IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29094-8-III**
Respondent,	)	
	)	**Division Three**
v.	)	
JASON PAUL SHEPARD,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	

Sweeney, J. — This appeal follows convictions for kidnapping and robbery. The defendant approached his victim at a gas station and asked her for gas money; she agreed. He then ordered her into the passenger seat of her own car, drove from the gas station, demanded her bank card, and threatened to hurt her when she could not give him the number for her bank card. He argues on appeal, as he did in the trial court, that the kidnapping was only "incidental" to the robbery and therefore should be dismissed for insufficient evidence. We conclude that the kidnapping did not merge with the robbery. He also contends that the current sentencing judge abused his discretion by simply adopting the conclusions of an earlier sentencing judge that two convictions did not

amount to the "same criminal conduct." There we conclude as a matter of law that the earlier convictions did not amount to the same criminal conduct. We then affirm the convictions and the sentence.

FACTS

Brittany Fields pumped gas into her car at a Spokane gas station around 1:00 a.m. on May 6, 2009. Jason Shepard got out of a car parked nearby and asked Ms. Fields for gas money. Ms. Fields responded by putting $10 worth of gas in Mr. Shepard's car. Mr. Shepard then told her to get in the passenger seat of her car, grabbed her by her arm, and pushed her into her car. Mr. Shepard got into the driver's seat of Ms. Fields' car and drove away. He drove for one to two blocks and then demanded Ms. Fields' bank card and cell phone. Ms. Fields complied. Mr. Shepard next demanded the personal identification number (PIN) to Ms. Fields' bank card. Ms. Fields said she did not know her PIN. Mr. Shepard then threatened to hurt her. Ms. Fields testified that "[a]t that point I started to realize the severity of the situation and I started to cry." Report of Proceedings (RP) at 195. Mr. Shepard drove the car about 10 blocks then stopped and said to a woman who had pulled alongside: "'I got her debit card and her cell phone, should I get anything else?'" The woman responded, "'I don't care, get what you want.'" RP at 198. Mr. Shepard got out of Ms. Fields' car and left with the other woman in her car.

The State charged Mr. Shepard with

one count of kidnapping in the first degree, one count of second degree robbery, and one count of second degree theft. A jury convicted him of all three charges. Mr. Shepard moved to dismiss the kidnapping conviction for insufficient evidence. The court denied his motion. He appeals the denial of that motion.

Mr. Shepard also appeals his sentence. The court deferred to an earlier sentencing court's conclusion that the two crimes did not amount to the same criminal conduct. These earlier convictions arose out of incidents that took place on October 20 and 21, 1998. Police saw Mr. Shepard drive a stolen Nissan on October 20, pursued him but were unable to catch him. Police caught him, the following day, with the Nissan and other stolen items. Mr. Shepard pleaded guilty to one count of first degree stolen property arising out of the October 20 incident and one count of second degree possession of stolen property arising out of the October 21 incident. The earlier sentencing court sentenced Mr. Shepard to concurrent jail terms on each possession of stolen property count but refused to conclude that the crimes were the same criminal conduct.

The court here deferred to that earlier ruling:

> [T]he [prior] 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.
>
> Now, with that, and I don't know how to go any deeper into that. I'm just relying on those documents or [sic] those charges.

RP at 482-83.

DISCUSSION

Kidnapping—Incidental To Robbery

Mr. Shepard contends that the kidnapping here was incidental to the robbery and therefore not supported by facts sufficient for a separate conviction for kidnapping.

The State must produce substantial evidence to support the elements of a crime. *State v. Werneth*, 147 Wn. App. 549, 552, 197 P.3d 1195 (2008). Whether the State has met that burden of production is a question of law that we will review de novo. *Id.*

Second degree robbery is "unlawfully tak[ing] personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone." Former RCW 9A.56.190 (1975). Kidnapping in the first degree requires that the State prove the intentional abducting of another with intent:

> (b) To facilitate commission of any felony or flight thereafter; or
> (c) To inflict bodily injury on him; or
> (d) To inflict extreme mental distress on him or a third person.

Former RCW 9A.40.020(1) (1975). "Abduct" is "restrain[ing] 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." Former RCW 9A.40.010(2) (1975). And "restrain" is "restrict[ing] a person's movements without consent and without legal authority in a manner which interferes substantially with

his liberty." Former RCW 9A.40.010(1) (1975).

