

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACOB BERT KLEMP,

Defendant-Appellant.

UNPUBLISHED

September 15, 2000

No. 219079

Kent Circuit Court

LC No. 98-007681-FC

Before: Doctoroff, P.J., and Holbrook, Jr., and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and forcible confinement kidnapping, MCL 750.349; MSA 28.581. Although originally charged with larceny from a person, MCL 750.357; MSA 28.589, the jury acquitted defendant of that charge. The trial court sentenced defendant to a mandatory term of life imprisonment without parole for the felony murder conviction, as well as a term of 25 to 75 years for the kidnapping. Defendant received no sentence on his conviction of first-degree premeditated murder. Defendant appeals as of right. We affirm defendant's murder convictions, but remand for vacation of his kidnapping conviction and correction of the judgment of sentence.

I

This case arises from the death of Randall Sluiter on June 21, 1998. On appeal, defendant first challenges the trial court's refusal to instruct the jury concerning the defense of voluntary intoxication. In doing so, defendant argues that the trial court erred in basing its decision on a comparison of the intoxication defense to that of a diminished capacity defense, which defendant failed to properly raise before trial. See MCL 768.20a(1); MSA 28.1043(1)(1). Defendant further contends that in refusing to read the requested instruction to the jury, the trial court erroneously relied on the notion that a general instruction on specific intent, when combined with the arguments of defense counsel concerning the intent needed to convict defendant of the charged crimes, was sufficient to "cover" the intoxication issue.

We find merit in each of defendant's contentions regarding this issue. In *People v Wilkins*, 184 Mich App 443, 447; 459 NW2d 57 (1990), this Court held that the notice requirement applicable to the insanity defense does not apply to the defense of voluntary intoxication when raised to negate a specific intent. Further, the United States Supreme Court has held that other jury instructions and arguments of counsel cannot substitute for the trial court's reading of the correct jury instructions requested by trial counsel. *Carter v Kentucky*, 450 US 288, 304; 101 S Ct 1112; 67 L Ed 2d 241 (1981). Therefore, we believe that the trial court erred in relying on these two grounds to refuse defendant's request for a jury instruction regarding the defense of voluntary intoxication. Nevertheless, we do not believe that the court's failure to instruct the jury as requested requires reversal of defendant's convictions. This Court will not reverse where the trial court reached the right result, albeit for the wrong reason. *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 1 (1998).

Initially, we note that the trial court's failure to instruct the jury regarding the defense of voluntary intoxication was harmless error with regard to the crime of larceny from a person, and was simply not error with regard to the crime of forcible confinement kidnapping. Voluntary intoxication is a defense only to specific intent crimes. *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1997). Defendant argues that he was entitled to an instruction on the voluntary intoxication defense because he was charged with larceny from a person, which is a specific intent crime. Because the jury acquitted defendant of the larceny charge, we believe that the failure to read the requested instruction as to that offense was harmless error. Logically, the jury's decision to convict defendant of felony murder must have rested on the underlying felony of forcible confinement kidnapping, given the acquittal on the larceny charge. Because forcible confinement kidnapping is a general intent crime, *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994), defendant was not entitled to the requested instruction as to the kidnapping charge. Therefore, as to the crimes of larceny from a person and forcible confinement kidnapping, we disagree with defendant's contention that the trial court's failure to read a jury instruction regarding the defense of voluntary intoxication constituted error requiring reversal.

Nevertheless, the crime of first-degree murder, of which defendant was convicted, is a specific intent crime, because the defendant must commit the offense with the intent to kill the victim. *People v Lloyd*, 459 Mich 433, 444; 590 NW2d 738 (1999). A successful voluntary intoxication defense can reduce this offense to second-degree murder. *Id.* at 447. Therefore, we must decide whether defendant was entitled to a reading of the requested instruction regarding the charge of first-degree murder, given the evidence presented at trial.

