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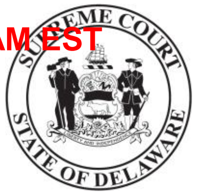

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RONDAIGES A. HARPER,	)	
	)	
Defendant Below-Appellant,	)	**No. 453, 2014**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

**ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY**

STATE'S ANSWERING BRIEF

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DATE: January 26, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Rondaiges A. Harper's Opening Brief.

This is the State's Answering Brief in opposition to Harper's direct appeal.

SUMMARY OF ARGUMENT

I. DENIED. Carjacking may be a continuing offense as long as the owner/victim remains a prisoner in the vehicle. While Rondaiges A. Harper was not present when the victim's vehicle was forcibly seized by the two female co-defendants, he later assisted the co-defendants in continuing the crime by returning the victim to the trunk of her car on two occasions and later dropping the victim off at an isolated cemetery at night.

II. DENIED. A rational trier of fact could find beyond a reasonable doubt that the State proved all the statutory elements of first degree kidnapping. (B-105-07). See 11 Del. C. § 783A(3). The unlawful restraint of the carjacking victim by confining her to her car trunk for nearly two days facilitated the commission of the underlying carjacking offense or flight therefrom.

III. DENIED. The restraint of Margaret Smith was independent of and not incidental to her carjacking. (B-90-91). It was not necessary to keep Smith confined in her car trunk for nearly two days in order to commit the carjacking offense. The jury was properly instructed under Weber v. State, 547 A.2d 948, 959 (Del. 1988) (B-106), and the trial evidence was sufficient to support Harper's first degree kidnapping conviction.

STATEMENT OF FACTS

On Monday, March 18, 2013, Margaret Smith, an 89 year old widow (B-32, 41), drove her 2001 tan Buick LeSabre automobile (A-18; B-39, 43) to the Milford Delaware Chicken Man. (A-9). There Smith was approached by two juvenile females, Junia McDonald and Jackeline Perez (A-20), who asked for a ride home. (A-9). Smith had cash in her pocketbook (A-13-14), as well as $800 pinned inside her clothing. (B-97). At the direction of McDonald and Perez, Smith drove the two girls to different locations in the Milford area; however, each time the girls would tell Smith to take them somewhere else. (A-9, 11).

After the last stop, one of the girls asked Smith for her car keys. (A-11). Smith put up a fight and would not relinquish her car keys, but the two girls were able to overpower the elderly Smith who was less than 5 feet tall. (A-11-12; B-42, 49). McDonald and Perez unlatched the car trunk and shoved Smith inside. (A-12; B-49). The girls drove away in the car, and Smith was rolling around inside the rear trunk. (A-12; B-46).

McDonald contacted a third juvenile, Philip Brewer (B-55), via Facebook. (A-26). The two girls picked up Brewer at his mother's home on Monday, March 18, 2013 (A-25-26), and then the trio picked up the defendant Rondaiges A. Harper, who lived near Brewer. (A-27). The four juveniles rode around in Smith's car listening to music. (A-29, 35). Smith, who was still in the car trunk, testified at

Harper's June 2014 Sussex County Superior Court jury trial that the music was loud. (B-46).

The group drove to a park in Coverdale and listened to music in Smith's car. (A-28-29). After the car battery died (A-29), Brewer and Harper went to Brewer's home to retrieve Brewer's mother's car in an attempt to jump start Smith's Buick. (B-59). Returning with his mother's car, Brewer discovered there were no jumper cables. (B-60). Brewer and Harper asked McDonald to open the Buick trunk to look for jumper cables, but McDonald refused and said her uncle was on the way to jump the Buick. (B-60). Thereafter, McDonald and Brewer got in Brewer's mother's car while Harper and Perez remained in the Buick. (B-60). Brewer and McDonald had sex in Brewer's mother's car. (A-32).

Next, Harper came over to Brewer's mother's car and announced that "somebody was in the trunk." (A-30; B-60). According to Brewer, "We popped the trunk and seen the lady in there." (A-30). When Harper asked what is going on, the two girls said they gave Smith liquor to use her car. (A-30). The girls also claimed that Smith did not want to get in the back seat and preferred to be in the Buick trunk. (A-30-31). While the trunk was open, Smith stated that the Buick was her car. (A-31). Brewer and Harper did help Smith get out of the Buick trunk (A-31), but when the juveniles decided to go to Brewer's grandmother's home, they put Smith back in the Buick trunk. (A-31-32).

