

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOHN O'BRIEN,

Defendant-Appellant.

UNPUBLISHED
February 21, 2003

No. 235678
Genesee Circuit Court
LC No. 00-006649-FH

Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

A jury convicted defendant Michael O'Brien of parental kidnapping.¹ The trial court sentenced O'Brien to probation for five years. After O'Brien violated his probation, he pleaded guilty of the violation and was sentenced to 365 days in jail, with credit for 117 days served. He appeals as of right. The probation violation is not at issue in this appeal. We affirm.

I. Basic Facts And Procedural History

O'Brien and his former wife, Kathy Lynn Carpenter, shared joint legal custody of their nine-year-old son and twelve-year-old daughter, but Carpenter had primary physical custody of the children. The former couple had hotly disputed this arrangement. In early July 2000, O'Brien picked up the children for two weeks of parenting time. While O'Brien had the children, Carpenter tried to maintain telephone contact with them, but O'Brien reportedly refused to cooperate with these efforts. O'Brien then failed to return the children to Carpenter as he was required to do on July 22, 2000, at 6:00 p.m. Carpenter called 911 at 7:00 p.m. on July 22 to report that the children had not been returned, but learned nothing of the children's whereabouts until the morning of July 26. The children, who had been with O'Brien's sister, were returned safely to Carpenter.

O'Brien explained his conduct by claiming that he thought Carpenter's husband, Terry Carpenter, posed a risk of sexually abusing his daughter, and possibly his son. In fact, Terry Carpenter had been convicted of a sex crime involving a minor female. Additionally, O'Brien

¹ MCL 750.350a(1).

was concerned that the children had been missing school. Nevertheless, the prosecutor subsequently charged O'Brien with parental kidnapping. At trial, O'Brien sought to present evidence of the reason why he kept his children longer than allowed for visitation because, he claimed, it was consistent with the affirmative defense in the parental kidnapping statute. That statutory affirmative defense states that "[i]t is a complete defense under this section if a parent proves that his or her actions were taken for the purpose of protecting the child from an immediate and actual threat of physical or mental harm, abuse, or neglect."²

When O'Brien's attorney initially raised the affirmative defense before trial, defense counsel hoped to present various facts that put Carpenter in a poor light, noting Terry Carpenter's history of criminal sexual conduct and alleging that she had neglected the children's education. Defense counsel stated at the initial hearing that O'Brien had known about Terry Carpenter's record of sexual abuse earlier, but had returned the children to their mother's home nonetheless. The trial court delayed ruling on the admissibility of the affirmative defense pending defense counsel's offer of proof.

An evidentiary hearing followed, at which O'Brien testified that he learned of Terry Carpenter's record of second-degree criminal sexual conduct in late 1995 or early 1996, and that he learned that the victim was a fourteen-year-old girl in February 1997. Defense counsel elicited an affirmative response when he asked O'Brien if he had kept the children from their mother's home out of an actual and immediate fear that they would otherwise be subjected to physical or mental harm, abuse, or neglect. However, defense counsel was less successful in eliciting favorable responses when he questioned O'Brien in greater detail. When asked what immediate and actual threat prompted him to keep the children, O'Brien replied, "I really had no idea, because I can't even call and talk to my children." Similarly, when the trial court asked if O'Brien believed that Terry Carpenter was about to make sexual advances toward his daughter, O'Brien replied, "I don't really know because, you know, they say they go for younger ones, but, I mean, so far it's more like 14, 15. But, you know, what I've read, they . . . quite often pick a younger victim." When the court pressed O'Brien about why he felt there was some immediate risk of harm, O'Brien answered, "I cannot testify to anything that would be classified as immediate," then elaborated that he was feeling "a frustration of not knowing and not being able to do anything."

Asked on cross-examination if he agreed that his children were in no actual or immediate danger when he kept them from their mother, O'Brien admitted that he had no such knowledge at that time. O'Brien additionally conceded that the children had said nothing to him about any misconduct against them by Terry Carpenter, and that while he kept the children he did not take them to the police, any social worker, or any mental health provider. O'Brien responded in the affirmative when asked if he had taken the children out of general frustration with the custody issue. The trial court ultimately concluded that O'Brien "conceded that he could not establish a fear of actual and immediate threat of physical harm to his children" when he kept them from their mother. As a result, the trial court excluded from trial the evidence of Terry Carpenter's criminal sexual conduct conviction.

² MCL 750.350a(5).

II. The Affirmative Defense

A. Standard Of Review

O'Brien argues that the trial court erred in barring him from presenting the statutory affirmative defense to parental kidnapping. We review a trial court's decision to admit or exclude evidence for an abuse of discretion.³

B. Analysis

MCL 750.350a(5) does not provide an affirmative defense for every parental kidnapping charge. Rather, the statute unambiguously requires the act of keeping a child from another parent to be an effort to protect the child from "an immediate and actual threat of physical or mental harm, abuse, or neglect."⁴ As the trial court recognized, O'Brien's testimony at the evidentiary hearing failed to demonstrate that he believed that he was acting to protect his child from any sort of immediate and actual threat. Accordingly, the trial court did not abuse its discretion in excluding this defense and the related evidence that Terry Carpenter had been convicted of criminal sexual conduct. That the trial court ultimately instructed the jury on the defense of MCL 750.350a(5) does not affect our analysis.

