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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CLIFTON HAYES, Defendant and Appellant.	B277263 (Los Angeles County Super. Ct. No. LA082323)

APPEAL from a judgment of the Superior Court of Los Angeles County, Susan M. Speer, Judge. Affirmed as modified and remanded.

Marilyn G. Burkhardt, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy

Attorney General, Douglas L. Wilson, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Clifton Hayes robbed the same restaurant on two nights within one month of each other. He was convicted of kidnapping for purposes of robbery (Pen. Code, § 209, subd. (b))[1] (count 1) and second degree burglary (§ 211) (count 10) for the first robbery. The second episode resulted in his conviction of nine other offenses.[2] Defendant challenges the sufficiency of the evidence to support the asportation element of the kidnapping for purposes of robbery conviction and contends the trial court erred in imposing two consecutive life terms with the possibility of parole instead of one life term with the minimum parole eligibility date doubled.

There was no substantial evidence of the asporation element of kidnapping for purposes of robbery (count 1). Accordingly, we reduce defendant's count 1 conviction to the

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[1] All statutory citations are to the Penal Code.

[2] There were more victims in the restaurant on the second evening, and defendant was convicted of two counts of second degree robbery, six counts of assault with a semiautomatic firearm, and one count of possession of a firearm by a felon. The jury found true allegations that defendant was convicted of four prior serious or violent felonies. Defendant does not challenge any of the convictions stemming from criminal conduct on the second evening.

lesser included offense of felony false imprisonment in violation of section 237, subdivision (a) and remand for resentencing.[3]

FACTUAL AND PROCEDURAL BACKGROUND

A. Prosecution Evidence

Rayna Rounds was a manager at Fleming's Prime Steakhouse and Wine Bar in Woodland Hills. In February 2015, defendant and his wife celebrated their anniversary there. Rounds recognized defendant from high school and chatted with the couple at their table. Defendant returned to the restaurant a few days later with three male friends known to Rounds as defendant's cousin, Mouton aka "Gangster Al;" "Third;" and another male whose name Rounds could not recall. Within a week, defendant and Rounds embarked on an intimate relationship, usually arranging to meet via text messages.

Rounds closed the restaurant on April 8, 2015. Shortly before midnight, after all the other employees had gone for the evening, defendant showed up with Mouton. Rounds brought them in through the back door to use the restroom. For approximately 20 to 30 minutes, defendant and Mouton looked around the back area of the restaurant.

The following day, on April 9, 2015, Rounds was again the closing manager. She had tentative plans to meet defendant, depending on when she left work. The restaurant closed at 10:00 p.m., and at about 11:50 p.m., Rounds was the only employee present. As she was preparing to leave, defendant telephoned

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[3] This disposition moots defendant's claim of sentencing error.

and asked when she would be ready.[4] Defendant said he was near another eatery, about two miles away.

Rounds opened the back door a little before midnight and started to step outside when she was rushed by three masked men. The first man told her, "Your life depends on this, [expletive], tell me where the money's at." Rounds hesitated, and the man punched her in the face with his closed fist. She staggered and the assailant dragged her by the hair down a hallway toward the front of the restaurant.

Based on his voice, body shape, and body piercing, Rounds realized it was Mouton who punched and dragged her. She recognized another of the trio as Third, but did not know the last man.[5]

Mouton again demanded money. Rounds retrieved the key to the manager's office from her purse, and the four of them went to the office, where she unlocked the door.

After being threatened again, Rounds opened the safe. Mouton rifled through it and withdrew approximately $10,000. Mouton also took Rounds' cell phone and backpack, and the men left.

At 12:06 p.m., using the telephone in the manager's office, Rounds called 911. At 12:09 a.m., Rounds, having located her cell phone outside the back door, [6] sent a text message to defendant

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[4] It was unusual for defendant to call Rounds. She often met him outside the restaurant and they would then make plans for the rest of the evening.

[5] A surveillance video of the back door area confirmed three men entered Fleming's on the night of the robbery.

[6] Rounds' bag was also recovered just outside the restaurant.

stating: "Your friends just robbed me!!!" Rounds also texted defendant, stating: "Really?" "You set me up. I saw that was Al. He punched me in the nose." "[Expletive] you."

Los Angeles Police Detective Douglas Johnson interviewed Rounds at the restaurant. Her description of the robbery included everything except her identification of Mouton and Third. She was not truthful because she believed defendant, who knew where she lived and her children went to school, masterminded the crime and might harm her family.

While still at the restaurant, Rounds texted defendant several more times and then spoke with him by telephone. Rounds told defendant his friends robbed her and he needed to find out what was going on. Rounds also asked defendant to come to the restaurant; but he declined, telling Rounds he had a gun and there were too many police there.

