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NO. 70822-8-I

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

REC'D
MAR 14 2014
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ORESTE DUANES GONZALES,

Appellant.

FILED
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael C. Hayden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports the appellant's kidnapping conviction.

2. The court found the appellant's kidnapping and robbery convictions were same criminal conduct but failed to enter a written finding.

Issues Pertaining to Assignments of Error

1. Where the restraint of the complainant was incidental to the robbery, does insufficient evidence support the appellant's kidnapping conviction?

2. The court found the appellant's convictions for kidnapping and one count of robbery were the same criminal conduct but failed to indicate that on the appellant's judgment and sentence. Should the judgment and sentence be corrected to reflect the court's finding?

B. STATEMENT OF THE CASE¹

1. Charges, pre-trial rulings, and verdicts

The State charged Oreste Duanes Gonzales (Duanes) with first degree robbery² with a firearm enhancement (Count 1). The crime was alleged to have occurred between August 29 and August 30, 2012 at a motel in Seattle. CP 121-22.

The State also charged Duanes with three counts of first degree robbery and one count of first degree kidnapping occurring on September 28, 2012. CP 122-23 (Counts 2-5). Those charges involved two separate incidents and three complainants. The first two complainants, Hamilton Carter and C.D., were robbed by two men as they sat in Carter's car in Renton. CP 4, 122 (Counts 2 and 3). The State also alleged that Marques Alonso was robbed by two men in Burien and that the robbers drove him a short distance in the course of the robbery. CP 4, 123 (Counts 4 and 5).

The court severed Count 1, the Seattle motel incident, from the other counts for trial. But the court denied Duanes's motion to sever the

¹ The brief refers to the verbatim reports as follows: 1RP – 5/2, 5/17, and 8/29/13 (sentencing); 2RP – 6/3/13; 3RP – 6/4/13; 4RP – 6/5/13; 5RP – 6/6/13; 6RP – 6/10/13; 7RP – 6/11/13; 8RP – 6/12/13; 9RP – 6/13/13 (morning); 10RP – 6/13/13 (afternoon); 11RP – 6/19/13; 12RP – 6/20/13; and 13RP – 6/24/13; 14RP – 6/25/13; and 15RP – 6/26/13.

² Each of the charged robberies was elevated to the first degree based on the display of “what appeared to be a firearm.” RCW 9A.56.200(1)(a)(ii).

Renton charges (2 and 3) from the Burien charges (4 and 5). CP 29-30 (order on motion for severance); 76-85 and 51-61 (defense memoranda); 1RP 24, 31-39; 2RP 88-114.

Duanes also moved to suppress Carter's photomontage identification of him as well as any in-court identification by Carter at trial. Duanes argued the investigating detective improperly steered Carter from a previous suspect identification,³ and then bolstered his identification by telling Carter the robbery was a part of a series of robberies by Cuban-Americans. CP 67-70 (defense memorandum); 2RP 10-83 (suppression hearing, arguments, and court ruling). Duanes was born in Cuba. 7RP 35; CP 52. The Court denied the motion. 2RP 83-88.

Duanes was convicted as charged. CP 124-27, 158. The court calculated Duanes's offender score as seven for each count, including six points for the current offenses under the doubling provisions of RCW 9.94A.525(8). CP 162, 167; 1RP 53.

³ Carter called the police after seeing the robbers at McDonald's the day after the Renton robbery. 2RP 26, 36. Carter then worked with a police artist to create a sketch of one of the robbers. 2RP 69. On his motion to suppress, Duanes argued the detective in question did not believe the men in the McDonald's surveillance video committed the robbery and improperly influenced Carter when conducting the montage identification procedure. 2RP 43-47, 60.

The court imposed concurrent high-end standard range sentences. With the 60-month firearm enhancement, the sentence totaled 204 months. CP 160-69.

Duanes timely appeals. CP 170.

2. Trial testimony

Burien resident Marques Alfonzo pulled out his driveway shortly after noon on September 28, 2012. 4RP 159-60. Two men, one with lighter skin and one with darker skin, approached as Alfonzo's car entered the street. 4RP 161. The light-skinned man asked for directions to a nearby school. 4RP 161-62. While Alfonzo provided the directions, the other man pointed a gun through Alfonzo's window. 4RP 163-65; 5RP 35, 41.

Alfonzo recognized the light-skinned man as Duanes, a family acquaintance he had known 12 to 15 years earlier. 4RP 165, 175-76; 6RP 110-11. Duanes ordered Alfonzo to climb over the gear shift and sit in the passenger seat. 4RP 165. Duanes climbed into the driver's seat and the other man sat behind Duanes, still holding the gun. 4RP 165.