III. Earlier Testimony

A. Standard Of Review

O'Brien asserts that the trial court erred in allowing the prosecutor to introduce some of his testimony from custody proceedings that took place earlier in the year, which he claims violated his right not to incriminate himself. O'Brien did not object to the evidence on this basis at trial, and therefore failed to preserve this issue for appeal.⁵ As a result, he must demonstrate plain error affecting his substantial rights.⁶ O'Brien also claims that the trial court erred in failing to permit him to quote further from that transcript to explain that he acted in part because of his concerns regarding Terry Carpenter. We review this preserved evidentiary issue to determine if the trial court abused its discretion.⁷

B. Self-Incrimination

At trial defense counsel objected to the prosecutor's effort to introduce four or five pages of O'Brien's testimony from the custody case that occurred earlier in the year. Defense counsel argues that he had not been provided with proper notice or copies of the testimony in question, but stated generally that it would be proper to admit O'Brien's entire testimony "minus anything

³ See *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995).

⁴ MCL 750.350a(5).

⁵ See *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

⁶ See *People v Carines*, 460 Mich 760, 763-764; 597 NW2d 130 (1999).

⁷ See *Bahoda*, *supra* at 288.

... ruled ... inadmissible.” Defense counsel further protested that if the prosecutor wished to use excerpts of the testimony, the defense would want the option of introducing additional portions of the earlier testimony, explaining, “[t]hings can be taken out of context,” and “there are complete answers and there are incomplete answers.” Defense counsel assured the trial court that he would not present any evidence in violation of the order barring evidence of Terry Carpenter’s criminal sexual conduct conviction.

Both the federal and state constitutions guarantee an individual’s right not to be compelled to incriminate himself.⁸ The privilege protects an accused from being compelled to testify against himself.⁹ “The privilege against self-incrimination applies to a civil proceeding at which evidence is sought which might subject the witness to criminal prosecution,”¹⁰ although a civil proceeding such as the custody hearing in this case does not require *Miranda*¹¹ warnings.¹² “Where a defendant fails to claim the privilege, no question of compulsion arises, nor does the waiver issue arise.”¹³ Accordingly, “absent an indication that the prior testimony was given under compulsion, it is freely admissible as substantive evidence in a later prosecution for an unrelated offense.”¹⁴

At trial, when the prosecutor announced that he wished to use O’Brien’s testimony from the custody proceeding two months earlier to establish that he had admitted to keeping the children beyond his entitlement in the hope of improving his negotiating posture, defense counsel expressed no concerns about the right against self-incrimination. Moreover, before either the criminal or the custody trials had commenced, the trial court asked defense counsel to express a preference concerning the order in which the two actions should be heard, thus offering the opportunity to complete the criminal action before O’Brien’s testimonial record in the upcoming custody litigation came into existence. This record indicates that O’Brien failed to assert any right against self-incrimination below. Therefore, this claim does not warrant appellate relief.

C. Completeness

When it became clear that the prosecutor would be allowed to introduce into evidence O’Brien’s testimony from the custody trial in which he admitted keeping the children from their mother, defense counsel wished to introduce O’Brien’s accompanying explanation that he had

⁸ US Const, Ams V and XIV; Const 1963, art 1, § 17.

⁹ See *People v Burhans*, 166 Mich App 758, 761-762; 421 NW2d 285 (1988).

¹⁰ *In re Stricklin*, 148 Mich App 659, 664; 384 NW2d 833 (1986).

¹¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

¹² See *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999) (“It is well settled that *Miranda* warnings need be given only in situations involving a custodial interrogation.”).

¹³ *People v Ewing*, 99 Mich App 110, 114; 297 NW2d 628 (1980).

¹⁴ *Id.*, citing Anno: *Use in subsequent prosecution of self-incriminating testimony given without invoking privilege*, 5 ALR2d 1404, 1412-1413.

been fearful because the mother “has no problem, you know, with [Terry Carpenter’s] watching the kids.” MRE 106 provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

The operative words for purposes of this issue are “in fairness.”

Because, as we concluded above, O’Brien did not offer to present facts sufficient to establish the defense of MCL 750.350a(5), evidence of his concerns regarding the danger that Terry Carpenter posed to the children was properly kept from the jury. Although a jury is entitled to hear the complete story of the case before it,¹⁵ allowing the specific mention of Terry Carpenter as a person posing a threat to the children would have brought a custody issue before a jury empanelled to decide the criminal case. O’Brien had nothing to gain from this except by making an inappropriate play for sympathy from the jury. The trial court properly tailored the evidence to avoid inadmissible material. Moreover, Kathy Carpenter’s brother testified that O’Brien had admitted that he was keeping the children from their mother’s home, and that he explained that, by so doing, he was “protecting his children.” This explained O’Brien’s motives to the jury sufficiently to complete the story for them, and to ensure fairness.¹⁶ For these reasons, we reject this claim of error.

