IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

THE STATE OF WASHINGTON, Respondent,	)	No. 29021-2-III
v.	)	UNPUBLISHED OPINION
REX D. GREGORY, Appellant.	)	

Korsmo, C.J. — This appeal challenges just one of Rex Gregory's six convictions for sexual encounters with children. We agree with his argument that the evidence did not support the conviction for second degree kidnapping and reverse that count.

FACTS

Mr. Gregory's four convictions for first degree child molestation of a different victim are not at issue and will not be further discussed. He also was convicted of second degree child rape and second degree kidnapping with sexual motivation of S.H. She is developmentally delayed and was 14 at the time of the charged incident.

Mr. Gregory developed a sexual relationship with S.H. who lived in the neighborhood. The relationship came to light when S.H.'s brother found the two having sexual intercourse in the back of a minivan parked in Mr. Gregory's carport. The van was backed into the spot so that the front of the van faced the street. A neighbor walking by heard noises from the van but continued on.

S.H.'s brother went looking for his sister who had been walking the dog. He saw the dog tied up to the carport and walked there to investigate. Then he saw the pair having intercourse with their legs hanging out the open rear hatch door of the vehicle. S.H. saw her brother and promptly terminated the encounter with Mr. Gregory.

She later testified that she had gone to Mr. Gregory's house. Because his wife was home asleep, he had asked her to go to the van. The two went out to the van and engaged in sexual intercourse until her brother arrived. This incident led to the two charges involving S.H. After the jury found the defendant guilty on all six counts, the trial court sentenced Mr. Gregory using an offender score of 15 resulting from the five other current offenses. He then timely appealed to this court.

ANALYSIS

Mr. Gregory focuses his appeal solely on the kidnapping conviction and its related enhancement from the sexual motivation finding.[1] Since our resolution of his evidentiary

[1] Mr. Gregory pro se filed a Statement of Additional Grounds that raises several

sufficiency challenge is dispositive, that is the only argument we need address.

Very well-settled standards govern review of evidentiary sufficiency challenges. We review such challenges to see if there was evidence from which the trier of fact could find each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.*

The crime of second degree kidnapping as charged here requires proof that the defendant intentionally abducted S.H. Clerk's Papers (CP) at 73; RCW 9A.40.030. "'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." Former RCW 9A.40.010(2) (1975). "'Restrain'" in turn "means to restrict 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). The restraint is "'without consent'" if accomplished by force or threat, or with the "acquiescence of the victim, if he is a child less than sixteen years old." *Id.*

The sole element at issue in this case is whether or not Mr. Gregory "abducted"

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issues. Some of them are resolved by our ruling and the others lack sufficient analysis or citation to consider. RAP 10.10(c). It will not be further addressed here.

S.H. He argues that he neither "restrained" nor "abducted" S.H. He contends that there was no "restraint" because there was no restriction placed on S.H. that substantially interfered with her liberty. We need not address that claim because we agree that, even if he did restrain S.H., Mr. Gregory did not "abduct" her.

As charged here, the State needed to establish that Mr. Gregory secreted or held S.H. "in a place where she was not likely to be found" in order to establish the "abduct" element.[2] The prosecution argues that whether the minivan was a place where S.H. was not likely to be found was a factual question for the jury and that the evidence supported that determination, pointing to the photographs admitted at trial that showed the back of the van was not easily visible due to the placement of the car and adjoining structures and trees.

We do not believe that evidence shows that the minivan was itself a place where she was unlikely to be found. The vehicle was parked in the public view and had not been used to transport S.H. The location of S.H. within the minivan was not easily observed until one got close to the vehicle, as her brother did. Still, passersby could hear her and see the vehicle, and the dog she was walking was tied to the carport sheltering the minivan. The exposed nature of the vehicle parked in her own neighborhood precluded a

[2] There was no allegation, and no evidence presented, that suggested Mr. Gregory threatened the use of deadly force to abduct S.H.

finding that it was a place S.H. was unlikely to be found. The back of the vehicle provided some privacy and served as little more than an additional room for the couple to meet in, but it was not in the nature of a place of confinement.

Automobiles can serve as places where a person is secreted for purposes of the kidnapping statute. *E.g.*, *State v. Whitney*, 44 Wn. App. 17, 720 P.2d 853 (1986) (victim held under dashboard covered by a coat and driven a short distance), *aff'd*, 108 Wn.2d 506, 739 P.2d 1150 (1987); *State v. Harris*, 36 Wn. App. 746, 677 P.2d 202 (1984) (victim restrained long time in vehicle driven a great distance and eventually stopped in a dead-end street). However, this automobile was not. No attempt was made to conceal or hold S.H. there. It simply was the location defendant chose for the illegal tryst.

The fact that a crime occurs in a private location chosen by the defendant does not itself make that location a place used to secrete the victim. There must be some indicia of confinement beyond the mere privacy afforded by the location. We conclude that a car parked in a carport that was itself accessible to others does not constitute a place where the victim was unlikely to be found. The evidence of abduction was insufficient to support the second degree kidnapping conviction.

The conviction for second degree kidnapping with sexual motivation is reversed. The offender score for the other offenses would therefore drop from 15 to 12, but there

would be no change in the sentencing range for the minimum term of confinement in the other counts. The case is remanded for correction of the judgment and sentence to reflect the reversal of the kidnapping conviction and the associated sexual motivation finding. In all other respects, the judgment is affirmed.

Affirmed in part, reversed in part, and remanded.

A majority of the panel has determined 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.

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Korsmo, C.J.

WE CONCUR:

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Sweeney, J.

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Siddoway, J.