-for-word litany approach. . . .

Completion of these judicial procedures allows the court to consider a request to proceed in propria persona. If a judge is uncertain regarding whether any of the waiver procedures are met, he should deny the defendant's request to proceed in propria persona, noting the reasons for the denial on the record. The defendant should then continue to be represented by retained or appointed counsel, unless the judge determines substitute counsel is appropriate." [*Id.*, quoting *People v Adkins (After Remand)*, 452 Mich 702, 726-727; 551 NW2d 108 (1996) (emphasis deleted).]

Here, the record shows that the trial court substantially complied with the requirements of *Anderson* and MCR 6.005(D). Defendant requested to represent himself the day before the first day of trial. At that time, the trial court advised him of the extensive charges against him and the possibility that he could be sentenced to life imprisonment if convicted. The court ascertained that defendant did not have any legal training and had never previously represented himself. The court also warned defendant of the dangers of self-representation. After a short recess, defendant withdrew his request and stated that he wished to continue being represented by his appointed counsel.

The following day, before jury selection, defendant again requested to represent himself, which the trial court denied. The court properly determined that the complexity of the proceedings and defendant's lack of education and understanding of legal principles, including the rules of evidence, did not favor self-representation. The court further determined that, in the interest of maintaining orderly proceedings, it was imperative that defendant be represented by counsel. The court opined that, otherwise, the trial would become a charade and stated that based on defendant's demeanor and assertions, the court was not satisfied that he would not disrupt the proceedings if he acted as his own attorney. Moreover, the court opined that defendant's assertion of his right to self-representation, his withdrawal of the request, and the subsequent reassertion of that right was merely a delay tactic to avoid proceeding with the trial.

The trial court's factual findings were not clearly erroneous, and the court did not err by denying defendant's request. Defendant admitted that while incarcerated, he was not provided access to the law library and was "on 23 hour lockdown." The prosecutor opined that defendant was confined to his cell for security purposes because of four criminal sexual conduct charges he incurred while he was incarcerated. Thus, it does not appear that defendant would have been able to research issues pertaining to his case or otherwise effectively act as his own counsel. Moreover, because of defendant's offenses while incarcerated and his previous history of escape, he was required to wear leg irons during trial. The trial court properly opined that it would be impractical for defendant to move from his seated position which concealed the leg irons from the jury. The trial court's determination that defendant may disrupt, unduly inconvenience, and burden the court was sound considering defendant's demeanor, history of escape, and recent alleged criminal offenses. Further, considering defendant's repeated assertions of his right to self-representation and the previous withdrawal of his request, he was apparently uncertain regarding whether he truly wished to represent himself. Thus, it appears that his request was not unequivocal. The trial court further properly determined that the request was merely a delay tactic. Accordingly, the court did not err by denying defendant's request to represent himself.

Defendant next argues that he is entitled to resentencing for various reasons. We initially address defendant's contention that the sentencing guidelines were required to be scored for

every offense, or minimally, every separate offense class. We disagree. Because defendant has multiple concurrent convictions, an SIR was required to be prepared only for the highest crime class felony conviction. *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005). First-degree criminal sexual conduct and kidnapping are both class A felonies, and an SIR was prepared for defendant's first-degree criminal sexual conduct conviction. Under *Mack*, an SIR was not required to be prepared for defendant's remaining convictions. *Id.*

Defendant concedes that his minimum sentences of 62 years for first-degree criminal sexual conduct and kidnapping are within the sentencing guidelines range of 225 to 750 months for class A felonies. A minimum sentence within the legislative guidelines range is presumptively proportionate and must be affirmed on appeal. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003). Defendant argues that his sentences for his non-class A offenses exceeded the minimum guidelines ranges applicable to those offenses and were disproportionate. Although the sentencing guidelines are not applicable to lower class concurrent convictions, all sentences must nevertheless adhere to the principle of proportionality. *Mack, supra* at 128-129.

