

NO. 68418-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY CHAPARRO,

Appellant.

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
DIVISION I
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I. ISSUES

(1) The defendant was convicted of unlawful imprisonment and attempted second degree assault. Evidence supported an inference that the defendant restrained the victim to keep her quiet. He then tried to obstruct her breathing. Was the unlawful imprisonment “incidental” to the attempted second degree assault?

(2) The defendant was charged with harassment and second degree assault of his girlfriend. The trial court admitted evidence of prior assaults by the defendant against the girlfriend, for the purpose of (a) assisting the jury in assessing her credibility and (b) establishing that she reasonably believed the defendant’s threats. Was the admission of this evidence an abuse of discretion?

II. STATEMENT OF THE CASE

The defendant, Randy Chaparro, was the boyfriend of Najae Stevenson. In mid-July 2011, Ms. Stevenson discovered that she was pregnant with the defendant’s child. By mid-August, Ms. Stevenson was “mostly staying at [the defendant’s house],” but things were “a little bit rocky” between them. 1 RP 33-34.

On August 15, an argument erupted between the defendant and Ms. Stevenson. The defendant hit her in the stomach with an open palm. She went to the bathroom to put on make-up, She

then decided to confront the defendant about what he had done. “[S]omehow I think he didn’t want me to be louder or anything and we got kind of tangled up, and we ended up going to the floor.” The defendant ended up on top of her. She was “crying and probably screaming and distraught.” The defendant “grabbed a pillow and put it over my face and was telling me to shut up and stuff.” The pillow covering her face made it difficult for her to breathe for three or four seconds. 1 RP 39-46. (In closing argument, the prosecutor relied on this incident as the basis for the charge of unlawful imprisonment. 2 RP 216.)

While this was going on, Ms. Stevenson was “just like kicking and trying to get him off me and just trying to get away.” She got free through “a mix of squirming free and he just decided to get off me.” She went back into the bathroom and called her mother. The defendant kicked her in the shin and told her to shut up. 1 RP 46-47.

Ms. Stevenson went back into the defendant’s room. She grabbed her clothes and purse and started going down the stairs. She told the defendant that she was going to call the cops on him. He chased her down and tackled her. He got on top of her again and tried to put his hand over her mouth. He told her that if she

called the cops he would kill her. She got free, left the house, and called police. 1 RP 47-51.

When police arrived, Ms. Stevenson was visibly upset and shaken. She appeared to be very afraid. She told the officer that the defendant had chased her, suffocated her by putting a pillow over her face, and threatened to kill her. 2 RP 103-04.

Police arrested the defendant. He told them he had an argument with Ms. Stevenson. They yelled at each other. He put her in a "bear hug." "[H]e described how he put her head in between like his collar bone and neck ... and tried to get her to quiet down by holding her tight like that." He denied hitting her or placing anything over her mouth. 2 RP 129-34, 141.

The defendant testified that Ms. Stevenson claimed he didn't love her any more. He "grabbed her by her head" and told her she was sorry. She hit him in the chest four times "like gently." He told her he would leave her alone. He started to leave the house. She grabbed her purse and went storming down the stairs. She threatened to kill herself. She pulled her hair, hit herself in the face, and fell to the floor on her knees. He told her to get out of the house, and she did. 2 RP 171-78.

The defendant was charged with felony harassment, second degree assault, and unlawful imprisonment. 1 CP 108. At trial, the court admitted evidence of two prior incidents between the defendant and Ms. Stevenson. In one, the defendant was on a bus with her and a friend. The defendant and his friend were saying “mean things about women.” “I didn’t like that and I wanted to get up, and he choked me.” In another incident, the defendant gave her a black eye “for really no reason.” 1 RP 36. The court admitted this evidence for two purposes: (1) “to assist the jury in judging her credibility”; (2) “the reasonableness of her fear in the face of alleged threat to kill her.” 1 RP 15.

On the charge of unlawful imprisonment, the jury found the defendant guilty as charged. On the charge of second degree assault, it found the defendant not guilty as charged, but guilty of attempted second degree assault. On the charge of harassment, it found the defendant not guilty. CP 27-33.

III. ARGUMENT

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

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

The defendant claims that there is insufficient evidence to convict him of unlawful imprisonment. He does not claim that there is insufficient evidence of restraint, but he argues that the restraint was “incidental” to the attempted assault. To resolve this claim, it is necessary to examine the origin and nature of the “incidental restraint” doctrine.

In Washington, this doctrine 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 (court’s emphasis).

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.”¹ 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

¹ 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.

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 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 defendant claims that “assault by ... suffocation will necessarily involve some significant level of restraint.” Brief of Appellant at 6. Under the ordinary meaning of “restraint,” this may be true. It is not, however, true under the relevant statutory definitions:

“Restraint” means to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his or her liberty.

RCW 9A.40.010(6).

“Suffocation” means to block or impair a person’s intake of air at the nose or mouth, whether by smothering or other means, with the intent to obstruct the person’s ability to breathe.

RCW 9A.04.110(27).

Under these definitions, a momentary intentional obstruction of a person’s breathing is “suffocation.” A momentary restriction of a person’s movements is not, however, “restraint,” because it does not interfere substantially with the person’s liberty. In the present case, for example, the attempted suffocation lasted only a few seconds. 1 RP 46. Had the victim’s breathing been obstructed for that length of time, it would have constituted second degree assault. It is unlikely, however, that restricting a person’s movements for only a few seconds would be sufficiently substantial to constitute “restraint” under the statutory definition. Consequently, it is entirely possible to commit assault by suffocation without committing any “restraint.” This being so, the “incidental restraint” doctrine is inapplicable to second degree assault.

