

KIDNAPPING BY TRICKERY OR DECEIT (INVEIGLE)

G.L. c. 265, § 26 (third clause)

The defendant is charged with kidnapping by trickery or deceit.

To prove that the defendant is guilty of this charge, the

Commonwealth must prove two things beyond a reasonable doubt:

***First:* That the defendant used a trick or deceit to seize or
confine [alleged victim] ;**

***Second:* That the defendant intended by such trick or deceit to
secretly confine or imprison [alleged victim] (in this commonwealth
against their will) (to be sent out of this commonwealth against their
will) (in any way held to service against their will).**

**To prove the first element, the Commonwealth must prove that
the defendant used a trick or deceit. Deceit is when one causes
someone to accept as true or valid what is in fact untrue or invalid. A
trick, on the other hand, need not be untrue.**

To prove the second element, the Commonwealth must prove that the defendant used a trick or deceit with the intent that [alleged victim] be confined or imprisoned (held to service) against their will. This requires you to make a decision about the defendant's state of mind at that time. You should consider all the evidence, and any reasonable inferences you draw from the evidence, in determining whether the defendant acted with the intent to confine or imprison (hold to service) [alleged victim] against their will.

SUPPLEMENTAL INSTRUCTION

If alleged victim is a minor. Because [alleged victim] is a minor, they could not consent to being confined or imprisoned.

Commonwealth v. Colon, 431 Mass. 188, 189 (2000).

NOTES:

1. Definitions. “[T]he concept of ‘confinement’ has been broadly interpreted to mean any restraint of person’s movement.” *Commonwealth v. Lent*, 46 Mass. App. Ct. 705, 710 (1999); *accord Commonwealth v. Titus*, 32 Mass. App. Ct. 216, 222 (1992) (the “essence [of kidnapping] is restraint, restraint of locomotion”). The term “forcibly” does not require physical force, but rather is satisfied by a display of potential force. *Titus*, 32 Mass. App. Ct. at 221 (“The judge correctly noted that there need not be physical force applied against the victim; if the victim is subdued by the ‘display of potential force, [that] is sufficient.’”) (quoting *Commonwealth v. Cavacciola*, 409 Mass. 648, 652 (1991)).

2. When specific intent is required. “[T]he first clause of § 26 ‘states a crime which may be proved by objective facts concerning the use of force and confinement and does not require proving a specific criminal intent.’” *Commonwealth v. Bibby*, 54 Mass. App. Ct. 158, 161 (2002) (quoting *Commonwealth v. Saylor*, 27 Mass. App. Ct. 117, 121-122 (1989)). Proof of the third clause for the use of trickery or deceit (inveigle) requires proof of a specific intent. *Commonwealth v. Lent*, 46 Mass. App. Ct. 705, fn. at 709 (1999) and cases cited.

3. Aggravated versions. Kidnapping may be aggravated by being armed “with a firearm, rifle, shotgun, machine gun or assault weapon.” G.L. c. 265, § 26, ¶ 2. In District Court, this changes the maximum penalty from two years in a house of correction to two and one-half years in a house of correction. See G.L. c. 218, § 26. This aggravator does not apply if the defendant is a parent of a minor victim. G.L. c. 265, § 26, ¶ 2. Kidnapping may also be aggravated by: (1) the intent to extort money or other valuable item; (2) being armed and inflicting serious bodily injury; (3) being armed and sexually assaulting the victim; or (4) the victim’s being under the age of 16 (if the defendant is not the victim’s parent). In each of these cases, the only permissible punishment is state prison and thus the crime is presumably outside the final jurisdiction of the District Court. G.L. c. 265, § 26; G.L. c. 218, § 26.

4. Merger. Where the confinement is integral to another a crime, such as rape, it may merge into the other crime. *Commonwealth v. Kickery*, 31 Mass. App. Ct. 720, 723-724 (1991) (“any confinement of the victim during the rape itself did not exceed the restraint which was incident to the rape and did not constitute the separate crime of kidnapping, separate and apart from the rape”). Confinement beyond the minimum necessary to complete the other crime, however, may separately support a conviction for kidnapping. *Commonwealth v. Cobb*, 45 Mass. App. Ct. 271, 276 (1998) (tying the victim’s hands and feet and throwing a blanket over the victim’s head while searching for money and valuables was sufficient to support a conviction of kidnapping, in addition to convictions for home invasion and armed robbery).