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SID J. WHITE
MAR 18 1992
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

RICHARD EARL WALKER, :

Petitioner, :

vs. : Case No. 78,759

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

TIMOTHY A. HICKEY
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 861588

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE

On August 25, 1989, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging Petitioner, RICHARD EARL WALKER, with two counts of robbery with a firearm, contrary to sections 812.13(1) and (2)(a), Florida Statutes (1989); and four counts of kidnapping, contrary to section 787.01(1)(a)2, Florida Statutes (1989). (R 245-257) On November 13, 1989, the State Attorney filed a supersedes information upgrading the kidnapping charges to armed kidnapping, pursuant to section 775.087(1)(a), Florida Statutes (1989). (R 249-251)

On November 14, 1989, Mr. Walker was tried by a jury. (R 1-195) The jury convicted Mr. Walker of two counts of the lesser included offense of robbery with a weapon; three counts of armed kidnapping; and one count of the lesser included offense of kidnapping. (R 188-189, 286-288) On November 15, 1989, the trial court adjudicated Mr. Walker guilty and sentenced him to thirty years Florida state prison for each of the two robbery with a weapon convictions; forty years Florida state prison for each of the three armed kidnapping convictions; and forty years Florida state prison for kidnapping, all to run concurrently. (R 213-214, 290-298) The sentencing guideline scoresheet recommended a sentence of twenty-seven to forty years Florida state prison. (R 299-300)

On December 12, 1989, the trial court denied Mr. Walker's motion for a new trial. (R 301, 314) On January 5, 1990, Mr.

Walker filed a timely notice of appeal to the Second District Court of Appeal. (R 302)

In Walker v. State, 585 So.2d 1107 (Fla. 2d DCA 1991), the Second District Court of Appeal affirmed Mr. Walker's convictions and sentences, with one judge dissenting as to the kidnapping and armed kidnapping convictions. This court accepted jurisdiction of Mr. Walker's appeal on February 24, 1992.

STATEMENT OF THE FACTS

Mr. Walker admitted he robbed the clerk and a customer of a Majik Market convenience store at approximately 9:30 p.m. on August 5, 1989. (R 94-96) Mr. Walker denied carrying a gun during the robberies. (R 95, 96) Mr. Walker testified he tucked an L-shaped stick into the front waistband of his pants, under his shirt, to simulate a gun. (R 95, 100) Mr. Walker entered the Majik Market and instructed the clerk to open the cash register. (R 100) Mr. Walker indicated he had a gun. (R 100) Mr. Walker may also have threatened to shoot the clerk. (R 99) Mr. Walker admitted taking money from the cash register and $40 from a Majik Market customer. (R 96, 108)

Mr. Walker instructed the clerk, the clerk's two teenaged relatives, and a customer to go to the back of the store and lie down on the floor. (R 108-111) Mr. Walker threatened these four people with the object under his shirt. (R 109) Mr. Walker estimated the distance to the back of the store to be approximately twenty feet. (R 111) Mr. Walker admitted instructing the four people to the back of the store to make his escape and reduce the risk of getting caught. (R 116)

Helen East, the twenty-three-year-old clerk, testified Mr. Walker instructed her to give him all the money or he would shoot her. (R 23) Mr. Walker placed his hand on his waist and stated he had a gun. (R 23-24) Although Helen East saw a bulge in Mr. Walkers waist, she never saw a gun. (R 24, 32) After Helen East opened the cash register, Mr. Walker took $96 from the drawer. (R

24-25) Mr. Walker began arguing with a store customer who refused to hand over his wallet. (R 25) Helen East eventually convinced the customer to give Mr. Walker the money. (R 25-26)

Helen East testified Mr. Walker next instructed all four people in the store to go to the far corner of the store and lie down on the floor. (R 27-28) Helen East estimated the distance to be forty feet. (R 28, 32) While Mr. Walker continued to argue with the customer, Helen East walked to the back of the store and got down to her knees. (R 29)

Seventeen-year-old Robin Gallagher testified she was at the Majik Market visiting her sister, Helen East. (R 35, 54) After Helen East opened the cash register, Mr. Walker lifted his shirt. (R 37, 54) Robin Gallagher testified she saw the handle of a gun protruding from the top of Mr. Walker's pants. (R 37, 39, 45) Mr. Walker instructed Robin Gallagher to "get over there." (R 37, 39) Robin Gallagher complied by moving approximately thirteen feet to the "lefthand" side of the store and lying down on the floor. (R 37, 39-40, 42)

