

NO. 44389-9-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ADRIAN JUAN TOMAS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable Toni A. Sheldon, Judge
Cause No. 07-1-00415-7

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count III, kidnapping in the first degree, from the jury for lack of sufficiency of the evidence of restraint.
02. The trial court erred in not taking count III, kidnapping in the first degree, from the jury for lack of sufficiency of the evidence where the restraint, if any, was incidental to the offense of assault in the first degree
03. The trial court erred in sentencing Tomas to consecutive sentences for his two serious violent offenses where the offenses encompassed the same criminal conduct for sentencing purposes.
04. The trial court erred in imposing a community custody condition requiring Tomas to have a chemical dependency evaluation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was insufficient evidence to convict Tomas of kidnapping in the first degree as a separate crime from assault in the first degree?
[Assignment of Error Nos. 1 and 2].
02. Whether the trial court erred in sentencing Tomas to consecutive sentences for his two serious violent offenses where the offenses encompassed the same criminal conduct for sentencing purposes?
[Assignment of Error No. 3].

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03. Whether the trial court acted without authority in ordering Tomas to have a chemical dependency evaluation?
[Assignment of Error No. 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Adrian J. Tomas was charged by amended information filed in Mason County Superior Court December 4, 2012, with attempted murder in the first degree (deadly weapon enhancement), count I, assault in the first degree (deadly weapon enhancement), count II, and kidnapping in the first degree, count III, contrary to RCWs 9A.32.030, 9A.28.020, 9.94A.825, 9A.36.011 and 9A.40.020. [CP 86-88].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 76]. Trial to a jury commenced December 5, the Honorable Toni A. Sheldon presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 227]. Tomas was found not guilty of attempted murder in the first degree but guilty of the two remaining charges, plus the deadly weapon enhancement as to count II. [CP 35-37, 39]. Following sentencing, timely notice of this appeal followed. [CP 2, 17-30, 35-37, 39].

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02. Substantive Facts

In the early morning of August 5, 2012, police dispatch received several calls reporting a person screaming for help in a nearby wooded area. [RP 80-81]. One of the callers said the voice he heard “was saying please don’t shoot me, I’m – you’re my best friend.” [RP 121]. At approximately 5:10 that morning, Michael Lowe was located in the area, suffering from multiple injuries and in need of medical assistance. [RP 77, 86, 92].

Lowe explained that he and Tomas, his brother-in-law, had gone drinking the previous evening. [RP 53, 56]. When he left the bar at closing, he climbed into the bed of Tomas’s truck and went to sleep, believing Tomas would drive him back to Tomas’s home where the two had agreed to stay. [RP 54, 56, 67, 73-74, 164]. The next thing he knew he was being dragged from the truck in a wooded area by Tomas who proceeded to beat him with a pipe before threatening him with what he thought was a firearm. He yelled at Tomas not to shoot him before getting away and hiding behind some bushes until Tomas left the scene. [RP 60-61]. As a result of the assault, he suffered multiple lacerations, a skull fracture, an ulna shaft fracture and a fourth metacarpal fracture. [220-23]. The injuries were potentially life threatening. [RP 224].

A metal wrench and exhaust pipe found inside Tomas's truck along with a T-shirt worn by Tomas and hair samples embedded in blood found on the left front fender of the truck all contained blood that matched the DNA profile for Lowe. [RP 142, 199-201, 210-13].

Following his arrest, Tomas initially gave the police a fake name and date of birth and said that "somebody else" had assaulted Lowe. [RP 153]. He eventually admitted to striking Lowe, saying he did it because he believed Lowe had burglarized his residence and stolen numerous items and work tools several days earlier. [RP 154-55]. He denied hitting Lowe with anything but his hands. [RP 155]. Tomas did "not have any bruising, any cuts." [RP 155].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT TOMAS OF KIDNAPPING IN THE FIRST DEGREE AS A SEPARATE CRIME FROM ASSAULT IN THE FIRST DEGREE.

Due Process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of

the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

A person can be charged under RCW 9A.40.020 with kidnapping in the first degree if he or she intentionally abducted another person. For a conviction, though, “the mere incidental restraint and movement of [a] victim during the course of another crime” is insufficient to show a separate kidnapping where the movement and restraint had “no independent purpose or injury.” State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995). Here, there was insufficient evidence to demonstrate that Tomas restrained and moved Lowe for a purpose independent from his intent to commit assault.

To convict Tomas of kidnapping, jury instruction 21 required the jury to find “(1) [t]hat on or about August 15, 2012, the defendant intentionally abducted Michael Lowe; (2) [t]hat the defendant abducted that person with intent to inflict bodily injury on the person; and [t]hat any of these acts occurred in the State of Washington.” [CP 63].

“Abduct” is defined in RCW 9A.40.010(1) in terms of “restrain”; “restrain,” in turn, is defined in RCW 9A.40.010(6) in pertinent part as follows: “‘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....” Evidence of restraint or movement of the victim, however, is insufficient to prove kidnapping where it is “merely incidental” to the commission of another separately charged crime. State v. Green, 94 Wn.2d 216, 227, 616 P.2d 628 (1980).¹ In determining whether kidnapping is incidental to another crime, courts consider the surrounding circumstances, facts and relevant statutory definitions. State v. Harris, 36 Wn. App. 746, 752-53, 677 P.2d 202 (1984).

