IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,	)	
	)	
Plaintiff-Respondent,	)	Trial Court No. 040130443
Respondent on Review,	)	
v.	)	Appellate Court No. A128080
	)	
LUIS ARMANDO MEJIA,	)	Supreme Court No. S056560
	)	
Defendant-Appellant,	)	
Petitioner on Review.	)	

PETITIONER'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
On Appeal from a Judgment
Of the Circuit Court for Multnomah County
Honorable EDWARD J. JONES, Judge

Affirmed: March 19, 2008
Before Landau, Presiding Judge
Ortega, Judge, and Carson, Senior Judge

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TABLE OF CONTENTS

STATEMENT OF THE CASE 1

NATURE OF THE PROCEEDING 1

QUESTION PRESENTED 1

Does a person commit kidnapping by asportation in conjunction with burglary, assault and menacing when he: (1) moves his former lover from the threshold of her doorway into and within her residence; (2) threatens to kill her if she persists in breaking up their family; and (3) prevents her from screaming, using her cell phone and escaping over an hour and a half period until she agrees to resume the relationship with him?

PROPOSED RULE OF LAW 2

SUMMARY OF ARGUMENT 2

SUMMARY OF FACTS 4

ARGUMENT 8

Standard of Review 8

DISCUSSION 8

I. Introduction 8

II. Text and Context Kidnapping Statute: "With Intent to Interfere Substantially With Another's Personal Liberty" 10

a. The court has interpreted the substantial interference element to require (in a kidnapping by asportation) evidence of a defendant's intent to move the victim a substantial distance 12

b. Defendant's movement of the victim and his other acts of interference with her liberty occurred in conjunction with the commission of other offenses and are insufficient evidence that defendant acted with the separate and concurrent intent to interfere substantially with the victim's personal liberty 17

III. Legislative History 19

a. The legislature articulated a clear intent to narrowly define the crime of kidnapping and to exclude from its scope conduct that is punishable under some other criminal provision; e.g. extortion, robbery, rape, homicide, assault 19

b. The Commission struggled to effectuate its clearly stated intent and considered multiple approaches before adopting the substantial interference element, which is comparable to the Model Penal Code's requirement that a person move a victim a "substantial distance" 24

IV. Maxims of Construction 31

V. Conclusion 33

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Carlson v. Myers,
327 Or 213, 959 P2d 31 (1998) 32

People v. Chessman,
38 Cal 2d 166, 238 P2d 1001 (1951) 21, 22, 24

People v. Daniels,
71 Cal 2d 1119, 459 P2d 225, 238 (1969) 21

PGE v. Bureau of Labor and Industries,
317 Or 606, 859 P2d 1143 (1993) 8, 10, 19, 31, 32

Salem Police Employees Union v. City of Salem,
308 Or 383, 781 P2d 335 (1989) 32

State v. Clevenger,
297 Or 234, 683 P2d 1360 (1984) 12

State v. Elliott,
204 Or 460, 277 P2d 754, *cert den*, 349 US 929 (1975) 12

State v. Garcia,
288 Or 413, 605 P2d 671 (1980) 12, 13, 14, 16, 20, 30

State v. Glaspey,
337 Or 558, 100 P3d 730 (2004) 10

State v. Gulley,
324 Or 57, 921 P2d 396 (1996) 32

State v. Harris,
288 Or 703, 609 P2d 798 (1980) 8

State v. Murray,
340 Or 599, 16 P3d 10 (2006) 12, 15

State v. Wolleat,
338 Or 469, 111 P3d 1131 (2005) 4, 9, 14, 18, 27

State v. Zweigart,
344 Or 619, 188 P3d 242 (2008) 4, 16

STATUTES

Former ORS 163.610 (1967) 21

ORS 163.215 30

ORS 163.225 ..... 11, 12

OTHER AUTHORITIES

Commentary to Commission Proposed Oregon Criminal Code,
Final Draft and Report §98 (July 1970) 29

Commentary to Criminal Law Revision Commission,
Tentative Draft No 1 §12 (Aug 1969) 22

Commentary to Criminal Law Revision Commission,
Preliminary Draft No 4 §12 (April 1969) 30

Commentary to Criminal Law Revision Commission,
Preliminary Draft No 3 §12 (Feb 1969) 22, 25, 29

Commentary to Criminal Law Revision Commission,
Preliminary Draft No 2 §12 (Dec 1968) 25

Commentary to Criminal Law Revision Commission,
Preliminary Draft No 1 §12 (Oct 1968) 20, 21, 25, 27

Minutes, Criminal Law Revision Commission,
June 17, 1969 ..... 15, 20, 29, 30

Minutes, Criminal Law Revision Commission,
subcommittee No 2, Dec 12, 1968 ..... 28, 29

Minutes, Criminal Law Revision Commission,
subcommittee No 2, Oct 25, 1968 ..... 15, 28

Model Penal Code 24, 26, 27, 29, 30

DEFENDANT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Nature of the Proceeding

This is a criminal case in which defendant was charged in a ten-count indictment with kidnapping in the first degree (counts 1 and 2), burglary in the first degree (count 3), unlawful use of a firearm (count 4), menacing (count 5) and assault in the fourth degree (counts 6-10). Before the court submitted the case to the jury, defendant moved for a judgment of acquittal on the kidnapping charge, arguing that the state failed to prove that he intended to interfere substantially with the victim's personal liberty. The court denied the motion, and the jury found defendant guilty of kidnapping in the second degree, a lesser included offense of both counts 1 and 2, burglary in the first degree, menacing and three counts of assault in the fourth degree. Defendant was acquitted of counts 4 (unlawful use of weapon) and counts 9 and 10 (assault in the fourth degree). Defendant appealed, challenging the sufficiency of the evidence to support the kidnapping conviction. The Court of Appeals affirmed without opinion. Defendant petitioned for review, and this court allowed review. *State v. Mejia*, 223 Or App 259, 195 P3d 924, *rev allowed*, ___ Or___ (2008).