Alfonzo pleaded that he had a baby on the way and urged them to take the car and release him. The men responded by telling him to empty his pockets. 4RP 168. Specifically, they ordered Alfonzo to give them his

money, marijuana, a phone, as well as Alfonzo's "Air Jordan" shoes. 4RP 170.

While Alfonzo was being robbed, the car traveled south a block, east a few blocks, and then north one to two blocks. 4RP 169; 5RP 11. The car then slowed, and the men ordered Alfonzo out. 4RP 169. They told Alfonzo that if he walked in the direction they had come from and rounded a corner, the car would be waiting for him. 4RP 169; 5RP 12. Alfonzo followed the directions and found his car shortly thereafter. 4RP 174. Alfonzo estimated it was a 10-minute walk from the drop-off location to his home. 5RP 12.

Alfonzo discovered that additional items were missing from the car. All together, the men took Alfonzo's wallet and contents, his wedding ring, two necklaces, a backpack, a laptop, an iPod, a Global Positioning System device, and two pairs of athletic shoes. 4RP 170, 172; 5RP 16-22. At trial, Alfonzo identified various items found in a search of Duanes's van and at the residence of Duanes's elderly former foster mother. 5RP 22-30; 6RP 92-98, 119. Items taken from Hamilton Carter and C.D. were also found at the home. 4RP 47-49, 92-93; 6RP 125-37.

Duanes denied robbing anyone. Duanes acknowledged he lived at the home, but a number of other people also shared the home. 7RP 33-39, 60-61. Duanes was uncertain how items belonging to Carter and C.D.

came to be found there, but people frequently “came and went.” 7RP 45. In addition, Duanes pointed out he no longer lived in the room where a number of items were found. 7RP 35-38, 45 (testimony); 8RP 71-72 (defense closing argument). Duanes’s roommate confirmed the living situation was as Duanes described. 8RP 5-9.

On the other hand, Duanes knew Alfonzo. 7RP 39-41. The men rekindled their acquaintanceship after meeting by chance at a gas station. 7RP 40-41. Alfonzo asked Duanes to supply him with marijuana. When Alfonzo was unable to come up with money to pay Duanes, Alfonzo provided Duanes his belongings as collateral. 7RP 42-45.

C. ARGUMENT

1. UNDER THE INCIDENTAL RESTRAINT DOCTRINE⁴
THE EVIDENCE WAS INSUFFICIENT TO PROVE A
KIDNAPPING SEPARATE FROM ROBBERY

Evidence was insufficient to convict Duanes of kidnapping Alfonzo because any restraint was incidental to robbery. The kidnapping conviction should therefore be vacated and dismissed with prejudice.

⁴ In making this argument, Duanes relies on authority from Division Two of this Court. He is aware that this division has decided to the contrary. E.g., State v. Phuong, 174 Wn. App. 494, 508, 299 P.3d 37 (2013); State v. Grant, 172 Wn. App. 496, 498, 301 P.3d 459 (2012), review denied, 177 Wn.2d 1021 (2013). On March 6, 2014, the Supreme Court granted review on this issue in State v. Daylan Berg, a Division Two case (Court of Appeals nos. 41167-9-II, 41173-3-II; Supreme Court case no. 89570-8).

Due process under the Fourteenth Amendment requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is insufficient to support a conviction unless, viewed in the light most favorable to the State, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

To prove first degree kidnapping, the State must show the accused intentionally abducted another person. RCW 9A.40.020. Abduction is a "critical element in the proof of kidnapping." State v. Green, 94 Wn.2d 216, 225, 616 P.2d 628 (1980). "Abduct" means "to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(2). "Restrain" means "to restrict a person's movements without consent" and "'restraint' is 'without consent' if it is accomplished by . . . physical force, intimidation, or deception." RCW 9A.40.010(1).

But "the mere incidental restraint and movement of [a] victim during the course of another crime" is insufficient to show a separate kidnapping crime where the movement and restraint had "no independent purpose or injury." State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29

(1995) (kidnapping not incidental to murder where defendant planned to kidnap random victim and was in the course of kidnapping when the plan went awry, resulting in murder); see Green, 94 Wn.2d at 227 (where defendant grabbed victim, carried her 50-60 feet, placed her behind building and killed her there, insufficient evidence of kidnapping because the restraint and movement of the victim was merely "incidental" to homicide rather than independent of it).

In other words, to sustain a conviction for kidnapping, the restraint must not be merely incidental to commission of another crime. State v. Berg, 177 Wn. App. 119, 136, 310 P.3d 866 (2013), review granted, ___ Wn.2d ___ (2014); State v. Elmore, 154 Wn. App. 885, 901, 228 P.3d 760 (2010). Whether the restraint is incidental to the commission of another crime is a fact-specific determination. Id.; State v. Korum, 120 Wn. App. 686, 707, 86 P.3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2007).

