

COURT OF APPEALS
DIVISION II
1010320 11 03 07
STATE OF WASHINGTON
BY ca
DEPUTY

NO. 40793-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

SHAMARR DERRICK PARKER, Appellant.

APPELLANT'S BRIEF

Rebecca Wold Bouchey
WSBA #26081
Attorney for Appellant

P.O. Box 1401
Mercer Island, WA 98040
(206) 275-0551

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
III.	SUMMARY OF THE ARGUMENT.....	1
IV.	STATEMENT OF THE CASE	2
V.	ARGUMENT	6
	ISSUE 1: IS THERE SUFFICIENT EVIDENCE TO SUPPORT THE KIDNAPPING CONVICTION WHERE THE JURY SPECIFICALLY REJECTED THE VICTIM’S TESTIMONY AND THE ONLY TESTIMONY OF “RESTRAINT” RELATED TO THE VICTIM’S STORY OF ALLEGED RAPE, AND DESCRIBED ONLY INCIDENTAL RESTRAINT	6
VI.	CONCLUSION.....	11

TABLE OF AUTHORITIES

TABLE OF CASES

Washington Cases

<i>State v. Aver</i> , 109 Wn.2d 303, 310, 745 P.2d 479 (1987).....	6
<i>State v. Brett</i> , 126 Wn.2d 136, 166 892 P.2d 29 (1995)	8
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980)	6
<i>State v. Green</i> , 94 Wn.2d 216, 227, 616 P.2d 628 (1980)	8, 9
<i>State v. Johnson</i> , 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).....	8, 9

STATUTES

RCW 9A.40.020.....	6
--------------------	---

I. ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Mr. Parker of first degree kidnapping without evidence sufficient to convince a fair-minded jury of his guilt beyond a reasonable doubt.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is there sufficient evidence to support the kidnapping conviction where the jury specifically rejected the victim's testimony and the only testimony of "restraint" related to the victim's story of alleged rape, and described only incidental restraint?

III. SUMMARY OF THE ARGUMENT

This case arises from allegations of rape, which were rejected by the jury. Although the prosecution's witness, Ashley Weeks, testified that she was abducted and raped by Shamarr Parker, the jury ultimately did not believe her testimony and did not convict Mr. Parker of rape. From the beginning, Mr. Parker had admitted that he had committed theft by taking from Ms. Weeks her stash of marijuana. The jury accepted this concession and convicted Mr. Parker of first degree robbery. However,

the jury went further and convicted Mr. Parker of first degree kidnapping. Without Ms. Weeks' testimony, there is insufficient evidence of kidnapping in this case. The jury rejected Ms. Weeks testimony when it refused to return a guilty verdict on the charge of rape. Therefore, there is also insufficient evidence of first degree kidnapping in this case.

IV. STATEMENT OF THE CASE

On December 19, 2008, Tracy Miller called 9-1-1 to report that her then seventeen year old daughter, Ashley Weeks, had told her she had been raped. RP 94.

The story Ms. Weeks told was that she had been waiting at the bus stop when Mr. Parker drove by a couple of times. Ms. Weeks said she walked away, but met up with Mr. Parker in an alley, where she said he grabbed her, tied her hands and forced her into the back of the car. RP 181, 183-84. Then, Ms. Weeks said Mr. Parker drove through deep snow to an unknown remote location, where he went through her clothes, took money, and raped her. RP 189, 194. Ms. Weeks claimed that Mr. Parker had threatened her with a knife. RP 183. She said she had never met Mr. Parker before. RP 186. Ms. Weeks had written down the license number of the car, which she gave to the police. RP 200.

Ms. Weeks was taken to the hospital and a rape exam was performed. RP 372. Testing of the samples gathered from Ms. Weeks

during the rape exam established the presence of semen, but DNA testing established a match to Justin Lyons, not Shamarr Parker. RP 661.

Ms. Weeks admitted that she lied to police, hospital staff and her mother about several pertinent facts. On the day she said she was raped, Ms. Weeks had actually not been with girlfriends as she told her mother and police, but had spent the day with her boyfriend, having sex and smoking marijuana. RP 137, 172, 249. Jason Lyons, Ms. Weeks' boyfriend testified that he had dropped her off at a bus station in Puyallup, not ridden with her on the bus as she had initially told police her "friend" had done. RP 446. Ms. Weeks did not admit to police that she had sex with Mr. Lyons that day until she was confronted by the detective with DNA results showing the sperm recovered did not match Mr. Parker. RP 208, 328. Moreover, Ms. Weeks did not admit that she had possessed marijuana or that it had been stolen until confronted at the defense interview. RP 190, 208, 331. Even then, at first, Ms. Weeks said she only had two small bags. RP 332. At trial, she testified she had four bags of marijuana. RP 190, 332.

