No. 29021-2-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

REX D. GREGORY, Appellant.

BRIEF OF RESPONDENT

CURT L. LIEDKIE
Asotin County Deputy
Prosecuting Attorney
WSBA #30371

P. O. Box 220
Asotin, Washington 99402
(509) 243-2061

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Court Rules

Other Authority

I. ISSUES

1. DID THE TRIAL COURT VIOLATE THE DEFENDANT'S RIGHT TO SPEEDY TRIAL UNDER CrR 3.3?

2. WAS THE EVIDENCE SUFFICIENT TO SUPPORT THE JURY'S VERDICT AS TO THE CHARGE OF KIDNAPPING IN THE SECOND DEGREE?

3. SHOULD THE JURY'S FINDING OF SEXUAL MOTIVITION AS TO THE CHARGE OF KIDNAPPING IN THE SECOND DEGREE BE SET ASIDE?

II. STATEMENT OF THE CASE

FACTS

The Appellant, Rex D. Gregory, was born September 14, 1973. 177-6 Report of Proceedings (*hereinafter* 177-6 RP[1]) 689. The Appellant began dating JoDee Gregory in the early spring of 2004 and they were married April 9, 2005. 177-6 RP 690, 691. Mr. Gregory resided with JoDee for some time prior to dating. 177-6 RP 691. JoDee had a daughter, S.A.O., born June 25, 1998. 177-6 RP 690. S.A.O. resided with JoDee and the Appellant during this time frame. 177-6 RP 690.

The Appellant began molesting S.A.O. when she was seven years old. 177-6 RP 766, 767. Gregory came into her room at night and began touching her vaginal area. 177-6 RP 767. Gregory used some type of numbing cream on her genitals and had a massager. 177-6 RP 766, 767. On another occasion, Gregory took her for a "picnic" to the mouth of Alpowa Creek where he exposed himself and made her touch his penis. 177-6 RP 768, 769. Prior to doing so, the Appellant asked her if she would "do him a favor." 177-6 RP 769, ll 6-10.

The Appellant also had S.A.O. sit on his lap in a chair at the family residence. 177-6 RP 775. The Appellant covered her and

---

[1]In the interest of clarity, the State adopts the Appellant's designation of the transcripts from the separate causes and trials.

himself with a blanket and rubbed her vaginal area. 177-6 RP 775. S.A.O. reported the incident in the bedroom and the incident in the chair to her mother, JoDee, but JoDee didn't believe her and took no action. 177-6 RP 776.

Some time later, S.A.O. reported these incidents to her stepsister, who reported this to Ursula O'Conner, S.A.O.'s stepmother. 177-6 RP 776, 777. S.A.O. then told Ursula what happened and Ursula reported the matter to the police in November of 2006. 177-6 RP 875, 878-881, 883.

There were no further reported incidents from November of 2006 until January of 2009. 177-6 RP 778. On January 23, 2009, the Appellant tried to force himself on S.A.O. 177-6 RP 778. S.A.O. was wearing a nightgown and Gregory came up from behind her. 177-6 RP 778. He grabbed her from behind and the two went to the floor. 177-6 RP 778. The Appellant had a hand on her breast and was reaching up her nightgown. 177-6 RP 778. Gregory touched her crotch area through her panties and S.A.O. fought him off. 177-6 RP 779. She was able to get away from Gregory by hitting him and yelling for him to let her go. 177-6 RP 779. JoDee had been in the shower and S.A.O. ran to her mother for help. 177-6 RP 779. JoDee kicked the Appellant out of the house and called her sister, Amanda Hunter. 177-6 RP 780. Amanda came to the house and spoke with S.A.O. 177-6 RP 907,

908. S.A.O. was upset and throwing up. 177-6 RP 907. After speaking with S.A.O., Amanda and JoDee took her to the police station to make a report. 177-6 RP 910.

S.A.O. was completely removed from the home and began living full time with her father and stepmother, Ursula, immediately after the January incident. 177-6 RP 781, 885.

In June of 2009, S.H. and her family moved into a duplex apartment next door to the Appellant and JoDee. 177-6 RP 568. S.H. was born September 6, 1995. 177-6 RP 564. S.H. was mentally slower than other children her age and had difficulty with certain tasks that thirteen year olds would ordinarily have mastered, such as the ability to tell time. 177-6 RP 566. She also had difficulty with chronology. 177-6 RP 567. While she could remember events, she had difficulty placing events in order. 177-6 RP 567.

During the summer months of 2009, S.H.'s mother, Charlesa Grayson, noticed that the Appellant was inordinately friendly with S.H. 177-6 RP 573. Gregory gave her presents and snacks, and otherwise gave a lot of attention to S.H. 177-6 RP 573.

