State v. Grant, No. 65172-2-I

Becker, J. (dissenting) — Appellant Terry Grant contends there was insufficient evidence to convict him of kidnapping the same person that he robbed because the restraint was incidental to the robbery. I agree and respectfully dissent from the majority's affirmance of his kidnapping conviction.

The majority's answer to Grant's challenge is to say that the crimes of robbery and kidnapping do not merge. Merger is not the issue in dispute. Merger is a double jeopardy issue. Sufficiency of the evidence is a due process issue. The majority's analysis blurs the distinction between these two constitutional issues. It is quite clear that a defendant may be punished separately for robbery and kidnapping without violating the prohibition against double jeopardy under the Fifth Amendment of the United States Constitution. State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983); State v. Louis, 155 Wn.2d 563, 568-71, 120 P.3d 936 (2005). Grant's appeal does not contend the two crimes merged. He challenges the sufficiency of the evidence to support his conviction for kidnapping.

The dispute between the parties in this case is over the application of the concept of "incidental restraint" discussed in State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). Green is the leading case we must look to when reviewing the sufficiency of the evidence to prove a kidnapping that occurs contemporaneously with another crime. Under Green, the State bears the

burden of proving that acts of restraint giving rise to a kidnapping charge were not merely "incidental" to the commission of a second, different offense. Green, 94 Wn.2d at 227. While Green "borrowed" the concept of incidental restraint from an earlier merger case, it incorporated this concept into a new standard for determining sufficiency of the evidence on appeal. In re Pers. Restraint of Bybee, 142 Wn. App. 260, 266-67, 175 P.3d 589 (2007). Green is the seminal case in which the court adopted the test for sufficiency of the evidence from Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979): "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.

In Green, the court held the evidence insufficient to support the use of kidnapping as an element of aggravated first degree murder. This was because the State failed to prove abduction, an element of kidnapping. Green, 94 Wn.2d at 224-30. Abduction may be proved in three distinct ways, each of which necessarily involves restraint. Green, 94 Wn.2d at 225. Abduction may be proved where the victim is restrained by threatening deadly force, by using deadly force, or by secreting or holding her in a place where she is not likely to be found. RCW 9A.40.010(1); Green, 94 Wn.2d at 225.

In Green, there was no evidence of a threat of deadly force. There was no evidence of the use of deadly force apart from the killing itself, and the killing itself could not constitute the restraint necessary to prove kidnapping. Green, 94

Wn.2d at 229; Vladovic, 99 Wn.2d at 424. This left one other possibility—whether the victim was abducted by secretion. The court concluded secretion was not proved either; 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." Green, 94 Wn.2d at 227. Because the State proved none of the means of abduction, the evidence was insufficient to establish the crime of kidnapping. Green, 94 Wn.2d at 230.

In this case, Grant argues that his restraint of robbery victim Joanne Bigelow was merely incidental to the robbery in the same way that the movement of the murder victim in Green was incidental to the killing. The majority responds that kidnapping and robbery cannot "merge" even where the kidnapping was merely incidental to the robbery. Majority at 4, citing Vladovic, 99 Wn.2d at 420-21. But again, Grant is arguing sufficiency of the evidence under Green, not merger or double jeopardy under Vladovic. The portion of Vladovic addressing sufficiency of the evidence is found at 99 Wn.2d 424.

In Vladovic, armed robbers entered Bagley Hall at the University of Washington and encountered five employees. A jury found the defendant guilty of attempted first degree robbery for attempting to steal the contents of a safe; first degree robbery for stealing money from the wallet of Mr. Jensen, the storeroom manager; and four counts of first degree kidnapping for restraining the remaining four employees by using or threatening to use deadly force. Vladovic, 99 Wn.2d at 416.

At 99 Wn.2d 424, the Vladovic court tersely held Green "inapposite" because it was factually distinguishable in that, according to the jury's findings, the restraint of the four employees was a separate act from the robbery of the storeroom manager's wallet.

