STATE OF NEW JERSEY

v.

ANTHONY CASEY,
Defendant - Appellant

A-11-1234-T3

Superior Court, Appellate Division

Submitted August 1, 2011 - Decided September 1, 2011

Before Judges GRIM, REAPER and MERCY.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Cr-10-9028.

Joan Baez argued the cause for the defendant-appellant (Dewey Cheathem & Howe, L.L.P., attorneys for defendant-appellant; Ms. Baez of counsel and on the brief)

Ashton Jeffrey, First Assistant Prosecutor, argued the cause for the State of New Jersey (Lamar Lawton, Essex County Prosecutor; Mr. Jeffrey of counsel and on the brief).

GRIM, J.A.D. joined by **REAPER, J.A.D.**

On March 16, 2011, following a jury trial in Superior Court, Law Division, Essex County, defendant Anthony Casey was convicted of one count of first degree robbery, contrary to N.J.S.A. 2C:15-1; and one count of second-degree kidnapping, contrary to N.J.S.A. 2C:13-1(b)(1). Defendant was sentenced thereafter to concurrent 20-year term of imprisonment.

In this appeal, defendant contends that the trial court erred when it denied his motion at the close of the State's case, renewed at the end of the trial, for a judgment of acquittal on the kidnapping charge on the grounds that the evidence was insufficient as a matter of law to support a conviction. He also contends that the trial court erred in not ordering a mistrial on the grounds that the prosecutor in his summation improperly commented on the defendant's failure to testify at trial.

We disagree on both counts. We hold that the evidence presented at trial was sufficient as a matter of law to support defendant's conviction for kidnapping. We further hold that the prosecutor's comments in summation may have approached the limit of proper argument but did not cross the line and, in any case, were harmless. We therefore affirm defendant's conviction.

The Facts

On September 15, 2010, at approximately 8:05 p.m., George Caylee ("Caylee") was operating a licensed cab in the City of Newark. He had left a fare at the intersection of Market and Washington Streets and was driving northeast on Washington Street when he was hailed by a man standing on the east side of Washington Street at the intersection of New Street. The man was wearing a black hooded sweatshirt, dark jeans and black sneakers and had a scarlet and black bandana around his wrist. The man asked to be taken to an address on North Walnut Street in East Orange.

As the cab proceeded up Washington Street towards Broad Street, the man directed Caylee to turn left on James Street, a smaller more isolated street compared to Washington. Caylee did so, and the man immediately asked him to pull over and stop for a minute. He told Caylee he had to check his wallet to be sure he had enough cash to pay for the cab ride. Caylee pulled to the side of the street and stopped. At that point, the man placed an object which Caylee believed to be a gun to the back of Caylee's neck and ordered him to hand over all of his cash.

Caylee did exactly as he was told, turning over $96 in cash. Once he had given the man all of the money he had, the man ordered him to drive. Caylee began to plead for his life, begging the man not to hurt him and saying he had a wife and children who depended on him. The man continued to hold the object to Caylee's neck and again ordered him to drive. Caylee put the vehicle in gear and began to pull out. The man immediately ordered him to turn right on Essex Street, a much smaller, more isolated and desolate street even than James Street.

After Caylee made that turn, on the orders of the robber, Caylee pulled into an alley behind the Newark Public Library. He again begged the man not to hurt him. The man ordered him to turn off all the vehicle lights, kill the engine and give him the keys. Caylee did as he was told. The man then ordered Caylee out of the front seat and onto the floor of the back seat. Caylee again did as he was told. The man told him to stay on the floor for 10 minutes, told him he would be killed if he moved before the 10 minutes were up, and slammed the door leaving Caylee inside the cab.

Caylee waited the 10 minutes as told, carefully lifted himself off the floor, and when he saw the man had in fact gone, he radioed to his dispatcher and officers of the Newark Police Department were dispatched to the scene.

The police were unable to recover any usable fingerprints from the vehicle but did find a scarlet and black bandana on the ground about 15 feet from the cab near the mouth of the alley. Forensic testing of the bandana produced DNA samples that were then sent to the Federal DNA Clearinghouse for comparison to all available known samples.

