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STATE OF MICHIGAN

IN THE 17TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF KENT

THE PEOPLE OF THE
STATE OF MICHIGAN

vs.

Case No.: 93-63014-FCA
93-63014-FCB

DANIEL A. TURNER and
STEPHEN D. TURNER,

Defendants.
_____/

MOTION TO QUASH
MOTION TO SEVER
MOTION TO SHOW CAUSE

Before the Honorable DENNIS C. KOLENDA, Circuit Judge,

November 24, 1993 -- Grand Rapids, Michigan

APPEARANCES:

FOR THE PEOPLE:	KEVIN M. BRAMBLE (P38380) Assistant Prosecuting Attorney 416 Hall of Justice Grand Rapids, MI 49503
FOR THE DEFENDANT DANIEL TURNER:	ROBERT E. MIRQUE (P47391) 920 McKay Tower Grand Rapids, MI 49503
FOR THE DEFENDANT STEPHEN TURNER:	TONYA L. KRAUSE (P42056) 920 McKay Tower Grand Rapids, MI 49503

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WITNESSES: None.

EXHIBITS: None.

Grand Rapids, Michigan
Friday, November 24, 1993

MR. BRAMBLE: Kevin Bramble on behalf of the State of Michigan.

MR. MIRQUE: Robert Mirque of the Defender's Office on behalf of Daniel Turner. The co-defendant and I have several motions on this morning's docket. The first motion I wish to raise is on behalf of Mr. Turner, alone, and that is the Motion to Quash count one of the People's Information charging Mr. Turner with kidnapping a child under the age of 14 under MCL 750.350.

We ask this Court to approach the question as to whether or not the bind over is correct from two points of view. First, I believe the Court is afforded the opportunity of de novo review of the decision to bind over if in fact the Magistrate down below applied the law incorrectly to the facts.

The second prong of attack that the defendant wishes to raise is that if the Court finds that the law was correctly applied, that the State has not provided any evidence as to the specific intent element of the crime and, therefore, the Court would be judging under an abuse of discretion standard.

Under the de novo approach, your Honor, the People have charged the defendant with 750.350 which

states that there is a specific intent element to the crime. That the defendant was intending at the time of the taking to detain the child from its rightful guardian, parent or any other person in charge as the guardian, simply the child.

In the case that the defendant has found, four cases, in particular, the People vs. Fields case, People vs. Nelson People vs. Cogdenhe Court states that in --

THE COURT: I remember it well.

MR. MIRQUE: Those cases all seem to have stemmed from a dispute as to who was the rightful custodian of the child after there was a disruption of the family environment. It appears the enforcement of such act was to detur a parent from taking away the child and what would be the Court-recognized custodian, and take it away from that person so that he could care for that child.

Nowhere during those four cases was there any intent to perform any additional felony on that child. It was simply a matter of custodial dispute.

The law was apparently enacted and has been historically enforced to target those individuals who for no other reason but to deprive one parent from

another of the rightful ownership of the child. We feel, given that history, 750.350 does not apply to this particular case.

Would Mr. Bramble like to respond to that before I move on to abuse of discretion?

THE COURT: Why don't you do it all and then he can respond to it all?

MR. MIRQUE: In the abuse of discretion argument, your Honor, the State has brought no evidence to suggest that Mr. Turner intended to deprive the child of rightful ownership of the child. If the Court agrees that this act can be found applicable to this situation, then the prosecutor, by its prelim, must have established some satasfaction for that particular element. We feel in reviewing the preliminary examination that there has been no such evidence.

The one case where I did find where 350 has been applied to a straight kidnapping case, a 1934 case, the defendant took the child for two days at a cottage and then took her, additionally, to their home for one day, and then released the child upon satisfaction of ransom. No intervening felony had occurred. It was a true kidnapping in the sense that would properly be addressed under 750.349, which included the elements of assplortation which require that any taking of a child,

forcibly, be not incidental -- or incidental to the underlying offense.

If the Court is considering kidnapping, is kidnapping, and then under 349, the element of asportation is to be applied, then also in 350 what we argue is that element of asportation should also be applied under the 350 statute. And the case law for asportation requires that the taking must be not incidental to the underlying felony. And in this case, if you look under the prosecutor's lens and the evidence supplied at prelim, it appears that Mr. Turner allegedly took the child merely to take her into the apartment and commit a CSC. One continuing crime and not the kidnapping and then once the kidnapping was completed, CSC had occurred.

Therefore, what Mr. Turner is requesting that 350 does not apply by its law, given the history of the enforcement of that act, and even if it does apply, the prosecution has failed to present any evidence satisfying the specific intent element of that crime

THE COURT: Mr. Bramble?