An instruction regarding the defense of intoxication is proper only if the facts of the case would allow the jury to conclude that the defendant's intoxication was "so great" as to render him incapable of forming the requisite intent. *People v Mills*, 450 Mich 61, 82; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). In this case there was some evidence that defendant had consumed alcoholic beverages on the night of the incident, including testimony from his former girlfriend, a bartender, that defendant appeared to be intoxicated only a short while before the initial assault on the victim. However, there was no evidence presented at trial that defendant was so overcome by the effects of his drinking that he could not form the requisite intent to support his convictions. To the contrary, defendant's conduct that night belies this assertion.

The testimony at trial indicated that after becoming annoyed with the victim's conduct, defendant had sufficient control of his abilities to enter the house, retrieve a board, and then strike the victim twice in the back of the head, while stating that he was "going to make a problem." After doing so, defendant was lucid enough to devise and participate in a plan to dispose of the victim by dragging him to the car, placing him in the trunk and then driving him, without incident, to a secluded area more than ninety miles from the scene of the assault. Defendant then was of sufficient mind to determine that ethylene glycol, an ingredient found in anti-freeze, would be necessary to hasten his victim's death. Defendant poured that substance into the victim's mouth, before dragging the victim to a nearby pond and pushing him under the water, where the victim drowned. In addition to these facts tending to show that defendant was not so overcome by the effects of his drinking as to be unable to form a specific intent to commit the crime of first-degree murder, defendant remembered many of the details regarding the crime and confessed those details to Shawna Warden shortly after committing the offense, while she aided defendant in fleeing the state.

Accordingly, because there was no evidence in the record that defendant was so overcome by the effects of his drinking that he could not form the requisite intent to support his conviction of first-degree murder, we will not reverse his convictions based on the trial court's failure to instruct the jury regarding the voluntary intoxication defense.

II

Defendant next challenges the sufficiency of evidence to sustain his conviction of forcible confinement kidnapping.

In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Jaffray, supra* at 296. The elements of the crime of forcible confinement kidnapping are: (1) a forcible confinement of another within this state, (2) done willfully, 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 the underlying crime, unless that crime involves murder, extortion, or the taking of a hostage. *People v Wesley*, 421 Mich 375, 388; 365 NW2d 692 (1984).

Defendant argues that this Court should adopt the reasoning of *People v Miles*, 23 NY2d 527, 536-537; 245 NE2d 688 (1969), and hold that the criminal intent required in Michigan for a conviction of forcible confinement kidnapping is that the defendant confined the victim with the knowledge that the victim was alive. According to defendant, this intent is derived from the statutory requirement that the victim be confined "against his will." MCL 750.349; MSA 28.851. Defendant essentially argues that he could not have intended to confine the victim "against his will" if he believed the victim was dead at the time of the confinement. At trial, Sean Eman and Joshua Piper both testified that they believed the victim was already dead when loaded into the trunk of defendant's car, at the scene of the initial assault. Based on this testimony, defendant asks this Court to reverse his kidnapping and felony murder convictions, on the ground that he did not possess the requisite intent to commit these offense, because

he believed the victim was already dead when placed in the trunk of his car. After review of the cited opinion and the testimony presented at trial which would be relevant to this issue, we do not believe that the facts of this case require that we decide whether such a rule is warranted.

Viewing the evidence presented at trial in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant believed the victim was still alive when loaded into the trunk of defendant's car. Unlike the situation in *Miles*, there was nothing in the testimony presented at defendant's trial from which it could be inferred that defendant possessed a belief that the victim was dead at the time he was placed inside the trunk of the car. Defendant did not himself testify at trial and although both Piper and Eman testified as to their own belief that the victim had expired before the trip to Benton Township, this evidence does nothing to shed light on what defendant himself believed at that time. Similarly, no witness at trial offered testimony concerning statements made or actions taken by defendant which would be consistent with a belief by defendant that the victim was no longer alive at that time. In fact, contrary to an affirmative finding on that issue, Piper testified that immediately before the victim was placed into the trunk of the car, defendant participated in "stomping" on the victim's head, a futile and useless gesture for one who in fact believed the target of his attack to be deceased.

