

Document: C.R.S. 18-3-302

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Colorado Revised Statutes Annotated Title 18. Criminal Code (Arts. 1 — 26) Article 3. Offenses Against the Person (Pts. 1 — 6) Part 3. Kidnapping (§§ 18-3-301 — 18-3-306)

18-3-302. Second degree kidnapping.

(1) Any person who knowingly seizes and carries any person from one place to another, without his consent and without lawful justification, commits second degree kidnapping.

(2) Any person who takes, entices, or decoys away any child not his own under the age of eighteen years with intent to keep or conceal the child from his parent or guardian or with intent to sell, trade, or barter such child for consideration commits second degree kidnapping.

(3) Second degree kidnapping is a class 2 felony if any of the following circumstances exist:

(a) The person kidnapped is a victim of a sexual offense pursuant to part 4 of this article; or

(b) The person kidnapped is a victim of a robbery.

(4)

(a) Unless it is a class 2 felony under subsection (3) of this section, second degree kidnapping is a class 3 felony if any of the following circumstances exist:

(I) The kidnapping is accomplished with intent to sell, trade, or barter the victim for consideration; or

(II) The kidnapping is accomplished by the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon; or

(III) The kidnapping is accomplished by the perpetrator representing verbally or otherwise that he or she is armed with a deadly weapon.

(b) A defendant convicted of second degree kidnapping committed under any of the circumstances set forth in this subsection (4) shall be sentenced by the court in accordance with the provisions of section 18-1.3-406.

(5) Second degree kidnapping is a class 4 felony, except as provided in subsections (3) and (4) of this

section.

History

Source: **L. 71:**R&RE, p. 421, § 1.**C.R.S. 1963:**§ 40-3-302. **L. 77:**Entire section R&RE, p. 961, § 13, effective July 1. **L. 81:**Entire section R&RE, p. 983, § 1, effective July 1. **L. 86:**(4) amended, p. 777, § 5, effective July 1. **L. 87:**(1) amended, p. 615, § 4, effective July 1. **L. 89:**(2) and (4) amended, p. 902, §§ 1, 2, effective July 1. **L. 2000:**(4) amended, p. 694, § 6, effective July 1. **L. 2001:**(3), (4), and (5) amended, p. 857, § 2, effective July 1. **L. 2002:**(4)(b) amended, p. 1512, § 188, effective October 1. **L. 2003:**(3)(a) amended, p. 1432, § 20, effective April 29. **L. 2007:**(4) amended, p. 1687, § 5, effective July 1.

▼ Annotations

Research References & Practice Aids

Hierarchy Notes:

C.R.S. Title 18

C.R.S. Title 18, Art. 3

State Notes

ANNOTATION

Law reviews.

For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "Recovering the Parentally Kidnapped Child", see 12 Colo. Law. 1798 (1983). For article, "Missing Children", see 13 Colo. Law. 1005 (1984).

Annotator's note.

Since § 18-3-302 is similar to former § 40-2-44, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

**Second degree kidnapping statute criminalizing “knowingly, forcibly, or otherwise”
seizing and carrying any person from one place to another is unconstitutionally vague.**

However, the phrase “forcibly or otherwise” is severable from the constitutional sections of the statute, leaving the remainder complete and in accord with legislative intent. *People v. Powell*, 716 P.2d 1096 (Colo. 1986) (decided prior to 1987 amendment).

**No equal protection violation where general assembly chose to punish with the same
severity all cases where kidnapping was accompanied by sexual assault,**

making no distinction between misdemeanor and felony sexual assault. *People v. Williams*, 89 P.3d 492 (Colo. App. 2003).

**Because this section does not proscribe the same criminal conduct as § 18-3-301, it does
not violate the requirements of equal protection.**

Inclusion of the terms “entices” and “decoys” in subsection (2) of this section does not mean that the word “takes” necessarily prohibits only forcible seizures therefore prohibiting the same conduct defined in § 18-3-301 (1)(a). A taking could occur without force, with the intent to keep or conceal the child from his or her parent or guardian or with intent to sell, trade, or barter the child for consideration, but without the child’s being enticed or decoyed away. The terms “entices” and “decoys”, therefore, are not rendered meaningless by an interpretation of “takes” that encompasses nonforcible seizures. *People v. Kendall*, 174 P.3d 791 (Colo. App. 2007).

The obvious distinction between § 18-3-301 (1)(a) and subsection (2) of this section is that subsection (2) of this section applies only to children. Section 18-3-301 (1)(a) and subsection (2) of this section do not prohibit exactly the same criminal conduct while imposing disparate penalties. *People v. Kendall*, 174 P.3d 791 (Colo. App. 2007).

