

FILED
Court of Appeals
Division III
State of Washington
8/11/2020 3:05 PM

No. 37217-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

KEENAN T. SEYMOUR,

Appellant

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

NO. 19-1-01102-03

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The State disagrees with the assignment of error; there was sufficient evidence to convict the defendant of Second-Degree Kidnapping regarding the two-year-old victim in Count II.
- B. The State disagrees with this assignment of error; the Harassment and Kidnapping crimes were not based on the same facts.
- C. The State disagrees with assignments of error 3, 4 and 5; the court's order denying the defendant a redacted copy of the discovery was not an abuse of discretion, did not violate his access to the court, and did not violate CrR 4.7 (h).

II. STATEMENT OF FACTS

It may be helpful to discuss the facts supporting each of the crimes.

Kidnapping in the First Degree against Hailey Forney.

The defendant was charged with Kidnapping in the First-Degree regarding Ms. Forney. CP 61-64. However, he was found guilty of Kidnapping in the Second Degree on this count. CP 146. The facts supporting that charge are as follows:

Ms. Forney, age 19, has a two-year old son, L.L. RP¹ at 438-39.

She had a brief, one-week, dating relationship with the defendant, ending

¹ Unless otherwise indicated, "RP" refers to the verbatim report of proceedings from jury trial on November 4-8, 2019 prepared by Katie DeVoir.

shortly before the date of the crimes herein. RP at 441-446. The dating relationship ended because the defendant began drinking “a lot” and became mean and aggressive. RP at 446.

On September 1, 2019, Ms. Forney worked her shift at a nursing home, starting at 7:00 P.M. and ending at 7:00 A.M. RP at 447. While she did contact the defendant that morning, she told him not to come over because he had been drinking. RP at 448. However, the defendant showed up with a male friend she did not know at about 11:00 A.M. RP at 449.

Since the defendant and his friend had been drinking, were drinking, and brought alcohol with them, Ms. Forney wanted to take them home. RP at 449-50. Ms. Forney had always provided transportation for the defendant, and there was no testimony that the defendant had any other access to a vehicle. RP at 445. So, she put her two-year-old in a car seat and the friend got in the back seat. RP at 451. The defendant began to act rude to her and she told him to walk home. RP at 452.

For whatever reason the defendant became violent. He ripped the keys out of the ignition and threw them against the back window. RP at 457. The glass from the broken window hit Ms. Forney’s two-year-old son. *Id.* The defendant started beating Ms. Forney. RP at 458-61.

Ms. Forney lived with her grandparents and her cousin, but they were not at the house at this time and no one else was present. RP at 447.

She thought that if she could convince the defendant to go to a car window repair shop, she could ask someone for help. RP at 465. She offered to pay for the repairs from money she saved. RP at 463.

The defendant had her cell phone and told her to get into the front passenger seat. *Id.* He got into the driver's seat. RP at 464. As the defendant was driving, he threatened Ms. Forney's life, saying that to prevent her from informing the police he would take her out to the woods, kill her, and put her body in a bag. RP at 465-66.

Ms. Forney was unable to flee while the defendant was driving because her son was in the vehicle and the defendant would not let her reach him. RP at 471-72. She was afraid the defendant would take off in her car with her son in it. RP at 473. She estimated she asked the defendant to be let go around 50 times. RP at 487. Even if she did escape from the car and call the police, the defendant said he would not stop if the police tried to pull him over, again causing Ms. Forney to think that he would kill everyone in the car. RP at 469.

It was Labor Day, so they soon discovered various shops were closed. RP at 466. They went first to Les Schwab, then to Wal-Mart, where Ms. Forney mouthed, "Please help me" to an employee. RP at 466, 468. The defendant gave Ms. Forney her cell phone but she had to show

the screen to the defendant as she tried to find an open automotive shop and she had to put any telephone calls on speaker. RP at 470.

They went to a Taco Bell and he made her get out of the vehicle while he smoked. RP at 471. She thought if they went to a gas station, she could get out of the vehicle and seek help. RP at 472. While she did get out the vehicle to hand over money to the defendant's friend, who was pumping the gas, the defendant kept a close eye on her so she could not contact third parties. RP at 472-73. When they left the Circle K, the defendant told her that he would kill her but that he needed to drop by his house first. RP at 474. Ms. Forney took this to mean that he would pick up a handgun; the defendant had earlier in the day shown her a photo of him holding a gun at his residence. RP at 474-75. When they arrived at the house, Ms. Forney's goal was to get the defendant inside his house. RP at 476. She told him she would not snitch, it was not his fault, and that he could hug her. *Id.* It took about 30 minutes, but the defendant eventually went into his residence. *Id.* She called the police at 1:41 P.M. RP at 391, 478-79.

