

70822-8

70822-8

NO. 70822-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ORESTE DUANES GONZALES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. First degree kidnapping here requires restraint with intent to facilitate the commission of a robbery or flight thereafter. The State presented evidence that Duanes Gonzales and his accomplice robbed Alfonzo at gunpoint. The two men held him hostage in his own car by driving him for a while with a gun pointed at him, despite Alfonzo's plea for the men to simply take his property, including the car, and release him. Was there sufficient evidence for a rational trier of fact to find that the kidnapping was not incidental to the robbery?

2. Crimes are considered the "same criminal conduct" for scoring purposes when they are committed against the same victim, at the same time and place, and with the same criminal intent. A jury convicted Duanes Gonzales of first degree robbery and first degree kidnapping for robbing Alfonzo at gunpoint and abducting him in his own car for some time. Although the trial court did not make an explicit finding in the judgment and sentence that both crimes were part of the same criminal conduct, the record and

the sentence imposed reflect that was the case. Should this Court remand for correction of the judgment and sentence to reflect a finding that both crimes constituted the same criminal conduct?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Oreste Lazar Duanes Gonzales (Duanes Gonzales), by amended information as follows:

Count I: first degree robbery, against Jonathan Marshall, with a violation date between August 30 and August 31, 2012, where at midnight, Duanes Gonzales robbed Jonathan Marshall at gunpoint outside of his apartment located next to the Marco Polo Motel;

Count II: first degree robbery, against Hamilton Carter, with a violation date of September 28, 2012, where Duanes Gonzales robbed Carter at gunpoint while he was in his car eating lunch;

Count III: first degree robbery, against Crisella Del Carmen, with a violation date of September 28, 2012, where Duanes Gonzales robbed Del Carmen at gunpoint while she was in Carter's car eating lunch;

Count IV: first degree robbery, against Marques Alfonzo, with a violation date of September 28, 2012; and

Count V: first degree kidnapping, against Marques Alfonzo, with a violation date of September 28, 2012.

CP 4-45, 130-32. The State also alleged that Duanes Gonzales was armed with a firearm during the commission of the robbery in count I. CP 130-32; 2RP 7-8.¹

Duanes Gonzales moved successfully to have count I severed from counts II-V. CP 29-30. The two trials were held before the Honorable Michael Hayden. Two separate juries convicted Duanes Gonzales as charged. CP 124-27, 158-59; 9RP (a.m. proceedings) 3-4. The trial court imposed a standard range sentence. CP 160-69. Duanes Gonzales now appeals.

2. SUBSTANTIVE FACTS

On September 28, 2012, Marques Alfonzo and his pregnant wife had a baby class at 1:15 or 1:30 p.m. 4RP 159-60. Alfonzo went out to his driveway between “noon and one-ish” and as he

¹ The Verbatim Report of this jury trial consists of nine volumes referred to in this brief as: 1RP (May 5, May 17, and August 29, 2013); 2RP (June 3, 2013); 3RP (June 4, 2013); 4RP (June 5, 2013); 5RP (June 6, 2013); 6RP (June 10, 2013); 7RP (June 11, 2013); 8RP (June 12, 2013); and 9RP (June 13, 2013).

started backing out, he saw two men walking by the hedges of his property. 4RP 160. Alfonzo stopped and yielded to the men. Alfonzo's residential street does not have a lot of foot traffic. 4RP 161. Once Alfonzo's car was completely on the street, the two men approached him. 4RP 160-61. Duanes Gonzales approached on the driver's side and asked for directions to a school. 4RP 161-62. As Alfonzo was giving him directions to St. Bernadette, a Catholic school down the street from his residence, Duanes Gonzales' accomplice (the accomplice) got close to the car and put a semi-automatic handgun to the window. 4RP 162-65.

The accomplice ordered Alfonzo to move over to the passenger side. 4RP 165. As Alfonzo tried to exit the car, the accomplice told him to jump over the gearshift and move over. 4RP 165. Alfonzo complied. Duanes Gonzales got in the driver's side as the accomplice got behind him. 4RP 165-66.

Duanes Gonzales drove off while the accomplice continued to point the gun at Alfonzo. 4RP 166-67. Duanes Gonzales turned on the next street, drove for a few blocks, turning into a residential area and driving approximately another block and a half. 4RP 168-69. The two men demanded everything from Alfonzo,

including the shoes he was wearing and his wedding ring.