Question Presented

Does a person commit kidnapping by asportation in conjunction with burglary, assault and menacing when he: (1) moves his former lover from the threshold of her doorway into and within her residence; (2) threatens to kill her if she persists in breaking up their family; and (3) prevents her from screaming, using her cell phone

and escaping over an hour and a half period until she agrees to resume the relationship with him?

Proposed Rule of Law

To commit a kidnapping by asportation in conjunction with another crime, a person must remove the victim from the place where she is found and prevent the victim's liberation for a period of time that is notably discrete from the commission of the other crime. In order to prove defendant acted with the separate and concurrent intent to interfere substantially with the victim's liberty, the state must prove more than the temporary confinement or movement that can naturally occur in conjunction with the commission of other crimes. When the movement or detention of a victim occurs during the commission of another offense, a separate conviction for kidnapping is appropriate only if the victim is removed from the place where she is found and the movement is notably discrete from the movement that can occur with the underlying crime, that is, the movement has clear significance independent from the other crime or crimes.

Summary of Argument

The legislature intended the kidnapping statutes to apply when one person abducts another with the intent to prevent his liberation. It did not intend the scope of the kidnapping statutes to include movements that are either incidental to

or an integral part of some other crime. Recognizing that kidnapping prosecutions could improperly result from incidental movements accompanying other crimes, the legislature tried to circumscribe the kidnapping statute through the mental state element. The legislature defined the crime of kidnapping as requiring the (1) movement of the victim[1] (2) with the intent to "interfere substantially" with the victim's "personal liberty."

The court has previously interpreted the mental state element, intent to interfere substantially with the victim's liberty, as requiring evidence of defendant's intent to move the victim a "substantial distance" when the state alleges asportation. Both the legislative history and the case law clearly demonstrate that movement within a residence during the commission of other offenses is not substantial movement, but is "merely incidental" to the commission of other offenses. A defendant who pushes a victim back into her house during a burglary, moves her within her residence during multiple acts of domestic assault, takes her phone and threatens her in an attempt to coerce her into resuming a romantic relationship has not committed kidnapping by asportation. The movement and the other acts of interference are incidental to the actor's overall goal of coercing the victim into resuming the relationship. For those reasons, this court should hold that, to commit a

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[1] Kidnapping also can be proved by evidence that the defendant secretly confined the victim in a place where the victim is not likely to be found. The state did not charge defendant with the confinement theory of kidnapping.

kidnapping in conjunction with another crime, a defendant must remove the victim from the place where she is found and prevent the victim's liberation for a period of time that is notably discrete from the commission of the other crime.

The movement of the victim from the threshold of her doorway back into her house and into other rooms brings this case within the precedents of *State v. Wolleat,* 338 Or 469, 111 P3d 1131 (2005) and *State v. Zweigart*, 344 Or 619, 188 P3d 242 (2008). Defendant's movement of the victim into and within her home was an insignificant change in location—comparable to moving a victim of a robbery from the front of his store to the back of his store to open a safe, moving the victim from one room to another during a domestic altercation, and moving the victim from upstairs to downstairs during a burglary. Defendant's acts of overcoming the victim's resistance by taking her cell phone, preventing her from screaming, and preventing her from escaping were concomitant with defendant's acts of burglary, assault, and menacing and do not evidence a separate intent to interfere substantially with the victim's liberty through asportation. For those reasons, the evidence in this case is insufficient to support defendant's kidnapping by asportation conviction.

Summary of Facts

The victim and defendant met in Las Vegas, Nevada in 1999, fell in love, moved in together and had a child together. (Tr. 168-70). The victim left defendant

and returned to Oregon in 2000. In 2003, the victim obtained a restraining order against defendant. (Tr. 174).

On the evening of November 20, 2003, the victim put her daughter to bed at her brother's house. Sometime between 9:00 and 9:30 p.m., the victim drove five blocks back to her apartment to bathe and change. (Tr. 176). The victim had plans to go to a movie with friends, and it took her approximately 20 minutes to get ready. (Tr. 178, 183-84).

As she opened her front door to step outside, defendant grabbed her (giving her a "bear hug") and forced his way into her apartment. (Tr. 184). The victim believed one of her feet was "a hair outside" the doorway when defendant grabbed her. (Tr. 237). Her body, however, was still in the doorway. (Tr. 237).

The victim was surprised. She asked defendant what he was doing there and told him to "get out of here." (Tr. 185). While forcefully grabbing her, defendant told her that he just "want[ed] to talk with her." (Tr. 185). The victim struggled against defendant, and defendant's anger level increased. (Tr. 185). The victim did not want to talk with defendant. (Tr. 186). The struggle continued down the hallway of the apartment. (Tr. 186). At some point, the victim tried to use her cell phone to call for help, but defendant took it from her and put it in his pocket. (Tr. 204).

The struggle became more physical near the bathroom. (Tr. 186). The victim believed that defendant was trying to "seclude her," and she became "a lot more

nervous." (Tr. 186). The victim began to scream. (Tr. 186). Defendant "very forcefully" put his hand over the victim's mouth, "smashing her face." (Tr. 186, 194, 237, 260).[2] The victim kicked and bit defendant. (Tr. 187).

Defendant forced the victim into the bedroom and pushed her back up to a dresser. (Tr. 187). While holding the victim, defendant asked her why she was breaking up their family and told her that he still wanted to be with her. (Tr. 187). Defendant told her that if he couldn't have her "nobody will." (Tr. 187).[3]

The victim tried to talk with defendant, reminding him of their daughter. (Tr. 190). Defendant relaxed his hold on the victim. (Tr. 191). The victim tried to escape through a window over her bed, but defendant grabbed the victim by her legs, preventing her escape. (Tr. 192). The victim struggled and kicked a hole in the wall. (Tr. 192).