In the morning hours of September 22, 2009, police were summons to the Grayson residence regarding a call of a man holding a girl in the back of his van. 177-6 RP 603. Sgt. Richard Muszynski of the Clarkston Police Department responded and

contacted S.H. and her father, Matt Grayson. 177-6 RP 603. S.H. told the officer that the Appellant had asked her to come out to the van with him and asked her to get inside the back. 177-6 RP 604. S.H. reported that went outside to take the family dog out and she then went to Gregory's apartment. 177-6 RP 604. She told the officer that the Appellant then asked to go outside to the van with him. 177-6 RP 604. She stated that Gregory asked her to get inside the van and that he got on top of her. 177-6 RP 604.

Sgt. Muszynski then contacted the Appellant at his apartment. 177-6 RP 604, 605. Sgt. Muszynski advised Gregory of the complaint and asked him if he had seen S.H. that morning and Gregory stated that he had not. 177-6 RP 606. After repeatedly denying that he seen S.H., Gregory and he finally admitted that he had seen S.H that morning. 177-6 RP 606. The Appellant denied that he had been in contact with her, or that she had been in his van. 177-6 RP 607.

Officers spoke with S.H.'s younger brother who had seen the Appellant on top of S.H. in the back of the Appellant's van. 177-6 RP 608, 609. He had gone outside and walked to the other side of the apartment. 177-6 RP 608. When he got to the back of the Appellant's carport, he saw Gregory on top of S.H. 177-6 RP 608, 541 - 544.

Sgt. Muszynski then recontacted Gregory and advised him

that there was a second witness who saw him with S.H. in the back of the van. 177-6 RP 610. The Appellant then became very nervous but continued to deny that S.H. had been at his residence or in the van. 177-6 RP 610. After further questioning, the Appellant then stated that S.H. may have been in the van and that She may have climbed into the van by herself. 177-6 RP 611, ll 6-9. The Appellant further stated that he may have tried to get her out. 177-6 RP 611, l 10.

The Appellant was arrested and taken to the Asotin County Jail. 177-6 RP 612. Later that day, Sgt. Muszynski received additional information from S.H.'s father that she remembered that she bit the Appellant on the hand while they were in the van. 177-6 RP 612 - 13. Sgt. Muszynski went to the jail to contact Gregory and look at his hands. 177-6 RP 613. When Sgt. Muszynski asked to see his hands, Gregory stated, "Oh, yeah, I forgot to tell you. When I was trying to get (S.H.) out of the van, when she refused to come out, she bit me." 177-6 RP 613, ll 20-22. Sgt. Muszynksi observed a bite mark on the Appellant's right hand between the thumb and index finger. 177-6 RP 613.

While she did not intitially tell the police about, and actually denied, a sexual relationship with Gregory, in and around the end of February or the first part of March, 2010, S.H. disclosed that she and the Appellant had been in a sexual relationship. 177-6 RP

571. She revealed that she and the Appellant had engaged in vaginal intercourse in the Appellant's house on several occasions. 177-6 RP 479, 483. S.H.'s told her friend at school, prior to her fourteenth birthday, that she had sex with the Appellant. 177-6 RP 1034.

S.H. further revealed that on the day he was arrested, she and Gregory had gone to the van to have intercourse. 177-6 RP 486 - 8. She stated that they went to the van because the Appellant's roommate and JoDee were both inside the house. 177-6 RP 486. She testified that they were in the van having sex when she saw her brother at which point she bit Gregory to get him off of her. 177-6 RP 486 - 488.

Procedural History

Following his arrest on September 22, 2009, the Defendant was charged by way of Information with Kidnapping in the Second Degree with Sexual Motivation. 150-4 Clerks Paper's (*hereinafter* CP) 188. On October 6, 2009, the State filed Notice of Intent to Utilize Prior Sex Crimes pursuant to RCW 10.58.090, relating to the acts committed by Gregory against S.A.O. and the Appellant responded with a Motion in Limine to exclude such evidence. 150-4 CP 193, 196-197. On November 2, 2009, the Court, after hearing, denied the Appellant's motion in Limine and ruled that evidence of the sex crimes committed by Mr. Gregory as to S.A.O.

were admissible to prove sexual motivation as to S.H. 150-4 RP 44, 45.

Two days later, the State filed a motion to amend the Information to add three counts of Child Molestation in the First Degree, relating to Mr. Gregory's acts against his stepdaughter, S.A.O. 150-4 CP 222 - 223. On November 17, 2009, the Court addressed a series of motions and pretrial issues, including the State's motion to amend the Information. 150-4 RP 60 - 71. At hearing, the Trial Court found probable cause to support the requested amendment but denied the State's Motion to Amend, citing the fact that trial was only two weeks away and that the Court believed it would not be fair to the Appellant to force him to prepare for three additional charges is such a short period of time. 150-4 RP 70 - 71, 69, ll 19 - 22.

