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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

THANKSNIEKY PHUONG,

Defendant and Appellant.

2d Crim. No. B232025
(Super. Ct. No. KA090504)
(Los Angeles County)

In 1983, Thanksnieky Phuong (appellant) entered the victim's home on the pretext of seeking childcare services. Once inside, he viciously attacked and beat her, demanded money, and continued the attack. He dragged her away from the front door, upstairs into the master bedroom, then to the bathroom, where he gratuitously slashed her abdomen and, thinking her unconscious, fled from the home. Twenty-six years later he was linked to the crime by a cold case fingerprint match.

Appellant was charged with kidnapping to commit another crime (robbery). (Pen. Code, former § 209, subd. (b).) He was sentenced to life imprisonment with the possibility of parole. On appeal appellant contends that there is not sufficient evidence that he was the perpetrator, or sufficient evidence of asportation to support his aggravated kidnapping conviction (*People v. Daniels* (1969) 71 Cal.2d 1119, 1139), and that the People's failure to preserve potentially exculpatory evidence deprived him of due process. We affirm.

BACKGROUND

Prosecution Case

In 1983, Cindy Chao lived in West Covina. Her neighbor operated a babysitting service and Chao helped her on occasion. On June 1, 1983, at her neighbor's request, Chao called the telephone number of a man who needed a sitter. Chao gave him directions so he could come to her home the next day. On June 2, the man called Chao several times to ask for directions, and said he could not find her home. Eventually, she agreed to meet him at a mall near her home. That man was later identified as appellant. He met Chao, followed her home, and entered her living room.

When Chao noticed that appellant had no child with him, she became suspicious and asked why. He explained that his wife was caring for their child. When appellant asked for an ashtray, Chao went to the kitchen. When she returned, appellant put a knife against her neck, face and jaw, and told her not to move or say anything. He threatened to kill her if she did so, and asked where her handbag was.

Appellant dragged Chao to her downstairs bathroom, where he repeatedly hit her head against the sink. He turned on the faucet and pushed her face toward the water. She screamed and tried to escape. Appellant became angry and used ropes to tie her hands and her feet together. He kicked her and put a cloth in her mouth. He briefly left her alone in the bathroom. When he returned, he brought a knife from the kitchen.

Appellant dragged Chao up the stairs to the master bedroom. As Chao sat of the edge of the bed, appellant searched through her dresser drawers and emptied the contents of her purse onto the bed. He angrily said, "When I was in Hong Kong robbing I took a lot of money." Appellant left the bedroom to search downstairs while Chao remained on the bed. At some point, Chao managed to free her hands and remove the cloth from her mouth. Appellant returned quickly and dragged Chao into the master bathroom, opened her jeans, and stabbed her in the stomach with two knives. When she saw her intestines protruding, Chao pretended that she had passed out. When appellant went back downstairs, Chao used her clothing to bind her abdomen, and crawled back to

her bedroom. She tried to call her neighbor, but nobody answered. As she was calling the operator, she heard appellant coming back upstairs. She hid next to the bed, near the window. Appellant entered the room briefly. Shortly thereafter, she heard him leave the house. She again called the operator. Appellant took jewelry and approximately $300 from Chao's home.

Chao required abdominal surgery and several days of intensive care treatment. Her surgical scar crossed the entire width of her abdomen.

West Covina Police Department (WCPD) Officers Robert Tibbetts and Darryl Clepper responded to the Chao residence on the night of the attack, and found it "ransack[ed]." Tibbetts collected a woman's slipper, a knotted piece of rope, and blood in the downstairs bathroom. He found a knife and an ashtray with a cigarette butt in the living room. He also found two bloody footprints upstairs, in the master bathroom. Officer Clepper recovered a latent fingerprint from the downstairs bathroom door. He also recovered a latent print from the downstairs bathroom door frame.

Officer Tony Chan interviewed Chao at the hospital on the day after the attack. She told him the assailant was a man of about 20-25 years of age, or in his mid-20s. He had a slender build and high cheek bones. He spoke Mandarin with a heavy Cantonese accent and said that he had recently migrated from Hong Kong. Chao also told the officer that the assailant smoked a cigarette in her living room.

