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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

SHAMARR DERRICK PARKER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan E. Chushcoff

No. 08-1-06144-4

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the State adduced sufficient evidence to support the jury's verdict finding defendant guilty of kidnapping?

B. STATEMENT OF THE CASE.

1. Procedure

On December 31, 2008, the Pierce County Prosecuting Attorney's Office charged SHAMARR PARKER hereinafter "defendant," with one count of kidnapping in the first degree and one count of rape in the first degree. CP 122-123. On January 12, 2010, the State filed a second amended information adding one count of robbery in the first degree. CP 1-3.

The case was assigned to the Honorable Bryan Chushcoff for trial. The jury began hearing the evidence on April 8, 2010. 3RP 93.¹ Upon hearing the evidence and deliberating on it, the jury found defendant guilty of kidnapping in the first degree and robbery in the first degree. CP 124, 130. By special verdict, the jury found defendant was armed with a deadly weapon during the commission of the kidnapping and the robbery. CP 126, 132. The jury informed the court they could not reach a

¹ The Verbatim Report of Proceedings is contained in 11 volumes. The State will refer to the proceedings in the following manner: Volume 1 – 1RP; Volume 2 – 2RP; Volume 3 – 3RP; Volume 4 – 4RP; Volume 5 – 5RP; Volume 6 – 6RP; Volume 7 – 7RP; Volume 8 – 8RP; Volume 9 – 9RP; Volume 10 – 10RP; Volume 11 – 11RP.

unanimous decision as to the rape charge. CP 133. After taking the jury's verdict for the kidnapping and robbery, the court declared a mistrial as to the rape charge. CP 90-91. The court subsequently granted the State's motion to dismiss the rape charge without prejudice. *Id.*

The trial court sentenced defendant to 198 months for the kidnapping conviction, and 171 months for the robbery conviction, to run concurrent with each other. CP 95-111. Both sentences fell in the middle of defendant's standard range. *Id.* Defendant received an additional 24 months on each conviction for the deadly weapon enhancements to run consecutive to the kidnapping conviction and to each other. This resulted in a total confinement period of 246 months. *Id.* From entry of this judgment, defendant filed a timely notice of appeal. CP 112.

2. Facts

In the evening of December 19, 2008, A.W.² waited at a bus stop at 38th and Pacific Avenue while on her way home. 3RP 173. A heavy snowstorm had hit the area that day, delaying buses. RP 95, 171. While waiting for the bus, a small, four-door, brown car drove by A.W.. 3RP 175-176. As the car drove by, the driver yelled at A.W., asking if she wanted a ride. *Id.* After passing A.W., the car pulled into a nearby parking lot. 3RP 177. Nervous, A.W. began walking away from the car towards a different bus stop. *Id.* As A.W. walked away, the brown car

² Because the victim was a minor when the crime occurred, the State will refer to her by her initials, A.W.

circled around and drove by her again. 3RP 179. Once again, the driver yelled out at A.W. as he passed her. *Id.* A.W. became nervous and began walking faster. 3RP 180. She noticed the car a third time and decided to cut through an alley to avoid the driver. 3RP 181.

Shortly after entering the alley, A.W. heard a car driving towards her. 3RP 181. She soon recognized the car as the same brown car from earlier. *Id.* A.W. testified the driver, later identified as defendant, got out of the car and grabbed her by the arm. 3RP 182. Defendant had a knife in his free hand that he held to A.W.'s throat. 3RP 183.³ Defendant told A.W. he would not stab her if she cooperated. *Id.* He pushed A.W. towards his car and tied up her arms with plastic bindings. *Id.* He then pushed A.W. into the backseat of the vehicle. 3RP 184.

Defendant shut the car door, got into the driver's seat, and began driving. 3RP 185. A.W. testified defendant drove for an unknown amount of time before coming to a stop. *Id.* When the car finally stopped, defendant told A.W. to move to the front seat. *Id.* At that point, A.W. noticed several police cars and firetrucks in the area. 3RP 186. Because her hands were tied, A.W. could not open the door or window to call for help. 3RP 187. Defendant began driving again before coming to a stop for the second time. *Id.* A.W. described the area as open with no buildings nearby and covered in snow. 3RP 196-197.