At the hearing on November 17, 2009, Mr. Gregory waived speedy trial to accommodate a trial date of December 2, 2009. 150-4 RP 93 - 94. 150-4 CP 262.

A trial commenced in that matter on December 2, 2009 and on December 7, 2009, the jury deadlocked and a mistrial was declared without objection from the Appellant. 150-4 RP 1022, 150-4 CP 305 - 306. The Court entered written findings and an order granting a mistrial on December 14, 2009. 150-4 CP 305 - 306.

Prior thereto and on November 23, 2009, the State filed three counts of Child Molestation in the First Degree, stemming from the events involving S.A.O. in Asotin County Superior Court Cause 09-1-00177-6. 177-6 CP 1 - 3. The Appellant was arraigned on November 30, 2009. 177-6 RP 4 - 11. Conditions of release including a surety bond requirement were set. 177-6 CP 309 - 310. On December 3, 2009, the Appellant filed an affidavit of prejudice to disqualify the Honorable William D. Acey. 177-6 CP 6 - 8. On December 9, 2009, the Honorable Ray D. Lutes was assigned to hear the matter. 177-6 CP 9. On December 14, 2009, the Court entered an order setting trial for January 19, 2010 and setting a pretrial hearing for January 4, 2010. 177-6 CP 10. The State moved to consolidate the charges in 150-4 with the charges in 177-6 for trial, and subsequently filed a memorandum in support thereof on December 31, 2009. 177-6 CP 15 - 17, 18 - 21.

A hearing was held on January 4, 2010 at which time the Appellant requested and was granted a continuance on the State's motion to consolidate. 177-6 RP 18, ll. 1 - 11. The Appellant also sought to strike the trial date set for January 19, 2010 which request was likewise granted and the matter was continued to January 11, 2010 for further hearings and selection of a trial date. 177-6 RP 18 - 21.

At hearing held January 11, 2010, the Court granted the

State's motion to consolidate the cases for trial. 177-6 RP 50. At that time the Court also granted the State's Motion to add an additional count of Child Molestation pertaining to the Alpowa Creek incident. 177-6 RP 56 ll. 9 - 10, 177-6 CP 15 - 17. To accomplish consolidation and amendment, the parties discussed and decided that Cause 09-1-00150-4 would be dismissed without prejudice and the charge therein added by amendment to the Information in 09-1-00177-6. Additionally, a fourth charge of Child Molestation in the First Degree was added. 177-6 RP 56. A pretrial hearing date of February 22, 2010 and a trial date of March 8, 2010 were ordered by the Court. 177-6 CP 311. No objection to the March 8 trial date was ever filed. The Order Amending Information and Amended Information were filed with the Court on February 22, 2010 177-6 CP 30, 31 - 35. The Amended Information charged the Defendant with four counts of Child Molestation in the First Degree and one count of Kidnapping in the Second Degree with Sexual Motivation. 177-6 CP 31 - 35.

On March 2, 2010, the State, in response to S.H.'s revelations regarding the Appellant engaging in sexual intercourse with her, moved to amend the Information to include a charge of Rape of a Child in the Second Degree or in the alternative, Rape of a Child in the Third Degree. 177-6 CP 63 - 67. The Court heard the motion on March 4, 2010 and granted the State's Motion to

Amend. 177-6 RP 94 - 109, 177-6 CP 68, 69 - 74. No objection to the trial date was made at that time. 177-6 RP 67 - 125. At that hearing, the Court continued the matter one day to March 5, 2010 for the purpose of arraigning the Appellant on the Second Amended Information. 177-6 RP 113, ll. 14 - 25, 114, ll. 1 - 20.

On March 5, 2010, the Court made the State and Mr. Gregory aware that counsel for the Appellant, Richard A. Laws, appeared in chambers prior to hearing and advised the Court that he was experiencing a medical emergency and would therefore not be present for the hearing that morning. 177-6 RP 130 - 131. Based upon counsel's medical condition, his physical appearance, and his pre-hearing discussions with the judge, the Court determined that Mr. Laws would not be available to begin the trial until March 10, 2010.[2] 177-6 RP 131, ll. 18 - 25, 132, ll. 1 - 11. Do to Mr. Laws unavailability, the arraignment on the Second Amended Information was continued, at the Appellant's request, until the following week. 177-6 RP 134, ll. 1 - 10.

On March 8, 2010, Mr. Laws' partner, Scott Broyles, appeared and apprized the Court of Mr. Laws' current medical

---

[2]March 5, 2010 was a Friday. The transcript reflects that the Court originally ordered the trial to start on Monday (March 8, 2010) but was ordering that the trial would not commence until Wednesday (March 10, 2010). 177-6 RP 131, ll. 18 - 25, 132, ll. 1 - 11.

situation. 177-6 RP 140. Mr. Broyles advised that Mr. Laws' doctor has ordered him to a week of "down time" and that he would be available by March 22, 2010 to proceed to trial. 177-6 RP 140, ll. 18 - 23. Mr. Gregory indicated his approval of the continuance of the trial date from March 8, 2010 to March 22, 2010. 177-6 RP 140, l. 25. The Court entered findings regarding necessity of the continuance and written order continuing the trial to March 22, 2010. 177-6 CP 75, 76 - 77. No objection was filed regarding the trial date of March 22, 2010.