On October 12, 2010, a forensic DNA expert from the FBI notified the Newark Police Department that the DNA found on the bandana matched that of the defendant, whose DNA sample had been submitted to the Federal Clearinghouse because of his service in the New Jersey National Guard. Investigation showed that defendant was an East Orange resident and a student at the Rutgers Law School in Newark. The law school is located on the west side of Washington Street directly across from the location where the robber had hailed Caylee. The investigation further showed that defendant had attended

a night appellate advocacy class on the evening of Wednesday, September 15th, that had let out just before 8 p.m.

Defendant was brought to police headquarters for questioning. After being read his right and waiving his right to remain silent, defendant admitted he had been at the law school on the evening of September 15. He claimed he had walked from the law school to the Broad Street Station where he had taken a train home to East Orange; surveillance cameras at the train station proved not to have been operating on the night of the robbery and he was unable to produce a train ticket or other evidence supporting his story. He admitted owning a scarlet and black bandana and explained that many Rutgers law students had been given the bandanas on Monday the 15th for participating in a blood drive. When he was asked to produce the bandana, he told the officers he had lost it the week of the blood drive.

Meanwhile, the police called Caylee to ask him to come down to Police Headquarters to view a line-up to determine if he could pick out the man who had robbed him. Defendant requested that his lawyer be present for the line-up, and the lawyer arrived prior to and was present for the line-up. Of the six similarly-sized and similarly-dressed men in the lineup, Caylee said defendant was “definitely the right size and the right shape” and “definitely sounded like” the robber.

The Prosecution

Defendant was indicted on October 14, 2010 on one count of first degree robbery, contrary to N.J.S.A. 2C:15-1; and one count of second-degree kidnapping, contrary to N.J.S.A. 2C:13-1(b)(1).

Trial began with the selection of the jury on March 14, 2011. The State presented the testimony of the cab driver-victim, the officers who questioned the defendant, and the forensic scientists from the Newark Police Lab who retrieved the DNA sample from the bandana and from the Federal DNA Clearinghouse who the DNA sample to the defendant’s DNA on file.

At the end of the State’s case, defendant moved for the entry of a judgment of acquittal on the kidnapping count. He argued that the State had not presented evidence that the victim had been moved a substantial distance or confined for a substantial time. However, the trial court found that the the victim’s testimony showed that there was sufficient evidence of the confinement of the victim within the cab and the physical movement of the victim to support sending the count to the jury. It therefore denied the motion.

Defendant then presented his case. Character witnesses and classmates testified to defendant’s good conduct and reputation in the community. Two of his classmates testified that they frequently walked with defendant from the law school to the Broad Street train station and often took a route that led them down Washington Street, into the alley by the Newark Public Library and then down Essex Street to Orange Street and to the train station on University. None of defendant’s witnesses testified directly to his conduct or whereabouts on the night in question. Defendant himself did not testify.

Defendant’s counsel argued in summation that there was no direct evidence linking him to the crime and an alternative explanation for the presence of the bandana in the alley, namely that it had been lost while he walked from the law school to the train station at some point after he received it. In particular, defense counsel argued:

> Let's just work on the bandana stuff. That bandana is not totally, or at all, strong enough to say that my client definitely did this robbery. The only thing it show[s] is that at one time he wore that bandana. That's all it shows, or he had that bandana.
>
> If you are going to find my client guilty, which is going to be very difficult indeed, because there's been really no evidence against him, and it has to be without a reasonable doubt. And there is reasonable doubt -- in fact[,] there's overwhelming doubt, because my client wasn't there. His bandana was in that alley, but what else? And, as I mentioned before[,] the bandana was there because he's a regular in the neighborhood, he walks down that alley, so therefore that would explain the bandana.

The prosecutor in his summation responded specifically to the defense argument on the bandana:

> Now let's talk about the evidence. Realistically what evidence is there that this thing was ever lost? You can suggest things, you can make innuendos of things in closing arguments, but what you're supposed to base your case on is what comes from there, the witness stand. . . . There were two days between that blood drive and the robbery. How could it still have his DNA on it if he lost it right away and it sat out there in the open with the wind and the sun and the elements? How was it sitting out there lost for days and nobody picked it up? This isn’t just any lost bandana. . . .
>
> Okay, his defense is certainly not that the DNA is not his DNA. He admits it, he knows it, it's incontrovertible. It's one person in 120 billion. It's Casey's DNA. But what has to happen for, for him to lose it evidently -- although we haven't heard any testimony, as I said -- that means what?