Robin Gallagher testified Mr. Walker instructed all four people to go to the corner of the store near the soda fountain and beverage cooler. (R 41, 60) Robin Gallagher estimated the distance to the corner of the store to be approximately thirty feet. (R 42) Robin Gallagher lied down on the floor while Helen East and her cousin, Pamela Allen, knelt down in the corner of the store. (R 41-42)

Fourteen-year-old Pamela Allen testified she was at the Majik Market with her cousins Helen East and Robin Gallagher. (R 55-56) Mr. Walker instructed Pamela Allen to go to the corner of the store and lie down. (R 58) Pamela Allen estimated the distance to the corner of the store to be thirty feet. (R 59) Pamela Allen knelt down on her knees but did not lie on the floor. (R 60) Pamela Allen could see out the store windows while standing in this corner, but not while kneeling. (R 62)

Seventy-one-year-old Garland Haga testified he was at the Majik Market talking with the clerk before starting his shift as an a security guard at a nearby apartment complex. (R 64-66) After taking the money from the cash register, Mr. Walker ordered Garland Haga to hand over his wallet. (R 67-68) Garland Haga initially refused, but eventually gave Mr. Walker the forty dollars from the wallet. (R 67-68) Garland Haga testified Mr. Walker had a bulge in his waistband. (R 68) Garland Haga never saw a gun. (R 72)

Mr. Walker ordered Garland Haga to go to the corner of the store with the three women. (R 68-70) Mr. Walker threatened to shoot Garland Haga if he did not comply. (R 68-69) Garland Haga testified he moved only ten feet before Mr. Walker left the store. (R 69) Garland Haga never went the rest of the way back to the corner of the store. (R 69) After Mr. Walker left, Helen East immediately locked the door and called the police. (R 29)

SUMMARY OF THE ARGUMENT

The instant facts are insufficient to support Mr. Walker's four kidnapping convictions. The movement of the Majik Market clerk and customers during the course of the robberies fails to satisfy the Ferguson three-prong test. See, Ferguson v. State, 533 So.2d 763 (1988). The movement of ten to forty feet within one room of the Majik Market was slight, insignificant, and incidental to the robberies. Mr. Walker did not move anyone to a more secluded location; use physical force and violence; or increase the risk of physical harm beyond that inherent in the robberies. The movement also did not make the robberies substantially easier to commit or substantially lessen the risk of detection.

The confinement of the Majik Market clerk and customers during the course of the robberies also fails to satisfy the Ferguson three-prong test. The confinement was slight, inconsequential, and incident to the robberies because Mr. Walker did not move anyone from the room or use any physical restraint. This brief confinement lasted only as long as it took to complete the robberies. Such confinement is inherent in the robberies themselves. Furthermore, this minimal confinement did not make the robberies substantially or significantly lessen the risk of detection. Broadening the definition of kidnapping to encompass the instant facts would improperly strip the offense of kidnapping of any added deterrent effect.

ARGUMENT

ISSUE I

WHETHER THE EVIDENCE WAS SUFFICIENT TO CONVICT APPELLANT OF KIDNAPPING?

Mr. Walker was convicted of four counts of kidnapping under section 787.01(1)(a)2, Florida Statutes (1989), which defines kidnapping as:

> forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to... [c]ommit or facilitate commission of any felony.

Section 787.01(1)(a)2, Florida Statutes (1989).

Construing section 787.01(1)(a)2 literally would improperly convert almost every forcible felony into kidnapping. Mobley v. State, 409 So.2d 1031, 1034 (Fla. 1982); Harkins v. State, 380 So.2d 524, 528 (Fla. 5th DCA 1980). Therefore, this court adopted a three-pronged test to determine whether movement or confinement during the commission of another felony is sufficient to justify an additional conviction for kidnapping. Ferguson v. State, 533 So.2d 763, 764 (Fla. 1988); Faison v. State, 426 So.2d 963, 965 (Fla. 1983).

