IN THE SUPREME COURT OF THE STATE OF NEVADA

SHERIFF, CLARK COUNTY,
Appellant,
vs.
MICHAEL ANTHONY BRANDON,
Respondent.

No. 39057

FILED

OCT 21 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from an order of the district court granting a pretrial petition for a writ of habeas corpus and dismissing charges of first-degree kidnapping.

Respondent Michael Anthony Brandon was charged with seventy-three crimes related to alleged sexual assaults of his natural daughters during the period of August 1996 through June 2001. Included in the charges were six counts of first-degree kidnapping. The alleged sexual assaults all took place in various rooms inside the Brandon residence.

Following a preliminary hearing on August 8, 2001, the charges against Brandon were bound over to the district court for trial. On October 15, 2001, Brandon filed a pretrial petition for a writ of habeas corpus challenging the sufficiency of evidence for the first-degree kidnapping charges. Following two hearings, the district court issued the pretrial writ dismissing the six first-degree kidnapping charges. This appeal followed.

The State alleges that sufficient evidence of asportation or restraint was introduced at the preliminary hearing. Brandon asserts that no evidence shows that any asportation or restraint was more than

incidental to the sexual assaults and that, therefore, the district court did not err in dismissing the charges.

We reaffirm that where kidnapping is incidental to another crime, the evidence of kidnapping must include an element of asportation or physical restraint that either increases the risk of harm to the victim or has an independent purpose and significance. Accordingly, we conclude the district court did not err in granting Brandon's pretrial petition and dismissing five of the first-degree kidnapping counts because they were incidental to the sexual assaults. However, we conclude sufficient evidence was adduced to support one charge of first-degree kidnapping. We therefore reverse and remand on that count with instructions to reinstate the charge.

Brandon was charged by information with multiple counts involving sexual assaults of his ten-year-old and fourteen-year-old daughters. Of these charges, six counts involved allegations of first-degree kidnapping related to sexual assaults. These charges are as follows:

Count	Victim	Alleged Act
I	Fourteen	Vaginal assault in Brandon's bedroom
V	Fourteen	Sexual assault/oral copulation
VII	Fourteen	Sexual assault/oral copulation
X	Fourteen	Anal assault in garage – dragged into garage by hands
XLVII	Ten	Sexual assault/oral copulation – carried into Brandon's bedroom
L	Ten	Sexual assault/oral copulation – carried into her bedroom

In his initial conversations with police detectives, which were admitted into evidence at the preliminary hearing, Brandon stated the alleged activities did not take place in a specific room of the house or during a specific time of day. Further, Brandon denied ever tying or using another item to restrain the girls during the sexual activities. However, Brandon stated both children asked him to stop the assaults as they were occurring and that he used physical force to assure their compliance. Both girls testified at the preliminary hearings. Their testimony is summarized below.

Count I

Although the ten-year-old was nonresponsive during the majority of her testimony, she stated she witnessed her sister and her father engaging in a sexual act. In response to leading questions from the State, she testified she walked into Brandon's bedroom after she heard her older sister screaming. She stated both Brandon and her sister were naked and Brandon was on top of her. The ten-year-old answered affirmatively when asked if the door to the bedroom was "wide open."

The fourteen-year-old's testimony regarding these events is similar except she stated Brandon got up when her younger sister came into the room and walked her out. She testified Brandon then came back into the room and continued to sexually assault her. The fourteen-year-old indicated she could not remember how she got to the bedroom.

Counts V and VII

The fourteen-year-old testified about multiple acts of forcible oral copulation of Brandon starting during her seventh grade year of school. She indicated that Brandon engaged in this act in all of the rooms of the Brandon residence.

In one instance, she testified she came home from school and was going to get something to eat in the kitchen when Brandon approached her and told her to wait to eat. Brandon then allegedly took her into her own bedroom and forced her to orally copulate him.

The fourteen-year-old also testified about an incident where Brandon took her to his bedroom and told her to "suck it." She stated she laid on her back and Brandon straddled her, forcing his penis into her mouth causing her to choke.