³ At trial, A.W. was unable to positively identify a knife retrieved from defendant's car as the knife used during her kidnapping. RP 241.

At this point, defendant untied the bindings on A.W.'s arms and told A.W. to remove her jacket. 3RP 189. While A.W. took off the jacket, defendant went through her purse. *Id.* Defendant removed four one-gram bags of marijuana and money from A.W.'s purse. 3RP 190. Defendant then searched through her jacket. *Id.* While searching through A.W.'s items, defendant showed her the knife and said, "This is nothing but a robbery. Don't make me use this. Just cooperate." *Id.*

Defendant continued searching through A.W.'s items. 3RP 190. At one point, he asked her if she kept money in her bra or underwear. *Id.* Despite replying in the negative, A.W. testified defendant felt inside her bra and underwear for money. *Id.* Defendant then had A.W. remove her shoes, pants and underwear. 3RP 194.

A.W. testified defendant proceeded to engage in vaginal intercourse with her while holding a knife to her throat. 3RP 194.⁴ She testified that during the intercourse, she stared at Mardi Gras beads hanging from defendant's rearview mirror. *Id.*⁵

After the robbery and rape, defendant asked where A.W. lived where so he could drive her home. 3RP 196. According to A.W., defendant said he did not want to leave her at their current location and "the least he could do was give [A.W.] a ride home." 3RP 197. A.W. did

⁴ The trial judge declared a mistrial on the rape charge as the jury was unable to reach a unanimous verdict. CP 90-91.

⁵ At trial, A.W. identified Plaintiff's Exhibit No. 2 as the beads she saw hanging from defendant's rearview mirror. Plaintiff's Exhibit No. 2; RP 246.

not want to tell defendant where she actually lived. *Id.* Rather, she told him she lived on 56th and Puget Sound, approximately 15 to 20 blocks from her actual house. *Id.* As defendant began to drive away, his car got temporarily stuck in the snow. 3RP 198. Eventually defendant's car gained traction and he drove away from the area. *Id.*

Defendant dropped A.W. off a few blocks away from the requested intersection and said, "Maybe this will teach you not to walk around by yourself at night." 3RP 200. Defendant then left the area in his vehicle. *Id.* As defendant drove away, A.W. focused on his license plate number, found a pen, and wrote the number down on her hand. *Id.*; Plaintiff's Exhibit No. 30.

Based on the license plate number provided by A.W., the Tacoma Police Department located defendant within hours of the crime. 5RP 481, 483. Officer Eric Scripps testified he checked the license plate number against Department of Licensing records and found a vehicle registration and address matching the license plate number. 5RP 481. The number matched a vehicle registered to Marcella Brooks. 5RP 482. Marcella Brooks is defendant's mother. 6RP 542. Officer Scripps reported to the address matching the registration and saw a "brownish sedan" with beads hanging from the rearview mirror. 5RP 483. No one answered the door at the address. 5RP 484.

Due to the seriousness of the crime, officers at the scene impounded the car and towed it to Tacoma Police Department headquarters. 5RP 485. Officers obtained a search warrant for the vehicle and Lisa Rossi, a crime scene technician with Tacoma Police Department, searched the vehicle at headquarters. 5RP 492-493. Rossi testified that during the search she located a knife under the front passenger seat of the vehicle. 5RP 494. Rossi checked the knife for fingerprints and lifted latent prints from the knife's blade. 5RP 509-510. Timothy Taylor, a latent fingerprint examiner for Tacoma Police Department testified the prints lifted from the blade matched defendant's fingerprints. 6RP 595. In addition to the knife, Rossi testified she found plastic cords in the driver's side door pocket and plastic beads hanging from the rearview mirror. 5RP 495-496.