Mr. Parker told his ex-girlfriend, Dacia Birka, on December 19, 2008, that he took marijuana from a girl that night. RP 544. Ms. Birka told police about this conversation during an interview following Mr. Parker's arrest. RP 560. Mr. Parker told her that his cousin had bought

marijuana from the girl before. RP 556. So, he called her and arranged to buy from her. RP 557. They met up as arranged and she got in the car and gave him the marijuana. RP 557. Mr. Parker said he took “two zips.” RP 545. Then, he told her he was not going to pay and ordered her out of the car. RP 557. Mr. Parker said when she refused to leave the car, he threatened her with a knife to make her leave. RP 557. Ms. Birka told police that she looked through Mr. Parker’s cell phone and found an entry for a girl named Ashley and phone calls made to the number. RP 560, 695. Ms. Birka also told them that Mr. Parker decided he did not need to leave town because he did not think police would be too concerned about a case of “petty theft.” RP 697.

Police established that the car matching the license number belonged to Mr. Parker’s mother and that Mr. Parker frequently drove it. RP 481-82, 543. Police found a knife in the car, but Ms. Weeks could not say that it matched the knife she described as a “fillet knife” with a light wood handle. RP 315, 340, 493, 494, 656. The front seat of the car matched Ms. Weeks’ description—there were beads hanging from the rearview mirror. RP 496, 711. But, the back seat of the car contained a child seat that had signs of having been in place for some time. RP 534-35. Ms. Weeks had never mentioned a child seat in the back seat. RP 710.

If Ms. Weeks had been lying across the back seat as she had said, she would have been pushed up against the child seat. See RP 183-84, 736.

Police identified what they believed was the location of the rape. RP 259. Although Ms. Weeks could not say the route that was taken and remembered little detail about it, she told police this was the location of the rape. RP 259, 657. No evidence was found at that location that linked it to Mr. Parker. The property owner said they had problems frequently with strangers driving onto the property. RP 579.

At trial, Mr. Parker's counsel conceded that he was guilty of robbery, but argued that there was insufficient evidence of kidnapping or rape. RP 754, 757.

After two days of deliberation, the jury reached agreement on two of the three charges. The jury convicted Mr. Parker of first degree robbery and first degree kidnapping. RP 798-799. In specific interrogatories completed by the jury, it specifically rejected rape as the underlying motive for kidnapping, selecting robbery instead. RP 798. The jury returned a special verdict for a deadly weapon used in the kidnapping. RP 799. The jury also returned a deadly weapon special verdict for the robbery, but could only agree that it "appeared to be" a deadly weapon, and could not agree that it actually was a deadly weapon. RP 799-800.

At sentencing, the parties agreed on the offender score and sentencing range. RP 809-810, 817. They also agreed and the court found that the two convictions constituted the same criminal conduct. RP 817, 826-27, CP 98. The sentences were run concurrently with the two enhancements consecutive to the underlying sentence and each other. RP 826-27, CP 102.

This appeal timely follows.

V. ARGUMENT

ISSUE 1: IS THERE SUFFICIENT EVIDENCE TO SUPPORT THE KIDNAPPING CONVICTION WHERE THE JURY SPECIFICALLY REJECTED THE VICTIM'S TESTIMONY AND THE ONLY TESTIMONY OF "RESTRAINT" RELATED TO THE VICTIM'S STORY OF ALLEGED RAPE, AND DESCRIBED ONLY INCIDENTAL RESTRAINT?

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Mr. Parker was charged with violating RCW 9A.40.020(1)(b) and the jury was instructed that: "A person commits the crime of Kidnapping in the First Degree when he intentionally abducts another person with

intent to facilitate the commission of rape or robbery or flight thereafter.”

CP 58. The definition given to the jury for “abduct” was “to restrain a person by either secreting or holding the person in a place where that person is not likely to be found or using or threatening to use deadly force.” RP 60. The jury was told that “[r]estraint or 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.” RP 60.

This case is unique because it is obvious from the jury’s failure to reach a verdict on the rape charge that the jury did not believe Ms. Weeks’ testimony that she was raped. The problem is that Ms. Weeks’ testimony about being taken to another location is inextricably intertwined with her rape story—which was rejected by the jury. If the rape is rejected, then there is also insufficient evidence of kidnapping because without Ms. Weeks’ testimony, there is absolutely no evidence that she was restrained beyond what was incidental to the robbery.

Mr. Parker’s statements to Ms. Birka support the first degree robbery conviction, but there is nothing in these statements to support evidence of restraint or abduction. According to those statements, Ms. Weeks voluntarily got into Mr. Parker’s car to sell marijuana, but refused

to leave without being paid. Far from being restrained by force, Mr. Parker brandished the knife to get her to leave.

