Supreme Court No. 99092-1
(COA No. 79344-6-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY L. DAVIS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Anthony Davis, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Davis seeks review of the decision by the Court of Appeals dated August 3, 2020, for which reconsideration was denied on September 2, 2020. Copies are attached as Appendix A and B.

C. ISSUES PRESENTED FOR REVIEW

1. The search incident to arrest exception to the warrant requirement is narrowly construed and authorizes only a search of the arrested person contemporaneous with the arrest. Here, Mr. Davis carried a backpack when detained by police at the front door of a home where he was staying. After his arrest, he was taken jail without the backpack. The police claimed they needed to search this backpack "incident to the arrest," because they would be taking it to the jail later for safekeeping, even though the homeowner, a parent, was present and able to

safeguard it. Do the police lack authority of law to search personal property under the guise of safekeeping when there is a presently available adult capable of safekeeping this property?

2. Searches of personal property following an arrest are permitted incident to the arrest when there was no other place for the police to safely stow to the property.[1] This type of warrantless seizure of private property taken from the front stoop of a home when the homeowner is present and when the property was possessed by people who came from this home has never been authorized by this Court. Should review be granted to address this constitutional issue?

3. In *State v. Villela*, 194 Wn.2d 451, 460, 450 P.3d 170 (2019), this Court ruled it is unconstitutional for police to impound and conduct an inventory search of a car simply because police were arresting the driver, without first exploring reasonable, available alternatives. This limitation on the government's authority applies because there is no automatic entitlement for the police to search a person's personal property any time that person is arrested. Should review be granted

because the Court of Appeals refused to apply this legal analysis to Mr. Davis's case, contrary to the protections in article I, section 7 and the Fourth Amendment?

4. An essential element of kidnapping in the first degree is that a person's freedom of action is substantially restrained. This substantial restraint must be more than a temporary inconvenience or minor delay. Mr. Smith voluntarily entered a stranger's car to sell marijuana and said he was forced to stay in the car for no more than 20 seconds. Based on the short duration of the delay, is there insufficient evidence the Mr. Smith was substantially restrained as required to prove kidnapping, consistently with case law demanding more than a minor delay to establish substantial restraint?

D. STATEMENT OF THE CASE

On April 17, 2016, Jorden Smith called the police and claimed some people stole his rent money and phone. 10/17/18RP 428-29. He initially claimed he was selling cosmetics to strangers in a car at the Alderwood Mall and these people

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[1] *State v. Brock*, 184 Wn.2d 148, 355 P.3d 1118 (2015); *State v. Byrd*, 178 Wn.2d 611, 615, 310 P.3d 793 (2013).

took $1500 from him and his phone. 10/1/618RP 349, 370; 10/17/18RP 424-25.

Mr. Smith later admitted he was selling marijuana, not cosmetics. 10/16/18RP 370, 381. He routinely sold marijuana in the mall's parking lot, and advertised these sales on Craigslist. 10/16/18RP 350, 400; 10/17/18RP 461. He also admitted he did not know how much money he had with him, it was not $100 bills as he first told the police but $20 bills, and may have been $800. 10/17/18RP 424-26.

Mr. Smith selected the Alderwood Mall parking lot as the meeting place to sell marijuana. 10/16/18RP 397, 400. He got into the back seat of a car with a female driver and male front passenger. *Id.* at 358-59. As he was displaying "the merchandise" in the car, a third person in the back seat put him in a headlock and the front seat passenger put what seemed to be a gun to his head. *Id.* at 360, 362. Someone asked him if it was worth dying. *Id.* at 362. He did not remember anyone taking his money but it was missing afterward. 10/17/18RP 424.

While this was going on, the driver began moving slowly in the parking lot for "like a 10-second drive" before stopping the

car. 10/16/18RP 363; 10/17/18RP 468. The front passenger got out and opened the door, and the backseat passenger pushed Mr. Smith out of the car. 10/16/18RP 365. Mr. Smith said the entire episode where the car moved lasted 15 or 20 seconds. *Id*. at 364.

Mr. Smith watched the car leave the parking lot and memorized its license plate number. 10/16/18RP 367. He said the car was a Nissan Pathfinder. *Id*. at 358. He described the perpetrators by their race and sex: a female driver who was white or Hispanic and wore a fedora, a male passenger who was white or Hispanic with glasses, and black male in the back seat. CP 202. He told the police the gun he saw was not a revolver. 10/17/18RP 433.

