NO. 41167-9-II

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

STATE OF WASHINGTON, Respondent

v.

DAYLAN ERIN BERG and JEFFREY SCOTT REED, Appellants

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 09-1-00761-6 and
09-1-00762-4

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

A. SUPPLEMENTAL ARGUMENT

The court has asked the parties to provide supplemental briefing on whether it should depart from its holding in *State v. Korum*. 120 Wn. App. 686, 702-03, 707 86 P.3d 166 (2004), *reversed in part on other grounds*, 157 Wn.2d 614 (2006). In *Korum*, the court held there was insufficient evidence to prove the defendant's kidnapping convictions because the kidnappings were "merely incidental" to the defendant's robbery convictions. *Korum*, 120 Wn. App. at 702-03. For the reasons set forth below, yes, the court should depart from its holding in *Korum*.[1]

I. The court in Korum misapprehended the Supreme Court's holding in State v. Green.

In *Korum*, the court stated its holding was "require[d]" by *Green*, because, in *Green*, "the Supreme Court held that there was insufficient evidence of kidnapping because the restraint and movement of the victim was merely 'incidental' to and not 'an integral part of and [was] independent of the underlying homicide.'" *Korum*, at 702-03, *citing State v. Green*, 94 Wn.2d 216, 227, 616 P.2d 628 (1980). In their supplemental briefs, Berg and Reed argue that the court should not depart from its

[1] The arguments in the State's supplemental briefing are based largely on Division One's detailed analysis of the incidental restraint doctrine in *State v. Phuong*. __ Wn. App.__, 299 P.3d 37 (April 22, 2013). *Phuong* was published after the State's original brief was filed and prior to oral argument.

holding in *Korum* because *Green* is controlling Supreme Court authority. *See* Berg – Supplemental Brief of Appellant (hereafter, "Berg"), at 1 and Reed – Supplemental Brief of Appellant (hereafter, "Reed"), at 1. The State agrees that *Green* is controlling authority; however, in *Green*, the Court never held there was insufficient evidence of kidnapping because the kidnapping was "merely incidental" to another charged offense. Consequently, the court's reliance on *Green* was misplaced.

Green was convicted of aggravated first degree murder, based on the aggravating factor that the murder was committed in the commission of first degree kidnapping. *Green*, 94 Wn.2d at 218. A person is guilty of first degree kidnapping when he or she "intentionally abducts another person with intent...[t]o facilitate commission of any felony or flight thereafter." RCW 9A.40.020(1), (1)(b). "'Abduct' means to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(1).

On review, the Court in *Green* was asked to determine whether the State had presented sufficient evidence of kidnapping under the newly-established "*Jackson* test" for sufficiency of the evidence. *Green*, at 224,

citing Jackson v. Virginia, 443 U.S. 307 (1979).[2] Under the *Jackson* test, the Court found there was insufficient evidence to prove the kidnapping aggravator for the following reasons. The Court found there was no evidence of restraint by "threatened use" of deadly force. *Green*, at 228 (stating "the record discloses no evidence that Green employed a *threat* to use deadly force) (emphasis in original). Also, the Court found there was no evidence of restraint by "actual use" of deadly force "*other* than the stabbing of the victim." *Id.* (emphasis in original). Further, and most apt to the facts in the case, the Court found, even though Green moved the victim before he accosted her, the victim was clearly visible to the public in the location where she was accosted, and ultimately killed, and there was a "total lack of any evidence of actual isolation from open public areas." *Id.*, at 226 (stating Green "could not have chosen a more public place to accost his victim or commit the homicide some 2 to 3 minutes later"). Consequently, the Court found there was no evidence of restraint by "secretion" because "no rational trier of fact could have found *beyond a reasonable doubt*, that the victim had been restrained by means of

[2] In *Jackson v. Virginia*, the Court held the test for sufficiency of the evidence, pursuant to the Due Process clause of the Fourteenth Amendment, was whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. Prior to *Jackson*, the relevant inquiry was whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Jackson*, at 318.

secreting her in a place *where she was not likely to be found.*" *Id.* (emphasis in original).

The foregoing findings make it clear that the Court in *Green* did not find there was insufficient evidence to prove the kidnapping aggravator because the restraint employed to commit the kidnapping was "merely incidental" to the homicide. Rather, the Court found there was insufficient evidence to prove the kidnapping aggravator because there was no evidence that restraint was employed, at all.

To be sure, the Court in *Green* went on to state the following regarding "incidental restraint":

> [w]hile movement of the victim occurred, the mere *incidental* restraint and movement of the victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping.