Los Angeles County Sheriff's Office (LASO) Deputy Mahlmon Coleman spoke with Chao in the hospital on June 7, 1983. He prepared a composite drawing of her assailant. Chao testified that Coleman's composite was 40 to 50 percent accurate, and that her assailant's hair was not wavy like that in the composite. Chao gave similar testimony regarding the composite drawing at trial.

The assailant's identity remained unknown until March 2004, when Gema Reyes, California Department of Justice (DOJ) Latent Print Analyst, was reviewing unsolved cases. Reyes entered the Chao case latent prints into the DOJ automated latent print system (ALPS). The ALPS provided several prints as possible matches. Reyes

examined them and thought that one print seemed to match the latent print from Chao's downstairs bathroom door. She obtained the DOJ packet which contained prints that were taken from appellant in 1986.[1] Reyes compared appellant's right middle fingerprint from the 1986 packet with the Chao bathroom door latent print. She concluded that the prints had 13 points of similarity, no points of dissimilarity, and that both were made by appellant. The WCPD obtained appellant's fingerprints after arresting him on June 18, 2009. Reyes and WCPD Officer Tedde Stephan independently examined and compared the right middle fingerprint from the Chao bathroom door with that from appellant's June 18, 2009, booking record and concluded that he made both fingerprints. Stephan found 26 common minutia points between the two fingerprints. Stephan testified that fingerprints can remain in place from one month to one year, depending on environmental factors, such as temperature and moisture.

WCPD Detective Irene Meza obtained appellant's January 8, 1986, booking photograph from the Monterey Park Police Department. Meza prepared a six-pack photo display that included appellant's 1986 booking photo in position number 2. When Chao viewed it, she selected the photograph in position number 2 and said it looked "similar" to her assailant. On January 27, 2011, Chao made a similar comment regarding appellant's photograph in a separate six-pack that included color photographs. Chao did not identify appellant at trial.

Defense Case

Appellant testified at trial. He moved to the United States from Hong Kong. He never went to Chao's home, or any place in Covina or West Covina. He never called Chao regarding babysitting, or made any appointment with her. When he was asked how his fingerprint could have been recovered from Chao's residence if he had never been there, appellant responded that someone might have planted it there.

[1] The parties stipulated that in 1986 appellant was arrested on an unrelated matter for which he was neither charged nor convicted.

DISCUSSION

Substantial Evidence

Appellant argues that there is not sufficient evidence to support the judgment. More specifically, he argues that the evidence does not establish that he was the perpetrator, and that there is not sufficient evidence of asportation to support his aggravated kidnapping conviction. We disagree.

In reviewing a claim of insufficient evidence, we consider the entire record in the light most favorable to the judgment, to determine whether there was reasonable and credible evidence of solid value sufficient for a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) We presume all facts in favor of the judgment which the jury could reasonably deduce from the evidence, and will uphold a judgment based on substantial evidence even if the evidence also might reasonably be reconciled with a contrary finding. (*Ibid.; People v. Guerra* (2006) 37 Cal.4th 1067, 1129, overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 114.) A judgment will be reversed only if there is no substantial evidence to support the verdict under any hypothesis. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Identification

It is well established that fingerprints are considered strong evidence of identity and, standing alone, may be sufficient to identify the perpetrator of a crime. (*People v. Andrews* (1989) 49 Cal.3d 200, 211, overruled on other grounds in *People v. Trevino* (2001) 26 Cal.4th 237.) It is for the jury to weigh the evidence and draw an inference as to how the defendant's prints came to be on a particular item. (*People v. Massey* (1961) 196 Cal.App.2d 230, 234; *People v. Preciado* (1991) 233 Cal.App.3d 1244, 1247.)