Defendant took the comforter from the bed and covered the victim's face, smothering her. (Tr. 192). The victim had difficulty breathing. (Tr. 192). Defendant

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[2] Defendant was charged with five counts of assault—four counts related to four incidents during which the defendant choked the victim. One count related to an incident in which the defendant "smashed" the victim's face. The victim testified that defendant smashed her face when he used his open hand to quiet her screams in the hallway and when defendant pushed the comforter down on her face in the bedroom. It is not clear which of these smashing incidents was the basis for the assault charge.

[3] The victim testified that defendant pulled out a gun and threatened to kill her and kill himself. (Tr. 188). However, the jury acquitted defendant of all charges relating to the firearm, including count four, unlawful use of a firearm and the firearm enhancement factor on counts one and two (kidnapping in the first degree) and count three (burglary in the first degree).

and the victim rolled off the bed and onto the floor. Defendant straddled the victim and held her down. (Tr. 193). Defendant said he was going to kill her and began to choke her. (Tr. 193). The victim started to lose consciousness and felt dizzy. (Tr. 195). Defendant released his grip for a minute. (Tr. 195, 197). The victim struggled again. Defendant choked the victim a second time, releasing his grip before the victim lost consciousness. (Tr. 197). The victim testified that defendant choked her two additional times near to the point of passing out.[4] The victim believed that these choking incidents occurred over a 15-minute time period. (Tr. 199).

The victim grew tired of fighting. (Tr. 197). She told defendant that she agreed that their daughter needed a family. (Tr. 202). Defendant and the victim talked. (Tr. 202). The victim convinced defendant that she would not call the police. (Tr. 202-03). Defendant said if she called the police he would shoot her. (Tr. 102). The victim agreed to meet defendant the next morning. (Tr. 202-03). Defendant helped the victim with her coat, wiped blood from her face with a piece of toilet paper, and walked her to her car. (Tr. 203). Defendant returned the victim's cell phone and jogged off. (Tr. 203). The victim drove to her brother's house and called police. (Tr. 203-05).

The victim estimated that the entire episode with defendant lasted "an hour and a half, at least." (Tr. 205). Police were dispatched to the victim's brother's house at

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[4] The jury acquitted defendant of two counts of assault.

11:22 p.m. (Tr. 80). A police officer subsequently measured the distances from the victim's door to the back of her apartment. The distance from the front door to the bedroom was 12 feet 5 inches, and the distance from that point to the back of her bedroom was 17 feet 2 inches. (Tr. 344-45).

ARGUMENT

Standard of Review

The question of statutory interpretation is a legal question. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993).

The denial of a motion for judgment of acquittal is reviewed for an error of law. *State v. Harris*, 288 Or 703, 723, 609 P2d 798 (1980).

Discussion

I. Introduction

While burglarizing the victim's home to assault and coerce her into resuming a romantic relationship, defendant pushed the victim from her front doorway back inside her home. The victim grabbed her cell phone, but defendant took it and put it in his pocket. Defendant ignored the victim's requests to leave and forced the victim down a hallway. Defendant prevented the victim from screaming by "smashing" her face with an open hand. Defendant forced the victim into her bedroom. Defendant told the victim he would kill her if he couldn't have her. The victim tried to escape

through an open window, but defendant prevented her by grabbing her legs. Defendant told the victim that he was going to kill her, and he choked her several times. When the victim agreed to reconcile with defendant, the violence ended, and defendant left. Defendant was convicted of burglary, assault, menacing and kidnapping for his conduct. Defendant does not challenge his burglary, assault or menacing convictions on appeal. Defendant challenges only his kidnapping conviction.

The overriding question in this case is whether the legislature intended the crime of kidnapping to apply when the movement and interference with the victim's liberty occurs in conjunction with the commission of other substantive criminal offenses. Defendant maintains that this case is indistinguishable from *Wolleat.* As in *Wolleat*, the movement of the victim and the interference with her liberty were incidental to the commission of other offenses and do not evidence a separate and concurrent intent to interfere substantially with the victim's liberty within the meaning of the kidnapping statute. The legislature intended to limit the scope of kidnapping to those interferences with a victim's liberty that are substantial and independent of other offenses. The legislative history discloses concern about the misapplication of the crime of kidnapping to movements and detentions that occur as a natural and subsidiary incident to the commission of other felonies like extortion, homicide, assault, rape or robbery. Consequently, the controlling rule of law is that

the movement and interference with a victim that occurs in conjunction with the commission of other crimes is insufficient to support a separate conviction for kidnapping by asportation unless the victim is removed from the place where she is found and the movement is notably discrete from the underlying crimes, that is, the movement of the victim has clear significance independent from the other crimes.

II. Text and Context Kidnapping Statute: "With Intent to Interfere Substantially With Another's Personal Liberty"

The scope of the kidnapping statutes presents a question of statutory construction. *State v. Glaspey*, 337 Or 558, 562, 100 P3d 730 (2004). The court utilizes the methodology set out in *PGE v. Bureau of Labor and Industries* to ascertain legislative intent. 317 Or 606. Under that methodology, the court first analyzes the text of the statute in context. *Id.* at 610-11. If the meaning of the statute is clear at that first level of analysis, then no further analysis is needed. *Id.* at 611. If the meaning of the statute remains unclear, the court examines the legislative history. If necessary, the court will resort to maxims of statutory construction if the first two levels of analysis do not establish legislative intent. *Id.*

ORS 163.225(1) sets out the crime of kidnapping in the second degree. That statute provides:

> "A person commits the crime of kidnapping in the second degree if, with intent to interfere substantially with another's personal liberty, and without consent or legal authority, the person:
>
> "(a) Takes the person from one place to another; or

> "(b) Secretly confines the person in a place where the person is not likely to be found."