Green, at 227 (italics in original). It is this quote that the court relied on in *Korum* (and Berg and Reed rely on in the instant case) to find that *Green* created a Fourteenth Amendment requirement that a kidnapping must not be "merely incidental" to another charged offense, in order for there to be sufficient evidence of the kidnapping. *Korum*, at 703, *citing Green*, at 227; *see* Berg, at 3-4; Reed, at 3-4. However, the foregoing quote was dictum. It is clear that the foregoing quote is dictum because the Court in *Green* had already found there was no evidence of the element of restraint,

at all, irrespective of whether any restraint was "merely incidental" to the homicide. Further, it is clear that the foregoing quote is dictum because the Court made no mention of "incidental restraint" in its holding. The Court simply held:

> [w]e hold that kidnapping by means of secreting or holding the victim in a place where she was not likely to be found has not been established either by substantial evidence or by the standard of proof required by *Jackson v. Virginia, supra.*

Green, at 228.

The court's holding in *Korum* was neither supported nor compelled by *Green*. Therefore, *Korum* should be revisited.

II. The incidental restraint doctrine implicates the merger doctrine. It does not implicate challenges to the sufficiency of the evidence.

Evidence is insufficient to support a finding of guilt if, after viewing the evidence in the light most favorable to the State, no rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *See State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment. *Jackson*, at 316.

Korum did not claim that no rational trier of fact could find the essential elements of kidnapping beyond a reasonable doubt. Rather, Korum accepted there was sufficient evidence to find him guilty of

kidnapping; however, he argued, pursuant to the incidental restraint doctrine, this otherwise sufficient evidence was rendered insufficient because the kidnappings were "merely 'incidental'" to the robberies. *See Korum*, at 702. Because Korum's argument required an initial acknowledgment that there was sufficient evidence of the kidnappings, the court erred when it accepted Korum's argument as a Fourteenth Amendment challenge to the sufficiency of the evidence.

Instead, Korum's argument regarding "incidental restraint" should have been analyzed as a challenge under the merger doctrine. Under the merger doctrine, two crimes will merge, for the purposes of sentencing, when there is sufficient evidence that both crimes have occurred, however, the legislature has clearly indicated that in order to prove a particular degree of crime, the State must prove not only that a defendant committed that crime, but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes. *State v. Louis*, 155 Wn.2d 563, 571, 120 P.3d 936 (2005). The merger doctrine is a tool of statutory construction "'used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions.'" *Id.*, (quoting *State v. Vladovic*, 99 Wn.2d 413, 419, *n.* 2, 662 P.2d 853 (1983) (internal citations omitted)). The merger

doctrine prevents "pyramiding the charges." *State v. Johnson*, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979).

In their supplemental briefs, Berg and Reed contend that the Supreme Court has repeatedly accepted that the incidental restraint doctrine applies to Fourteenth Amendment challenges to the sufficiency of the evidence. *See* Berg, at 5-6; Reed, at 4. However, this contention, again, is based on a misapprehension of Supreme Court precedent.

The Supreme Court has consistently analyzed "incidental restraint" challenges under the merger doctrine. For example, in *Johnson*, the defendant was convicted of two counts of each of first-degree rape, first-degree kidnapping, and first-degree assault. 92 Wn.2d at 672. In order to prove first degree rape, the State was required to prove the rape was accompanied by the separate act of kidnapping or assault. *Johnson*, at 674. Johnson claimed he was unduly prejudiced when the State was allowed to separately file lesser charges that were encompassed in the greater charge. *Id.*, at 673-74. In response, the Court stated that "a prosecutor should not be denied the right to charge separate offenses for he may fail to persuade the jury that the greater offense was committed." *Id.*, at 680. However, the Court explained, when one crime is "incidental to" and an element of another crime, the incidental crime will merge with the other crime. *Id.*, at 678 (stating it was the legislature's intent that

"punishment for first-degree rape should suffice as punishment for crimes proven in aid of the conviction, which are *incidental* to and elements of the central crime." *Id.* (emphasis added). The Court found the crimes of kidnapping and assault were elements of the crime of first degree rape and that the kidnapping and the assault in Johnson's case were merely incidental to the rape because they occurred almost contemporaneously with the rape and because they served no purpose other than to facilitate the rape. *Id.*, at 681. Consequently, the Court held "when proof of [kidnapping and/or assault] was accepted by the jury, those crimes became *merged* in the completed crime of first-degree rape." *Id.* (emphasis added) (footnote omitted).

