

29094-8-III
COURT OF APPEALS
DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON PAUL SHEPARD, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to grant the motion to dismiss the kidnapping conviction.
2. The court erred in counting two prior convictions for possession of stolen property as a single offense for purposes of calculating the offender score.

B. ISSUES

1. Evidence showed the defendant pushed the victim into her car, then drove the car about ten blocks while demanding her cell phone and credit card. After obtaining these items he stopped the car and got out, leaving the victim in her car with the keys in the ignition. Was this evidence of incidental restraint and movement of the victim, which had no independent purpose or injury apart from facilitating the robbery, sufficient to establish a kidnapping?
2. The defendant had two prior convictions for possession of stolen property based on having been seen in the same stolen car on two successive days. The prior convictions had been found not to constitute the same criminal conduct. In calculating the defendant's offender score for the current

convictions, did the trial court err in failing to make an independent determination that these prior convictions constituted the same criminal conduct?

C. STATEMENT OF THE CASE

Jason Shepard appeals his convictions on charges of kidnapping, robbery and theft. (CP 310-23)

Brittany Fields told a jury that she had stopped at a self-service gas station about one o'clock in the morning. (RP 184-85) While she was putting gas in her car, Jason Shepard approached her, told her his baby was in the ICU at Sacred Heart hospital, and asked for "a couple of dollars so he could go see his baby." (RP 187) Ms. Fields told him to bring his car over to the gas pump, and while he was doing so she ran her credit card to give him \$10 worth of gas. (RP 187-88)

According to Ms. Fields, when Mr. Shepard finished putting gas in his car, he came up behind her and told her to get in the passenger seat of her car. (RP 189) Then he pushed her into her car and across to the passenger seat, and drove away from the gas station. (RP 190) As he was driving, he asked her for her cell phone and her debit card. (RP 191) She complied with these demands. (RP 193) He asked her for the access

password for the debit card, and when she said she didn't have it he threatened her. (RP 194)

Ms. Fields testified that after driving about ten blocks, Mr. Shepard stopped the car. (RP 197) A woman who had been following them pulled up next to Ms. Fields's car, and after she exchanged remarks with Mr. Shepard he got out of Ms. Fields's car and drove away with the woman. (RP 198)

Prior to sentencing, defense counsel moved to dismiss the kidnapping and theft charges because the evidence was insufficient to show they were not merely incidental to the robbery. (CP 276)

At sentencing, defense counsel argued that two of Mr. Shepard's prior convictions should be counted as a single point because they encompassed the same criminal conduct. (RP 473-74; CP 291) The State submitted documents showing that Mr. Shepard had been convicted of two counts of possession of stolen property involving a single car but alleged to have occurred on two successive days in 1998. (CP 232) He had been seen in the car on the first day, but eluded a pursuing police officer and was arrested when he was seen in the same car the following day. (CP 251-53) In 1999, the court had found these offenses were not the same criminal conduct; the sentences, however, were served concurrently. (CP 233, 237)

Although expressing some doubt, the court in the present case stated that the prior court's determination was dispositive on the issue of the scoring of these convictions:

It was a little hard for me to understand the possession on two separate dates but it was the same car. The date were sequentially one following the other. The point is, however, when you look at the record, it's obvious to me, as Mr. Steinmetz has pointed out, that in that particular instance the Court found that there was not the same course of conduct. That to me is the finding. That's there so I'm not going to mess with that. That's the finding of the Court.

(RP 482-83) Counting these prior convictions as two points, Mr. Shepard's offender score for the kidnapping was 7 points. The court imposed a maximum standard range sentence of 144 months for the kidnapping, with the sentences for the other two offenses to run concurrently. (CP 300, 302)

D. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE KIDNAPPING WAS NOT MERELY INCIDENTAL TO ROBBERY.

To establish that a defendant committed the offense of first degree kidnapping, the State must prove that the defendant intentionally abducted another person. RCW 9A.40.020. But the evidence may be insufficient to establish abduction where there is mere incidental restraint and movement

of the victim during the course of another crime when the restraint has no independent purpose or injury. *See State v. Green*, 94 Wn.2d 216, 227, 616 P.2d 628 (1980).

Evidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction. *State v. Saunders*, 120 Wash.App. 800, 817-18, 86 P.3d 232 (2004); *see also State v. Whitney*, 108 Wash.2d 506, 511, 739 P.2d 1150 (1987) (where such conduct involved in the perpetration of a crime does not have an independent purpose or effect, it should be punished as an incident of the crime and not additionally as a separate crime). . . . Thus, whether the kidnapping is incidental to the commission of other crimes is a fact-specific determination. *See State v. Green*, 94 Wash.2d 216, 225-27, 616 P.2d 628 (1980); *State v. Korum*, 120 Wash.App. 686, 707, 86 P.3d 166 (2004), *rev'd on other grounds*, 157 Wash.2d 614, 141 P.3d 13 (2007).

State v. Elmore, 154 Wn. App. 885, 901, 228 P.3d 760, 767-68 (2010).