During Monday evening, March 18, the four juveniles were smoking marijuana and trying to figure out how to jump start Smith's Buick. (B-61). After leaving Brewer's grandmother's home, the juveniles returned to the Coverdale park to look in the Buick trunk for jumper cables. (B-61). There were jumper cables in the Buick trunk, and "we had the lady get out again." (B-61). Both Harper and Brewer removed Smith from the Buick trunk on this second occasion, but the boys could not find the car's battery. (B-62). According to Brewer, when the group was unable to locate the Buick's battery, Harper put Smith "back in the trunk." (B-62).

Eventually, Brewer's uncle succeeded in jump stating Smith's Buick. (A-34). The juveniles then checked into a motel and left Smith in the car trunk. (B-62-63). On Tuesday the group returned to Coverdale to purchase more marijuana. (B-63). McDonald was able to communicate with Smith in the car trunk by pulling down the backseat armrest. (B-63-64). During a trip to McDonald's, Junia McDonald asked Smith if she wanted some food, but Smith only replied that she wanted to go home. (B-63-64).

Smith was never removed from the car trunk during her two day ordeal to use the bathroom (B-64), and she had to urinate on her clothing. (A-15; B-25, 40, 48). Banging on the trunk did not help (A-15-16), and when Smith asked to use the bathroom, McDonald and Perez told her to shut up. (A-15; B-51). Smith had nothing to eat during her two days in the car trunk (A-15; B-47), and she was

unable to take her medications. (B-37, 45). McDonald and Perez took money from Smith (B-50), and there was no cash in Smith's purse. (B-52-53).

Perez wanted to return to Milford and burn up Smith's car while Smith was still in the trunk. (A-37; B-64). Both Harper and Brewer opposed setting the car on fire. (A-37). Harper then suggested dropping Smith off at an isolated Sussex County graveyard. (A-37-38). A cemetery is located off of King Road near Seaford. (B-22). To reach the cemetery it is necessary to drive off King Road onto a dirt road named Calvary Road. (B-4, 6). There is no lighting in the area and the cemetery is not well maintained. (B-23). Calvary Road is 150 to 200 feet long, and the dirt road is filled with potholes. (B-14). Trash lines the dirt road to the cemetery, and there are trees on both sides of Calvary Road. (B-6).

At this point Brewer was driving Smith's Buick when the group stopped at the Calvary Road cemetery in the evening. (A-38). According to Brewer, Harper and the two girls got out of the Buick "and they got the lady out of the car and they just sat her in the graveyard." (A-38). Once Smith was left in the cemetery, the four juveniles returned to the motel, and the next morning McDonald and Perez went "to get their nails done." (A-39).

Wednesday morning, March 20, 2013, 66 year old Betty Edwards went to the Calvary Road cemetery to visit her son's grave. (B-3-5). Edwards saw an old woman (Margaret Smith) emerge from the nearby wooded area. (B-7-8). Edwards

testified that it was cold that morning (B-10), and Smith was only wearing dirty, wet socks on her feet. (B-7-8). Smith asked Edwards to take her to a store to purchase two canes. (B-9). Instead, Edwards telephoned 911 at 8:20 A.M. on March 20, 2013. (B-1-2, 11).

Delaware State Police Trooper James W. Gooch was dispatched to the Calvary Road cemetery on the morning of March 20. (B-12-13). When Gooch arrived he observed that Margaret Smith was disheveled, in her stocking feet, and appeared disoriented. (B-15-16). Officer Gooch transported Smith to the Nanticoke Memorial Hospital in Seaford (B-16), and contacted Sabrina L. Carroll, Smith's niece (B-31), who had previously reported her aunt as missing. (B-17, 34).

At the Nanticoke Hospital, Smith's body temperature was 96.2 degrees (B-94), she was dehydrated (B-95), and had an urinary tract infection. (B-30, 96). Smith's knees were cut and scraped, and she had a lot of bruising from rolling around in the car trunk. (B-35, 46). After being released from Nanticoke, Smith was rehospitalized on March 22, 2013 at Christiana Hospital. (B-28). Abrasions on Smith's knees and hands were noted at Christiana, and she was treated for cellulitis, a skin infection, of her feet. (B-29).