The matter proceed to trial on March 22, 2010. 177-6 RP 158 - end. In addition to the testimony outlined above, the State called a neighbor, Steve Payton, to the stand who testified that as he was leaving for work at approximately 6:35am, he observed S.H. outside with her dog. 177-6 RP 683, ll. 11 - 14. Before he got to his vehicle, he had to go back to his apartment and retrieve a forgotten item. 177-6 RP 684, ll. 6 - 9. He testified that he was in his apartment for another five to ten minutes and when he went back out to get into his car he saw the dog, alone, on a rope. 177-6 RP 684, ll. 15 - 18. As he neared his vehicle which was parked on the street, he passed by the Appellant's carport and observed Gregory's van backed into the carport. 177-6 RP 684, ll. 20 - 21. Payton further noticed that the rear hatch door to the van was open. 177-6 RP 684, ll. 22 - 23. Because of the time of day, this

was strange to him and he approached with the intent to close the door. 177-6 RP 686, ll. 1 - 2. As he approached, he heard voices coming from the van. 177-6 RP 684, l. 25, 685, l. 1. He described the voices as whispering. 177-6 RP 685, ll. 8 - 10. Mr. Payton then went to his car and left for work. 177-6 RP 685, ll. 5 - 7.

Witnesses testified that the Appellant's wife was inside the house asleep in the bedroom and that Curtis Devault, Gregory's roommate, was also in the house asleep at the time the Appellant was in the van with S.H.. 177-6 RP 486, 693 - 694, 1171 - 1172. JoDee Gregory testified that she found condoms in the Appellant's drawer. 177-6 RP 696. The condom box was sold with twelve individual condoms and three were missing from the package. 177-6 RP 697. JoDee testified that because of the family's religious beliefs, she and the Appellant did not use condoms and therefore, it was suspicious to her that he would have condoms. 177-6 RP 697 - 698. JoDee contacted the police and reported the condoms. 177-6 RP 698. S.H. testified that the Appellant had purchased condoms and told her about buying them. 177-6 RP 483, ll. 3 - 8. On cross examination, she testified that Gregory did not use the condoms when they had intercourse.177-6 RP 532, ll. 12 - 13. However, she also testified that she had not seen his penis when they had intercourse. 177-6 RP 484, ll. 1 - 3. She further testified that they had vaginal intercourse, "Like once - -

twice - - three times. I can't remember." 177-6 RP 18 - 22. S.H. testified that she was embarrassed about having intercourse with the Appellant and tried to cover it up. 177-6 RP 489 - 490. Charlesa Grayson, S.H.'s mother, testified that the Appellant did not have permission to have her daughter in his van. 177-6 RP 575, ll. 1 - 3.

At the conclusion of the trial, the jury deliberated for a little under an hour and a half.[3] 177-6 RP 1293, 1296. The jury found the Appellant, Rex Gregory, guilty beyond a reasonable doubt of four counts of Child Molestation in the First Degree, on count of Kidnapping in the Second Degree and Rape of a Child in the Second Degree. 177-6 CP 124 - 125. The jury returned a special verdict finding that the crime of Kidnapping in the Second Degree was sexually motivated. 177-6 CP 126.

After presentence investigation, the Defendant was sentenced to a total indeterminant sentence of life in prison on each count and a determinant period of confinement of three hundred four (304) months, including 24 months consecutive, as required by for the sexual motivation enhancement. 177-6 CP 157 - 167.

---

[3] The transcriber's note indicates that the jury was excused to deliberate at 4:27pm and the Court, after all parties were assembled for the verdict, went back on the record at 6:15pm.

Mr. Gregory now appeals claiming that his right to speedy trial was violated as it relates to the charge of Kidnapping in the Second Degree. He further challenges the sufficiency of the evidence to support conviction for that charge. Finally, the Appellant claims that the special verdict instructions were infirm and that the finding of sexual motivation should be set aside.

III. ARGUMENT

The issues raised by the Appellant may appear meritorious at first blush. However, the issues raised fail to take into consideration the facts of this case or applicable law. The issues will be addressed herein in the order they are raised.

1. BECAUSE CONTINUANCES IN THIS MATTER WERE AT HIS REQUEST AND THE APPELLANT FAILED TO OBJECT TO THE TRIAL DATE, ANY OBJECTION THERETO WAS WAIVED.

