

NO. 65978-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFERY C. MARBLE,

Appellant.

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BRIEF OF RESPONDENT

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I. ISSUES

(1) The defendant held the victim prisoner in her home for a period of hours while he repeatedly assaulted her. Was the unlawful imprisonment “incidental” to the assault, so as to prevent the defendant from being convicted of both crimes?

(2) Was defense counsel ineffective for failing to argue that unlawful imprisonment and first degree assault encompassed the same criminal conduct, where (a) raising this argument could have had a negative impact on the court’s exercise of its sentencing discretion, (b) the unlawful imprisonment was committed over a longer time period than the assault, and (c) objective circumstances indicate that the original restraint was for a purpose separate from the assault?

II. STATEMENT OF THE CASE

In 2009, the defendant, Jeffrey Marble, was living with his wife, Catherine Dunne-Marble.¹ On the evening of Friday, May 29, a man came to their door to tell them that their house was in foreclosure. This was very surprising to Ms. Dunne-Marble. She was, however, too sick that weekend to follow up on this information. RP 47-48.

On Monday morning, June 1, their son, Gavin Dunne-Marble, left for school at around 6 a.m. Ms. Dunne-Marble decided to go to the bank to find out about the mortgage. When she told the defendant this, he became "slightly agitated." As she started down the stairs towards the carport, the defendant pushed her. She asked him what he was doing, but he said he wasn't doing anything. She started down the stairs again. The defendant grabbed her back. He said that they weren't going to the bank until they sorted the issue out about her saying that he pushed her. RP 49-52.

Ms. Dunne-Marble went back up the stairs into the kitchen. She picked up the phone to call 911. The defendant knocked it out of her hand. She tried to call on her cell phone, but he knocked that out of her hand as well. She then felt a blow to her head. This first blow was struck at around 10:00 or 11:00. RP 51-53.

The defendant started hitting her with a barbell. This went on for hours. He would get exhausted from hitting her but then resume. At one point he bashed her head on the floor and pushed her against the stair railings. She thought that he was trying to

¹ By the time of trial, they were divorced, and her name was Catherine Dunne. RP 39-40.

break the railing and push her downstairs. She eventually was able to get up and walk to the bathroom. She tried to escape through the bathroom window, but he pulled her back and resumed hitting her. RP 55-59.

Gavin returned home between 4:30 and 5 p.m. As he unlocked the door, he heard his mother calling for help. There was blood all over. He went up to the bathroom and found his father pinning his mother against the wall. There was a barbell on the counter. She asked him to remove the barbell, which he did. He then "kind of lifted my dad off of my mom." As soon as she was free, she ran out of the house. RP 103-07.

The defendant was charged with first degree assault and unlawful imprisonment, both committed while armed with a deadly weapon. CP 77. A jury found him guilty as charged. CP 46-48, 51. At sentencing, the court counted the two crimes as "other current offenses," yielding an offender score of 1 for each crime. This resulted in a standard sentence range of 102-136 months for the first degree assault and 3-8 months for the unlawful imprisonment. 1 CP 12. The weapon enhancements were an additional 24 months for the assault and 6 months for the unlawful imprisonment. The base ranges for the two crimes ran

concurrently, but both weapon enhancements ran consecutively. See RCW 9.94A.533(4), 9.94A.589(1)(a).

The prosecutor argued for a sentence at the top of the range totaling 166 months (136 months for the assault plus a 24-month enhancement for the assault plus a 6-month enhancement for the unlawful imprisonment). RP 278-79. The defense argued for a sentence at the bottom of the range totaling 132 months (102 + 24 + 6). RP 285-86. The court imposed a mid-range sentence of 124 months for the assault, with a concurrent sentence of 8 months for the unlawful imprisonment. With the weapon enhancements, this sentence totaled 154 months (124 + 24 + 6). RP 290; 1 CP 13.

III. ARGUMENT

A. THE EVIDENCE SUPPORTS A FINDING THAT THE UNLAWFUL IMPRISONMENT WAS NOT INCIDENTAL TO THE FIRST DEGREE ASSAULT.

1. Since The Crime Of Assault Does Not Inherently Involve Any Restraint, A Person Who Both Restrains And Assaults A Victim Is Properly Convicted Of Both Crimes.

