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Division III  
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No. 35450-4  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON,**

Respondent,

vs.

**NESTOR VALDOVINOS GONZALEZ,**

Appellant.

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**RESPONDENT'S REPLY BRIEF**

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**I. IDENTITY OF RESPONDENT:**

The State of Washington was the Plaintiff in the Superior Court, and is Respondent herein. The State is represented by the Kittitas County Prosecutor's Office.

**II. STATEMENT OF RELIEF SOUGHT:**

The State is asking this Court to affirm the decisions of the Superior Court and uphold the Appellant's Conviction and Sentence.

**III. RESPONSE TO ISSUES PRESENTED FOR REVIEW:**

A. The State does not agree with the argument made by Appellant as to the basis for review, but will address the purported merits rather than contest the Commissioner's ruling.

B. Appellant has not correctly applied the standard for a vagueness challenge; the Kidnapping in the First Degree statute, RCW 9A.40.020, is not vague facially or as applied, and in this case the Kidnap was not merely incidental to the Robbery.

**IV. STATEMENT OF THE CASE:**

The parties are limited as to how detailed this Statement can be by the state of the record. Appellant's summary describing the facts of the case (Br. of Appellant, at 2 – 3) is sufficient for the

purpose of Respondent's response, and it will be accepted as it is, unless otherwise noted below.

**V. ARGUMENT:**

**A. Appellant does not correctly describe the applicable standard.**

Appellant has incorrectly stated the applicable standards for the assessment of vagueness. Reasoned review shows an argument that is simply unable to achieve its Sisyphean task. This court should summarily dismiss the appeal, affirm the convictions and deny any relief.

A properly enacted statute or ordinance is presumed constitutional. The party challenging the enactment bears the burden of proving the statute to be unconstitutionally vague beyond a reasonable doubt. *Spokane v. Douglass*, 115 Wn. 2d 171, 177, 795 P. 2d 693 (1990). It has been established for nearly a century that "(t)he due process clause of the Fourteenth Amendment to the United States Constitution requires statutes to provide fair notice of the conduct they proscribe." *State v. Watson*, 160 Wn. 2d 1, 6, 154 P. 3d 909 (2007) (citations omitted). To achieve that goal, the statutory language "must be sufficiently explicit to inform those who are subject to it what conduct on their

part will render them liable to its penalties”. *Watson*, at 6-7, citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926). 92 years later, the law remains the same. *State v. Murray*, \_\_\_ Wn. 2d \_\_\_, \_\_\_ P. 3d \_\_\_ (slip op., May 17, 2018, at ¶¶ 18-21). A statute must also provide ascertainable standards of guilt to prevent arbitrary enforcement. An enactment that fails either test is unconstitutionally vague. *Spokane v. Douglass*, 115 Wn. 2d 171, 178, 795 P. 2d 693 (1990) (citations omitted). Washington generally addresses the issue in the same manner as the Federal Courts do. *State v. Gray*, 189 Wn. 2d. 334, 348, 402 P. 3d 254 (2017) (citations omitted).

A statute can be void for vagueness in either or both of those two ways.

First, the statute may authorize and even encourage arbitrary and discriminatory enforcement. Second, the statute could fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits. The most important aspect of the vagueness doctrine is the requirement that a legislature establish minimal guidelines to govern law enforcement.

*Gray*, at 347-348 (citations and internal quotation marks omitted).

The statute at issue in *Gray*, RCW 9.68A.050 (“Dealing in depictions of minor engaged in sexually explicit conduct”), was applied to the sending of sexually explicit photos via text message by the seventeen year old juvenile male who was depicted in the photos to an adult woman. The statute reads, in relevant portion: “A person commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the first degree when he or she” ... “knowingly ... disseminates... “visual or printed matter that depicts a minor in an act of sexually explicit conduct”.

Gray and his *amici* argued that the statute does not adequately inform the public that a depicted minor can also be the “person”, thus not providing reasonable notice about what acts are prohibited. The Court quickly rejected that position, noting that a “person” means any “person”, which must include a minor taking photos of himself. Gray further argued that the State can pick and choose which minors will be prosecuted under the statute, specifically the potentially different responses to consensual exchanges of such photos between teens. *Gray*, at 347-348.

Our Supreme Court rejected those assertions, pointing out the statute does not lead to arbitrary and discriminatory enforcement. Gray’s claim that the State infrequently prosecutes

teens who exchange explicit images but chose to prosecute him showed arbitrariness was rejected because of the vast discretion possessed by prosecutors. There was also no evidence that the State had prosecuted him for some improper purpose. *Gray*, at 348 (citation omitted.) One can readily distinguish among the social harms to which the law and prosecutors must pay attention, and see a rational basis for the differences to which Gray referred. Such is an appropriate, not improper, basis for the exercise of discretion in that manner. “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” *RPC 3.8, comment 1* (Washington Revision, effective December 13, 2011.)

