

29094-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON P. SHEPARD, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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Andrew J. Metts
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INDEX

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....1

ARGUMENT4

 A. THE KIDNAPPING CONTINUED AFTER
 THE ROBBERY WAS COMPLETED4

 B. THE TRIAL COURT DID NOT ERR IN
 COUNTING THE PRIOR POSSESSION
 OF STOLEN PROPERTY CONVICTIONS
 AS SEPARATE CRIMINAL CONDUCT9

CONCLUSION.....11

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. ALLEN, 94 Wn.2d 860, 621 P.2d 143 (1980), <i>abrogated on other grounds by</i> <i>State v. Vladovic</i> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	6, 7
STATE V. GREEN, 94 Wn.2d 216, 616 P.2d 628 (1980).....	4, 8
STATE V. KORUM, 157 Wn.2d 614, 141 P.3d 13 (2006).....	8
STATE V. LOUIS, 155 Wn.2d 563, 120 P.3d 936 (2005).....	5
STATE V. MAXFIELD, 125 Wn.2d 378, 886 P.2d 123 (1994).....	10
STATE V. ROBINSON, 20 Wn. App. 882, 582 P.2d 580 (1978), <i>aff'd</i> , 92 Wn.2d 357, 597 P.2d 892 (1979).....	5
STATE V. VLADOVIC, 99 Wn.2d 413, 662 P.2d 853 (1983).....	5

STATUTES

RCW 9.94A.589.....	10
RCW 9A.40.010(1).....	5

I.

APPELLANT'S 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 offender score.

II.

ISSUES PRESENTED

- A. There was more than ample evidence to support the First Degree Kidnapping conviction.
- B. The trial court did not err in counting two prior Possession of Stolen Property counts as separate counts.

III.

STATEMENT OF THE CASE

The defendant was charged by information filed in Spokane County Superior Court with one count of First Degree Kidnapping, one count of Second Degree Robbery and one count of Second Degree Theft (access device). CP 1-2

The victim, Ms. Brittany Fields stopped at a self-serve gas station in the early morning hours of May 4-5, 2009. RP 185. This station was located at Lyons and Nevada streets in Spokane County. RP 186. Ms. Fields noticed two cars in the station parking lot as she was pumping the gas into her car. RP 187. A male got out of one of the cars and walked up to her. RP 187. The man stated that he had a baby in the Sacred Heart ICU and he asked Ms. Fields for a couple of dollars so that he could get to Sacred Heart to see his baby. RP 187.

Ms. Fields agreed to give the person some gasoline and told him to bring his car over to the pump. RP 187. Ms. Fields did not notice anyone else in the man's car. RP 187. Ms. Fields swiped her card and allowed the male to put \$10.00 worth of gas into his car. RP 188.

Ms. Fields wished the man good luck with his baby and moved to get back into her car. RP 189. The man came up behind Ms. Fields and told her to get into the passenger side. RP 189. He grabbed her by the arm and pushed her from the driver's side of her car to the passenger side. RP 190. The man got into the driver's position and pulled the victim's car onto Nevada and then left on Lyons streets. RP 190.

As the stranger was driving the car, he demanded Ms. Fields' debit car and cell phone. This demand occurred approximately one to two minutes. RP 191. The debit card was in Ms. Fields' pocket and she gave

it to the driver. RP 193. The cell phone was in her purse and she also gave that to the man. RP 194.

After the man got the debit card and the cell phone, he demanded the PIN number for the debit card. RP 194. The card was recently issued and Ms. Fields did not know the PIN number. RP 194. The man stated that if she did not give him the PIN number, he would hurt her. RP 194. The victim started to cry. RP 195. She told the man that he could take anything he wanted, just do not hurt her. RP 195.

The man drove the car approximately ten blocks from the gas station to where he ultimately stopped. RP 196. According to Ms. Fields, this took six to eight minutes.¹ RP 195. The man was 6' to 6' 2" and built "...pretty big." RP 196. Ms. Fields described herself as 5' 8" tall with a slender build. RP 196.

The driver ultimately stopped and his girlfriend pulled alongside and the man stated, "I got her debit card and her cell phone, should I get anything else." RP 198. The girlfriend stated, "I don't care, get what you want." RP 198. The man looked back at Ms. Fields and then got out of her car and into the other car and departed. RP 198. Ms. Fields was able to get the license plate number of the second car. RP 198.