MR. BRAMBLE: Your Honor, I would simply refer the Court to paragraph three of the defendant's motion indicated on July 20, 1993, that the alleged victim testified the defendant grabbed the victim, took her

into his apartment and performed two sexual acts on the victim once inside the apartment and released her.

The applicable statute is child enticement statute that says:

"A person shall not maliciously, forcibly or fraudulently lead, take, carry away decoy or entice away any child under the age of 14 years with the intent to detain or conceal the child from a child's parent or legal guardian or from a person or persons who have adopted the child or from any other person having lawful charge of the child."

I submit, if you compare that statute with simply paragraph three of the defendant's motion, you can't -- I don't think, a person, when they engage in this type of activity; grab a child and say my intent here is to detain or conceal you from your parents. I think you have to look at -- their intent can be determined from their actions. And the testimony was, she's playing on the step outside the apartment, she's grabbed, forcibly grabbed, taken, carried away, brought into their apartment.

Secondly, I note that the statute does not require that there be any permanent or intent to permanently take the child away from the custodial parent or from the parent, but it is simply that taking

away and that concealing for any length of time, meets the statutory requirements.

I submit when you look at the testimony of the victim at the time of the preliminary examination, that we presented ample evidence to bind the defendant over on this charge, and there was no abuse of discretion on the part of the Magistrate or the Judge.

THE COURT: With regard to the first argument advanced, that is that the statute should be limited to controversies between the caretakers, that may have been what the Legislature had in mind when they adopted the statute, but the words used are more expansive than that and they don't limit it to that factual scenario. I have to follow the words, and if the words are clear as they are, at least they are clear that it isn't limited as is alleged here, the actual intent becomes irrelevant. We don't delve into the minds of the Legislature to find out whether they meant something other than what they said, we simply follow what they said. That's the holding in People vs. Lowell Mich 349, 358, 359 and a whole host of other cases.

Accordingly, for that particular reason, the motion is denied. With regard to the allegation that there has been an abuse of discretion here because adequate evidence of intent and/or asportation were not

submitted with regard to the issue of intent, the facts which it is alleged here justify a finding, not necessarily that you agree with it, but that it justifies the bind over, themselves, allow for the inference of the requisite intent. And so I don't see an abuse of discretion. And, frankly, I'm not prepared at this point to add to this statute the asportation element that the Adams kidnapping statute because they are much different situations.

On the face of it, this statute is satisfied once a child is carried away or enticed away with an intent here, and I can certainly understand that there is no need to add an element here that there was to add an element to Adams

Accordingly, the motion to quash is denied. Lets move on to the joint motion.

MR. MIRQUE: Thank you, your Honor.

Second motion is a motion to sever. It is a motion that arises out of some negotiations that had broken down between the prosecutor's office and the co-defendant. It was our understanding that this motion would need not to be filed. However, the prosecution has elected not to sign a stipulation and order granting separate juries in this matter and we've been forced to

bring this motion.

Mr. Turner had allegedly made some statements that Daniel Turner feels would be prejudicial to him. Ms. Krause is on behalf of Stephen Turner. She would be more apt to talk about Stephen's belief as to Daniel Turner's statement. However Mr. Turner is aware that Stephen Turner has made statements during the course of the polygraph examination that he elected to undergo, given statute, and those statements, although would not implicate Mr. Stephen Turner, certainly do implicate Mr. Daniel Turner, and if we had a common jury between the two, they would surely effect Stephen Turner's fair determination of innocence and guilt. Furthermore, we would not have the opportunity to cross examine Mr. Stephen Turner should he elect not to testify.

Furthermore, the antagonistic nature of the two defenses in that Stephen Turner seems to be saying that Daniel Turner was involved in this matter, and Stephen Turner had nothing to do with it, would surely be of an anntagonistic nature to satisfy the requirements for a separate jury.

THE COURT: Ms. Krause?

MS. KRAUSE: Good morning. Tonya Krause on behalf of the defendant, Stephen Turner. An affidavit I have here that I would like to file with the Court was

not attached to the motion to sever or for separate trials. I have stated in my affidavit that it's my understanding in investigating this case and preparing for trial that it is likely my client will take the stand. If my client takes the stand, there will be testimony that will exculpate himself and incriminate the co-defendant.

In addition to that, there are statements that are attributable to the co-defendant, Mr. Daniel Turner, which could be taken as incriminating to both himself and to my client. And if he is not called to the stand to testify, it is my belief, and at this time he will not be, that I will not be afforded the opportunity of cross examination in reference to those statements. Because of that, as Mr. Mirque said, I believe there are antagonistic defenses that warrant separate trials.

Alternatively, we would be willing to accept separate juries. I think that could be accommodated and the defendants' Constitutional protection could be met given the situation of the separate juries.