> Petitioner relies on Green in arguing that his kidnapping conviction cannot stand because the acts did not bear the indicia of a true kidnapping. We stated in Green that an ultimate killing of a victim does not itself constitute the restraint necessary to prove kidnapping. Green is inapposite in the instant case since, as discussed above, the restraint of the four employees was a separate act from the robbery of Mr. Jensen. Therefore, the robbery of Mr. Jensen could not supply the restraint element of the kidnappings. We have reviewed petitioner's remaining challenges to the sufficiency of the evidence and find them to be without merit.

Vladovic, 99 Wn.2d at 424. With this conclusion, the majority found it unnecessary to address the Green-based issues in Justice Utter's separate opinion in Vladovic, 99 Wn.2d at 426-37 (Utter, J., concurring in part and dissenting in part).

The Vladovic majority found there was no basis to apply merger in the double jeopardy sense of that term, that is, in the sense discussed in State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979), cert. dismissed, 446 U.S. 948, 100 S. Ct. 2179, 64 L. Ed. 2d 819 (1980); Vladovic, 99 Wn.2d at 427. Justice Utter termed this the "general merger" rule, 99 Wn.2d at 427, and agreed it did not apply. But he did not think the fact that the crimes involved different victims should have stopped the court from applying what he referred to as the "kidnapping merger" rule recognized in Green. His use of the term "kidnapping merger" can be confusing because it sounds as if it is an alternative double

jeopardy analysis. Actually, what Justice Utter was advocating, consistent with Green, is a rule for analyzing the sufficiency of the evidence. This can be seen in his recommendation on the proper instruction to be given a jury: "At the new trial Mr. Vladovic would, however, be entitled to an instruction directing the jury that a restraint by deadly force is insufficient to support a conviction of kidnapping if it is incidental to another crime. The term incidental should be defined in terms of the test and factors enunciated in [Gov't of V.I. v. Berry, 604 F.2d 221, 227 (3rd Cir. 1979)]." Vladovic, 99 Wn.2d at 437 (Utter, J., concurring in part and dissenting in part). Justice Utter's position on incidental restraint was derived from a construction of the kidnapping statute as fully outlined in his opinion. It does not, as the majority here claims, add a nonstatutory element to the crime.

Here, unlike in Vladovic, the defendant was convicted of robbing and restraining the same victim, Bigelow. Therefore, the Green analysis is not inapposite, as the Vladovic majority concluded it was in that case. To the contrary, Green is the leading case that must be used to determine whether the restriction of Bigelow's movement was sufficient to establish abduction by secretion, or whether it was merely the "incidental" restraint occurring in the course of the robbery.

The majority aligns itself with State v. Butler, 165 Wn. App. 820, 269 P.3d 315 (2012). Majority at 6 n.20. Butler suggests that the analysis of incidental restraint might better be left to the trier of fact because it involves factual rather

than legal considerations. Butler, 165 Wn. App. at 833. This is true, as far as it goes. The determination of incidental restraint is "to be made under the facts of each case, in light of the totality of surrounding circumstances." Green, 94 Wn.2d at 227. But as Green makes equally clear, the issue of incidental restraint may be raised on appeal. It then becomes the obligation of the appellate court to review the sufficiency of the evidence under Green, a case our Supreme Court has never renounced, revised, or backed away from. The Supreme Court's most recent reference to the issue expressly affirms the continuing vitality of Green: "This court has held and the State concedes that 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. See Green, 94 Wn.2d at 227 (kidnapping merges into first degree rape)." State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996):