The crime of kidnapping has two core elements—a physical act and a mental state. The physical act of kidnapping may be committed by either "tak[ing] a person from one place to another" or "secretly confin[ing] the person in a place where the person is not likely to be found." Kidnapping also requires a mental state, namely, "with intent to interfere substantially with another's personal liberty."

In the present case, the indictment charged defendant under the asportation theory of kidnapping. The indictment alleged that defendant did "take [the victim] from one place to another." ER. 1. Defendant did not challenge the physical act of asportation in the Court of Appeals. Accordingly, that element will not be addressed in significant detail. However, in an effort to facilitate the court's analysis of the kidnapping statute, defendant observes that the evidence in his case is insufficient to establish the physical act of asportation, specifically, that he moved the victim from one place to another when he moved her from the threshold of her doorway into and within her home. *See State v. Murray*, 340 Or 599, 606, 16 P3d 10 (2006) (movement of the victim from the driver seat to the passenger seat of her car was insufficient evidence of the physical act of asportation). Had the state charged this case as a kidnapping by confinement, the sufficiency of evidence with respect to the physical act element would present a closer question.

The issue in the present case is limited to whether defendant's conduct evidenced an "intent to interfere substantially with another's personal liberty." ORS 163.225. This phrase and its terms are not statutorily defined. However, the court has interpreted this statutory language, and the interpretation is now "'a part of the statute as if written into it at the time of its enactment.'" *State v. Clevenger*, 297 Or 234, 244, 683 P2d 1360 (1984), *quoting State v. Elliott*, 204 Or 460, 465, 277 P2d 754, *cert den*, 349 US 929 (1975).

a. The court has interpreted the substantial interference element to require (in a kidnapping by asportation) evidence of a defendant's intent to move the victim a substantial distance

In *State v. Garcia*, 288 Or 413, 605 P2d 671 (1980), the court interpreted the kidnapping statutes and the mental state element, in particular, and concluded that the legislature intended to preclude kidnapping convictions based on incidental interferences with another's liberty. The court noted that the legislature was particularly concerned with circumscribing the kidnapping statute to exclude from liability conduct that should be punished as some other crime. *Id.* at 417.

Ultimately, after reviewing three subsequent drafts and the tentative and final daft commentaries, the court concluded that the legislature specifically crafted the mental state element with the purpose of precluding kidnapping convictions when the detention or movement were merely incidental to the accomplishment of another crime. *Id.* at 421. The court in *Garcia* explained:

> "The Commission reasoned that even though the malefactor's conduct offended the statutory injunctions against rape or robbery, he would be guilty of kidnapping also if in committing rape or robbery he took the victim a 'substantial distance' or held the victim 'a substantial period of time.' * * *."

Id. at 420-21. Thus, the court concluded that a person is guilty of kidnapping only if the person moves the victim with the intent to interfere substantially with the victim's personal liberty:

> "In summary, the legislature said there may be a separate conviction and sentence for kidnapping *only when it is not incidental to another crime*, and it may be found not to be incidental if the defendant had the intent to interfere substantially with the victim's personal liberty."

Id. at 423 (emphasis added).

The defendant in *Garcia* had failed to move for a judgment of acquittal on the kidnapping charge. *Id.* at 422. As a consequence, the court did not apply the principles to the facts at issue. The evidence in *Garcia* showed that the defendant held a knife to the victim's throat, forced her to cross a street, walk two blocks, cross another street and then go behind a house were the defendant raped and sodomized her. *Id.* at 415.

In *Wolleat*, 338 Or 469, the court again focused on the mental state element of the kidnapping offense and confronted the question of how to determine whether the movement of a victim was merely incidental to the commission of other crimes. The court framed the issue on review as: "When will the movement of a person from one place to another during the commission of another crime * * * be sufficient to

establish the crime of kidnapping?" *Id.* at 472. Citing to *State v. Garcia*, 288 Or 413, the *Wolleat* court reiterated that the kidnapping statutes proscribe "substantial interference" with another's personal liberty, and that "in order for the interference to be substantial, a defendant must intend * * * to move the victim a 'substantial distance' * * *." *Id.* at 475.

The court also looked to the legislative history for guidance on "whether there is some minimal distance that a defendant must intend to move the victim" before a reasonable juror could infer that defendant intended to interfere substantially with the victim's personal liberty. *Id.* at 476. The court noted that the research counsel told a subcommittee of the Criminal Law Revision Commission ("Commission") that the phase "substantial distance" in the first preliminary draft of the kidnapping statutes "'was intended to differentiate between a situation where a person was removed from the place where he was found by the kidnaper [sic: kidnapper][5] to a place not within the immediate vicinity as opposed to a mere displacement incidental to another offense, such as removing a person to another room." *Id.* at 476 (quoting Minutes, Criminal Law Revision Commission, subcommittee No 2, Oct 25, 1968, 3).

The court further observed that when the Commission considered the fourth preliminary draft of the kidnapping statutes, the director of the Commission, Donald Pailette, explained that the element "intent to interfere substantially with another's

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[5] For readability, defendant has silently corrected the Commission's spelling of "kidnaper" to "kidnapper" and "kidnaping" to "kidnapping" throughout the brief.

personal liberty" could not be omitted from the statute because that phrase was meant to distinguish kidnapping from incidental conduct that might accompany some other crime. 338 Or at 477 (citing to Minutes, Criminal Law Revision Commission, June 17, 1969, 20).

The court concluded that the legislative history made clear that simply "[m]oving the victim from one room to another while committing another crime does not constitute moving the victim a substantial distance." *Id.* at 478. Such movement, the court noted, "is not sufficient, by itself, to give rise to an intent to interfere substantially with the victim's liberty to move freely." *Id.* at 478. Applying those principles to the facts at issue, the court determined that the defendant's movement of the victim 15 to 20 feet within the residence during an assault was insufficient as a matter of law to establish defendant's intent to interfere substantially with the victim's liberty. *Id.* at 478.