Dacia Birka testified she knew defendant since middle school and has a child with defendant. 6RP 542. Birka testified that on December 19, 2008, defendant showed up at her house looking disheveled. 6RP 543. Defendant told her he was looking for some easy money for Christmas so he took marijuana from a girl. 6RP 544. Defendant told Birka he had a knife while taking the marijuana. 6RP 545.

On January 10, 2009, A.W. accompanied Detective Graham to an open lot at 4200 Waller Road East, in Pierce County, where officers believed the robbery occurred. 4RP 259; 6RP 571, 656. Detective

Graham testified A.W. became emotional when she saw the property and said, "This is it." 7RP 657. Bart McMacken, the owner of the property testified he visited the property the day after a large snow storm in December 2008. 6RP 574. While at the property he noticed tire marks in the snow. *Id.* McMacken testified the marks looked as if a car had been stuck in the snow with the tires spinning out before gaining traction. 6RP 575. A.W. also identified for Detective Graham an alley between Fawcett and Tacoma Avenue where she believed defendant initially grabbed her. 4RP 261; 7RP 659.

A.W. denied ever meeting defendant before December 19, 2008. 3RP 202. She also denied meeting defendant on the day in question to sell him drugs. 3RP 261.

Defendant did not testify at trial. Defendant called his mother, Marcella Brooks, to testify on his behalf. 7RP 747. Brooks testified the knife found in the car belonged to her. 7RP 748. She further testified that she kept the knife in the car to scrape ice off her windshield. *Id.* Defendant called no other witnesses at trial.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT FINDING DEFENDANT GUILTY OF KIDNAPPING.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State*

v. McCullum, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review 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. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All 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).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations

are necessary because witness testimony can conflict. As such, these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Defendant claims the jury did not have sufficient evidence to convict him of kidnapping. A person commits the crime of kidnapping in the first degree when he intentionally abducts another person with intent to facilitate the commission of rape or robbery or flight thereafter. CP 49-87 (Jury Instruction No. 7); *See also* RCW 9A.40.020. To convict the defendant of kidnapping, the jury had to find beyond a reasonable doubt that:

- 1) on or about December 19, 2008 defendant intentionally abducted A.W;
- 2) defendant abducted A.W. with intent to facilitate the commission of rape or robbery; and
- 3) any of these acts occurred in the State of Washington.

CP 49-87 (Jury Instruction No. 10). Defendant specifically challenges the sufficiency of the evidence proving defendant abducted and therefore restrained A.W. Brief of Appellant at 6. Additionally, defendant argues

that even if this court finds sufficient evidence to prove restraint occurred, any restraint used was merely incidental to the robbery. *Id.* at 8.

The court instructed the jury that “abduct” means to “restrain a person by either secreting or holding the person in a place where that person is not likely to be found or using or threatening to use deadly force. CP 49-87 (Jury Instruction No. 9). The court instructed the jury that “restraint” means to restrict another person’s movements without consent and without legal authority in a manner that interferes substantially with that person’s liberty. *Id.*

In the case at bar, the State adduced sufficient evidence to prove defendant abducted A.W. First, A.W. testified about several physical items which were subsequently recovered from defendant’s car that support the restraint element. Officers impounded defendant’s car within hours of A.W.’s abduction. 5RP 482.

A.W. told the jury, police officers, and hospital staff defendant tied her arms behind her using a plastic feeling cord. 3RP 184; 4RP 246; 5RP 389. Rossi testified she found a plastic cord in a driver’s side door pocket when executing a search warrant on defendant’s vehicle. 5RP 495. No evidence showed A.W. went anywhere near the driver’s side door. She therefore would not have known about the plastic cord in the door without having come in contact with the cord in some other way. That contact

occurred when defendant used the cord to tie up A.W.'s arms. A.W.'s testimony about having her arms tied with a plastic cord matches the physical evidence retrieved from the vehicle and supports a conclusion that defendant restrained A.W. by restricting her movements without consent. *See* CP 49-87 (Jury Instruction No. 9).