¹ The transcript states: "Probably six to eight members." RP 195. The word "members" makes no sense in the context of the sentence and the State assumes that the word actually used by the witness was "minutes."

In court, Ms. Fields identified the defendant as the man that robbed her. RP 199.

Because focus of the appeal is narrow and identity is not an issue in this appeal, the remainder of the transcript will be truncated.

The jury found the defendant guilty as charged on counts one, two and three. CP 452-53. The jury found the aggravating circumstance of the victim acting as a Good Samaritan on all counts. RP 453. This appeal followed. CP 310-323.

IV.

ARGUMENT

A. THE KIDNAPPING CONTINUED AFTER THE ROBBERY WAS COMPLETED.

The defendant argues that there was insufficient evidence to support the conviction for First Degree Kidnapping. Relying on *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980), the defendant contends that the evidence was insufficient to establish unlawful imprisonment because any restraint involved in the kidnapping was merely "incidental" to the robbery. The defendant must first show that the actions of the defendant in restraining the victim were incidental to the robbery and had no independent purpose other than facilitating the robbery. According to the defendant, if the kidnapping is "merely

incidental to the robbery, then there is insufficient evidence to support the kidnapping.

To restrain someone is to restrict their movements “without consent and without legal authority in a manner which interferes substantially with [her] liberty.” RCW 9A.40.010(1). Substantial interference is a “ ‘real’ or ‘material’ interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict.” *State v. Robinson*, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), *aff’d*, 92 Wn.2d 357, 597 P.2d 892 (1979).

Kidnapping cannot merge into robbery. *State v. Vladovic*, 99 Wn.2d 413, 421, 662 P.2d 853 (1983) (kidnapping does not merge into robbery); *State v. Louis*, 155 Wn.2d 563, 571, 120 P.3d 936 (2005) (kidnapping does not merge into robbery).

The facts of this case show that the defendant obtained the victim’s debit card and cell phone and *then continued to restrain* the victim *after* having obtained those items. The defendant kept driving for a total of 10 blocks. RP 196. The defendant showed that he had no problem continuing the ordeal when he stated to his girlfriend in a following car that he had the victim’s card and cell phone. Within earshot of the victim, the defendant asked his girlfriend if he should *get anything else*. RP 198. This shows that if the girlfriend had wanted something else, the defendant

was more than willing to continue holding the victim. The facts certainly show that the kidnapping was not incidental to the robbery.

In a case quite similar to this case, the victim was working outside a Stop-and-Go Store when the defendants approached in a vehicle. *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), *supra*. They pointed a rifle at the victim, told him it was a "hold up," and demanded that he get in their car. *State v. Allen*, 94 Wn.2d at 861. They then told the victim to give them instructions on how to open the cash register. Once the defendants got the cash register drawer from the store, they drove away with the victim still in the back seat of the vehicle and the rifle still pointed at him. After driving three blocks, the defendants told the victim to get out of the car and run back to the store. *State v. Allen*, 94 Wn.2d at 861.

The Washington Supreme Court upheld the trial court's ruling that the kidnapping was not incidental to the robbery, finding that "[t]he first crime (robbery) had come to an end before the second crime (kidnapping) began." *State v. Allen*, 94 Wn.2d at 864. The defendants were charged with first degree robbery and first degree kidnapping. On appeal, one of the defendants argued that the kidnapping was merely incidental to the robbery. The Supreme Court reasoned that the force or fear was employed

to obtain personal property (*i.e.*, the money) from the victim. In the subsequent kidnapping, the force was used to abduct the victim by secreting him in a place where he was not likely to be found (*i.e.*, lying flat in the back seat of a car) or to facilitate the flight from the scene of the robbery, thus unlawfully restraining or restricting the victim's movement by physical force or intimidation. *State v. Allen*, 94 Wn.2d at 864.

The only material difference in the present case is that the kidnapping of the victim began before the robbery. That difference is not material, however, to the underlying principle: The kidnapping and robbery were separate. The kidnapping of Ms. Fields began as soon as defendant Shepard forced her into her car and she was whisked away from the gas station in her car. At that point, the victim was being held in a place where she was not likely to be found, at night, in her car. This restraint was not merely incidental to the commission of the second degree robbery. The restraint was a necessary precedent to the commission of the robbery. If the defendant had allowed the victim to enter her car without the restraint, he likely would not have been able to commit the robbery. She most likely would have driven away from him before he had the opportunity to commit the robbery.