The car was registered to Rebekah Midkiff. CP 202; PreTrial Ex. 1. The police went to the Midkiff home and saw an Infiniti in the driveway with the license plate Mr. Smith described. *Id*. The police saw a female and two males walk out of the home and detained them. *Id*. The woman, 18-year old Desiree Midkiff, was holding a purse and Anthony Davis held a backpack. *Id*.; 12/13/18RP 803-05.

Because Mr. Smith had not given the police his correct address, it took the police some time to locate him. 10/17/18RP 429; 502-03. After about one and one-half hours, they found him and brought him to the Midkiff home, where he said these were the three people who stole his money. 10/17/18RP 505.

After this identification, the police took the three to jail. CP 202; PreTrial Ex. 1. The backpack and purse remained on the Midkiff's front stoop. 8/1/18RP 141, 146. An officer who stayed at the scene took the backpack and purse and searched them without a warrant. *Id*. at 150-51. The backpack had marijuana in it along with a holster. 10/17/18RP 526. It did not contain any money. *Id*. at 536. The police did not locate the money Mr. Smith claimed was stolen from him or his phone. *Id*. at 536-37; 10/18/19RP 639-40. No one searched Mr. Smith's car for any evidence. 10/18/19RP 640.

The police got a search warrant for the Midkiff house and car. 10/18/18RP 583, 642. The car had marijuana and a BB gun that looked like revolver. 10/18/18RP 597. The house had Mr. Davis and Ms. Midkiff's clothes and mail. *Id*. at 583, 589.

The prosecution charged all three with first degree robbery and kidnaping in the first degree. CP 280. Mr. Noyes was tried separately and found not guilty. 10/5/18RP 3. Mr. Davis and Ms. Midkiff were tried jointly; Mr. Davis was convicted as charged and Ms. Midkiff was convicted of first degree kidnapping, but the jury was unable to reach a unanimous verdict for robbery. 10/22/18RP 743, 747; CP 125-26.

Both Mr. Davis and Ms. Midkiff were 18 years old and had no criminal history. 12/13/18RP 803-05. His father explained some of the difficulties his son endured as a young black man that could be hard for others to understand but which affected his development and education. *Id*. at 793-94. The court imposed an exceptional sentence below the standard range of 30 months of imprisonment for Mr. Davis. *Id*. at 806.

E. ARGUMENT

1. This Court should grant review to address the narrow exception to the warrant requirement for property the police take for safekeeping after an arrest, where there is a presently available adult able to safeguard the property and where this Court's precedent strongly favors a warrant in this circumstance.

Article I, section 7 offers only "narrowly construed" exceptions to the warrant requirement. *State v. Buelna Valdez*, 167 Wn.2d 761, 775, 224 P.3d 751 (2009). Any exception to the warrant requirement must be "grounded" and "limited" to the specific authorization permitting this search under the state and federal constitutions. *Id*. at 776; U.S. Const. amend. IV.

A search incident to arrest is not an open-ended invitation to rifle through items the accused possessed when first stopped by the police. *State v. Villela*, 194 Wn.2d 451, 460, 450 P.3d 170 (2019). In *Villela*, this Court ruled it was unconstitutional to allow police to impound a car, then search it as incident to arrest as an inventory search for safekeeping, when they were arresting a person who was driving a car at the time. *Id*. at 456, 459-60.

The *Villela* Court ruled this search and seizure was not authorized under article I, section 7 unless the police first considered "reasonable alternatives" to seizing and searching the vehicle incident to the driver's arrest. *Id.* at 460. This limitation on the government's authority applies because there is no automatic entitlement for the police to search a person's personal property any time that person is arrested. *Id.* On the contrary, there must be no other reasonable option. *Id.*

There is no material, constitutional justification for treating a person's backpack differently from a car. When a person is arrested at the front stoop of a home and the homeowner is present, the safekeeping justification for the search of a closing bag with personal property evaporates. The police are not entitled to conduct a warrantless search for a concocted safekeeping purpose when safekeeping is unnecessary.

The Court of Appeals opinion insists that police are automatically entitled to seize and search any property a person possesses when first detained, based on the need for safe-keeping of that property after the person is arrested and taken to jail. The analysis misunderstands the reasonable option

available to the police that prohibited a search of property. The police may not automatically seize and search property under the guise of "safekeeping" during an arrest.

Mr. Davis was put into custody by the police as he stepped out the front door of the Midkiff's home. CP 202; 8/1/18RP 138. The home's owner was present and waited alongside everyone else, outside the home, for a long period of time while the police investigated and then arrested Mr. Davis and the two other people he was with. CP 202; 8/1/18RP 167. The police did not need to search the home in order to discover that Mr. Davis was living in this home. The homeowner was standing there, with the police, for over one hour before the police searched the personal property left on the front porch by the occupants of the home.

Using the fallacy of a mandatory seizure of property predicated on the necessity of jail booking practices is contrary to the protections of article I, section 7. This Court has only allowed such a search where the evidence shows an actual need for "safekeeping" of property following the property owner's arrest.

In *State v. Brock*, 184 Wn.2d 148, 355 P.3d 1118 (2015), the court affirmed a backpack search of a person arrested in a public park because there was "no other place to safely stow" the backpack, and "Brock would have to bring the backpack along with him into custody." *Id*. at 159, It was because the personal item would "necessarily travel with the arrestee to jail" that the search incident to arrest exception to the warrant requirement permitted the search. *Id*. at 155.

In *State v. Byrd*, 178 Wn.2d 611, 615, 310 P.3d 793 (2013), the defendant was arrested at the side of a road for being in possession of a stolen car. She was holding her purse at the time of her arrest and it would necessary come with her as part of her arrest, which authorized the police to search it.

Neither *Brock* nor *Byrd* authorize this type of invasion of private property taken from the front stoop of a home when the homeowner is present and when the property was possessed by people who came from this home. The police also knew the car used on the incident under investigation was registered to this home, further demonstrating the police knew they were arresting people from this home. Yet the police refused to leave

the property at this home and refused to get a warrant in order to search it based on a false premise.

Before seizing and searching property incident to arrest, a police officer "*must consider reasonable alternatives.*" *Villela*, 194 Wn.2d at 460 (emphasis in original, internal citation omitted). Article I, section 7 does not authorize police to search a person's backpack when there is a plain, safe, reasonable, and readily available alternative to seizing it under the guise of "safekeeping." The police were required to get a warrant to search it.

This Court should grant review to reconcile its application of article I, section 7 in *Villela*, with the circumstances of *Brock* and *Byrd*, where there is a reasonable and indeed obviously available alternative to taking property to jail, yet the police refuse to do so in order to search the property without a warrant.

2. Substantial restraint is an essential element of kidnapping that requires more than feeling not free to leave for a few seconds' duration. This Court should grant review where these overlapping elements do not establish a separate crime.

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. For evidence to be legally sufficient, a "modicum of evidence" on an essential element is "simply inadequate." *Jackson v. Virginia*, 443 U.S. 307, 320, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Rational inferences from the evidence "must be reasonable and 'cannot be based on speculation.'" *State v. Hummel*, 196 Wn. App. 329, 357, 382 P.3d 592 (2016) (quoting *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)).

Kidnapping requires an intentional abduction. RCW 9A.40.010(1); RCW 9A.40.020(1). As charged here, it further required this intentional abduction was undertaken with the added intent to facilitate the commission of a robbery. CP 139; RCW 9A.40.010(1); RCW 9A.40.020(1)(b).

The legal requirement of an intentional abduction mandates proof of a substantial interference with the person's liberty. RCW 9A.40.010(1), (6). Restraint must be proven by evidence the person's movements were restricted "without consent and without legal authority in a manner which interferes substantially with his or her liberty." RCW 9A.40.010(6).

In a kidnapping prosecution, "by the plain terms of the statutory definition, the restriction of movement must substantially interfere with the victim's liberty" *State v. Dillon*, 163 Wn. App. 101, 107, 257 P.3d 678 (2011). In *Dillon*, the child complainant voluntary got into the defendant's car as part of an agreement to meet after chatting on-line. This Court found insufficient evidence the complainant's liberty was substantially restrained, even though this case involved a child complainant and, for a child, no physical force or deception is necessary to substantially restrain a child. *Id*. at 108; *see* RCW 9A.40.010(6).

The substantial interference with a person's liberty required to prove restraint must be a "real or material interference," as contrasted with an inconvenience or

annoyance. *State v. Robinson*, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), *aff'd*, 92 Wn.2d 357, 597 P.2d 857 (1979). The Legislature used the word "substantial" to indicate the serious nature of the act and to show it intended this statute to embrace conduct more significant than some delay in a person's freedom of movement. *Id*.