Kidnapping in the Second Degree, against two-year-old, L.L.

Let us return to the start of the problems: after Ms. Forney strapped her son into his car seat, the defendant's friend got in the back seat, the defendant started becoming rude, and Ms. Forney said he could walk

home. The defendant took her car keys and threw them against the back window, shattering it. RP at 457. L.L. was sitting nearby, and the glass hit him. *Id.* At no point did the defendant allow Ms. Forney to clean the glass off L.L. RP at 543.

The defendant next threw Ms. Forney over a brick wall and said, “Go inside unless you want your son to see you get knocked out.” RP at 458. He took Ms. Forney inside her residence, leaving L.L. in the vehicle with a stranger. RP at 459.

In response to the defendant’s threat to kill her, she asked him to drop off L.L. at her father’s residence. RP at 474. The defendant responded that she should not worry about her son. *Id.* Ms. Forney took this ominously: she thought the defendant might kill her and leave L.L. on the side of the road or give him to others who would hurt him. *Id.* She estimated she asked the defendant to give her L.L. about 20 times. RP at 488. She offered to give the defendant the car, her money, and her cell phone if he would just give L.L. back to her. RP at 473.

The ordeal for both Ms. Forney and L.L. lasted roughly one hour and 40 minutes, from 11:00 A.M. to 1:41 P.M. RP at 391, 449.

Felony Harassment against Ms. Forney, Count 3:

Ms. Forney believed the defendant’s statement that he would kill her. RP at 467. He had just beaten her for no reason, and he had a gun. *Id.*

He told her he would kill her when they got into her car, when they went to Les Schwab, and when they left the Circle K. RP at 465-67, 474.

Fourth Degree Assault against Ms. Forney, Count 4:

The defendant started beating Ms. Forney after she told him to walk home. He grabbed her by the hair, threw her over a retaining wall, and started beating her. RP at 458. He took her inside her residence and continued to beat her, hitting her in the head. RP at 459-60. He kned her in the thighs a few times. RP at 461. After this ordeal, when she was taken to the hospital, Ms. Forney's face was bruised and swollen, her ear was split and bleeding, hair had been pulled out of her head, her feet and ankles were scratched from being thrown over the retaining wall, and she could not open her mouth. RP at 480. When she testified, she stated that she still suffers headaches and only two weeks prior was she able to put food in her mouth. RP at 481.

Trial court's decision to not allow defendant to have redacted discovery.

The defendant's motion for discovery was heard on October 16, 2019. The prosecutor pointed out that the defendant's friend who accompanied him to Ms. Forney's house and who was present throughout the car trip, was still on the run and had a violent criminal history. RP 10/16/19 at 5-6. The prosecutor also stated that he had monitored some

phone calls of the defendant and reported that the defendant had ordered a third person to put money on his jail account and had told that person not to speak with the police. RP 10/16/19 at 6-7.

In his written memorandum opposing the motion, the prosecutor pointed out that the defendant had been released from a federal prison about two weeks before this incident and that he had convictions for Residential Burglary, Robbery in the Second Degree, nine counts of Rape of a Child in the Second Degree, and five counts of Assault in the Fourth Degree. CP 27.

The trial court denied the defendant's motion, citing the facts of the present case as alleged in the probable cause affidavit, the defendant's criminal history, and the concerns over interference with the administration of justice and community safety. RP 10/16/19 at 8.

III. ARGUMENT

A. There was sufficient evidence to support the conviction of the defendant on Count 2, Kidnapping in the Second-Degree regarding two-year-old L.L.

1. Standard on review:

To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. Evidence sufficiency challenges

admit the truth of the State’s evidence and all reasonable inferences that can be drawn from it. A review court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Stewart*, 12 Wn. App. 2d 236, 239-40, 457 P.3d 1213 (2020).