The Appellant first claims that the Trial Court failed to comply with the requirements of CrR 3.3 following a mistrial in 09-1-00150-4. It is important to note that the Appellant makes no claim regarding the timeliness of any other charges. On December 14, 2009, the Trial Court entered an written order declaring a mistrial and granting a new trial based upon the jury's "hung verdict." CrR 3.3(c)(2) provides:

> (c) Commencement Date.
>
> (2) Resetting of Commencement Date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.
>
> (iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

Under the rule, the new commencement date, as to the charge of Kidnapping in the Second Degree would be December 14, 2009.

CrR 3.3 further establishes the applicable periods. Therein the rule provides that a defendant who is in custody shall have a trial within 60 days and a defendant who is not in custody shall have a trial within 90 days. *See* CrR 3.3(b). It is the State's position that, under the facts of this case, the Court had 90 days, or until March 14, 2010 in which to bring him to trial, after the Court entered order declaring a mistrial.[4] Further, the continuance from March 8, 2010 to March 22, 2010 was clearly at the request of the Appellant due to Mr. Laws' medical condition. As stated in CrR 3.3(f)(2), the bringing of a motion to continue waives any objection to the requested delay.

Pretermitting the issue of the Appellant's actual speedy trial date, this issue is easily defeated by further review of the court rule and the case law interpreting it. CrR 3.3(d)(3) provides:

---

[4] The Appellant asserts that because he was in custody, he was entitled to have his trial held within 60 days. However, the Appellant's argument ignores the fact that, at the time the Court declared a mistrial, the State had filed charges relating to S.A.O. and the Court had set conditions of release in that matter, including a $250,000.00 cash or surety bond. 177-6 CP 309 - 310. *See* State v. Bobenhouse, 143 Wn.App. 315, 329, 177 P.3d 209 (Div. III, 2008)(*aff'd* 166 Wn.2d 881, 214 P.3d 907(2009))(*finding that "detained in jail' means in custody pursuant to the pending charge and that any period of time when the defendant is held in custody on an unrelated charge or is serving another sentence is excluded.*)

> *Objection to Trial Setting.* A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. ***A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.***

(*emphasis added*). Here the Appellant made no motion to dismiss and did not object to any trial dates set, including the trial date of March 22, 2010. As such, he cannot now raise this issue. This result is confirmed by applicable case law. The same result was reached by this Court in State v. Bobenhouse, 143 Wn.App. 315, 322, 177 P.3d 209 (Div. III, 2008). Therein, the Court stated,

> Mr. Bobenhouse did not object at any time to the dates set for trial. Accordingly, the last allowable date for his trial was August 29, 2006, the date set for trial after his last motion for a continuance.

There as here, Mr. Gregory made no objection in writing or otherwise to the dates selected for trial. Further, continuances were at the behest and for the benefit of the Appellant.

The Appellant cites to State v. Austin, 59 Wn.App. 186, 796 P.2d 746 (Div I, 1990) as authority that the 10 day requirement doesn't apply to him. His argument hinges on the false premise that his speedy trial time had already expired when the Court selected the March 8, 2010 trial date. Assuming, *arguendo*, that

the Appellant was entitled to trial within 60 days of his commencement date, his last day for speedy trial would have been February 12, 2010. The Appellant asserts that consolidation and trial setting did not occur until February 22, 2010 when the Court finally entered the order amending the Information in 177-6 to include the allegations from 150-4. However, the Appellant misreads the transcripts.

The Trial Court granted the State's motion to consolidate after hearing on January 11, 2010 and selected a joint trial date of March 8, 2010. 177-6 RP 50, ll. 1 - 5, 57 - 62. All parties, including the Appellant who was present, were on notice that, as of January 11, 2010, the trial date in both matters would be March 8, 2010. The Court's order consolidating these matters was merely formalized by the entry of the order allowing amendment and the filing of the Amended Information which occurred on February 22, 2010. The Appellant's intimation that he was not timely arraigned is likewise not well taken. The Appellant had previously been arraigned on each of the charges then pending, including arraignment on the Kidnapping charge as early as September 28, 2010 under the 150-4 cause.

There is further reason to distinguish the Austin case. In Austin, the defendant objected, albeit, at the eleventh hour. Here,

as in Bobenhouse, the Appellant never lodged any form of objection. While waiving the ten day requirement under the circumstance of the case, the Austin Court placed additional limitation on a defendant's ability to obtain dismissal for violation of the speedy trial time. Therein the Court stated:

> In such event, the defense must notify the prosecutor and the court of its speedy trial objection in sufficient time for the trial to commence within the proper speedy trial period. Austin failed to do so. The trial court correctly ruled that such failure constituted a waiver of Austin's speedy trial objection to the assault charge.