Defense counsel did not object to the argument when made. However, at a break after the summation, counsel objected on the grounds that the comments constituted impermissible comment on the defendant’s failure to take the stand and testify and moved for a mistrial. The trial court denied the motion but at the end of the trial, the judge specifically and properly charged the jury that a defendant in a criminal case has no obligation to present any evidence at all and no obligation to testify, and that the burden of proof always rests with the prosecution. The trial judge also charged the jury that statements of counsel during argument are not evidence.

The jury returned its verdict on March 16, 2011, finding the defendant guilty on both counts. Defendant renewed his motion for a judgment of acquittal on the kidnapping charge and moved, in the alternative, for a new trial; the motion was denied. On April 15,

2011, defendant was sentenced to an aggregate sentence of 20 years imprisonment. The defendant was committed to the custody of the Department of Corrections; bail pending appeal was denied.

Defendant filed his notice of appeal to this Court from the judgment of conviction on May 31, 2011.

Discussion

We conclude, first, that the evidence in this case was sufficient as a matter of law to support a conviction for kidnapping under our statute.

The statute, N.J.S.A. 2C:13-1(b)(1) provides that a defendant is guilty of kidnapping where he “unlawfully removes another ... a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period” with a purpose “[t]o facilitate commission of any crime or flight thereafter”. The conjunctive in the definition makes it clear that either distance or time is sufficient to support a conviction. In this case, the evidence shows both.

The distance between the initial pick-up at the intersection of New and Washington Streets in Newark and the robbery site was not insubstantial. Nor was the distance between the robbery site and the victim’s confinement in the cab. Either singly or in combination, the movement involved in this case is enough to constitute removal over a substantial distance and thus to satisfy the mandates of the statute. See *State v. Masino*, 94 N.J. 436 (1983) (moving a sexual assault victim across a road, behind a row of trees and down to a pond); *State v. Purnell*, 394 N.J. Super. 28, 53 (App. Div. 2007) (taking a victim up a flight of stairs in an apartment house); *State v. Matarama*, 306 N.J. Super. 6, 21-22 (App. Div. 1997), certif. den. 153 N.J. 50 (1998) (dragging victim 23 feet). Whenever the asportation increases the vulnerability of the victim, and thereby exposes him to a greater risk of harm, the movement is substantial enough to justify conviction under the kidnap statute. *State v. Arp*, 274 N.J. Super. 379 (Law Div. 1994).

The time the victim was forced to drive, under threat of injury, after the robbery and the time he spent confined in the vehicle at the orders of the robber clearly enhanced the victim’s terror. That fear was substantial and not at all related to the fear arising from the robbery itself. See *State v. LaFrance*, 117 N.J. 583 (1990). Moreover, it was for the purpose of immobilizing the victim so that the defendant would have time to make his get-away.

Here, there can be no question but that the movement of this victim into a dark lonely isolated alley and his confinement there in the cab increased his vulnerability and exposed him to a greater risk of harm. In our view, then, either physical movement or the time of confinement was sufficient to support defendant’s conviction for kidnapping.

Turning to the question of the prosecutor’s summation in this case, we begin by noting that we do not countenance comments by a prosecutor that can be interpreted by a jury as commenting on the decision of a defendant not to testify. Here, however, it is critical to note that no objection was made at the time of the prosecutor’s remarks. Generally, if no objection is made to the allegedly-improper remarks, the remarks will not be deemed prejudicial. *State v. Ramseur*, 106 N.J. 123, 323 (1987). The failure to object suggests

that defense counsel did not believe the remarks were prejudicial at the time they were made. The failure to object deprived the court of an opportunity to take curative action at the time. *State v. Bauman*, 298 N.J. Super. 176, 207 (App. Div.), certif. denied, 150 N.J. 25 (1997). However, the trial court did take appropriate action in its charge to the jury when it specifically and properly instructed the jury as to the allocation of the burden of proof and to the fact that a defendant is under absolutely no obligation to testify or, indeed, to present any evidence.

