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SUPREME COURT
STATE OF WASHINGTON
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NO. 89570-8

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY SCOTT REED,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 41167-9-II
Clark County No. 09-1-00761-6

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ARGUMENT

THE COURT OF APPEALS' DECISION IS IN LINE WITH SUPREME COURT PRECEDENT AND SHOULD BE AFFIRMED.

In its part-published opinion, the Court of Appeals vacated Jeffrey Reed's first degree kidnapping conviction for insufficient evidence, following its previous decision in State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004), aff'd in part, rev. in part on other grounds, 157 Wn.2d 614 (2006). Korum followed precedent from this Court which has not been overturned. Nor should it be overturned. Division One's decision to abandon the incidental restraint doctrine in determining the sufficiency of the evidence in restraint-based crimes¹ flies in the face of this precedent and should be rejected.

Under Washington Supreme Court precedent, there is insufficient evidence to establish all the elements of a kidnapping where the restraint of the victim is incidental to the commission of another crime. State v. Green, 94 Wn.2d 216, 227-28, 616 P.2d 628 (1980); State v. Vladovic, 99 Wn.2d 413, 424, 662 P.2d 853 (1983); State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995).

¹ State v. Phuong, 174 Wn. App. 494, 299 P.3d 37 (2013); State v. Grant, 172 Wn. App. 496, 301 P.3d 459 (2012), review denied, 177 Wn.2d 1021 (2013).

A defendant is guilty of first degree kidnapping if he intentionally "abducts" another person. RCW 9A.40.020(1). Abduction is a "critical element in the proof of kidnapping." Green, 94 Wn.2d at 225. "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 of a victim during the course of another crime is insufficient to establish a separate crime of kidnapping where the movement and restraint had no independent purpose or injury. See Brett, 126 Wn.2d at 166; Green, 94 Wn.2d at 227.

The Court of Appeals in this case recognized that the incidental restraint doctrine is required by Green. State v. Berg, 177 Wn. App. 119, 131, 310 P.3d 866 (2013). In Green, this Court held the elements of kidnapping in aggravation of first-degree murder were not established by sufficient evidence because the restraint and movement of the victim was merely "incidental" to the homicide rather than independent of it. Green, 94 Wn.2d at 219, 227-28. The Court stated this conclusion was "compelled" by Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Green, 94 Wn.2d at 219. Jackson held the proper test

for determining the sufficiency of evidence to support a conviction 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." Green, 94 Wn.2d at 221 (quoting Jackson, 443 U.S. at 319).

Green began its analysis by noting that while kidnapping is an element of aggravated murder in the first degree, it is also a separate and distinct statutory crime having specific elements, each of which must be established beyond a reasonable doubt. Green, 94 Wn.2d at 224. "The issue, as framed in Jackson v. Virginia, *supra*, is whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of kidnapping beyond a reasonable doubt." Green, 94 Wn.2d at 221-22.

The Court held that the State had not established kidnapping by means of secreting or holding the victim in a place where she was not likely to be found, by the standard of proof required by Jackson. Id. at 228. Evidence showed the defendant grabbed the victim, carried her 20-50 feet, placed her behind a building and killed her there. Id. at 226-27. One reason the evidence was insufficient to convict for kidnapping was that "these events were actually an integral part of and not independent of the underlying homicide" — the kidnapping was merely incidental to the

commission of another crime. Id. at 227. The Court reasoned, "the mere incidental restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping." Id.

Here, the State argued below that this passage in Green was dictum, because the Green Court had already found there was no evidence of restraint. The Court of Appeals rejected this argument, noting that a statement is dictum only if it is unrelated to the issues before the court and unnecessary to decide the case. Berg, 177 Wn. App. at 133 (citing State v. Potter, 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992)). Because the Green Court in this passage explained why there was no evidence of restraint, the passage was necessary to the decision and is not dictum. Berg, 177 Wn. App. at 133.

