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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DAYLAN ERIN BERG
and
JEFFERY SCOTT REED,
Petitioners

FROM THE COURT OF APPEALS DIVISION II NO. 41167-9-II
and
SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.
09-1-00761-6 and 09-1-00762-4

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ARGUMENT

The Respondent¹, State of Washington, submits this supplemental brief for the Court's consideration of its request that this Court reverse the holding of the part-published opinion of Division II in *State v. Berg*, 177 Wn.App. 119, 310 P.3d 866 (2013).

I. THE COURT OF APPEALS MISAPPREHENDED THE SUPREME COURT'S HOLDING IN STATE v. GREEN RENDERING ITS RELIANCE ON THE CASE INAPPROPRIATE AND RESULTING IN FAULTY REASONING IN ITS OPINION BELOW

The Court of Appeals, Division II, has long misapprehended the Supreme Court's decision in *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980), as evidenced by its opinions in *State v. Korum*, 120 Wn.App. 686, 86 P.3d 166 (2004), *reversed in part on other grounds*, 157 Wn.2d 614, 141 P.3d 14 (2006) and *State v. Berg*, 177 Wn.App. 119, 310 P.3d 866 (2013). This misapprehension has led to an improper analysis of the incidental restraint concern as one of sufficiency of the evidence instead of a merger issue. The application of the sufficiency of the evidence standard to Berg's and Reed's convictions of Kidnapping in the First Degree below

¹ Both defendants and the State of Washington petitioned this Court for review of the decision of the Court of Appeals. The State's petition was the sole petition accepted for review. Despite the fact that it is the State's petition on for review by this Court, the State is identified as the Respondent pursuant to letter of the Court dated November 22, 2013)

was improper. There was clearly sufficient evidence presented at trial to support Berg's and Reed's convictions for Kidnapping. This Court should reverse the Court of Appeals' vacation of the Kidnapping convictions as there was sufficient evidence of Kidnapping presented at trial.

The defendant Green in *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980) was convicted of aggravated murder in the first degree based on the aggravator that Green caused the death of the victim in the course of or in furtherance of rape in the first degree or kidnapping in the first degree. *Green*, 94 Wn.2d at 231. On review, the Court in *Green* considered whether the State had presented sufficient evidence of kidnapping under the then newly-established "*Jackson test*" for sufficiency of the evidence. *Id.* at 224 (citing to *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). To establish kidnapping, the State had to prove that Green had restrained the victim by either secreting or holding her in a place where she was not likely to be found, or used or threatened to use deadly force. *Id.* at 225 (citing RCW 9A.40.010(2); .020).

In *Green*, no evidence was presented at trial that Green restrained the victim by threatened use of deadly force or by actual use of deadly force, aside from the killing itself. *Id.* at 228. Therefore under any potential test for sufficiency of the evidence, this conviction could not be

sustained under the second prong of the definition of “abduct” as no evidence of that prong was presented at all. *Id.* The Supreme Court further found that the location where Green had taken his victim was not “a place where she [was] not likely to be found” as the loading area where he was found with the child was not enclosed (as it had no exterior doors), was visible from the children’s play area, and could be viewed from the windows of nearby apartments. *Id.* at 226. In essence, this location was “plainly visible” from the outside and clearly was not secretion in a place not likely to be found. *Id.* The Supreme Court found that no kidnapping had been committed in *Green*, and there is no indication that the only reason there was insufficient evidence of a kidnapping was because of the presence of and relation to the murder conviction. Further, had there not been a killing in *Green*, yet the same facts regarding the movement and restraint of the victim were presented to a jury, it is clear from the Supreme Court’s analysis of the definition of “abduct” as applied to the facts of the case that there would have been no kidnapping. Green may have been guilty of Unlawful Imprisonment, or other crimes, but not of Kidnapping.

The opinion in *Green* and its meaning are quite different from the interpretation Division II of the Court of Appeals has given *Green* both in *Korum, supra* and in the present case. In *Korum*, the Court of Appeals

stated its holding was “require[d]” by *Green* because, in *Green*, “the Supreme Court held that there was insufficient evidence of kidnapping because the restraint and movement of the victim was merely ‘incidental’ to and not ‘an integral part of and [was] independent of the underlying homicide.’” *Korum*, 120 Wn.App. at 702-03. Division’s II’s reliance upon a misunderstanding of *Green* has resulted in an improper application of sufficiency of the evidence to an issue in which only the merger doctrine should apply.