This substantial interference with a person's freedom of movement may not be consensual. *State v. Green*, 94 Wn.2d 216, 226-28, 616 P.2d 628 (1980). This Court has recognized there is clear overlap between kidnapping and robbery, even if the kidnapping does not merge into the robbery. *See State v. Vladovic*, 99 Wn.2d 413, 421, 662 P.2d 853 (1983).

Here, there is no dispute the complainant consensually entered a stranger's car to make an illicit sale of marijuana products. While in the car, he was threatened and his property was taken, showing he was robbed. The driver drove the car for what Mr. Smith described it as a "10 second" drive within the parking lot, and he also said it lasted no more than 20 seconds before he was pushed out of the car. 10/16/18RP 363-65. He ran

to his own nearby car this public shopping center. 10/16/18RP 365.

The force used to steal property does not amount to the "substantial restraint" required to constitute the more serious offense of kidnapping. *See, e.g.*, *State v. Berg*, 181 Wn.2d 857, 872, 337 P.3d 310 (2014) (holding that sufficiency of kidnapping must be analyzed separately from robbery, and holding person "at gunpoint on the ground for approximately 30 minutes" sufficient substantial restraint); *Green*, 94 Wn.2d at 226-27 (carrying person for "unusually short time," over "minimal distance" in place with "clear visibility" to others constitutes insufficient evidence kidnapping).

Mr. Smith's description of being in a car that was driven for a maximum 20 seconds in a populated shopping mall while robbed, where he voluntarily entered the car for purposes of selling marijuana, does not met the threshold of substantial restraint necessary for prove kidnapping in the first degree.

This case demonstrates the risk of improperly elevated charges where mere seconds of restraint is used to markedly elevate a robbery into first degree kidnapping, resulting in a

tremendous increase in punishment. Mr. Davis was a young Black teenager at the time of this incident and the State opted to pursue the most serious of possible charges. It is particularly important that this Court use its oversight of the criminal justice system to guard against racial disparity in prosecution and to protect against a conviction that does not rest on sufficient evidence of a separate, serious offense. *See* Open Letter from Washington Supreme Court, June 2, 2020 (recognizing imperative of legal system working to eradicate racial disparity in criminal justice system rather than relying on precedents allowing such disparity to continue), available at: http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

This Court should grant review due to the overlap between robbery and kidnapping, need to clarify the separate elements of these offenses, and the importance of drawing clear lines on the element of these overlapping offenses to prevent racial disparity in the criminal justice system.

F. CONCLUSION

Based on the foregoing, Petitioner Anthony Davis respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 2nd day of October 2020.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANTHONY LEE ROBERT DAVIS, Appellant.	No. 79344-6-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — A police officer may search personal articles incident to arrest that are in an arrestee's actual and exclusive possession when the arrest process begins. When police officers contacted and detained Anthony Davis, he was holding a backpack. Formal arrest was delayed pending victim identification. Not until one officer drove away with Davis, did another officer at the scene search Davis's backpack. This was a valid search incident to Davis's arrest. We affirm.

FACTS

A jury convicted Anthony Davis of robbery in the first degree and kidnapping in the first degree.

According to the evidence presented at Davis's trial, in April 2016, Jorden Smith was regularly engaged in the illegal sale of marijuana, primarily in concentrated form. He advertised his products on Craigslist.org and at that time, was offering to sell a gram of concentrate for $30, or four grams for $100.

Smith communicated with a potential buyer by text message and arranged to meet that person on April 17, 2016. Smith had previously met the same buyer, later identified as Davis, two days earlier and sold him 2 grams of concentrates. They arranged to meet at the same Alderwood Mall location where they had met before, in the parking lot of the H-Mart grocery store.

Davis asked to purchase $1,500 worth of cannabis products. When Smith arrived at the designated time, Davis was sitting in the passenger seat of a tan colored vehicle that Smith believed was a Nissan Pathfinder. Someone in the vehicle "waved" Smith over. Smith walked over, carrying a bag containing 2 trays of vials containing marijuana concentrates and three jars of flower marijuana. Smith sat in the back seat, on the driver's side.

Smith observed that the driver was a female with a tanned complexion and straight hair, who was wearing a fedora. Smith was able to see her side profile, but not fully able to see her face. Smith said that Davis, who was looking directly at him, was wearing glasses, had a tapered fade hairstyle, and a light complexion, similar to his own.