To affirm the kidnapping conviction, sufficient evidence must show Duanes or an accomplice restrained and moved Alfonzo for a purpose independent from the intent to commit robbery. There is no such evidence in this case.

In Korum, Division Two of this Court held that kidnapping convictions were incidental to the robberies because (1) the restraint was

for the sole purpose of facilitating the robberies; (2) forcible restraint is inherent in armed robberies; (3) the restrained victims were not moved away from their homes; (4) although some victims were left restrained in their homes when the robbers left, the duration was not substantially longer than the commission of the robberies; and (5) the restraint did not create danger independent of the danger posed by the armed robberies. Korum, 120 Wn. App. at 707. The Court reached an identical conclusion as to the victim of “Count 3” even though her circumstances were slightly different — during the robbery she was moved from the home, where she was originally located, to another location on the property. Id.

The Court ruled that, as a matter of law, the preceding factors indicated that the kidnappings were incidental to the robberies. Accordingly, the Court ordered the convictions to be dismissed for insufficient evidence. Id. at 689.

In Berg, Division Two followed its decision in Korum. Berg, 177 Wn. App. at 130-39. Berg and Reed learned that Watts grew marijuana in a workshop located in a walled-off portion of his garage. One evening, Berg and Reed forcibly entered the workshop. Berg and Reed ordered Watts to the ground and threatened to shoot him if he moved. While Berg used the gun to keep Watts on the floor, Reed went inside the house, took Watts's cell phone and wallet, and then loaded marijuana plants into a car.

Reed returned to the workshop. Reed told Watts to remain on the floor for fifteen minutes. Id. at 123. Three or four minutes after Berg and Reed left, Watts stood up and walked into his house. Id. at 123-24. As in Korum, the Court determined Berg's kidnapping conviction should be reversed for insufficient evidence. Berg, 177 Wn. App. at 139.

The factors the Berg and Korum Courts found dispositive are present in Duanes's case. Duanes denied involvement in the robbery. But under the State's theory, the men only restrained Alfonzo so they could rob him. The duration of the restraint was not substantially longer than the commission of the robbery. Indeed, the restraint was contemporaneous with the commission of the robbery. The men let Alfonzo go even before they had taken all the items from the car. 4RP 166-74.

While Alfonzo was not restrained in a home, this case is not sufficiently distinguishable from the facts of Korum and Berg to warrant a different result. The men drove Alfonzo's car only a few blocks and then released him a short walk from where the three started. All the events occurred in broad daylight. 4RP 169. This is similar to the "Count 3" victim in Korum, who was likewise moved a short distance in the course of the robbery. 120 Wn. App. at 707.

Finally, the restraint of Alfonzo, which consisted of being made to ride a few blocks in the passenger seat, did not expose him to danger

beyond that posed by the armed robbery itself. Police described Alfonzo as “anxious” after the incident but he was not physically injured. 5RP 44.

When the only evidence presented to the jury demonstrates that the restraint is merely incidental to completing another crime, the State has presented insufficient evidence to convict an accused of a separately charged kidnapping. Berg, 177 Wn. App. at 139; Korum, 120 Wn. App. at 707. Duanes’s kidnapping conviction should therefore be reversed and the charge dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

2. THE JUDGMENT AND SENTENCE SHOULD BE AMENDED TO REFLECT THE COURT’S FINDING THAT THE ALFONZO KIDNAPPING AND ROBBERY WERE THE SAME CRIMINAL CONDUCT.

The court found that for each count, Alfonzo’s other current offenses scored six points, for a total of seven points on each count. RCW 9.94A.525(8) (in calculation of score for offenses deemed “violent,” doubling points for prior and other current “violent” offenses); CP 162; 1RP 53. Because there were five current offenses, this appears to reflect a finding that both Alfonzo counts constituted the same criminal conduct. RCW 9.94A.589(1)(a). But the Court failed to indicate such finding on the judgment and sentence.

This Court should remand for correction of the judgment and sentence to reflect the court's finding of same criminal conduct. State v. Calhoun, 163 Wn. App. 153, 170, 257 P.3d 693 (2011) (citing State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999)), review denied, 173 Wn.2d 1018 (2012); see also State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

D. CONCLUSION

This Court should dismiss the kidnapping conviction as incidental to the robbery. In any event, the judgment and sentence should be corrected to reflect the court's finding that the kidnapping and robbery were the same criminal conduct.

DATED this 14th day of March, 2013.

Respectfully submitted,

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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 14TH DAY OF MARCH 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ORESTE DUANES GONZALES
DOC NO. 771876
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1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF MARCH 2014.

X Patrick Mayovsky