Furthermore, even if the doctrine does apply to second degree assault, it makes no difference in the present case. The defendant was not convicted of that crime; he was convicted of

attempted second degree assault. An *attempt* need not involve any restraint at all. An attempt that does involve a restraint is more serious than one that does not, thereby justifying convictions for both crimes

Any contrary rule would lead to a bizarre result: that an unlawful imprisonment committed with intent to suffocate someone would be *less* serious than one committed without that intent. Under the circumstances of this case, the sentencing range for unlawful imprisonment (12+-16 months) was slightly higher than the range for attempted assault (11¼-15 months). (The trial court imposed identical sentences of 15 months confinement for the two crimes. CP 5.) More significantly, unlawful imprisonment is a “crime against a person,” while attempted second degree assault is not. RCW 9.94A.411. Consequently, a person who is convicted of unlawful imprisonment is subject to one year of community custody. RCW 9.94A.701(30)(a). In contrast, a person who is convicted of only attempted second degree assault is not subject to any community custody.

Under the defendant’s reasoning, if he committed unlawful imprisonment but no other crime, he would be subject to up to 16 months confinement plus 12 months of community custody. If,

however, he committed unlawful imprisonment while attempting to suffocate someone, he is subject to only 15 months confinement with *no* community custody. This is absurd. An attempt to suffocate someone does not make a crime any *less* serious. The “incidental restraint” doctrine does not apply to a person who is convicted of unlawful imprisonment and attempted second degree assault.

2. Even If The Incidental Restraint Doctrine Applied To These Crimes, The Jury Was Entitled To Infer That The Restraint Had An Independent Purpose.

Even if the “incidental restraint” doctrine applies to this case at all, the restraint involved her 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.

Here, the evidence supported a finding that the restraint had an independent purpose. The victim testified that she was arguing with the defendant and was really angry. She thought “he didn’t want me to be louder,” so they “ended up going to the floor.” 1 RP 42. She was crying and screaming. The defendant put a pillow over her face and told her to shut up. 1 RP 42-45. Jurors could conclude that the initial restraint was for the purpose of ending the victim’s argument. After she started crying and screaming, the defendant decided to silence her by stopping her breathing. Because the jury was entitled to infer that the restraint had an independent purpose, the evidence supports the defendant’s convictions for both unlawful imprisonment and attempted assault.

B. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF PRIOR ASSAULTS FOR THE PURPOSE OF PROVING AN ELEMENT OF HARASSMENT AND ALLOWING A PROPER ASSESSMENT OF THE VICTIM'S CREDIBILITY.

The defendant also challenges the trial court's decision to admit evidence of his prior assaults against the victim. The court admitted this evidence for two purposes: (1) "to assist the jury in judging [the victim's] credibility"; (2) "the reasonableness of her fear in the face of alleged threat to kill her." 1 RP 15.

The second reason identified by the court relates to the charge of harassment, on which the defendant was acquitted. To prove harassment, the State was required to prove that the defendant "place[d] the person threatened in reasonable fear the threat will be carried out." RCW 9A.46.020(1)(b). The defendant's prior violent actions are admissible to prove the reasonableness of the victim's fear. State v. Barragan, 102 Wn. App. 754, 758-59, 9 P.3d 942 (2000); State v. Ragin, 94 Wn. App. 407, 410-11, 972 P.2d 519 (1999); see State v. Magers, 164 Wn.2d 174, 181-83 ¶¶ 16-20, 189 P.3d 126 (2008). The defendant's brief does not even mention these cases. See Brief of Appellant at 13. The trial court properly admitted the evidence on this basis.

With regard to the other basis, the defendant acknowledges that the admissibility of the evidence is supported by State v. Baker, 162 Wn. App. 468, 259 P.3d 270, review denied, 173 Wn.2d 1004 (2011). There, this court upheld the admissibility of prior incidents of violence in domestic violence cases:

[V]ictims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others. . . [The victim's] credibility was a central issue at trial. The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim

Id. at 475 16, quoting State v. Grant, 83 Wn. App. 98, 107-08, 920 P.2d 609 (1996).

The defendant criticizes the analysis of Baker, claiming that it “created an exception which swallows the rule.” Brief of Appellant at 13. This is not correct. In prosecutions for assaultive conduct, there is no rule against admitting prior incidents of violence between the same parties. To the contrary, such evidence has regularly been admitted to establish the defendant’s motive. See, e.g., State v. Stenson, 132 Wn.2d 668, 701-02, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998) (admissibility in murder prosecution); State v. Powell, 126 Wn.2d 244, 259-60, 893 P.2d

615 (1995) (same); see Baker, 162 Wn. App. at 473-74 ¶ 14 (relying on motive as alternative basis for admitting evidence). Baker is thus consistent with prior case law. The trial court properly admitted the evidence to prove credibility.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on September 25, 2012.

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September 25, 2012

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**Re: STATE v. RANDY R. CHAPARRO
COURT OF APPEALS NO. 68418-3-1**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

[Handwritten signature: Seth A. Fine]

SETH A. FINE, #10937
Deputy Prosecuting Attorney

cc: Washington Appellate Project
Appellant's attorney

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THE STATE OF WASHINGTON,

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No. 68418-3-I

AFFIDAVIT OF MAILING

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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 2th day of September, 2012.

A handwritten signature in black ink, appearing to read 'Diane K. Kremenich', written over a horizontal line. The signature is stylized and cursive.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit