COA NO. 41167-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAYLAN BERG,

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

1. THIS COURT'S DECISION IN KORUM IS SOUND BECAUSE IT IS A FAITHFUL APPLICATION OF BINDING SUPREME COURT PRECEDENT.

This Court has called for supplemental briefing on whether it should depart from its decision in State v. Korum, 120 Wn. App. 686, 702-03, 707, 86 P.3d 166 (2004), aff'd in part, rev. in part on other grounds, 157 Wn.2d 614 (2006). In Korum, this Court held as a matter of law that the kidnapping convictions were incidental to the robberies and therefore not supported by sufficient evidence. Korum, 120 Wn. App. at 707. In reaching that holding, the Court relied on the Washington Supreme Court's decision in State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). Korum, 120 Wn. App. at 702-07. Green is still good law and the Court of Appeals is duty bound to follow it. See State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (Court of Appeals is not free to ignore controlling Supreme Court authority). There is no basis to depart from Korum.

a. Precedent Establishes The Incidental Restraint Analysis Is Appropriate In Determining Whether Sufficient Evidence Supports A Kidnapping.

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. Green, 94 Wn.2d at 227-28; 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), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).

To establish a defendant committed first degree kidnapping, the State must prove that the defendant 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).

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 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.

Abduction may be proved in three distinct ways, each of which necessarily involves restraint. Green, 94 Wn.2d at 225. The Court held that kidnapping by means of secreting or holding the victim in a place where she was not likely to be found was not established 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 why 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.

Notwithstanding this binding precedent, a split Division One court in Grant recently repudiated the incidental restraint standard as inapplicable to a sufficiency of evidence challenge, affirming the kidnapping conviction on the ground that separate convictions for first degree robbery and first degree kidnapping do not violate double jeopardy. State v. Grant, __Wn. App.__, __ P.3d __, 2012 WL 8009687 at *4-5 (2012).[1] A split Division One court in Phuong likewise interpreted Green as addressing a double jeopardy problem under the merger rule. State v. Phuong, __ Wn. App. __, 299 P.3d 37, 55-57 (2013).[2] Division Three similarly converted a sufficiency of evidence challenge under the incidental restraint standard to one of double jeopardy. State v. Butler, 165 Wn. App. 820, 831, 269 P.3d 315 (2012).

But the Supreme Court in 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. And Berg raises a sufficiency of evidence challenge, not a double jeopardy challenge.

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[1] A petition for review is pending in Grant (No. 88581-8).
[2] A petition for review is pending in Phuong (number not yet assigned).

As recognized by Division Two of this Court, the sufficiency of 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).

The Supreme Court also recognizes the distinction. In Vladovic, the Supreme Court was faced with deciding two separate claims (1) whether convictions for both first degree robbery and first degree kidnapping violated double jeopardy and (2) whether there was sufficient evidence to support the kidnapping conviction under the incidental restraint doctrine enunciated in Green. Vladovic, 99 Wn.2d at 417, 420-24.

The Court held the conviction for robbery and kidnapping did not merge and were not barred by double jeopardy. Id. at 417, 420-24. It then addressed the separate claim that insufficient evidence supported the kidnapping conviction. Id. at 424. The petitioner relied on Green in arguing his kidnapping convictions could not stand because the acts did not bear the indicia of a true kidnapping. Id. Vladovic applied the sufficiency of evidence test enunciated in Green: "whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of [the crime] beyond a reasonable

doubt." Id. (quoting Green, 94 Wn.2d at 221–22). Vladovic recognized an ultimate killing of a victim does not itself constitute the restraint necessary to prove kidnapping under Green, but found Green did not compel reversal under the facts of the case because the restraint of certain victims was a separate act from the robbery of a different victim. Vladovic, 99 Wn.2d at 424. If the incidental restraint analysis were inapplicable in determining sufficiency of evidence, then there would have been absolutely no reason why the Court in Vladovic applied that analysis when faced with a sufficiency of evidence claim.