Further, even if defendant did believe that the victim was dead when he was placed in the trunk of defendant's car, we believe that a rational trier of fact could have found beyond a reasonable doubt that defendant knew the victim was still alive when removed from the trunk of defendant's car. Because we believe that defendant's actions after that discovery would independently support a conviction of forcible confinement kidnapping, we find further support for our decision that we need not reach the issue decided in the *Miles* case.

After defendant drove a significant distance in his car, with Piper and Eman in the passenger compartment and the victim locked inside the trunk, defendant stopped in a swampy area near an irrigation pond on a farm in Berrien County, near the Indiana border. Piper testified that the victim was removed from the trunk and placed on the ground near the rear of the vehicle, and that the victim was making gurgling noises at that time. This testimony supports a finding that the victim was still alive at this point.

Piper testified that defendant proceeded to beat the victim with a stick, and then pulled a bottle of anti-freeze from the trunk of the car and poured it into the victim's mouth. Piper then witnessed defendant drag the victim toward a pond. Eman supplemented Piper's testimony, stating that defendant dragged the victim approximately fifteen feet into the pond, where he attempted to push the victim below the surface of the water. Finally, the forensic pathologist who autopsied the victim's body testified that the likely cause of the victim's death was drowning. Defendant's actions after arriving at the pond further support a finding that defendant knew the victim was alive at this point in time.

The prosecution argues that defendant's actions after he removed the victim from the trunk of his car constitute the crime of kidnapping. Defendant responds by arguing that the victim was not "secretly confined" when dragged from the trunk of the car to the pond, and therefore defendant's conduct after arriving at the irrigation pond is insufficient to support a conviction of kidnapping.

However, defendant fails to recognize the distinction between forcible confinement kidnapping and secret confinement kidnapping. In order to convict defendant of forcible confinement kidnapping, based on his actions after arriving at the irrigation pond, the jury needed only have concluded that defendant (1) forcibly confined the victim, (2) willfully, maliciously and without lawful authority, (3) against the victim's will. *Wesley, supra* at 389. The prosecution was not required to prove that the defendant "secretly confined" the victim. *Id.* Further, the prosecution was not required to prove asportation separate from that required to murder the victim. *Id.* at 388. Viewed in the light most favorable to the prosecution, we believe that a rational jury could have found, beyond a reasonable doubt, that defendant committed a forcible confinement kidnapping after he removed the victim from the trunk of his car, when he knew the victim was still alive.

Accordingly, inasmuch as the rule sought by defendant would not have been applicable under the facts of this case, we find it unnecessary to engage in any further analysis of the issue. "Appellate courts do not issue abstract opinions of purely academic interest or reach out to anticipate and decide controversies which may arise in future litigation." *People v Turner*, 123 Mich App 600, 603-604; 332 NW2d 626 (1983). In light of this determination, we find it unnecessary to address defendant's claim that the trial court erroneously refused to instruct the jury that defendant could be convicted of kidnapping only if he knew that the victim was alive at the time of the confinement.

III

Defendant next argues that the trial court erred in refusing to allow Robin Crawford to impeach Piper's claim at trial that he had not used cocaine within the seventy-two hour period before the victim's death. Defendant contends that Crawford's testimony went directly to Piper's ability to perceive and accurately report the events that transpired that night. Therefore, he argues that the trial court abused its discretion in refusing to admit Crawford's testimony, after concluding that the testimony would constitute improper impeachment on a collateral matter. We disagree.

"The impeachment of a witness regarding a collateral matter is within the sound discretion of the trial court." *People v Wofford*, 196 Mich App 275, 281; 492 NW2d 747 (1992). When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement. *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). Nonetheless, it has long been the rule in this jurisdiction that such extrinsic evidence may not be used to impeach a witness on a collateral matter, even where such evidence constitutes a prior inconsistent statement otherwise admissible under MRE 613(b). *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984). The purpose of this rule is to "avoid the waste of time and confusion of issues that would result from shifting the trial's inquiry to an event unrelated to the offense charged." *People v Guy*, 121 Mich App 592, 604; 329 NW2d 435 (1982).

