

KIDNAPPING - PERMANENT DEPRIVATION OF CUSTODY
N.J.S.A. 2C:13-1b(4)

The defendant is charged with the crime of kidnapping. The indictment reads in pertinent part as follows:

(Read Indictment)

The pertinent part of the statute on which this indictment is based reads as follows:

A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period, with [the purpose to] permanently deprive a parent, guardian, or other lawful custodian of custody of the victim.

In order for you to find the defendant guilty of kidnapping, the State is required to prove each of the following two elements to you beyond a reasonable doubt:

1. That the defendant (**select as appropriate**):
 - a. unlawfully removed _____, from (his/her) place of residence... or
 - b. unlawfully removed _____, from (his/her) place of business... or
 - c. unlawfully removed _____, a substantial distance from the vicinity where (he/she) was found... or
 - d. unlawfully confined _____, for a substantial period;

(and)
2. That the removal (or confinement) was with the purpose to permanently deprive a parent, guardian, or other lawful custodian of custody of the victim.

In relation to the first element you will note that I have used the term(s) "unlawfully removed" and/or "unlawfully confined."

(IF THE PERSON ALLEGED TO HAVE BEEN REMOVED OR CONFINED IS 14 YEARS OF AGE OR OLDER, AND NOT INCOMPETENT USE THE FOLLOWING)

A removal (or confinement) is "unlawful" if it is accomplished by force, threat or deception.¹

¹ N.J.S.A. 2C:13-1d. But see State v. Froland, 193 N.J. 186, 188 (2007), in which the Court held that absent the use of "force, threat or deception" under N.J.S.A. 2C:13-1d, "a party who acts with the permission of a parent is not guilty of non-consent kidnapping" under this statute. Defendant, step-mother of children who were removed by their non-custodial parent without the custodial parent's consent, "could not be convicted of kidnapping because she had the consent of [one] who is clearly a 'parent' within the meaning of the statute. Rather, both of them were subject to prosecution under the interference with custody statute [N.J.S.A. 2C:13-4a]." Id. at 201.

**(IF THE PERSON REMOVED OR CONFINED IS UNDER THE AGE OF 14
OR INCOMPETENT, USE THE FOLLOWING)**

In the case of a person who is under the age of 14 or who is incompetent, a removal (or confinement) is "unlawful" if it is accomplished without the consent of a parent, guardian, or other person responsible for the general supervision of (his/her) welfare.²

(CHARGE WHEN ELEMENT 1 c. OR d. IS ALLEGED)

When the removal of a victim is from a place other than the victim's residence or place of business, the removal must be to another place which is a "substantial distance" from the vicinity from which the victim was removed. However, for this purpose a "substantial distance" is not measured in feet, yards, or miles, nor by any other standard of linear measurement. Rather, a "substantial distance" is one that is significant, in that it is more than incidental to the underlying crime and substantially increases the risk of harm to the victim. That increased risk of harm must not be trivial. If the victim is removed only a slight distance from the vicinity from which he or she was removed and such movement does not create the isolation and increased risk of harm that are at the heart of the kidnapping statute, then you should not convict the defendant of the kidnapping charge.³

Unlawful confinement must be for a "substantial period." However, for this purpose a "substantial period" is not measured in seconds, minutes or hours, nor by any other standard based strictly on the passage of time. Rather, a "substantial period" is one that is significant, in that it is more than incidental to the underlying crime and substantially increases the risk of harm to the victim. That increased risk of harm must not be trivial. If the victim is confined for only a slight period of time and such confinement does not create the isolation and increased risk of harm that are at the heart of the kidnapping statute, then you should not convict the defendant of the kidnapping charge.⁴

Therefore, in determining whether the removal (and/or confinement) was substantial, you may consider⁵

² Id.

³ State v. Masino, 94 N.J. 436, 447 (1983).

⁴ State v. Smith, 210 N.J. Super. 43, 60-61 (App. Div. 1986), certif. denied, 105 N.J. 582 (1986). State v. Deutsch, 229 N.J. Super. 374, 383, 387 (App. Div. 1988). Cf. State v. Bryant, 217 N.J. Super. 72, 80-82 (App. Div. 1987), certif. denied, 108 N.J. 202 (1987); State v. LaFrance, 117 N.J. 583, 594 (1990).