The next day, for approximately 16 hours, Rounds texted defendant without any response from him. Defendant finally texted, "My car got shot up looking for Al."[7]

Flemings was robbed a second time on May 4, 2015. Rounds no longer worked there. Defendant and Mouton were arrested on May 24, 2015, after being stopped for driving a car without license plates. Inside the vehicle the police found the distinctive semiautomatic handgun defendant used during the second Fleming robbery.

With cell phone records, the connection between Mouton, defendant and Rounds soon became apparent to the police. Rounds then cooperated. She had saved all the text messages between herself and defendant, and the police accessed them.

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[7] When Rounds next saw defendant's car, it did not have any damage.

She said defendant was not physically present in the restaurant during the April 9, 2015 robbery.

B. Defendant's Evidence

Defendant testified at trial. He downplayed the relationship with Rounds, insisting she took him out a few times. His alibi for the first robbery was that he was with yet another woman, not his wife, at the time of the crime.

C. Convictions and Sentencing

As indicated above (see fn. 2), the jury convicted defendant of 11 offenses and found he personally used a firearm in the second robbery (§§ 12022.53, subd. (b), 12022.5, subds. (a) & (d)). The jury also found true allegations defendant was convicted of four prior serious or violent felony convictions (§§ 667, subds. (b)-(i); 1170.12, subd. (b); and 667, subd. (a)(1).

The trial court struck three of the prior convictions and sentenced defendant to two consecutive life terms with a possibility of parole on count 1, and a determinate term of 30 years and four months on the remaining counts.

DISCUSSION

Defendant challenges the sufficiency of the evidence to support the asportation element of kidnapping for purposes of robbery (count 1), arguing the movement of Rounds inside the restaurant was incidental to the robbery and did not increase the risk of harm to her. *People v. Daniels* (1969) 71 Cal.2d 1119 (*Daniels*) is controlling, and we reduce the kidnapping conviction to the lesser included offense of felony false imprisonment in violation of section 237, subdivision (a).

Section 209, subdivision (b) provides in part: "(1) Any person who kidnaps or carries away any individual to commit robbery . . . shall be punished by imprisonment in the state prison for life with the possibility of parole. [¶] (2) This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." In *People v. Vines* (2011) 51 Cal.4th 830, 869-871, our Supreme Court held, "kidnapping for robbery . . . require[s] movement of the victim that (1) was not merely incidental to the commission of the robbery, and (2) . . . increased the risk of harm over and above that necessarily present in the crime of robbery itself. [Citations.] These two elements are not mutually exclusive but are interrelated. [Citations.] [¶] With regard to the first prong [movement of the victim that was not merely incidental to the commission of the robbery], the jury considers the 'scope and nature' of the movement, which includes the actual distance a victim is moved. [Citations.] There is, however, no minimum distance a defendant must move a victim to satisfy the first prong. [Citations.] [¶] The second prong [movement of the victim that increased the risk of harm over and above that necessarily present in the crime of robbery itself] refers to whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that inherent in the [robbery]. [Citations.] This includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes." (Internal quotation marks omitted.)

Similarly, in *Daniels, supra,* 71 Cal.2d 1119, our Supreme Court considered whether the evidence of asportation was sufficient where the defendants in several instances accosted victims at their front doors, gained entry, and then forcibly moved them inside their homes. (*Id.* at pp. 1123-1125.) The *Daniels* court held the evidence was not sufficient to support kidnapping convictions, explaining, "the brief movements which [the] defendants . . . compelled their victims to perform in furtherance of robbery were merely incidental to that crime and did not substantially increase the risk of harm otherwise present. Indeed, 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 or business or other enclosure—his conduct generally will not be deemed to constitute the offense proscribed by section 209. Movement across a room or from one room to another, in short, cannot reasonably be found to be asportation 'into another part of the same county.'" (*Id.* at p. 1140.)

Much like the victims who opened doors to their attackers in *Daniels,* Rounds was accosted by defendant's partners in crime just as she stepped out of the restaurant's back door. The robbers struck, menaced, and dragged Rounds by the hair inside the restaurant. She was forced to move to different locations inside the establishment, but that movement was not for the purpose of committing a crime other than robbery (*People v. Shadden* (2001) 93 Cal.App.4th 164 [sexual offense]) or to increase the danger to Rounds or prevent her from seeking help after the robbers left (*People v. Vines, supra,* 51 Cal.4th 830 [restaurant employees locked in freezer]). The evidence was "insufficient to support a conviction of aggravated kidnapping as a matter of law." (*People*

v. Washington (2005) 127 Cal.App.4th 290, 302 ["[W]here *Daniels* applies, the evidence is insufficient to support a conviction of aggravated kidnapping as a matter of law . . ."].)