A.W. also testified she remembered Mardi Gras beads hanging from the rearview mirror of defendant's car. 3RP 195. Rossi and Officer Scripps testified they found plastic bead necklaces hanging from the rearview mirror of defendant's car. 5RP 483, 495. The final piece of physical evidence mentioned by A.W. was the knife defendant brandished when forcing A.W. into his car and when robbing her. 3RP 183, 190. Rossi found a knife below the front passenger seat of defendant's car. 5RP 494. Fingerprints lifted from the knife matched defendant. 6RP 595. Additionally, Birka testified defendant told her he used a knife while taking marijuana and money from A.W. 6RP 544-545. Defendant held the knife to A.W.'s throat and threatened A.W. by saying "Don't make me use [the knife]." 3RP 183, 190. A.W. testified she cooperated with defendant's demands because she did not want to give him any reason to use the knife against her. 3RP 191.

By holding the knife to A.W.'s throat, keeping the knife in A.W.'s sight, and threatening to use the knife against her, defendant threatened to

use deadly force as a way to get and keep A.W. in his car. Even ignoring evidence that defendant tied her arms behind her back, defendant's threatened use of deadly force to keep A.W. in his car supports a finding that defendant restrained A.W. See *State v. Medina*, 112 Wn. App. 40, 43, 48 P.3d 1005 (2002) (defendant restrained victim in car without use of ties or bindings); *State v. Mines*, 163 Wn.2d 387, 398, 179 P.3d 835 (2008) (defendants used verbal threats of deadly force to restrain victim in back of van).

Viewing this evidence in the light most favorable to the State, defendant tied A.W.'s arms behind her back using plastic cords. This restrained A.W.'s movements without A.W.'s consent. Defendant also brandished a knife and threatened deadly force against A.W. if A.W. did not comply with defendant's demands. These actions kept A.W. in the car against her will, thereby further restraining her movements. This evidence is sufficient to prove defendant restrained A.W.

In addition to the physical evidence of A.W.'s abduction presented at trial, the jury heard that A.W. identified the field where defendant robbed her as being a property at 4200 Waller Road East. 4RP 260; 7RP 656-657. A.W. testified defendant's vehicle initially got stuck in the snow when trying to leave the Waller Road property after her robbery. 6RP 575. The owner of the Waller Road property visited the property the day

after a large snow storm in December and saw tracks on the property indicating someone had driven onto the land and become stuck in the snow. 6RP 576, 582. While the owner could not remember the day of the large snow storm, he testified no other snowstorms hit the area between when he saw the tracks and when he spoke with a Tacoma Police Office detective.

Drawing all reasonable conclusions in favor of the State, this evidence shows defendant transported A.W. from the alley where she was abducted to the Waller Road property before robbing her. A.W. identified the Waller Road property as the site of the robbery. The owner confirmed the presence of a vehicle at the property the night of the snowstorm. By transporting A.W. to the property in his car, defendant further restricted A.W.'s ability to move freely.

Viewing all the evidence in the light most favorable to the State and drawing all inferences in favor of the State, the State adduced evidence showing defendant tied A.W.'s arms behind her back using a plastic cord, forced A.W. into his car, threatened A.W. with a knife, and transported A.W. to the Waller Road property. This evidence is sufficient

to prove defendant restrained A.W. and therefore to prove defendant kidnapped her.⁶

This evidence is also sufficient to prove the restraint used against A.W. was not incidental to committing the robbery. Evidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction. *State v. Elmore*, 154 Wn. App. 885, 901, 228 P.3d 760 (2010); *State v. Saunders*, 120 Wn. App. 800, 817-817, 86 P.3d 232 (2004). While incidental restraint is rooted in the merger doctrine, courts reviewing incidental restraint as it pertains to kidnapping make fact-specific determinations akin to a sufficiency of the evidence analysis. *Elmore*, 154 Wn. App. at 901.

In looking at the facts used to prove restraint, the court must view the totality of the circumstances. *Saunders* 120 Wn. App at 817; *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). Courts review “the facts and circumstances surrounding the crime and the nature of the acts and their

⁶ Defendant argues in his brief the jury rejected A.W.’s testimony about the rape and therefore determined A.W. was not credible. Brief of Appellant at 7, 10. This misconstrues what happened at the trial court. The jury did not find defendant not guilty of rape. Rather, the jury could not reach a unanimous decision. In not reaching a decision, the jury refused to say whether or not the State proved rape in the first degree beyond a reasonable doubt. This is not the same as a determination on the credibility of any witness. The jury clearly found A.W.’s testimony credible when they found defendant guilty of kidnapping and robbery. Furthermore, just because the jury could not reach a unanimous decision on whether a rape was *completed* does not mean the jury did not believe defendant had some sexual motivation when kidnapping defendant. A challenge to the sufficiency of the evidence accepts the State’s evidence as true and does not allow for reviewing courts to speculate as to what pieces of evidence the jury did or did not find credible.

relation to the crime.” *Saunders*, 120 Wn. App. at 818 (citing *State v. Harris*, 36 Wn. App. 746, 677 P.2d 202 (1984)). When the only evidence presented to the jury demonstrates that the restraint is merely incidental to completing another crime, the jury does not have sufficient evidence to convict a defendant of a separately charged kidnapping. *In re Bybee*, 142 Wn. App. 260, 175 P.3d 589 (2007).

In determining whether the facts and circumstances of a robbery and kidnapping sufficiently support the separately charged kidnapping, courts may consider 1) whether the restraint used was for the sole purpose of facilitating the robbery; 2) whether the duration of the restraint is substantially longer than the commission of the robbery; 3) whether the restrained victims are transported to another location; and 4) whether the restraint created a danger independent of the danger posed by the robbery. *Elmore*, 154 Wn. App. at 902; *State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004), *rev'd on other grounds by* 157 Wn.2d 614, 141 P.3d 13 (2006).

In defendant’s case, the State presented sufficient evidence proving the restraint used for the kidnapping was not incidental to the robbery. While the jury found the kidnapping facilitated the robbery, the restraint used in the kidnapping was above and beyond that used for the robbery,

and therefore sufficient to support an independent charge and conviction.

CP 117.

Defendant pulled up to A.W. in an alley, grabbed her, tied her arms behind her back, held a knife to her throat, and forced her into the backseat of his car. 3RP 182-184. He then drove from the alley to the Waller Road property in unincorporated Pierce County before untying the plastic bindings. 3RP 189, 196-197. Each of these acts occurred before defendant showed any intention of taking items from A.W. By tying up A.W. and then removing the bindings before robbing her, defendant used restraint beyond that used to ultimately rob her.

Other factors support the independent kidnapping conviction. Defendant restrained A.W. for an extended period of time, much longer than the time it took to take money and marijuana out of A.W.'s purse. Additionally, rather than robbing A.W. in the alley, he transported A.W. to the Waller Road property and then from the Waller Road property to Tacoma. The distance defendant transported A.W. went beyond the distance used in facilitating a typical robbery. Given the length of time defendant restrained A.W., the distance defendant transported A.W., and the use of bindings on A.W.'s arms before the robbery, the State presented sufficient evidence to prove the restraint used to kidnap A.W. was not incidental to the restraint used in the robbery.

Defendant compares his case to *State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979), however *Johnson* is not applicable to the case at hand. Brief of Appellant at 9. *Johnson*, which has since been overruled in part by *State v. Sweet*, 138 Wn.2d 466, 908 P.2d 1223 (1999), looked at whether kidnapping and assault must merge with rape in the first degree, when restraint and use of force were elements that elevated the acts of sexual intercourse to rape in the first degree. *Johnson*, 92 Wn.2d at 681. The court held the restraint for the kidnapping and use of force in the assault were intertwined with the rape. *Id.* The court ruled further that:

[t]hey occurred almost contemporaneously in time and place. The sole purpose of the kidnapping and assault was to compel the victims' submission to acts of sexual intercourse. These crimes resulted in no injury independent of or greater than the injury of rape. Nevertheless, they were crimes for which, without the additional proof of rape, the defendant could have been convicted under RCW 9A.36.010 and 9A.40.020(1). But as we construe the legislative intent, when that proof was accepted by the jury, those crimes became merged in the completed crime of first-degree rape.

