Criminal Law: Kidnapping: False Imprisonment: Communication by Judge to Jury

Ronald A. Padway

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In Hackbarth v. State, (Wis.) 229 N.W. 83, a jury found the defendant guilty of having participated in seizing one who was working as a strikebreaker, carrying him to defendant's farm, where he was bound and blindfolded, kept in a barn loft for a considerable time, then taken out, coated with tar, carried into the country, and cast adrift beside a lonely road. The case record contains, in addition, an admission by the defendant as to his participation therein.

Upon appeal, two questions were considered. The first is: Whether a count in the information sufficiently stated the crime of kidnapping under Section 340.54 Wis. Stat. 1927, or, on the contrary, simply stated the misdemeanor of false imprisonment. The information filed by the district attorney charged that the defendant "without lawful authority, forcibly confined another, to-wit, H____ H____, within this state, and against his will with intent to cause said H____ H____ to be secretly confined in this state and against his will, contrary to the form of statute in such cases made and provided____." The applicable statute reads, "Any person who shall____ without____ lawful authority, forcibly seize, confine, inveigle or kidnap another with intent to cause such person to be secretly confined or imprisoned in this state against his will____ shall be deemed guilty of a felony____." Held: that the allegation of an intent to secretly confine another within the state against his will establishes the charge of kidnapping, the gist of "kidnapping" as contrasted with "false imprisonment" being the intent to secretly confine, and the common law requirement of an intent to take one from within the state being not required by the statute.

The defendant (plaintiff in error on appeal) relied on Smith v. State, 63 Wis. 453, 23 N.W. 879, as basis for reversal. In that case, intent to secretly confine was not set forth in the information and upon that deficiency a judgment finding the defendant guilty of kidnapping was reversed with directions to regard the information as sufficiently setting forth merely the charge of false imprisonment. Therein the Supreme Court explained that false imprisonment becomes kidnapping only where an intent to carry or send out of the state qualifies or adds to the act. In the instant case, the appellant found fault with the wording in the information, especially with the use of the words "intent" and "confine." Claim was made "that in the criminal law the intent

may be inferred from the act. Consequently, to charge a person with secretly confining another is sufficient to charge false imprisonment. Now, if the phrase 'with intent to secretly confine' is added, there is no change in effect for the reason that the law would presume such an intent from the act itself. But, if an intent is alleged, different from what may be presumed from the act itself, the crime increases in severity, and is given color by such an allegation. The act then becomes merely minor, and the intent becomes the gist of the crime. In the instant case the intent alleged adds nothing to the act, does not color it, is no more reprehensible than the act, and is a necessary preceding element of the act. Thus, the second count only alleges false imprisonment."

In Wisconsin, an information which follows the wording of the statute is sufficient. *State v. Duwalt*, 26 Wis. 415; *State v. Welch*, 37 Wis. 196; Section 355.33 Wis. Stat. 1927. Thus, where an information failed to charge the specific statutory offense, that of false imprisonment as a misdemeanor at common law was permitted to stand. *Davies v. State*, 72 Wis. 54, 38 N.W. 722. In Montana, where an information failed to contain the word "secretly" as in the phrase "secretly confined," held nevertheless sufficient to charge kidnapping and support a conviction for felony. *Ex Parte McDonald*, 50 Mont. 348, 146 Pac. 942. In Massachusetts, specific intent must be found as a fact to have existed, and a distinction may be made as to the various members of a kidnapping band to the extent that the leader, knowing the full purpose, may be chargeable with intent, whereas the hirelings may be wholly innocent as to the intent in such measure as to merely sustain false imprisonment. *Commonwealth v. Nickerson*, 5 Allen (Mass.) 518, 87 Mass. 518. In New York an intent to secretly confine must be shown, and secrecy must cloak the transaction. *People v. Camp*, 139 N.Y. 87, 34 N.E. 755. See also: *State v. Hoyle*, 114 Wash. 290, 194 Pac. 976, a child is not capable of consenting to the kidnapping; *People v. Sheasby*, (Calif.) 255 Pac. 836, in the absence of circumstances constituting lawful excuse, no intent is necessary other than the intent to do acts denounced by statute; *People v. Fick*, 89 Calif. 144, 26 Pac. 759, acts are sufficiently alleged when indictment is in the language of the statute, and whether "Choy Fong," name of prosecutrix as alleged in indictment, is *idem sonans* with "Toy Fong," shown by evidence to be her true name, held question of fact for jury.

The Wisconsin statutes provide no punishment for the common law offense of false imprisonment, but the statute on kidnapping seems to cover it.