There was no physical evidence to support the claim of abduction or restraint. No evidence at the alleged scene of the rape (which was dismissed by the jury) linked Mr. Parker or his car to the location. To the contrary, the day of the alleged crime, the roads were treacherous from snow and it would have been difficult for Mr. Parker to have driven Ms. Weeks away from their meeting place and back.

Moreover, to the degree that the jury might have used Ms. Weeks' testimony of the transport to another location, rejected the rape, but believed that was where she was robbed, this is also insufficient to support an abduction finding because the restraint is merely incidental to the robbery.

“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.” *State v. Brett*, 126 Wn.2d 136, 166 892 P.2d 29 (1995); *See also State v. Green*, 94 Wn.2d 216, 227, 616 P.2d 628 (1980) (kidnapping merges into first degree rape); *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948, 100 S.Ct. 2179, 64 L.Ed.2d 819 (1980) (kidnapping merges into first degree rape).

A case that is illustrative on the concept of incidental restraint is *State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979), *overruled in part* by *State v. Sweet*, 138 Wn.2d 466, 476-79, 980 P.2d 1223 (1999). Although *Johnson* analyses “incidental restraint” in the since-overruled a merger analysis, courts have since applied this same analysis to a standard for finding sufficient evidence to support a kidnapping conviction. *State v. Green*, 94 Wash.2d 216, 225-28, 616 P.2d 628 (1980), applied what was then a new sufficient-evidence standard to hold that evidence of restraint (necessary to prove kidnapping) was insufficient under the facts of that case to prove kidnapping because that same restraint was incidental to an attempted rape. *Green* borrowed the “incidental restraint” concept from *Johnson* and incorporated this concept into a new standard for determining sufficiency of evidence on appeal. *Green*, 94 Wn.2d at 225-26.

In *Johnson*, two girls voluntarily went with Johnson to his home. 92 Wn.2d at 672. He summoned one girl to the bathroom where he declared his intention to rape her, held a knife to her neck, and bound her hands and mouth with adhesive tape. *Johnson*, 92 Wn.2d at 672. He then similarly restrained the other girl, and raped both victims. *Johnson*, 92 Wn.2d at 672-73. Johnson left to buy cigarettes, came back, and then took one of the girls to a wooded area where he raped her again. *Johnson*, 92 Wn.2d at 673. The *Johnson* Court found that the kidnapping was not

separate and distinct from, but was merely incidental to the rape. *Johnson*, 92 Wn.2d at 681.

Like *Johnson*, the alleged abduction in this case was merely incidental to the robbery. The jury found that Mr. Parker “abducted Ms. Weeks to facilitate the commission of the crime of robbery.” Supp. CP, Interrogatories, Count I. Because the jury did not believe that Ms. Weeks was raped, her remaining testimony amounts to this: she was forced into the car, taken to another location, robbed, and returned to her home. Thus any restraint was for the purpose of robbery and was ended when the robbery was complete. This testimony, if believed, is at best a description of “mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury.” She was taken to another location to rob her—the incidental restraint is not sufficient to support an independent charge of kidnapping.

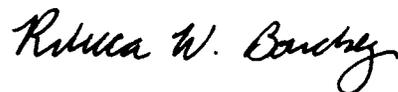
Although it is true that a court reviewing a claim of sufficiency does not delve into credibility, *State v. Mines*, 163 Wn.2d 387, 179 P.3d 835 (2008), in this case, the jury itself made the credibility determination when it rejected Ms. Weeks’ testimony that she was raped. Without testimony about the alleged rape, which is part and parcel of Ms. Weeks’ whole story of being abducted, there is not sufficient evidence to support a conviction for first degree kidnapping because there is no evidence of

abduction or restraint beyond that incidental to the robbery. Moreover, even if the court does give credence to Ms. Weeks' remaining testimony, the abduction and restraint she testified to was merely incidental to the robbery and therefore insufficient to support a separate kidnapping charge. For these reasons, the kidnapping conviction must be reversed.

VI. CONCLUSION

Without the discredited testimony of Ms. Weeks, there is no evidence in this case that she was abducted or restrained and therefore there is insufficient evidence of kidnapping in the first degree. Furthermore, Ms. Weeks' testimony is insufficient to establish sufficient evidence of abduction and restraint separate from what was incidental to the robbery charge. The kidnapping conviction must therefore be reversed.

DATED: December 17, 2010



Rebecca Wold Bouchey #26081
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on December 17, 2010, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

Counsel for the Respondent:
Kathleen Proctor
Office of Prosecuting Attorney
930 Tacoma Ave. S., Rm. 946
Tacoma, Washington 98402-2171

Appellant:
Shamarr Parker
DOC #752439
Washington State Penitentiary
1313 N. 13th
Walla Walla, WA 99362

Rebecca W. Bouchey

Rebecca Wold Bouchey
WSB# 26081
Attorney for Appellant

RECEIVED
STATE OF WASHINGTON
BY
IDENTITY