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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed February 5, 1980

vs.)

SAMUEL M. COPELAND,) 265
61307

Defendant-Appellant.)

Appeal from Polk District Court - Dale S. Missildine, Judge.

Defendant appeals his conviction of two counts of child stealing in violation of section 706.2, The Code 1977. AFFIRMED.

E. Ralph Walker and Greg A. Naylor of Thoma, Schoenthal, Davis, Hockenberg & Wine, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Julie Pottorff, Assistant Attorney General; for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals his conviction of two counts of child stealing in violation of section 706.2, The Code 1977. He is the natural father of the minor children he is alleged to have abducted.

The events upon which the first count of the indictment are predicated occurred while a divorce action between defendant and his wife was pending in the courts of the State of Illinois. At the time of these events an order had been entered in that litigation providing that defendant's wife should have temporary custody pendente lite with the right to temporarily reside with the children in the State of Iowa. During the time this order was effective, defendant was to have rights of visitation. Defendant, in count one of the indictment, is alleged to have taken the children from Iowa to Israel in order to detain and conceal said children from their mother, the person having lawful custody thereof.

The events upon which the second count of the indictment are predicated occurred subsequent to the entry of a final decree of divorce by the Illinois courts. That final decree granted custody of defendant's minor children to his wife. The second child stealing incident occurred subsequent to the return of the children to their mother by the Israeli courts. It involved taking the children from Iowa to Florida and Georgia in order to again detain and conceal them from their mother.

In reviewing defendant's several assignments of error, we consider first those which, if accepted, would serve to completely defeat the prosecution against him. We then consider the significant assignments of error which, if accepted, would result in a new trial being granted.

I. Defendant's first contention is that the grand jury indictment against him is void because returned after the beginning of the next calendar quarter following the quarter for which the grand jury was impanelled. As support for this contention defendant relies upon Steinbeck v. Iowa District Court, 224 N.W.2d 469 (Iowa 1974). We conclude that the rule announced in Steinbeck is not available for defendant for two reasons.

First, the claim is one which, under section 769.18, The Code 1977, must be raised before entry of a plea. Defendant's effort to raise this issue was too late under the provisions of that statute and also under Rule 26F of the local district court rules. Secondly, even if we were to consider this claim on its merits, we are satisfied that the grand jury had authority to act. The indictments in Steinbeck were returned after the

time for the next quarter grand jury to be impanelled and after that grand jury was in fact impanelled. In the present case, the indictment was returned on April 1, 1977. The time for impanelling the grand jury for the next quarter, under section 770.1, The Code 1977, was not until the following Monday. We cannot conclude that it was the intent of Steinbeck to prohibit the first quarter grand jury from acting prior to the time that the next grand jury was to be impanelled.

II. Defendant also asserts that section 706.2, The Code 1977, is unconstitutionally vague in failing to apprise a person of ordinary intelligence that a natural parent may be charged with the offense embodied in that statute. We disagree. The statute in question provides:

> If any person maliciously, forcibly, or fraudulently take, decoy, or entice away any child under the age of sixteen years with intent to detain or conceal such child from its parents, guardian, or other person or institution having the lawful custody thereof, he shall be imprisoned in the penitentiary not more than ten years, or be imprisoned in the county jail not more than one year, or be fined not exceeding one thousand dollars. (emphasis supplied)

We conclude that this statute, given its plain meaning, adequately conveys the idea that any person, without exception, may be prosecuted for taking a child from whomever has lawful custody of that child.

III. Next we consider defendant's contention that a natural parent may not be prosecuted under section 706.2. As a result of our conclusions in the previous division we hold that the statute clearly provides that any person who violates its provisions may be convicted of the offense therein embodied. No exception is provided for a natural parent. We have found no cases in this jurisdiction directly on point but believe that State v. Dewey, 155 Iowa 469, 136 N.W. 533 (1912), is instructive on this issue. There, defendant was charged with conspiracy to commit kidnapping at the behest of and in concert with the natural father of the children to be abducted. At the time, a divorce action was pending between the father and mother of the children. In reversing the defendant's conviction, the court held that where "no order had been made in the case that would in any way affect the right of either to the custody of the children" the father could not be guilty of kidnapping his own children nor could a conspiracy to do so be unlawful. In the present case, unlike Dewey, there had been a court order affecting defendant's right to custody prior to both of the incidents of child stealing.

Other jurisdictions have recognized that a natural parent who takes his or her own child from the parent having lawful custody under a court order may be convicted under applicable child stealing or kidnapping statutes. See, e.g., State v. Musumeci, 355 A.2d 434 (N.H. 1976); People v. Hyatt, 18 Cal. App.2d 618, 96 Cal. Rptr. 156 (1971); State v. Crafton, 15 Ohio App.2d 160, 239 N.E.2d 571 (1968); Hicks v. State, 158 Tenn. 204, 112 S.W.2d 385 (1928); State v. Taylor, 125 Kan. 594, 264 P. 1069 (1928); Commonwealth v. Bresnahan, 255 Mass. 144, 150 N.E. 882 (1926); Annot. 77 A.L.R. 317, 320-323 (1932).

Defendant urges that even if he may be convicted under section 706.2 subsequent to the final custody award of the Illinois court he was not subject to prosecution for acts committed during the time when only a temporary order was in effect. We disagree. The issue on both counts of the indictment is whether the mother was the party "having the lawful custody" of the children. The record clearly establishes that she was and conversely that defendant was not the party having such lawful custody.

In reaching the result that defendant was properly subject to conviction under the statute we necessarily reject two other contentions of the defendant: (1) that he was lawfully exercising rights of visitation under either the temporary order or final decree of the Illinois court; and (2) that the law has been so arbitrarily enforced as to constitute selective prosecution in violation of defendant's 14th amendment rights. Both of these contentions are without support in the record.

IV. We next consider defendant's claim that he is entitled to a new trial because the trial court erroneously excluded testimony regarding his motivation in taking his children from his former wife.[1] The trial court initially indicated that evidence of defendant's motivation would be admissible but later reversed that decision and excluded efforts by the defendant to present such evidence to the jury.

The applicable statute has previously been quoted in this opinion. It clearly builds into the offense a requirement that the state establish that the taking of the child be done "maliciously, forcibly, or fraudulently." The use of these three adjectives in the

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[1] In an offer of proof, defendant asserted the reasons he took his children were (1) his ex-wife's neglect of their medical care; (2) her denial of his visitation rights; (3) her failure to properly attend to the religious upbringing of the children; (4) her involvement with other male figures.

disjunctive presents two possible constructions. They may be considered as alternative means by which the taking of the child becomes felonious, or, the disjunctive form may be disregarded if the sense of the law suggests a conjunctive meaning was intended. Lahr v. Incorporated Town of Primghar, 225 Iowa 686, 281 N.W. 214 (1938); State v. Stutsman, 44 Iowa 703 (1875).

Even if we were to conclude that a disjunctive meaning was intended in the present statute, this does not fully dispose of defendant's argument. The instructions under which the case was submitted to the jury embodied the language of the statute and therefore did permit the jury to convict defendant on the basis of a "malicious" taking.[2]

A malicious taking occurred if defendant intentionally abducted the children. In the legal sense, "malicious" is an act willfully done. See State v. Dunn, 199 N.W.2d 104, 108 (Iowa 1972) (wherein the court stated, "[t]he intentional doing of a 'wrongful act' . . . will permit an inference of . . . legal malice. . . .") In the instant case, the court defined "malicious" in its instructions as "a wicked or unlawful purpose and includes not only anger, but also wicked acts done intentionally without just cause or excuse." Defendant asserts he was entitled to present evidence to rebut any claim he acted with an evil or wicked purpose. However, his motive for acting was not material; only a finding he acted intentionally was necessary to conclude he acted maliciously. The trial court definition unnecessarily raised the question whether defendant acted wickedly. No prejudice, however, resulted to defendant by its presence or his inability to introduce evidence on the issue. The issue of wickedness presented defendant a defense of just cause he would not have been entitled to raise had the term "malicious" been correctly defined. Just cause could not mitigate the intentional nature of defendant's act; thus evidence on motive was immaterial and defendant was not prejudiced by its exclusion.