This appeal involves two issues, neither of which was raised in the trial court. The defendant was convicted of two crimes: first degree assault and unlawful imprisonment. He has not challenged his assault conviction. He does challenge the unlawful imprisonment conviction, arguing that this crime was “incidental” to

the assault. To resolve this claim, it is necessary to examine the origin and nature of the “incidental assault” doctrine.

The “incidental restraint” doctrine in Washington originated in State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). The defendant there was convicted of aggravated first degree murder, committed in the course of kidnapping. This combination of charges raised problems because of the breadth of the statutory definition of kidnapping. Second degree kidnapping is committed by intentionally “abducting” another person. RCW 9A.40.030(1). An “abduction” occurs when a person is “restrained” by the use or threat of deadly force. RCW 9A.40.010(2). “‘Restraining’ means to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his liberty.” RCW 9A.40.010(1). Under these definitions, *any* intentional murder could become aggravated first degree murder.

In the broadest sense, the infliction of a fatal wound is the ultimate form of “restraint” because it obviously “restricts a person’s movement in a manner which interferes substantially with the person’s liberty.” If such logic is applied to the law of kidnapping, however, *every* intentional killing would also be a kidnapping because the killing itself would supply the requisite “restraint”. . . Moreover, *every* intentional killing would *automatically* become murder in the first degree under RCW 9A.32.030(c)(5) which provides that one causing the death of another in the course of

any kidnapping is automatically guilty of murder in the first degree. Most importantly, the intentional killing, converted thusly into first degree murder, would in turn *automatically* be converted into *aggravated* murder in the first degree under [former] RCW 9A.32.045(7) because it was committed in the course of a kidnapping.

Green, 94 Wn.2d at 229 (court's emphasis, some citations omitted).

To avoid this problem, the court held that "the mere *incidental* restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping." Id. at 227.

There are several other crimes that inherently involve restraint. Rape, for example, almost always involves restraining the victim for the time necessary to accomplish the crime. Rape is elevated to first degree if the defendant kidnaps the victim. RCW 9A.44.040(1)(b). Thus the rape statute, like the murder statute, creates the danger that every rape could automatically be considered first degree rape. Consequently, the "incidental restraint" doctrine applies when a person is restrained in the course of a rape. See, e.g., State v. Saunders, 120 Wn. App. 800, 815-18, 86 P.3d 232 (2004).

Similarly, Division Two of this court has concluded that “all robberies necessarily involve some degree of forcible restraint.”² If this is correct, it creates the danger that every robber who uses a deadly weapon could also be convicted of first degree kidnapping. Consequently, Division Two has applied the “incidental restraint” doctrine to robbery. State v. Korum, 120 Wn. App. 686, 705, 86 P.3d 166 (2004), rev’d on other grounds, 157 Wn.2d 614, 236 P.3d 205 (2010).

In contrast, when a crime does not inherently involve any restraint, the “incidental restraint” doctrine is inapplicable. For example, Division Two has refused to apply the doctrine when a defendant was convicted of first degree burglary and conspiracy to commit second degree robbery as well as first degree kidnapping. State v. Elmore, 154 Wn. App. 885, 228 P.3d 760, review denied, 169 Wn.2d 1018 (2010). With regard to the conspiracy to commit robbery, the court said that kidnapping could never be incidental to that crime. This is because “the restraint used must be an integral

² This conclusion is questionable. It is entirely possible to commit robbery without substantially interfering with a person’s liberty. For example, a purse snatching could be a robbery that did not involve any “restraint.” It is therefore questionable whether the “incidental restraint” doctrine should be applied to robbery. This issue need not, however, be resolved in the present case.

part of the underlying crime,” and the conspiracy is generally completed before the actual robbery. Id. at 901 ¶ 23. With respect to the burglary, the kidnapping was not “incidental” because (among other reasons) “restraint does not inhere in the crime of burglary.” Id. at 902 ¶ 25.

The same reasoning applies here. Unlawful imprisonment does not inhere in assault, nor is it an integral part of that crime. Assault can be and often is committed by means that do not restrict a person’s movement at all – let alone doing so in a manner that substantially interferes with her liberty. Thus, unlike the situation in Green and similar cases, prosecutors cannot use kidnapping or unlawful imprisonment charges to increase the penalty for routine assaults. Rather, such charges can only be added in unusual cases, where the defendant has restrained the victim in addition to assaulting her. It is entirely appropriate that such aggravated offenses be subject to increased punishment. If an offender who assaults someone also restrains that victim, he can properly be convicted of both assault and unlawful imprisonment. The “incidental restraint” doctrine is inapplicable to this combination of crimes.