Id. In reaching this rule, the *Johnson* court relied on their interpretations of the rape statutes and merger statutes, making their decision one of statutory interpretation. They concluded that under the facts of that case, the legislature intended only one punishment for that type of scenario. *Id.*

In defendant's case, the State did not rely on the kidnapping to elevate the robbery charge from the second degree to the first degree. CP 1-3.⁷

Additionally, the analysis used in *Johnson* differs substantially from that which is undertaken by courts today in determining whether a kidnapping is merely incidental to another crime. For example, in *State v. Saunders*, this court held that when viewing the totality of the circumstances, evidence that Saunders handcuffed, shackled, and taped the victim's mouth shut before raping the victim indicated "restraint above and beyond that required or even typical in the commission of rape. Thus, there was sufficient evidence of kidnapping that was not merely incidental to the rape." *Saunders*, 120 Wn. App. at 818. Rather than looking at statutory interpretation, the *Saunders* court relied on the sufficiency of the evidence to support the independent charge. *Id.* *Saunders* is similar to the case at hand because defendant used restraint for an extended period of time that went above and beyond the restraint necessary or typical when merely stealing items out of a teenage girl's purse.

⁷ The court instructed the jury that to find defendant guilty of robbery in the first degree the State had to prove beyond a reasonable doubt that: 1) on or about December 19, 2008, the defendant unlawfully took personal property from the person or in the presence of another; 2) the defendant intended to commit theft of the property; 3) the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person; 4) the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and 5) in the commission of these acts or in immediate flight therefrom the defendant (a) was armed with a deadly weapon, or (b) displayed what appeared to be a firearm or other deadly weapon. CP 49-97 (Jury Instruction No. 24).

Defendant's case is also similar to *State v. Allen*, 94 Wn.2d 860, 621 P.2d 143 (1980), *abrogated on other grounds by State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983). In *Allen*, the co-defendants pointed a rifle at the employee of a convenience store and told him it was a "hold up." *Allen*, 94 Wn.2d at 861. The co-defendants then demanded that the victim get into their car. *Id.* Once inside the car, the co-defendants ordered the victim to tell them how to open the store's cash register. *Id.* After taking items from the cash register, the co-defendants drove away, keeping the victim in the back seat of the vehicle with the rifle pointed at him. *Id.* After driving three blocks, the co-defendants told the victim to get out of the car. *Id.* The Washington Supreme Court found the kidnapping was not incidental to the robbery because the robbery had come to an end before the kidnapping began. *Id.* at 864.

In defendant's case at hand, the order of the robbery and kidnapping were reversed compared to *Allen*, but the fact remains that like *Allen*, defendant completed two independent crimes. Defendant tied up A.W., drove her around town, and then untied her before making any attempt to rob her. 3RP 183, 189-190. Had the restraint used in the kidnapping been merely incidental to the robbery, it is reasonable to expect defendant would have robbed A.W. before removing the plastic ties from her arms. Rather, the evidence shows the initial restraint used

against A.W. was for the sole purpose of getting A.W. into defendant's vehicle and transporting her to a different location.

Viewing the totality of the circumstances, the restraint used to kidnap A.W. was not incidental to the restraint used in the robbery. Accepting the State's evidence as true, and viewing the evidence in the light most favorable to the State, the jury had sufficient evidence and was within their rights to find defendant kidnaped A.W..

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm the judgment and sentence below.

DATED: March 21, 2011

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Pierce County
Prosecuting Attorney


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Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3-21-11 Theresa Ka
Date Signature

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