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NO. 89570-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DAYLAN BERG,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Robert Lewis, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT DAYLAN BERG

CASEY GRANNIS
Attorney for Respondent

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ISSUE

Whether insufficient evidence supports Berg's conviction for kidnapping because it was incidental to the robbery?

B. STATEMENT OF THE CASE

Albert Watts operated a medical marijuana grow operation from inside the garage of the house he lived in. RP 986-87, 988-90, 1029. Watts had a roommate who lived in the house with him. 986-87, 999.

On the night of April 15, 2009, two men unknown to Watts broke through the back door of the garage as he tended his marijuana plants. RP 987, 991-94. Jeffrey Reed (the short man) ordered Watts to get on the ground while pointing a gun at his head. RP 992-94. Watts complied by lying down in front of the door. RP 994-95, 1011.

Daylan Berg (the tall man) followed Reed into the room. RP 993, 995. Reed gave the gun to Berg and told him to hold Watts down. RP 992, 995. Berg did as he was told by putting a knee in Watts' back and the gun to Watts' head. RP 995. They yelled they were there to take the plants and whatever they wanted. RP 995. Reed asked where Watts' roommate was. RP 997. Watts said he was at work. RP 997. Reed went back and forth from the house and garage, during which time he took the marijuana plants. RP 997-99. Berg told Watts to keep looking straight down and reminded Watts they would kill him whenever he tried to turn

his head. RP 998. Watts estimated he was pinned to the floor for 30 minutes. RP 999. The garage — the site of Watts's restraint — was attached to the house. RP 998, 1001. Watts was restrained at its backdoor, which leads to the backyard. RP 991-92, 994-95. There is a regular entry door that leads directly from the garage to the interior of the house. RP 998, 1001.

When Reed returned, Berg got off Watts and asked what they were going to do. RP 1000. Reed threatened Watts not to go to the police. RP 1000, 1017. Reed told Watts to stay on the floor for 15 minutes and then left with Berg. RP 1000, 1034. Watts stayed on the floor for three or four minutes and then got up and went to the kitchen before going outside. RP 1000-04. He was met by police responding to a neighbor's 911 call about suspicious activity at the residence. RP 1001-04, 1085.

Watts was unable to identify the men from a later photo array or at trial. RP 1005, 1027, 1034-35. Various pieces of evidence pointed to Berg and Reed as the perpetrators in the above-described incident, as well as a subsequent shooting of a police officer that occurred during their flight from the scene. RP 558, 1015-16, 1093-94, 1098-99, 1113, 1119-20, 1132-50, 1154, 1195, 1204-06, 1211-12, 1225-29, 1238-41, 1275-76, 1314-15, 1319-20, 1563-64, 1566-68, 1648-51, 1655-67, 1682-84, 1687-

89, 1726-29, 1737-38, 1822-23, 1846, 1944, 1973-77, 1901-03, 1907, 1916-1920, 1991-92.

The State charged Berg with attempted first degree murder for the shooting, and first degree robbery, first degree kidnapping, first degree burglary, and intimidating a witness in connection with events at the Watts residence. CP 1-3. A jury returned guilty verdicts on all counts and affirmative special verdicts. CP 80-92. The court imposed an exceptional sentence of 500 months on the attempted murder count and 748 months total confinement. CP 99, 108.

The Court of Appeals reversed the kidnapping conviction due to insufficient evidence but otherwise affirmed. State v. Berg, 177 Wn. App. 119, 122, 310 P.3d 866 (2013). This Court granted the State's petition for review on the kidnapping issue.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO PROVE THE KIDNAPPING UNDER THE INCIDENTAL RESTRAINT STANDARD.

Due process requires the State to prove every element of the charged offense beyond a reasonable doubt to obtain a criminal conviction. State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend XIV; Wash. Const. art. I, § 3. Under Washington Supreme Court

precedent, there is insufficient evidence to establish the elements of a kidnapping where the restraint of the victim is incidental to the commission of another crime. Green, 94 Wn.2d at 227-28; 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), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996). In Berg's case, the restraint used in the kidnapping was incidental to the robbery. The kidnapping conviction is therefore unsupported by sufficient evidence. The Court of Appeals should be affirmed.

a. What Green Means: The Abduction Element Of Kidnapping Is Not Established If The Abduction Is Incidental To Another Crime.

