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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DALE SHELDON BARNES et al., Defendants and Appellants.	B250651 (Los Angeles County Super. Ct. No. KA099184)

APPEAL from judgments of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed in part, reversed in part, vacated in part, and remanded with directions.

Lynne S. Coffin, under appointment by the Court of Appeal, for Defendant and Appellant Dale Sheldon Barnes.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant Gabrielle Shanique Payne.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Dale Sheldon Barnes and Gabrielle Shanique Payne appeal from the judgments entered following their convictions by jury on count 1 – attempted second degree robbery, count 2 – kidnapping to rob, and count 3 – second degree robbery, with Barnes admitting he suffered 3 prior felony convictions, three prior serious felony convictions, two prior violent felony convictions, and four prior felony convictions for which he served separate prison terms. (Pen. Code, §§ 664, 211, 209, subd. (b)(1), 667, subds. (a) & (d), 667.5, subds. (a) & (b).) The court sentenced Barnes to prison for 50 years to life, and sentenced Payne to prison for life with the possibility of parole (with a minimum parole eligibility term of seven years) plus eight months. We affirm in part, reverse in part, vacate in part, and remand for resentencing with directions.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on August 17, 2012, Deyanira Barraza was at work at the Bel Aire Little People School in West Covina.[1] The school was a preschool and afterschool facility where children were present from 6 a.m. to 7 p.m. Barraza, as the school's director, handled the money and tuition.

Barraza testified as follows. About 5:00 p.m., Barraza was seated at her desk in the school's front room. The school had surveillance cameras and one was pointed at her desk. Appellants together entered the front room through the school's main door. Appellants asked for the administrator and were a "couple of feet" from Barraza at the time. Barraza indicated the administrator was not in but Barraza was the director and could help. Appellants, as a ruse, asked where they could pay tuition, and Barraza asked for whom were they paying. It was mostly Barnes who was asking questions. During

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[1] Suffice it to say as to count 1 that about 4:30 p.m. on August 17, 2012, appellants attempted to rob a teller at a U.S. Bank branch in West Covina. Payne, as a ruse, indicated she wanted to make a withdrawal, but ultimately demanded the bank's money and threatened to shoot everyone. The teller tried to activate an alarm but appellants told him not to do so. Barnes had a hand on his waist and the teller thought Barnes had a gun. The teller refused to surrender money. Payne said, "He's not going to do it" and appellants left. The bank was perhaps two to three miles from the school involved in counts 2 and 3.

cross-examination, Barraza testified she had seen a video pertaining to the incident and the only thing Payne said to Barraza was, "How can I make a payment." After that, only Barnes was talking.

Appellants indicated they wanted to pay for a nephew. Barraza also testified it was Barnes who said this. Barraza asked for the name of the nephew. When appellants were talking with Barraza, appellants were a "couple of feet" from each other. Appellants did not provide a name of the nephew. Instead, Barnes approached Barraza closely and, in a low voice, told her she was being robbed. When Barnes said that, he lifted his shirt, displaying a gun handle protruding from his waistband. Appellants were close together at the time.

Barraza was shocked. She testified, "they asked me where the money was, and I said it was in the office." Barraza testified Barnes told Barraza to stand and "take them to where the money was." Barraza had to do so because there were about 16 children, including her daughter, in a nearby classroom.

Appellants and Barraza entered the hallway leading to the office. The full length of the hallway was about seven feet six inches. There was no camera in the hallway or office. The hallway was small. A doorway to the above mentioned classroom was on the south side of the hallway, between the front room and the office.

Barraza led appellants to the office. Appellants followed Barraza closely, and Payne was in front of Barnes. En route, Barraza, in the hallway, could see the children in the classroom. A teacher was with the children. A person in the classroom could see into the hallway. However, Barraza also testified that when she walked past the classroom, she did not look in or signal something was happening, because Barnes told her not to look. When Barraza went to the office, Barnes did the talking and was the person with whom Barraza interacted.