Smith displayed his products. After a brief silence, Davis said, "Popcorn." At that point, a third individual, a male, sprang up from the rear of the vehicle. He put Smith in a headlock. At the same time, Smith felt a hard object against his forehead. Smith looked up and saw that Davis was holding what appeared to be a firearm to his head.

The car began to move. Smith heard both Davis and the person in the rear say, "'If he's moving, we're going to have to . . . pop him.'" One of the individuals asked Smith if "it," presumably his merchandise, was worth "dying for." The person in the rear continued to hold Smith, while Davis continued holding the gun to his head. Davis went through Smith's pockets. He took Smith's phone, remarking that he did not intend to keep it, but did not want Smith to have his phone number.

The drive lasted from 10 to 20 seconds. The driver pulled up behind some stores. Davis got out and opened the rear door, while still holding the gun. Then, the person in the rear released his hold on Smith and shoved him out of the vehicle. Smith landed on his hands. The driver turned the vehicle around and Davis told Smith to "take a walk."

Davis got back in the vehicle and the driver drove away. Smith went to a nearby store and called the police. He realized that in addition to his telephone, he was also missing between $800 and $1,000.

Smith reported the incident to the police and provided the license plate number. However, because he was afraid of the repercussions of admitting to selling marijuana, Smith initially told the police that he was selling cosmetics.

The license plate number Smith provided was registered to an Infiniti QX-4, which has a similar body style to a Nissan Pathfinder, and was associated with an address in Bothell. Two Lynwood police officers, Warren Creech and Christopher Breault, went to the registered owner's Bothell address. The Infiniti

was parked in the driveway and the hood was warm to the touch. Within a couple of minutes, Davis and two other individuals matching the descriptions Smith had provided, emerged from the home. The officers approached them. The female was holding a tan purse and Davis was holding a backpack.

The officers detained and separated the three suspects. Davis set the backpack on the ground so that one of the officers could place him in handcuffs. Police held Davis and the others in front of the house for more than an hour, waiting for other officers to locate and transport Smith. In the meantime, Officer Creech observed, through the car window, a "revolver" on the front passenger floorboard of the Infiniti.

When officers brought Smith to the scene, he identified the female and the second male, with less than 100 percent certainty, as being the driver and the person in the rear who held him in a headlock. He said he was 100 percent certain that Davis was the front passenger who held a gun to his head.

After Smith identified Davis and the others, police officers arrested them. While another officer placed Davis in his patrol car and drove him to jail, Officer Creech retrieved Davis's backpack, placed it on the hood of his vehicle, and searched it. It contained a holster for a revolver and 40 small containers of a brown substance which smelled like marijuana. Smith identified the containers as identical to the ones taken from him. Police found additional containers of concentrated marijuana in the pocket of the individual that Smith identified as the person who held him in a headlock. A search of the residence uncovered

personal items belonging to Davis in one bedroom, along with additional matching containers in that room. When they searched the Infiniti, police recovered the weapon, which turned out to be a "BB gun revolver," and three jars of flower marijuana.

Upon his convictions, the sentencing court imposed an exceptional sentence below the standard range, based on Davis's age and lack of criminal history.

DISCUSSION

I. Search Incident to Arrest

Davis contends that the warrantless search of his backpack was not a valid search incident to his arrest and the court erred by denying his motion to suppress.

When reviewing the denial of a suppression motion, this court "determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of the stated premise.'" Id. (quoting State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). We review de novo the trial court's conclusions of law regarding a motion to suppress. State v. VanNess, 186 Wn. App. 148, 154, 344 P.3d 713 (2015).

Generally, a warrantless search is prohibited by the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington

Constitution. Garvin, 166 Wn.2d at 249. There are a few "'jealously and carefully drawn exceptions'" to the warrant requirement. Id. at 249-50 (quoting State v. Duncan, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002)). The State bears a heavy burden to show the search falls within one of the narrowly drawn exceptions. Id. at 250.