2. There was sufficient evidence that the defendant intentionally abducted L.L.

The defendant argues that if a parent and child are kidnapped at the same time, only the parent can be legally kidnapped because the parent would have known the whereabouts of the child. The child would not be “secreted or held in a place unlikely to be found” and therefore would not meet the definition of “restrain” in RCW 9A.40.010 (2). The defendant cites *State v. Stubsjoen*, 48 Wn. App. 139, 738 P.2d 306 (1987) in support.

However, *Stubsjoen* is not on point because it only involved the kidnapping of a six-month-old child, not the kidnapping of the child and her parent. The issue in *Stubsjoen* was whether having the child in public places and on public streets met the definition of “abduct.” *Stubsjoen* held

a reasonable interpretation of the current kidnap statute, which is consistent with its purpose, is that a child is abducted when held in areas or under circumstances where it is unlikely those persons directly affected by the victim's disappearance will find the child. Here, such persons were the child's parents, legal guardian or custodian, and law enforcement officers.

Id. at 145.

Likewise, in this case the defendant intentionally drove off in Ms. Forney's car knowing L.L. was in the vehicle. Ms. Forney was unable to use her cell phone without the defendant's knowledge and unable to escape the car. Ms. Forney's grandparents and her cousin, with whom she lived, would not have been able to find her or L.L. Law enforcement would not have been able to find her or L.L. L.L.'s father would not have been able to find him.

The defendant's emphasis on two facts is misplaced. The defendant argues that he did not place L.L. in the vehicle or strap him into the car seat; Ms. Forney did that. That is correct, but the defendant knew that he was abducting both Ms. Forney and L.L. When Ms. Forney told him to walk home, he instead began beating her, took her car keys, and forced both into a meandering car ride full of his threats to kill Ms. Forney and his refusal to release L.L.

The defendant also emphasizes his statement that Ms. Forney should not worry about L.L., as if he meant to protect him. Ms. Forney took this much more ominously, and the jury could too. The context of the defendant's statements was based on his threats to kill Ms. Forney by driving into the woods, killing her, and putting her body in a bag. In response she asked that he drop off L.L. with her father. RP at 474. The

defendant refused, leaving Ms. Forney to wonder if he would kill her and leave L.L. on the side of the road or with others who would harm him. *Id.* She repeatedly, perhaps up to 20 times, asked the defendant to let L.L. go. RP at 488.

The defendant is not challenging his conviction for Second Degree Kidnapping of Ms. Forney. The elements of that conviction are established, and they are also for L.L. RCW 9A.40.030, the statute defining Second Degree Kidnapping, and RCW 9A.40.010 (1) and (2), defining “restrain” and “abduct” are attached as Appendix A and B.

B. There are no merger or double jeopardy issues regarding the convictions for Harassment and Kidnapping in which Ms. Forney is the victim.

1. Standard on review:

The defendant begins by arguing that the Harassment and Kidnapping charges constitute double jeopardy and ends by arguing that they merge. The concepts are different and both concepts were discussed in *State v. Muhammad*, 194 Wn.2d 577, 451 P.3d 1060 (2019).

Double jeopardy prevents the sentencing court from prescribing a greater punishment than the legislature intended. The court must determine whether the legislature intended for the sentencing court to punish a defendant for two different crimes. “Our review is de novo, and legislative intent is the touchstone.” *Id.* at 616. Double jeopardy claims are

reviewed de novo. *State v. Leming*, 133 Wn. App. 875, 881, 138 P.3d 1095 (2006).

The merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (*e.g.*, first degree rape) the State must prove not only that a defendant committed that crime (*e.g.*, rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (*e.g.*, assault or kidnapping).

Id. at 890, citing *State v. Vladovic*, 99 Wn.2d 413, 420–21, 662 P.2d 853 (1983).

2. Neither doctrine applies. Harassment and Kidnapping do not involve the same elements, nor the same conduct.

The defendant argues:

Here, although Seymour did not use a weapon to abduct Forney as the defendant in *Davis* did, he threatened repeatedly to take her into the woods and kill her. But for threatening to use deadly force against her, which constituted the crime of harassment, Seymour’s restraint of Forney would have constituted only unlawful imprisonment. Because the harassment elevated the crime to second degree kidnapping, the punishment for the threat is presumed to be included within the greater penalty for the kidnapping conviction.

Br. of Appellant at 16-17.

