

Garza Undone: House Bill 575

“Why do we need a new kidnapping statute when the old one worked so well?”

The History Of Kidnapping In Georgia Before November 3, 2008

- Before 1953
- 1953 legislative changes
- 1968 legislative changes
- Case law evolution

Before 1953

- The 1933 Code defined kidnapping as: “Every person who shall forcibly abduct or steal away any person, without lawful authority or warrant, ***from this State or any county thereof, and send or convey such person beyond the limits of the State or a county thereof*** against his will, shall be guilty of kidnapping.”

1953 Changes

- “So as to eliminate therefrom the requirement....that the person kidnapped be taken beyond the limits of the state or county.”
- Legislative change: “Every person who shall forcibly abduct or steal away any person, without lawful authority or warrant, and hold said person against his will, shall be guilty of kidnapping.”

1961-1967

- In 1961, a Criminal Law Study Committee was created to study and revise Georgia’s criminal laws and procedures.
- The Committee relied on the Model Penal Code
- For purposes of asportation, the Model Penal Code states that a victim must have been moved from his place of residence or business, or a substantial distance from the vicinity where found. (Model Penal Code Sect. 212.1).

1968

- The kidnapping statute was amended to remove the necessity of proving “force” as an element of the offense. Ga. L. 1968, pp. 1249, 1282.
- New law: “(a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.”

1968-2008

- No material changes to the definition of kidnapping
- In 1982 amended to create the separate offense of interference with custody.
- In 1994 amended to make convictions fall under O.C.G.A. 17-10-6.1 (serious violent felonies) and O.C.G.A. 17-10-7 (repeat offenders).
- In 2006 punishment changes.

Case Law From 1968 to 2008

- The element of movement became associated with the term “asportation”, the act of carrying away as applied to theft cases.
- Asportation was satisfied by **any movement of the victim, however slight.**

Case law 1968 -2008 (cont.)

- In *Love v. State*, 190 Ga. App. 264 (1989), the defendant was convicted of kidnapping with bodily injury when he forced the victim from a seated position on a concrete wall to the ground several feet below where he raped her. In a special concurrence by then Judge Benham, he wrote, “. . . the carrying away was ever so slight, occurring when defendant dislodged the victim from the concrete wall and forced her to the ground several feet below, thereby removing her from a public place to a concealed place. Appellant would have us rule that for asportation to take place, the perpetrator must remove the victim to a different location. Asportation does not require removal to a different location. . . . However, in those cases where the movement involved is minimal, and the alleged kidnapping occurs in furtherance of some other criminal enterprise such as rape, the movement necessary to constitute asportation must be more than a mere positional change, e.g., from a standing to supine position. ***It must be movement that is not merely incidental to the other criminal act, but movement designed to carry out better the criminal activity when, as here, there is movement from a place of visibility to a place of concealment.***”

Case Law 1968-2008 (cont.)

- As late as 2007, the slight movement test continued to be employed by the courts.
- In Lyons v. State, 282 Ga. 588, (2007) the Supreme Court stated that the "requirement of asportation to prove kidnapping is satisfied if there is movement of the victim, however slight that movement is. The distance that a kidnapper transports the victim is not of legal significance. However, where the movement involved is minimal, and the alleged kidnapping occurs in furtherance of some other criminal enterprise, in order to constitute asportation, ***the movement must be more than a mere positional change of the victim incidental to the other criminal act; it must be movement, even if a positional change, designed to better carry out the criminal activity***".

We Was Robbed!!

- On November 3, 2008, the Supreme Court issued their opinion in Garza v. State, 284 Ga. 696.
- Garza reversed 40 years of case law with the stroke of a pen.

Garza Facts:

- On Oct. 16, 2001, Joey Garza entered the home of Angela Mendoza on the pretext that he had left his wallet in her van.
- Once inside and while Mendoza's children slept, he locked the door, pulled a gun, put it to her head, and threatened to shoot her if she did not follow his instructions.
- Garza hit Mendoza in the head with the gun, knocking her to the floor and cutting her head.
- He bound the prone victim's hands with electrical tape which he had brought with him.
- He tied her ankles with a torn sheet.
- Garza forced Mendoza from the floor up into a chair, gagged her with a diaper and ordered her not to move from the chair.
- Garza disabled the phone.
- He continued to threaten to shoot Mendoza and her children, placing the gun against the baby's head.
- After holding Mendoza in the chair for two hours, he allowed her move to a couch, where he placed a noose tied to a ball bat around her neck.
- Six hours after the ordeal started, Garza fell asleep and Mendoza escaped through a window with one of the children.
- The police arrived and Garza continued to hold one child hostage for several hours.
- Garza grabbed the child by the shirt and forced him to move from one room to another, down a hallway and back to a bedroom more than once.

