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65172-2

COA NO. 65172-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

TERRY GRANT,

Appellant.

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

The Honorable Ronald L. Castleberry, 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 CRIME SEPARATE FROM ROBBERY UNDER THE INCIDENTAL RESTRAINT DOCTRINE.

To affirm the kidnapping conviction, sufficient evidence must show Grant restrained and moved Bigelow for a purpose independent from the intent to commit another crime. State v. Green, 94 Wn.2d 216, 227-28, 616 P.2d 628 (1980). Grant argued in the opening brief that insufficient evidence supported the kidnapping conviction because the restraint and movement of the victim was incidental to the robbery. Opening Brief of Appellant at 12-15. This was a typical robbery where the victim remained inside the home while restrained. The totality of the circumstances shows the movement from upstairs to downstairs was a technical movement that had no independent purpose and effect from the robbery itself.

The State nonetheless claims the kidnapping was not incidental to the robbery because more restraint than necessary was used to accomplish the robbery. Brief of Respondent (BOR) at 10. In this regard, the State asserts the display of weapons was sufficient force to complete the robbery but the restraint went further because Bigelow was bound with zip ties. BOR at 10. This argument fails.

In State v. Korum, the defendants committed one robbery inside a home at gunpoint while restraining the victim with duct tape and dragging him across the floor. State v. Korum, 120 Wn. App. 686, 690, 86 P.3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2007). In another home robbery, the defendants used duct tape to restrain two adults and a two-year-old child at gunpoint during the commission of the robbery. Korum, 120 Wn. App. at 691. In still another robbery, the defendants entered the dwellings armed and used duct tape and slip ties to restrain seven people (including children) at gunpoint. Id. at 691. The robbers initially tied one victim to a chair and taped her mouth and eyes. Id. at 692. All of these kidnappings were incidental to the robberies. Id. at 707. Such restraint was for the sole purpose of facilitating the robberies and did not create danger independent of the danger posed by the armed robberies themselves. Id.

The same holds true here. The use of zip ties to restrain Bigelow did not have any purpose independent from the robbery. The restraint did not create any danger above and beyond the restraint inherent in the use of firearms during an armed robbery.

Sensing but not acknowledging the problem, the State ultimately tries to distinguish Grant's case from Korum on two grounds: (1) Bigelow was concealed in the downstairs bathroom of her own house; and (2) it

took a long time for Bigelow to free herself from the zip ties. BOR at 12. Those two arguments are addressed in turn.

The salient point in Korum was that the victims were not moved from their homes in the course of the robberies, which meant that the victims were not secreted in a place where they were unlikely to be found. Korum, 120 Wn. App. at 707. The same is true here. Bigelow was not removed from the environment in which she was found and isolated in another. No Washington court has ever found a victim was transported to a place where she was unlikely to be found when the victim remained in her house for the entire duration of the crime. Cf. State v. Harris, 36 Wn. App. 746, 754, 677 P.3d 202 (1984) (sufficient evidence of kidnapping distinct from rape where defendants picked up victim from bar but drove victim to dead end gravel road instead of taking her home, thereby holding her in a secluded place where she was not likely to be found).

Moreover, Bigelow's daughter Carmen, Carmen's boyfriend, and Carmen's daughter lived in the house with Bigelow and were merely temporarily absent at the time of the robbery. 8RP 21-23, 67-68. This is another fact militating against a finding of concealment sufficient to support an independent kidnapping conviction. Bigelow's restraint in the bathroom of her own house shared with other family members does not

amount to be placed in a secluded area where the victim was unlikely to be found.

While movement of the victim occurred, the incidental restraint and movement of a victim which might occur during the course of another crime are not, standing alone, indicia of a true kidnapping. Green, 94 Wn.2d at 22 (citing People v. Adams, 389 Mich. 222, 236, 205 N.W.2d 415 (Mich. 1973)) (under kidnapping statute, a movement of the victim does not constitute an asportation unless it has significance independent of the assault).

When a robbery takes place within a victim's residence, the perpetrator frequently will move the victim from one room to the other to effectuate the robbery. Moving Bigelow from the upstairs foyer to the downstairs bathroom is a mere technical movement that retains no criminal significance apart from the robbery itself. Cf. State v. Cartwright, 177 N.C. App. 531, 535-37, 629 S.E.2d 318 (N.C. Ct. App. 2006) (moving victim from one room to another inside home during course of robbery was mere technical asportation that did not constitute independent confinement, restraint, or removal necessary to establish sufficient evidence of kidnapping); People v. Morrison, 4 Cal.3d 442, 443, 482 P.2d 663 (Cal. 1971) (in the course of robbing one person in the confines of private residence, defendant caused victim to move up and down the stairs

and into various rooms; kidnapping conviction could not be sustained because these movements were merely incidental to the robbery).