IV. Appeals to Sympathy

A. Standard Of Review

O’Brien argues that the prosecutor improperly elicited several statements from witnesses indicating that Kathy Carpenter was upset while her children were missing and relieved when they were returned, and improperly emphasized this to the jury. He also claims that the prosecutor committed misconduct in presenting the jury with an alleged civic-duty argument. The plain error standard again applies to this issue because when defense counsel objected to these remarks at all, the objection was not on the same basis as the arguments in this appeal.¹⁷

B. The Prosecutor’s References

MCL 750.350a(1) prohibits a parent from retaining a child “with the intent to detain or conceal the child from any other parent” in violation of the latter’s custodial rights. Thus, the prosecutor was obliged to prove that that Kathy Carpenter did not in any way acquiesce in O’Brien’s actions. Indeed, defense counsel pointed out to the jury that O’Brien had parenting-time privileges, and had collected the children pursuant to a court order. Defense counsel also

¹⁵ *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996).

¹⁶ *Sholl*, *supra*; MRE 106.

¹⁷ See *Carines*, *supra*; *Aldrich*, *supra*.

argued that the case “isn’t about mom being at home being worried about who her kids are with and where they are.” Under the circumstances, we agree with the trial court that Kathy Carpenter’s emotions were relevant, because they tended to prove that she had no knowledge or control over her children’s whereabouts at a time when she was entitled to exercise such control.

O’Brien also challenges several portions of the prosecutor’s opening statement, which included the following:

When you hear the evidence, I’m going to ask that you [hold O’Brien] accountable for his actions in doing that wrong.

* * *

The reason to hold him accountable for his actions are twofold. One, obviously, because what happens with our laws in this society if people don’t. And, two, the emotional impact upon both the kids, and the mother, who is a person.

And you all can imagine, as a parent, or a person knowing people, loved ones, significant others, when a person is supposed to be there and they’re not [and] there is no communication, you worry.

. . . And you can imagine, this mother had to go to bed Saturday night, July 22nd, without her kids, without knowing where they are, not knowing what’s going on.

. . . And you can imagine the stress going through her mind. She doesn’t know where her kids are, she doesn’t know where he is, she doesn’t know nothing.

. . . So, there is a happy ending to what happened, but think about the emotions that this mother had to go through for four days and not knowing what’s going on with her kids

And do we as a society want to condone that? And I say we don’t. . . . You hold [defendant] accountable for that wrong. And . . . find him guilty of violating the statute

O’Brien additionally points out that in the closing arguments, the prosecutor stated that he “caused a lot of stress and emotional distress to the mother of not knowing where those children were for four days. And what I’m asking you to do is to hold the defendant accountable for that.”

A prosecutor enjoys wide latitude in fashioning arguments, and may argue the evidence and all reasonable inferences from it.¹⁸ However, a prosecutor may not express personal

¹⁸ See *Bahoda, supra* at 282.

opinions about the defendant's guilt, urge the jury to convict out of civic duty, or appeal to the jurors' fears or prejudices.¹⁹ Nor may a prosecutor urge a jury to convict out of sympathy for the victim.²⁰ The prosecutor's opening statements did not constitute plain error affecting his substantial rights. Again, Kathy Carpenter's frame of mind was relevant, because the prosecutor was obliged to prove that she did not acquiesce in O'Brien's actions. Further, because the jury could reasonably be expected to have some sympathy to O'Brien's desire to have more time with his children, the prosecutor was entitled to remind the jury that the mother was also a parent with feeling in the matter. A prosecutor need not confine argument to the "blandest of all possible terms."²¹ To the extent that the prosecutor's emphasis on the mother's suffering might be considered excessive, the trial court instructed the jury not to let sympathy affect its verdict. "It is well established that jurors are presumed to follow their instructions."²² Further, as concern the prosecutor's appeal for justice, we do not regard the rule against civic-duty argument to be so strict that a prosecutor may not even suggest that justice demands conviction when the evidence proves guilt beyond a reasonable doubt, as it did in this case. In any event, the trial court cured any prejudice from this justice argument by instructing the jury that arguments of counsel are not evidence.²³

We also reject O'Brien's contention that the parental kidnapping statute protects only the children involved. A parent whose legal entitlement to his or her children is frustrated by the other's kidnapping of them is also very much a victim of that crime, and MCL 750.350a serves to protect the legal custodial rights of parents while also guarding the interests of children caught in contentious custody battles.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Donald S. Owens

¹⁹ See *id.* at 282-283.

²⁰ See *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

²¹ *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973).

²² *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

²³ See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).