Similarly, in *State v. Allen*, when Allen argued that his kidnapping conviction should have been dismissed by the trial court because, "at best, the kidnapping was only incidental to the robbery [conviction] and thus the kidnapping charge was duplicitous," the Court analyzed Allen's argument as implicating the merger doctrine. *State v. Allen* 94 Wn.2d 860, 862, 621 P.2d 143 (1980). The Court held:

> [w]e hold only under the facts of this case the kidnapping and the robbery occurred as separate events, albeit close in time, and that the subsequent kidnapping *was neither incidental to nor merged* with the robbery.

Allen, 94 Wn.2d at 864 (emphasis added). *See also Vladovic*, at 420-21 (when Vladovic was convicted of both robbery and kidnapping, holding Vladovic's kidnapping conviction did not merge with his first degree robbery conviction because proof of kidnapping was not necessary to prove robbery or attempted robbery).

As Berg points out in his supplemental brief, Vladovic also argued that the evidence was insufficient to convict him of kidnapping because the kidnapping was merely incidental to the robbery. *See* Berg, at 5-6, *citing Vladovic*, at 420-24. However, the Court in *Vladovic* declined to evaluate whether the incidental restraint doctrine actually applied to sufficiency of the evidence challenges. Instead, the Court simply stated that *Green* was inapposite and that the kidnapping was clearly a separate act from the robbery because it involved a different victim.[3] *Id.*

Similarly, contrary to Berg and Reed's assertions, in *State v. Brett*, the Court did not affirmatively hold that the incidental restraint doctrine applied to sufficiency of the evidence challenges. *See* Berg, at 6; Reed, at 1, *citing State v. Brett,* 126 Wn.2d 136, 892 P.2d 29 (1995). To be sure, the Court in *Brett* stated: "[t]his court has held and the state concedes that

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[3] In addition, the court in *Korum* did not rely on the majority opinion in *Vladovic* as authority; rather, the court cited only to Justice Utter's partial concurrence and partial dissent, which is not binding. *Korum*, at 706, *citing Vladovic*, at 432-33 (Utter, J., concurring in part, dissenting in part); *see also Ermine v. Spokane*, 143 Wn.2d 636, 645, 23 P.3d 49 (2001) ("...we recognize that Justice O'Connor's separate concurring opinion is not binding...").

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." *Brett*, 126 Wn.2d, at 166. However, it is apparent that the Court was continuing to analyze the incidental restraint doctrine as a merger issue because it pointed out that the "holdings" on which it was relying were decided under the merger doctrine. *Brett*, 126 Wn.2d at 166, *citing* "*[s]ee Green*, 94 Wn.2d at 227 (kidnapping merges into first degree rape); *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1279 (1979) (kidnapping merges into first degree rape), *cert. dismissed*, 446 U.S. 948, 64 L. Ed. 2d 819, 100 S. Ct. 2179 (1980). *See also State v. Allen*, 94 Wn.2d 860, 862-64, 621 P.2d 143 (1980)."[4]

In fact, in *Phuong*, Division One opined that the only reason the Court in *Green* included its passage on "incidental restraint" was because, having found there was sufficient evidence to prove kidnapping beyond a reasonable doubt, the Court was contemplating "whether...that offense would merge into the charged offense of aggravated murder of which it was an element." *Phuong*, at 39, *citing Green*, at 227 (*citing Johnson*, at 676). The *Phuong* court stated the Court in *Green* was clearly

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[4] Also, it is worth mentioning that the court in *Korum* did not rely on *Brett* as authority. Rather, the court stated, *Brett* "does not apply here because its facts differ substantially." *Korum*, at 706, *citing Brett,* 126 Wn.2d 136.

contemplating the merger doctrine with its passage on incidental restraint, because the Court cited to *Johnson* as authority immediately after its passage on incidental restraint. *Phuong*, at 37 (stating *Johnson* is clearly a case about merger).

Because the incidental restraint doctrine does not apply to sufficiency of the evidence challenges, *Korum* should be revisited.

III. The court exceeded its authority in *Korum* because its holding required the State to prove an additional, non-statutory, element for the crime of kidnapping.

The "[a]uthority to define crimes and set punishments rests firmly with the legislature." *State v. Torres Ramos*, 149 Wn. App. 266, 271, 202 P.3d 383 (2009). The Washington legislature has defined the crime of first degree kidnapping as occurring when there is an intentional abduction with the intent to commit an enumerated list of unlawful acts. RCW 9A.40.020. The legislature has further defined "abduction" as restraint by secretion or by use, or threatened use, of deadly force. RCW 9A.40.010.