THE COURT: Mr. Bramble?

MR. BRAMBLE: My understanding of the Detective Straub's statement taken from co-defendant simply indicates that Mr. Mirque's client was present in the apartment with the alleged victim at the time this

incident occurred. I think that is the extent of any type of inconsistencies.

I would agree that a portion of that statement then is exculpatory regarding Ms. Krause's client. But as I had indicated at the pre-trial and as I had told defenses counsel, I was willing to -- I feel under the statute they have to provide the Court with an affidavit indicating what the reason for requesting a separate jury or separate trials, and then I would leave it to your discretion, your Honor.

THE COURT: Well, frankly, it's the uncertainty as to what the trial proofs are going to be which is the most persuasive reason for having two juries because, frankly, I don't want to find out in the middle of the trial that we have a problem and that we, therefore, have to grant a mistrial to somebody, maybe both, and try this case a second or a third time when in fact we can try it only once.

The realistic prospect here, and I can't say it's more than a prospect, but that's enough, of antagonistic defense and some statements that might be admissible against one and not the other to say to try this matter separately. My experience is, however, that we can do that with two juries in one courtroom. We just did it in a murder case, and once we got the

procedure down, it worked smoothly and well. I frankly think that since it can be done so easily, it's hardly worth the risk of an unfair conviction or a reversal on appeal to do it all over again when we could have, with a little extra effort, avoided the whole problem.

We will, therefore, try this matter in front of two juries, not try the case separately. I think two juries is, in fact, a severance. It is simply more convenient for the Court. More significantly, it is more convenient for the complainant who might be a victim. That hasn't been determined yet, but given she is a young child, under any circumstances, we shouldn't engineer things so that she has to testify twice when it can be arranged that it be done only once, and I don't see any possible prejudice to the defendant of having two separate juries because they will, in fact, be getting separate trials. It just so happens we will be conducting the separate trials simultaneously.

Let me deal with the voir dire issue. I've had experience with high visibility cases. It's my experience that what everyone thinks of high visibility is not to the jurors. What I will do is what I did in the Corbett-Delany case and what I did in the Ratliff case which has got to be the paradigm of high visibility cases, we should work out before we commence

jury selection, counsel, what facts have been reported in the paper that are seriously not in dispute, if there are any, and simply ask the jury if they know anything more about this case than that. Any juror who says they do will then be voir dired separately. But I don't think we need to start the process by voir diring separately. My experience has simply been to say, there has been something in the paper about it, does anybody remember anything specific other than there was some incident reported, let me know.

We've had anywhere from none to three or four people say that they think they know something. At that point, we'll go into a jury room and voir dire them separately. I don't think we need to do that with the whole panel to begin with because, frankly, what you find is that, and it's an interesting commentary that's lost on the media and nobody remembers what they read anyway.

MS. KRAUSE: If I might address that issue, it seems to be my motion was twofold. One was a separate trial because of publicity, but the publicity didn't rise to the level of the need for a change of venue. The concern with what was in the media, are the sensitive issues that are involved in this case as it relates to transgenderism and cross dressing and things

of that nature. That was one of the reasons we wanted separate questions as to those issues. Mr. Mirque and I attached to the motion possible questions, sample questionnaires to be given to the jurors, and we still ask that that be done. Given that it is such a sensitive area and people may have very strong opinions, biases and prejudices about these particular issues, I don't want a spontaneous statement from a prospective juror to taint anybody else on the voir dire, and that's why we're asking that those particular issues be covered separately, or individually, or by the supplemental questionnaire.

MR. BRAMBLE: I specifically oppose any type of written form. Number one, I'm not sure if the Court wants to start this type of practice and whether or not the clerk's office has the ability to perform such a task such as that. I submit all of the questions, and I've reviewed it, are things that can be covered during the normal every day voir dire that this Court oversees in its courtroom.

THE COURT: Well, the reason, frankly, to have individuals voir dired is to run the risk of one juror knowing something, educating jurors who don't know something and thereby tainting the whole pool. None of these proposed questions relate to that, but relate to

people's reaction to what is going to be the evidence in the case, apparently.

Every potential juror has got to be asked these questions, and I don't see any point to this constant repetitive voir dire which is, frankly, going to be virtually the whole voir dire in the case. It is no different than any other case I've seen in which -- have been the victim of a crime, et cetera -- some people say, yes, some people say, no. I've had many a case where it's been a child/victim, and when I explained the case, asked if it is going to strike too close to home so that you can't deal with it, and some people say, yes, some people say, no. We explore that, but I don't think any juror is being educated inappropriately by virtue of the other juror's response. If it was, frankly, then every voir dire has to be conducted in this fashion because while the questions, substantively, are different, generically, they are the same in every other case.