4RP 170-72.

Alfonzo complied with their demands because he was not going to argue with somebody who had a gun pointed to his head.

4RP 173. As Alfonzo was giving the men his property, the

accomplice asked for Alfonzo's wedding ring. 4RP 173. Alfonzo

asked them to let him keep the ring, but the accomplice replied,

"I really don't give a fuck. Tell your wife thank you for me."

4RP 173. Alfonzo took his wedding ring off and handed it to the

accomplice. 4RP 173. As Duanes Gonzales kept driving, and the

accomplice continued to point the gun at Alfonzo, Alfonzo pleaded

for the men to let him go. 4RP 168. Alfonzo said "hundreds of

times" that he had a baby coming, but the men did not respond,

except for one saying something about his son graduating soon.

4RP 168. They stole his wallet, phone, a necklace he was wearing

with a silver Hawaiian warrior, his wedding ring, the shoes he was

wearing, plus another pair he had in the back seat of the car.

4RP 170-72.

While Duanes Gonzales was driving, Alfonzo, who felt he

could not get out or go anywhere, told the two men to let him go

and simply take the car, "Just take it," he implored, but they did not

respond. 4RP 167. Instead, Duanes Gonzales continued driving. Eventually, Duanes Gonzales slowed the car down. 4RP 169. The men ordered Alfonzo to walk in the opposite direction in which they were driving, and told him that in about five minutes Alfonzo could go around the corner to retrieve his car. 4RP 169-70, 173-74. Alfonzo did exactly what he was told – he walked about five minutes, went around the corner, and found his car running with the doors open. 4RP 173-74; 5RP 12-13.

Alfonzo estimated it took him about 10 minutes to walk from the place where he was dropped off to where his car was located. 5RP 12. Alfonzo also estimated that it would take him about 20 to 25 minutes to walk from where he was dropped off to his residence.² 5RP 11. Once Alfonzo got in the car, he realized the men had also stolen a backpack that was in the trunk with his laptop, as well as another necklace, his iPod and his Global Positioning System device. 4RP 172-73; 5RP 16-22. Alfonzo drove to a neighbor's house to call 911 since he did not have a land line at the house and had just been robbed of his cell phone. 4RP 174.

² Duanes Gonzales mistakenly states the time to walk from where Alfonzo was dropped off to his residence to be 10 minutes. App. Br. 5.

King County Sheriff's Deputy Glasgow responded to Alfonzo's residence at 2:22 p.m. 5RP 45. Alfonzo was in the driveway without any shoes, and appeared distraught and shocked. 5RP 45.

At the time of the incident, Alfonzo thought he recognized Duanes Gonzales as someone he had met 12 to 15 years prior to the incident. 4RP 165, 175-76. Alfonzo indicated he had not seen Duanes Gonzales since then. 4RP 176-77; 5RP 31.

Duanes Gonzales testified in his own defense and denied robbing Alfonzo.³ 7RP 33-63. Duanes Gonzales stated he had seen Alfonzo a week prior to the robbery at a gas station. 7RP 40. According to Duanes Gonzales, during that encounter, he sold Alfonzo two ounces of marijuana, worth \$550. 7RP 41, 51. Duanes Gonzales claimed that Alfonzo did not have the money to pay him, so Alfonzo voluntarily gave Duanes Gonzales all of his property as collateral.⁴ 7RP 43-45, 49-50. Alfonzo denied seeing Duanes Gonzales the week prior to the robbery and kidnapping,

³ Duanes Gonzales did not contest that he had been in Alfonzo's car, nor did he challenge the palm print recovered on the outside driver's door. 5RP 72.

⁴ Most of Alfonzo's property was recovered at Duanes Gonzales' place of residence and his van. 7RP 51-52, 54, 57, 59.

buying marijuana from him, and giving Duanes Gonzales property voluntarily. 4RP 176-77.