In *People v. Preciado*, *supra*, 233 Cal.App.3d at pages 1246-1247, the court concluded that the defendant's fingerprints on a box in a burgled apartment constituted sufficient evidence to support his conviction where the victim did not know

the defendant, and the box had never left the victim's home. In the instant case, the police lifted appellant's fingerprint from the door of Chao's downstairs bathroom on June 2, 1983, just hours after the attack. At trial, appellant denied that he was ever in Chao's house, and suggested that someone planted his fingerprint on the bathroom door. He argues that the recovered print could have been placed there as much as a year prior to June 2, 1983. The jury was entitled to draw its own inference as to how and when appellant's fingerprint was placed on Chao's downstairs bathroom door, and infer that it was left there on June 2, 1983. (*Ibid.*) Based on the fingerprint evidence, as well as Chao's identification of his photographs, the jury could reasonably infer that appellant was the perpetrator of the robbery.

Asportation

Appellant argues that there is insufficient evidence of asportation to support his aggravated kidnapping conviction because Chao's movement within her home was merely incidental to the robbery and did not substantially increase her risk of harm above that necessarily present in the crime of robbery. (*People v. Daniels, supra,* 71 Cal.2d at p. 1139.) We disagree.

"Kidnapping for robbery, or aggravated kidnapping, requires movement of the victim that is not merely incidental to the commission of the robbery, and which substantially increases the risk of harm over and above that necessarily present in the crime of robbery itself." *(People v. Rayford* (1994) 9 Cal.4th 1, 12.) '"These two aspects are not mutually exclusive, but interrelated.' [Citation.]" (*People v. Martinez* (1999) 20 Cal.4th 225, 232-233 "[T]he determination whether the movement in any particular case meets this standard involves a consideration of 'the "scope and nature" of the movement,' and 'the context of the environment in which the movement occurred.'" (*People v. Corcoran* (2006) 143 Cal.App.4th 272, 278, quoting *Rayford,* at p. 12.)

In arguing that there is not sufficient evidence of asportation, appellant relies upon *Daniels* and its progeny. In *Daniels,* the defendants robbed and raped victims in their own homes, and the court concluded that "when in the course of a robbery a

defendant does no more than move his victim around inside the premises in which he finds him—whether it be a residence, as here, or a place of business or other enclosure—his conduct generally will not be deemed to constitute the offense proscribed by [Penal Code] section 209." (*People v. Daniels, supra,* 71 Cal.2d at p. 1140.)

In citing *Daniels,* appellant stresses that in this case, all of the movement occurred within Chao's home. However, he acknowledges contrary authority, specifically, *People v. Vines* (2011) 51 Cal.4th 830, in which the court found substantial evidence to support an aggravated robbery conviction although the assailant never moved his victim beyond the premises in which the crime was committed. In *Vines*, while robbing a McDonald's restaurant, the defendant pointed his gun at several restaurant employees, obtained the key to the safe, and instructed the employees to go downstairs and enter a walk-in freezer. After they complied, the defendant slammed the freezer door and locked it. (*Id*. at pp. 841-842.) The defendant argued that there was insufficient evidence of asportation where the employee victims remained on the business premises throughout the robbery. The court disagreed, and concluded it "[could not] say the 'scope and nature' of this movement was 'merely incidental' to the commission of the robbery." (*Id.* at p. 871.) It further noted that "the movement subjected the victims to a substantially increased risk of harm because of the low temperature in the freezer, the decreased likelihood of detection, and the danger inherent in the victims' foreseeable attempts to escape such an environment." (*Ibid*.)

Considering the totality of the circumstances and viewing the evidence in the light most favorable to the judgment, we conclude that there is substantial evidence of asportation to support the aggravated kidnapping conviction. Appellant's movement of Chao within her home substantially increased her risk of harm above that necessarily present in the crime of robbery. Appellant moved her increasingly farther from the front door, and reduced the likelihood of detection or escape, as he dragged her up a flight of stairs to the master bedroom and bathroom. Further, the scope and nature of appellant's movement of Chao throughout her home, at knifepoint, with bound hands and feet, while

bleeding, and after he had slammed her head against a sink, was not "merely incidental" to the commission of the robbery. (*People v. Vines, supra*, 51 Cal.4th at p. 871.) In fact, he moved freely in her home, apparently searching for more money or valuable property, and left her in the master bedroom. Before leaving, he gratuitously slashed her abdomen.