We will do a limited individual voir dire if jurors indicate that they know something about this case such that we don't want to educate the rest. But their reactions to what the evidence will be doesn't warrant a separate voir dire. These questions will be asked. You may ask them, but we won't do it separately

MR. MIRQUE: Next, your Honor, is a motion to show cause. We have a discovery order existing in the file. On page 4 of that discovery order it was ordered that the prosecutor's office shall answer whether or not the alleged victim is participating in counselling, and where. The prosecutor's office has not supplied that information. We found it through documents that they provided us. So on the face of it, they have not complied fully with that order.

Second of all, --

THE COURT: But you have the information, so lets move on.

MR. BRAMBLE: You were provided with the information, if you found it in the documents that I gave you. Would that be safe to say?

MR. MIRQUE: The prosecutor's office shall answer, not the police department.

THE COURT: Lets focus on the big issue here.

MR. MIRQUE: The real issue, your Honor, is that those documents should have been turned over to the Court for inspection. I don't know whether or not they have been. In discussing with you, you indicated that they have not yet been. I've talked to Mr. Bramble last week. He said that he would be working on it. Well, now it's the weekend before trial and working on it is

not good enough. We need to know what's in those documents. If there is anything exculpatory in there, we are not prepared to proceed unless that information is given to us.

THE COURT: In fact the documents have not been turned over because the father of the child has reported to the Court that he'll not sign a release. The Court has been in touch with the counselling agency, that they will not turn over the documents without a release or Court order. So if somebody will draft me a Court order, I will sign it and direct that the documents be turned over to me. I will look at them.

MR. MIRQUE: If that will solve the problem in order to release or order to turn those --

THE COURT: They say it will and then under People vs. Abanski have to look at it anyway.

MR. MIRQUE: The question then becomes one of time, your Honor. We can have the order today. We can have it executed and delivered to you. The question then becomes how fast --

THE COURT: I take it the counselling agency is down south, isn't it, somewhere?

MR. MIRQUE: I believe it's in Muskegon.

You are going to need time to review those

documents, we're going to need time to know whether there is something in there of substance that could benefit the defendant. We are starting trial on Monday. Now, I certainly don't propose an adjournment, but if need be, we are asking one because, if there is something exculpatory in there, we want to know it and we want to prepare adequately. I'm sure the prosecutor would like the opportunity, if there is exculpatory information, to prepare adequately to meet those charges also.

THE COURT: We won't know that until I see it. We are going to have to pick juries over two days, I suspect. One of you will pick one jury Monday and the other on Tuesday, although you should both be here. If we are lucky and I can find another judge to do it, we will then pick the juries simultaneously. You should see, Mr. Bramble, if somebody in your office can help you pick a jury. That's what we did in that murder case.

I don't think, however, that we are going to get to the meat of anything until Wednesday. It will take you two days to pick a jury, and then I'm not going to be here Tuesday morning, under the best of circumstances, so we'll have a couple days. I will take a look at the material when they arrive. If there

is something significant, it will be turned over. If it is significant enough to require an adjournment, one will be granted. But, lets wait and see before we make that decision.

MR. MIRQUE: Thank you, your Honor. I think the rest of the motions remain with Ms. Krause.

MS. KRAUSE: The final motion, your Honor, is for direction from the Court as to how the alleged victim can be cross examined in this case. The alleged victim is ten years old and I believe she is of sufficient age and intelligence to handle cross examination pursuant to Michigan Rule of Evidence. I know that this Court, in particular, has used creative methods before for younger children as to how they may be cross examined, and if impeachment issues arise, how impeachment issues will be handled. We are asking for direction to assist us in preparing for trial and the possibility of impeachment.

THE COURT: Unfortunately, I can't give it to you because my previous so-called creative method has always depended upon the age, maturity and articulateness of the child involved, and I haven't seen the child, so I don't know. If traditional cross examination will be both meaningful to the defendant and not harassment to the child, then we'll do it in the

traditional way. If, however, because of the immaturity or something else, we have to do it otherwise, to make it meaningful, that can get in the way, but to make it meaningful, we'll do it the other way. But I just don't know. I'll let you know as soon as I've seen enough of the child to decide.

MR. BRAMBLE: Thank you, your Honor.

MR. MIRQUE: Thank you, your Honor.

MS. KRAUSE: Thank you.

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STATE OF MICHIGAN)

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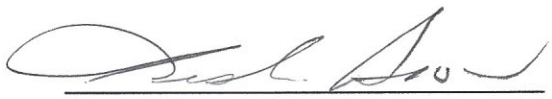
COUNTY OF KENT)

I, Leslie Brown, CSR, do hereby certify that the foregoing pages 1 through 21, inclusive, comprise a full and accurate transcript of the aforementioned cause on said date.



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