Verdict and Appeal

- Garza was convicted in the Superior Court of Lee County for the offenses of kidnapping, false imprisonment and aggravated assault.
- Garza appealed.
- Appeal was affirmed by the Georgia Court of Appeals at Garza v. State, 285 Ga. App. 648.
- Holding: "Here, although Mendoza moved only from a standing position to the floor after being struck, it is clear that such movement, though slight, materially facilitated what followed-Mendoza's false imprisonment as evidence by Garza's actions in binding her wrists and ankles and confining her to a chair." (at page 904).
- Filed for certiorari.

The Supreme Court Sticks It To Us

- Garza v. State, 284 Ga. 696 (Nov. 3, 2008)
- Judgment reversed.
- Supreme Court, Hunstein, held: When determining whether the movement at issue constitutes asportation for purposes of kidnapping, courts should consider the duration of the movement and whether the movement occurred during the commission of a separate offense; neither of the two distinct movements of the victim during the defendant's false imprisonment of her constituted the necessary asportation to support defendant's kidnapping conviction.
- Overruling Lyons v. State, 282 Ga. 588 and Griffin v. State, 282 Ga. 215.
- Carley dissented in which Hines and Melton joined.

Garza

- Adopted the "more cogent" standard for determining the sufficiency of evidence for asportation.
- "Having surveyed the approaches of other jurisdictions in determining what movements are more than merely incidental to other criminal activity, we hereby adopt the test first articulated in Govt. of Virgin Islands v. Berry, 604 F. 2d 221 (1979)..."

Garza

- “The Berry test, formulated in an effort to ‘synthesize’ the various standards adopted by those jurisdictions embracing the ‘modern approach’ with respect to asportation, assesses four factors in determining whether the movement at issue constitutes asportation.”

The Berry Test

- 1. The duration of the movement;
- 2. Whether the movement occurred during the commission of a separate offense;
- 3. Whether such movement was an inherent part of that separate offense; and
- 4. Whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense.

Garza

- “Assessment of these factors will assist Georgia prosecutors and courts alike in determining whether the movement in question is in the nature of the evil the kidnapping statute was originally intended to address, i.e., movement serving to substantially isolate the victim from protection or rescue, or, merely a ‘criminologically insignificant circumstance’ attendant to some other crime.”
- “To the extent prior case law and, specifically, the ‘slight movement’ standard are inconsistent with this approach, those cases and that standard are hereby overruled.”

“What Do We Do Now?”

- Fall 2008 DA’s Association meeting
- DAs committed to fixing Garza during the 2009 session of the General Assembly.
- The “Garza Fix” became a legislative priority.

House Bill 575

O.C.G.A. 16-5-40 was revised as follows:

- (a) A person commits the offense of kidnapping when such person abducts or steals away another person without lawful authority or warrant and holds such other person against his or her will.
- (b) (1) For the offense of kidnapping to occur, slight movement shall be sufficient; provided, however, that any such slight movement of another person which occurs while in the commission of any other offense shall not constitute the offense of kidnapping if such movement is merely incidental to such other offense.

HB 575 (cont.)

- (2) Movement shall not be considered merely incidental to another offense if it:
 - (A) Conceals or isolates the victim;
 - (B) Makes the commission of the other offense substantially easier;
 - (c) Lessens the risk of detection;
 - (D) Is for the purpose of avoiding apprehension.
- (c) The offense of kidnapping shall be considered a separate offense and shall not merge with any other offense.

HB 575 (cont.)

- (d-e) No change in punishment provisions
- (f) The offense of kidnapping is declared to be a continuous offense, and venue may be in any county where the accused exercises dominion or control over the person of another.

What Does HB 575 Do?

- 1. Paragraph (a) retains the old definition of kidnapping.
- 2. Paragraph (b)(1) codifies the language of Lyons.
- 3. Paragraph (c) prevents merger with other offenses.
- 4. Paragraph (f) expands venue to any county where the kidnapping has occurred. However, it does not allow multiple prosecutions in different counties.

What HB 575 Doesn't Do

- It doesn't define *incidental*.
- Dictionary definition: Depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose.*

Caveat

- May create confusion concerning jury instructions.
- “Any other offense” language may lead to numerous requests to change unindicted offenses.
- Judges are currently preparing pattern instructions.

WARNING

- Be careful when and how you charge the new offense of kidnapping.
- Better safe than sorry rule.

“The Ride” by Chris Ledoux

- Sit tall in the saddle.
- Hold your head up high.
- Keep your eyes fixed where the trail meets the sky.
- Live like you ain't afraid to die.
- Don't be scared.
- Just enjoy the ride.