Moreover, the focus of the remarks was on the likelihood that defendant's DNA would still be detectable on the bandana and the likelihood that the bandana would be found in the alley if it had been dropped earlier than the robbery, and not on the fact that the defendant did not take the stand to explain the loss of the bandana. Prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented. *State v. Harris*, 141 N.J. 525, 559 (1995); *State v. Williams*, 113 N.J. 393, 447 (1988). Indeed, prosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries. *Harris*, 141 N.J. at 559. Given the evidence in this case, the prosecutor's entitlement to respond to defense arguments, the lack of a direct link between the remarks and the defendant's privilege not to testify, the failure of defense counsel to object at the time, and the propriety of the charge to the jury, we conclude that any error in allowing the remarks was harmless.

We repeat that we do not countenance comments by a prosecutor in summation that can be interpreted by a jury as commenting on the decision of a defendant not to testify. In the unique factual scenario presented by this case, we conclude that the prosecutor's comments did not violate the defendant's right to a fair trial.

Accordingly, the decision of the trial court is hereby ***affirmed***.

MERCY, J.A.D., dissenting

I find the majority's conclusions to be irreconcilable with a proper reading of the law and the Constitution and, therefore, I respectfully dissent.

First, our jurisprudence could not be clearer that not every movement of a crime victim, not every momentary confinement, elevates the singular crime being committed into the double offense of the crime plus kidnapping. *State v. LaFrance*, 117 N.J. 583, 586 (1990). Our legislature rejected the notion that every crime should become two crimes whenever a zealous prosecutor finds some movement or confinement. The language of the statute and our cases interpreting it make it clear that kidnapping does not occur when the asportation or confinement is "merely incidental to" the commission of other substantive crimes and does not substantially increase the risk of harm beyond that necessarily present in the crime itself. See *Virgin Islands v. Berry*, 604 F.2d 221, 227 (3d Cir.1979). Under the *Berry* test, affirmed by our High Court in *LaFrance*, our judges and our juries must consider:

> (1) the duration of the detention or asportation; (2) whether the detention or asportation occurred during the commission of a separate offense; (3) whether the detention or asportation which occurred is inherent in the separate offense; and (4) whether the asportation or detention created a

> significant danger to the victim independent of that posed by the separate offense.

Virgin Islands v. Berry, 604 F.2d at 227, cited in *State v. LaFrance*, 117 N.J. at 588.

This is the test our Supreme Court also set in *State v. Masino*, 94 N.J. 436, 447 (1983), where the Court held:

> [O]ne is transported a "substantial distance" if that asportation is criminally significant in the sense of being more than merely incidental to the underlying crime. That determination is made with reference not only to the distance travelled but also to the enhanced risk of harm resulting from the asportation and isolation of the victim. That enhanced risk must not be trivial

The majority claims to apply this test and concludes that "the movement of this victim into a dark lonely isolated alley and his confinement there in the cab increased his vulnerability and exposed him to a greater risk of harm." But that facile statement, without evidentiary support, simply ignores the critical evidence provided by the victim cab driver in this case:

> Q. You weren't afraid at all until the moment you felt that cold object on the back of your neck, right?
> A. Right.
> Q. And you never saw what the cold object was, did you?
> A. No.
> Q. And from that moment, from the moment of the robbery to the moment you pulled into that alley was how long, maybe 30 seconds?
> A. That's about right. Maybe a little longer. Not more than a minute, I'd guess.
> Q. You turned onto Essex Street, correct?
> A. Yes.
> Q. And the robber told you to pull over, right?
> A. Yes.
> Q. So you pulled right over on Essex, didn't you?
> A. No, I pulled into the alley.
> Q. The robber never told you to pull into the alley, did he?
> A. No.
> Q. You decided to pull into the alley on your own, right?
> A. Yes.
> Q. You were familiar with that alley, weren't you?
> A. Yes.
> Q. And you thought you'd be as safe there as you could be, right?
> A. Yes, under the circumstances.
> Q. Right, under the circumstances. So the person who chose the alley was you?
> A. Yes.
> Q. And when the door to the cab closed you could hear the robber, right?
> A. Yes.