During pre-trial motions, the trial court advised Duanes Gonzales of the potential sentence he could receive if convicted. 2RP 51-52. During this exchange, the State indicated that the kidnapping and robbery charges involving Alfonzo were the same course of conduct. 2RP 55. Similarly, at the conclusion of the trial involving counts II through V, and before commencing the trial on count I, the State made Duanes Gonzales an offer on the record to resolve the last count short of trial. In explaining Duanes Gonzales' offender score and standard range, the State indicated the first degree robbery and first degree kidnapping charges were the same course of criminal conduct. 9RP (p.m. proceedings) 8. At that time, although the trial court did not make a specific finding, the court also calculated Duanes Gonzales' offender score as if the two crimes were part of the same course of criminal conduct. 9RP (p.m. proceedings) 9. However, at the sentencing hearing, which took place at a later date, neither party nor the trial court indicated on the record that the crimes of kidnapping and first degree robbery involving Alfonzo were the same criminal conduct. Similarly, the judgment and sentence did not reflect a finding that

these two crimes were part of the same course of criminal conduct. CP 160-69. Nonetheless, Duanes Gonzales' offender score was properly calculated at seven – including six points for each concurrent offense – reflecting the two crimes were not counted against each other and thus constituted the same course of conduct.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS DUANES GONZALES' KIDNAPPING CONVICTION.

On appeal, Duanes Gonzales does not challenge any of the robbery convictions, including the one against Alfonzo. Rather, Duanes Gonzales argues that his conviction for kidnapping must be vacated because there is insufficient evidence to establish that the restraint of Alfonzo, employed during the commission of the robbery, was separate and independent. Duanes Gonzales' claim fails. Viewing the evidence in the light most favorable to the State, there is substantial evidence for a rational trier of fact to find that that the kidnapping was not merely "incidental" to the robbery of Alfonzo.

It is not the role of the reviewing court to determine whether or not it believes the evidence at trial established guilt beyond a reasonable doubt; “[i]nstead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt.” State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (italics added). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences that reasonably can be drawn therefrom.” Id. at 201.

Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Ware, 111 Wn. App. 738, 741, 46 P.3d 280 (2002). To convict Duanes Gonzales of first degree kidnapping, the State was required to prove that he (1) intentionally abducted Alfonzo (2) with the intent to facilitate commission of a robbery or flight thereafter. RCW 9A.40.020(1); CP 118. "Abduct" means to restrain a person by either (a) secreting or holding the person in a place where he is not likely to be found, or (b) using or threatening to use deadly force. RCW 9A.40.010(1). "Restrain" 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(6). Restraint is "without consent" if it is accomplished by physical force or intimidation. Id. A substantial interference must involve a "real" or "material" interference with a person's liberty, rather than "a petty annoyance, a slight inconvenience, or an imaginary conflict." State v. Washington, 135 Wn. App. 42, 50, 143 P.3d 606 (2006).

Duanes Gonzales argues that the evidence was insufficient to establish kidnapping because any restraint of Alfonzo's liberty was merely "incidental" to the robbery. Duanes Gonzales contends that the restraint was contemporaneous to the robbery because the

duration of the restraint was not substantially longer than the commission of the robbery. App Br. 10. Additionally, Duanes Gonzales argues that the restraint of Alfonzo consisted of being made to ride a few blocks without being exposed to danger beyond that posed by the armed robbery. App Br. 10-11. Duanes Gonzales' argument should be rejected in light of established case law.

This Court has held that the State must prove the statutory elements of each crime beyond a reasonable doubt, but the State does not need to prove that one crime was "not incidental" to the other. State v. Grant, 172 Wn. App. 496, 301 P.3d 459 (2012), rev. denied, 177 Wn.2d 1021 (2013); see State v. Phoung, 174 Wn. App. 494, 499, 299 P.3d 37 (2013) (holding that our legislature has not required as an element of the unlawful imprisonment that the restraint be "not incidental" to another offense). Where there is enough evidence of kidnapping, it cannot be said that it is merely incidental to robbery as a matter of law. See State v. Stirgus, 21 Wn. App. 627, 631, 586 P.2d 532 (1978). Instead, whether the kidnapping is incidental to the commission of other crimes is a fact-specific determination. See Green, 94 Wn.2d at 225-27;

State v. Elmore, 154 Wn. App. 885, 901, 228 P.3d 760, rev. denied, 169 Wn.2d 1018 (2010).