After taking Margaret Smith to the hospital in Seaford on March 20, 2013 (B-16), Trooper Gooch returned to the Calvary Road Cemetery to look for Smith's 2001 tan Buick LeSabre. (B-17, 39). Although Gooch found tire tracks and

“crawling marks” in the cemetery (B-18), he was unable to locate Smith’s vehicle. (B-19-20). When Trooper Michael P. Maher of the Criminalistics Unit (B-21) visited the cemetery on March 29, 2013 (B-22), he found Smith’s medications in a bag and a black cane leaning against a headstone. (B-24, 26). Maher also found Smith’s jeans which smelled like urine. (B-24-25).

Unable to locate Smith’s car on March 20, Trooper Gooch left the car listing as missing on the police computer network. (B-19-20). About 7 P.M. on March 20, 2013, Delaware State Police Trooper Patrick Schlimer was patrolling in a marked police vehicle. (A-18; B-38). Schlimer was running vehicle tag numbers when he discovered that Smith’s 2001 Buick was reported as missing. (A-18).

When Schlimer stopped Smith’s Buick on the evening of March 20 (A-19), he discovered five juveniles inside the vehicle. (A-20). Junia McDonald was driving, and Phillip Brewer was in the front passenger seat. (A-20). In the backseat Schlimer discovered Rondaiges A. Harper, Daniaya Smith, and Jackeline Perez. (A-20). None of the five juveniles had identification, and Daniaya Smith apparently joined the group after Margaret Smith was left in the cemetery. (A-20).

Backup officers were summoned to the vehicle stop scene, and the occupants of the Buick were taken in separate police cars to State Police Troop # 4. (A-21). Trooper Scott Gray interviewed Harper (B-65), and the videotape of that recorded police interview was admitted at Harper’s trial as State’s Exhibit # 83. (B-66). The

videotaped interview of Harper was played for the Superior Court jury. (B-67).

Harper elected not to testify on his own behalf at trial. (B-101-02).

I. CARJACKING IS A CONTINUING OFFENSE

QUESTION PRESENTED

Is first degree carjacking [11 Del. C. § 836(a)(6)] a continuing offense?

STANDARD AND SCOPE OF REVIEW

The Superior Court's jury instruction (B-104), and interpretation of the Delaware Statute that "the crime of carjacking would be continuous while the hostage remains in the car and would not end until the hostage is permanently released from the car . . . ." (B-88-89) is subject to de novo appellate review. See R. T. Vanderbilt Company, Inc. v. Galliher, 98 A.3d 122, 125 (Del. 2014); Dennis v. State, 41 A.3d 391, 393 (Del. 2012) (carjacking prosecution).

MERITS OF THE ARGUMENT

On the morning of the fourth day of Rondaiges A. Harper's Sussex County Superior Court jury trial (June 26, 2014), the trial judge conducted a jury prayer conference with counsel. (B-68-92). Initially, defense counsel for Harper raised a question about the propriety of one sentence in the proposed first degree carjacking jury instruction to the effect that "The crime of carjacking may be continuous where a victim may be a hostage until a victim is released from the motor vehicle." (B-68). In response, the trial judge acknowledged that this challenged sentence was not part of any Delaware Pattern Jury Instruction. (B-68-69). The trial judge then explained his legal reasoning, including the citation of federal carjacking decisions

on the question from the First, Second, and Third Circuits and references to Professor Wayne R. LaFave's treatise on Substantive Criminal Law, for viewing the carjacking of Margaret Smith's 2001 Buick LeSabre automobile as a continuing offense under the particular facts as presented in the prior trial testimony. (B-69-74).

Harper's defense counsel disagreed with the trial judge's determination that the carjacking of Smith's car was an offense that continued until the 89 year old victim was released some two days later at an isolated cemetery near Seaford, Delaware. (B-74). Harper's counsel argued that federal court decisions viewing carjacking as a continuing offense as long as the owner/victim is being held hostage should have no application here because the federal carjacking statute [18 U.S.C. § 2119] differs from the Delaware provision defining first degree carjacking of an elderly victim [11 Del. C. § 836(a)(6)] at issue in Harper's prosecution. (B-76). The trial judge did concede that "I haven't seen any cases in Delaware where this kind of thing has come up." (B-77).

The trial prosecutrix agreed with the trial judge's legal analysis and summarized some of the pertinent trial evidence as to why the carjacking was a continuing crime and Smith's kidnapping was a separate offense. (B-78-84). After the trial judge pointed out that there was evidence that the victim Smith was "in and out of the trunk, at lease, twice" (B-84), the prosecutrix added, with respect to

defendant Harper, "that the defendant formed the intent to participate in the carjacking when he puts her back in the trunk because he is, then, effectively taking control of the vehicle directly from the owner of that vehicle . . . ." (B-86-87).

The Superior Court Judge concluded the prayer conference discussion of the challenged language in the first degree carjacking jury instruction (B-104), by ruling:

> So then based upon the LaFave treatise, the Davis case and the other cases cited, I'm finding that the language used in the federal side is similar to the Delaware language. The crime of carjacking would be continuous while the hostage remains in the car and would not end until the hostage is permanently released from the car which, in this case, would be the cemetery.

(B-88-89). Although the trial judge said Davis, he was apparently referring to Dennis v. State, 41 A.3d 391 (Del. 2012). (B-75). Thereafter, as part of the first degree carjacking instruction to Harper's jury, the Superior Court Judge charged: "The crime of carjacking may be continuous where a victim may be a hostage until a victim is released from the motor vehicle." (B-104). This is an accurate jury instruction based upon the particular facts in Margaret Smith's carjacking.

"A party is not entitled to a particular jury instruction but does have the unqualified right to have the jury instructed on a correct statement of the substance of the law." Koutoufaris v. Dick, 604 A.2d 390, 399 (Del. 1992). See also Banther v. State, 977 A.2d 870, 883 (Del. 2009); Grace v. State, 658 A.2d 1011, 1014 (Del.

1995); Flamer v. State, 490 A.2d 104, 128 (Del.), cert. denied, 464 U.S. 865 (1983). "In a complex case the Court has a duty to tailor its instructions of law to the jury so as to clearly make them applicable to the specific facts of the case as shown by the evidence." Lutzkovitz v. Murray, 339 A.2d 64, 67 (Del. 1975) (citing Beck v. Haley, 239 A.2d 699, 702 (Del. 1968)). In tailoring jury instructions to the specific facts of a case, the trial judge is given substantial latitude. See Atkins v. State, 523 A.2d 539, 549 (Del. 1987); Brown v. State, 1992 WL 135160 (Del. March 11, 1992) at * 2.

The federal carjacking statute [18 U.S.C. § 2119] is sufficiently analogous to the Delaware first degree carjacking provision [11 Del. C. § 836(a)(6)] at issue in Harper's State court prosecution at least as to the question of whether carjacking may be a continuing offense to make federal court precedents addressing the question persuasive authority. (B-69-74). Likewise, the jury instruction given in Harper's prosecution is sufficiently tailored to the specific facts in the Margaret Smith 2013 carjacking. Accordingly, the trial judge did a correct synthesis of the Delaware statutory provision with the persuasive federal case authority in framing the factual issue for the jury to decide if the carjacking here was or was not a continuous or continuing offense. There was no legal error either in interpreting the Delaware first degree carjacking statute or in fashioning a correct jury instruction for determination of Harper's guilt on the first degree carjacking allegation.

The question of whether a carjacking may be a continuing offense such that someone like Harper or Brewer who enters the vehicle after its initial forceful seizure from the owner may also be prosecuted for carjacking has been addressed most frequently in federal court decisions in the United States Court of Appeals for the First Circuit. See United States v. Figueroa-Cartagena, 612 F.3d 69, 73-75 (1st Cir. 2010); United States v. Lebron-Cepeda, 324 F.3d 52, 61 (1st Cir. 2003) (per curiam), cert. denied, 540 U.S. 892 (2003); Ramirez-Burgos v. United States, 313 F.3d 23, 30 n. 9 (1st Cir. 2002) ("the commission of a carjacking continues at least while the carjacker maintains control over the victim and her car."). See also United States v. Matos-Quinones, 456 F.3d 14, 19 n. 4 (1st Cir. 2006) (dictum); United States v. Martinez-Bermudez, 387 F.3d 98, 101 (1st Cir. 2004) (dictum). See generally 2 Wayne R. LaFave, Substantive Criminal Law § 13.2 (2d ed. 2003).