The definition of “abduct” is: “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 (2). Here, the defendant secreted both L.L. and Ms. Forney in a place where they were not likely to be found—a moving vehicle for perhaps more than an hour. The defendant was in control of that car: he was driving, he had the keys, he had a friend in the back seat, and he kept Ms. Forney and her cell phone under surveillance. As the prosecutor argued at trial, what better means of hiding someone than having them in a moving car, under surveillance, with cell phone use restricted, and with a friend in the back. RP at 624.

Further, the defendant did not threaten to kill Ms. Forney until she got in the car and he started driving. At that point Ms. Forney and her child had been abducted, although the kidnapping continued until she regained her liberty. *State v. Classen*, 4 Wn. App. 2d 520, 532, 422 P.3d 489 (2018). The defendant's threats to kill Ms. Forney did not keep her in the car. What kept her in the car was her son and the fear of what would happen to him if she escaped. RP at 530.

Therefore, neither double jeopardy nor the merger doctrine applies. Double jeopardy does not apply because the same conduct does not constitute the crimes. A defendant can abduct a person, in this case an ex-girlfriend, without threatening to kill her. The merger doctrine does not apply because the crime of Unlawful Imprisonment, RCW 9A.40.040, is not elevated to Kidnapping in the Second Degree if, and only if, the

defendant threatens to kill to victim. Unlawful Imprisonment is elevated to Kidnapping in the Second Degree if the defendant secrets or hides the victim in a place where she is not likely to be found.

The defendant's citation to *State v. Davis*, 177 Wn. App. 454, 311 P.3d 1278 (2013) is not on point. Mr. Davis committed the crimes of Kidnapping in the Second Degree on two people by pointing a gun at them. The State did not allege or prove a different act constituting the threatened use of deadly force. *Id.* at 464-65. In *Davis* it was necessary for the defendant to commit Second Degree Assault in order to commit the Kidnapping.

Here, the defendant was charged and there was evidence that he abducted Ms. Forney by secreting or hiding her in a place where she would not be found or by using or threatening to use deadly force, under RCW 9A.40.010 (2). There was evidence supporting the "secreting or hiding" prong and the prosecutor in closing argument gave reasons why this prong was met. The jury could easily have concluded that the abduction was based on this prong.

Davis held that where the State was required to prove the defendant engaged in conduct amounting to second degree assault to elevate unlawful imprisonment to second degree kidnapping, the offenses merge. *Id.* at 465. It was not necessary to prove the defendant committed a

felony harassment here in order to prove the defendant was guilty of second-degree kidnapping. The *Davis* court emphasized that the manner in which cases are charged and proved is the key. *Id.* at 463.

The importance of the way a crime is charged, and the proof of that crime, was restated in *State v. Esparza*, 135 Wn. App. 54, 143 P.3d 612 (2006). That case involved a Second-Degree Assault and an Attempted First-Degree Robbery. The Robbery charge alleged that the defendant used a firearm to commit the offense. The *Esparza* court held that since it was not necessary to prove the defendant engaged in conduct amounting to second degree assault in order to elevate the robbery conviction, the merger doctrine did not prohibit convictions for both Attempted First Degree Robbery and Second-Degree Assault. *Id.* at 65-66.

Here, the defendant may have had a winning argument if the State had charged him with abducting Ms. Forney only by threatening to use deadly force on her or if those threats were the only method by which he abducted her. Because the State charged the defendant under both prongs of “abduct” and because there was evidence the defendant held Ms. Forney in a place where she was not likely to be found, the charges of Felony Harassment and Kidnapping do not merge.

C. The trial court did not abuse its discretion by not allowing the defendant to have in his own possession a redacted copy of the discovery.

1. Standard on review:

The scope of discovery is within the sound discretion of the trial court and its decisions will not be disturbed absent manifest abuse of that discretion. *State v. Pawlyk*, 115 Wn.2d 457, 470-71, 800 P.2d 338 (1990).

2. The trial court properly exercised its discretion.

The trial court had these facts before it: the offense was very violent, involving beating a woman for no reason, endangering a child, threatening to kill the woman, hiding both the woman and child, and numerous warnings to the woman about snitching. The defendant was a violent person and had just been released from federal prison about two weeks before for unlawfully entering a residence and beating the new boyfriend of an ex-girlfriend. The defendant made efforts to tamper with a witness through a jailhouse phone call. The friend of the defendant was still on the loose, with an outstanding warrant. By the time of the hearing the victim had identified this individual.