The statement in *Green* in which Division II has relied upon to support its reasoning states as follows: “[w]hile movement of the victim occurred, the mere incidental restraint and movement of the victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping.” *Green*, 94 Wn.2d at 227 (citing to *State v. Johnson*, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979)). Division II of the Court of Appeals interpreted this statement from the Supreme Court to have created a Fourteenth Amendment requirement that a kidnapping must not be “merely incidental” to another charged offense in order for there to be sufficient evidence of a kidnapping. *Korum*, 120 Wn.App. at 703 (citing *Green*, 94 Wn.2d at 227); see *State v. Berg*, 177 Wn.App. 119, 132, 310 P.3d 866 (2013). However, this quote from *Green* is dictum; it is clear the Court had already found no evidence of the element of abduction at all,

irrespective of whether the restraint of the victim was incidental to the homicide. *Green*, 94 Wn.2d at 227. The Court in *Green* had already, prior to the incidental restraint comment, stated that due to the facts relating to the kidnapping that

...there is no substantial evidence of restraint by means of secreting the victim in a place where she was not likely to be found. Further, under the Jackson test, no rational trier of fact could have found beyond a reasonable doubt, that the victim had been restrained by means of secreting her in a place where she was not likely to be found. Under either test it is clear *Green* could hardly have chosen a more public place to accost his victim or commit the homicide some 2-3 minutes later.

Id. at 226 (referring to the standard for review of sufficiency of the evidence set forth by *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)).

From this statement, it is evident the Supreme Court had analyzed the sufficiency of the evidence of kidnapping alone, regardless of whether another crime was charged alongside it.

In *State v. Phuong*, 174 Wn.App. 494, 299 P.3d 37 (2013), Division I of the Court of Appeals traced the Supreme Court's use of the "incidental restraint" language throughout its opinions in *State v. Green* (*Green I*), 94 Wn.2d 431, 588 P.2d 1370 (1979), *Johnson, supra*, and *Green, supra*. *Phuong*, 174 Wn.App. at 511- In reviewing the history of this language, the *Phuong* court found it was clear the language from *Green* regarding "incidental restraint" does not implicate a federal due

process right to proof beyond a reasonable doubt of restraint not incidental to a separately charged offense to support a kidnapping conviction, but rather that the Supreme Court recognized the incidental restraint concern to be a matter of merger of offenses. *Phuong*, 174 Wn.App. at 517.

In reading the opinion in *Green* further, the Supreme Court discusses court holdings in the States of Michigan and New York. The Supreme Court stated that “New York has taken a similar view of the *merging* of a technical ‘kidnapping’ when that ‘kidnapping’ is merely incidental to the commission of another crime.” *Green*, 94 Wn.2d at 227 (emphasis added) (citing *People v. Cassidy*, 40 N.Y.2d 763, 390 N.Y.S.2d 45, 358 N.E.2d 870 (1976); *People v. Levy*, 15 N.Y.2d 159, 164, 256 N.Y.S.2d 793, 204 N.E.2d 842, *cert. denied*, 381 U.S. 938, 85 S. Ct. 1770, 14 L.Ed.2d 701 (1965); and *Johnson, supra*). It is apparent from the totality of the opinion in *Green*, and the Supreme Court’s use of the term ‘incidental restraint’ in other opinions, that the Supreme Court’s consideration in *Green* of ‘incidental restraint’ was limited to merger and did not create a new Fourteenth Amendment Due Process right to have a kidnapping conviction vacated where the Court determines restraint employed in committing the offense was ‘merely incidental’ to another offense. Division II’s finding that the *Green* Court held that the incidental restraint concern involves sufficiency of the evidence is erroneous, and its

application of that erroneous holding to the case at hand lead to an improper vacation of Berg's and Reed's Kidnapping convictions.

II. THE INCIDENTAL RESTRAINT CONCERN SHOULD BE ADDRESSED AS A MERGER ISSUE AND NOT A SUFFICIENCY OF THE EVIDENCE ISSUE

The Court of Appeals addressed the incidental restraint concern as a sufficiency of the evidence issue. However, this concern is more appropriately addressed under the merger doctrine, and a review of case law shows that this Supreme Court has consistently analyzed the incidental restraint concern as an issue of merger.