The 2010 First Circuit decision in Figueroa-Cartagena directly addresses the type of carjacking scenario involved in Harper's prosecution. There, a third defendant, Naliza Figueroa-Cartagena, although not involved in the initial carjacking of Hector Perez-Torres by Gabriel and Alberto Castro-Davis on the afternoon of July 15, 2006 in Caguas, Puerto Rico, later assisted in retaining control of the victim Perez who was handcuffed inside his own car. Figueroa-Cartagena, 612 F.3d at 72. When Gabriel and Alberto arrived at the home of Neliza's parents with Perez handcuffed inside his own car, Neliza called her brother Jose who was

inside the house and she asked Jose to go outside and speak with Gabriel. Jose complied and while outside Gabriel offered him money to guard Perez.

While Jose was guarding the carjacking victim, Gabriel and Alberto left to withdraw money by using Perez's ATM card. Jose became nervous and telephoned Gabriel, but Neliza answered the phone and assured her brother that they were nearby. Perez jumped from his car trying to escape, but Jose struggled with the victim until Gabriel, Alberto, and Neliza all arrived and subdued Perez. When neighbors approached the house after hearing the tumult, Neliza told them not to become involved and she and Gabriel closed a gate to prevent the neighbors from approaching. Id. at 72. Although apparently not involved in Perez's subsequent murder, Neliza and the two original carjackers were all charged with aiding and abetting a carjacking resulting in death under 18 U.S.C. § 2119(3). Following her conviction, Neliza challenged the sufficiency of the evidence against her. Neliza focused on the "temporal limits" of the carjacking, and argued that her involvement, like Harper's, occurred after the initial seizure of the victim's car. Figueora-Cartagena, 612 F.3d at 73. Acknowledging that an accused cannot be convicted of aiding and abetting a completed crime [Id. at 73], the First Circuit still affirmed Neliza's convictions. Id. at 75. The appellate court pointed out, ". . . the carjacking offense conduct remained ongoing while Perez was a hostage in the car for many hours after Neliza became involved." Id. at 75. Neliza was not merely

present at the scene of an unfolding crime, she materially aided the two original carjackers in their criminal enterprise. Id. at 75.

In Harper's prosecution, his conduct was similar to that of Neliza. Margaret Smith was initially carjacked by McDonald and Perez. Harper later became involved in the crimes against Smith when he twice placed Smith back in her car trunk and assisted the two female co-defendants in dropping Smith off at a cemetery in the night. See United States v. Lebron-Cepeda, 324 F.3d 52, 61 (1st Cir.), cert. denied, 540 U.S. 892 (2003); Ramirez-Burgos v. United States, 313 F.3d 23, 30 n. 9 (1st Cir. 2002); United States v. Gonzales-Mercado, 239 F. Supp.2d 148, 149 (D.P.R. 2002) (carjacking victim forced into car trunk).

Although not a carjacking prosecution, the United States Court of Appeals for the Second Circuit has also held that "where the crime has more than one stage, the defendant may be convicted of aiding and abetting even if he did not learn of the crime at its inception but knowingly assisted at a later stage." United States v. Reifler, 446 F.3d 65, 96 (2d Cir. 2006). See also United States v. Jones, 998 F.2d 74, 79-81 (2d Cir.), cert. denied, 510 U.S. 958 (1993) (defendant who learned of bank robbery only during the escape and assisted in the escape could be convicted of aiding and abetting the robbery); United States v. Phillips, 688 F.2d 52, 54-55 (8th Cir. 1982) (cashing money order that was fraudulently wired aided and abetted the wire fraud).