Whether or not personal information such as dates of birth, full names, addresses, and telephone numbers had been redacted, if the defendant obtained the discovery he would have proof that Ms. Forney called the police, proof that the friend did not call police, proof that the police were looking for the friend, proof that Ms. Forney identified him,

and proof of the extent that Ms. Forney went to rouse him into leaving her. The trial court properly concluded that her safety was in danger and the administration of justice was in danger if the defendant had the police reports.

3. There was no prejudice to the defendant.

The defendant has not explained how this made any difference to the trial. His attorney did not explain why the defendant himself needed to have the discovery. The defense attorney did not claim it would help in the presentation of the defense.

CrR 4.7 (h)(3) allows the court discretion about whether to permit a defendant to personally have discovery. If ever there was a case where it should not be allowed, this was it.

IV. CONCLUSION

The conviction in Count II, Kidnapping in the Second Degree, with L.L. as a victim, should be affirmed. Count I, Kidnapping in the Second Degree with Ms. Forney as a victim, and Count III, Felony Harassment against her, do not merge. The trial court properly exercised its discretion in not allowing Mr. Seymour a personal copy of the discovery.

RESPECTFULLY SUBMITTED on August 11, 2020.

ANDY MILLER

Prosecutor

A handwritten signature in blue ink, appearing to read "Terry J. Bloor", is written over a horizontal line.

Terry J. Bloor, Deputy

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Appendices

Appendix A: RCW 9A.40.030

Appendix B: RCW 9A.40.010

Appendix A

RCW 9A.40.030

RCW 9A.40.030**Kidnapping in the second degree.**

(1) A person is guilty of kidnapping in the second degree if he or she intentionally abducts another person under circumstances not amounting to kidnapping in the first degree.

(2) In any prosecution for kidnapping in the second degree, it is a defense if established by the defendant by a preponderance of the evidence that (a) the abduction does not include the use of or intent to use or threat to use deadly force, and (b) the actor is a relative of the person abducted, and (c) the actor's sole intent is to assume custody of that person. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, any other crime.

(3)(a) Except as provided in (b) of this subsection, kidnapping in the second degree is a class B felony.

(b) Kidnapping in the second degree with a finding of sexual motivation under RCW **9.94A.835** or **13.40.135** is a class A felony.

[**2003 c 53 § 65**; **2001 2nd sp.s. c 12 § 356**; **1975 1st ex.s. c 260 § 9A.40.030**.]

NOTES:

Intent—Effective date—2003 c 53: See notes following RCW **2.48.180**.

Intent—Severability—Effective dates—2001 2nd sp.s. c 12: See notes following RCW **71.09.250**.

Application—2001 2nd sp.s. c 12 §§ 301-363: See note following RCW **9.94A.030**.

Appendix B

RCW 9A.40.010

RCW 9A.40.010

Definitions.

The following definitions apply in this chapter:

(1) "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.

(2) "Commercial sex act" means any act of sexual contact or sexual intercourse for which something of value is given or received.

(3) "Forced labor" means knowingly providing or obtaining labor or services of a person by: (a) Threats of serious harm to, or physical restraint against, that person or another person; or (b) means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

(4) "Involuntary servitude" means a condition of servitude in which the victim was forced to work by the use or threat of physical restraint or physical injury, by the use of threat of coercion through law or legal process, or as set forth in RCW 9A.40.110. For the purposes of this subsection, "coercion" has the same meaning as provided in RCW 9A.36.070.

(5) "Relative" means an ancestor, descendant, or sibling, including a relative of the same degree through marriage or adoption, or a spouse.

(6) "Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he or she is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him or her has not acquiesced.

(7) "Serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor, services, or a commercial sex act in order to avoid incurring that harm.

[2014 c 52 § 2. Prior: 2011 c 336 § 363; 2011 c 111 § 2; 1975 1st ex.s. c 260 § 9A.40.010.]

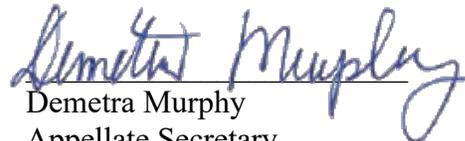
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on August 11, 2020.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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Appellate Court Case Title: State of Washington v. Keenan T. Seymour
Superior Court Case Number: 19-1-01102-9

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