In *Murray*, the court focused on the act element of the offense and considered what movement was necessary to establish asportation from one place to another. 340 Or 599. After analyzing the plain language of the statue and reviewing the legislative history, the court concluded that a defendant must move a victim a substantial distance in order for a rational finder of fact to conclude that the defendant had "taken" the victim from one place to another. *Id.* at 606. The court further observed that the movement "from one place to another" was "situational and contextual" and

dependent on the function of the object moved and the area in which the movement occurred. *Id.*

Applying those principles, the court determined that the defendant, who had pushed a struggling and resistant victim from the driver's seat of her car to the passenger seat "did not 'take' [the victim] anywhere or, even if he did, the distance that [the victim] was moved was not 'substantial.'" *Id.* The court further explained:

> "That means that, even if one were to find some sort of asportation in the events in question, it was only 'incidental'—as that word was used in *Garcia*—to defendant's theft of the car and, therefore, not the kind of conduct that the legislature intended to permit to serve as the basis for a separate kidnapping charge."

Id.

Most recently in *Zweigart*, 344 Or 619, the court again confronted the question of what movement of the victim during the commission of another crime is sufficient to establish intent to interfere substantially with another person's liberty. In *Zweigart,* defendant moved the victim at gunpoint, during the course of a burglary and robbery, down the stairs from her bedroom to the safe on the ground floor. *Id.* at 623. Defendant directed the victim to lie down and then he shot her. *Id.* The court concluded that the movement of the victim was incidental to the robbery and the shooting and, therefore, was insufficient to establish defendant's intent to interfere substantially with the victim's liberty independent from the other offenses. *Id.* at 636-37.

The court's previous decisions establish that in kidnapping by asportation the "intent to interfere substantially with another's personal liberty" is manifested in substantial movement. That is, the defendant must intend to move the victim a "substantial distance." Movement that occurs in conjunction with the commission of another substantive criminal offense is not substantial movement, but is movement that is merely incidental to another offense. In summary, substantial interference (in a kidnapping by asportation) requires substantial movement.

b. Defendant's movement of the victim and his other acts of interference with her liberty occurred in conjunction with the commission of other offenses and are insufficient evidence that defendant acted with the separate and concurrent intent to interfere substantially with the victim's personal liberty

In the present case, defendant's movements of the victim occurred during the commission of other felonies. Defendant went to the victim's house to convince her to stay with him. Defendant's act of moving the victim from her doorway back into her home was essential to the offense of burglary (the indictment alleged that defendant entered and remained with the intent to assault the victim). While defendant prevented the victim from leaving her home, defendant's movement of the victim into and within her home is comparable to the movement of a victim of a robbery from the front of his store to the back of his store to open a safe. Defendant did not remove the victim from the security of familiar surroundings to surroundings within his control. In addition, the movement that occurred within the house was not

substantial, but attendant to the commission of defendant's other crimes. Defendant moved the victim approximately 29 feet into and within the residence during the course of a struggle. Under the rationale of *Wolleat*, that movement is incidental, as a matter of law.

Defendant's additional acts of interference also do not demonstrate his intent to interfere substantially with the victim's liberty. Defendant covered the victim's mouth when she tried to scream, grabbed the victim's leg when she tried to escape, and took the victim's cell phone when she tried to make a call. In each situation (when defendant covered the victim's mouth, took her cell phone, and prevented her escape) defendant had merely reacted and responded to acts by the victim. Those responses were unsophisticated and unplanned. A kidnapping does not occur during the commission of another crime simply because a defendant struggles with a resistant victim. Defendant's unwillingness to be deterred simply demonstrates his firm intent to coerce the victim into reconciling with him by menacing and assaulting her. It does not demonstrate an intent to interfere substantially with the victim's liberty separate and apart from the other offenses and his ultimate objective of coercing the victim to reconcile with him.

Similarly, the length of detention fails to establish that defendant acted with the intent to interfere substantially with the victim's liberty. The length of the victim's detention was essentially concurrent with the commission of the underlying felonies

and defendant's attempt to coerce the victim to reunite with him. That is, the length of detention is demonstrative of defendant's ongoing intent to coerce the victim, cause physical injury to the victim, and frighten the victim. The length of the detention does not demonstrate that defendant acted with the separate intent to interfere substantially with the victim's liberty.[6]

In short, the movement and the restraint in the present case were concomitant with the commission of the other crimes and were the sort that would naturally accompany the other crimes. Put another way, the movement and restraint had no significance independent of the other crimes. For those reasons, defendant's acts of moving and restraining the victim were insufficient to establish a separate intent to interfere substantially with the victim's liberty. Because the text and context of the kidnapping statutes provide a clear an unambiguous resolution, no further analysis is required. *PGE*, 17 Or 611. However, should the court determine that the text and context of the kidnapping statutes do not provide a clear answer; the legislative history resolves any lingering doubts about the statute.

III. Legislative History

a. <u>The legislature articulated a clear intent to narrowly define the crime of kidnapping and to exclude from its scope conduct that is punishable under some other criminal provision; e.g. extortion, robbery, rape, homicide, assault</u>

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[6] As noted above, the state did not charge defendant with kidnapping by confinement.

The legislative history of the statute supports the interpretation that kidnapping by asportation does not occur during the commission of another felony, unless a defendant removes the victim from the place where she is found and prevents the victim's liberation for a period of time that is notably discrete from the commission of the other crime. It is apparent from the legislative history that a principal concern in crafting the kidnapping statute was to circumscribe and delineate the kidnapping offense from conduct that was separately punishable under some other criminal provision. Minutes, Criminal Law Revision Commission, June 17, 1969, 9, 20.