Depending upon the particular facts in a case, a carjacking may be a continuing offense as long as the victim/owner remains a hostage within the defendant's control. For example, the Ninth Circuit found that "the carjacking did not end at the moment Kimberly and Kenneth were locked in the trunk of Kimberly's car," but "the commission of the carjacking crime continued until Kimberly was dumped along the road . . . ." United States v. Hicks, 103 F.3d 837, 843 (9th Cir. 1996). In a Philadelphia federal carjacking offense, the United States District Court for the Eastern District of Pennsylvania also found that a carjacking offense continues until the victim is permanently separated from her vehicle. United States v. Jones, 2003 WL 21362798 (E.D. Pa. June 10, 2003) at * 6 (citing Hicks and First Circuit decisions). See United States v. Shugart, 227 Fed. Appx. 334, 336 (5th Cir. April 10, 2007) (teenage carjacking victims remained in defendant's "clutches" even while speaking with emergency personnel after vehicle accident). Compare United States v. Ali Mohamed Ali, 982 F. Supp.2d 85, 88-89 (D.D.C. 2013) (piracy can continue even after pirate leaves the high seas). Here, Harper's carjacking offense continued as long as Margaret Smith remained a hostage within the trunk of her car.

While Delaware may not have specifically addressed the "temporal limits" of a State carjacking offense under 11 Del. C. §§ 835-36, this Court has noted that the presence of the victim "makes a carjacking a crime against the person, whereas a

theft of a motor vehicle is a crime against property only." Dennis v. State, 41 A.3d 391, 394 (Del. 2012). The first degree carjacking in Harper's prosecution was a crime against the person of the victim, and that crime continued as long as Margaret Smith remained a prisoner for nearly two days in the trunk of her 2001 Buick LeSabre. The federal carjacking statute [18 U.S.C. § 2119] is not sufficiently different from the Delaware State statute prohibiting the same type of conduct; accordingly, the pertinent federal court decisions addressing the "temporal limits" of the carjacking offense and the criminal responsibility of a latecomer to the crime are relevant in assessing the liability of Rondaiges A. Harper for the first degree carjacking allegation. Since Harper was a participant in the ongoing crime, he was properly convicted of first degree carjacking of the elderly victim.

II. THERE WAS SUFFICIENT EVIDENCE OF FIRST DEGREE KIDNAPPING

QUESTION PRESENTED

Was there sufficient evidence to convict the accused of first degree kidnapping?

STANDARD AND SCOPE OF REVIEW

Appellate review of a trial judge's denial of a defense motion for judgment of acquittal (B-98-101) is de novo to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the essential elements of first degree kidnapping beyond a reasonable doubt. See Lowther v. State, 2014 WL 5794842 (Del. Nov. 6, 2014) at * 2; Bethard v. State, 28 A.3d 395, 397-98 (Del. 2011); Vincent v. State, 996 A.2d 777, 778-79 (Del. 2010); Williams v. State, 539 A.2d 164, 168 (Del.), cert. denied, 488 U.S. 969 (1988) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

MERITS OF ARGUMENT

On the last day of trial (June 26, 2014), defense counsel for Rondaiges A. Harper moved for a judgment of acquittal as to two counts of the indictment. (B-98-100). Most of the defense argument focused on the question of whether or not carjacking is "a continuous course of conduct." (B-99). The trial judge denied the defense motion for a judgment of acquittal. (B-101). Thereafter, Harper's jury was

charged as to the statutory elements of first degree kidnapping (B-105-07), as well as the lesser included offenses of second degree kidnapping (B-107-09), first degree unlawful imprisonment (B-110-12), and second degree unlawful imprisonment. (B-112-13). Although given the option of three lesser included offenses (B-107-12), Harper's jury convicted the accused of the lead offense of first degree kidnapping. (B-115-16).

In this direct appeal, Harper argues that he should have been convicted of the lesser included offense of unlawful imprisonment, but not kidnapping. Specifically, Harper argues that the State did not prove that the unlawful restraint of Margaret Smith by confining her within the trunk of her automobile was for the purpose of facilitating "the commission of any felony or flight thereafter." (B-106). See 11 Del. C. § 783A(3). The felony in this case is the first degree carjacking of Smith's vehicle. (B-106).

This Court reviews de novo the Superior Court's denial of a motion for judgment of acquittal to determine whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could find the essential elements of first degree kidnapping beyond a reasonable doubt. See Jones v. State, 2011 WL 1087490 (Del. March 24, 2011) at * 2 (attempted first degree kidnapping conviction). Here, the restraint of Smith by placing her in the car trunk for nearly two days was more interference with her liberty than is ordinarily incidental to a

carjacking where the owner is quickly dispossessed of the vehicle and the carjacker drives away with the automobile. See generally Scott v. State, 521 A.2d 235, 242 (Del. 1987).