2. Even If The Incidental Restraint Doctrine Applied To These Crimes, A Restraint That Lasted For Hours Caused Harm Greater Than Would Have Resulted From The Assault Alone.

Even if the “incidental restraint” doctrine applies to this case at all, the restraint involved here was not “incidental” to the assault. “[W]hether the restraint is incidental to the commission of another crime is a fact-specific determination.” Elmore, 154 Wn. App. at 901 ¶ 23. Since the issue involves sufficiency of the evidence, the evidence and all reasonable inferences must be viewed most favorably to the State. State v. Atkins, 130 Wn. App. 395, 401-02 ¶ 18, 123 P.3d 126 (2005).

Restraint has been found “incidental” when it has “no independent purpose *or injury*.” State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 92 (1995), cert. denied, 516 U.S. 1121 (1996) (emphasis added). The lack of an independent *purpose*, by itself, does not render a restraint “incidental.” For example, this court has held that unlawful imprisonment was *not* incidental to a rape, even though it was committed for the sole purpose of accomplishing the rape. The court reasoned that the defendant had restrained the victim before he commenced raping and her. The rape was “over and above the unlawful imprisonment.” As a result, the unlawful imprisonment was not “incidental,” and there was sufficient

evidence to support a conviction for that crime. Atkins, 130 Wn. App. at 402 ¶¶ 19-21.

In the present case, the evidence supports a finding that the unlawful imprisonment had both a separate purpose and inflicted separate injury. When the defendant first prevented the victim from leaving the house, she was intending to go to the bank to check on the status of the mortgage payments. RP 49. This visit would have disclosed that the defendant had falsely told her that her house was not in foreclosure. RP 47, 72. A jury could infer that the unlawful imprisonment was committed to prevent the victim from learning about the defendant's misconduct, while the assault was committed to cause her physical harm. These separate purposes prevent the unlawful imprisonment from being incidental.

The evidence also supports a finding that the two crimes created different injuries. The first degree assault charge alleged that the defendant assaulted the victim with a deadly weapon, with intent to inflict great bodily harm. 1 CP 77. The amount of harm actually inflicted was irrelevant to this charge. The defendant would have been guilty if, acting with the requisite intent, he had struck the victim *once* with the weapon. Instead, he held her prisoner for hours while he repeatedly beat her. RP 54-60. The lengthy period

of terror constitutes an injury greater than that produced by the assault alone. Consequently, the unlawful imprisonment was not incidental to the rape. The evidence supports the defendant's conviction for unlawful imprisonment.

B. THE DEFENDANT HAS FAILED TO ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE COUNSEL.

1. Defense Counsel Can Properly Decide Not To Raise An Argument That Could Have A Negative Impact On The Court's Exercise Of Its Sentencing Discretion.

In his other argument, the defendant claims that defense counsel was ineffective for failing to argue that the assault and unlawful imprisonment encompassed the same criminal conduct. To establish ineffective assistance, the defendant must show that (1) counsel's performance was deficient and (2) this deficient performance resulted in prejudice. State v. Grier, 171 Wn.2d 17, 32-33 ¶ 40, 246 P.3d 1260 (2011); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To establish deficient performance, the defendant must show that counsel's actions were "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690.

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy.

Id. at 689. In the present case, the defendant can establish neither deficient performance nor prejudice.

With regard to deficient performance, counsel's actions had a reasonable tactical basis. Regardless of the offender score, the sentencing court had broad discretion. With an offender score of 1, the effective standard range was 132-166 months. (This reflects a base range for the assault of 102-136 months, plus a 24-month weapon enhancement for the assault, plus a 6-month weapon enhancement for the unlawful imprisonment.) With an offender score of 0, the effective range would be 123-153 months (base range of 93-123 months plus 30 months total enhancements). Within the standard range, the court could vary its sentence by 34 months (with an offender score of 1) or 30 months (with a score of 0). This greatly exceeds the difference that could result from a lower offender score (9 months at the low end of the range, 13 months at the high end).