The commentary to the first preliminary draft observed that:

> "Current kidnapping statutes apply to abductions which are incidental to or an integral part of the commission of an independent crime such as robbery or rape where the victim is removed and confined for a given period to effectuate the criminal purpose. Where the detention period *is brief* there is no genuine kidnapping ."[7]

Commentary to Criminal Law Revision Commission Preliminary Draft No 1 §12, 8 (Oct 1968) (emphasis added).

Prior to the enactment of the 1971 Oregon Criminal Code, the crime of kidnapping was delineated in *former* ORS 163.610 (1967). That statute provided that:

> "Every person who without lawful authority forcibly seizes and confines, inveigles or kidnaps another, with intent to cause such other person to be secretly confined or imprisoned in this state against his or her will, or to cause such other person to be sent out of the state against his or her will shall be punished * * * ."

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[7] The court quoted this piece of legislative history in *Garcia*. 288 Or at 417.

Although there are very few kidnapping cases under *former* ORS 163.610 (1967) (and none seeming to involve the sufficiency of evidence), the legislative history demonstrates the legislature's concern that ORS 163.610 allowed for kidnapping convictions for conduct that was punishable under some other criminal provision: e.g. extortion, homicide, assault, rape, and robbery.

The commentaries to the first and third preliminary drafts and the commentary to the first tentative draft cite the California Supreme Court's decision of *People v. Chessman*, 38 Cal 2d 166, 238 P2d 1001 (1951),[8] as illustrative of the misapplication of the crime of kidnapping (to secure greater punishment) to movements and detentions that were incidental to the commission of other offenses. Commentary to Criminal Law Revision Preliminary Draft No 1 §12, 9 (Oct 1968). Commentary to Preliminary Draft No 3 §12, 6 (Feb 1969). Commentary to Criminal Law Revision Commission Tentative Draft No 1 §12, 6, 9 (Aug 1969).

In *Chessman*, the defendant was convicted of 17 felonies including two counts of kidnapping for the purpose of robbery (involving the victims, and 38 Cal 2d at 172, 238 P2d at 1005. On Jan 19, 1948, the defendant stopped his car

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[8] In *People v. Daniels*, 71 Cal 2d 1119, 1139, 459 P2d 225, 238 (1969), the California Supreme Court abandoned the rule of construction in *Chessman*, that "'[i]t is the fact, not the distance, of forcible removal which constitutes kidnapping in this state.'" The *Daniels* court further reasoned that the California legislature intended to exclude from the scope of the kidnapping statute "not only 'stand still' robberies * * * but also those in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself." *Id.*

near a parked car occupied by and *Id.* at 185, 238 P2d at 1013. He displayed a .45 automatic pistol and threatened to kill and if they did not obey him. Defendant took wallet and the keys to her car. He then walked 22 feet to his car, made her enter the car, and forced her to commit sexual acts. *Id.* at 186, 238 P2d at 1013. After taking $5.00 from purse and returning car keys, defendant permitted to get out of his car, and he drove away. *Id.*

On January 21, 1948, the defendant approached a parked car occupied by and *Id.* at 186, 238 P2d at 1013. He pushed a .45 automatic pistol through the door and said, "This is a stick-up." The defendant then forced to enter his car, which he drove to an isolated place where he compelled her to commit sexual acts. *Id.*

At the time the defendant committed his crimes, section 209, the crime of kidnapping for the purpose of robbery provided that:

> "Every person who * * * *holds or detains* * * **(another person) to commit* * * *robbery* * * * shall suffer death or shall be punished by imprisonment in the state prison for life without the possibility of parole * * * in cases in which the person * * * subjected to such kidnapping suffers * * * bodily harm * * *."

Id. at 191, 238 P2d at 1016 (emphasis added). Before defendant's judgment of conviction became final, the detention of a victim during the commission of an armed

robbery was excluded from section 209 liability by a 1951 legislative amendment. As amended, section 209 provided that:

> "Any person * * * *who kidnaps or carries away any individual to commit robbery* * * * shall suffer death or shall be punished by imprisonment * * * for life without the possibility of parole * * * in cases in which the person * * * subjected to such kidnapping suffers * * * bodily harm * * *."

Id. (emphasis added).

Defendant argued that his offenses were simple robberies and not kidnappings for the purposes of robbery as described under amended section 209. *Id.* The California Supreme Court disagreed, reasoning that although the amendment applied to defendant, his offenses were not simple armed robberies but were, in fact, kidnappings for the purpose of robbery. The court explained:

> "But the offenses for which defendant received the death penalty here were not mere armed robberies. Defendant by threat of force transported his female victim for a considerable distance in defendant's car, from the car of to the car of defendant pursuant to a plan which purposed the commission of robberies and the infliction of bodily harm (the sex crimes). The fact that in being kidnapped or carried away was forced to move only 22 feet does not make her abduction any the less a kidnapping within the meaning of the statute. She was taken from the car of her chosen escort, and from his company, to the car of defendant and into the latter's company and there detained as a virtual prisoner and forced to submit to his demands. It is the fact, not the distance, of forcible removal which constitutes kidnapping in this state."

Id.