Statutes will be found to be vague in violation of constitutional standards only in exceptional cases, such as when important statutory terms are extremely hazy and entirely undefined. *State v. Evans*, 177 Wn. 2d 186, 204, 298 P, 3d 724 (2013) (internal quotation marks and citations omitted). Statutes will not be found unconstitutional merely because of ambiguity and the need for statutory construction. *Evans*, at 204-205 (citations omitted). This is not a new or novel position. “No more than a reasonable degree of certainty can be demanded” and “one who deliberately goes perilously close to an area of proscribed

conduct shall take the risk that he may cross the line”. *Gray*, at 203, citing *Boyce Motor Lines, Inc. v. United States*, 342 US 337, 340, 72 S. Ct. 329, 96 L. Ed. 367 (1952).

Appellant has also misstated another portion of the standard applied to a review of this nature. Criminal statutes are assessed for vagueness on an “as applied” basis, not on a facial basis.

Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis.

*Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) (citations omitted). The cases cited by Appellant to support his assertion that a facial challenge is appropriate do not actually support it. “Our concern here is based upon the potential for arbitrarily suppressing First Amendment liberties.” *Kolander v. Lawson*, 461 U.S. 352, 358 (1983) (citations and internal quotation marks omitted). As to *Johnson*, the problem presented was that the statute’s wording was so vague that the various federal courts had tremendous difficulty in assessing its applicability to a wide variety of fact patterns. *Johnson v. United States*, \_\_\_ U.S. \_\_\_,

135 S. Ct. 2551, 2560 (2015). “We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.” *Johnson, Id.*, at 2557. Nothing in the ruling asserts that the vagueness analysis was “facial”, and certainly nothing in *Johnson* supports a claim that the limitation of facial invalidity analysis to First Amendment cases as described in *Maynard v. Cartwright* has been overruled.

**B. The statute is not vague under any standard.**

Appellant correctly described the “merger” issue, in that he admits that if the evidence is sufficient to establish both the crimes of Robbery and Kidnapping, the crimes do not merge. Br. of Appellant, at 9.

However, Appellant goes on to assert that the statute and case law do not have adequate standards to guide law enforcement and the courts in assessing the sufficiency of the evidence required to charge and convict a person of kidnapping. This is both incorrect and a backhanded slap at the decision in *State v. Berg*, 181 Wn. 2d 857, 337 P. 3d 310, (2014), possibly in an effort to revive or apply the unfortunate “incidental restraint” doctrine.

Appellant asserts that the statutory definitions of “restrain” and “abduct” in RCW 9A.40.010 have broadened the statute past its intended purpose. Br. of Appellant, at 10. This is simply not correct. One may commit a crime, robbery in the current case, without actually taking the steps that were taken by Appellant in the case at hand. There many examples of other crimes as to which the same would be true. Burglary, Rape and other Assaults are among them. This is not a novel concept. *People v. Duggar*, 5 Cal. 2d 337 (1936). While the majority of the case is directed to the sanity of the defendant, one of the crimes of which he was convicted was kidnapping (it is described as “kidnapping for the purpose of robbery”), and his convictions and death sentence were upheld.<sup>1</sup> The description of that offense is sufficiently similar to the facts in the case at hand. *Duggar, Id.*, at 339-340.

The purposes of the criminal law in Washington are provided in RCW 9A.04.020:

- (1) The general purposes of the provisions governing the definition of offenses are:
  - (a) To forbid and prevent conduct that inflicts or threatens substantial harm to individual or public interests;

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<sup>1</sup> The State is aware of what appear to be substantial flaws in the procedure on appeal that should not occur today, but that does not impact the validity of the authority on the issue for which it is cited.

- (b) To safeguard conduct that is without culpability from condemnation as criminal;
- (c) To give fair warning of the nature of the conduct declared to constitute an offense;
- (d) To differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.

The Kidnapping statute does in fact satisfy these purposes.

The actual thrust of Appellant's argument is that Washington law does not match an irrelevant stereotype. The real state of the law often is not reflected in the folklore, at least some of which is likely to be based on popular entertainment. It is probable that there are many people who watched television shows about law enforcement and the courts who developed incorrect beliefs as a result, just as one who watched a show such as "Movin' On" (NBC, 1974-1976) likely had unrealistic views of the transportation industry. However, the existence of the stereotype is not part of the legal test of what the legislature is permitted to do in defining a crime. "Because the legislature has the power to define criminal conduct and assign requisite punishment, the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors." *State v. Berg*, 181 Wn. 2d 857, 864, 337 P. 3d 310, (2014) (citations and internal quotation

marks omitted). “Our Supreme Court has observed that the Sentencing Reform Act of 1981, chapter 9.94A RCW, reflects a legislative intent that a prosecutor’s charging decisions are generally not subject to judicial review.” *State v. Agustin*, 1 Wn. App. 2d, 911, 917 (2018)(citations omitted).

**C. The Kidnapping was not incidental to the Robbery.**

Appellant did not “merely” rob the store in question. He could have done so without forcing the occupants of the store down the aisle, forcing them to lie on the floor, and then tying their hands behind their backs. The impact of this additional set of actions is far different than the impact of the robbery in and of itself. The robbery could easily have resulted in significant negative emotional impacts. However, the additional actions, rendering the victims utterly helpless and certainly afraid of the highly foreseeable bullet to the head, are obviously far worse. “Where two offenses would otherwise merge but have independent purposes or effects, separate punishment may be applied.” *Berg, Id.*, at 865-866.