Mr. Shepard relies on the analysis set out in *State v. Korum*[1] and *State v. Elmore*[2] (a case that relied on *Korum*) for his contention that the kidnapping here was incidental to the robbery and there was not enough of a showing by the State, independent of the robbery, to support the conviction for kidnapping. Br. of Appellant at 5-6. We reject the contention for at least three reasons.

First, like any case law precedent, *Korum* has to be put in its proper factual context. In *Korum*, the court was charged with deciding whether a prosecutor vindictively overcharged a defendant in retribution for successfully moving to set aside a guilty plea. 120 Wn. App. at 689-90. The court then begins its analysis with a discussion of the prosecutorial standards set out in RCW 9.94A.411 including that: "'[c]rimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.'" *Korum* 120 Wn. App. at 702 (quoting former RCW 9.94A.440(2) (1996), *recodified as* RCW 9.94A.411(2)). The court cited to federal authority that prohibits, or at least discourages, "'without explanation, *increas[ing] the number of or severity of those charges* in circumstances which suggest that the increase is

[1] *State v. Korum*, 120 Wn. App. 686, 703, 86 P.3d 166 (2004), *aff'd in part, rev'd in part on other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2006).

[2] *State v. Elmore*, 154 Wn. App. 885, 901, 228 P.3d 760, *review denied*, 169 Wn.2d 1018 (2010).

retaliation for the defendant's assertion of statutory or constitutional rights.'" *Korum*, 120 Wn. App. at 702 (quoting *Hardwick v. Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977)). And the court in *Korum* relies on the dissent in *State v. Vladovic*,[3] not the majority opinion, to discuss the court's concern over the pyramiding of charges by a prosecutor. *Korum*, 120 Wn. App. at 704. Ultimately, the court in *Korum* concluded that "the State's stacking of multiple kidnapping charges following Korum's plea withdrawal was not consistent with the legislature's directives in former RCW 9.94A.440(2)." 120 Wn. App. at 703. We are not concerned here with prosecutorial vindictiveness and the State overcharging Mr. Shepard.

And that brings us to our second point which is that the controlling Supreme Court authority here is *Vladovic*. And that case resolves these questions on the basis of merger principles. *Vladovic*, 99 Wn.2d at 418-22. In *Vladovic* the court holds that the controlling principles here are those of the merger doctrine, with its attendant inquiry into legislative intent, not whether one crime was "incidental" to another:

> Our only apparent divergence from the above analysis [merger analysis] occurred in *State v. Allen*, 94 Wn.2d 860, 621 P.2d 143 (1980), which petitioner relies upon. In *Allen* we determined that, under the facts of that case, the kidnapping was separate and distinct from the robbery and thus the case fell within an exception to the merger doctrine set forth in *Johnson* I [*State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979)]. There is dictum in *Allen* to the effect that had the kidnapping merely been incidental to the robbery, the former offense would have "merge[d] into the robbery as a matter of law." *Allen*, at 864. That statement is not in accord

[3] 99 Wn.2d 413, 430, 662 P.2d 853 (1983) (Utter, J., dissenting).

> with either *Johnson* I or II [*State v. Johnson*, 96 Wn.2d 926, 639 P.2d 1332 (1982)] and we do not now adhere to it. We reaffirm our holdings that the merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (*e.g.*, first degree rape) the State must prove not only that a defendant committed that crime (*e.g.*, rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (*e.g.*, assault or kidnapping). Pursuant to this rule, kidnapping does not merge into first degree robbery.

Id. at 420-21.

The legislature has the exclusive power to define crimes and punishments. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). The object here is to identify that legislative intent and pass on whether the legislature has exceeded its authority by punishing a defendant twice for the same offense. *Id.* We apply the merger doctrine to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. *Vladovic*, 99 Wn.2d at 419 n.2. So, if the State must prove the elements of one crime (here kidnapping) in order to prove that the defendant committed another (here robbery) then the kidnapping is said to merge with the robbery. *Id.* at 420-21.

The crime of robbery is the taking of personal property from the person of another or in her presence and against her will with either the use or threatened use of force or violence. Former RCW 9A.56.190. Here, the State did not have to prove that Mr. Shepard kidnapped Ms. Fields to prove the robbery. He was physically much larger and ultimately threatened to hurt her if she did

not produce the PIN necessary to take money from her account. Seizing her and her car and driving from the gas station may have added to the intimidation but it was nonetheless not a necessary element of first degree robbery. *See* former RCW 9A.56.190. We conclude that there is no legislative intent to punish only the robbery and the crimes do not therefore merge. *Vladovic*, 99 Wn.2d at 420.