Q. You heard his footsteps going away from you?

A. Right.

Q. You didn't hear any footsteps coming back towards you?

A. No.

Q. And you weren't afraid any more when you heard him go away, were you?

A. Not really.

Q. You could have gotten up at that point and gotten out of the cab or called the police, right?

A. ***I could have, yes***. [Emphasis added.]

I see no distinction between this case and such cases as *State v. Tronchin,* 223 N.J. Super. 586, 593-594 (App. Div. 1988). Nothing about the distance, the location, or the time the victim spent in the cab takes this out of the sphere of a run-of-the-mill robbery. Making it into a kidnapping as well is against the logic of our legislature and our case law. I would find that the kidnapping conviction cannot stand.

I also cannot agree with the majority as to the comments by the prosecutor during his summation. Our courts have emphatically stated that a prosecutor should not in either obvious or subtle fashion draw attention to a defendant's decision not to testify. *State v. Engel*, 249 N.J. Super. 336, 382 (App. Div.), certif. denied, 130 N.J. 393 (1991). When a prosecutor's comments indicate or imply a failure by the defense to present testimony, the facts and circumstances must be closely scrutinized to determine whether the defendant's Fifth Amendment privilege to remain silent has been violated and his right to a fair trial compromised. *State v. Sinclair*, 49 N.J. 525, 549 (1967); *Engel*, 249 N.J. Super. at 382. The comments here cannot withstand that close scrutiny.

It is abundantly clear that the jury was being asked questions to which one person and only one person might have the answer: only the defendant could say how and when and where he lost the bandana. The prosecutor's statement that the jurors could only consider "what comes from there, the witness stand" is nothing less than asking the jurors to consider the fact that the defendant did not go "there" and take "the witness stand." And that the prosecutor cannot do. As our Supreme Court held in *State v. Josephs*, 174 N.J. 44, 126 (2002), "prosecutors may not discuss the significance of testimony not presented." And see State v. Carter, 91 N.J. 86, 127 (1982):

> The Fifth Amendment, applicable to the States by reason of the Fourteenth Amendment, "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Griffin v. California, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106, 110, reh. denied, 381 U.S. 957, 85 S.Ct. 1797, 14 L.Ed.2d 730 (1965); State v. Lanzo, 44 N.J. 560 (1965). The prosecutor may, however, comment on the evidence in the record and argue about the significance of the testimony introduced at the trial. State v. Sinclair, 49 N.J. 525, 548 (1967). In doing so, the prosecutor must clearly avoid reflecting upon a defendant's Fifth Amendment right to remain silent.

The majority tries to excuse the failure of the trial court to remedy the egregious violation by the prosecution of the defendant's Fifth Amendment rights by suggesting that the defendant's counsel did not object at the moment the remarks were uttered.

However, it is clear that counsel did object, and move for a mistrial, not just “at a break” at the majority says but at the very first opportunity after the prosecutor’s summation and immediately made it clear that he did not object earlier for fear of underscoring the remarks in the jury’s presence. That is a reasonable approach for defense counsel to take. It was not reasonable for the judge to wait until the jury instructions to try to remedy the prejudice here.

I would hold, as our courts have so often, that any comment by any prosecutor -- subtle or obvious, direct or indirect -- on the absence of testimony that could only come from the defendant is violative of the defendant’s Fifth Amendment rights and, unless harmless beyond a reasonable doubt, requires a new trial. The absence of direct evidence, the weakness of the victim’s identification of the defendant as the robber, the strong character evidence offered on the defendant’s behalf all make it obvious that this was a close case indeed and the prejudice caused by the prosecutor’s comment cannot possibly be considered harmless here.

I dissent.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

No. 61,804

STATE OF NEW JERSEY	:	
v.	:	**ORDER**
ANTHONY CASEY,	:	
Defendant-Appellant.	:	

This matter having been brought before the Court on September 9, 2011, by the defendant-appellant, it is, on this 9th day of September 2011, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with the Court on or before November 21, 2011.

Jonus Pettifogger, Deputy Clerk
For the Court