The second question considered is: Whether a communication by the presiding judge to the jury, counsel being absent, informing them
of the maximum and minimum punishment, was sufficient to constitute prejudicial error. The jurors sent a note by the bailiff, and the judge likewise sent his answer by note. The jurors were not recalled to the court room. Held: where the evidence is conclusive as to defendant's guilt, being bolstered by his own admissions, and the primary basis of appeal is a question of law, the Supreme Court will, in the exercise of its discretionary powers, declare that the procedure, while error, is not prejudiced error.

Fundamentally, communications between court and jury should be free from any suspicion of secrecy. Dishmaker v. Heck, 159 Wis. 572, 577, 150 N.W. 951. If at all, it should be made in open court, in the presence of counsel. Havenor v. State, 125 Wis. 444, 447, 104 N.W. 116, 117. But where defendant's guilt is so conclusive as to raise only questions of law upon appeal, and the granting of a new trial for the error stated "would seem to be almost an affront to good sense," it will be deemed not prejudicial error. Dishmaker v. Heck, supra.

It is the general rule that such procedure will constitute error, for no party should be subjected to the burden of an inquiry before the court aside from the charges regularly against him. Havenor v. State, supra, p. 446. That the proceedings of courts be open and public and in the presence of the parties or their representatives, is subject to strict enforcement, for "parties are not to be put to the burden of showing that it is in fact injurious..." Sargent v. Roberts, 1 Pick. (Mass.) 337.

In another Wisconsin case, the members of the jury asked for the pleadings and papers in a case, whereupon the judge went to the open doorway of the jury room and from the threshold told them that he could not grant their request, but would inform them concerning any disputed figures or amounts as in evidence, and did so. Upon appeal, this was declared error, the court upholding Havenor v. State, supra, and saying, in addition, that "whenever counsel are present or not, if the jury are to be further instructed they should be brought into the open court. The rule is strict but salutary. All court proceedings should be in the open; there should be no opportunity for the doing of things in a corner, nor should a defeated party be required to show that such a communication as was here had was in fact prejudicial... There is safety in no other rule." Hurst v. Webster Mfg. Co., 128 Wis. 342, 347, 107 N.W. 666. Sufficiency seems not dependent on its affecting the jury, nor on being prejudicial, for where the judge stated to the jury that the sheriff would take them out to supper and that they would probably agree after further deliberation, the Supreme Court disregarded the immediate harmlessness of the offense in deference to the decided cases, which were "found to be strong, authoritative and con-
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consistent in treating this as reversible error.” Ducate v. Brighton, 133 Wis. 628, 637, 114 N.W. 103.

Variance from the rule expressed in the above cases appears in Ketchum v. Chgo. etc. R. Co., 150 Wis., 211, 136 N.W. 634, where jurors requested and obtained from the attending court officer, not the judge, the measurements of certain railroad cars, the action being denounced as improper, but being regarded as having had no effect upon the verdict, especially in view of Section 274.37 Wis. Stat., which requires an affirmative showing that error affected substantial rights of the appellant. The statute referred to provided in part that no judgment shall be reversed or set aside or new trial granted for any error as to procedure unless the error complained of has affected substantial rights of the party complaining. The retreat thereby marked from the strict rule above exemplified met with dissent by Justice Timlin, who feared the case as precedent and favored the granting of a new trial due to the misconduct of the jury. Ketchum v. R. Co., 150 Wis. 211, at pp. 220-222, 136 N.W. 634; see also Sedlack v. State, 141 Wis. 589, 592, 124 N.W. 510.

In cases involving communications of this kind, it is important that distinction be made between communications had by the court with the jury, and communications had by the jury with someone other than the judge. The latter circumstance is open to interpretation as to whether it constitutes “court procedure” within the meaning of the statute; and on that basis the cases of Ketchum v. R. Co. and Sedlack v. State may show a seeming rather than a real deviation from the ruling in Havenor v. State and the cases cited therewith. At any rate, the instant case, Hackbarth v. State, is a noteworthy departure in that where the evidence as to guilt is strong, and backed by the defendant’s own admissions, it will outweigh a claim of prejudicial error.

RONALD A. PADWAY

Landlord and Tenant: Rental of Premises While Padlocked.

The plaintiffs in this action brought suit for the recovery of rent. Two separate leases involving different properties are the contracts sued on, and are considered in separate actions, both of which are herein discussed. Rundle-Spence Mfg. Co. v. Jakopichek, Wis., 229 N.W. 550.

Defendant entered in a written lease for the premises known as No. 86 Second street, beginning July 1, 1924, and ending June 30, 1927, by the terms of which lease he was to pay an annual rental of $1,200.

Jakopichek subleased the premises to Ignatz Pitzer and Leo Braun for the entire period for a consideration amounting to $1,200 over and