The Prosecution Did Not Deprive Appellant of Due Process by Failing to Preserve Potentially Exculpatory Evidence

Appellant contends that the trial court erred by denying his motion to dismiss his case on the ground that the prosecution deprived him of due process by failing to preserve potentially exculpatory evidence. We disagree.

Law enforcement agencies have a duty to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488, fn. omitted; *People v. Zapien* (1993) 4 Cal.4th 929, 964.) To fall within the scope of this duty, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Trombetta,* at p. 489.) Absent a showing of bad faith on the part of the police, the failure to preserve the evidence does not constitute a due process violation. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57-58; *People v. Roybal* (1998) 19 Cal.4th 481, 510.)

In arguing that law enforcement failed to preserve potentially exculpatory evidence that they recovered in 1983, appellant cites the unavailable cigarette butt and the knife that was not preserved to prevent contamination. However, when WCPD recovered that evidence, DNA analysis was not a regular practice. It did not become a regular practice until the late 1980s and early 1990s. Evidence handling and storage techniques to prevent contamination have evolved since the late 1990s, with the increased use and refinement of DNA analysis. WCPD did not have the ability to test for DNA in 1983. It used DNA analysis in the late 1990s, but only in cases with known suspects, because it was very expensive.

In 2009, after WCPD Detective Irene Meza started working on the Chao case, she obtained a box with evidence from storage. It contained a knife with an evidence tag and a bed sheet from the Chao crime scene. Knowing that other evidence had been logged in the June 1983 crime report, Meza continued searching for evidence. A receipt showed that some of the evidence was received by the LASO crime lab. Meza could not find any way to determine what tests or analyses that lab conducted, or where the evidence was stored after that lab returned it to WCPD. Meza contacted Clepper, a retired detective who had worked on the Chao case. She asked him about a missing sheet of paper with a hand print and foot print that was referenced in the June 1983 crime report. He did not recall where it was, or whether it had been submitted to the DOJ. Meza searched continually for the missing evidence. She spent hours with retired WCPD Officer Tibbetts reviewing the contents of every single WCPD evidence envelope for crimes that occurred from 1980 through 1989.

At trial, Tibbetts testified regarding WCPD investigation procedures, including evidence recovery, handling, analysis and storage from 1983 through 2001, when he retired. In 1983, officers bagged individual items of evidence separately, and labeled each bag with an evidence tag. The items were placed on a large board, with the crime date, location, and a log listing each item of evidence, including its specific recovery location. The items were sealed and stored in a locked evidence locker, with large items placed elsewhere within a locked evidence room. The fingerprint technician kept the fingerprint cards.

In the late 1980s and early 1990s, WCPD used computerized entries of items listed on police reports, indicating their storage location. In the mid-1990s, a shortage of storage space forced WCPD to consolidate and move evidence to accommodate evidence from newer cases. WCPD also had an ongoing evidence destruction process, whereby each investigator would periodically review his or her cases to determine what evidence should be retained or destroyed, pursuant to the department's established criteria. Investigators typically reviewed their cases about every six months.

After a certain number of years, evidence would be destroyed for cases with no suspects. When Tibbetts retired in 2001, there was no suspect in the Chao case.

Before trial, appellant moved to dismiss his case alleging that the prosecution lost a cigarette butt and failed to preserve the knife that it recovered from Chao's residence on June 2, 1983. The trial court found that appellant had failed to show (1) that the lost, destroyed or poorly preserved evidence had an apparent exculpatory value, and (2) that it was recklessly or intentionally destroyed by the police agency or prosecution. The record supports its findings. The court denied the motion, without prejudice, and invited appellant to refile the motions when he could make that showing. There was no further motion. There is no evidence that WCPD, or any agency, intentionally destroyed potentially exculpatory evidence or otherwise acted in bad faith. Absent such a showing, there is no due process violation. (*Arizona v. Youngblood, supra,* 488 U.S. at pp. 57-58; *People v. Roybal, supra,* 19 Cal.4th at p. 510.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Douglas Sortino, Judge
Superior Court County of Los Angeles

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