The prosecutor concedes that defendant's sentences for breaking and entering a coin-operated device (Counts 4-8) and felonious assault (Count 11) are invalid, and defendant is entitled to resentencing on these convictions. MCL 769.12(1)(b) provides that "[i]f the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term that is less than 5 years, the court . . . may sentence the person to imprisonment for a maximum term of not more than 15 years." Upon a first conviction, breaking and entering a coin-operated device is punishable by a three-year prison term, and felonious assault is punishable by a four-year prison term. MCL 752.811(a); MCL 750.82(1). Thus, even considering defendant's status as a fourth habitual offender, the trial court could have properly sentenced defendant to a maximum term of only 15 years' imprisonment for these offenses. Accordingly, we vacate defendant's sentences for breaking and entering a coin-operated device and felonious assault and remand for resentencing on these convictions.

We next address defendant's proportionality argument regarding his sentences for second-degree criminal sexual conduct (Count 2), breaking and entering a building with intent to commit a felony or larceny therein (Count 3), first-degree home invasion (Count 9), and assault with intent to do great bodily harm less than murder (Counts 10 and 12). The principle of proportionality requires that a sentence "be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A disproportionate sentence constitutes an abuse of discretion. *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001).

Defendant argues that his minimum sentences for Counts 2-3, 9-10, and 12 would have greatly exceeded the appropriate guidelines ranges had an SIR been prepared for those offenses. However, because defendant was a habitual fourth offender, and each of the offenses was punishable by a maximum term of five years or more, or life, the trial court had discretion to sentence him to life imprisonment or to any lesser term. MCL 769.12. Further, although the sentences are lengthy, they are not disproportionate to the seriousness of the offender or the circumstances surrounding the offenses. At sentencing, the trial court recognized defendant's extensive criminal history. Defendant's presentence investigation report (PSIR) reveals numerous juvenile and adult offenses committed since defendant, age 45 at the time of

sentencing, was 16 years old. Defendant's adult criminal history reflects 20 previous offenses, including some committed while he was incarcerated. In fact, defendant had been charged with four criminal sexual conduct offenses while awaiting trial in the instant case, but the trial court did not consider those offenses when sentencing him. The trial court aptly noted that defendant poses a serious threat to the safety of the community.

In addition, the circumstances surrounding the offenses in this case establish their very serious nature. Defendant charged toward AP while she was eating breakfast, slammed her head against a table, tied her wrists and ankles together, and engaged in vaginal penetration with her. She was able to summon assistance only because she managed to untie the bootlaces wrapped around her wrists and ankles. Defendant thereafter forced himself inside Belcher's home, repeatedly struck her with a hammer, and held her hostage inside the home despite police efforts to convince him to let her go and surrender. Defendant's actions were thus violent and evidenced the threat that he poses to the community. Considering the circumstances surrounding the offense and the offender, defendant's sentences on Counts 2-3, 9-10, and 12 are proportionate.

Defendant further argues that a different judge should conduct his resentencing on Counts 4-8 and 11. In determining whether a different judge should resentence a defendant, this Court considers:

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (quotations omitted).]

The trial court's error regarding Counts 4-8 and 11 stemmed from its erroneous belief that because defendant is a habitual fourth offender, his maximum sentence for those offenses was life imprisonment rather than 15 years' imprisonment. Because defendant may not be sentenced for a period longer than 15 years for those offenses, the original trial court judge would not have substantial difficulty setting aside his previously expressed view that defendant should spend the rest of his life in prison, at least with respect to Counts 4-8 and 11. In addition, because we are affirming defendant's remaining sentences, reassignment is not necessary to preserve the appearance of justice and would entail unnecessary duplication disproportionate to any gain in preserving the appearance of fairness. *Hill, supra* at 398.