The Commission's repudiation of the California Supreme Court's decision in *Chessman* makes clear that the legislature intended to narrowly define the crime of kidnapping and exclude from its scope behavior whose chief significance is assault, rape, robbery or some other substantive offense. Further, the Commission's rejection of *Chessman* suggests that although the legislature was unwilling to set arbitrary time or distance limits to concretely describe the crime of kidnapping, it intended the offense of kidnapping to apply only when the movement or detention of the victim was discrete from the commission of other crimes. In short, the Commission articulated a clear intent to disallow prosecutions for kidnapping based on conduct that was principally a robbery, rape, or some other substantive offense.

b. The Commission struggled to effectuate its clearly stated intent and considered multiple approaches before adopting the substantial interference element, which is comparable to the Model Penal Code's requirement that a person move a victim a "substantial distance"

In the first three drafts, the Commission tried to distinguish the offense of kidnapping in the second degree from the crime of unlawful imprisonment through the act element by defining the terms "abduct" and "restrain." Criminal Law Revision Commission Preliminary Draft No 1 §12, 1, 5 (Oct 1968). Criminal Law Revision Commission Preliminary Draft No 2 §12, 2, 4-5 (Dec 1968). Criminal Law Revision Commission Preliminary Draft No 3 §12, 1, 5 (Feb 1969). In the first preliminary draft, the Commission defined the terms "restrain" and "abduct" as follows:

> "Section 1. Kidnapping and related offenses; definitions. As used in _____, except as the context may require otherwise:
>
> "(1) 'Restrain' means to intentionally restrict a person's movements in such manner as to interfere substantially with his liberty by moving him from one place to another or by confining him either in the place where the restriction commences or in a place to which he has been moved, without his consent and with knowledge the restriction is unlawful. * * *.
>
> "(2) 'Abduct' means to restrain a person with intent to prevent his liberation 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 physical force."

Criminal Law Revision Commission Preliminary Draft No 1 §12, 1 (Oct 1968). Using these concepts, kidnapping in the second degree occurred when a person abducted another person. *Id.* at 5. An act of abduction required a successful act of restraint and intent to prevent the victim's liberation by confining the victim in a place where he was not likely to be found or by restraining the victim with threats of deadly physical force. The definition of abduction was not significantly changed in the second or third preliminary drafts. Thus, in the first three preliminary drafts, kidnapping in the second degree was based solely on acts of restraint or confinement. There was no reference to kidnapping by asportation, and there was no temporal proscription on the offense—i.e. some minimal period of time in which a victim was required to be held.

Conversely, the first preliminary draft of the kidnapping in the first degree statute provided for kidnappings by asportation when there was substantial movement and kidnappings by confinement when there was a substantial period of confinement. That draft was taken largely from the Model Penal Code[9] and provided that a "person commits the crime of kidnapping if he unlawfully removes another person from his place of residence or business or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation." Criminal Law Revision Commission Preliminary Draft No 1 §12, 5 (Oct 1968).

In discussing the preliminary draft, the research counsel:

> "called attention to the use of 'substantial' in subsection (1) and said the word involved an important policy decision in light of the number of kidnapping-robbery cases and kidnapping-rape cases where

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[9] Section 212.1 of the Model Penal Code provides:

> "A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:
>
> "* * *.

The Model Penal Code drafters explain the purpose of defining kidnapping in terms of *removing* the victim from his home or work: "This eliminates the absurdity of prosecuting for kidnapping in cases where the victim is forced into his own home to open the safe or to the back of his store in the course of a robbery." Comments to Section 212.1 (Tent Draft No 11, 1960), pp 13-14.

> the defendant was prosecuted both for the offense of robbery or rape and also for the offense of kidnapping. Subsection (1) was designed to prevent the prosecution of a defendant for kidnapping, * * *, when the crime actually amounted to a rape or robbery. The Model Penal Code had accomplished this objective by employing 'substantial' to differentiate between a detention that would be of such duration that it would become a kidnapping as opposed to detention for a shorter period incidental to the commission of another crime. She gave as an example the detention of a bank employee for 20 minutes while the bank was being robbed and indicated that under the draft section such an act would be robbery and not kidnapping."

Id. at 2-3. The research counsel also explained that the phrase "substantial distance" in the first preliminary draft was "*intended to differentiate between a situation where a person was removed from the place where he was found by the kidnapper to a place not within the immediate vicinity as opposed to a mere displacement incidental to another offense* * * *." *Id.*[10] (emphasis added).

In considering this draft, the subcommittee discussed New York's attempt to deal with the problems with kidnapping prosecutions by setting distance and time limits on an abduction before it constituted the separate crime of kidnapping. Minutes, Criminal Law Revision Commission, subcommittee No 2, Oct 25, 1968, 2-3. The subcommittee rejected the idea of imposing a specific yet arbitrary period of detention or a specific degree of movement onto the kidnapping definition. *Id.* ("The

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[10] This explanation by the research counsel was quoted by the court in *Wolleat.* 338 Or at 476.

committee agreed that 'substantial period' was preferable to setting an arbitrary time limit").

However, after hearing Justice Sloan's[11] concerns about the concept of "substantial distance"[12], the subcommittee removed kidnapping by asportation from the offense of first degree kidnapping. The subcommittee also removed the temporal proscription "substantial period" from kidnapping by confinement in the first degree statute and instead defined first degree kidnapping in the second and third preliminary drafts as an "abduction" that was committed with one of three further unlawful purposes.[13] Minutes, Criminal Law Revision Commission, subcommittee No 2, Dec

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[11] Justice Sloan was the chairman of the Bar Committee on Criminal Law and Procedure; he was not a member of the subcommittee or the Commission.

[12] Justice Sloan believed that "the distance a person was moved was unimportant. The victim could be concealed in place only a few feet from where he was found, he said, and it could be difficult or impossible to find him." Justice Sloan also objected to the language "removes another from his place of residence or business" because he disagreed that "taking a child from his residence or place of business was more serious than abducting him from a school or playground." Minutes, Criminal Law Revision Commission, subcommittee No 2, Oct 25, 1968, 3.

[13] In preliminary draft three, the crime of kidnapping in the first degree was set out as follows:

"A person commits the crime of kidnapping in the first degree if he abducts another person with any of the following unlawful purposes:

"(1) To compel any person to pay or deliver money or property as ransom; or

"(2) To hold the victim as a shield or hostage; or

"(3) To inflict serious physical injury or to terrorize the victim or another person."

Criminal Law Revision Commission Preliminary Draft No 3 §12, 5 (Feb 1969).