In this situation, counsel could have concluded that it was less important to obtain a lower standard range than it was to influence the court's selection of a sentence within the applicable range. A sentence at the high end of the lower range (153 months) would be significantly more severe than a sentence at the low end of the higher range (132 months). Arguing for a lower range would be counter-productive if it influenced the court to impose a high-end sentence instead of a low-end sentence.

Counsel could reasonably fear that this might be the result. Had counsel raised a "same criminal conduct" argument, he would have asserted that the penalty for inflicting several hours of terror was the same as the penalty for striking a single blow. Such an argument might have been highly unpalatable to the court. The court might have viewed it as an attempt to minimize the impact of the crime. Even if the court had accepted the argument, it might have compensated for the lower range by increasing the sentence within the range. And, of course, the court might have rejected a "same criminal conduct" argument, in light of the analysis discussed below. In that case, the defendant would face the possibility that the argument might negatively influence the court without producing any beneficial benefit.

Instead of facing these potential problems, counsel sought a lenient sentence in a different manner. He argued for a sentence at the bottom end of the higher range, based on the defendant's complete absence of any criminal history. RP 284-86. The defendant thus accepted responsibility for all of his acts but also sought credit for his previously crime-free life. This argument could have influenced the court positively and was unlikely to influence it negatively. Of course, this strategy had risks as well – it increased the high end of the available sentence range. Counsel was entitled to make an assessment of the likelihood that a higher sentence would be imposed. When a strategy has both risks and benefits, balancing them is a strategic decision, which the courts should not second-guess. See Grier, 171 Wn.2d at 38 ¶ 55.

Ultimately, this strategy was only partially successful. The court imposed a sentence totaling 154 months – one month higher than would have been permissible if the court had used the lower sentence range. The ultimate success or failure of a strategy is, however, irrelevant to an assessment of counsel's performance. Grier, 171 Wn.2d at 43 ¶ 65. Counsel could not know in advance what the sentence would be. He had to make his best prediction of what strategy would maximize the chance of a lenient sentence and

minimize the risk of a severe one. The strategy he chose was one reasonable way of approaching this problem. Counsel's selection of this strategy cannot be labeled ineffective assistance.

2. Since A “Same Criminal Conduct” Argument Would Properly Have Been Rejected, The Defendant Was Not Prejudiced By Counsel’s Failure To Raise One.

Even if counsel's actions could be considered deficient, the defendant cannot show that they resulted in prejudice. To establish prejudice, the defendant must show a reasonable probability that but for counsel's deficient performance, the outcome of the proceedings would have been different. Grier, 171 Wn.2d at 33 ¶ 43. As already pointed out, the sentence imposed in the present case slightly exceeded the highest sentence that would have been available if the two crimes had been considered “the same criminal conduct.” Consequently, prejudice is established if and only if the defendant can show a reasonable probability that the sentencing court would have found the two crimes to be the “same criminal conduct.”

“Same criminal conduct’ ... means two ... crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a); see 13B Wash. Prac. § 3510 (1998 & 2010 supp.) (summarizing

cases defining “same criminal conduct”). A trial court’s application of this standard is reviewed for abuse of discretion or misapplication of law. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). Here, the two crimes were not “the same criminal conduct” for two reasons: they were not committed at the “same time,” and they did not involve “the same criminal intent.”

a. If two crimes are committed during overlapping time periods with interruptions between them, they are not committed at the “same time.”

To satisfy the “same time” requirement, the crimes need not be simultaneous. It is sufficient if they involve “a continuous, uninterrupted sequence of conduct over a very short period of time.” State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1977). If, however, there is an interruption between the acts, they do not occur at the “same time.” For example, two assaults were not the “same criminal conduct” when the defendant shot at the victim from a car, turned around, and then shot at the victim again. In re Rangel, 99 Wn. App. 596, 599-600, 996 P.2d 620 (2000). Also, an overlap in time between the two crimes is not sufficient to make them the “same criminal conduct.” In one case, for example, the defendant broke his way into a house and forced a resident into a car. The Supreme Court held that because the crimes of burglary

and kidnapping were not confined to the same time and place, they did not “encompass the same criminal conduct.” State v. Lessley, 118 Wn.2d 773, 776, 827 P.2d 996 (1992).

