

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHERIFF, CLARK COUNTY,  
Appellant,  
vs.  
ANGELA VANESSA JOHNSON,  
Respondent.

No. 41509

FILED

AUG 19 2003

ORDER OF REVERSAL AND REMAND

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

This is a sheriff's appeal from an order of the district court granting respondent Angela Vanessa Johnson's pretrial petition for a writ of habeas corpus.

On September 12, 2002, Johnson was charged by way of a criminal information with one count each of burglary, conspiracy to commit robbery, robbery, and first-degree kidnapping.

On March 19, 2003, Johnson filed a pretrial petition for a writ of habeas corpus in the district court. The State opposed the petition. On May 16, 2003, the district court entered an order granting Johnson's petition and dismissing the count of first-degree kidnapping. The State now appeals from the district court's order granting Johnson's petition. The State contends that it presented sufficient evidence at the preliminary hearing to establish probable cause to believe that the alleged first-degree kidnapping was not merely incidental to the robbery and increased the risk of harm to the victim, and therefore the count should not have been dismissed. We agree with the State and reverse the district court's order.

In her pretrial petition below, Johnson cited to Wright v. State for support and argued that the movement of the victim was incidental to

the robbery and did not increase the risk of harm to the victim beyond that associated with the robbery.<sup>1</sup> Therefore, Johnson contended, the kidnapping should not be considered a separate crime and the charge should not stand. At the hearing on the petition in the district court, no evidence was presented by either Johnson or the State. The extent of counsels' argument and the district court's ruling is as follows:

COURT: Submitted by the State?

[STATE]: Yes, your Honor. We would just note that the Nevada law has established that the binding alone is sufficient for a kidnap.

COURT: Well, not as a matter of law. As a matter of law I'm going to grant the petition with regards to the kidnapping issue. I find that the kidnap was incidental, and, therefore, grant the motion as to the kidnapping.

[DEFENSE COUNSEL]: Great. Thank you, your Honor.

On May 16, 2003, the district court entered a summary order, without findings of fact and conclusions of law, granting Johnson's petition. The State now appeals from the district court's order.

On appeal from an order granting a pretrial petition for a writ of habeas corpus based on lack of probable cause, "[t]he sole function of the supreme court is to determine whether all of the evidence received at the

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<sup>1</sup>94 Nev. 415, 581 P.2d 442 (1978) (holding that conviction for kidnapping must be set aside if movement of the victim was incidental to robbery and did not substantially increase risk of harm already present during commission of robbery); see also Davis v. State, 110 Nev. 1107, 1114, 881 P.2d 657, 662 (1994) ("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").

preliminary hearing establishes probable cause to believe that an offense has been committed and that defendant committed it.”<sup>2</sup> As a general rule, this court will not overturn an order granting a pretrial petition for a writ of habeas corpus for lack of probable cause absent a showing of substantial error by the district court.<sup>3</sup>

The probable cause determination has two components: (1) that an offense has been committed; and (2) that the accused committed the offense.<sup>4</sup> Probable cause to support a criminal charge “may be based on slight, even ‘marginal’ evidence, because it does not involve a determination of the guilt or innocence of an accused.”<sup>5</sup> “To commit an accused for trial, the State is not required to negate all inferences which might explain his conduct, but only to present enough evidence to support a reasonable inference that the accused committed the offense.”<sup>6</sup> “Although the [S]tate’s burden at the preliminary examination is slight, it remains incumbent upon the [S]tate to produce some evidence that the offense charged was committed by the accused.”<sup>7</sup> Finally, this court has stated that “[w]hether the movement of the victims is incidental to the associated offense and whether it increased the risk of harm to the victims

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<sup>2</sup>Lamb v. Holsten, 85 Nev. 566, 568, 459 P.2d 771, 772 (1969).

<sup>3</sup>Sheriff v. Provenza, 97 Nev. 346, 347, 630 P.2d 265, 265 (1981).

<sup>4</sup>NRS 171.206.

<sup>5</sup>Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (citations omitted).

<sup>6</sup>Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971).

<sup>7</sup>Woodall v. Sheriff, 95 Nev. 218, 220, 591 P.2d 1144, 1144-45 (1979).

are questions of fact to be determined by the trier of fact in all but the clearest cases.”<sup>8</sup>

In the instant case, the victim, a store manager at Cigarettes Cheaper, testified at the preliminary hearing that Johnson’s accomplices entered the store and asked to see an item in a display case behind the counter. As the victim turned to access the item, the assailants came behind the counter, knocked the victim to the ground, covered her mouth and eyes with duct tape, dragged her to a back room, and taped her legs and ankles together. The assailants then brought the victim to a bathroom in the back of the store, duct-taped her wrists to her ankles, and placed her on her side in order to tape her to the toilet. The victim was left behind a closed door. The victim testified that she had difficulty breathing due to having her mouth covered with tape, and she suffered bruises to her arms and hands.

Based on our review of the record, we conclude that the State presented enough evidence to support a reasonable inference that: (1) Johnson violated NRS 200.310(1); and (2) the kidnapping was not incidental to the robbery and the movement of the victim increased the risk of harm to the victim.<sup>9</sup> Physically restraining the victim with duct

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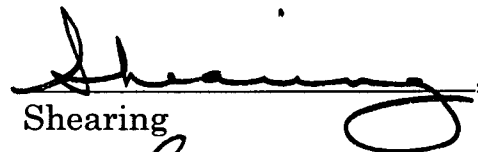
<sup>8</sup>Turner v. State, 98 Nev. 243, 245, 645 P.2d 971, 972 (1982); see also Nev. Const. art. 6, § 4; NRS 177.025.


<sup>9</sup>See NRS 200.310(1) (“A person who willfully seizes, confines, . . . abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain . . . for the purpose of committing . . . robbery . . . is guilty of kidnapping in the first degree.”); Hutchins v. State, 110 Nev. 103, 108, 867 P.2d 1136, 1140 (1994) (“kidnapping is not incidental to the underlying offense if ‘the restraint increased the risk of harm’ or ‘had an independent purpose and significance as [being] essential to the accomplishment of the other


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tape and forcibly moving her to a bathroom in the back of the store where she was duct-taped to a toilet and left behind a closed door was not necessary to effectuate the robbery of the store. The victim testified that she had difficulty breathing after her mouth was covered with duct tape; therefore, along with being confined in that position in the rear bathroom, the risk of harm to her was substantially increased. Moreover, because the victim was restrained behind a closed door in the rear of the store, her chances of being seen, heard, and rescued were greatly diminished. Therefore, based on all of the above, we conclude that the district court erred in granting Johnson's pretrial habeas petition thereby dismissing the charge of first-degree kidnapping. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

 J.  
Shearing

 J.  
Leavitt

 J.  
Becker

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offense") (quoting Clem v. State, 104 Nev. 351, 354, 760 P.2d 103, 105 (1990), overruled on other grounds, Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990)).

cc: Hon. John S. McGroarty, District Judge  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Joseph A. Scalia II  
Clark County Clerk