In a Standard 4 brief, defendant argues that there were insufficient previous convictions to support his habitual offender fourth sentence enhancement under MCL 769.12. Because defendant did not preserve this issue for appellate review, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Reversal is warranted only if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Defendant contends that his 1980 conviction for robbery should not have been considered to enhance his sentence under MCL 769.12 because it occurred more than ten years before the instant offenses. In *People v Zinn*, 217 Mich App 340, 349; 551 NW2d 704 (1996), this Court determined that a trial court may constitutionally consider convictions that are more than ten years old in determining whether a defendant is an habitual offender.

Defendant also contends that his sentence should not have been enhanced under MCL 769.12 because his only previous conviction, other than the 1980 robbery conviction, was his 1992 escape conviction. Defendant maintains that the 1993 and 1994 escape convictions listed on the habitual offender notice do not exist. Although defendant's PSIR lists several convictions in addition to the 1980 robbery conviction, it does not list convictions for escape occurring in 1993 or 1994. Rather, the only escape conviction listed in the PSIR is the one that defendant admits he committed in 1992. Defendant was advised of the fourth habitual offender notice on the day before trial if not before that date. In the context of warning defendant about the dangers of self-representation, the trial court advised him that the prosecutor's notice alleged that he had three previous escape convictions. Thus, defendant's contention that he was unaware until sentencing that he could be sentenced as a fourth habitual offender is simply untrue.

Under MCL 769.13(4), a defendant may challenge the accuracy or validity of one or more prior convictions listed in a notice by filing a written motion. Even if the 1993 and 1994 escape convictions listed in the notice did not occur, however, defendant has not established plain error affecting his substantial rights. If he had challenged the accuracy of the habitual offender notice in the trial court, the prosecutor could have amended the notice to include previous convictions other than the contested 1993 and 1994 escape convictions. *People v Hornsby*, 251 Mich App 462, 469-473; 650 NW2d 700 (2002). Defendant's PSIR lists at least three other convictions that could have supported defendant's sentence enhancement as a fourth habitual offender. Defendant did not contest the accuracy of his PSIR at sentencing. Thus, he has failed to establish plain error with respect to his habitual offender fourth sentence enhancement under MCL 769.12. As such, we deny his request for a remand to the trial court for a *Ginther*¹ hearing in this regard.

Defendant next argues in his Standard 4 brief that he was denied his state and federal constitutional rights to a speedy trial.² We disagree. Because defendant did not preserve this issue for appellate review, our review is limited to plain error affecting his substantial rights. *Carines, supra* at 763, 774.

A criminal defendant has both constitutional and statutory rights to a speedy trial. US Const, Ams VI and XIV; Const 1963, art 1, § 20; MCL 768.1. In determining whether a defendant has been denied a speedy trial, courts must consider: "(1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4)

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² Although defendant briefly mentions his right to a speedy trial under the 180-day rule, MCL 780.131(1), his reference to the rule is misplaced. Because he was not an inmate of a correctional facility, the 180-day rule is inapplicable. MCL 780.131(1).

prejudice to the defendant from the delay.” *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000) (citations omitted). A delay of less than 18 months requires a defendant to prove that he suffered prejudice. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). On the other hand, a delay of 18 months or longer is presumed prejudicial, and in such cases the burden is on the prosecutor to rebut the presumption of prejudice. *Id.*

Here, the delay between defendant’s arraignment and the first day of trial was approximately ten months. The record indicates that during that time, seven pretrial conferences were adjourned at defendant’s request, trial was adjourned at defendant’s request three times, defendant requested new counsel on one occasion, and defendant’s replacement counsel moved to withdraw, resulting in the appointment of a third attorney (LC No. 2005-001604-FC Docket Sheet). These delays were all attributable to defendant. In addition, defendant did not assert his right to a speedy trial. Rather, on the day that trial was finally scheduled to begin, he attempted to further delay trial by requesting to represent himself.