The defendant threatened physical harm to the victim. RP 191. The victim cried through much of the ordeal. To argue that the kidnapping was “merely incidental” to the robbery does not comport with the story from the victim.² The defendant could have demanded the card and the cell phone at the gas station, but he did not. The terrorizing of the victim for some minutes was not required to commit the robbery. The kidnapping was a separate injury. The facts of this case are nothing like those in the cases cited by the defendant.

For example, the defendant cites to *State v. Korum*, 157 Wn.2d 614, 627, 141 P.3d 13 (2006). In *Korum* the victims were part of a home invasion robbery. The victims were hardly moved at all and restrained within their house. The circumstances in *Korum* are completely different than those in this case.

In *Green*, the Court decided that the kidnapping in that case was incidental to the murder. *Id.* at 227. The decision was based on the facts that the victim was moved only 25-50 feet, the murder was done in an open, public area and the restraint of the victim was for the purposes of the murder. *Id.* at 227. Again, the facts of that case are not even similar to this case in which the victim was restrained for a number of minutes, driven away from a public location, deprived of her cell phone and thus

² The defendant did not testify and presented no defense case.

ability to obtain help, and the restraint in this case continued even after the defendant had completed the robbery. Unlike the cases cited by the defendant, the kidnapping was not “part and parcel” of the robbery. If the defendant had wanted to avoid a kidnapping charge, he could have robbed the victim at the unattended gas station and not forced her into the car.

Of course, it could be argued that the victim could have jumped from the car at some point during the kidnapping and escaped. This sort of argument asks a 20 year old, slender girl to jump from a moving car after being forced into that car (at 1:00 AM) by a significantly larger male. The State submits that the law does not require a victim to exhibit superhero powers.

B. THE TRIAL COURT DID NOT ERR IN COUNTING THE PRIOR POSSESSION OF STOLEN PROPERTY CONVICTIONS AS SEPARATE CRIMINAL CONDUCT.

The defendant asserts that the trial judge in this case erred by not counting two 1999 possession of stolen property crimes as “same criminal conduct” the net effect of such finding would be to lower the defendant’s criminal history score by one point.

The two crimes being contested by the defendant are a result of convictions from guilty pleas in Spokane County Superior Court. Among the elements of the plea bargain were two possession of stolen property charges, one for first degree and one for second degree. Both charges arose from the possession of the same Nissan, but one day apart. The defendant ran from the police on the first incident, bouncing through a rough field, where the police cruisers could not continue, and made good his escape. The summary of facts notes that when finally apprehended on the second date, the defendant was armed with a loaded Smith and Wesson handgun and other weapons were discovered in the car. The value of those weapons along with other stolen property in the car could easily explain the two differing possession charges.

RCW 9.94A.589 states in part: “‘Same criminal conduct,’ as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” *Id.* If any one of these elements is missing, the sentencing court must count the offenses separately when calculating the offender score. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

There is no way to know the defendant's criminal intent, but certainly the defendant did not stop the Nissan and idle in the same location for 20+ hours. Each time the defendant got into the Nissan, he had to form the intent to possess the car knowing it was stolen. It seems unlikely that the defendant would sleep, eliminate bodily wastes, eat, etc. without getting out of the car at some point. Additionally, he had to have moved the stolen item(s) to at least one additional location if not many.

By definition, the two possession crimes could not be "same criminal conduct" as they do not meet the definition. The trial court in this case was presented a sentencing memorandum, CP 158-265, which included the judgment and sentence paperwork for the two vehicle possessions as well as a summary of facts for the crimes. CP 158-265. The sentencing court in 1999, logically the entity most familiar with the case, counted each of the possession charges separately.

It was not illogical or erroneous for the trial court in this case to adopt the holding of the first court and refuse to find the two possession of stolen property charges comprised "same criminal conduct." With the application of logic to the matters of intent and location, clearly the two crimes did not fit the statutory definition of "same course of conduct."

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 2nd day of May, 2011.

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A handwritten signature in black ink, appearing to read "Andrew J. Metts", is written over a horizontal line.

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