Sufficiency of the evidence is a standard that determines whether there was sufficient evidence presented at trial to sustain a defendant's conviction for a certain crime. The existence or non-existence of other current convictions has no bearing on whether or not the State proved the statutory elements of a crime to a jury. Now if a defendant is convicted of two or more crimes, it may be that double jeopardy would prohibit the entry of judgment on both crimes, or that both crimes would be considered 'same criminal conduct' for sentencing purposes, or that one crime merges into another.

The merger doctrine is a rule of statutory construction which applies where the Legislature has clearly indicated that in order to prove a

particular degree of crime the State must prove not only that the defendant committed that crime, but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes. *State v. Vladovic*, 99 Wn.2d 413, 421, 662 P.2d 853 (1983). The merger doctrine is “used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions.” *Id.* at 419, n. 2 (citing *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932)). An example of this is when a defendant commits Robbery in the First Degree while armed with a deadly weapon pursuant to RCW 9A.56.200(1)(a)(i) and Assault in the Second Degree with a deadly weapon pursuant to RCW 9A.36.021(1)(c) wherein the defendant pointed a gun at a victim in order to obtain the victim’s personal property. Essentially, for merger to apply, one crime is subsumed within the greater.

This Court has previously analyzed the “incidental restraint” concern under the merger doctrine. In *State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979), the defendant was charged with Rape in the First Degree, which in order to prove, the State had to show was accompanied by the separate act of kidnapping or assault. *Johnson*, 92 Wn.2d at 674. The State also filed charges of Kidnapping and Assault, which Johnson claimed prejudiced him. *Id.* at 673-74. This Court rejected Johnson’s

argument that the State should not be allowed to charge separate offenses in this situation, but found that when the crime of kidnapping is itself an element of another crime, like Rape in the First Degree, the kidnapping should merge with the rape. *Id.* at 680-81.

Only four months after its decision in *Green, supra*, this Court issued its decision in *State v. Allen*, 94 Wn.2d 860, 621 P.2d 143 (1980). There, Allen, who had been convicted of Robbery in the First Degree and Kidnapping in the First Degree, argued that the kidnapping was “only incidental to the robbery....” *Allen*, 94 Wn.2d at 862. Allen’s argument was not one of sufficiency of the evidence. The Court’s decision implicated the merger doctrine as the Court cited to both *Green, supra* and *Johnson, supra*. The Court held that the robbery and kidnapping in Allen’s case were separate events and therefore would not merge, clearly indicating its acceptance of the idea that Kidnapping could merge with Robbery in certain factual circumstances. *Id.* at 864.

In *State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983), this Court addressed “whether the doctrine of merger or the constitutional guaranty against double jeopardy prohibits multiple convictions for attempted robbery, robbery and kidnapping.” *Phuong*, 174 Wn.App. at 523 (quoting *Vladovic*, 99 Wn.2d at 417). The Court in *Vladovic* discussed the *Johnson* Court’s holding and examined the issue of whether

kidnapping merges with robbery. The Court there rejected a merger, distinguishing *Johnson* because “[p]roof of kidnapping is not necessary to prove the robbery or attempted robbery.” *Vladovic*, 99 Wn.2d at 420. The Court held that kidnapping does not merge into first degree robbery pursuant to the merger doctrine. *Id.* at 421. The Court further made it clear that it is the role of the Legislature, and not the judiciary to define the offense of kidnapping. *Id.* at 418, n. 1. The Court in *Phuong* interpreted the Supreme Court’s holding in *Vladovic* to recognize that it is the province of the Legislature to define crimes and that the Supreme Court did “not interpret RCW 9A.40.010 to require that the restraint involved in a kidnapping be ‘not incidental’ to a separately charged offense.” *Phuong*, 174 Wn.App. at 525 (emphasis original).