A money cabinet was inside the office. The office had two other doors that were locked. Barraza entered the office with appellants right behind her. Barraza had no choice but to enter. Barraza opened the money cabinet and showed Barnes the money inside a box. Barnes took the money. Barraza's purse was hanging on a chair, and her cell phone was on a desk. Barnes took the purse and cell phone. Barraza had cash and personal property in her purse, including her keys to her house and car. Barraza asked for the keys and Barnes gave them to her.

Once Barnes took the money and Barraza's purse, appellants began leaving by the same way they had come. Payne led, followed by Barnes and then Barraza. Barraza did not recall appellants telling her to go to the front room as the three were leaving the office. Whatever appellants did with Barraza in the office, appellants did not order or request that Barraza follow them. Barraza followed appellants out because she just felt she should do so.

When the three arrived at the front room, Barnes took the school's cordless telephone that was on top of Barraza's computer, but he was not interacting with Barraza. Payne was heading towards the exit. Appellants left.

Neither appellant ever touched Barraza. Barraza testified the incident lasted probably about one-and-a-half to two minutes and, during that time, she was "really, really scared because -- I mean, the kids were there so my first instinct was the kids." Barnes never displayed the gun after he initially displayed it.

West Covina Police Officer Tedde Stephan, in charge of forensics, testified as follows. Stephan went to the school and asked Barraza to walk him through "where she was taken" by appellants. Stephan, using a roller tape, walked specifically where Barraza showed him. He determined Barraza "had to walk" about 64 feet, both ways.

ISSUES

Appellants claim insufficient evidence supports their convictions for kidnapping to rob (count 2). Payne claims (1) the trial court erred by refusing to instruct on kidnapping as a lesser included offense of kidnapping to rob and (2) the trial court erred as to counts 2 and 3 by failing to instruct sua sponte on the principles of derivative liability under aiding and abetting, or uncharged conspiracy, theories.

DISCUSSION

1. *Insufficient Evidence Supports Appellants' Convictions for Kidnapping to Rob.*

Appellants claim insufficient evidence supports their convictions for kidnapping to rob. We agree. In *People v. Washington* (2005) 127 Cal.App.4th 290 (*Washington*), "[a]ppellants committed a takeover robbery of a bank. While Mack robbed the tellers, Washington moved the bank manager from her office to the vault room, a distance of approximately 25 feet, and forced the manager to open the vault with the assistance of a teller who moved from the teller area to the vault room, a distance of approximately 15 feet.[2] Appellants took cash from the vault, then fled." (*Id*. at p. 294.)

In *Washington*, this division held there was insufficient evidence to sustain the two kidnapping to rob convictions. (*Washington*, *supra*, 127 Cal.App.4th at p. 295.) *Washington* concluded, "the *brief* movement of the manager and the teller *from the public area of the bank to the vault room* was *incidental* to the robbery within the meaning of [*People v. Daniels* (1969) 71 Cal.2d 1119 (*Daniels*)]." (*Washington*, at p. 295, italics added.)

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2 *Washington* observed the teller actually moved 45 feet because, as events unfolded, she had to traverse the distance between the teller area and vault room three times. A diagram provided evidence the manager traveled at least 25 feet and, during her testimony, underestimated the distance she had travelled. (*Washington*, *supra*, 127 Cal.App.4th at p. 299.)

Washington observed, "*Daniels* held a conviction of kidnapping for the purpose of robbery requires 'movement of the victim that is not merely incidental to the commission of the underlying crime and that increases the risk of harm to the victim over and above that necessarily present in the underlying crime itself.' [Citations.]" (*Washington, supra,* 127 Cal.App.4th at p. 297.)

Washington stated, "In *Daniels,* the defendants were alleged to have robbed and raped three victims in their homes, moving the victims from room to room 18 feet, five to six feet, and 30 feet, respectively. *Daniels* ruled such *brief* movements were *merely incidental* to the associated offenses. [Citation.] . . . *Daniels* observed 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 [in *Daniels*], or a place of business or other enclosure—his conduct generally will not be deemed to constitute the offense proscribed by section 209.' [Citation.]" (*Washington, supra,* 127 Cal.App.4th at pp. 297-298, italics added.)

Washington also stated, "robbery of a business owner or employee includes the risk of movement of the victim to the location of the valuables owned by the business that are held on the business premises." (*Washington, supra,* 127 Cal.App.4th at p. 300.)