One exception to the warrant requirement is a search incident to arrest. State v. Brock, 184 Wn.2d 148, 154, 355 P.3d 1118 (2015). There are two types of searches incident to arrest: "(1) a search of the arrestee's person (including those personal effects immediately associated with his or her person—such as purses, backpacks, or even luggage) and (2) a search of the area within the arrestee's immediate control." Id. "A valid search of the latter requires a justification grounded in either officer safety or evidence preservation—there must be some articulable concern that the arrestee can access the item in order to draw a weapon or destroy the evidence." Id. By contrast, a search of the arrestee's person "presumes exigencies and is justified as part of the arrest." State v. MacDicken, 179 Wn.2d 936, 941, 319 P.3d 31 (2014). Such a search requires no additional justification beyond the validity of the arrest itself. State v. Byrd, 178 Wn.2d 611, 617-18, 310 P.3d 793 (2013).

In recent years, our Supreme Court has addressed the extent to which a search of a person incident to arrest extends to articles associated with the arrestee. For instance, the defendant in Byrd was arrested for possession of stolen property after a police officer determined that the car she was riding in had

stolen license plates. Id. at 615. At the time of arrest, Byrd was sitting in the front passenger seat with her purse in her lap. Id. Before removing Byrd from the car, an officer took the purse from her lap and placed it on the ground nearby. Id. After securing Byrd in a patrol car, the officer searched the purse and discovered methamphetamine. Id.

Our Supreme Court held that a search incident to arrest extends to personal property "immediately associated" with the arrestee's person, and applied to the purse in Byrd's lap at the time of her arrest. Id. at 621, 623-24. The court cautioned that the exception does not apply to everything within an arrestee's "reach," but includes "only those personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest." Id. at 623.

Two years later, in Brock, our Supreme Court further clarified the scope of this rule, known as the "time of arrest rule." Brock, 184 Wn.2d at 154. There, a police officer searched the backpack Brock was carrying when the officer approached him in a public park. Brock, 184 Wn.2d at 151. The officer first took the backpack from Brock for safety purposes and to facilitate a Terry[1] stop and frisk, and placed it in the passenger seat of a patrol vehicle. Id. at 151-52. After discovering that Brock had provided false information, the officer arrested him and searched the backpack. Id. at 152.

[1] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Our Supreme Court concluded that Brock possessed the backpack "immediately preceding" his arrest even though he had been separated from the item for approximately ten minutes before his formal arrest. Id. at 158-59. The court stated,

> We hold that when the officer removes the item from the arrestee's person during a lawful Terry stop and the Terry stop ripens into a lawful arrest, the passage of time does not negate the authority of law justifying the search incident to arrest.

Id. at 159. The court observed that the "time of arrest" rule is informed by the "practical reality" that articles that are "part of the person" are also seized during an arrest and will travel with the arrestee into custody. Id. at 156. The court observed that this was so in the case of Brock's backpack: "Having no other place to safely stow it," it would be taken into custody. Id. at 159.

Here as in Brock, there is no dispute that Davis had actual and exclusive possession of his backpack when the arrest process began. Officer Creech testified at the CrR 3.6 hearing that the backpack was either in Davis's hands or slung over his shoulder when he first contacted Davis. Davis was separated from this backpack while detained and his detention later ripened into a lawful arrest. In these critical respects, Davis's case is indistinguishable from Brock.

Without challenging the court's conclusion that Brock is "directly on point," Davis argues that this case is materially different from Brock. He contends that here, (1) the search of his backpack was not contemporaneous with his arrest, and (2) the backpack was not transported to jail with him.

Police officers may conduct a contemporaneous warrantless search shortly after they have removed the arrestee from the immediate area, but the arrest and search should not be separated by a significant lapse of time or by intervening acts.[2] See State v. Smith, 119 Wn.2d 675, 683-84, 835 P.2d 1025 (1992), abrogated on other grounds by Byrd, 178 Wn.2d at 623. For instance, in Smith, an officer searched the arrestee's fanny pack at the scene of arrest approximately 9 to 17 minutes after handcuffing and placing him in the back of a police car. Id. at 683. The court held that the delay and the officer's intervening actions were reasonable and necessary to secure the premises and to protect the officer and the public; therefore, the search was not improper. Smith, 119 Wn.2d at 683-84.

Likewise, here, the trial court found there was no significant delay between Davis's arrest and the search of his backpack. The court also found that the search took place at approximately the same time that officers removed Davis from the scene of arrest. Specifically, the court found that as soon as Smith made a positive identification, police officers placed Davis under arrest. The court found that "[a]t approximately the same time" that other officers were transporting the three individuals to jail, Officer Creech retrieved the backpack from the place where Davis deposited it. And finally, the court found that "just as

[2] Davis asserts that the right of police officers to search incident to arrest "evaporates" when the arrestee is removed to the scene. But, his reliance on cases involving vehicle searches is misplaced. See State v. Byrd, 178 Wn.2d at 619-20 (searches of a person incident to arrest are distinct from searches of the passenger compartment of a vehicle and rules circumscribing vehicle searches do not apply to a search of an arrestee's person).