To establish a kidnapping, the State must prove the defendant 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(1). "Restrain" means "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty" and "'restraint' is 'without consent' if it is accomplished by . . . physical force, intimidation, or deception." RCW 9A.40.010(6).

In Green, the Supreme Court held a kidnapping in aggravation of first-degree murder was 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 based this holding under the sufficiency of evidence standard articulated in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Green, 94 Wn.2d at 219.

Green recognized that while kidnapping is an element of aggravated murder in the first degree, it is also a separate statutory crime having specific elements, each of which must be established beyond a reasonable doubt. Green, 94 Wn.2d at 224. Abduction may be proved in three distinct ways, each of which necessarily involves restraint. Id. at 225. The Court held that kidnapping by means of secreting or holding the victim in a place where she was not likely to be found was not established 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. The evidence was insufficient to convict for kidnapping "by means of secreting or holding the victim in a place where she was not likely to be found" because "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. (citing People v. Adams, 389 Mich. 222, 236, 205 N.W.2d 415 (Mich. 1973); People v. Levy, 15 N.Y.2d 159, 164, 256 N.Y.S.2d 793, 204 N.E.2d 842 (N.Y.), cert. denied, 381 U.S. 938, 85 S. Ct. 1770, 14 L. Ed. 2d 701 (1965)). Green therefore held "kidnapping by means of secreting or holding the victim in a place where she was not likely to be found has not been established . . . by . . . the standard of proof required by Jackson v. Virginia, supra." Green, 94 Wn.2d at 228.

Further, there was no evidence of restraint by means of a threat to use deadly force. Id. In addition, there was no evidence of restraint by deadly force other than other than that employed in the ultimate killing, and the killing itself could not supply the restraint necessary to prove kidnapping under the sufficiency of evidence standard. Id. at 228-29.

Following Green, Division Two in State v. Korum held the kidnapping convictions in that case were incidental to the robberies and therefore unsupported by sufficient evidence. State v. Korum, 120 Wn. App. 686, 707, 86 P.3d 166 (2004), aff'd in part, rev. in part on other grounds, 157 Wn.2d 614 (2006). In reaching that holding, the Court relied

on Green. Korum, 120 Wn. App. at 702-07. In Berg's case, Division Two properly adhered to Korum and its faithful application of Green in reversing the kidnapping conviction. Berg, 177 Wn. App. at 130-38.

Notwithstanding Green and Korum, a split Division One court in Grant recently repudiated the incidental restraint standard as inapplicable to a sufficiency of evidence challenge, affirming the kidnapping conviction on the ground that separate convictions for first degree robbery and first degree kidnapping do not violate double jeopardy. State v. Grant, 172 Wn. App. 496, 301 P.3d 459, 460 (2012), review denied, 177 Wn.2d 1021, 304 P.3d 115 (2013). A split Division One court in Phuong likewise interpreted Green as addressing a double jeopardy problem using a merger analysis. State v. Phuong, 174 Wn. App. 494, 518, 532, 299 P.3d 37 (2013), review pending (No. 88889-2). Division Three similarly converted a sufficiency of evidence challenge under the incidental restraint standard to one of double jeopardy. State v. Butler, 165 Wn. App. 820, 831, 269 P.3d 315 (2012).

Division Two is correct that "the split among the Courts of Appeals over the vitality of the incidental restraint doctrine is, in reality, a dispute about the meaning of Green." Berg, 177 Wn. App. at 131. The Supreme Court in Green clearly applied 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.

Berg raises a sufficiency of evidence challenge, not a double jeopardy challenge. See In re Pers. Restraint of Bybee, 142 Wn. App. 260, 266-67, 175 P.3d 589 (2007) ("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.").

