Topic:
CRIMINAL OFFENSES

This issue distributed to:
Judges
Prosecutors
Public Defenders
Police Legal Advisors
Criminal Justice Trainers

ADMINISTRATION OF JUSTICE MEMORANDA

PUBLISHED BY THE INSTITUTE OF GOVERNMENT
University of North Carolina at Chapel Hill

November, 1975 No. 02/75

REVISED KIDNAPPING STATUTE

L. Poindexter Watts

The 1975 General Assembly rewrote the kidnapping statute, G.S. 14-39, effective July 1, 1975. A number of inquiries and suggestions concerning the new law lead me to attempt an analysis of the legislation's impact. G.S. 14-39, as set out in Michie Advance Pamphlet No. 6, reads as follows:

ARTICLE 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping. — (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(b) Any person convicted of kidnapping shall be guilty of a felony and shall be punished by imprisonment for not less than 25 years nor more than life. If the person kidnapped, as defined in subsection (a), was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, the person so convicted shall be punished by imprisonment for not more than 25 years, or by a fine of not more than ten thousand dollars ($10,000), or both, in the discretion of the court.

(c) Any firm or corporation convicted of kidnapping shall be punished by a fine of not less than five thousand dollars ($5,000) nor more than one hundred thousand dollars ($100,000), and its charter and right to do business in the State of North Carolina shall be forfeited. (1933, c. 542; 1975, c. 843, s. 1.)

This publication is issued occasionally by the Institute of Government. An issue is distributed to those of the following groups to whom its subject is of interest: sheriffs, general law enforcement officers, special-purpose law enforcement officers, police attorneys, judges, clerks, district attorneys, public defenders, adult correction officers, juvenile correction personnel, jailers, and criminal justice trainers. The upper left-hand corner lists those to whom this issue was distributed and indicates a topic heading for this issue, to be used in filing. Comments, suggestions for future issues, and additions or changes to the mailing lists should be sent to: Editor, Administration of Justice Memoranda, Institute of Government, P.O. Box 990, Chapel Hill, N.C. 27514.

Effect Upon Common-Law Offense of Kidnapping

Before July 1 of this year, G.S. 14-39 provided a punishment of up to life imprisonment for these four offenses: (1) kidnapping; (2) causing someone to be kidnapped; (3) demanding a ransom to be paid on account of kidnapping; and (4) holding a human being for ransom. The statute did not define the basic offense of kidnapping but left this to the common law of North Carolina. The common-law elements as listed in the Solicitors' Manual were:

unlawfully
taking and
carrying away
a human being
by force or
by fraud
against his will

In many respects, the new statute is broader than the old because it applies to situations in which the person is merely confined or restrained--thus eliminating the need to prove that the defendant was transported into a different environment. At least in theory, however, the common-law crime of kidnapping covered some situations the new statute does not. Two hypothetical cases come to mind:

Case A. An escaping misdemeanor prisoner flags down an automobile driven by a frail woman. He forces her to drive him away in his bid for freedom. This is a clear-cut case of kidnapping under our common law, but there are problems under the new statute. The driver would not seem to be a hostage or a shield as the term is usually understood, and the facilitation of flight in this case would be following a misdemeanor escape--not the felony needed to trigger the new statute. The only part of the statute that may apply is the one making the abduction a crime if done to terrorize the victim. An argument could be made that the prisoner had a subsidiary purpose to terrorize to insure that the driver acquiesced, but the major purpose would be to facilitate the flight.

Case B. A man telephones a young girl who earns money as a babysitter and asks her to babysit for him. She agrees; he comes to her home and picks her up in his automobile. He drives her to a lonely country road and makes sexual advances (falling short of assault with intent to commit rape or any other felony). She jumps out of the car and runs away, and he drives off. This has been held to be kidnapping by State v. Gough, 257 N.C. 438 (1962). Whether this behavior is covered under the new statute is subject to even greater dispute than in the case above. If the abductor received a perverted pleasure from the girl's terrorization, then it might be possible to allege and prove that this was at least one of his purposes. But the jury could well find the defendant vain enough to believe the girl would be secretly delighted with her situation and not terrorized at all. In this instance, proving that his purpose was to terrorize would be difficult.

Obviously, in the real world there will not be many times when the new law will fail to cover situations embraced by the previous common law of kidnapping, but they will exist.

The next question is whether the common law of kidnapping has been superseded by the new statute. This is a tricky area. My normal presumption is strongly in favor of the continued existence of the common law when a statute codifies only part of it. One of my law professors once said that "North Carolina is the commonest of the common-law states," and I believe this still holds true. Our legislature tends to pass piecemeal legislation--thus arguing for the continued existence of the underlying common law. However, I think the new kidnapping statute occupies the field. The wording is: "Any person who . . . [engages in specified conduct] shall be guilty of kidnapping if such . . . [conduct] is for the purpose of . . . ." (Emphasis added.)