Davis was either being transported or left the scene," Officer Creech searched the contents of the backpack.

Officer Creech's testimony supports these findings. He explained that he was personally unable to accompany any of the suspects to jail because he had a police K-9 in the back of his patrol vehicle. He testified that multiple officers were required to assist with transporting the three suspects from Bothell to the Lynwood jail. Once those officers arrived, they took over the task of monitoring Davis and the others. He then turned his attention to the scene and collected the backpack and the purse from the porch area. Officer Creech specifically testified that he retrieved the backpack "as [the suspects] were secured in the patrol vehicles." As he began to search the contents, he did not recall whether the arrestees were still at the scene in the patrol cars or whether they had just departed from the scene.[3]

While it is true that Davis and his backpack did not travel to the jail in the same patrol car, the evidence supports the court's unchallenged finding that having determined that the backpack was Davis's personal effect, Officer Creech intended to take it to jail. Officer Creech explained that the officers who arrived on the scene later to assist with transportation did not take any personal effects because they did not know which items were associated with the suspects. But, he, on the other hand, had "full awareness that those backpacks and purses had

[3] Officer Creech's narrative report was not inconsistent with his testimony. His statement that he first retrieved the backpack and "later" searched it simply describes the sequence of his actions and does not contradict his testimony indicating there was no lengthy delay.

been in their possession" and therefore, was in a position to make sure the correct items went to the jail with the suspects. Davis cites no authority that suggests a meaningful distinction between transporting a personal effect in the trunk of the same patrol car as the arrestee and transporting the article shortly after in a different vehicle.

Officer Creech explained that the suspects' personal effects could not be left at the scene because, having arrested the individuals, the police "would be responsible" for their personal effects. He said it was necessary to search the contents of the backpack because those items "were being taken into [his] police vehicle and then back to the police station." Officer Creech testified that a search was required to ensure that he would not inadvertently introduce any "hazards" into his vehicle, the jail, or the evidence facility.

Davis contends there were no exigencies requiring an immediate search of his backpack and maintains that the police officers could have included the item in their application for a search warrant. He also claims it was unnecessary to take his backpack into custody, because, unlike Brock, he was not arrested in a public location. He suggests that officers could have safely left his property in the care of the homeowner. And, because police officers saw him emerge from the home, he asserts that his "personal connection" to the residence was clear.

But, again, the presence of exigent circumstances is unnecessary to justify the search of a personal article at the time of arrest because "exigencies are presumed when officer searches an arrestee's person." Byrd, 178 Wn.2d at

620. And, as a factual matter, there is nothing in the record to indicate that police officers had any information about the nature of Davis's connection to the residence.[4] Davis cites no authority that requires police officers to explore other potentially viable options to store an article of the person upon arrest. The court rejected a similar argument in Byrd:

> Byrd cites no authority for the claim that she could have shed the purse after being placed under arrest, and her proposed rule has no limits. If an officer cannot prevent an arrestee from leaving her purse in a car, what of other personal articles, such as an arrestee's jacket, a "baggie" of drugs, or a concealed firearm? We reject Byrd's claim and hold that if [the officer] had authority to seize Byrd and place her under custodial arrest, he also had authority to seize articles of her person, including her clothing and purse that were in her possession at the time of arrest.

Byrd, 178 Wn.2d at 624. In other words, the time of arrest rule cannot be avoided merely because, hypothetically, an item could be left behind. The authority to seize and search stemmed from Davis's actual possession of the backpack at the outset of the arrest process and his subsequent lawful arrest. No further justification is required.

Because the backpack was an article of Davis's person when the police contacted and detained him, it was within the scope of the search incident to arrest. The trial court did not err in denying Davis's motion to suppress evidence discovered in the search of his backpack.

[4] It was only after searching the home that police discovered mail and clothing belonging to him in one of the bedrooms.

II. Sufficiency of the Evidence

Davis challenges the sufficiency of the evidence to support his conviction of kidnapping. Specifically, he argues that the State's evidence was insufficient to prove that he "abducted" Smith.