This Court recognizes sufficiency of evidence under the due process clause and double jeopardy are distinct issues of law, although use of the term "merger" in both contexts invites the type of confusion to which Division One has succumbed. Judge Becker, dissenting in Grant, put her finger on the problem in distinguishing between the "general merger" rule applied in the double jeopardy context and the "kidnapping merger" rule applied in the due process sufficiency of evidence context. Grant, 301 P.3d at 466 (Becker, J., dissenting).

Vladovic was decided on the basis of that distinction. In Vladovic, the Supreme Court was faced with deciding two separate claims (1) whether convictions for both first degree robbery and first degree kidnapping violated double jeopardy and (2) whether there was sufficient evidence to support the kidnapping conviction under the incidental restraint doctrine enunciated in Green. Vladovic, 99 Wn.2d at 417, 420-24.

The Court held the conviction for robbery and kidnapping did not merge and were not barred by double jeopardy. Id. at 417, 420-24. It then

addressed the separate claim that insufficient evidence supported the kidnapping conviction. Id. at 424. The petitioner relied on Green in arguing his kidnapping convictions could not stand because the acts did not bear the indicia of a true kidnapping. Id.

Vladovic applied the sufficiency of evidence test set forth in Green: "whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of [the crime] beyond a reasonable doubt." Id. (quoting Green, 94 Wn.2d at 221-22). Vladovic recognized an ultimate killing of a victim does not itself constitute the restraint necessary to prove kidnapping under Green, but found Green did not compel reversal under the facts of the case because the restraint of certain victims was a separate act from the robbery of a different victim. Vladovic, 99 Wn.2d at 424. If the incidental restraint analysis were inapplicable in determining sufficiency of evidence, then there would have been absolutely no reason why the Court in Vladovic applied that analysis when faced with a sufficiency of evidence claim.

The Supreme Court addressed the incidental restraint issue again in Brett, where the petitioner argued insufficient evidence supported the special verdict that the murder was committed in the course of the kidnapping 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. at 166-67.

The two-judge majority in Phuong misread Brett in claiming it was really about merger under a double jeopardy analysis. Phuong, 174 Wn. App. at 530-31. The petitioner in Brett raised a sufficiency of evidence challenge and that is the challenge the Court addressed through application of the incidental restraint standard. Brett, 126 Wn.2d at 166-67.

The Washington Supreme Court is far from alone in this approach. The majority of jurisdictions have construed kidnapping statutes as inapplicable "to unlawful confinements or movements 'incidental' to the commission of other felonies." Frank J. Wozniak, Annotation, Seizure or Detention for Purpose of Committing Rape, Robbery, or Other Offense as Constituting Separate Crime of Kidnapping, 39 A.L.R.5th 283, 356 (1996). "[T]he direction of the criminal law has been to limit the scope of the kidnapping statute . . . to true kidnapping situations and not to apply it to crimes which are essentially robbery, rape or assault and in which some

confinement or asportation occurs as a subsidiary incident." State v. Goodhue, 175 Vt. 457, 463, 833 A.2d 861 (Vt. 2003) (quoting People v. Lombardi, 20 N.Y.2d 266, 270, 282 N.Y.S.2d 519, 229 N.E.2d 206 (N.Y. 1967)).¹

The seminal case is People v. Levy,² in which New York's high court recognized a broad interpretation of restraint in its kidnapping statute "could literally overrun several other crimes, notably robbery and rape, and in some circumstances assault, since detention and sometimes confinement, against the will of the victim, frequently accompany these crimes. Some of the definitions could apply alike to kidnapping and abduction. It is a common occurrence in robbery, for example, that the victim be confined briefly at gunpoint or bound and detained, or moved into and left in another room or place. It is unlikely that these restraints, sometimes accompanied by asportation, which are incidents to other crimes and have long been treated as integral parts of other crimes, were intended by the Legislature in framing its broad definition of kidnapping to constitute a separate crime of kidnapping, even though kidnapping

¹ See, e.g., State v. Miller, 175 W.Va. 616, 621, 336 S.E.2d 910 (W.Va. 1985) ("Most courts have concluded that a kidnapping has not been committed when it is incidental to another crime."); Mobley v. State, 409 So.2d 1031, 1034 (Fla. 1982) ("The prevalent view nationwide is that kidnapping statutes, regardless of their wording, do not apply to unlawful confinements or movements incidental to other felonies.").