For instance, in Grant, the defendant and another man pushed their way into the victim's residence armed with weapons. 172 Wn. App. at 496. They bound the victim's ankles, tied her wrists and dragged her downstairs. Id. The men then ransacked the house for three hours, periodically questioning the victim at gunpoint. Id. After taking televisions, cameras, jewelry and guns, they left and the victim managed to escape. Id. On appeal, like Duanes Gonzales, Grant argued that due process required a showing that the "restraint" was for a different purpose independent of the commission of the robbery. Id. This Court held that the Due Process Clause requires the State to prove the statutory elements of kidnapping, but that "[i]t *does not* require the State to prove that first degree kidnapping was 'not incidental' to first degree robbery." Id. (italics added).

Acknowledging this Court's precedent, Duanes Gonzales argues the contrary and relies on Division II's decisions on State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004), aff'd in part and rev'd in part on other grounds, 157 Wn.2d 614 (2006), and State v. Berg, 177 Wn. App. 119, 310 P.3d 866 (2013), rev. granted in part,

179 Wn.2d 1028 (2014).⁵ In Korum, the State charged the defendant with several counts of kidnapping stemming from a conspiracy to rob drug dealers in a series of home invasions. 120 Wn. App. at 689. The perpetrators restrained the victims with duct tape while searching the homes and stealing drugs, money, and other valuables. Id. at 690-92. There was no evidence the victims were ever removed from their homes. The court determined that this restraint of the victims did not constitute separate kidnappings. Id. at 707.

Similarly, in Berg, the State charged the defendant with several crimes including first degree robbery and first degree kidnapping stemming from an incident where Berg robbed a medical marijuana user during a home invasion. 177 Wn. App. at 122-23. Berg held the victim at gunpoint on the floor and threatened to shoot him while his accomplice stole the marijuana. Id. at 123. After Berg's accomplice loaded a car with the marijuana, Berg stopped pinning the victim to the floor. Id. As the perpetrators left they told the victim to stay on the ground for fifteen minutes. Id. Relying in Korum, the court held that Green, supra, required

⁵ On March 6, 2014, the Supreme Court granted review in Berg (Court of Appeals no. 41167-9-II, 41173-3-II; Supreme Court case no. 89570-8). Oral argument is scheduled for May 27, 2014.

application of the incidental restraint doctrine, concluding that the State's evidence on restraint was merely incidental to the robbery. 177 Wn. App. at 131, 138.

In Green, the Washington Supreme Court reversed a defendant's conviction for aggravated first-degree murder based on kidnapping, because there was insufficient evidence to establish that the defendant abducted the victim by secreting her in a place where she was unlikely to be found. 94 Wn.2d at 226. At trial, the evidence showed that the defendant stabbed a young girl on a public sidewalk in broad daylight and then dragged her 20-50 feet behind an apartment building over the course of 2-3 minutes. Id. at 222-24. The Green court held that the evidence was insufficient based on the "unusually short" time involved, the "minimal distance" the defendant moved the victim, the "clear visibility" of their location, and the "total lack of any evidence of actual isolation from open public areas." Id. The court added that "the mere incidental restraint" and movement of the victim was an integral part of the homicide, and not the "indicia of a true kidnapping." Id. at 226-27.

To the extent Green requires that the restraint sufficient to maintain a prosecution for kidnapping be distinct from the restraint inherent in robbery, that requirement is satisfied here. Once

Duanes Gonzales drove off, forcing Alfonzo to remain in the car without his consent and transporting him away from his home, especially after Alfonzo said, "Just take it [the car]," his restraint of Alfonzo assumed an independent purpose and also resulted in a separate and distinct injury. 4RP 167. Unlike the circumstances in Green, Duanes Gonzales' restraint of Alfonzo was not a necessary or integral part of the robbery and was therefore sufficient to support his conviction. See Washington, 135 Wn. App. at 50-51 (restraint sufficient to establish unlawful imprisonment where defendant held victim in car while he assaulted her).

In Green, the victim was dragged 20-50 feet, whereas here, Duanes Gonzales drove Alfonzo some distance from his residence, requiring approximately a 20 to 25 minute walk. 5RP 11. Similarly, although we do not know the exact length of time that Alfonzo was held hostage in his own car at gun point, it is reasonable to infer that it was longer than 2 to 3 minutes.