To support a separate conviction for kidnapping, Ferguson requires that the movement or confinement:

(a) must not be slight, inconsequential and merely incidental to the other crime;

(b) must not be of the kind inherent in the nature of the other crime; and

(c) must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection. (emphasis added)

Ferguson, 533 So.2d at 764; Faison, 426 So.2d at 965. To constitute kidnapping, movement or confinement must satisfy each of the three Ferguson prongs. Kirtsey v. State, 511 So.2d 744, 745 (Fla. 5th DCA 1987). Because the instant facts fail to satisfy each of the three Ferguson prongs, the Second District Court of Appeal erred in affirming Mr. Walker's four kidnapping convictions.

The instant facts fail the first prong of Ferguson because both the movement and confinement were slight, inconsequential, and merely incidental to the robberies. Florida courts consider several factors to determine whether movement during the course of a forcible felony justifies an additional conviction for kidnapping. These factors include the distance moved; the degree of force and violence used; the relative seclusion of the location moved to; and any substantially increased risk of physical or psychological harm caused by the movement. See, Ferguson v. State, 533 So.2d 763, 764 (Fla. 1988); Faison v. State, 426 So.2d 963, 966 (Fla. 1983); Bush v. State, 526 So.2d 992, 994 (Fla. 4th DCA 1988); Friend v. State, 385 So.2d 696, 697 (Fla. 1st DCA 1980)[1] Although no single factor is determinative, none of these factors indicate the instant movement was significant.

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[1] See also, United States v. Howard, 918 F.2d 1529 (11th Cir. 1990) (considering the duration and increased risk of harm caused by the movement or detention), cert. denied, 111 S.Ct. 2240 (1991); Virgin Islands v. Berry, 604 F.2d 221, 227 (3rd Cir. 1979).

The distances moved in the instant case were very short. According to Garland Haga's own testimony, he moved no more than ten feet during the entire episode. (R 69-70) The three women in the store moved only thirty or forty feet to the other side of the same room. (R 27-28, 41-42, 58-59) Such slight and inconsequential movement does not satisfy the first prong of Ferguson. See, Keller v. State, 586 So.2d 1258, 1262 (Fla. 5th DCA 1991) (citing Faison; movement of "several feet" prior to sexual battery held slight and inconsequential under parallel false imprisonment statute); Jackson v. State, 436 So.2d 1101, 1102 (Fla. 4th DCA 1983) (movement across threshold and short distance into apartment held slight and inconsequential).

The instant movement occurred solely within one room of the Majik Market building. In the factually similar case of Kirtsey v. State, 511 So.2d 744, 745 (Fla. 5th DCA 1987), the court held movement of Pizza Hut employees to be slight and incidental to an armed robbery because the movement was limited to the interior of the restaurant. Similarly, in Merritt v. State, 516 So.2d 290, 291 (Fla. 1st DCA 1987), the court held movement within a bedroom to be slight and inconsequential.

Several Florida courts have also approved the following illustrative example:

> The forced direction of a store clerk to cross the store to open a cash register is not a kidnapping...

(emphasis added) (citation omitted). Johnson v. State, 509 So.2d 1237, 1239 (Fla. 4th DCA 1987); Carron v. State, 414 So.2d 288,

289 (Fla. 2d DCA 1982), approved, 427 So.2d 192 (Fla. 1983); Harkins v. State, 380 So.2d 524, 528 (Fla. 5th DCA 1980). Accordingly, the instant movement across the Majik Market was slight and inconsequential.

Other Florida cases upholding kidnapping occurring in one room are based upon extended confinement or physical restraint, rather than movement. See, Marsh v. State, 546 So.2d 33, 34 (Fla. 3rd DCA 1989) (bound, gagged, and wrapped in blankets for half an hour); Merritt v. State, 516 So.2d 290, 291 (Fla. 1st DCA 1987) (tied up with telephone cord and gagged in a bedroom; any movement in bedroom held "inconsequential"); Sanborn v. State, 513 So.2d 1380, 1381 (Fla. 3rd DCA 1987) (tied to bed); Sorey v. State, 419 So.2d 810, 811 (Fla. 3rd DCA 1982) (Burger King employees' hands and feet tied in restaurant). However, there was no substantial confinement in the instant case.

Slight movement may also become significant when accomplished by "substantial force and violence." Faison v. State, 426 So.2d 963 (Fla. 1983) (dragged to the back of an office, "violently" dragged from kitchen to bedroom); Bush v. State, 526 So.2d 992, 994 (Fla. 4th DCA 1988) (dragged into nearby woods, thrown to the ground, and choked until unconscious).