² Cited by Green, 94 Wn.2d at 227.

might sometimes be spelled out literally from the statutory words." Levy, 15 N.Y.2d at 164.³

Numerous courts in other jurisdictions determine whether sufficient evidence supports a kidnapping conviction under an incidental restraint standard, regardless of whether double jeopardy is violated.⁴

³ Although Levy referred to the concept of "merger," it was subsequently noted that term was "technically inapt because, unlike a true merger situation, where the lesser crime merges only upon conviction of the greater . . . the merger analysis in a kidnapping case is unaltered even if defendant is acquitted of the rape or robbery." People v. Gonzalez, 80 N.Y.2d 146, 152, 603 N.E.2d 938 (N.Y. 1992).

⁴ See, e.g., People v. Bridges, 199 Colo. 520, 525, 528-29, 612 P.2d 1110 (Colo. 1980) (reversing kidnapping conviction because incidental to robbery and sexual assault; "the merger doctrine" under a double jeopardy analysis did not apply but "[i]n order to determine whether the defendant's conduct in the instant case constituted kidnapping, it is necessary to consider the appropriate construction of the statute and the sufficiency of the evidence to satisfy the statutory standards."), disapproved on other grounds by People v. Lowe, 660 P.2d 1261 (Colo. 1983); Burton v. State, 426 A.2d 829, 833, 835-36 (Del. 1981) (evidence sufficient to sustain kidnapping conviction; element of "substantial interference" with liberty satisfied where restraint was not incidental to another crime; analyzing whether double jeopardy violated as separate issue); People v. Mutch, 4 Cal.3d 389, 393-95, 482 P.2d 633 (Cal. 1971) (under People v. Daniels, 71 Cal.2d 1119, 459 P.2d 225 (Cal. 1969), incidental movement not within scope intended by legislature in prescribing the asportation element of kidnapping; in Daniels, "we reversed the defendants' kidnaping convictions under Penal Code section 209 on the ground that when the statute is properly construed the evidence there introduced was insufficient to support the judgments"); Government of Virgin Islands v. Berry, 604 F.2d 221, 228-29 (3d Cir. 1979) (reversing convictions of kidnapping because they were incidental robbery: "we do not believe that it was the intent of the Virgin Islands legislature to deem these acts kidnapping. We therefore cannot sustain the kidnapping conviction."); State v. Rich, 305 N.W.2d 739, 745-46 (Iowa 1981) (holding evidence sufficient to sustain

That is not a "novel" due process argument, as Division One would have it,⁵ but rather one that has a long history in the common law of our nation. The Supreme Court's decision in Green was born from that fertile ground, which continues to be the law of many jurisdictions to this day.

Korum fleshed out a comprehensive list of indicia to measure whether a kidnapping is incidental to a robbery: (1) facilitating the robbery was the restraint's sole purpose, (2) the restraint was inherent in the robbery, (3) the robbery victims were not transported from their home to a place where they were not likely 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. Korum, 120 Wn. App. at 707. The Court of Appeals correctly concluded those indicia of incidental restraint are present in Berg's case. Berg, 177 Wn. App. at 137-38. The indicia articulated by Korum make sense and are comparable to

kidnapping where removal and confinement substantially exceeded that which is incidental to the commission of sexual abuse); State v. Lykken, 484 N.W.2d 869, 875-78 (S.D. 1992) (recognizing a person cannot be convicted of kidnapping where the only restraint utilized was that necessary to complete the crime of rape, but affirming the defendant's kidnapping conviction because the evidence, viewed in the light most favorable to the state, showed the kidnapping was not incidental to the rape); State v. Beatty, 347 N.C. 555, 557-60, 495 S.E.2d 367 (N.C. 1998) (insufficient evidence to support kidnapping where restraint used to effectuate robbery consisting of pointing gun at victim).

⁵ Phuong, 174 Wn. App. at 518, 521.

those used in other jurisdictions.⁶ See 1 Am. Jur. 2d Abduction and Kidnapping § 9 (2014).