This Court addressed the incidental restraint issue again in State v. Brett. Brett argued there was insufficient evidence to support the special verdict that the murder was committed in the course of kidnapping in the first degree because the restraint was incidental to the murder, and thus there was no "abduction." Brett, 126 Wn.2d at 166. The Court recognized it had previously held "the 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." Id. (citing

Green, 94 Wn.2d at 227). There was sufficient evidence in Brett's case, however, because the kidnapping was not incidental to murder — Brett planned to kidnap the random victim and was in the course of kidnapping that victim when the plan went awry, resulting in murder. Id.

The Court of Appeals has followed this Supreme Court precedent in a number of decisions, determining whether, on the facts of a particular case, sufficient evidence supported a kidnapping conviction under an incidental restraint analysis. See, e.g., State v. Korum, 120 Wn. App. at 702-03, 707 (restraint of victims was incidental to robberies and therefore insufficient evidence supported kidnapping convictions); State v. Elmore, 154 Wn. App. 885, 901, 228 P.3d 760 ("Evidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction."), review denied, 169 Wn.2d 1018 (2010); State v. Saunders, 120 Wn. App. 800, 818-19, 86 P.3d 232 (2004) (sufficient evidence supported kidnapping where it was not merely incidental to rape; restraint went above and beyond that required or even typical in the commission of rape); see also State v. Washington, 135 Wn. App. 42, 50-51, 143 P.3d 606 (2006) (applying incidental restraint doctrine to crime of unlawful imprisonment in determining sufficiency of evidence).

In Phuong, the Division One majority sidesteps the incidental restraint doctrine by interpreting Green as addressing a double jeopardy problem under the merger rule. Phuong, 174 Wn. App. at 517, 521 n.21. But Green made it crystal clear that it was applying the sufficiency of evidence test under the due process clause of the Fourteenth Amendment. Green, 94 Wn.2d at 225–26, 228. There is no mention of double jeopardy in Green. The sufficiency of the evidence analysis is distinct from whether crimes merge for double jeopardy purposes: "Although Green borrowed the 'incidental restraint' concept from an earlier merger case, it incorporated this concept into a new standard for determining sufficiency of evidence on appeal." In re Pers. Restraint of Bybee, 142 Wn. App. 260, 266-67, 175 P.3d 589 (2007).

Unlike Division One's abandonment of the incidental restraint doctrine, Division Two's decisions in this case and Korum are in line with binding precedent from this Court. There is no reason for this Court to depart from its analysis in Green.

As the Court of Appeals concluded, there was insufficient evidence to prove first degree kidnapping in this case. Reed and Berg were charged with burglary, robbery, and kidnapping arising out of a home invasion. CP 7-9. The evidence showed that two men broke into Watts's home, and one held him at gunpoint while the other searched the home for drugs and

other items to steal. 24RP 998. Watts was not moved to another location; rather, he was told to get to the ground right where he was when he encountered the robbers, and he remained there throughout. 24RP 994. Although he was told to remain on the ground for 15 minutes after the robbers left, he was not physically restrained, and he got up within three minutes. 24RP 1000. There was no evidence that Watts was restrained for any purpose separate and independent of the home invasion, and the restraint did not create any independent danger.

The kidnapping in this case was incidental to the robbery as a matter of law because (1) the sole purpose of the restraint was to facilitate the robbery, (2) the restraint was inherent in the robbery, (3) the victim was not transported to a place he was unlikely to be found, (4) the restraint did not last substantially longer than necessary to complete the robbery, and (5) the restraint did not create a significant independent danger. See Korum, 120 Wn. App. at 703. The Court of Appeals' decision vacating the kidnapping conviction should be affirmed.

B. CONCLUSION

For the reasons addressed above, this Court should affirm the decision of the Court of Appeals vacating Reed's conviction of first degree kidnapping.

DATED this 7th day of April, 2014.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I deposited in the mails of the United States of America,
postage prepaid, a properly stamped and addressed envelope containing a
copy of the Supplemental Brief of Petitioner in *State v. Jeffrey S. Reed*,

Cause No. 89570-8 directed to:

Jeffrey S. Reed, DOC# 343607
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
April 7, 2014

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My Supplemental Brief is attached.

Catherine Glinski