⁵ In State v. LaFrance, 117 N.J. 583 (1990), the court suggested that "future trials should reflect that we have emphasized that the charge to the jury convey the elements of the crime in the factual context of the case. Court and counsel should frame a charge to the jury in which defendant's conduct is measured in terms of whether the detention was merely incidental to the underlying crimes". State v. LaFrance at 594. The enumerated factors should only be charged if relevant, and the trial judge may charge other factors where appropriate.

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1. the distance of the removal (and/or the duration of confinement);
2. whether the removal (and/or confinement) occurred during the commission of a separate offense;
3. whether the removal (and/or confinement) which occurred is inherent in the separate offense; and
4. whether the removal (and/or confinement) created a significant danger to the victim independent of that posed by the separate offense.

[CHARGE IN ALL CASES]

The second element that the State is required to prove beyond a reasonable doubt is that the removal (and/or confinement) was with the purpose to permanently deprive a parent, guardian, or other lawful custodian of custody of the victim. A "parent" means a parent, guardian or other lawful custodian of a minor child.⁶ "Permanently deprive" means unlawfully taking (a child) (children) with the purpose of raising the child[ren] as one's own.

A person acts purposely with respect to the nature of his/her conduct or a result of his/her conduct if it is his/her conscious object to engage in conduct of that nature or to cause such a result, that is, if the person means to do what he/she does or to cause such a result. A person acts purposely with respect to attendant circumstances if the person is aware of the existence of such circumstances, or believes or hopes that they exist. "With purpose," "designed," "with design," or equivalent terms have the same meaning.⁷

The nature of the purpose with which the defendant acted towards the victim is a question of fact for the jury to decide. Purpose is a condition of the mind which cannot be seen, and can only be determined by inferences drawn from the defendant's conduct, words or acts as they have been presented in the evidence you have heard and seen in this case. It is not necessary that the State produce a witness or witnesses to testify that the defendant stated, for example, that his/her purpose in removing _____ (and/or) confining _____, was to permanently deprive a parent, guardian, or other lawful custodian of custody of the victim. It is within the power of the jury to find that proof of purpose has been furnished beyond a reasonable doubt, by inferences which you may draw from the nature of the acts and the circumstances surrounding the conduct under investigation as they have been presented in the evidence you have heard and seen in this case.

⁶ N.J.S.A. 2C:13-1g.

⁷ N.J.S.A. 2C:2-2b(1).

AFFIRMATIVE DEFENSES

[Charge when applicable; select appropriate section(s)]

I - (Available to all defendants⁸)

In this matter, the defendant has presented evidence that the taking, detaining, enticing or concealing of the minor child[ren] was done for the following reason(s):

1. The defendant reasonably believed that the action was necessary to preserve the child (or children) from imminent danger to (his/her/their) welfare. However, this defense is not available if the defendant did not, as soon as reasonably practicable but in no event more than 24 hours after taking (detaining, enticing, or concealing) a child (or children) under his/her protection, give notice of the child's (or children's) location to the police department of the municipality where the child[ren] resided, the office of the county prosecutor in the county where the child[ren] resided, or the Division of Youth and Family Services in the Department of Human Services; or
2. The defendant reasonably believed that the taking or detaining of the minor child[ren] was consented to by the other parent, or by an authorized State agency; or
3. The child[ren], being at the time of the taking or concealment not less than 14 years old, was/were taken away at (his/her/their) own volition and without purpose to commit a criminal offense with or against the child[ren].

[CHARGE FOLLOWING PARAGRAPHS WHEN SUBSECTIONS 1 OR 2 ARE ALLEGED]

“Reasonably believes” designates a belief the holding of which does not make the actor reckless or criminally negligent.⁹

A person acts recklessly when he/she consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his/her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him/her, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.¹⁰

A person acts negligently when he/she should be aware of a substantial and unjustifiable risk that the material element exists or will result from his/her conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of

⁸ N.J.S.A. 2C:13-1e. The affirmative defenses set forth in this subsection must be proved by the defendant by clear and convincing evidence.

⁹ N.J.S.A. 2C:1-14j.

¹⁰ N.J.S.A. 2C:2-2b(3).