Term “seize” does not imply the use of force.

Where defendant conceded that evidence was sufficient to show he “took” his daughter from her custodial parent, conviction under subsection (1) was proper although taking was not by force. *People v. Metcalf*, 926 P.2d 133 (Colo. App. 1996).

Taking a person through the use of deceit falls within the term “seize” because it is a taking without the consent of the victim. Consent obtained through deceit is invalid. *People v. Maass*, 981 P.2d 177 (Colo. App. 1988).

**Forcing customer of movie theater to accompany defendant at gunpoint to theater
manager’s office with threats of retribution if he called the police satisfies “seize and
carry” requirement**

for purposes of second degree kidnapping. *People v. Ridenour*, 878 P.2d 23 (Colo. App. 1994).

**The court did not commit plain error in instructing the jury that “seized and carried”
means any movement, however short in distance.**

The court’s instruction accurately states the law. Further, it was appropriate for the court to instruct the jury on the phrase “seized and carried” since it has special meaning in the context of kidnapping and is a statutory term of art. *People v. Rogers*, 220 P.3d 931 (Colo. App. 2008).

Phrase “without lawful justification” is not a term of art,

nor does it connote some additional legal purpose ulterior to the act of seizing and transporting a nonconsenting victim. Instructing jury to give phrase “the common meaning that the words imply” was not plain error. *People v. Schuett*, 833 P.2d 44 (Colo. 1992).

**Conviction for second degree kidnapping that involves sexual assault requires proof of
sexual assault**

beyond reasonable doubt. *People v. Powell*, 716 P.2d 1096 (Colo. 1986).

A defendant convicted of sexual assault and second degree kidnapping under subsection (3)

is not subjected to unconstitutional "double punishment" in the sense of being convicted of two substantive offenses for the same conduct. The sexual assault factor under subsection (3) is a sentence enhancement factor, and, where, as here, the intent of the legislature clearly authorizes a conviction of second degree kidnapping as a class 2 felony on the basis of a related conviction for sexual assault, the kidnapping conviction must be upheld. *People v. Powell*, 716 P.2d 1096 (Colo. 1986); *People v. Turner*, 730 P.2d 333 (Colo. App. 1986).

Analysis is identical for purposes of double jeopardy and merger doctrines.

Sexual assault is not a lesser included offense of second degree kidnapping where the fact that sexual assault occurred in conjunction with kidnapping is used to raise the kidnapping from a class 4 to a class 2 felony. *People v. Henderson*, 810 P.2d 1058 (Colo. 1991); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001); *People v. Aguilar-Ramos*, 224 P.3d 402 (Colo. App. 2009); *Lewis v. People*, 261 P.3d 480 (Colo. 2011).

Distinction between sentence-enhancement factor and element of separate offense.

Subsection (3)(a) of this section does not create a separate and definable offense from that created in subsection (1) or (2); it simply relates to what felony level the offense entails. *People v. Henderson*, 810 P.2d 1058 (Colo. 1991); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001); *Lewis v. People*, 261 P.3d 480 (Colo. 2011).

Sexual assault is not a lesser included offense of, and therefore not merged into, second degree kidnapping involving sexual assault.

People v. Henderson, 810 P.2d 1058 (Colo. 1991); *People v. McKnight*, 813 P.2d 331 (Colo. 1991); *People v. Johnson*, 815 P.2d 427 (Colo. 1991); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001); *People v. Ramirez*, 140 P.3d 169 (Colo. App. 2005); *People v. Baker*, 178 P.3d 1225 (Colo. App. 2007); *Lewis v. People*, 261 P.3d 480 (Colo. 2011); *People v. Herdman*, 2012 COA 89, 310 P.3d 170.

Section not vague.

The kidnapping statutes, by using words such as "seize" and "imprison" to define the offenses, are not so vague that men of common intelligence and understanding are required to guess as to their application. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Essential elements of the crime of kidnapping are:

(1) Willfulness or intent to do the act; (2) the act must be done without lawful authority; (3) there must be a seizing, or imprisoning; and (4) the act must be done against the victim's will, by means of force or otherwise. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

A material element of the crime of kidnapping is that a person must be held against his or her will. *People v. Johnson*, 183 Colo. 219, 516 P.2d 116 (1973).

Person is guilty of attempted second degree kidnapping

if he knowingly engaged in conduct which is strongly corroborative of the firmness of his purpose to knowingly seize or carry another person from one place to another without his consent and without lawful justification. *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (1980).