Finally, Justice Utter, in his dissent in *Vladovic*, *supra*, discussed that the Supreme Court had “expressly recognized the kidnapping merger rule,” and referred to the Court’s holding in *Green*, *supra*. This discussion by Justice Utter, a concurring Justice in the *Green* opinion, shows that the discussion of incidental restraint in *Green* implicated the idea of a kidnap merger rule and not sufficiency of the evidence. This Court later stood by its decision in *Vladovic*, *supra*, and held in *State v. Louis*, 155 Wn.2d 563, 20 P.3d 936 (2005), that kidnapping and robbery do not merge as a matter of law because the Legislature has not found that the elements of

kidnapping must be met to commit robbery or vice versa. *Louis*, 155 Wn.2d at 571. The *Louis* Court also deferred to the Legislature's authority to define crimes and found that "the legislature has not indicated that a defendant must commit kidnapping before he or she can be found guilty of first degree robbery or commit armed robbery before he or she can be convicted of first degree kidnapping." *Id.*

It is evident from the Court's opinions over the years that the concern of incidental restraint has been and should continue to be addressed as a merger issue.

III. THE STATE PRESENTED SUFFICIENT EVIDENCE AT TRIAL SO THAT A RATIONAL TRIER OF FACT COULD HAVE FOUND ALL THE ELEMENTS OF KIDNAPPING BEYOND A REASONABLE DOUBT

On appeal, Berg and Reed challenged their kidnapping convictions for sufficiency of the evidence. At trial, the State presented sufficient evidence for any rational trier of fact to find all the elements of the crime were proven beyond a reasonable doubt.

When a defendant alleges the evidence at trial was insufficient to support his conviction, an appellate court reviews the record to determine whether any rational trier of fact could have found that the State proved

the elements of the crime beyond a reasonable doubt. *Green*, 94 Wn.2d at 221-22 (citing *Jackson*, 443 U.S. at 319). A reviewing court considers the evidence in the light most favorable to the State and takes all reasonable inferences from the evidence in the light most favorable to the State. *State v. McPhee*, 156 Wn.App. 44, 62, 230 P.3d 284, *rev. denied*, 169 Wn.2d 1028 (2010).

To prove Kidnapping in the First Degree at trial, the State had to prove that Berg and Reed intentionally abducted another person with intent to facilitate the commission of any felony or flight thereafter, RCW 9A.40.020(1)(b). Abduction can be proven in three ways: (1) restraint by secreting the victim in a place where he or she is not likely to be found; (2) restraint by threats of deadly force, or (3) restraint by the use of deadly force. RCW 9A.40.010(1). The evidence at Berg's and Reed's trial showed that Reed held a semi-automatic pistol pointed at the victim's head and told him to "get on the ground." 24 RP at 992-94. Reed told Berg to get on the victim's back and "hold him down." 24 RP at 995. Berg pressed his knee into the victim's back and pointed the gun next to his head and made it so the victim could not move. 24 RP at 995. Anytime the victim attempted to move his head Berg told him that "they would kill [him]...he would kill [him]." 24 RP at 998. Berg held the victim down for approximately 30 minutes. 24 RP at 999. Berg and Reed then finished the

robbery and told the victim that they had his wallet, knew where he lived, and could find him. They told the victim they would hunt him down and kill him if he called police. 24 RP at 1000, 1017. Reed also ordered the victim to stay on the ground for an additional 15 minutes after Berg and Reed left. 24 RP at 1000.

Taking these facts in the light most favorable to the State and allowing all reasonable inferences that can be drawn therefrom, there was more than sufficient evidence for a rational jury to find Berg and Reed guilty of Kidnapping. It is only the presence of the other charged offense – Robbery – that caused Division II to find there was insufficient evidence of Kidnapping presented at trial.

IV. THE COURT OF APPEALS VIOLATED SEPARATION OF POWERS BY INVADING THE PROVINCE OF THE LEGISLATURE IN ADDING A NON-STATUTORY ELEMENT TO KIDNAPPING

The Court of Appeals, Division II's holding in this case shows that Division II has found the existence of an additional, non-statutory element of Kidnapping. Division II claims they have simply narrowly interpreted the statutory element of restraint, and have not added an additional element to the crime of kidnapping. *Berg*, 177 Wn.App. at 132, n. 10. However, it is clear that the element of "restraint" as defined by the

Legislature does not require restraint not incidental to any other crime in order to fulfill the definition of restraint. By adding a non-statutory element to the crime of Kidnapping and requiring the State to prove this element at trial, the Court of Appeals in Division II has invaded the province of the Legislature to define crimes.

