

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)
)
 v.)
)
ANTHONY ZUPPO,)
ID. Nos. 0101004412 / 0101004566))
0101006615 / 0103013369))
0104000965 / 0104006906))
0107022384))
))
Defendant.)

MOTION FOR JUDGMENT OF ACQUITTAL
GRANTED AS TO COUNT IV, KIDNAPING SECOND DEGREE

ORDER

1. This 4th day of February, 2002, the defendant has moved for judgment of acquittal at the close of all the evidence at trial. The charges include Kidnaping in the Second Degree at Count IV of the indictment. This kidnaping charge arises from an alleged sexual assault which occurred on January 3, 2001. The defendant is also charged with Rape in the First Degree and Attempted Rape in the First Degree for the same sexual assault.

2. The defendant and the alleged victim were living together. According to the testimony of the alleged victim, on the day in question the defendant became angry at her and went into the bedroom. He called for her to come in. She didn't want to, but did because she was afraid she would get in trouble if she didn't. In the bedroom, the defendant removed her clothing. He then bound both her hands with a restraint.

State v. Anthony Zuppo

ID. Nos. 0101004412, 0101004566,
0101006615, 0103013369, 0104000965,
0104006906 and 0107022384
February 4, 2002

He also placed a rope around her neck and criss-crossed it across her breasts. He also placed a blindfold on her. The alleged sexual assault then took place. Upon the conclusion of the alleged sexual assault, the defendant removed the hand restraint, blindfold and rope. At that point the event was concluded and both parties went into the bathroom, where the alleged victim showered and the defendant washed.

3. *Weber v. State*¹ establishes that before submitting a kidnaping charge to the jury when there is an underlying charge, the Court must determine whether there is evidence of restraint which is independent of restraint incidental to the underlying offense. The independent restraint must be, according to *Weber*, substantial interference with the victim's liberty beyond the interference that is normally incident to the underlying crime. A separate kidnaping conviction cannot be sustained unless there is such independent restraint.

4. The State urges the Court to submit the kidnaping charge to the jury. It notes that the kidnaping charge alleges that the defendant unlawfully restrained the alleged victim with the intent to violate or abuse the victim sexually or to terrorize the victim. In other words, the unlawful purpose of the kidnaping was not the same as the underlying offenses, rape and attempted rape. It points to the restraints and rope as evidence of restraint. It argues that it is conceivable that the jury may acquit the defendant of the rape charges and yet find the defendant guilty of the kidnaping charge.

¹ Del. Supr., 547 A.2d 948 (1988).

State v. Anthony Zuppo

ID. Nos. 0101004412, 0101004566,
0101006615, 0103013369, 0104000965,
0104006906 and 0107022384
February 4, 2002

5. *Weber*, however, requires the Court to determine at the close of the evidence, before the charges are submitted to the jury, whether, as a matter of law, there is evidence that the restraint involved is “‘much more’ (substantial) interference with the victims liberty than is ordinarily incident to the underlying crime.”² If there is not, the kidnaping charge should not be submitted to the jury. This analysis applies regardless of whether the underlying crime is also the unlawful purpose of the kidnaping charge or not. In *Weber* the underlying crime was an assault, but the unlawful purpose of the kidnaping charge was, like here, terrorization of the victim. The interplay between the underlying crime and the unlawful purpose of the kidnaping charge is discussed at length in the section of the *Weber* case dealing with the State’s motion for reargument in that case. *Weber* does not contemplate that the Court will submit both the kidnaping charge and the underlying charge to the jury, see whether they convict of one or both, and, if both, determine whether they merge. The Supreme Court has recently reaffirmed the principles of *Weber* and the necessity that the trial court perform the required analysis before the charges are submitted to the jury in the case of *Gronenthal v. State*³, which coincidentally involved an underlying rape where the victim was bound.

6. In this case, I conclude that the evidence of restraint does not support a separate conviction of kidnaping. Judgment of acquittal on the kidnaping charge at

² *Id.* at 959.

³ Del. Supr., 779 A.2d 876 (2001).

State v. Anthony Zuppo

ID. Nos. 0101004412, 0101004566,
0101006615, 0103013369, 0104000965,
0104006906 and 0107022384

February 4, 2002

Count IV of the indictment is, therefore, **granted**. Since the kidnaping charge was also the underlying felony which elevated the attempted rape and rape charges to first degree, they are now reduced to Attempted Rape in the Second Degree and Rape in the Second Degree, respectively.

IT IS SO ORDERED.

Resident Judge

oc: Prothonotary - NCC
cc: Paul R. Wallace, Esq.
James A. Bayard, Esq.
File