Austin, at 200. Even in Austin, the Court denied dismissal where the defendant waited too long to make an objection. It would be anomalous that a defendant who objects prior (barely) to expiration of the speedy trial clock is denied relief but a defendant who never objects may raise the issue on appeal. Stated more succinctly by the Austin court, "A tardy reliance on speedy trial rules cannot justify a dismissal." *Id*. The Appellant's arguments regarding any alleged speedy trial violation must necessarily fail.

2. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE GUILTY VERDICT AS TO KIDNAPPING IN THE SECOND DEGREE.

The Appellant next asserts that the evidence was insufficient to support the jury's verdict as to the charge of Kidnapping in the Second Degree. In assessing the sufficiency of the evidence, the

court must view the evidence in the light most favorable to the State and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See* State v. Luther, 157 Wn.2d 63, 77, 134 P.3d 205 (2006). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *See* State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The truth of the State's evidence is presumed as well as all reasonable inferences from that evidence. *See* State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254 (Div. III, 1980), *aff'd*, 95 Wn.2d 385, 622 P.2d 1240(1980). Circumstantial and direct evidence are equally reliable. *See* State v. Lubers, 81 Wn.App. 614, 619, 915 P.2d 1157 (Div. II, 1996). Appellate courts defer to the trier of fact on the credibility of witnesses and the persuasiveness of the evidence. *See Id.*

RCW 9A.40.030(1) provides:

> A person is guilty of kidnapping in the second degree if he or she intentionally abducts another person under circumstances not amounting to kidnapping in the first degree.

Here, the Appellant specifically assails the State's case with regard to proof of "abduction" or "restraint."

RCW 9A.40.010 provides in pertinent part:

> (1) "Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty.

> Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him has not acquiesced.
>
> (2) "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;

Here, the jury heard evidence that S.H. was a child less than sixteen years of age, that the Appellant lured/took her from inside his house to the back of his van, and got on top of her in the back of his van. The jury further heard from her mother that Gregory did not have permission to have her in his van. Testimony was taken that the Appellant's wife and roommate were inside the house. A reasonable inference may be drawn that the Appellant took her outside to the van to avoid detection.

The Appellant seems to claim that the back of the van could not be considered a "place where he is not likely to be found" simply because he was caught by S.H.'s little brother. However, a review of the evidence produced at trial demonstrates that the van was backed into the carport. 177-9 Exhibit P1 through P10 inclusive. The photos clearly show that the area utilized by the Appellant was concealed in the front by the van, in the back by a closet, on one side by the apartment and on the other side by two

large blue spruce pine trees. Further, the Appellant's act of taking S.H. to that location demonstrates his belief that the location would be a safe place for him to engage in sexual intercourse.

The whole of the evidence, and reasonable inferences drawn therefrom, support the jury's determination that the back of the van, backed into the carport, was a place where S.H. was "not likely to be found." The Courts have previously ruled that a vehicle is a place where the victim is "not likely to be found." *See* State v. Harris, 36 Wn.App. 746, 754, 677 P.2d 202(Div. I, 1984)(*restraint of victim in car was a place where victim likely would not be found*); State v. Whitney, 44 Wn.App. 17, 21, 720 P.2d 853 (Div. I, 1986) (*abduction occurred where defendant forced victim into his car, "a place where [she was] not likely to be found"*); State v. Billups, 62 Wn.App. 122, 127, 813 P.2d 149 (Div. I, 1991) (*children lured into van were in a place where they were not likely to be found*). Here, the vehicle was backed into the carport. It was surrounded on the remaining three exposed sides by the apartment, the rear closet of the carport, and trees. Even Mr. Payton, who walked past on his way to work, could not see the Appellant or S.H. in the van.

The Appellant next argues that there was no evidence of physical restraint. However, in the context of minor child abduction, even acquiescence of the child equals restraint if done without the consent of a parent or guardian. *See* RCW

9A.40.010(1)(b). There is no requirement of violent force under these circumstances. The courts of this State have upheld kidnapping convictions even where the child victim is an accomplice with the defendant. *See* State v. Ayala, 108 Wn.App. 480, 31 P.3d 58 (Div. III, 2001)(*review denied* 145 Wn.2d 1031, 42 P.3d 975.)(Evidence of 14-year-old kidnapping victim's alleged acquiescence was inadmissible at trial pursuant to statute, despite defendant's contention that victim had been part of conspiracy to extort money from victim's father by staging victim's abduction for ransom.). Where the child is a participant in the kidnapping, it is illogical to hold that "restraint" necessarily requires physical force. The fact that it was a child who was taken to a place where the child would not likely be found, without a parent's consent, is sufficient.

In any event, the Appellant herein did physically restrain S.H. He was lying on top of her in the back of the van. Further, she had to bite him to get him off of her when she saw her brother. Under any view, the Appellant restricted the victim's movements. As stated above in Ayala, consent to the act by the minor child is irrelevant. The jury could reasonably have found that the Appellant abducted S.H. when he moved her from inside his house to the van. Therefore, the Appellant's argument on this point likewise fails.