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his/her conduct and the circumstances known to him/her, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.¹¹

An actor is "reckless" or "criminally negligent" when the actual result must be within the risk of which the actor is aware or, in the case of criminal negligence, of which he/she should be aware, or, if not, the actual result must involve the same kind of injury or harm as the probable result and must not be too remote, accidental in its occurrence, or depend on another's volitional act to have a just bearing on the actor's liability or on the gravity of his behavior.¹²

The defendant must prove this defense by clear and convincing evidence. By clear and convincing evidence, I mean evidence which produces in your minds a firm belief as to the truth of the precise fact being asserted. This is a lesser burden of proof than beyond a reasonable doubt. Evidence may be uncontroverted, but yet not clear and convincing. On the other hand, evidence may be clear and convincing even in the absence of corroboration, and even if it has been contradicted. Although the burden rests upon the defendant to establish this affirmative defense by proof of clear and convincing evidence, the burden of proving the defendant guilty of the offense charged here beyond a reasonable doubt is always on the State, and that burden never shifts.

If you are satisfied by clear and convincing evidence that the defendant has established the affirmative defense just mentioned above, then you must find defendant not guilty.

Affirmative Defense II
(Available only to custodial parent)¹³

It is an affirmative defense to this prosecution that the defendant, a parent having the right of custody, reasonably believed that he/she was fleeing from imminent physical danger from _____ (the other parent), provided that the defendant, as soon as reasonably practicable:

1. Gives notice of the child's (or children's) location to the police department of the municipality where the child resided, the office of the county prosecutor in the county where the child resided, or the Division of Youth and Family Services in the Department of Human Services; or
2. Commences an action affecting custody in an appropriate court.

¹¹ N.J.S.A. 2C:2-2b(4).

¹² N.J.S.A. 2C:2-3c.

¹³ N.J.S.A. 2C:13-1f. Unlike N.J.S.A. 2C:13-1e, this subsection does not place a burden on the defendant; rather, it requires the State to disprove the defense alleged. This distinction is noted throughout the text and the associated footnotes.

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A “parent” means a parent, guardian or other lawful custodian of a minor child.¹⁴

"Imminent" means likely to happen without delay.¹⁵

“Reasonably believes” designates a belief the holding of which does not make the actor reckless or criminally negligent.¹⁶

A person acts recklessly when he/she consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his/her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him/her, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor’s situation.¹⁷

A person acts negligently when he/she should be aware of a substantial and unjustifiable risk that the material element exists or will result from his/her conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his/her conduct and the circumstances known to him/her, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.¹⁸

An actor is “reckless” or “criminally negligent” when the actual result must be within the risk of which the actor is aware or, in the case of criminal negligence, of which he/she should be aware, or, if not, the actual result must involve the same kind of injury or harm as the probable result and must not be too remote, accidental in its occurrence, or depend on another’s volitional act to have a just bearing on the actor’s liability or on the gravity of his behavior.¹⁹

If the State has failed to disprove any element of this affirmative defense beyond a reasonable doubt,²⁰ then you must find the defendant not guilty.

[CHARGE IN ALL CASES]

If you are satisfied, beyond a reasonable doubt, that the State has proven each of the elements of this offense, as I have defined them to you, [and you have found that the defendant has not proven by clear and convincing evidence the existence of the affirmative defense,²¹] or,

¹⁴ N.J.S.A. 2C: 13-1g.

¹⁵ See Model Jury Charge for Simple Assault (Physical Menace/Substantial Step) (Lesser Included) (N.J.S.A. 2C:12-1a(3)).

¹⁶ N.J.S.A. 2C:1-14j.

¹⁷ N.J.S.A. 2C:2-2b(3).

¹⁸ N.J.S.A. 2C:2-2b(4).

¹⁹ N.J.S.A. 2C:2-3c.

²⁰ State v. Galiyano, 178 N.J. Super. 393, 397 (App. Div.), certif. denied, 87 N.J. 424 (1981).

²¹ For an affirmative defense as set forth under N.J.S.A. 2C:13-1e.

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[and you have found that the State has disproved an element of the affirmative defense beyond a reasonable doubt²²], then you must find the defendant guilty. If you find, however, that the State has failed to prove any of the elements of the crime beyond a reasonable doubt [or, if you have found by clear and convincing evidence that the defendant has proven the affirmative defense²³] or, [if you are satisfied that the State has not disproved any element of the affirmative defense beyond a reasonable doubt²⁴], then you must find the defendant not guilty.