Several cases have analyzed “incidental” crimes involving kidnapping and an additional crime. *See, e.g., State v. Green*, 94 Wn.2d 216, 226-27, 616 P.2d 628 (1980) (movement of the victim was incidental to the homicide and did not support additional kidnapping conviction); *State v. Korum*, 120 Wn. App. 686, 703, 86 P.3d 166 (2004) (restraint of victims during a robbery was solely to facilitate robberies and not kidnappings), *aff'd in part, reversed in part on other grounds*, 157 Wn.2d 614 (2006); *State v. Saunders*, 120 Wn. App. 800, 819, 86 P.3d 232 (2004) (kidnapping was not merely incidental to rape);

State v. Harris, 36 Wn. App. 746, 754, 677 P.2d 202 (1984) (rational trier of fact could reasonably have found the abduction as a separate offense from the rape). These cases explain that “mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury is insufficient to establish a kidnapping.” *State v. Brett*, 126 Wn.2d 136, 166, 892 P.2d 29 (1995).

Korum provides an example of kidnappings incidental to robberies. In *Korum* the State charged the defendant with several kidnapping charges stemming from a conspiracy to rob drug dealers in a series of home invasions. 120 Wn. App. at 689. In that case, the perpetrators restrained the victims with duct tape while searching the homes and stealing drugs, money, and other valuables. *Id.* at 690-92. The court determined that this restraint of the victims did not constitute separate kidnappings:

[W]e hold as a matter of law that the kidnappings here were incidental to the robberies for the following reasons: (1) The restraints were for the sole purpose of facilitating the robberies-to prevent the victims’ interference with searching their homes for money and drugs to steal; (2) forcible restraint of the victims was inherent in these armed robberies; (3) the victims were not transported away from their homes during or after the invasions to some remote spot where they were not likely to be found; (4) although some victims were left restrained in their homes when the robbers left, the duration of the restraint does not appear to have been substantially longer than that required for commission of the robberies; and (5) the

restraints did not create a significant danger independent of that posed by the armed robberies themselves.

Id. at 707 (footnotes omitted) (*citing Green*, 94 Wn.2d at 216).

The evidence demonstrates that restraining Ms. Fields was incidental to the robbery. It served no other purpose than to place the victim in a situation where she would be willing to hand over her property. As soon as the robbery was complete Mr. Shepard returned control of her car to Ms. Fields. Ms. Fields did not describe any danger or injury beyond being pushed into her car, which was the force used to effect the robbery.

The evidence was insufficient to support the kidnapping conviction.

2. THE COURT SHOULD HAVE INDEPENDENTLY DETERMINED THAT THE TWO PRIOR CONVICTIONS FOR POSSESSION OF STOLEN PROPERTY CONSTITUTED THE SAME COURSE OF CONDUCT.

The sentencing court has an affirmative duty to determine whether the prior offenses shall be counted as one offense or as separate offenses:

Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. *The current sentencing court shall determine* with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, *whether those offenses shall be counted as*

one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a).

RCW 9.94A.525(5)(a)(i).

The trial court has discretion to make factual determinations as to whether convictions constitute the same criminal conduct. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). When two or more crimes require the same criminal intent, are committed at the same time and place, and involve the same victim, they constitute the same criminal conduct and the sentencing court must count them as one offense when computing the defendant’s criminal history at sentencing. RCW 9.94A.589(1)(a).

Possession of stolen property is a continuing offense, and possession of the same property for a period of several days constitutes a single offense. *State v. McReynolds*, 117 Wn. App. 309, 340, 71 P.3d 663 (2003). In *McReynolds*, the court held that when a defendant possesses stolen property from multiple owners at the same time, the unit of prosecution is a single count of possession of stolen property and the degree of the crime is the aggregate value of the items of stolen property. 117 Wn. App. at 338-39. Because the McReynoldses had been convicted of first degree possession of stolen property, for property they both continuously possessed during a period of 15 days, their convictions for

additional counts of first degree possession of stolen property and second degree possession of stolen property, for other property possessed during that same period, violated their rights against double jeopardy and were dismissed. *McReynolds*, 117 Wn. App. at 340.

Mr. Shepard's convictions for possession of stolen property were entered pursuant to his guilty plea and were apparently not appealed. (CP 232) In his guilty plea statement, Mr. Shepard admitted "I was driving a stolen car that I had found threw [sic] a friend. And I saw the police and panicked [sic]." (CP 247) Nothing in this statement would support the inference that Mr. Shepard did not possess the stolen car continuously from October 21 to October 22, 1998.

The State has the burden of proving criminal history by a preponderance of the evidence under RCW 9.94A.500. The State failed to present any evidence that the prior possession convictions did not encompass the same, continuing conduct constituting a single offense. Accordingly, the court erred in failing to find that these convictions should be scored as a single offense.

E. CONCLUSION

The kidnapping conviction should be reversed and dismissed, and the case should be remanded for resentencing using an offender score in which the prior possession of stolen property convictions are scored as a single offense.

Dated this 2nd day of March, 2011.

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