Count X

The fourteen-year-old further testified about an incident where Brandon allegedly forced her to engage in anal intercourse in the garage of the Brandon residence. She stated Brandon dragged her into the garage by her arms. She testified she yelled and Brandon told her to be quiet. She testified that her mother was in the bathtub, but got out and made some noise in the kitchen causing Brandon to stop penetrating her. She stated she was bent over in the garage wearing a dress at this time. The fourteen-year-old testified Brandon again placed his penis in her rectum until "white stuff" came out of his penis. She stated she knew "white stuff" came out of his penis because it was "all over [her] butt."

Count XLVII

The ten-year-old testified she came home from school on one occasion and only Brandon and her younger brother were home. She stated she was in the fifth grade at the time. She testified Brandon made the brother sit in the living room to watch cartoons. She stated Brandon picked her up and walked into the bedroom. She testified that Brandon

"ma[de]"[1] her go into his bedroom where he told her to "suck it." She indicated she told Brandon, "no" and that he slapped her in response. The ten-year-old also stated Brandon pushed her on the bed and, in forcing the oral copulation, caused her to choke on his penis.

Count L

The ten-year-old also testified that Brandon allegedly forced her to have vaginal intercourse during her fourth grade year of school. Her younger brother was napping and her mother was at work on this occasion. She testified Brandon carried her into her older sister's bedroom, removed her shorts and underwear, and placed his penis in her vagina against her will.

Petition for writ of habeas corpus

Brandon filed a petition for a writ of habeas corpus. As to the first-degree kidnapping charges, Brandon argued any movement or restraint of the victims was incidental to the allegations of sexual assault or that insufficient evidence was adduced to support the charges.

The State filed a return to the writ petition. The State argued sufficient evidence was adduced at the preliminary hearing to support a finding of probable cause as to the six counts of first-degree kidnapping. In particular, the State argued that moving the children between rooms of the house or into the garage was sufficient asportation to support a charge of first-degree kidnapping. The State also argued that the restraint of the children was not incidental to the sexual assaults and constituted an independent ground for the kidnapping charges on some of the counts. The State contended that the asportation or restraint increased the risk of

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[1]As the questions were leading, this phrasing is the State's. For the most part, the ten-year-old answered in the affirmative or the negative.

harm to the children. Moreover, the State contended whether the movement was incidental to the underlying charge or increased the risk of harm to the victims were questions of fact for the jury. The State argued the increased risk of harm was the decreased risk of discovery and chances of escape.

The district court heard argument on the writ petition and issued a written order summarily dismissing the six counts of first-degree kidnapping. The State timely appealed.

NRS 171.206 requires the magistrate to hold an accused to answer in the district court if from the evidence produced at the preliminary examination it appears "that there is probable cause to believe that an offense has been committed and that the defendant has committed it."[2] "Probable cause to bind a defendant over for trial may be based on slight, even marginal, evidence because it does not involve a determination of guilt or innocence of an accused."[3] "In habeas corpus proceedings brought by one indicted in a crime, the court can only inquire into whether there exists any substantial evidence which, if true, would support a verdict of conviction. The court may not resolve a substantial conflict in the evidence because that is the exclusive function of the jury."[4]

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[2]See also Graves v. Sheriff, 88 Nev. 436, 439, 498 P.2d 1324, 1326 (1972) (appeal from the denial of a pretrial writ of habeas corpus in a case involving a charge of involuntary manslaughter).

[3]Sheriff v. Dhadda, 115 Nev. 175, 180, 980 P.2d 1062, 1065 (1999).

[4]Id. (citations omitted) (appeal from an order granting a pretrial writ of habeas corpus in a case involving charges of first-degree kidnapping and first-degree murder); see also Sheriff v. Medberry, 96 Nev. 202, 203-04, 606 P.2d 181, 182 (1980) (appeal from an order granting in part a pretrial writ of habeas corpus challenging first-degree kidnapping charges).

NRS 200.310(1) defines first-degree kidnapping as follows:

> A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault . . . and a person who leads, takes, entices, or carries away or detains any minor with the intent to . . . perpetrate upon the person of the minor any unlawful act is guilty of kidnapping in the first degree which is a category A felony.