Harper assisted in removing and returning the 89 year old Smith to her car trunk on two occasions. (A-31-32; B-62). On the second occasion, Harper and Phillip Brewer took Smith out of the vehicle trunk while searching for jumper cables to restart Smith's Buick after the battery died. (B-62). Finally, when Smith was permanently dispossessed of her Buick, Harper assisted McDonald and Perez in removing Smith from the car trunk and then leaving her in an isolated cemetery at night. (A-38).

The unlawful restraint of Smith in the automobile trunk facilitated the commission of the carjacking felony. While so confined Smith was unable to report that her car was stolen or describe the juveniles who had committed the carjacking. Smith was placed in a location within the vehicle where she would not be visible to an outside observer. This particular placement of Smith was an additional aid to facilitating the carjacking offense. Given the trial evidence of Harper's conduct in his various contacts with the victim, a rational trier of fact could reasonably conclude that Harper and the three co-defendants were all unlawfully restraining Smith, the conduct was intentional, Smith was not released unharmed and in a safe place, and the conduct facilitated the commission of the carjacking or flight

therefrom. (B-105-07). See 11 Del. C. § 783A(3). If a rational trier of fact could find Harper guilty of first degree kidnapping, it is irrelevant whether the trial evidence would also have supported a guilty verdict on a lesser included offense.

III. THE KIDNAPPING WAS INDEPENDENT OF AND NOT INCIDENTAL TO THE CARJACKING

QUESTION PRESENTED

Was the kidnapping of the victim independent of and not incidental to the carjacking of the victim's motor vehicle?

STANDARD AND SCOPE OF REVIEW

The Superior Court Judge's ruling (B-90-91) and subsequent jury instruction (B-106) that the restraint of the victim is independent of and not incidental to the carjacking presents a question of law subject to de novo appellate review. See Burrell v. State, 953 A.2d 957, 960 (Del. 2008); Brown v. State, 897 A.2d 748, 750 (Del. 2006); Lopez v. State, 861 A.2d 1245, 1249 (Del. 2004).

MERITS OF ARGUMENT

"In Delaware, it is well-settled that when kidnapping is charged along with an underlying offense, the kidnapping charge is submitted to a jury only if the trial judge first determines that there are sufficient facts supporting a finding that the defendant's restraint of the victim is 'independent of and not incidental to' an underlying offense." Jones v. State, 2011 WL 1087490 (Del. March 24, 2011) at * 2 (quoting Weber v. State, 547 A.2d 948, 959 (Del. 1988)). In the prosecution of Rondaiges A. Harper, the accused was charged with both first degree kidnapping, as well as the underlying offense of first degree carjacking. A Weber jury

instruction on kidnapping is mandatory. Allen v. State, 970 A.2d 203, 219 (Del. 2009).

The Superior Court Judge addressed the propriety of a Weber jury instruction during the June 26, 2014 jury prayer conference. (B-78, 83, 89-92). Initially, the trial judge posed the question to the State, "If we take the fact that the carjacking is a continuous transaction and does not end until the time when the victim was released in the cemetery and kidnapping is a continuous transaction on the restraint on liberty which doesn't end until release in the cemetery, how is the restraint independent of the underlying charge?" (B-78).

Later, the trial judge reiterated, "So with respect to the restraint, as we know; that under Weber, it must be independent of and not incidental to another crime. And the kidnapping charge, how would that be independent of and not incidental to carjacking?" (B-83). The prosecutrix responded to the trial judge's inquiry by noting, "Well, they did not need to restrain her in order to have that car. They could have simply pushed her aside. They had the keys; they overpowered her; they did not need to restrain her in the trunk of the car in order to effectively commit the carjacking." (B-83). The Superior Court Judge then observed, "So the argument would be that they didn't have to put her in the trunk?" (B-83). The trial judge was properly mindful of the requirement of Weber v. State, 547 A.2d 948, 959 (Del. 1988), when a kidnapping is alleged in conjunction with an underlying offense. See

Wright v. State, 980 A.2d 372, 376-79 (Del. 2009); Douglas v. State, 879 A.2d 594, 599-601 (Del. 2005); Williams v. State, 2003 WL 1869606 (Del. April 9, 2003) at * 3-5; Broughton v. State, 2001 WL 118005 (Del. Feb. 1, 2001) at * 1; Taylor v. State, 1991 WL 210961 (Del. Oct. 10, 1991) at * 2-3; Skinner v. State, 1990 WL 1470 (Del. Jan. 3, 1990) at * 1-2; Coleman v. State, 562 A.2d 1171, 1180 (Del. 1989). See also State v. Carletti, 2007 WL 1098549 (Del. Super. March 16, 2007) at * 4.