12, 1968, 5; Criminal Law Revision Commission Preliminary Draft No 3 §12, 5 (Feb 1969). The legislative history makes clear that the legislature was initially reluctant to define the offense of kidnapping with distance or time requirements. However, ultimately, the legislature determined that it could not adequately distinguish kidnapping from other incidental interferences with a person's liberty simply through the manner in which the restraint or detention was achieved.[14] Minutes, Criminal Law Revision Commission, June 17, 1969, 1-2. Thus, in the fourth preliminary draft, the legislature abandoned the concept of abduction and returned to the Model Penal Code's formulation of kidnapping, which included kidnappings by confinement and asportation, circumscribed through the concepts of "substantial period" and "substantial distance."

In the fourth preliminary draft (which is identical to current ORS 163.215), the Commission defined the offense of kidnapping as an act of asportation (taking a person from one place to another) or an act of confinement (secreting a person in a place where he is not likely to be found). Criminal Law Revision Commission Preliminary Draft No 4 §12, 3 (April 1969). The Commission incorporated the Model Penal Code's concepts of "substantial period" and "substantial distance" through the mental state element, "intent to interfere substantially with another's personal liberty."

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[14] Ultimately, the Commission deleted the crime of unlawful imprisonment from the code, reasoning that there were adequate civil remedies available in this area. Commentary to the Commission Proposed Oregon Criminal Code, Final Draft and Report §§ 98, 99, 128 (July 1970).

Minutes, Criminal Law Revision Commission, June 17, 1969, 20 (Donald Pailette, the director of the Commission, explained that the substantial interference element was meant to distinguish kidnapping from incidental conduct that might accompany some other crime). As such, the substantial interference element imposes on acts of asportation or detention the further act of taking the victim a substantial distance or holding the victim a substantial period of time. *Garcia*, 288 Or at 420-21 (so stating).

The Commission did not expressly state, as did the drafters of the Model Penal Code, that a conviction for kidnapping by asportation required the removal of a victim from his residence or place of business or the movement of a victim a substantial distance. However, the legislative history is silent with respect to any alternative meaning of the word "substantially" in the "intent to interfere substantially" element. Indeed, the court in *Garcia* commented: "We find nothing in the legislative history to indicate the legislature intended by its adverb 'substantially' [in the intent to interfere substantially element] anything other than was intended by the Commission in its use of the adjective 'substantial' in the [phrase substantial distance as used in the first preliminary draft]." 288 Or at 421. The legislative history thus strongly indicates that the Commission endorsed the Model Penal Code's conception of substantial distance in its entirety and intended for movements within a victim's residence

or place of business to be insufficient, as a matter of law, to establish a kidnapping by asportation.

In summary, the Commission and, subsequently, the legislature expressed a clear intent to narrowly define the crime of kidnapping and to exclude from its scope conduct punishable under some other criminal provision. In total, the legislative history supports defendant's assertion that the legislature did not intend for the offense of kidnapping to be available in conjunction with another crime, unless a defendant removed the victim from the place where she was found and prevented the victim's liberation for a period of time discrete from the commission of the other crime.

IV. Maxims of Construction

If the first two levels of the *PGE* analysis do not resolve the question of whether defendant committed a kidnapping in conjunction with his other offenses, the court may "resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *PGE* at 612. One maxim of construction instructs the court "to construe a statute in accordance with what it believes the legislature would have done, had that body specifically addressed the issue at hand." *State v. Gulley*, 324 Or 57, 66, 921 P2d 396 (1996). A second maxim of construction directs the court to construe the language of a statute in a manner consistent with its purpose. As explained in *Salem Police Employees Union v. City of Salem*, 308 Or 383, 781 P2d

335 (1989), if the legislature did not expressly consider the specific issue before the court, "'the test is general: whether a particular interpretation or application is consistent with or tends to advance a more generally expressed legislative policy.'" *Id.* at 389, *quoting Springfield Education Assn. v. School Dist.*, 290 Or 217, 226, 621 P2d 547 (1980).

The legislative history is properly considered in determining the legislature's probable response to the present issue. *See PGE*, 317 Or at 612; *Carlson v. Myers*, 327 Or 213, 226, 959 P2d 31 (1998). As discussed above, the Commission wanted to avoid kidnapping convictions for movements and detentions that were coextensive with the commission of other substantive crimes. By requiring substantial movement to entail the removal of the victim from the place where she is found and the prevention of the victim's liberation for a period of time that is notably discrete from the commission of the other crime, defendant's proposed rule effectuates the legislature's intent to exclude kidnapping prosecutions based on incidental movements and detentions. Conversely, the states proposed rule, that an intent to interfere substantially with the victim's liberty can be inferred from movement that occurs within the victim's home and is attendant to the commission of other offenses, contradicts the legislative intent to circumscribe the reach of the kidnapping statute. This court should announce the rule that to commit a kidnapping in conjunction with another crime, a defendant must remove the victim from the place where she is found

and prevent the victim's liberation for a period of time that is notably discrete from the commission of the other crime. For ease in application, this court should also announce that movements within a single residence or business are insufficient, as a matter of law, to support a conviction for kidnapping by asportation.

V. Conclusion

Defendant did not remove the victim from her home (the place she was found) or move the victim a substantial distance when he pushed her from her front doorway back into her home. The movement itself was minimal in distance and had no significance apart from defendant's acts of burglary, assault and menacing.

CONCLUSION

For the foregoing reasons, defendant respectfully prays that this court reverse the decision of the Court of Appeals, reverse defendant's conviction for kidnapping in the second degree and remand for further proceedings.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on February 25, 2009.

I further certify that I directed the Petitioner's Brief on the Merits to be served upon Erika Hadlock, attorney for Plaintiff-Respondent, on February 25, 2009, by having the document personally delivered to:

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