Defendant contends that he was prejudiced by the delay because three witnesses he intended to call to testify could no longer afford to travel from Alabama to testify on his behalf. He asserts that these witnesses, Rosalyn King, Sterling Anderson, and Willie Floyd, had previously traveled to Michigan from Alabama on numerous occasions, only to have the trial adjourned. Defendant fails to acknowledge, however, that trial was previously adjourned either at his request or because of his attorney’s motion to withdraw. Moreover, the absence of these witnesses did not deny defendant his ability to present a defense as he claims. If they would have testified as he asserts in his Standard 4 brief, their testimony would have primarily been corroborative of defendant’s testimony. Accordingly, defendant was not denied his constitutional rights to a speedy trial.

Defendant next contends in his Standard 4 brief that he was denied the effective assistance of counsel for several reasons. Because defendant failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, this Court’s review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *Matuszak, supra* at 48, quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel’s performance fell below an objective standard of reasonableness and that counsel’s representation so prejudiced him that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorner*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorner, supra* at 75-76. A defendant must also overcome the strong presumption that counsel’s actions constituted sound trial strategy. *Toma, supra* at 302.

Defendant first argues that counsel was ineffective for failing to subpoena Rosalyn King, Sterling Anderson, and Willie Floyd to testify at trial. Defense counsel’s failure to call witnesses constitutes ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). As previously

discussed, even if these witnesses would have testified in accordance with defendant's assertions in his Standard 4 brief, their testimony would not have provided a substantial defense. Moreover, because the record is silent regarding what these witnesses would have testified, defendant cannot establish a reasonable probability that the outcome would have been different had these witnesses testified. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant next argues that defense counsel failed to file pretrial motions for discovery of drug test results and criminal records regarding prosecution witnesses and for an evidentiary hearing regarding the prosecutor's biological evidence. Defendant alleges that the discovery material would have directly impeached key prosecution witnesses. Absent some indication of what the discovery would have revealed and what defendant intended to establish at the evidentiary hearing, he has failed to demonstrate a reasonable probability that counsel's alleged errors affected the outcome of the proceeding. *Toma, supra* at 302-303; *Moorer, supra* at 75-76.

Defendant next contends that counsel was ineffective for failing to object to the introduction of a 911 recording played before the jury. Defendant argues that the recording was not turned over to defense counsel before trial and that counsel was unaware of its existence before trial. The record fails to support defendant's contention that counsel was unaware of the recording before trial. In addition, because the prosecutor established a proper foundation for the admission of the recording, counsel had no valid reason to object to its admission. Counsel is not required to make futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant next argues that counsel was ineffective for failing to object to the prosecutor's use of cell phone records to impeach defendant's testimony that he spoke with AP on his cell phone before the offenses occurred. Defendant appears to be under the misapprehension that the trial court admitted the cell phone records as evidence. To the contrary, defense counsel argued against their admission and the court denied the prosecutor's request to admit the cell phone records. The record does not support defendant's assertion that defense counsel moved to strike the records from evidence after the jurors began deliberations. Because the records were never admitted, there existed nothing to strike. Although the trial court did not instruct the jurors to disregard the limited testimony concerning the records, considering the overwhelming evidence against defendant, any error in this regard was harmless. Defendant has not demonstrated a reasonable probability that counsel's actions affected the result of the proceeding. *Toma, supra* at 302-303; *Moorer, supra* at 75-76.

Defendant next argues that counsel was ineffective for failing to cross-examine Belcher and Adam Scoggins regarding alleged inconsistencies among their written statements to the police, preliminary examination testimony, and trial testimony. A defense attorney's decision regarding how to cross-examine witnesses is a matter of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). Neither Belcher's nor Scoggins's police statements are included with the lower court record and defendant has not provided copies of their statements on appeal. Thus, we are unable to review those statements to determine whether they conflicted with their preliminary examination or trial testimony.

Further, having reviewed Belcher's and Scoggins's preliminary examination and trial testimony, we conclude that counsel's cross-examination of these witnesses did not deprive defendant of the effective assistance of counsel. Contrary to defendant's assertion, Scoggins did

not testify at trial that defendant came toward him with his hand under his shirt as if he had a gun. Also, contrary to defendant's assertion, Belcher did not testify that defendant beat her over the head to gain access to her home. Rather, she testified that she opened the door and defendant forced himself inside. She testified that defendant did not strike her with the hammer until he was already inside her home and had asked for the keys to her truck. Thus, the record does not support defendant's assertions.