- b. Courts Have Used The Incidental Restraint Doctrine To Interpret What It Means To Establish The Element Of Abduction For The Kidnapping Offense And The Legislature Has Acquiesced In That Interpretation For Over 30 Years.

The Court in Green and those courts following Green, in adhering to the incidental restraint standard, have done no more than interpret what the legislature intended by requiring proof of "abduction" as an element of a true kidnapping. Contrary to the assertions in Phuong and Grant,⁷ application of the incidental restraint analysis does not add an additional, non-statutory element to the crime of kidnapping. The Court in Green interpreted what was required to establish the statutory element of abduction for a kidnapping offense through use of the incidental restraint standard. Green, 94 Wn.2d at 224-28. It applied a narrow rather than broad interpretation of what "restraint" meant in the kidnapping statute. Berg, 177 Wn. App. at 132 n.10.

⁶ The jury can and probably should be instructed to decide whether the kidnapping was incidental to another crime in determining whether an abduction occurred. See State v. Stirgus, 21 Wn. App. 627, 632, 586 P.2d 532 (1978) (question of whether the abduction was merely incidental to the rape was a question of fact for the jury, guided by appropriate instructions of the court).

⁷ Phuong, 174 Wn. App. at 540, 542 n. 37; Grant, 301 P.3d at 464.

That is the province of the judicial branch. See State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012) ("To determine whether the State has produced sufficient evidence to prove each element of the offense, we must begin by interpreting the underlying criminal statute."). "It is the province and duty of the judiciary to interpret the law." Backlund v. Board of Com'rs of King County Hosp. Dist. 2, 106 Wn.2d 632, 638, 724 P.2d 981 (1986). The Court did not usurp a legislative function in interpreting what the legislature intended to constitute a kidnapping. It is for the legislature to define crimes. It is the function of the judiciary to interpret the legislature's intent in so doing. Williamson, Inc. v. Calibre Homes, Inc., 147 Wn.2d 394, 401, 54 P.3d 1186 (2002).

Green is no outlier in that regard. As set forth above, many jurisdictions have construed their own kidnapping statutes in a similar manner.⁸ Green finds itself in the dominant view nationwide on what constitutes a true kidnapping.

⁸ See also, e.g., State v. Masino, 94 N.J. 436, 447-48, 466 A.2d 955 (N.J. 1983) (interpreting kidnapping statute and holding asportation must be more than merely incidental to the underlying crime; "we underscore the need for strict adherence by prosecutors and trial courts to the elements of kidnapping examined in this opinion. Today's decision is not to be read as a crack in the door against overzealous or creative prosecution for kidnapping nor as encouragement for use of a kidnapping charge as some sort of 'bonus' count in an indictment."); State v. Buggs, 219 Kan. 203, 215-17, 547 P.2d 720 (Kan. 1976) (holding kidnapping statute is not reasonably intended to cover movements and confinements which are

In the over 30 years since Green was decided and followed by other courts, the legislature has never substantively amended the kidnapping statute or issued clarifying legislation. RCW 9A.40.020, RCW 9A.40.030. This Court should be guided by the legislature's long-standing acquiescence: "Our interpretations of statutes form the background against which the legislature acts. We are reticent to remove from that background an interpretation that our coordinate branches of government have relied upon for such a lengthy period." City of Seattle v. McKenna, 172 Wn.2d 551, 562, 259 P.3d 1087 (2011).

The legislature has had over 30 years to amend the kidnapping statute or issue clarifying legislation in the event it disagreed with the sufficiency of evidence analysis in Green and subsequent cases employing the incidental restraint standard. It has not done so. If the incidental restraint analysis usurped legislative authority to define a crime as claimed

slight and 'merely incidental' to the commission of an underlying lesser crime; for example "[a] standstill robbery on the street is not a kidnapping;" sustaining kidnapping conviction because not incidental to robbery on facts of case); State v. Innis, 433 A.2d 646, 655 (R.I. 1981) (interpreting kidnapping statute to mean confinement that is incidental to the commission of a crime is not a kidnapping under the meaning of the statute); State v. Logan, 60 Ohio St.2d 126, 135, 397 N.E.2d 1345 (Ohio 1979) (interpreting kidnapping statute and reversing kidnapping conviction under following standard: whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense, and whether the victim was subjected to a substantial increase in the risk of harm separate from that involved in the underlying crime).