Due process of law requires the State to prove every element of a charged crime beyond a reasonable doubt in order to obtain a criminal conviction. State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). "The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

As charged here, in order to convict Davis of kidnapping, the jury had to find that he "intentionally abduct[ed]" Smith with intent to facilitate the commission robbery or flight thereafter. RCW 9A.40.020(1). According to the statute, a person may abduct by (1) secreting or holding another in a place he or she is unlikely to be found, or (2) using or threatening to use deadly force. RCW

9A.40.010(1). In this case, the State relied on only the second means of abduction and the court instructed the jury as follows:

> Abduct means to restrain a person by using or threatening to use deadly force.
>
> Restraint or to restrain means to restrict another person's movements without consent and without legal authority in a manner that interferes substantially with that person's liberty.

See RCW 9A.40.010(1).

Davis argues that holding Smith in a headlock, pointing an apparent firearm at his head, and threating to kill him, were the means to accomplish robbery. He contends that, apart from this conduct directed toward the goal of taking Smith's property, any restraint was minimal. He cites the fact that Smith entered the vehicle willingly, he estimated that the drive lasted no more than 20 seconds, and the car travelled only a short distance. Although Davis does not use the term "incidental," his analysis appears to be based on a now-abrogated interpretation of State v. Green, 94 Wn. App. 216, 226-28, 616 P.2d 628 (1980) (characterizing movement and restraint of the victim as incidental and finding evidence insufficient to establish abduction by secretion or holding where unlikely to be found).[5] As our Supreme Court made clear in State v. Berg, 181 Wn.2d 857, 860-61, 337 P.3d 310 (2014), where the State charges kidnapping and robbery separately, whether a kidnapping is "incidental" to a robbery is immaterial.

[5] See e.g. State v. Korum, 120 Wn. App. 686, 702-03, 86 P.3d 166 (2004) (interpreting Green as establishing due process standard that evidence of kidnapping is insufficient if it is incidental to another crime), affirmed in part and reversed in part, 157 Wn.2d 614, 141 P.3d 13 (2006).

To the extent that Davis argues that the facts are comparable to those in Green, he fails to appreciate that Green involved the sufficiency of evidence to prove abduction by a different means. The question in that case was whether the evidence was sufficient to support a finding that the defendant secreted or held the victim where she was unlikely to be found. Green, 94 Wn. App. at 226. In determining that the evidence was insufficient, the court relied on the short duration of time, the fact that the victim was moved an insubstantial distance, the "clear visibility" of the location, and lack of isolation from "open public areas." Id. These factors are not relevant to whether Davis and his accomplices restrained Smith by force or threat of force. And, the fact that Smith initially entered the car voluntarily does not affect the sufficiency of the evidence to establish restraint by force and threats of deadly force. See State v. Mines, 163 Wn.2d 387, 392, 179 P.3d 835 (2008) (evidence sufficient to support kidnapping conviction although the victim voluntarily entered the assailants' vehicle).

The State presented the following evidence of restraint. Triggered by a code word, Davis's accomplice placed Smith in a headlock. Then, while Smith was being held in this manner, Davis placed what appeared to be firearm to his forehead. Davis and the person holding Smith in a headlock threatened to kill Smith if he moved. Davis and his accomplices drove him from a visible location in the front parking lot of a store to a presumably more secluded location behind the stores. The person in the rear of the vehicle continued to hold Smith in a headlock until the vehicle stopped. When Davis opened the door, still pointing

the apparent firearm at Smith, Davis's accomplice shoved Smith out the vehicle. Viewing the evidence in the light most favorable to the State, as we must, a rational juror could find beyond a reasonable doubt that Davis and his accomplices substantially interfered with Smith's liberty by restraining him through force and the threat of deadly force.

Affirmed.

Appelwick, J.

WE CONCUR:

Bowman, J.

Leach, J.

APPENDIX B

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

STATE OF WASHINGTON, Respondent, v. ANTHONY LEE ROBERT DAVIS, Appellant.	No. 79344-6-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Anthony Davis, filed a motion for reconsideration. The respondent, State of Washington, has not filed an answer. The panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied. Now, therefore, it is

ORDERED that the motion for reconsideration is denied.

Appelwick, J.
Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79344-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Nathaniel Sugg
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☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: October 2, 2020
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

October 02, 2020 - 4:25 PM

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