The plain language of NRS 200.310(1) encompasses actions that involve asportation and/or restraint. Where kidnapping is alleged in addition to another primary offense, such as robbery or sexual assault, we have interpreted the statute to require that any asportation or restraint be independent of, and not inherent to, the primary offense.[5] Specifically, "where kidnapping is incidental to another crime, the evidence of kidnapping must include an element of asportation, physical restraint, or restraint which either increases the risk of harm to the victim or has an independent purpose and significance."[6]

Additionally, we have said that "whether the movement of the victims was incidental to the associated offense and whether the movement increased the risk of harm to the victims are questions of fact to

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[5]Hutchins v. State, 110 Nev. 103, 108, 867 P.2d 1136, 1139-40 (1994); accord Langford v. State, 95 Nev. 631, 600 P.2d 231 (1979); Wright v. State, 94 Nev. 415, 581 P.2d 442 (1978); Stalley v. State, 91 Nev. 671, 541 P.2d 658 (1975).

[6]Davis v. State, 110 Nev. 1107, 1114, 881 P.2d 657, 662 (1994).

be determined by the trier of fact in all but the clearest cases."[7] We note there is no reason to use a different standard for restraint cases. Whether the restraint is incidental to the primary offense is normally a question to be resolved by the trier of fact.

The State contends there was sufficient evidence of asportation or restraint to satisfy the increased risk of harm or independent purpose tests and to support a finding of probable cause. Brandon asserts that this is a clear case requiring dismissal of the charges.

We conclude the district court did not err in dismissing five of the six first-degree kidnapping charges against Brandon. To sustain the kidnapping charges as independent rather than incidental acts, the evidence of kidnapping must include an element of asportation or restraint that either increases the risk of harm to the victim or has an independent purpose and significance.[8] As to all counts, the evidence demonstrated that the only asportation involved was from one room of a private residence to another room or to the garage of the residence. There is no evidence that passersby would have heard anything that went on in the residence and that the risk of detection by anyone outside the residence was decreased (and risk of harm increased) by the movement.

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[7]Medberry, 96 Nev. at 204, 606 P.2d at 182 (appeal of an order granting in part a pretrial writ of habeas corpus in a case involving charges of sexual assault and first-degree kidnapping); see also Langford, 95 Nev. at 638-39, 600 P.2d at 236-37 (direct appeal involving charges of robbery and first-degree kidnapping where defendant challenged the jury instructions related to the charges of kidnapping).

[8]Wright, 94 Nev. at 417-18, 581 P.2d at 443-44; see also Davis, 110 Nev. at 1114, 881 P.2d at 662.

Absent other circumstances, the movement from one room to another is no different than the movement of the restaurant patrons from the front of the restaurant to the back of the restaurant in Wright v. State.[9]

Relying on Hutchins v. State,[10] the State contends that the movement from one room to another decreased the risk of detection by others in the residence, not persons outside the home, and this is sufficient to increase the risk of harm, particularly in a child molestation case. We agree with this general proposition. Because sexual assaults against children frequently occur in the privacy of a home, transporting a child from one room to another to avoid detection by a third person who might intercede on the child's behalf does increase the risk of harm to the child. However, because such assaults usually occur behind closed doors in a home, there must be evidence to show that a third person was capable of detecting the conduct. Applying this test to the facts before us, we conclude only one of the dismissed counts is supported by such evidence.

In Count I, risk of detection was not at issue. The bedroom door was open and, in fact, the ten-year old heard and saw the assault upon the fourteen-year-old. There was no evidence that the asportation increased the risk of harm. As to Counts V and VII, there was no testimony that anyone else was around when Brandon took the fourteen-year-old into the bedroom. As to Counts XLVII and L, the testimony indicates the 10-year-old girl's mother was at work, and the only other person in the house was a much younger brother who was either watching television or was napping. There is no evidence the movement

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[9]Wright, 94 Nev. 415, 581 P.2d 442.

[10]110 Nev. 103, 867 P.2d 1136.

significantly decreased the risk of detection and interference by the three-year-old sibling.