Contrary to defendant's assertion, Crawford's testimony would not have had a bearing on Piper's capacity to perceive or recall the events which occurred on the night in question. The testimony which defendant sought to admit merely indicated that Piper had told Crawford that he had been using cocaine during the relevant seventy-two hour period. Although Piper testified during trial that he did not recall telling this to Crawford, he further indicated that it was possible he made such a statement

because he was not always truthful in everything he said while he was at the bar. Piper nonetheless denied the use of any cocaine that evening, and nothing in Crawford's proposed testimony could have established this to be untrue. In other words, Crawford was not prepared to offer testimony that she witnessed Piper's use of cocaine, or even that she witnessed circumstances leading to an inference of such use. She merely would have testified that Piper told her he had used cocaine during that period and Piper had already conceded that he had possibly made that statement. Thus, the proffered testimony would not have established that Piper's ability to perceive or recall the events in question was in fact impaired as a result of cocaine use.

Accordingly, we find no error in the trial court's decision not to admit the challenged testimony.

Even assuming that the court erred in this regard, we note that Piper's capacity to recount the events of June 21, 1998, had already been significantly called into question by his own testimony that he had consumed approximately 15 to 20 beers, as well as at least one mixed drink, during the course of the evening in question. Therefore, we do not believe that such error, if any exists, was sufficiently outcome determinative to warrant reversal of defendant's convictions. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

IV

Finally, defendant argues that his conviction and sentence for kidnapping violates the constitutional protections against double jeopardy and must therefore be vacated. We agree.

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Northrop*, 213 Mich App 494, 496-497; 541 NW2d 275 (1995). As part of the protections afforded by these guarantees, a defendant cannot be made to suffer multiple punishments for the same offense. *People v Fox (After Remand)*, 232 Mich App 541, 556; 591 NW2d 384 (1998). Thus, our Supreme Court has held that a defendant may not be sentenced on both felony murder and the underlying felony because the underlying felony is an element of the offense of felony murder. *People v Wilder*, 411 Mich 328, 347; 308 NW2d 112 (1981).

In this case, defendant was charged and convicted on separate counts of both felony murder and kidnapping. While the original predicate for the felony murder charges consisted of both larceny and kidnapping, defendant's acquittal on the larceny charges require the conclusion that the jury's felony murder verdict was premised on a finding of guilt as to the charge of kidnapping. At sentencing, the trial court imposed a sentence of life imprisonment for defendant's felony murder conviction, along with a separate sentence of 25 to 75 years for his kidnapping conviction. The prosecution concedes on appeal that the separate kidnapping sentence violates double jeopardy because kidnapping served as the predicate offense for defendant's felony murder conviction and sentence. The appropriate remedy where a defendant is convicted of multiple offenses in violation of double jeopardy protections is to affirm the conviction of the higher charge and to vacate the conviction of the lower charge. *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993). Accordingly, defendant's kidnapping conviction and sentence must be vacated.

As an additional consideration, we further note that the trial court incorrectly dealt with defendant's dual convictions of first-degree premeditated murder and first-degree felony murder. In *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998), this Court held that the proper manner in which to treat such dual convictions is to draft a judgment of sentence which reflects that the defendant has received a conviction and single sentence for one count of first-degree murder, supported by two theories: premeditated murder and felony murder. *Id.* at 221-222. Here, the trial court opted not to sentence defendant on the premeditated murder conviction, and issued a judgment of sentence indicating that although defendant had been convicted by jury of first-degree premeditated murder, his sentence on that conviction had been vacated.

Inasmuch as such action is inconsistent with *Bigelow, supra*, we find it necessary to remand this matter to the trial court for both vacation of defendant's conviction and sentence for kidnapping, as well as modification of the judgment of sentence to reflect that defendant's murder conviction and single sentence is for one count of first-degree murder supported by the alternative theories of premeditated murder and felony murder.

Affirmed but remanded to the lower court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Donald E. Holbrook, Jr.

/s/ Michael R. Smolenski