

COA NO. 40805-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

OSCAR ESCOBAR,

Appellant.

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STATE OF WASHINGTON  
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FILED

COURT OF APPEALS  
DIVISION TWO

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

The Honorable Brian Tollefson, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE KIDNAPPING AS A SEPARATE CRIME UNDER THE INCIDENTAL RESTRAINT DOCTRINE.

In a footnote, the State mentions the assault merged with the kidnapping and robbery convictions and, for this reason, fails to address Escobar's argument that the kidnapping was incidental to the assault. Brief of Respondent (BOR) at 11 n.6.

The State cites no applicable authority for the proposition that a conviction need not survive a sufficiency of evidence challenge when another crime merges into it. Argument for which no authority is cited nor supported may not be considered on appeal. King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706, 717, 846, 846 P.2d 550 P.2d 550 (1993); see State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (courts may assume that, where no authority is cited in support of a proposition, "counsel, after diligent search, has found none."). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998); see also State v. N.E., 70 Wn. App. 602, 607 n.3, 854 P.2d 672 (1993) (argument presented in a footnote will not be addressed).

In any event, the State's undeveloped claim fails because the sufficiency of evidence analysis is distinct from whether crimes merge for

double jeopardy purposes. In re Pers. Restraint of Bybee, 142 Wn. App. 260, 266-67, 175 P.3d 589 (2007) ("Although Green<sup>1</sup> 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 determining whether there is insufficient evidence of kidnapping, it is irrelevant that the assault merged with the kidnapping and robbery. Escobar has the constitutional due process right not to be convicted if the State fails to prove all necessary facts of the crime. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). That due process right remains, regardless of whether his right to be free from double jeopardy is otherwise protected. For the unchallenged reasons set forth in the opening brief, there was insufficient evidence of kidnapping because it was incidental to the assault. See Opening Brief of Appellant at 12-17.

The State elsewhere claims the kidnapping was not incidental to the robbery because the robbery was "completed" when Escobar took the phone from Hernandez at gunpoint. BOR at 13. From this premise, the State argues there was sufficient evidence of kidnapping because the

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<sup>1</sup> State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

subsequent restraint of Hernandez as they moved around the apartment did not facilitate the robbery. BOR at 13.

The State's premise is flawed. Washington courts take a transactional view of robbery that does not consider the robbery complete until the assailant has escaped. State v. Manchester, 57 Wn. App. 765, 770, 790 P.2d 217 (1990). The robbery statute provides "force or fear must be used to obtain *or retain* possession of the property, *or to prevent or overcome resistance* to the taking[.]" RCW 9A.56.190 (emphasis added). By holding what appeared to be a gun on Hernandez as they moved around the apartment, Escobar used the threat of force to retain the phone or prevent Hernandez's resistance to the taking. Under the transactional view, a forceful retention of stolen property in the owner's presence is the type of "taking" contemplated by the robbery statute. State v. Handburgh, 119 Wn.2d 284, 290, 830 P.2d 641 (1992). The robbery remained ongoing after Escobar took the phone because he used the threat of force to retain it.

Conversely, the transactional view is inapplicable when an assailant uses force to unlawfully take personal property from a person but uses no additional force to retain it. State v. Robinson, 73 Wn. App. 851, 857, 872 P.2d 43 (1994). In Robinson, the defendant used force to take a girl's purse and then simply jumped into a car, which meant he did not use

any additional force to retain the purse or to try to escape. Robinson, 73 Wn. App. at 857. The "transactional view" did not apply because the taking was complete once the defendant possessed the purse and returned to the car. Id.

In contrast, the transactional view applies in Escobar's case because he used the threat of force to retain the property, which meant the robbery was not complete until Hernandez fled the apartment. Under these circumstances, there is insufficient evidence to support the kidnapping because the restraint was incidental to the robbery.

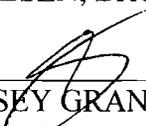
B. CONCLUSION

For the reasons stated above and in the opening brief, Escobar respectfully requests that this Court reverse the convictions.

DATED this 27<sup>th</sup> day of April 2011.

Respectfully Submitted,

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**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 30<sup>TH</sup> DAY OF DECEMBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF DECEMBER 2010.

x *Patrick Mayovsky*