To sustain a conviction, prosecution must prove victim was seized and transported without consent,

but it is not necessary to show that the involuntariness exists from the beginning of the transaction

if subsequently the victim is forcibly detained. *People v. Brown*, 622 P.2d 109 (Colo. App. 1980).

Robbery is not a lesser included offense to second degree kidnapping

even though a robbery in conjunction with the second degree kidnapping may lead to an enhanced penalty for that crime. *People v. Huggins*, 825 P.2d 1024 (Colo. App. 1991).

Movement for a "substantial" distance is not required

as an element of second degree kidnapping. *People v. Apodaca*, 668 P.2d 941 (Colo. App. 1982), *aff'd in part and rev'd in part on other grounds*, 712 P.2d 467 (Colo. 1985).

Insubstantial movement of the victim is sufficient to satisfy the element of second degree kidnapping that the victim be carried from one place to another

if the insubstantial movement causes increased risk of harm to the victim. *People v. Huggins*, 825 P.2d 1024 (Colo. App. 1991).

The evidence, viewed in a light most favorable to the prosecution, satisfied the asportation element of second degree kidnapping.

Even though moving the victim from the living room to the bedroom and then hallway was an insubstantial seizure and carrying, the movement did increase the risk of harm to the victim, thus satisfying the asportation element. Defendant increased the risk of harm to the victim by moving the victim to an area of the residence where an escape was less likely, and to an area where he was less likely to be detected since there were no windows. *People v. Rogers*, 220 P.3d 931 (Colo. App. 2008).

Where it is unclear whether movement was substantial,

jury should be instructed on relevance of increased risk of harm. *People v. Owens*, 97 P.3d 227 (Colo. App. 2004).

The element of this offense which requires that a person be moved "from one place to another"

is not met where the victim is forced to move from his living room to his bedroom at gunpoint. *People v. Bell*, 809 P.2d 1026 (Colo. App. 1990).

"Significant movement" of the victim

is not required as an element of kidnapping, but merely some movement which substantially increases the risk of harm to the victim. *People v. Unrein*, 677 P.2d 951 (Colo. App. 1983); *People v. Fuller*, 791 P.2d 702 (Colo. 1990).

The asportation element of second degree kidnapping

is the movement by the defendant of the victim from one place to another. Evidence that the defendant's actions substantially increased a risk of harm to the victim may be relevant to whether asportation was proved in some cases, but creating such a risk is not an essential element of the offense. *People v. Harlan*, 8 P.3d 448 (Colo. 2000).

The term "without lawful justification" in subsection (1) means

acting in a manner not authorized or permitted by law and does not connote some additional illegal purpose ulterior to the act of seizing and transporting a nonconsenting victim from one place to another. *People v. Schuett*, 833 P.2d 44 (Colo. 1992).

Trial court did not commit plain error

by failing to provide the jury with a clarifying definition of "without lawful justification". *People v. Schuett*, 833 P.2d 44 (Colo. 1992).

Although the jury was instructed as to first degree kidnapping and not second degree kidnapping,

where the jury found all of the elements necessary to prove second degree kidnapping beyond a reasonable doubt, the judgment of conviction for second degree kidnapping should be entered upon remand to the trial court. *People v. San Emerterio*, 819 P.2d 516 (Colo. App. 1991), rev'd on other grounds, 839 P.2d 1161 (Colo. 1992).

All elements of crime of kidnapping must be present

or the crime is not committed. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

The element contained in second degree kidnapping and not contained in false imprisonment,

a lesser included offense, is that of transportation of the victim. *People v. Arispe*, 191 Colo. 555, 555 P.2d 525 (1976).

False imprisonment is not a lesser included offense of attempted second degree kidnapping.

Thus, a prosecutor can prove attempted second degree kidnapping without showing that the victim was actually seized or falsely imprisoned. *People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

Prosecution must prove every material element of kidnapping including consent.

People v. Rutt, 179 Colo. 180, 500 P.2d 362 (1972).

Specific intent need not be proved by direct evidence

but may be inferred from the circumstances surrounding the commission of the offense. *People v. McGill*, 190 Colo. 443, 548 P.2d 600 (1976).

Assault is not necessary element

of the crime of kidnapping. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Subsection (2) prohibits unauthorized interference with parents' custodial right

to their children. *People v. Woodward*, 631 P.2d 1188 (Colo. App. 1981).

Conduct constituting child kidnapping.

Keeping a child in physical seclusion or keeping accurate information regarding the child's location from her parents, making it more difficult for the child's parents to discover her location, constitutes child kidnapping. *People v. Woodward*, 631 P.2d 1188 (Colo. App. 1981).