The Attorney General alternatively asserts that if the evidence is insufficient to support the conviction for kidnapping for purposes of robbery, this court should reduce the conviction to the lesser included offense of felony false imprisonment. (*People v. Enriquez* (1967) 65 Cal.2d 746, 749 ["When the record reveals that the defendant cannot be held for the crimes for which he was convicted and sentenced but that he may properly be convicted of the crime charged but of a lesser degree or of a lesser included offense, this court has authority to reduce the judgment accordingly"]; § 1260.) Defendant did not argue against this result in his reply brief or at oral argument.

False imprisonment occurs "when the victim is compelled to remain where he does not wish to remain, or to go where he does not wish to go." (*People v. Reed* (2000) 78 Cal.App.4th 274, 280, internal quotation marks omitted.) "No asportation is required [for false imprisonment]. '[K]idnapping, be it simple or aggravated, requires a degree of asportation not found in the definition of false imprisonment. Indeed, false imprisonment can occur with *any* movement or *no* movement at all.'" (*People v. Williams* (2017) 7 Cal.App.5th 644, 672.)

False imprisonment is a felony if it is "effected by violence [or] menace." (§ 237, subd. (a).) "'Violence' . . . means the exercise of physical force 'greater than that reasonably necessary to effect the restraint.'" (*People v. Newman* (2015) 238 Cal.App.4th 103, 108.) "'Menace' is an express or implied threat of force." (*Ibid.*) "[F]alse imprisonment is a lesser-included

offense of all types of kidnapping." (*People v. Straight* (1991) 230 Cal.App.3d 1372, 1374.)

The evidence is sufficient to support defendant's conviction of the lesser included offense of felony false imprisonment. Defendant does not contend otherwise. Upon issuance of the remittitur, count 1 is to be reduced to the lesser included offense of false imprisonment by violence in violation of section 237, subdivision (a), and defendant is to be resentenced. As a result, we do not address defendant's claimed sentencing error.

DISPOSITION

The conviction under count 1 is reduced to the lesser included offense of false imprisonment (§ 237, subd. (a)). The judgment of conviction is affirmed in all other respects. The matter is remanded for resentencing on all counts.

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DUNNING, J.*

I concur:

BAKER, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

KRIEGLER, Acting P.J., concurring
People v. Hayes
B277263

I concur fully in the result reached by the court's opinion. What is troubling about this case is that the trial court dismissed three prior strike convictions without a valid reason "in furtherance of justice," as required by Penal Code section 1385.[1] Equally troubling is the prosecution's failure to object and appeal, particularly where the evidence in support of the charge of kidnapping for the purpose of robbery in count 1 is plainly insufficient, and the charge should not have even been submitted to the jury.

The trial court noted that defendant was convicted in 1997 of kidnapping (§ 207, subd. (a)), second degree robbery (§ 211), attempted second degree robbery (§§ 664/211), and carjacking (§ 215, subd.(a).)) In the prior convictions, as in the current case, defendant acted in concert with another perpetrator. The trial court concluded the four prior convictions qualified "as separate strike offenses."

Despite these four prior valid convictions under the three strikes law, and the multiple convictions of additional serious and violent felonies in the current case, the court dismissed three of the four prior strike convictions because: (1) the four prior convictions "all involve the same victim;" and (2) "defendant's receiving a substantially lengthy sentence without the necessity of imposing the maximum sentence on the defendant as a fifth striker based upon the nature and conduct of the present case

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[1] Statutory references are to the Penal Code.

that involved two takeover robberies a month apart where no one was substantially physically injured."

Neither of the factors relied upon by the trial court support dismissals in furtherance of justice, as that term is defined in section 1385. A court's discretion to dismiss a strike under section 1385 is limited. (*People v. Williams* (1998) 17 Cal.4th 148, 158 (*Williams*).) A dismissal guided by antipathy to the effect of three strikes law is an abuse of discretion, where the dismissal ignores a defendant's background and the nature of his present offenses. (*Id.* at p. 159.) Dismissal of a strike prior conviction is proper where "the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Id.* at p. 161.)

As in *Williams*, "There is little about [defendant's] present felony, or his prior serious and/or violent felony convictions, that is favorable to his position. Indeed, there is nothing." (*Williams*, *supra*, 17 Cal.4th at p. 163.) The similar nature of the prior and current convictions reflects that defendant learned nothing from his prior convictions and he remains an intolerable danger to society. (*Ibid.*) Again, as in *Williams*, "As to his prior serious and/or violent felony convictions: The record on appeal is devoid of mitigation." (*Ibid.*)

Defendant's prior and current convictions preclude, as a matter of law, a finding that his circumstances are outside the spirit of the three strikes law. Defendant will no doubt receive a lengthy term in state prison when resentenced, but it will not be for the terms required by the three strikes law.

KRIEGLER, Acting P.J.