However, Mr. Walker used only verbal threats, without any physical force or violence. Three of the four other people in the store testified Mr. Walker never used or displayed a weapon. By expressly failing to find Mr. Walker carried a firearm, the jury rejected the fourteen-year-old girl's claim that she saw a firearm.

This lack of physical force or violence further indicates the movement was slight and inconsequential.

Florida courts generally hold movement to be significant where a defendant either forces people into a building; or abducts them from a building. In Ferguson, this court held movement was significant because the defendant forced Arby's employees outside the restaurant and into a restroom located a the back of the restaurant. Ferguson, 533 So.2d at 764.

Movement into a building becomes more significant because greater seclusion increases the risk of harm. See, Panno v. State, 517 So.2d 129, 130 (Fla. 4th DCA 1987) (pushed to the ground and forced into house); Carter v. State, 468 So.2d 370 (Fla. 1st DCA 1985) (forced into apartment and tied to bathroom towel bar); Dowdell v. State, 415 So.2d 144 (Fla. 1st DCA 1982) (forced from well-lit parking lot into closed restaurant). However, moving a short distance into a building remains slight and inconsequential, absent extended confinement. See, Jackson v. State, 436 So.2d 1101, 1102 (Fla. 4th DCA 1983) (movement across threshold slight and insignificant when followed by brief robbery).

Absent additional factors, Florida courts hold movement from one room to another within the same building to be slight and inconsequential. Brinson v. State, 483 So.2d 13 (Fla. 1st DCA 1985) (movement from room to room inside a residence); Simpkins v. State, 395 So.2d 625 (Fla. 1st DCA 1981) (movement from bedroom to livingroom); Friend v. State, 385 So.2d 696 (Fla. 1st DCA 1980) (movement to restroom in same office building). Contrast, Faison

v. State, 426 So.2d 963, 966 (Fla. 1983) (movement to area of greater seclusion within building significant when accomplished with great force and violence).

The fact that Mr. Walker did not move anyone to a more secluded location further indicates the instant movement was slight and insignificant. Mr. Walker did not force anyone into a more secluded storeroom or restroom. Both robberies were completed near the store entrance before anyone moved. Garland Haga moved only ten feet from the store entrance. The three women lied or knelt down near the soda fountain and cooler in the same room. Pamela Allen testified she could see out the windows standing in that location. (R 62)

The instant movement also failed to increase the risk of physical or psychological harm beyond that inherent in the robberies. Mr. Walker did not display a weapon or use violence to convince anyone to move. The people in the store moved only a short distance within a single room. Everyone remained together in the same room during the commission of both robberies. Furthermore, everyone remained in the same familiar surroundings of the Majik Market. See, Faison, 426 So.2d at 969 (Justice Boyd's dissenting opinion) (decreased risk of harm in familiar surroundings).

The slight, inconsequential, and incidental confinement in the instant case also fails the first prong of Ferguson. To determine whether confinement is slight, inconsequential, and incidental to another forcible felony, Florida courts consider both the degree of

control or physical restraint and the duration of the confinement. Jenkins v. State, 433 So.2d 603, 604 (Fla. 1st DCA 1983); Ayendes v. State, 385 So.2d 698, 699 (Fla. 1st DCA 1980).

The degree of control in the instant confinement was minimal. There was no physical restraint. No one was locked or barricaded in a restroom, cooler, or trunk. Contrast, Parker v. State, 570 So.2d 1048 (Fla. 1st DCA 1991) (shoved into car trunk); Johnson v. State, 509 So.2d 1237 (Fla. 4th DCA 1987) (barricaded in restroom). No one was bound or gagged. Contrast, Carter v. State, 468 So.2d 370 (Fla. 1st DCA 1985) (tied up in restroom). Mr. Walker did not physically push or drag the three women to the far side of the room. Mr. Walker did not even order them not to move after he left the store. Contrast, Ferguson v. State, 533 So.2d 763, 764 (Fla. 1988) (defendant ordered restaurant employees to remain confined in a closed restroom).

The duration of the instant confinement was also minimal. Mr. Walker did not confine anyone for an extended time to search the store for something to steal. Both robberies were completed within a matter of minutes. Mr. Walker also left the store as soon as he completed the robberies. As demonstrated by the immediate call to the police, no one was confined after Mr. Walker completed the robberies and left the store.