Subsection (2) does not require proof that a child be taken for any particular duration to show the actor's intent.

Evidence proving that defendant violently took the child from the victim without telling her where he was going is sufficient to sustain the jury's guilty verdict. *People v. Ortiz*, 155 P.3d 532 (Colo. App. 2006).

The offense of second degree kidnapping of a child in violation of subsection (2) does not impliedly require proof that the perpetrator took the child without the consent of a parent.

Nothing in the language of this section suggests that the parent or guardian must be aware of the defendant's intent at the time the child is taken. *People v. Ortiz*, 155 P.3d 532 (Colo. App. 2006).

defendant's intent at the time the child is taken. *People v. Ortiz*, 155 P.3d 532 (Colo. App. 2006).

False imprisonment is a lesser nonincluded offense of second degree kidnapping committed in violation of subsection (2).

Nothing in the language of subsection (2) suggests that the parent or guardian must be aware of the defendant's intent at the time the child is taken. Therefore, the absence of consent is not an implied element of second degree kidnapping committed in violation of subsection (2). *People v. Ortiz*, 155 P.3d 532 (Colo. App. 2006).

Both parents share an equal right to the custody of a child

in the absence of a court order granting legal or physical custody to one parent or the other for purpose of application of this section. *Armendariz v. People*, 711 P.2d 1268 (Colo. 1986); *People v. Haynie*, 826 P.2d 371 (Colo. App. 1991).

Therefore, even though the defendant father took his child from the mother, the prosecution was unable to prove the essential element of consent in the absence of a court order granting legal or physical custody of the child to the mother. *Armendariz v. People*, 711 P.2d 1268 (Colo. 1986).

The "taking" of a child under subsection (2) could occur without force

with the intent to keep or conceal the child from his or her parent or guardian. The terms "entices" or "decoys" are not rendered meaningless by an interpretation of "takes" that encompasses nonforcible seizures. *People v. Kendall*, 174 P.3d 791 (Colo. App. 2007).

Failure to include element of "knowingly" in instruction is error.

The trial court's failure to include the element of "knowingly" in a second degree kidnapping instruction is plain error. *People v. Clark*, 662 P.2d 1100 (Colo. App. 1982).

Justification is not affirmative defense,

but rather the state must prove unlawful justification as an essential element of the offense of second degree kidnapping. *People v. Rex*, 636 P.2d 1282 (Colo. App. 1981).

Voluntary intoxication not defense.

The mental culpability requirement of both second degree kidnapping and first degree sexual assault is "knowingly"; therefore, they are, by statutory definition, general intent crimes and voluntary intoxication is not a defense to either crime. *People v. Vigil*, 43 Colo. App. 121, 602 P.2d 884 (1979).

Evidence sufficient to sustain conviction.

Yescas v. People, 197 Colo. 379, 593 P.2d 358 (1979); *People v. Nunez*, 673 P.2d 53 (Colo. App. 1983); *People v. Powell*, 716 P.2d 1096 (Colo. 1986).

Where the assault by the defendant was a crime of physical force or violence, the victim had no choice in the matter, and the assault ended when the police arrived, the evidence was insufficient to support a first degree kidnapping charge but was sufficient to sustain a conviction for second degree kidnapping. *People v. Naranjo*, 612 P.2d 1099 (Colo. 1980).

Jury instruction held proper.

People v. Johnson, 183 Colo. 219, 516 P.2d 116 (1973).

Applied

in *People v. Wilkerson*, 192 Colo. 386, 559 P.2d 1107 (1977); *Goodwin v. District Court*, 197 Colo. 6, 588 P.2d 874 (1979); *People v. Blalock*, 197 Colo. 320, 592 P.2d 406 (1979); *People v. Goodwin*, 197 Colo. 47, 593 P.2d 326 (1979); *People v. Martinez*, 634 P.2d 26 (Colo. 1981); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *People v. Gussner*, 638 P.2d 45 (Colo. 1981); *People v. Shepley*, 635 P.2d 338 (Colo. 1981).

637 P.2d 338 (Colo. 1981); People v. Swanson, 638 P.2d 45 (Colo. 1981); People v. Sharpless, 635 P.2d 896 (Colo. App. 1981); People v. Sanchez, 649 P.2d 1049 (Colo. 1982); People v. Gouker, 665 P.2d 113 (Colo. 1983).

Research References & Practice Aids

Cross references:

For the legislative declaration contained in the 2002 act amending subsection (4)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

Colorado Revised Statutes Annotated

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