If I am wrong in this conclusion, and the old common-law offense does coexist with the new statute, then kidnapping as a common-law misdemeanor would be punishable under G.S. 14-3. Without question it would be an infamous offense, and G.S.14-3(b) would escalate the punishment to a ten-year felony. (N.b. to prosecutors: do not omit the word "infamous" in the indictment.) If my conclusion is correct, however, it would be necessary to prosecute for the common-law misdemeanor of false imprisonment in situations not covered under the new statute. I suspect that false imprisonment was not an infamous offense at common law--thus preventing escalation to a felony unless secrecy and malice is present--but I have not researched the point.

Accessory Before the Fact to Kidnapping

Under G.S. 14-6, the maximum term of imprisonment possible for an accessory before the fact to the crime of kidnapping is ten years. This has never before been a problem because G.S. 14-39 included causing someone to be kidnapped as a separate substantive offense punishable up to life imprisonment. In revising the section, however, this offense has been deleted. The consequences of this change are likely to be more important than the one treated above. It means that if the criminal mastermind behind the kidnapping was never physically present at the scene when the kidnapped person was confined, restrained, or removed from one place to another, then he would only be punishable as an accessory before the fact to the felony.

As a practical matter, of course, it may be difficult for the prosecutor to gather convincing proof of the complicity of a criminal mastermind who is careful to cover his tracks. If the proof is available, though, the State would have grounds to charge him with being an accessory before the fact to any other felonies perpetrated in the course of the kidnapping--plus the crime of conspiracy to kidnap. (As I understand it, conspiracy does not merge into the principal offense; consecutive sentences for conspiracy and for being an accessory before the fact could be imposed.)

Conspiracy to kidnap would be a common-law misdemeanor subject to escalation under G.S. 14-3(b). Again, I would advise prosecutors to put one or more of the aggravating elements of G.S. 14-3(b) in the indictment: that is, infamously, in secrecy and malice, or with deceit and intent to defraud.

Repeal of Demanding-Ransom Offense

The restructured statute does not carry forward the prior offense of "demand[ing] a ransom . . . to be paid on account of kidnapping . . . ." This statutory offense was presumably to be used when (1) some person not connected with the kidnapping took advantage of it to demand a ransom or (2) the State could not prove the ransom demander's connection with the kidnapping beyond a reasonable doubt but had clear evidence as to his demand of the ransom.

The most obvious substitute for the repealed demanding-ransom offense is the extortion felony enacted by the General Assembly in 1974 and codified as G.S. 14-118.4.

Fraud in the Confinement, Restraint, or Removal

It is interesting to contrast the old and new kidnapping offenses. The common-law offense is complete once there is a taking and carrying away under the appropriate circumstances; the purpose of the taking and carrying away is immaterial if the taking is unlawful, is done by force or by fraud, and is against the will of the victim. The new statutory offense specifies that the confinement, restraint, or removal be unlawful and be done without the consent of the victim (or, if the victim is under 16, without the consent of a parent or guardian), but it deletes force or fraud as an element and requires proof of one of the listed unlawful purposes.

Although fraud will no longer be even an alternative formal element of the statutory offense, there nevertheless are factual situations in which fraud may play a part. Suppose a child under 16 were confined or removed from one place to another for one of the prohibited purposes and with the fraudulently-obtained consent of a parent. Under general principles of law it is clear that such fraudulently obtained consent--which would not have been granted had the truth been known--is void. Similarly, if a person 16 or more is induced to accompany someone to an isolated place by trickery, without knowing that a ransom is being demanded for him, the law will certainly say this is a constructive confinement or removal, especially if it were obvious from the circumstances that the victim would not have been permitted to leave had he attempted to do so.

Parent Not Exempt

G.S. 14-39 formerly exempted a father or mother taking his own

child into custody from guilt for kidnapping. This was necessary because no specific intent was required under the common-law offense; it was sufficient if the taking and carrying away was unlawful. As the redefined offense requires proof of one of the listed criminal purposes, exemption of a parent for taking his own child is not desirable. A parent should indeed be prosecuted if he unlawfully takes custody of one of his children for one of the prohibited purposes of the statute.

Charging the Offense

The Solicitors' Manual gives two models for charging the common law offense of kidnapping: kidnapping by force, ". . . did unlawfully, wilfully, feloniously and forcibly kidnap John Doe"; and kidnapping by fraud, ". . . did unlawfully, wilfully, feloniously and fraudently kidnap John Doe." The courts have held that the word "kidnap" imports its common-law elements and gives the defendant sufficient notice of the offense with which he is being charged. Now that the offense of kidnapping has been statutorily redefined, however, the question arises as to charging the new offense in criminal pleadings.