V. Next, defendant contends that the trial court engaged in a continuous pattern of conduct which created bias against him in the eyes of the jury and thereby denied him his due process right to trial by an impartial tribunal. His first criticism of the

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[2] The first element the State was required to establish in instruction no. 10 (the marshalling instruction) required the State to establish "that the defendant maliciously, forcibly or fraudulently took, decoyed or enticed Ami Copeland and Cecelia Copeland, children under sixteen years of age, with the intent to detain or conceal said children from their mother."

trial court relates to voir dire and opening arguments. Counsel for the state made a belated objection to the fact that defendant's counsel, during his opening statement, read the statute under which defendant was charged including the penalty. Out of the presence of the jury, the trial court stated in part:

> This Court is getting tired of protecting the record for competent counsel in this case. I do not intend to do that in the future.
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> * * *
>
> Without condoning the actions of counsel for defendant in reading the statute, which I think was improper and clearly not a part of the opening statement, or proper opening statement, and particularly reading the penalty section in it, there was not objection by counsel after it became apparent that he was reading the statute verbatim to this jury. The Court had a tendency to want to do something about it, did not because counsel for the State did not object. Therefore, there is no mistrial here.

These statements occurred out of the presence of the jury. A fair reading of them demonstrates that primarily the trial court was expressing displeasure with the prosecution not the defense.

Defendant next contends that continuous interruptions by the trial court during voir dire, questioning of witnesses, and during defense counsel's colloquies with the court detracted from presentation of his case and further evidenced the court's hostile attitude toward the defendant.

Several of the "interruptions" occurred during voir dire. The trial court was acting within its power in limiting the scope of voir dire to the purpose of voir dire. State v. Teale, 154 Iowa 677, 135 N.W. 442, 444 (1912). Also during voir dire, the trial court instructed defense counsel to ask his prefatory questions to a group of four potential jurors and then follow with individual questions. That procedural request by the trial court was to expedite trial, a request within his discretion. State v. Musack, 254 Iowa 104, 116 N.W.2d 523 (1962).

The final interruption by the trial court occurred just following the court's sustaining of an objection by the State. Defense counsel questioned the ruling and the trial court explained the reasons for the ruling. The court's remarks were fair and proper and therefore not prejudicial to the defendant. State v. Johnson, 162 N.W.2d 453, 457 (Iowa 1968).

Defendant also argues that the reversal of a previous decision regarding admissibility of motivation testimony and numerous improper evidentiary rulings demonstrate judicial misconduct. We have considered each of these complaints and find the circumstances which occurred do not individually or collectively rise to the status of reversible error.

VI. Next, defendant challenges the alleged failure of the trial court to disclose a potential conflict of interest. The alleged conflict stemmed from the use by the trial court of a student intern whose children had at some point been cared for by Beverly Davis.

The facts demonstrate no conflict, not even a potential conflict. The student intern's assignment was merely to observe the court in action for course credit. The intern had not done any work for the judge on the case.

VII. Defendant contends the trial court abused its discretion in two ways during the selection of the jury. First, he asserts the trial court impermissibly restricted the scope of his voir dire examination of prospective jurors and second, he asserts the trial court improperly overruled two of his challenges for cause.

Our examination of the record convinces us that the challenges for cause were properly overruled and that while the scope of voir dire was to a degree restricted, this does not appear to have been to the detriment of defendant.

VIII. As to the final issue raised, we note that the matter of denying compensation for defendant's counsel on the basis of requested court appointment is collateral to the criminal conviction. Unless prejudice in asserting a defense is shown, such ruling may not be reviewed on an appeal from that conviction. State v. Kemps, 282 N.W.2d 704, 711 (Iowa 1979). We do not review it here.

We have considered the above issues and all other matters presented by defendant and find no basis for reversal.

AFFIRMED.