Furthermore, this is not a case where there is any evidence that Grant planned and acted with the purpose of kidnapping someone, only to commit another crime when the kidnapping plan went awry. Cf. State v. Brett, 126 Wn.2d 136, 167, 892 P.2d 29 (1995) (sufficient evidence of kidnapping where "Brett and Martin planned to kidnap well-to-do older victims, take them to a bank, and later kill them. The pair obtained items to facilitate the planned kidnapping, picked a residence at random, and forced their way into the Milosevich home. The jury could rationally have found Brett and Martin were 'in the course of' a kidnapping when the plan went awry, and Brett murdered Mr. Milosevich.").

Turning to the State's duration of restraint argument, a close reading of the record shows Bigelow's restraint was contemporaneous with the robbery and was not substantially longer than the time it took to complete the robbery itself. "A little after" 10 a.m. on December 4, 2008, two men armed with guns pushed their way into Bigelow's residence and bound her. 8RP 22-24, 63-64. The men were in Bigelow's house for about three hours. 8RP 30, 63. When asked how she knew the men were in her house for three hours, Bigelow responded "*Because I knew what time they got there, and when I ran over to my neighbor's house, the first thing I asked*

her was what time it was." 8RP 30 (emphasis added). She was told it was 1:30. 8RP 30. On cross examination, Bigelow agreed it ended "a little" after 1:00 and she went to her neighbor's house at about 1:30. 8RP 64. Bigelow said she called 911 from her neighbor's house and police arrived "maybe" 10 minutes later. 8RP 33, 187. The responding police officer testified he made contact with Bigelow at about 1 p.m., when the call to respond came out. 8RP 164.

This record establishes Bigelow was immediately able to leave the house after the robbers left or very soon thereafter. Although Bigelow was left restrained in her home when the robbers left, "the duration of the restraint does not appear to have been substantially longer than that required for commission of the robberies." Korum, 120 Wn. App. at 691.

The State also suggests considerably more restraint than necessary was used because the perpetrators told Bigelow that she would not be hurt if she cooperated and Bigelow was frightened because she believed they would kill her. BOR at 10. The State offers no explanation as to why such threat is not incidental to the robbery. That type of restraint is inherent in the crime of armed robbery.

In Korum, the robbers yelled at, kicked, hit, and threatened to burn one of the victims with acid if she did not say where the money and drugs were. Korum, 120 Wn. App. at 691. Neither the threat nor the physical

blows had an independent purpose from the robbery. Korum, 120 Wn. App. at 707. Grant's case cannot be meaningfully distinguished from Korum on the State's asserted ground.

While arguing Grant used more force than was necessary to effectuate the robbery, the State notes a sufficiency of evidence analysis addressing the incidental restraint doctrine borrows from merger doctrine case law. BOR at 8 (citing State v. Saunders, 120 Wn. App. 800, 816-17, 86 P.3d 232 (2004)); see also In re Pers. Restraint of Bybee, 142 Wn. App. 260, 266-67, 175 P.3d 589 (2007) ("Although Green 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."). Borrowing from merger doctrine case law defeats the State's argument that the kidnapping was not incidental to the robbery due to the degree of force used.

In considering whether offenses merge, the presence of injury does not defeat merger "merely because the defendant used *more* violence than necessary to accomplish the crime. The test is not whether the defendant used the least amount of force to accomplish the crime. The test is whether the unnecessary force had a purpose or effect independent of the crime." State v. Freeman, 153 Wn.2d 765, 779, 108 P.3d 753 (2005). For example, "when the defendant struck a victim *after* completing a robbery,

there was a separate injury and intent justifying a separate assault conviction, especially since the assault did not forward the robbery." Freeman, 153 Wn.2d at 779 (citing State v. Prater, 30 Wn. App. 512, 516, 635 P.2d 1104 (1981)).

Neither Grant nor the other man threatened or injured Bigelow after the robbery, nor did they otherwise inflict gratuitous violence independent of the robbery. "Using force to intimidate a victim into yielding property is often incidental to the robbery. The grievousness of the harm is not the question." Freeman, 153 Wn.2d at 779 (internal citation omitted).

B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the kidnapping conviction and order dismissal of that charge with prejudice.

DATED this 3 day of March, 2011

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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| STATE OF WASHINGTON | ) |                   |
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| Respondent,         | ) |                   |
|                     | ) |                   |
| v.                  | ) | COA NO. 65172-2-1 |
|                     | ) |                   |
| TERRY GRANT,        | ) |                   |
|                     | ) |                   |
| Appellant.          | ) |                   |

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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 3<sup>RD</sup> DAY OF MARCH 2011, 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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COURT OF APPEALS  
STATE OF WASHINGTON  
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*[Signature]*

**SIGNED** IN SEATTLE WASHINGTON, THIS 3<sup>RD</sup> DAY OF MARCH 2011.

x *Patrick Mayovsky*