3. THE JURY'S DETERMINATION THAT THE APPELLANT ACTED WITH SEXUAL MOTIVATION SHOULD NOT BE REVERSED.

The final issue raised by the Appellant relates to the jury instructions regarding the Sexual Motivation enhancement. This matter was tried to a jury commencing March 22, 2010. As to the special verdict, the jury was asked to decide whether Mr. Gregory acted with sexual motivation when committing the crime of Kidnapping in the First Degree. 177-6 CP 89 - 121. The jury was instructed using WPIC 160.00 which provided in pertinent part:

> In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

The Appellant did not object to the giving of that instruction. Subsequent to jury trial in this matter, the Washington Supreme Court issued its ruling in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (July 1, 2010). Therein, the Court ruled:

> [T]he jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, it is not required to find the absence of such a special finding.

See Bashaw, at 147. (*citing* State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)). The Appellant claims that under Bashaw, he is entitled to have the special verdict set aside.

A. The Appelant's Failure to Object to the Concluding Instruction Precludes Appellate Review.

At trial, the State alleged that the Appellant acted with sexual motivation in kidnapping S.H. The Jury was instructed, pursuant to WPIC 160.00 on the issue of the sentence enhancement based on sexual motivation as follows:

> In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

177-6 CP 89 - 121. The Appellant claims that, pursuant to State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (July 1, 2010), the concluding instruction was error and therefore, this Court should set aside the jury finding that he acted with sexual motivation. The Appellant did not object to the concluding instruction regarding "sexual motivation". Based upon the recent decision of this Court in State v. Nunez, __ Wn.App.___, ___ P.3d ___, 2011 WL 505335 (Div. III, February 15, 2011), the Appellant failed to preserve the issue for review by this Court.

In Nunez, this Court ruled that the defendant failed to preserve this very issue when he failed to object to the trial court giving an identical instruction. *Id.* (*Slip Opinion* p. 16). Like the case of Nunez, Mr. Gregory's matter was tried to jury prior to issuance of the Bashaw decision by the Washington Supreme

Court, and just like Nunez, Mr. Gregory did not object to the Court's instruction as to the special verdict. Pursuant to RAP 2.5 and Nunez, this Court should decline to address any alleged error in the sexual motivation concluding instruction.

B. Any Error in the Concluding Instruction Was Not a Manifest Constitutional Error Requiring Reversal of the Jury's Finding That the Defendant Acted with Sexual Motivation with Regard to the Charge of Kidnapping in the Second Degree

In response to the above sound and prudent logic, the Appellant may claim[5] that the error was not waived by his failure to object because it was "manifest Constutitional error" and therefore he is allowed to raise the issue for the first time on appeal. However, as succinctly and astutely articulated by this Court in Nunez, any arguable error is neither Constitutional, nor manifest.

In Nunez, this Court pointed out that the rule in State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), and applied in Bashaw, is not a result dictated by Constitutional jurisprudence, but rather a "common law rule" of "judicial economy." *See* Nunez, *Slip Opinion* p. 12). In analyzing the Supreme Court's decision in Bashaw, this Court noted:

> [T]he rule that a jury can reject an aggravating factor less than unanimously is not compelled by

---

[5]No such claim of "Constitutional" error was made in the Brief of Appellant. The Appellant simply relied upon the Supreme's Court's decision in Bashaw, without discussion of any Constitutional provision.

> constitutional provisions against double jeopardy, "but rather by the common law precedent of this court, as articulated in Goldberg." 169 Wn.2d at 146 n.7. The court characterized the rule adopted in Goldberg and reinforced in Bashaw as serving policies of judicial economy and finality, as with the procedural instruction for the jury arrived at in Labanowski.

See Nunez, *Slip Opinion* p. 12. (*citing* State v. Bashaw, 169 Wn.2d 146-7)(*referencing* State v. Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1991)). Having determined that the Bashaw rule was not of one of Constitutional magnitude, this Court went on to determine whether any such error would, in any event, be manifest.[6] *See* Nunez *Slip Opinion*, p. 14. Therein, this Court found that, even if Constitutional, the error complained of, both therein and herein, was not manifest. This Court stated:

> The giving of the challenged instruction in Mr. Nunez's case had no practical and identifiable consequences on the record that should have been apparent to the trial court. The instruction used conformed, in material respects, to the pattern concluding instruction then recommended for deliberations on the aggravating factors for controlled substance crimes. The jury was able to make all of the findings required, applying the proper burden of proof, under the instructions given.