Here, the restraint of Lowe was not a separate act from his assault.

The kidnapping, which requires restraint, and the assault were

¹ Cf. State v. Phong, ___ Wn. App. ___, 299 P.3d 37 (Div. I, 2013) (due process allows for conviction of unlawful imprisonment where restraint was merely incidental to another charged offense).

simultaneous. As argued by the State in closing, Lowe was restrained for purposes of the kidnapping charge when Tomas “drug him out of the truck....” [RP 267]. Which is to concede that the restraint occurred as the assault—the intentional touching—was initiated. To argue otherwise, is to posit that all physical assaults give rise to additional kidnapping charges, since the very nature of such an assault acts as a restraint on the person assaulted.

Under these unique facts, the kidnapping and the assault were not independent. Strictly speaking, there was no restraint for purposes of the kidnapping conviction, since the restraint was not employed until the initiation of the assault, as argued above. Even if Tomas’s restraint of Lowe is deemed incidental to the assault, under either circumstance (no restraint/incidental to), the evidence was insufficient to find that Tomas committed the separate crime of kidnapping.

02. TOMAS’S SERIOUS VIOLENT
CONVICTIONS FOR KIDNAPPING
IN THE FIRST DEGREE AND ASSAULT
IN THE FIRST DEGREE ENCOMPASSED
THE SAME CRIMINAL CONDUCT FOR
SENTENCING PURPOSES.

Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed.

State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986).

In sentencing Tomas, the trial court rejected his claim that his two convictions constituted the same course of criminal conduct:

First, to address the legal issue of whether the assault in the first degree and the kidnapping were the same criminal conduct, the Court would find that the victim is the same. The Court would find that the place and time, location was – started in in one location and then moved to another, so it’s not exactly the same location. But, what is truly different is the criminal intent. The criminal intent for the kidnapping and secreting a person in a place where he’s not likely to be found and then the criminal intent to assault – and in this case with a very severe beating – the Court will find it is not the same course of conduct.

[RP 294].

“RCW 9.94A.400(1)(a) (now recodified as RCW 9.94A.589(1)(a)) requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant’s offender score.” State v. Tresenriter, 101 Wn. App. 486, 496, 4 P.3d 145 (2000), reviewed denied, 143 Wn.2d 1010 (2001) (quoting State v. Tili, 139 Wn.2d 107, 118, 985 P.2d 365 (1999)). As used in this subsection, “same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). Under RCW 9.94A.589(1)(b), the court must impose consecutive sentences where the

defendant is convicted of two or more “serious violent offenses” involving “separate and distinct criminal conduct.” In determining whether criminal conduct is separate and distinct, Washington courts rely on the definition of “same criminal conduct” in RCW 9.94A.589(1)(a). State v. Brown, 100 Wn. App. 104, 113, 995 P.2d 1278 (2000), rev'd in part on other grounds by 147 Wn.2d 330, 58 P.3d 889 (2002). If two or more crimes fail to meet the statutory definition of “same criminal conduct,” they are necessarily “separate and distinct.” State v. Cubias, 155 Wn.2d 549, 552, 120 P.3d 929 (2005). This court reviews a trial court’s determination on the issue for an abuse of discretion or misapplication of the law. State v. Elliot, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990).

Given, as previously set forth, the evidence demonstrated that Tomas’s two convictions involved the same victim and were not differentiated by time, location or intended purpose, the offenses encompassed the same course of criminal conduct for sentencing purposes. Again, the State conceded in closing argument that Lowe was restrained for purposes of the kidnapping charge when Tomas “drug him out of the truck....” [RP 267]. Objectively viewed, there was no distinct and separate purpose other than to inflict bodily injury or harm. That was it. This record supports only a finding that the offenses were part of the

same criminal conduct, with the result that the matter must be remanded for resentencing only on the assault conviction.

03. THE TRIAL COURT ACTED WITHOUT AUTHORITY IN ORDERING TOMAS TO HAVE A CHEMICAL DEPENDENCY EVALUATION.

As conditions of community custody, the court

ordered that Tomas:

... shall have a chemical dependency ... evaluation while in confinement or within 30 days of release from custody, provide a copy of the evaluation to the CCO, successfully participate in and complete all recommended treatment, and sign all releases necessary to ensure the CCO can consult with the treatment provider to monitor progress and compliance;

[CP 27].

“In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). This court reviews whether a trial court had statutory authority to impose community custody conditions de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The court erred in ordering a chemical dependency evaluation and any recommended treatment without first making a finding of chemical dependency under RCW 9.94A.607(1), which provides:

Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonable related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender. (emphasis added).

See State v. Jones, 118 Wn. App. 199, 209-10, 76 P.3d 258 (2003) (failure to make statutorily required finding before ordering mental health treatment and counseling was reversible error even though record contained substantial evidence supporting such a finding). This condition must be stricken.

E. CONCLUSION

Based on the above, Tomas respectfully requests this court to reverse and dismiss his conviction for kidnapping in the first degree and/or to remand resentencing consistent with the arguments presented herein.

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DATED this 29th day of July 2013.

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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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