The assertion that *Berg* makes all crimes involving force or threat of force into violations of the Kidnapping statute is not sound. In fact, such an assertion was made in *Berg*, and soundly

rejected. “We ... take this opportunity to clarify that *Green II* (*State v. Green*, 94 Wn. 2d 216, 616 P. 2d 628 (1980)) did not alter the sufficiency of the evidence analysis for kidnapping based on whether the kidnapping was “incidental” to another crime ... ” *Berg, Id.*, at 872. The State will assume without conceding that fact patterns may still exist under which Kidnapping might merge into another crime. Whether or not that is a correct position, it can never be true as to robbery.

This court has never held that evidence of kidnapping is insufficient where the kidnapping conduct is incidental to another crime as a matter of due process. Instead, kidnapping conduct incidental to another crime has been addressed as an issue of merger and we have held that kidnapping and robbery never merge.

*Id.*

As the vagueness challenge is based upon due process, the correct conclusion as a result of the above language is that a vagueness challenge can never be successful under facts such as presented by the case at hand. Appellant appears to rely heavily on cases decided by Division II of this Court. That line of cases was rejected, and the reasoning of Divisions I and III found to be more persuasive by our Supreme Court, in *Berg*, at 870-871. Likewise,

the reasoning of *Green II* was rejected in the context of a robbery and probably in the context of most crimes.

Sufficiency of the evidence considers whether there was enough evidence proffered from which a jury could find beyond a reasonable doubt that the elements of the crime had been proved. Merger accepts that there was sufficient evidence of the elements of the crime but considers further whether the legislature nevertheless intended for one of the offenses to be extinguished because of its redundant consideration within the primary offense. This court has never held that evidence of kidnapping is insufficient where the kidnapping conduct is incidental to another crime as a matter of due process. *Instead, kidnapping conduct incidental to another crime has been addressed as an issue of merger and we have held that kidnapping and robbery never merge.*

*Berg, Id.*, at 872 (emphasis added). Appellant's argument simply cannot withstand the weight of the controlling legal authority.

Appellant's "intent" argument is nearly incomprehensible, and certainly illogical once parsed. One need not intend to accomplish the crime; they must intend to do the act that constitutes the crime. In a case such as this, that means to do the act that has the effect of "abducting" or "restraining" the victim. "INTENT. A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). *Stubsjoen* does

substantial collateral damage to Appellant's argument. "Thus, there was no issue whether Stubsjoen acted purposefully. The only question the jury was left to resolve was whether Stubsjoen, by her intentional conduct, accomplished a result which constituted an abduction." *State v. Stubsjoen*, 48 Wn. App. 139, 151, 738 P. 2d 306 (1987).

The State may be unduly dense, but cannot understand the citation to *State v. Harris*, 36 Wn. App. 746 (1984). The intent argument does not appear to be supported by any part of the case, and it also distinguishes *Green II*. Similarly, the citation to dissents and unpublished cases do not add persuasion to Appellant's arguments. All we get from those is that the law is clear enough as to this issue that the various cases addressed by the Court of Appeals were not novel enough to warrant publication, because the law is and was clear after *Berg*. In sum, the dissents cited merely show that one Judge, for reasons he found to be valid, did not agree with the majority as what the meaning of "Kidnaping" should be.

Counsel's concern about the breadth of the options made available to the State in addressing criminals and the offenses they commit in a case such as this is laudable as a vigorous effort to

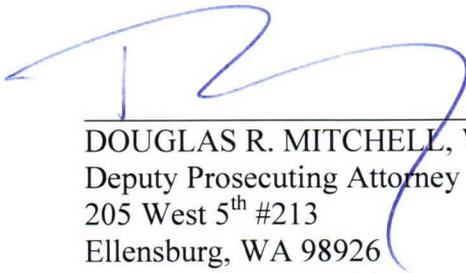
represent the interests of the Appellant. However, it simply does not reflect the tools provided to a prosecutor by the legislature by which the prosecutor's duties may be fulfilled. The Courts have recognized that grant of authority as legitimate. *State v Tracer*, 173 Wn. 2d 708, 725, 272 P. 2d 199 (2012) (Madsen, C.J., concurring) (citations omitted).

**VI. CONCLUSION:**

Appellant is desperately grasping at straws which as far as can be discerned do not exist. There are many bold assertions made, but the authority for them is lacking, and the appeal should be denied.

DATED this oth day of June, 2018.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that I am an employee of the Kittitas County Prosecutor's Office, over the age of 18 years, am not a party to nor interested in the above-entitled action, and am competent to be a witness herein. On the date below, I caused to be filed and served a true and correct copy of the foregoing document on the below-stated parties by the method(s) noted:

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DATED: June 8, 2018.

  
Rebecca D. Schoos, Legal Secretary

# KITTITAS COUNTY PROSECUTOR'S OFFICE

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