Defendant next contends that counsel was ineffective for failing to object when the trial court effectively foreclosed the possibility of the jury reviewing AP's transcribed testimony.³ The record does not support defendant's characterization of the trial court's comments. The court did not foreclose the possibility of the jury reviewing AP's testimony, but rather, stated that a transcript would not be available until the next day or the following Monday. The court asked that, in the meantime, the jurors rely on their collective memory of the testimony. Accordingly, the trial court did not foreclose the possibility that that jury could review AP's transcribed testimony. See MCR 6.414(J). Further, the record does not support defendant's contention that the trial court stated to the jury, "I want a verdict today." Defendant's claim is without merit.

Defendant next argues that counsel was ineffective during sentencing by failing to investigate his criminal record and advocate for a lesser habitual offender supplement. Defendant contends that he did not commit many of the offenses listed in his PSIR. The record shows that counsel attempted to discuss the PSIR with defendant before sentencing, but defendant refused to communicate with counsel. The trial court offered to adjourn the sentencing hearing until later in the morning to give defendant a chance to further discuss the PSIR with counsel, but defendant stated, "It's don't [sic] matter, your Honor. We can just proceed." Because defendant was given an opportunity to review the PSIR with counsel before he was sentenced, and the record does not support defendant's contention that he did not commit many of the offenses listed in the PSIR, he has not demonstrated a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *Toma, supra* at 302-303; *Matuszak, supra* at 48.

Defendant next argues in his Standard 4 brief that there was insufficient evidence to support his kidnapping conviction. We disagree. When determining whether sufficient evidence exists to support a conviction, we must view the evidence in the light most favorable to the prosecution and determine whether a rational fact-finder could conclude that the prosecutor proved every element of the offense beyond a reasonable doubt. *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). A reviewing court must draw all reasonable inferences and make credibility determinations in support of the jury verdict. *Nowack, supra* at 400.

The elements of forcible confinement kidnapping are:

- (1) a forcible confinement of another within the state,

³ Defendant asserts that the jury also asked to review Belcher's testimony, but the record does not support this assertion.

(2) done wilfully, maliciously and without lawful authority,

(3) against the will of the person confined or imprisoned, and

(4) an asportation of the victim which is not merely incidental to an underlying crime *unless* the crime involves murder, extortion or taking a hostage. [*People v Wesley*, 421 Mich 375, 388; 365 NW2d 692 (1984) (emphasis in original).]

Defendant argues that the prosecutor failed to present evidence of confinement and asportation because Belcher was in her own home, was able to move freely about the house, and was able to leave at any time.

The record does not support defendant's contentions. Belcher testified that defendant forced himself into her home when she answered his knock at the door. He then shut the door and began striking her in the head with a hammer. While she attempted to grab the hammer out of defendant's grasp, they "scuffled" through the kitchen and the living room and ended up in a bedroom. Thereafter, defendant barricaded the bedroom door with a dresser and confined Belcher in the bedroom for over an hour. She testified that she never felt free to leave, but she managed to flee out the front door when defendant appeared to be asleep on the couch. Further, movement of a victim incidental to an underlying crime involving taking a hostage is sufficient asportation to support a kidnapping conviction. *Wesley, supra* at 388. Here, defendant relayed to police serious physical threats against Belcher should they attempt to enter Belcher's home. Defendant's movement of Belcher inside the home was incidental to taking a hostage, and thus asportation sufficient to support the kidnapping conviction exists. Accordingly, the evidence was sufficient to support the elements of confinement and asportation.

Affirmed in part and remanded for resentencing on defendant's convictions of breaking and entering a coin-operated device and felonious assault. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Helene N. White

/s/ Brian K. Zahra