Bearing in mind the substantial Delaware case law on this issue and specifically citing this Court's 2009 decision in Wright (B-90), the trial judge ruled:

> Under the law as to the restraint of Margaret Smith, it must be independent of and not incidental to another crime. In this case, the other crime would be carjacking. Restraint is independent of and not incidental to another crime when it involves significantly more interference with the person's liberty than what is normally incidental to the other crime.
>
> In this case, restraint is independent of and not incidental to carjacking. A carjacking does not require putting a victim in the trunk of a car for the prolonged period of time, and also, in this particular case, you have that the evidence would show a jury could believe that she was taken in and out of the trunk at least twice.
>
> So with respect to that, preliminarily, it's sufficient for it to move forward to a jury. And, ultimately, it becomes a jury question.

(B-90-91).

The Superior Court Judge in deciding to submit the kidnapping allegation to Harper's jury with a proper Weber jury instruction (B-106) correctly applied the

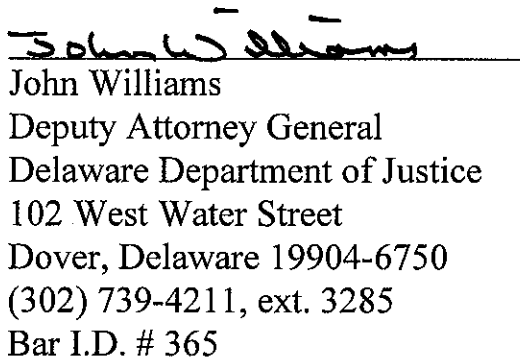
Delaware law on this issue. Likewise, the preliminary factual findings of the trial judge are based upon the trial evidence and are entitled to deference on appeal. See Burrell v. State, 953 A.2d 957, 960 (Del. 2008) ("A deferential standard of review is applied to factual findings by a trial judge. Those factual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous.") (citing Albury v. State, 551 A.2d 53, 60 (Del. 1988)); Ornelas v. United States, 517 U.S. 690, 696-97 (1996) (finding of historical fact)); City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc., 1 A.3d 281, 287 (Del. 2010) ("a mixed finding of fact and law . . . is entitled to considerable deference.") (citing First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 567 (Del. 1997)).

The restraint of Margaret Smith by placing her in the trunk of her car and not permanently releasing her for nearly two days was independent of and not incidental to the initial carjacking. As pointed out at trial by the State, the two teenage girls were able to overpower the 89 year old female victim, forcibly take her car keys from her, and force Smith into the trunk of her own car. (B-83). Harper assisted in this restraint by twice removing Smith from the car trunk (once to look for jumper cables) and then returning the victim to her place of confinement. (A-31-32; B-62). Harper discovered Smith in the car trunk and informed Phillip Brewer of the situation. (A-30; B-60). The two boys then opened

the car trunk and discovered Smith inside. (A-30). After this discovery, Harper did nothing to free Smith until he and the two female co-defendants removed Smith permanently from the vehicle and left the victim in an isolated cemetery at night. (A-38). On the basis of this trial evidence, Harper could be convicted of first degree kidnapping. The jury received a correct Weber instruction (B-106), and properly found Harper guilty of kidnapping.

CONCLUSION

The judgment of the Kent County Superior Court should be affirmed.



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Dated: January 26, 2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RONDAIGES A. HARPER,	)	
	)	
Defendant Below-Appellant,	)	**No. 453, 2014**
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 26th day of January 2015, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on January 26, 2015, she did electronically serve the attached State's Answering Brief properly addressed to:

John F. Brady, Esquire
21133 Sterling Avenue
Georgetown, DE 19947

Mary T. Corkell

Before me the day aforesaid.

Janice R. Malmberg

Notary Public