In the present case, appellants entered the school, went to the front desk, and Barnes eventually, displaying a gun, announced Barraza was being robbed. Appellants asked Barraza, who had identified herself as the school's director, where "the money" was. This was, in context, a reference to the school's money. Barraza said the money was in the office and Barnes told her to take appellants where "the money" was.

Like the case in *Daniels,* in the present case, in the course of a robbery, appellants did no more than move Barraza, their victim, around inside the premises in which they found her. Those premises were a place of business, i.e., a school. Like the case in *Washington,* in the present case the movement occurred entirely within the premises of the school, and Barraza, the victim, was moved the shortest distance between her original location in the front room and the office where the school's money was. There was no gratuitous movement of Barraza over and above that necessary to obtain the money in the

office. After appellants took the money from the office, they eventually left. The movement in this case is equivalent to the movement of victims to the location of safes in offices or locations out of public view. All movement occurred within close proximity to where the robbery commenced and the only thresholds crossed were those that separated appellants from the store's money.

The primary object of the robbery was to obtain money from the office. The fact that, in the office, appellants also robbed Barraza of her purse and cell phone does mean movement of Barraza to the office constituted aggravating kidnapping. Appellants had no interest in forcing Barraza to move just for the sake of moving; their intent was to commit robbery, and the brief movement which they compelled her to perform was solely to facilitate the robbery.

Like the case in *Washington*, we conclude the brief movement of Barraza, the school's director, from the public area of the school to the office was incidental to the robbery; therefore, appellants did not violate Penal Code section 209, subdivision (b)(1). (*Washington, supra*, 127 Cal.App.4th at p. 295.) Moreover, the fact that, while appellants were leaving, Barnes, almost as an afterthought, robbed Barraza of the school's cordless phone does not convert into an aggravating kidnapping what was otherwise not such a kidnapping. Insufficient evidence supported appellants' convictions on count 2; therefore, we will reverse those convictions and remand for resentencing. (*Id.* at pp. 297, 304.)[3]

[3] There is no need to address Payne's claim the trial court erred by refusing to instruct on kidnapping as a lesser included offense of kidnapping to rob. Our analysis compels the conclusion no kidnapping occurred. Respondent concedes in part II of respondent's opening brief that appellants were guilty, if at all, of kidnapping to rob.

2. *The Trial Court Did Not Prejudicially Err as to Count 3 by Failing to Instruct on Principles of Derivative Liability.*

Payne claims the trial court prejudicially erred as to counts 2 and 3 by failing to instruct sua sponte on the principles of derivative liability under aiding and abetting, or uncharged conspiracy, theories. In light of our previous discussion there is no need to decide the issue as to count 2. As to count 3, we reject Payne's claim. We have set forth the pertinent facts in our Factual Summary. No rational jury could have found appellants guilty of the robbery of Barraza (count 3) without concluding appellants were direct perpetrators and/or direct aiders and abettors, or conspirators; therefore the trial court's failure did not violate federal due process. (*People v. Delgado* (2013) 56 Cal.4th 480, 483-484, 489-491 (*Delgado*).) We note the jury was free to consider the evidence on count 1 (see fn. 1, *ante*) along with all other evidence when deciding appellants' guilt on count 3.

Moreover, the jury was fully instructed on the elements of robbery and found those elements proven beyond a reasonable doubt. Instructions on the liability of an aider and abettor, or conspirators, would merely have provided additional theories of appellants' liability; the absence of those theories could not have prejudiced appellants. Further, the circumstantial evidence appellants were working as direct aiders and abettors to rob Barraza was strong. No prejudicial error occurred. (Cf. *Delgado, supra*, 56 Cal.4th at pp. 484, 492.)

DISPOSITION

The judgments are affirmed, except each appellant's judgment of conviction for kidnapping to rob (Pen. Code, § 209, subd. (b)(l); count 2) is reversed, appellants' sentences are vacated, and the matter is remanded for resentencing as to appellants. The trial court is directed to forward to the Department of Corrections and Rehabilitation an amended abstract of judgment as to each appellant.

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KITCHING, Acting P. J.

We concur:

ALDRICH, J.

LAVIN, J.*

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