

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SHAMARR DERRICK PARKER,

Appellant.

No. 40793-1-II

UNPUBLISHED OPINION

Armstrong, P.J. – Shamarr Derrick Parker appeals his first degree kidnapping conviction, arguing that the evidence was insufficient to support convictions of both first degree kidnapping and first degree robbery because the victim’s restraint during the kidnapping was incidental to the robbery. Finding sufficient evidence to support a separate kidnapping conviction, we affirm.

Facts

In December 2008, T.M.¹ called 911 to report that her 17-year-old daughter A.W. had been raped at knifepoint. The State eventually charged Parker with first degree kidnapping while armed with a deadly weapon, first degree robbery while armed with a deadly weapon, and first degree rape while armed with a deadly weapon.

A.W. testified that she was waiting for a Tacoma bus to take her home when a brown car drove by. A heavy snow had fallen that day. Parker, the driver of the brown car, asked A.W. if she wanted a ride and pulled into a nearby parking lot. A.W. became nervous and began walking toward a different bus stop. When Parker drove by a second and third time, A.W. decided to cut through an alley.

¹ T.M. is referred to by her initials for the purpose of anonymity.

When A.W. did so, Parker drove into the alley, got out of his car, and grabbed her by the arm. A.W. testified that he held a knife to her throat and said he would not harm her if she kept quiet and cooperated. He pushed A.W. toward his car, tied her wrists behind her back with plastic bindings, and shoved her into the backseat so that she was lying on her side, facing the driver's seat.

A.W. testified that Parker drove for about a half hour to an open area without nearby buildings. Parker then untied her bindings and told her to remove her jacket. He went through A.W.'s jacket and purse, removing four small bags of marijuana and some cash. He again showed A.W. the knife and told her to cooperate in what was just a robbery. After searching through the rest of her things and inside her underwear for money, Parker forced A.W. to disrobe. She testified that he then engaged in vaginal intercourse while holding a knife to her throat, during which she stared at Mardi Gras beads hanging from the rearview mirror.

Afterward, Parker asked A.W. where she lived so he could drive her home, and she gave him an address several blocks away. As he tried to leave, he got temporarily stuck in the snow. When Parker dropped A.W. off, she wrote his license plate number on her hand and walked home.

Within hours, officers found the license plate on a brown sedan with beads hanging from its rear view mirror. After the car's impoundment, they found a knife under the front passenger seat; an expert testified that Parker's fingerprint was on the knife. Officers also found plastic cords in the driver's side door pocket. A.W. identified Parker from a photo montage but was not sure whether the knife from the car was the one he had used. She denied knowing Parker or

meeting him to sell drugs.

Parker's ex-girlfriend testified that he arrived at her home on the night of the robbery, looking disheveled. He told her he had used a knife to take marijuana from a girl. She denied telling a detective that she deleted A.W.'s first name and number from Parker's phone.

Detective Brad Graham eventually took A.W. to an open lot outside the city limits where officers believed the robbery had occurred. A.W. became upset when they arrived and said, "This is it." 7 Report of Proceedings at 657. The property owner testified that after a large snowstorm in December 2008, he had noticed tire marks in the snow that looked as though a car had been stuck before gaining traction. A.W. also identified the alley in which Parker grabbed her.

Testing of sperm samples gathered from A.W. revealed the source to be her boyfriend but not Parker. A.W. admitted spending the morning and afternoon before the robbery with her boyfriend.

Officers established that the brown sedan belonged to Parker's mother and that Parker sometimes drove it. After Parker's mother testified that she used the knife under the seat to scrape ice from the windshield, Detective Graham testified that Mrs. Parker could not explain the knife's location in her car when he interviewed her.

The defense argued during closing that A.W. made up the rape charge because she was mad at Parker for taking her drugs and because she had violated her curfew and wanted to deflect her mother's anger. During deliberations, the jury informed the court that it could not reach a unanimous verdict on all counts. The jury convicted Parker of first degree kidnapping and first degree robbery and found by special verdict that he was armed with a deadly weapon during the

commission of each offense. The jury could not reach a unanimous verdict on the rape charge, however, and the trial court declared a mistrial on that count. Parker received concurrent high-end sentences on each conviction and consecutive 24-month deadly weapon enhancements, for a total confinement period of 246 months.

Parker now challenges the sufficiency of the evidence supporting his first degree kidnapping conviction.

Analysis

Parker argues that the evidence was insufficient to support his kidnapping conviction because the jury rejected A.W.'s rape allegation and her remaining testimony described only a restraint that was incidental to the robbery.

Evidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction. *State v. Elmore*, 154 Wn. App. 885, 901, 228 P.3d 760, review denied, 169 Wn.2d 1018, 238 P.3d 502 (2010); see also *State v. Brett*, 126 Wn.2d 136, 166, 892 P.2d 29 (1995) (incidental restraint and movement of victim during course of another crime which has no independent purpose or injury is insufficient to establish kidnapping). Whether the kidnapping is incidental to the commission of another crime is a fact-specific determination. *Elmore*, 154 Wn. App. at 901. "Where there are sufficient facts to support a charge of two crimes, we cannot say as a matter of law that one charge is incidental to the other." *State v. Stirgus*, 21 Wn. App. 627, 631, 586 P.2d 532 (1978).

To convict Parker of first degree robbery, the jury had to find (1) a taking of personal property, (2) from the person or in another's presence, (3) by the use or threatened use of force,

violence or fear of injury, (4) such force or fear being used to obtain or retain the property, (5) while armed with or displaying what appeared to be a deadly weapon. *See State v. Allen*, 94 Wn.2d 860, 863, 621 P.2d 143 (1980), *abrogated on other grounds by State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983). The kidnapping charge required the jury to find an abduction to facilitate the commission of rape or robbery, with that abduction involving (1) a restriction of a person's movement, (2) without consent, by (3) secreting or holding the victim in a place where she is not likely to be found, or by (4) using or threatening to use deadly force. *See Allen*, 94 Wn.2d at 863.

The kidnapping began when Parker grabbed A.W., tied her wrists, and forced her to lie down in the back of his car. A.W. testified that Parker drove about a half hour before stopping, and the location she identified as the scene of the robbery was outside the city limits. Once there, Parker untied A.W.'s wrists before robbing her at knifepoint.

Parker argues that the jury discredited A.W.'s testimony when it rejected her rape allegation and that the remaining evidence supports a robbery but no independent restraint or abduction. We disagree that the jury's inability to agree on the rape charge constituted a complete rejection of A.W.'s testimony. Physical evidence supported her testimony that she was bound, secreted, and driven to a remote location before the robbery began. *See State v. Korum*, 120 Wn. App. 686, 707, 86 P.3d 166 (2004) (restraint was solely to facilitate robberies and not kidnapping partly because victims were not transported from their homes to remote spot where they were not likely to be found), *reversed in part on other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2006); *Stirgus*, 21 Wn. App. at 631 (trial court correctly decided that transporting victim for a

distance of four to six miles raised a jury question as to whether the kidnapping was incidental to a rape).

Here, the kidnapping and robbery occurred as separate events even though close in time. During the kidnapping, Parker used force to abduct A.W. by secreting her where she was not likely to be found; i.e., lying in the back seat of a car, and by taking her to a remote location. During the subsequent robbery, Parker used the threat of additional force to obtain A.W.'s personal property. *See Allen*, 94 Wn.2d at 863-64 (describing separate robbery and kidnapping under similar facts). Parker's movement and restraint of A.W. during her kidnapping was not incidental to her subsequent robbery, and the evidence was sufficient to support a separate kidnapping conviction.

Affirmed.

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

Armstrong, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.