The doctrine of separation of powers derives from the constitutional distribution of the government's authority into three different branches of government: the legislative branch, the executive branch and the judicial branch. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). Each branch only holds certain authority, and a violation of separation of powers occurs when one branch of government invades the province of another branch. *Id.* The purpose behind this doctrine is to limit each branch of government and prevent each branch from encroaching upon the "fundamental functions" of another. *Id.* (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). The Legislature has the power to define crimes. *State v. Torres Ramos*, 149 Wn.App. 266, 271, 202 P.3d 383 (2009).

The Legislature has defined the crime of kidnapping. RCW 9A.40.020. The Legislature has further defined "abduction" as used in the kidnapping statute. RCW 9A.40.010(1). The Legislature has further defined "restraint" as used in this statute. RCW 9A.40.010(6). The

Legislature has not defined the crime of kidnapping as requiring proof that the restraint employed by the defendant was not “incidental” to another charged offense.

However, the Court of Appeals in *Korum, supra* and in this case has effectively added an element to the crime of kidnapping that any restraint not be incidental to another charged crime. The Court of Appeals did this by finding insufficient evidence of the crime of kidnapping because it found the restraint was incidental to the charged crime of robbery. *Berg*, 177 Wn.App. at 138. The Court of Appeals had no authority to redefine the offense of kidnapping or to require the State prove an additional element.

The Court of Appeals’ opinion that it is not adding an additional element of non-incidental restraint, but rather has simply taken a narrow view of the term “restraint” is without merit. *See Berg*, 177 Wn.App. at 132, n. 10. The term “restrain” as defined by the Legislature means

To restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is ‘without consent’ if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he or she is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him or her has not acquiesced.

RCW 9A.40.010(6).

There is no possible interpretation of the definition of “restrain” which includes that the restraint must not be incidental to another charged crime. It is not appropriate to, in essence, add to the meaning of restraint by including that it must not be incidental to another crime. This is clearly the Court of Appeals adding a new element of the crime of Kidnapping. This is a violation of the separation of powers doctrine.

Further, this additional element of non-incidental restraint would only apply in some kidnapping cases and not all if the Court of Appeals’ decision in this case were to stand. This additional element appears to apply only when a second offense is charged along with a restraint-based offense. This defies logic. A kidnapping should remain a kidnapping regardless of whether it is accompanied by another crime or not. The existence of another charge or conviction should matter only so far as to whether the convictions violate double jeopardy, merge, or constitute same criminal conduct for sentencing purposes. The existence of another crime has no impact on whether the evidence at trial was sufficient to support a conviction. The Court of Appeals has misapplied the holding in *Green* to create a new element to the crime of kidnapping. The Court of Appeals should be reversed in so far as its decision is a clear violation of the separation of powers doctrine.

B. CONCLUSION

As the Court in *Phuong* put it, Division II of the Court of Appeals began from a “false premise—that *Green* created a novel due process standard for determining the sufficiency of the evidence on appeal....” *Phuong*, 174 Wn.App. at 538. From that false premise, Division II arrived at an improper conclusion, requiring that a kidnap be “not incidental” to a separate charged offense. It is clear from a full reading of the case law on this subject that the Supreme Court in *Green* did not create a new due process standard regarding kidnap convictions; rather the Court discussed the issue of merger of kidnapping into another offense. As Division II’s opinion in this case is based upon a misapprehension of prior precedent, this Court should reverse that Court’s holding in Berg’s and Reed’s case regarding the sufficiency of the evidence. From a review of the record, it is clear sufficient evidence exists to sustain their convictions for Kidnapping in the First Degree. The incidental restraint concern is appropriately addressed as a merger issue and not as sufficiency of the evidence. By addressing it as a sufficiency claim, the Court of Appeals essentially created a new element of non-incidental restraint to the crime of kidnapping which applies only when the crime of kidnapping is

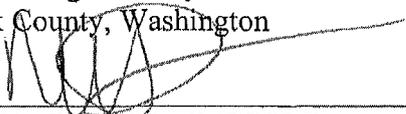
accompanied by another crime or conviction. This holding is improper and should be reversed.

DATED this 4th day of April, 2014.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:



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Subject: 89570-8, DAYLAN BERG AND JEFFERY REED - SUPPLEMENTAL BRIEF OF RESPONDENT

Dear Clerk:

Attached please find the State's Supplemental Brief of Respondent regarding the above matter. Please accept this document for filing. A copy of this email and attachment is being sent to Petitioners' counsel of record, Reed—Catherine Glinski and Berg—Casey Grannis.

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