We cannot say the same for Count X. In Count X, Brandon forceably removed the fourteen-year-old into the garage to avoid the girl's mother. This increased the risk of harm by decreasing the risk of detection.

The State also contends that there was sufficient restraint in each of the dismissed counts to warrant a finding of probable cause. We disagree. None of the counts involve restraint that goes beyond that inherent and necessary to the sexual assaults. Taking a child by the hand, picking them up, slapping or holding them down, however odious, is the type of force inherent to sexual assaults.

CONCLUSION

We conclude the district court did not err in granting Brandon's pretrial petition for a writ of habeas corpus and dismissing the first-degree kidnapping charges set forth in counts I, V, VII, XLVII, and L. We therefore affirm that part of the district court's order. However, we conclude sufficient evidence was adduced to support a charge of first-degree kidnapping as to Count X. Accordingly,

We ORDER the judgment of the district court AFFIRMED in part, REVERSED IN PART, and REMAND this case with instructions to reinstate Count X against appellant Michael Anthony Brandon.

Leavitt, J.

Leavitt

Becker, J.

Becker

cc: Hon. Sally L. Loehrer, District Judge
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Public Defender
Clark County Clerk

SHEARING, J., concurring in part and dissenting in part:

I would reverse the district court's dismissal of all the charges of first-degree kidnapping.

I agree with the majority that sufficient evidence was adduced to support charges of first-degree kidnapping as to Count X when Brandon carried his daughter into the garage for the purpose of committing sexual assault away from the rest of his family. I also agree with the majority's statement of our law "where kidnapping is incidental to another crime, the evidence of kidnapping must include an element of asportation, physical restraint, or restraint which either increases the risk of harm to the victim or has an independent purpose and significance."[1]

On the basis of this law, I conclude that sufficient evidence was adduced to support the other kidnapping counts. When Brandon forced or coerced his minor daughters into other rooms of the house in order to sexually molest them, the movement had an independent purpose and significance. It is apparent that Brandon was moving his children to other rooms of the house in order to commit his sexual molestation outside the view and interference of other family members. Taking the children to the bedrooms was no different and had no different purpose than taking his daughter to the garage—to conceal his criminal conduct from other family members.

This conduct of leading, taking, enticing, carrying away or detaining his daughters with intent to perpetrate upon them any unlawful act clearly falls within the conduct proscribed by NRS 200.310(1) and constitutes first-degree kidnapping. Brandon's asportation of his

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[1]Davis v. State, 110 Nev. 1107, 1114, 881 P.2d 657, 662 (1994).

daughters was quite different from the asportation of restaurant patrons from the front to the back of a restaurant, as in Wright v. State.[2] There, the asportation was simply to keep the patrons out of the way while Wright completed his robbery; the asportation was incidental to the robbery. That is similar to Brandon going to his daughter's room and climbing on top of her. There was restraint, but the restraint was incidental to the sexual assault and would not constitute kidnapping. Here Brandon was attempting to conceal his criminal activities—an independent purpose. He picked up a daughter from the area of the house which was occupied by other members of the family, took her to a bedroom, and closed the door. His restraint and asportation of his daughter had an independent purpose—to commit his crime in private. Therefore, he could be guilty of kidnapping.

Also, since it appears that Brandon would only sexually molest a daughter when out of the view of other family members, moving his daughters to the privacy of bedrooms also increased their risk of harm.

This court has said "whether the movement of the victims was incidental to the associated offense and whether the movement increased the risk of harm to the victims are questions of fact to be determined by

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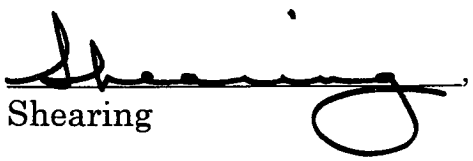
[2]94 Nev. 415, 416, 581 P.2d 442, 443 (1978).

the trier of fact in all but the clearest cases."[3] The kidnapping counts in this case should have been decided by a jury.



Shearing, J.

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[3]Sheriff v. Medberry, 96 Nev. 202, 204, 606 P.2d 181, 182 (1980), (citing Langford v. State, 95 Nev. 631, 638-39, 600 P. 2d 231, 236-37 (1979)).