The Supreme Court addressed the incidental restraint issue again in Brett, where the petitioner argued insufficient evidence supported the special verdict that the murder was committed in the course of the kidnapping 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. at 166-67.

The two-judge majority in Phuong tried to sidestep the significance of Brett by claiming it was really about double jeopardy merger. Phuong, 299 P.3d at 55-56. That is an untenable reading of Brett. The petitioner in that case raised a sufficiency of evidence challenge and that is the challenge the Court addressed through application of the incidental restraint standard. Brett, 126 Wn.2d at 166-67.

There is no basis to depart from Korum because this Court's holding in that case represents the application of Supreme Court precedent on when a kidnapping will be deemed unsupported by sufficient evidence in light of the incidental restraint standard. See Korum, 120 Wn. App. at 703 ("We agree with Korum that Green requires dismissal of the kidnapping charges here because they were incidental to the robberies.").

Korum is no outlier. The Court of Appeals has followed this Supreme Court precedent in a number of other decisions over the years in determining whether, on the facts of a particular case, sufficient evidence supported a restraint-based conviction under an incidental restraint analysis. See, e.g., 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), review denied, 160 Wn.2d 1017, 161 P.3d 1028 (2007).

b. Courts Have Used The Incidental Restraint Doctrine To Interpret What It Means To Establish The Element Of Abduction For The Kidnapping Offense And The Legislature Has Acquiesced In That Interpretation For Over 30 Years.

The Court in Green and those courts following Green have done no more that interpret what the legislature intended by requiring proof of "abduction" as an element of a true kidnapping. Contrary to the assertions in Phuong and Grant,[3] application of the incidental restraint analysis does not add an additional, non-statutory element to the crime of kidnapping. The Court in Green interpreted what was required to establish the statutory element of abduction for a kidnapping offense through use of the incidental restraint analysis. Green, 94 Wn.2d at 224-27. That is the province of the judicial branch. See State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012) ("To determine whether the State has produced sufficient evidence to prove each element of the offense, we must begin by

[3] Phuong, 299 P.3d at 62 n. 37; Grant, 2012 WL 8009687 at *5.

interpreting the underlying criminal statute."). What a statute means is a pure question of law reviewed de novo by the court. Budik, 173 Wn.2d at 733.

In the over 30 years since Green was decided and followed by other courts, the legislature has never substantively amended the kidnapping statute or issued clarifying legislation. RCW 9A.40.020, RCW 9A.40.030. "This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." City of Federal Way v. Koenig, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009).

The legislature had had over 30 years to amend the kidnapping statute or issue clarifying legislation in the event it disagreed with the sufficiency of evidence analysis in Green and subsequent cases employing the incidental restraint standard. It has not done so. If the incidental restraint analysis usurped legislative authority to define a crime as claimed by Division One in Grant and Phuong,[4] we certainly would have expected the legislature to act after this Court in Korum vacated multiple kidnapping convictions due to insufficient evidence under the incidental

[4] Phuong, 299 P.3d at 60-61; Grant, 2012 WL 8009687 at *5.

restraint standard. Korum, 120 Wn. App. at 707. That was almost 10 years ago.

The legislature has acquiesced to the incidental restraint doctrine as applied to determining whether sufficient evidence supports all the elements of the crime of kidnapping. That acquiescence favors Berg's argument. It is Divisions One and Three, not Berg or the judicial decisions relied on by Berg, which has disregarded legislative intent on the matter.

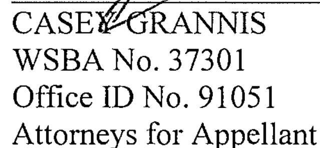
B. CONCLUSION

Berg requests reversal of the kidnapping conviction.

DATED this 31st day of May 2013.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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

STATE OF WASHINGTON, Respondent, vs. DAYLAN BERG, Appellant.	)))))))))	COA NO. 41167-9-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MAY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAYLAN BERG
DOC NO. 34306
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MAY 2013.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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