In the present case, the unlawful imprisonment extended over a greater period of time than the assault. The unlawful imprisonment occurred continuously from the time that the defendant prevented the victim from leaving her house (between 10 and 11 a.m.) until her son returned home (between 4:30 and 5 p.m.) RP 51-54, 60-61, 103. The assault occurred at intermittent intervals within this time period. It was interrupted several times: by conversations between the victim and the defendant, by her attempts to escape, and by his exhaustion from hitting her. RP 55-60. Since there was not a “continuous, uninterrupted sequence of conduct,” the “same time” requirement is not satisfied. Consequently, there is no reasonable probability that the trial court would have treated the two crimes as “the same criminal conduct.”

b. If objective circumstances indicate that one crime was initiated for a different purpose than the other crime, the two crimes do not involve “the same criminal intent.”

Even if the “same time” requirement could be considered satisfied, the “same criminal intent” requirement is not. In applying this factor, the issue is “the extent to which a defendant’s criminal

intent, as objectively viewed, changed from one crime to the next.”

Lessley, 188 Wn.2d at 777.

Intent is to be viewed objectively rather than subjectively. . . [T]he process for doing this has two components. The first is to objectively view each underlying statute and determine whether the required intents, if any, are the same or different for each count. If the intents are different, the offenses will count as separate crimes. If the intents are the same, then the second component is to “objectively view” the facts usable at sentencing, and determine whether the particular defendant's intent was the same or different with respect to each count.

State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, review denied, 118 Wn.2d 1006 (1991) (citations omitted); but see State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990) (standard is not *mens rea* element of crime, but offender's objective criminal purpose).

Here, the crime of first degree assault requires intent to inflict great bodily harm. RCW 9A.36.011(1). The crime of unlawful imprisonment contains no intent requirement, but it requires knowingly restraining another person. RCW 9A.40.040(1). These intents are not the same, so the first component of the test is not satisfied.

Under the second component of the test, the analysis is objective, not subjective. For example, in Lessley, the “same

criminal intent” requirement was not satisfied when a defendant kidnapped the victim after breaking into her residence.

His subjective intent is irrelevant, and we would only be speculating to assume that that subjective intent was to kidnap and assault [the victim]. He may initially only have intended to confront her.

Lessley, 118 Wn. App. at 778.

The present case is similar to Lessley. As already pointed out, the evidence indicates that the unlawful imprisonment was initiated for a different purpose than the assault. The objective purpose of the unlawful imprisonment was to prevent the victim from learning about the defendant’s failure to pay the mortgage. The objective purpose of the assault was to cause physical harm. It would be speculation to assume that, when the defendant started restraining the victim, he had already decided to cause her great bodily harm. Objectively viewed, the defendant’s intent changed from one crime to the other. Consequently, the two crimes did not encompass the same criminal conduct.

In a few cases, this court has held that kidnapping encompassed the same criminal conduct as a crime committed during the kidnapping. In one case, the crime was an assault, committed for the purpose of accomplishing the abduction. State v.

Taylor, 90 Wn. App. 312, 321, 950 P.2d 526 (1998). In another, the crime was rape. The court believed that the rape may have been committed to humiliate the victim, which was the same purpose as underlay the kidnapping. Saunders, 120 Wn. App. at 824-25. This analysis is questionable: it appears to reflect an assessment of the defendant's subjective motive, rather than his objective purpose.

In any event, neither Taylor nor Saunders involves a situation where a restraint commenced for one objective purpose is later expanded to accomplish another purpose. Consequently, neither is relevant to the issue in this case. Under Lessley, the change in the defendant's objective intent prevents the two crimes from being the "same criminal conduct." The defendant was therefore not prejudiced by his attorney's failure to raise this issue. The defendant has failed to establish ineffective assistance of counsel.

IV. CONCLUSION

For these reasons, the judgment and sentences for both crimes should be affirmed. Since the defendant has not challenged

his conviction for first degree assault, that conviction should be affirmed in any event.

Respectfully submitted on July 11, 2011.

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THE STATE OF WASHINGTON,

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JEFFERY C. MARBLE,

Appellant.

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AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 11th day of July, 2011, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 15th day of July, 2011.



DIANE K. KREMENICH
Legal Assistant/Appeals Unit