Accordingly, the instant confinement also fails the third Ferguson prong because such minimal confinement could not make the robberies substantially easier to commit or substantially lessen the risk of detection. Contrast, Sorey v. State, 419 So.2d 810, 811

(Fla. 3rd DCA 1982) (leaving Burger King employees tied up after completing the robbery substantially lessessed the risk of detection).

The instant confinement also fails the second prong of Ferguson because this minimal confinement was inherent in the commission of the robberies. A certain degree of confinement is necessarily inherent in a robbery, or any other forcible felony. Ferguson, 533 So.2d at 765 (Justices Kogan, Shaw, and Barkett's dissenting opinion); Simpkins, 395 So.2d at 626; Friend, 385 So.2d at 697. In Robinson v. State, 462 So.2d 471, 476 (Fla. 1st DCA 1985), the court held confinement in a car during the course of a sexual battery was merely incidental and inherent in the nature of the sexual battery. In the instant case, Mr. Walker did not detain anyone inside the store beyond the time necessary to commit the robberies.

The instant movement also fail the third prong of Ferguson because such slight movement did not make the robberies substantially easier to commit or substantially lessen the risk of detection. See, Ferguson, 533 So.2d at 764. The slight movement to the corner of the store did not make the robberies substantially easier to commit because both robberies were completed near the store entrance. In addition, the instant movement could not have substantially lessened the risk of detection because both robberies occurred near the store entrance.

Everyone except Pamela Allen could already identify Mr. Walker before anyone moved. Even after the robberies were completed,

Garland Haga remained near the store entrance. Although the three women lied or knelt down on the other side of the store, they could see out the windows when standing. Mr. Walker testified he instructed everyone in the store to move in order to make his escape easier. However, as the State Attorney suggested, no one in the store would have locked Mr. Walker in the store or stopped him from leaving. Such slight movement inside a single room of the store certainly could not substantially decrease the risk of detection.

This court must must avoid construing the offense of kidnapping overbroadly. As early as Chatwin v. United States, 326 U.S. 455, 464-465, 90 L.Ed. 198, 203 (1946), the United State Supreme Court recognized a "loose construction" of a kidnapping statute would lead to unreasonable results and unfair punishment. More recently, in Virgin Islands v. Berry, 604 F.2d 221 (3rd Cir. 1979), the court analyzed a variety of state court opinions to conclude, "the modern approach is to construe the kidnapping statutes so as 'to prevent gross distortion of lesser crimes into a much more serious crime by excess of prosecutorial zeal.'" Berry, at 226-227 (citation omitted). This court has also recognized it must construe statutes so as to avoid an unreasonable result. Carawan v. State, 515 So.2d 161, 167 (Fla. 1987).

Furthermore, courts must give effect to the legislative intent of a statute, even when that intent contradicts the strict letter of the statute. State v. Webb, 398 So.2d 820, 824 (Fla. 1981). In enacting section 787.01(1)(a)2, the Florida legislature never

intended to convert every armed robbery, a first degree felony, into the life felony of armed kidnapping. See, Johnson v. State, 509 So.2d 1237, 1238-1239 (Fla. 4th DCA 1987); Harkins v. State, 380 So.2d 524, 528 (Fla. 5th DCA 1980). Instead, the legislature intended to deter increased risk of physical or psychological harm to victims. See, Faison, 426 So.2d at 968 (Justice Boyd's dissenting opinion); Mobley, 409 So.2d at 1037.

To retain this added deterrent effect, Florida court must strictly adhere to the Ferguson three prong test. As Justice Boyd reasoned in his Faison dissent:

> criminal laws, if they are to retain their deterrent force, must not be applied overbroadly. The deterrent effect of a criminal law depends on its being applied with surgical precision to the situation the legislature intends to cover. If rapists and robbers can be encouraged to detain, confine or move their victims no more than is necessary to commit rape or robbery, and to leave them at the scene of the crime, having been moved only a room or two away from where first encountered, the kidnapping statute will have served one of its purposes. But if all rapists and robber are held to be kidnappers too, then the additional deterrent force of the kidnapping law is lost on one who has already decided to commit rape or robbery.

