NO. 41167-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY SCOTT REED,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Robert Lewis, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ARGUMENT

THIS COURT'S DECISION IN KORUM IS IN LINE WITH SUPREME COURT PRECEDENT AND SHOULD BE FOLLOWED IN THIS CASE.

This Court has asked whether it should depart from its holding in State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004), aff'd in part, rev. in part on other grounds, 157 Wn.2d 614 (2006). The answer is no. Korum followed Supreme Court precedent which the Supreme Court has not overturned. It remains good law. Division One's decision to abandon the incidental restraint doctrine in determining the sufficiency of the evidence in restraint-based crimes[1] flies in the face of this precedent and should not be followed.

Under Washington Supreme Court precedent, there is insufficient evidence to establish all the elements of a kidnapping where the restraint of the victim is incidental to the commission of another crime. State v. Green, 94 Wn.2d 216, 227-28, 616 P.2d 628 (1980); State v. Vladovic, 99 Wn.2d 413, 424, 662 P.2d 853 (1983); State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995). The Court of Appeals is not free to ignore controlling Supreme Court authority. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

[1] State v. Phuong, ___ Wn. App. ___, 299 P.3d 37 (2013); State v. Grant, ___ Wn. App. ___ (Cause No. 65172–2–I, 2012).

A defendant is guilty of first degree kidnapping if he intentionally "abducts" another person. RCW 9A.40.020(1). Abduction is a "critical element in the proof of kidnapping." Green, 94 Wn.2d at 225. "Abduct" means "to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(2). "Restrain" means "to restrict a person's movements without consent" and "'restraint' is 'without consent' if it is accomplished by . . . physical force, intimidation, or deception." RCW 9A.40.010(1). But the mere incidental restraint of a victim during the course of another crime is insufficient to establish a separate crime of kidnapping where the movement and restraint had no independent purpose or injury. See Brett, 126 Wn.2d at 166; Green, 94 Wn.2d at 227.

In Green, the Supreme Court held the elements of kidnapping in aggravation of first-degree murder were not established by sufficient evidence because the restraint and movement of the victim was merely "incidental" to the homicide rather than independent of it. Green, 94 Wn.2d at 219, 227-28. The Court stated this conclusion was "compelled" by Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Green, 94 Wn.2d at 219. Jackson held the proper test for determining the sufficiency of evidence to support a conviction is "whether, after viewing the evidence in the light most favorable to the prosecution, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Green, 94 Wn.2d at 221 (quoting Jackson, 443 U.S. at 319).

Green began its analysis by noting that while kidnapping is an element of aggravated murder in the first degree, it is also a separate and distinct statutory crime having specific elements, each of which must be established beyond a reasonable doubt. Green, 94 Wn.2d at 224. "The issue, as framed in Jackson v. Virginia, supra, is whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of kidnapping beyond a reasonable doubt." Green, 94 Wn.2d at 221-22.

The Court held that the State had not established kidnapping by means of secreting or holding the victim in a place where she was not likely to be found, by the standard of proof required by Jackson. Id. at 228. Evidence showed the defendant grabbed the victim, carried her 20-50 feet, placed her behind a building and killed her there. Id. at 226-27. One reason the evidence was insufficient to convict for kidnapping was that "these events were actually an integral part of and not independent of the underlying homicide" — the kidnapping was merely incidental to the commission of another crime. Id. at 227. The Court reasoned, "the mere incidental restraint and movement of a victim which might occur during the

course of a homicide are not, standing alone, indicia of a true kidnapping." Id.

The Court addressed the incidental restraint issue again in State v. Brett. Brett argued there was insufficient evidence to support the special verdict that the murder was committed in the course of kidnapping in the first degree because the restraint was incidental to the murder, and thus there was no "abduction." Brett, 126 Wn.2d at 166. The Court recognized it had previously held "the mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury is insufficient to establish a kidnapping." Id. (citing Green, 94 Wn.2d at 227). There was sufficient evidence in Brett's case, however, because the kidnapping was not incidental to murder — Brett planned to kidnap the random victim and was in the course of kidnapping that victim when the plan went awry, resulting in murder. Id.

The Court of Appeals has followed this Supreme Court precedent in a number of decisions, determining whether, on the facts of a particular case, sufficient evidence supported a kidnapping conviction under an incidental restraint analysis. See, e.g., State v. Korum, 120 Wn. App. at 702-03, 707 (restraint of victims was incidental to robberies and therefore insufficient evidence supported kidnapping convictions); State v. Elmore, 154 Wn. App. 885, 901, 228 P.3d 760 ("Evidence of restraint that is

merely incidental to the commission of another crime is insufficient to support a kidnapping conviction."), review denied, 169 Wn.2d 1018 (2010); State v. Saunders, 120 Wn. App. 800, 818-19, 86 P.3d 232 (2004) (sufficient evidence supported kidnapping where it was not merely incidental to rape; restraint went above and beyond that required or even typical in the commission of rape); see also State v. Washington, 135 Wn. App. 42, 50-51, 143 P.3d 606 (2006) (applying incidental restraint doctrine to crime of unlawful imprisonment in determining sufficiency of evidence).

In Phuong, the Division One majority sidesteps the incidental restraint doctrine by interpreting Green as addressing a double jeopardy problem under the merger rule. Phuong, 299 P.3d at 60. But Green made it crystal clear that it was applying the sufficiency of evidence test under the due process clause of the Fourteenth Amendment. Green, 94 Wn.2d at 225–26, 228. There is no mention of double jeopardy in Green.

This Court has recognized that the sufficiency of the evidence analysis is distinct from whether crimes merge for double jeopardy purposes: "Although Green borrowed the 'incidental restraint' concept from an earlier merger case, it incorporated this concept into a new standard for determining sufficiency of evidence on appeal." In re Pers. Restraint of Bybee, 142 Wn. App. 260, 266-67, 175 P.3d 589 (2007).

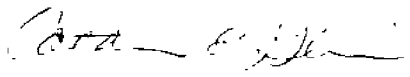
Unlike Division One's abandonment of the incidental restraint doctrine, this Court's decision in Korum is in line with binding Supreme Court precedent. There is no reason for this Court to depart from its analysis in Korum.

D. CONCLUSION

For the reasons addressed above, this Court should adhere to its decision in Korum and dismiss the kidnapping charge in this case.

DATED this 31st day of May, 2013.

Respectfully submitted,



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Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope containing a copy of the Supplemental Brief of Appellant in *State v. Jeffrey S. Reed,* Cause No. 41167-9-II directed to:

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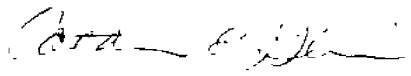

Catherine E. Glinski
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