The legislature has not defined the crime of kidnapping as also requiring proof that the restraint employed was not "merely incidental" to another charged offense. However, the court in *Korum* effectively added this non-statutory element to the kidnapping statute when it held the evidence was insufficient to prove first degree kidnapping because the State failed to prove that the restraint employed in the kidnapping was not

"merely incidental" to the offense of robbery. Because the court had no authority to redefine the offense of kidnapping or to require the State to prove an additional, non-statutory, element of the offense, *Korum* should be revisited.[5]

IV. *Korum* involved a unique set of facts that were not amenable to the establishment of a *per se* rule.

The court in *Korum* held the evidence was insufficient to convict Korum because "as a matter of law...the kidnappings were incidental to the robberies..." *Korum*, at 707. However, *Korum* was ultimately a case about prosecutorial vindictiveness.

The State originally allowed Korum to plead guilty to one count of second degree unlawful possession of a firearm and one count of first degree kidnapping, with a weapon enhancement, with a recommended a sentence of 132 months confinement. *Id.*, at 694. However, after Korum successfully withdrew his guilty plea and exercised his right to a jury trial, the State filed a second amended information, alleging 32 counts, including 10 counts of first degree kidnapping, 3 counts of first degree robbery, and 3 counts of first degree attempted robbery. *Id.*, at 695-96.

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[5] Berg argues that the court can disregard the express statutory language in the kidnapping statute because the legislature has not told the court "not" to do so. *See* Berg, at 9 (stating "[t]he legislature has had over 30 years to amend the kidnapping statute or issue clarifying legislation in the event it disagreed with the sufficiency of the evidence analysis... It has not done so."). This argument is, in a word, absurd.

After Korum was found guilty of 29 counts, following trial, the State recommended an exceptional sentence of 117 years confinement. *Id.*, at 698.

There was no evidence that the State had any motivation for adding thirty counts to Korum's amended information, or for recommending a ten-fold increase in Korum's sentence after Korum successfully withdrew his guilty plea and exercised his right to a jury trial, other than the motive of retaliation. *Id.*, at 715. The State blatantly over-charged Korum simply because it wanted to obtain a guilty plea. *Id.*, at 709. Consequently, the court, found a "'realistic likelihood of 'vindictiveness'" by the State, which deprived Korum of his constitutional right to due process. *Id.* 718 (quoting *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974)).

Given the egregiousness of the State's actions in *Korum*, perhaps it would have been inadequate for the court to simply consider whether Korum's kidnapping convictions "merged." However, the facts in Korum's case are not typical of the facts in most other cases, including the instant case, where there is no evidence of vindictiveness on the part of the State.[6] Consequently, *Korum* was the wrong case for this court to

[6] Berg and Reed were each found guilty of one count of first degree kidnapping and one count of first degree robbery after having been charged with both crimes in the original information. (Berg CP 1-3, 80-91; Reed CP 7-9, 333 – 346).

establish a sweeping, *per se*, rule that could impact kidnapping convictions in any case in which the defendant was also found guilty of another offense. Therefore, *Korum* should be revisited.

V. Even if this court declines to revisit *Korum*, Berg and Reed's convictions for kidnapping should be affirmed.

The court held the evidence was insufficient to convict Korum of kidnapping because the kidnappings were merely incidental to the robberies when they occurred nearly contemporaneously with the robberies and when the force employed served no purpose other than to facilitate the robberies. *Korum*, at 707.

In contrast, in the instant case, the kidnapping occurred at a separate time than the robbery and the force that was employed served a different purpose. Here, the robbery occurred when Berg pinned Watts to the ground, with a knee in his back and a gun pointed at his head, while Reed stole all of Watts' marijuana plants and "whatever else they wanted." (24 RP 993-998). The force that was employed at this point was for the purpose of facilitating the commission of the robbery. Meanwhile, the kidnapping occurred when, *after* Reed had taken all of Watts' property and loaded it into the getaway car, while continuing to point a gun at Watts' head, the appellants ordered Watts to stay on the ground for fifteen minutes or else they would come back and kill him.

(24 RP 999-1000). The threat to use deadly force that was employed at this point was for the purpose of facilitating the appellants' flight from the scene of the completed crimes. Consequently, the kidnapping was not "merely incidental" to the robbery. Therefore, even if the court declines to revisit *Korum*, Berg and Reed's convictions for kidnapping should be affirmed.

B. CONCLUSION

This court should depart from its holding in *Korum.* Berg and Reed's convictions for first degree kidnapping should be affirmed.

DATED this _____ day of June, 2013.

Respectfully submitted:

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