Since Brett, the Supreme Court has not had occasion to mention incidental restraint in connection with a kidnapping. In the Court of Appeals, however, the issue has been addressed often. Division Two has consistently applied Green and has made the concept of incidental restraint an integral part of analyzing sufficiency of the evidence. State v. Korum, 120 Wn. App. 686, 702-07, 86 P.3d 166 (2004), aff'd in part, rev'd in part on other grounds by 157 Wn.2d 614, 141 P.3d 13 (2006); State v. Saunders, 120 Wn. App. 800, 815-19, 86 P.3d 232 (2004); Bybee, 142 Wn. App. at 266-67 (argument that a

kidnapping conviction was incidental to a robbery raises an issue of sufficiency of the evidence, not double jeopardy, and therefore does not escape the one-year time bar for a personal restraint petition); State v. Elmore, 154 Wn. App. 885, 901-04, 228 P.3d 760, review denied, 169 Wn.2d 1018 (2010). In Divisions One and Three, the issue has been dealt with less consistently. For example, Green was applied in State v. Washington, 135 Wn. App. 42, 50-51, 143 P.3d 606 (2006), review denied, 160 Wn.2d 1017 (2007). But a recent trend in unpublished opinions has been simply to ignore Green and to treat Louis as controlling. This subterranean current of analysis surfaced in Butler, 165 Wn. App. at 828-33. Butler declares, erroneously in my opinion, that a sufficiency of the evidence analysis in a case of kidnapping and robbery is controlled by the merger principles utilized in Vladovic, 99 Wn.2d at 418-22, and Louis, 155 Wn.2d at 570-71. This is erroneous because the cited pages in Vladovic and Louis discuss double jeopardy. Sufficiency of the evidence and Green are discussed on a different page of Vladovic, 99 Wn.2d at 424. They are not mentioned at all in Louis.

Like the Butler court, the majority rejects the idea that the sufficiency of the evidence to prove kidnapping is analyzed more carefully when it occurs contemporaneously with another crime than when it occurs by itself. Viewing the kidnapping in isolation, the majority concludes “the evidence was ample.” Majority at 5. This approach is inconsistent with Green and the majority view in other jurisdictions. According to an A.L.R. survey, the majority view is that

"kidnapping statutes do not apply 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). A number of cases do support the minority view that "the seizure or detention of a rape victim, robbery victim, or victim of a similar offense, with any accompanying movement, is necessarily sufficient to constitute the separate crime of kidnapping." Wozniak, 39 A.L.R.5th at 361. Green puts Washington in the majority camp. Under Green, the question Grant deserves an answer to is whether the restraint necessary to prove the kidnapping was merely incidental to the separate crime of robbery. If so, the evidence should be held insufficient under Green. Korum, 120 Wn. App. at 702-07; Elmore, 154 Wn. App. at 901.

Grant argues that this court should adopt and apply the factors articulated in Korum as relevant to its review of the sufficiency of the evidence:

> (1) The restraints were for the sole purpose of facilitating the robberies—to prevent the victims' interference with searching their homes for money and drugs to steal; (2) forcible restraint of the victims was inherent in these armed robberies; (3) the victims were not transported away from their homes during or after the invasions to some remote spot where they were not likely to be found; (4) although some victims were left restrained in their homes when the robbers left, the duration of the restraint does not appear to have been substantially longer than that required for commission of the robberies; and (5) the restraints did not create a significant danger independent of that posed by the armed robberies themselves.

Korum, 120 Wn. App. at 707 (footnote omitted).

Korum comes closer to a correct understanding of Green than the majority

or Butler does. The Korum factors closely resemble the Berry test discussed by Justice Utter. Vladovic, 99 Wn.2d at 436 (Utter, J., concurring in part, dissenting in part). As discussed above, the Vladovic majority did not reject Justice Utter's proposal to use the Berry test as the basis for a jury instruction, but simply did not reach it.

The parties in this case have not briefed whether juries should be instructed on incidental restraint. Nevertheless, Green and Korum provide enough guidance for an appellate court to determine that there was insufficient evidence for the jury to find a true kidnapping here. Grant and his accomplice restrained Bigelow for the purpose of facilitating the robbery inside her home. The forcible restraint was inherent in the armed robbery. Bigelow was tied up in her home, not in some remote spot where she was unlikely to be found. The restraint was not substantially longer than necessary for the perpetrators to complete the robbery, and tying Bigelow up did not create a significant danger independent of that posed by the armed robbery itself.

I respectfully disagree with the majority's analysis and its conclusion. I would reverse the kidnapping conviction.

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