Alfonzo testified that he was getting ready to leave for the baby class between "noon and one-ish" given that the baby class was at 1:15 p.m. or 1:30 p.m. 4RP 160. Deputy Glasgow indicated he responded to Alfonzo's residence at 2:22 p.m., when Alfonzo was still shocked, standing in his driveway and not wearing any

shoes. 5RP 45. It is reasonable to infer that Alfonzo had not even been inside his own residence to put on shoes by the time the police arrived. Taking the smaller gap in time, it is reasonable to infer that at least one hour elapsed between the time when Duanes Gonzales first came in contact with Alonzo and when Alonzo drove back to his house. Furthermore, the evidence established that the men drove some distance; Alfonzo pleaded with the men "hundreds of times" to let him go because he had a baby on the way, to which one of the men replied that he had a son graduating soon; Alfonzo begged them to let him keep his wedding ring; there was enough time for Alfonzo to take off his shoes and necklace, and empty his pockets; and lastly, time for the men to provide instructions to Alfonzo to walk in the opposite direction for five minutes, and go around the corner where he would find his car. 4RP 168-74. This would have taken more than 2 to 3 minutes.

Duanes Gonzales argues that the robbery and the kidnapping were contemporaneous because the men let Alfonzo out of the car. However, the men's expectation was that Alfonzo would remain restrained for at least another five minutes following their departure. The threat of the firearm in fact caused Alfonzo to comply with these instructions. 4RP 173-74; 5RP 12-13.

Lastly, although this incident took place during the day, it was a quiet residential area without much foot traffic. 4RP 161. Holding someone hostage in a car is less visible than dragging a person on the ground, as in Green. Indeed, it is very likely that nobody observed the gun that the accomplice was pointing at Alfonzo while Duanes Gonzales was driving the car.

In sum, Duanes Gonzales used considerably more restraint on Alfonzo than necessary to accomplish the robbery, a fact which bears on the question of whether the restraint used was more than required or typical in the commission of the other offense. State v. Saunders, 120 Wn. App. 800, 818, 86 P.3d 232 (2004), rev. denied, 156 Wn.2d 1034 (2006). Pointing a gun at Alfonzo was sufficient force to have completed the robbery. However, Duanes Gonzales and the accomplice did much more than that. Driving Alfonzo around while pointing a gun at him, despite his plea for them to take his car and let him go, was additional restraint that set the kidnapping apart from the force necessary for the robbery.

Thus, in considering the totality of the circumstances and the evidence in the light most favorable to the State, there is ample evidence that Duanes Gonzales' restraint of Alfonzo was not merely "incidental" to the robbery. Sufficient evidence existed for a

rational trier of fact to find the essential elements of kidnapping beyond a reasonable doubt. This Court should not vacate Duanes Gonzales' conviction for first degree kidnapping.

2. DUANES GONZALES' JUDGMENT AND SENTENCE SHOULD REFLECT THAT FIRST DEGREE ROBBERY AND FIRST DEGREE KIDNAPPING WERE THE SAME COURSE OF CONDUCT.

Duanes Gonzales argues the trial court found his convictions for the kidnapping and robbery of Alfonzo to be the same criminal conduct but failed to indicate that on the judgment and sentence.

Duanes Gonzales is correct.

The kidnapping and robbery of Alfonzo encompass the same criminal conduct.

Whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently.

RCW 9.94A.589(1)(a).

Here, both crimes involved the same victim, occurred at the same time and place, and the intent behind the kidnapping furthered the robbery. The State indicated on the record that the robbery and the kidnapping were the same course of criminal conduct. 2RP 55-56; 9RP (p.m. proceedings) 8. More importantly, Duanes Gonzales' offender score was properly calculated.

However, the trial court left the box in section 2.1(i) of the judgment and sentence that relates to a finding of same criminal conduct unchecked. Thus, there is no explicit finding by the trial court that the two counts constituted the same criminal conduct. The State concedes that this scrivener's error must be corrected on the judgment and sentence. Therefore, this Court should remand the case for the trial court to correct the error on the judgment and sentence. No resentencing is necessary.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Duanes Gonzales' conviction for first degree kidnapping and remand for amendment of the judgment and

sentence to indicate that first degree robbery and first degree kidnapping were the same criminal conduct.

DATED this 13th day of May, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer M. Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. ORESTE DUANES GONZALES, Cause No. 70822-8 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 13 day of May, 2014


Name
Done in Seattle, Washington

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