As a matter of caution, I recommend that the full elements of the rewritten statutory offense be alleged. This is especially important because the rewritten offense has a number of alternative elements and the defendant will need to know which ones the State is going to attempt to prove in order to prepare his defense. Attached is a sheet suggesting the appropriate charging language under the rewritten statute.

Since kidnapping is a felony and only an indictment or an information can serve as the criminal pleading, one may ask whether a warrant or criminal summons for kidnapping need allege all the elements of the new offense. Under G.S. 15A-303(b) and 15A-304(c) it is clear that as process these documents need not allege all the elements so long as it is apparent that the crime of kidnapping is being charged, but for practical reasons I urge that warrants and summonses for kidnapping follow, where possible, the suggested charging language of the attached sheet. There are two main reasons for this. First, the statement of the crime set out in the process will be used in the probable cause hearing in district court. If the statement of the crime is too imprecise, the defendant would want to move for a bill of particulars. Second, in many districts the statement of the crime in the warrant or summons will routinely be used by the prosecutor's office in drafting the bill of indictment after the defendant is bound over to superior court. Therefore, in the ordinary case it seems desirable that the felony process used and tested in district court contain the elements to be charged in the superior court pleading (though the prosecutor's discretion to indict for whatever felony he believes can be proved is not fettered).

Released "in a Safe Place"

Several persons have speculated on the meaning of "safe place" in connection with the higher punishment that is possible if the defendant does not release the kidnapping victim "in a safe place." The basic intent of the provision is obviously to deter a kidnapper from releasing a child or helpless person deep in the woods in freezing weather--or under other circumstances in which the victim would run a risk of harm when released. Whether the place of release is safe will necessarily be a jury question.

If anyone wishes to research the matter, a place to start would be American Law Institute, Model Penal Code Tentative Draft No. 11, commentary to § 212.1, at 18-20 (1960). The drafters of the Model Penal Code adopted the concept of release-alive-in-a-safe-place as a substitute for the federal provision setting a lesser punishment if the kidnapping victim was "released unharmed." (If some harm occurred to the victim during the kidnapping, the old federal formula would give no further incentive to the kidnapper to release the victim alive.) Many states and other model codes have since adopted the "safe place" language, although it is noteworthy that N.Y. Rev. Penal Law § 135.35 expands it to "voluntarily returned alive or voluntarily released alive under circumstances enabling him to return to safety without substantial risk of death . . . . "

A related pair of questions concerns the failure of the North Carolina statute to carry forward the Model Penal Code specifications that the defendant "voluntarily" release the victim "prior to trial." The latter point is simple: the release must occur before the indictment--or else the aggravated offense will lie. The kidnapper could have the victim still stashed away when captured, so there would be need to provide the incentive to release, but extending the grace period up to the time of trial rather than cutting it off at the time of indictment would seem to make little practical difference given the prosecutor's discretion as to timing of the indictment (or of an information if the defendant consents). The Proposed Official Draft of the Model Penal Code added the word "voluntarily" to § 212.1 to make it clear that "rescue of the victim by the police will not avail the kidnapper." As a matter of interpretation, however, it seems that the act of "release" by the kidnapper would require some affirmative conduct on his part; addition of "voluntarily" is probably unnecessary.

Savings Clause

As the Michie Advance Pamphlet No. 6 indicates in its Editor's Note following G.S. 14-39, the 1975 legislation has a savings clause. This means that kidnappings occurring up to midnight of June 30, 1975, must be tried and punished under the old statute.

Attachment

KIDNAPPING, G.S. 14-39 (AS REWRITTEN EFFECTIVE JULY 1, 1975)

I. Kidnapping Person 16 Years of Age or Over

. . . did unlawfully, wilfully, and feloniously kidnap *(name victim)*, a person who had attained the age of 16 years, by unlawfully [confining him] [restraining him] [removing him from one place to another]* for the purpose of *(choose one or more of the alternatives listed below)*.

(1) holding him for ransom

(2) holding him as a hostage

(3) using him as a shield

(4) facilitating the commission of a felony, *(name felony)*

(5) facilitating the flight of *(name defendant or other person fleeing)* following his participation in the commission of a felony, *(name felony)*

(6) doing serious bodily injury to him

(7) doing serious bodily injury to *(name other person)*

(8) terrorizing him

(9) terrorizing *(name other person)*

II. Kidnapping Person Under 16 Years of Age

. . . did unlawfully, wilfully, and feloniously kidnap *(name victim)*, a person under 16 years of age, by unlawfully [confining him] [restraining him] [removing him from one place to another]*, without the consent of his parent or legal guardian, for the purpose of *(choose one or more of the alternatives listed under Charge I above)*.

III. Aggravated Kidnapping Offense

(In addition to Charge I or Charge II as appropriate, add the following sentence.) The person kidnapped was [seriously injured during the kidnapping] [sexually assaulted during the kidnapping] [not released in a safe place following the kidnapping]*.

---

* More than one of the phrases in brackets may be used when appropriate.