Faison, 426 So.2d at 969 (Justice Boyd's dissenting opinion). Broadening the Ferguson three prong test to encompass the instant facts would strip the kidnapping statute of any added deterrent effect.

CONCLUSION

Based upon the foregoing authority and analysis, Mr. Walker respectfully requests this Honorable Court reverse the decision of the District Court of Appeal.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

RICHARD EARL WALKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 90-00190

Opinion filed September 11, 1991.

Appeal from the Circuit Court
for Hillsborough County;
Susan C. Bucklew, Judge.

Elizabeth S. Wheeler of Berg
& Wheeler, P.A., Brandon, for
Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and
Donna A. Provonsha, Assistant
Attorney General, Tampa, for
Appellee.

CAMPBELL, Judge.

We affirm appellant's convictions and sentences. We write briefly only to explain our affirmance of appellant's kidnapping convictions in light of the dissent in this case.

Appellant was convicted of three counts of kidnapping with a weapon, one count of kidnapping, and two counts of robbery

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with a weapon. After the robbery of a clerk and a patron in a convenience store, appellant ordered all four of the then occupants of the store to go to the back of the store and lie on the floor. He threatened the four occupants with a gun to accomplish this purpose. Appellant admitted that he made this demand in order to enable him to escape.

In light of that admission, we believe it became a factual question, which the jury decided against appellant, as to whether appellant's movement of the victims was of such a degree as to comply with the holdings in Ferguson v. State, 533 So.2d 763 (Fla. 1988) and Faison v. State, 426 So.2d 963 (Fla. 1983). The jury having been properly charged as to the necessary elements of kidnapping and there being evidence to support their findings, we are prohibited from holding that the movement of the victims was insufficient to constitute kidnapping and thereby substitute our judgment for that of the jury.

Affirmed.

SCHOONOVER, C.J., Concurs.
PATTERSON, J., Concurs in part, dissents in part with opinion.

PATTERSON, Judge, Concurring in part, dissenting in part.

I concur in affirmance the appellant's convictions for robbery but would reverse the convictions for kidnapping. Many criminal episodes involve the temporary detention or movement of the victim. However, for such detention or movement to constitute the separate crime of kidnapping, it:

> (a) Must not be slight, inconsequential and merely incidental to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and
>
> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Faison v. State, 426 So. 2d 963, 965 (Fla. 1983).

As our supreme court in Mobley v. State, 409 So. 2d 1031 (Fla. 1982), observed of kidnapping:

> If construed literally this subsection would apply to any criminal transaction which inherently involves the unlawful confinement of another person, such as robbery or sexual battery. . . .
>
> The prevalent view nationwide is that kidnapping statutes, regardless of their wording, do not apply to unlawful confinements or movements incidental to other felonies.

409 So. 2d at 1034.

In this case, the appellant entered a convenience store and threatened the clerk and a customer with an object concealed under his shirt which he represented to be a firearm. The two victims surrendered their money to him. The appellant then ordered the clerk, the customer, and two teenage relatives of the

clerk to move to the rear of the store and lie on the floor, a distance of twenty to forty feet. The clerk and her relatives complied while the customer only moved approximately ten feet. The appellant then fled the store. Although the movement of the victims is not necessarily inherent to this crime of robbery, it was slight and inconsequential and does not have independent significance to rise to the level of a separate crime. My position is that the charges of kidnapping should not have been submitted to the jury and that the appellant's motion for judgment of acquittal, as to kidnapping, should have been granted.

The majority relies on Ferguson v. State, 533 So. 2d 763 (Fla. 1988), to support its position that a legitimate jury issue was established by the state. Ferguson, which involved the robbery of a fast food restaurant, is, however, factually dissimilar. Ferguson, after obtaining the restaurant's money at gunpoint, forced the manager and three employees out of the restaurant and put them into a restroom located in the rear of the building. These actions clearly present a jury issue as to the elements of kidnapping. On the other hand, the instant case is factually similar to Kirtsey v. State, 511 So. 2d 744 (Fla. 5th DCA 1987). In Kirtsey, the court held that confinement and movement of two victims within the interior of a restaurant during the course of a robbery was insufficient to constitute the offense of kidnapping. Here, as in Kirtsey, the confinement and movement of the victims was merely incidental to the offense of robbery. I would therefore reverse.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to William I. Munsey, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 16 day of March, 1992.

Respectfully submitted,

Timothy A. Hickey

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