[CHARGE WHEN FIRST DEGREE KIDNAPPING ALLEGED]

If you find that the State has proven beyond a reasonable doubt that the defendant committed the crime of kidnapping, you must go on to determine whether the State has also proven beyond a reasonable doubt that he/she knowingly harmed _____ or knowingly did not release _____ in a safe place prior to his/her apprehension.²⁵ The "harm" component can include physical, emotional, or psychological harm.²⁶ If the State is contending that the victim suffered emotional or psychological harm, it must prove that the victim suffered emotional or psychological harm beyond that inherent in a kidnapping. That is, it must prove that the victim suffered substantial or enduring emotional or psychological harm."²⁷ In this case, the State alleges that defendant [describe conduct allegedly constituting harm²⁸ or release in an unsafe place]. **[INCLUDE WHEN APPROPRIATE:** On the other hand, defendant contends that _____.]

A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that his/her conduct is of that nature, or that such circumstances exist, or he/she is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he/she is aware that it is practically certain that his/her conduct will cause such a result. "Knowingly," "with knowledge," or equivalent terms have the same meaning.

Knowledge is a condition of the mind which cannot be seen and can only be determined

²² For an affirmative defense as set forth under N.J.S.A. 2C:13-1f.

²³ For an affirmative defense as set forth under N.J.S.A. 2C:13-1e.

²⁴ For an affirmative defense as set forth under N.J.S.A. 2C:13-1f.

²⁵ State v. Sherman, 367 N.J. Super. 324, 330 (App. Div. 2004), certif. denied, 180 N.J. 356 (2004).

²⁶ Sherman, 367 N.J. Super. at 331.

²⁷ See Sherman, 367 N.J. Super. at 330.

²⁸ "We conclude that the 'harm' component of the unharmed release provision contained in N.J.S.A. 2C:13-1c[1] focuses on the conduct of the kidnapper during the purposeful removal and holding or confining of the victim, as distinguished from the type of harm inherent in every kidnapping." Sherman, 367 N.J. Super. at 330. The "harm" component can include "physical, emotional or psychological harm." Id. at 331.

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by inferences from conduct, words or acts. A state of mind is rarely susceptible of direct proof, but must ordinarily be inferred from the facts. Therefore, it is not necessary, members of the jury, that the State produce witnesses to testify that an accused said he/she had a certain state of mind when he/she engaged in a particular act. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference which may arise from the nature of his/her acts and his/her conduct, and from all he/she said and did at the particular time and place, and from all of the surrounding circumstances.

[CHARGE WHEN FIRST DEGREE KIDNAPPING IS ALLEGED]

If you find that the State has proven beyond a reasonable doubt that the defendant is guilty of kidnapping, but you have reasonable doubt as to whether the State has proven beyond a reasonable doubt that he/she knowingly harmed _____ or knowingly did not release _____ in a safe place prior to his/her apprehension you should then find the defendant guilty of kidnapping in the second degree.

If you find beyond a reasonable doubt that the defendant is guilty of kidnapping and that he/she knowingly harmed _____ or knowingly did not release _____ in a safe place prior to his/her apprehension, you should then find the defendant guilty of kidnapping in the first degree.

In order to determine whether the victim was released in a safe place, you must examine the totality of the circumstances and evaluate the evidence presented at trial in its entirety. You may consider the following:

- (1) age of the victim and any other physical or mental condition of the victim;²⁹
- (2) the location, the conditions of the area, and the time of the release;
- (3) the circumstances surrounding the release; and
- (4) any other circumstances that occurred or existed surrounding the release.

²⁹ In State v. Johnson, 309 N.J. Super. 237, 265 (App. Div.), certif. denied, 156 N.J. 387 (1998), the defendant carjacked a mother and her three-year-old daughter, then put the daughter out of the car before driving off with and subsequently robbing, raping, and killing the mother. The Appellate Division held that the jury properly found “that separating an upset, crying three year old child from her distraught mother and leaving her near the bushes of a closed day care center after 9 p.m. on a rainy November night hardly constitutes leaving her in a ‘safe place.’”