See Nunez, *Slip Opinion*, p. 14. (*citations omitted*). The rationale applied in Nunez applies to the case at bar, *a fortiori*. Here, not only

---

[6]The Court in Nunez properly noted that the Supreme Court's decision in Bashaw failed to engage in the proper four step analysis endorsed by State v. Lynn, 67, Wn. App. 339, 345, 835 P.2d 251 (Div I, 1992).

was the jury able to make "all required findings", but they effectively did so twice in finding that the Appellant had sexual intercourse with S.H., and that when he moved her from his apartment to the van, he was sexually motivated. The jury heard evidence of the Appellant's aberrant and ongoing sexual relationship with the child victim, and determined that he intended to further this relationship when he took her to the van and away from the location where his roommate or wife might find them. As stated in Nunez, there were "no practical and identifiable consequences on the record that should have been apparent to the trial court." Nunez, *supra*. This is especially true where the Appellant did not object.

C. Any Error in the Concluding Instruction Was Clearly Harmless Beyond a Reasonable Doubt.

While not applicable to this case, any error is harmless beyond a reasonable doubt under these facts. In Bashaw, the enhancement related to whether there was a school bus stop within a thousand feet of the location where the drug crime was committed. *See id.* at 138-9. The Court therein considered whether the erroneous instruction was harmless. *See id.* at 147. The Court stated:

> In order to hold that a jury instruction error was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.' "

See id. (*citing* State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889

(2002) (*quoting* Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). The Court found that there was no way to tell whether a correct instruction would have led to a different result. *See id.* at 148.

Here however, we have a direct insight into the deliberation process. The jury found that the Appellant had intercourse with S.H.. That finding was necessary to return a guilty verdict as to the charge of Rape of a Child in the Second Degree. The jury, having already found that the Appellant's motives toward the child were sexual, simply applied that motive to the charge of Kidnapping in the Second Degree. No other motive was ever offered. Here, there is no need for speculation or conjecture as to the jury's thought process. The jury returned verdicts of guilty on six counts, including instructions as to a lesser included charge of Rape of a Child in the Third Degree, as well as answering the question of sexual motivation finding, and they accomplished this feat in under an hour and a half. It is clear that the verdict would have been the same had the jury been instructed according to Bashaw.

This result is supported by case law in this state applying the harmless error test to other instructional errors. To determine whether the omission of an element is harmless error, the court considers whether the omitted element was supported by uncontroverted evidence. *See* State v. Hartzell, 153 Wn.App. 137,

172, 221 P.3d 928, 946 (Div. I, 2009)(*citing* Neder v. U.S., 527 U.S. 1, 19, 119 S.Ct. 1827 (1999) and State v. Jennings, 111 Wn.App. 54, 64, 44 P.3d 1 (Div. II, 2002), *review denied*, 148 Wn.2d 1001, 60 P.3d 1212 (2003). In Hartzell, the Court affirmed the convictions of the defendant therein for Unlawful Possession of a Firearm, despite the fact that the to conviction instruction omitted the necessary element of knowledge. *Id.* at 171. The Court determined that omission of an essential element was harmless beyond a reasonable doubt where the defendant was also charged and convicted of Assault in the Second Degree with a firearm. *See* Hartzell, at 172. Therein, the Court stated:

> In this case, the jury found each of the defendants guilty of second degree assault while armed with a deadly weapon for shooting into Hoage's apartment. The defendants did not defend against the charge of unlawful possession by claiming they did not know they possessed guns. Rather, they denied they were the ones who shot into the apartment. It is uncontroverted that the shooters, whoever they were, knew they were in possession of guns. Under these circumstances, omitting the element of knowledge from the instruction was harmless error.

See id. Here, the overwhelming evidence was that the Appellant was in the back of a van with a then fourteen year old girl in the early morning hours. Further, the evidence overwhelmingly demonstrated that he had been sexually abusing her since before her fourteenth birthday. There was no evidence that the Defendant abducted S.H. for any purpose other than for sex. As in

Hartzell, the Appellant did not deny that he kidnapped her for sexual purposes, he denied that he kidnapped her at all. Further, as in Hartzell, the jury necessarily found that the Appellant was sexually motivated when they also convicted him of Child Rape.

It is clear that any error was harmless beyond a reasonable doubt. As such, the Appellant's arguments necessarily fail under the facts of the case.

IV. CONCLUSION

The issues raised by the Appellant fail to present a basis for reversal of his conviction for the crime of Kidnapping in the Second Degree. The trial date in this matter complied with the requirements of CrR 3.3. Sufficient evidence supported the jury's verdict of guilty as to the charge of Kidnapping in the Second Degree. Any claimed instructional error as to the special verdict cannot be raised for the first time on appeal and is clearly harmless beyond any doubt. This court should deny the Appellant relief and the verdict of the jury should be affirmed.

Dated this 7th day of March, 2011.

Respectfully submitted,

CURT L. LIEDKIE, WSBA #30371
Attorney for Respondent
Deputy Prosecuting Attorney for Asotin County
P.O. Box 220
Asotin, Washington 99402
(509) 243-2061