by Division One in Grant and Phuong,⁹ we certainly would have expected the legislature to act after Korum vacated multiple kidnapping convictions due to insufficient evidence under the incidental restraint standard. Korum, 120 Wn. App. at 707. That was 10 years ago.¹⁰

"This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." City of Federal Way v. Koenig, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). "If the legislature does not register its disapproval of a court opinion, at some point that silence itself is evidence of legislative approval." In re Custody of A.F.J., 179 Wn.2d 179, 186, 314 P.3d 373 (2013) (quoting 1000 Friends of Wash. v. McFarland, 159 Wn.2d 165, 181, 149 P.3d 616 (2006)).

⁹ Phuong, 174 Wn. App. at 540, 542 n. 37; Grant, 301 P.3d at 464.

¹⁰ The Court of Appeals has followed Green in a number of other decisions over the years in determining whether, on the facts of a particular case, sufficient evidence supported a restraint-based conviction under an incidental restraint analysis. See, e.g., 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); 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), review denied, 160 Wn.2d 1017, 161 P.3d 1028 (2007).

The rule of statutory construction is that "[t]he Legislature is deemed to acquiesce in the interpretation of the court if *no change* is made for a substantial time after the decision." Wash. Ind. Telephone Ass'n v. Wash. Utilities & Transp. Com'n, 148 Wn.2d 887, 905 n.14, 64 P.3d 606 (2003) (quoting State v. Coe, 109 Wn.2d 832, 846, 750 P.2d 208 (1988)); see, e.g., Buchanan v. Int'l Bhd. of Teamsters, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980) (declining to overrule previous precedent because legislature had not amended statute in question for 17 years since the decision issued).

The legislature has acquiesced to the incidental restraint standard in determining whether sufficient evidence supports the abduction element of the crime of kidnapping. This legislative acquiescence in Green and Korum's interpretation of the kidnapping statute strongly favors Berg's interpretation.

The State is really asking this Court to overrule Green. "The doctrine of stare decisis 'requires a clear showing that an established rule is incorrect and harmful before it is abandoned.'" Riehl v. Foodmaker, Inc. 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). "This respect for precedent 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial

decisions, and contributes to the actual and perceived integrity of the judicial process." Koenig, 167 Wn.2d at 347 (quoting Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)).

The dictate of stare decisis must be read in conjunction with the proposition that "[t]he Legislature is presumed to be aware of judicial interpretation of its enactments,' and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language." Riehl, 152 Wn.2d at 147 (quoting Friends of Snoqualmie Valley v. King County Boundary Review Bd., 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992)). The State has not shown Green was incorrectly decided for the reasons set forth above. Legislative acquiescence to Green confirms the Court correctly interpreted legislative intent on the issue. Nor can the State show the incidental restraint doctrine advanced in Green and its progeny is harmful. An inability to extract the maximum amount of possible punishment from a given criminal act does not harm the public interest. On the contrary, it protects the integrity of the criminal justice system by curbing overzealous charging decisions.

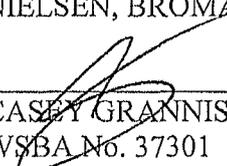
D. CONCLUSION

Berg requests that the Court of Appeals' decision to vacate the kidnapping conviction be affirmed.

DATED this 7th day of April 2014.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Respondent

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Attached for filing today is the Supplemental Brief of Respondent for the case referenced below:

State v. Dylan Berg

No. 89570-8

Supplemental Brief of Respondent

Casey Grannis
206.623.2373
WSBA No. 37301
Grannisc@nwattorney.net

Jamila Baker
Legal Assistant
Nielsen, Broman & Koch PLLC
1908 East Madison St. -
Seattle, WA 98122
206-623-2373
fax 206-623-2488