Our Supreme Court has applied a similar analysis in other cases. *In re Pers. Restraint of Fletcher*, 113 Wn.2d 42, 53, 776 P.2d 114 (1989) ("the person who intentionally abducts another need do so only with the *intent* to carry out one of the incidents enumerated in RCW 9A.40.020(1)(a) through (e) inclusive; not that the perpetrator actually bring about or complete one of those qualifying factors listed in the statute"). The wording of the kidnapping statute shows that the legislature did not intend for an underlying crime to be an element of kidnapping. *See id*. So, the merger doctrine does not apply to kidnapping. *Id.*; *State v. Louis*, 155 Wn.2d 563, 570-71, 120 P.3d 936 (2005) (affirming robbery and kidnapping convictions of Louis, who robbed jewelry store owners at gun point and left them bound inside the store's bathroom). Here there is no suggestion by counsel or in the statutory schemes of kidnapping and robbery that the legislature intended that one "merge" with the other. Former RCW 9A.40.020; former RCW 9A.56.190.

Finally, on this point, the considerations necessary to pass on whether one crime is "incidental" to another certainly seem

essentially factual. Indeed, it has been described as a "fact specific" determination. *Elmore* 154 Wn. App. at 901 ("Thus, whether the kidnapping is incidental to the commission of other crimes is a fact-specific determination."). Nonetheless, *State v. Green* clearly identifies this as a sufficiency of the evidence question and therefore a question of law. 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). And the facts here—that Mr. Shepard moved the victim 10 blocks, restrained the victim for 8 to 10 minutes, and added to the victim's injuries by restraining and threatening her even after taking her belongings—militate in favor of our conclusion that the kidnapping should not be merged with the robbery here.

Same Criminal Conduct

Mr. Shepard next contends that the sentencing court mistakenly concluded that earlier convictions did not constitute the same criminal conduct for sentencing purposes.

Whether multiple prior convictions amount to the same criminal conduct is now controlled by statute: "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . . '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." RCW 9.94A.589(1)(a).

We determine the meaning of a statute based on the clear language of that statute and decide that meaning as a matter of law.

State v. Theilken, 102 Wn.2d 271, 275, 684 P.2d 709 (1984); *State v. Ayala*, 108 Wn. App. 480, 484, 31 P.3d 58 (2001). And here there does not appear to be any dispute over the facts that resulted in Mr. Shepard's earlier convictions. And so for those reasons also our review is de novo. *Ayala*, 108 Wn. App. at 484.

Here the earlier felony judgment and sentence and reports from the Spokane Police Department and Washington State Patrol make clear that the earlier convictions do not amount to the same criminal conduct. CP at 232, 250-53. One count of possession of stolen property arose from possession of the Nissan on October 20 and that the other count of possession of stolen property arose from possessing some combination of stolen property on October 21, 1998. The conduct then is by statutory definition not the same criminal conduct. *See* RCW 9.94A.589 (stating that two or more crimes are the same criminal conduct if "committed at the same time and place").

Statement of Additional Grounds

Mr. Shepard argues pro se that there is insufficient evidence to support the intentional abduction element of kidnapping. This element requires that the victim was restrained 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." Former RCW 9A.40.010(2). Specifically, Mr. Shepard argues he did not secret or hold Ms. Fields in a place where she would not likely be found because she was always in a "populated and public area." However, the statute does not require that a

person be held in an unpopulated or private area. Additionally, in *State v. Harris*, the court held that there was sufficient evidence to sustain a kidnapping conviction when the defendant drove the victim in the opposite direction from her home, held her in a car at the end of a public street, and later released her in a residential area. 36 Wn. App. 746, 748, 677 P.2d 202 (1984). The manner in which Ms. Fields was held resembles the manner in which the victim in *Harris* was held. Both women were held on public streets and eventually released in a residential area. Although Ms. Fields was in her own car and in a public area, she would not have been in the area but for Mr. Shepard taking her there. The jury could then easily infer that Ms. Fields was in a place where she was not likely to be found. Thus, there was sufficient evidence to support the intentional abduction element of kidnapping.

We affirm the convictions and sentence.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: Sweeney, J.

Korsmo, A.C.J.

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Brown, J.