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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.

JAMES PATTERSON et al.,

Defendants and Appellants.

B277189

(Los Angeles County
Super. Ct. No. BA441747)

APPEAL from judgments of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Affirmed.

Teresa Biagini, under appointment by the Court of Appeal, for Defendant and Appellant James Patterson.

Janet Uson, under appointment by the Court of Appeal, for Defendant and Appellant Michael Cain.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Daniel C. Chang, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendants James Patterson and Michael Cain of multiple counts of simple kidnapping and robbery (Pen. Code, §§ 207, 211¹). Together they challenge the sufficiency of the evidence to support the asportation element of the kidnapping convictions. Cain alone asserts error under section 654 in the imposition of consecutive subordinate terms for the robberies. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Manchester Avenue Check N Go has one entrance. The door opens to the customer lobby, and a wall with a locked interior door and four teller windows separates the public area from the private employee space. A key is required to unlock the interior door; the store safe is located in the back room. The distance from the front door to the employee door is 15 to 20 feet, and the safe is approximately another 10 feet farther. The store is equipped with video security cameras.

Those cameras captured the pre- and post-closing events on November 20, 2015. Store manager Ashley Foster locked the door at approximately 7:00 p.m. and went through the normal end-of-day closing procedures, which included putting the day's cash and checks in the safe. At 7:30 p.m., she unlocked the door, activated the store's alarm, and walked out with fellow employees Mayra Escalante and Alejandra Rodriguez. Escalante pulled the iron gate closed behind them and then Foster locked the door.

The three were on the sidewalk, heading to their cars, when Patterson and Cain, ski-masked and gloved, approached. Patterson pointed a gun at the employees and ordered them back inside the store. Rodriguez was carrying her cell phone, and one

¹ All statutory references are to the Penal Code.

of the defendants took it. Terrified of being shot, the employees did as instructed.

Foster unlocked the door and Escalante entered a duress code that both disarmed the system and signaled the alarm company. The men asked where the safe was located and then ordered the victims into the employee area.

Store manager Foster was the only one with the safe's code. She entered it, but explained there was a 10-minute delay, during which time the safe emitted a beeping sound. After 10 minutes, when the beeping stopped, the code had to be re-entered to open the safe.

Defendants ordered the victims to sit on the floor and keep their heads down. They were in the back room and could not see, or be seen from, outside. While waiting for the safe to unlock, defendants took the opportunity to empty the victims' purses and take their wallets, cash, remaining cell phones, and Foster's keys.

When the beeping stopped, Foster re-entered the code. Defendants emptied everything into Escalante's purse and fled. Foster pressed the panic button and called her supervisor on the store's landline.

Police had already been dispatched in response to the duress alarm and saw defendants run out the door. A brief chase ensued, during which Patterson attempted to gain entry into a nearby home and convince the police he was a relative of one of the occupants, Akilah Brackett. The stolen items were recovered.

The original information charged both defendants with three counts of aggravated kidnapping (§ 209, subd. (b)(1)). Patterson alone was charged with the simple kidnapping (§ 207, subd. (a)) and false imprisonment (§ 237, subd. (a)) of Brackett. It was further alleged Patterson used a gun to commit these

offenses (§ 12022.53, subd. (b)) and had suffered one prior strike and served a prior prison term (§ 667, subd. (a)(1), (§ 667.5, subd. (b)).

At the close of the prosecution case, the trial court granted defendants' section 1118.1 motion and dismissed the aggravated kidnapping charges. The prosecution immediately orally amended the information to add three counts of the lesser included offenses of simple kidnapping of the store employees. The trial court denied defendants' section 1118.1 motion to acquit on the added charges.

A second amended information charged defendants with second degree robbery and simple kidnapping of each of the three employees (§§ 211, 207, subd. (a)). The Brackett charges remained.

The jury convicted defendants of the robberies and kidnappings of the Check N Go employees and found Patterson used a firearm to commit the offenses. The jury acquitted Patterson of kidnapping Brackett. On the prosecution's motion, the trial court dismissed the false imprisonment count. Patterson admitted the prior conviction and the allegation that he had not remained free from custody for five years.²

Cain was sentenced to state prison for a term of 11 years: the high term of eight years for one kidnapping conviction (§ 207) plus three consecutive one-year terms (§ 211; one-third the midterm) for each robbery victim. Five-year sentences for the other two kidnapping counts were imposed and ordered to run concurrently. He was ordered to pay statutory fees and fines and awarded custody credits.

² Patterson's sentence totaled 36 years and four months. He raised no sentencing issues on appeal.

DISCUSSION

I. Sufficiency of the Evidence to Support Kidnapping Convictions

Defendants jointly argue the evidence was insufficient to establish the asportation element of simple kidnapping. We disagree.

Simple kidnapping is defined in section 207, subdivision (a): “Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.” The asportation element of the offense requires some movement of the victim by force or fear without consent. (*People v. Williams* (2017) 7 Cal.App.5th 644, 670 (*Williams*); *People v. Bell* (2009) 179 Cal.App.4th 428, 436.)

Historically, a precise definition of the requisite “movement” to satisfy the asportation element proved elusive. After acknowledging “more than one Court of Appeal [had struggled with] determining simple kidnapping asportation,” the Supreme Court determined to resolve the debate in *People v. Martinez* (1999) 20 Cal.4th 225, 234 (*Martinez*). There, the Supreme Court announced, “factors other than actual distance . . . should apply in all cases involving simple kidnapping. . . . [F]or simple kidnapping asportation the movement must be ‘substantial in character’ [citation], but . . . the trier of fact may consider more than actual distance.” (*Id.* at p. 235.) Factors the trier of fact may consider in addition to distance include “whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger

inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*Id.* at p. 237.)

Our Supreme Court added to the asportation body of law in *People v. Dominguez* (2006) 39 Cal.4th 1141, 1152: "Measured distance, therefore, is a relevant factor, but one that must be considered in context, including the nature of the crime and its environment. In some cases a shorter distance may suffice in the presence of other factors, while in others a longer distance, in the absence of other circumstances, may be found insufficient. For example, moving robbery victims between six and 30 feet within their home or apartment (see [*People v.*] *Daniels* [1969] 71 Cal.2d [1119,] 1123-1124 [*Daniels*] . . .) or 15 feet from the teller area of a bank to its vault (*People v. Washington* (2005) 127 Cal.App.4th 290, 299 . . .) may be viewed as merely incidental to the commission of the robbery and thus insufficient to satisfy the asportation requirement of aggravated kidnapping. Yet, dragging a store clerk nine feet from the front counter of a store to a small back room for the purpose of raping her (see *People v. Shadden* (2001) 93 Cal.App.4th 164, 167 . . .) or forcibly moving a robbery victim 40 feet within a parking lot into a car (see *People v. Jones* (1999) 75 Cal.App.4th 616, 629 . . .) might, under the circumstances, substantially increase the risk of harm to the victim and thus satisfy the asportation requirement. These examples are illustrative only; each case must be considered in the context of the totality of its circumstances."

Applying *Martinez*, *supra*, 20 Cal.4th 225, this court in *People v. Arias* (2011) 193 Cal.App.4th 1428 (*Arias*) affirmed the defendant's simple kidnapping conviction. In *Arias*, the defendant armed himself with the intent to find and shoot

somebody from a rival gang. He went to an apartment building, found a resident he knew, and asked if he belonged to the rival gang. The resident denied gang membership, but the defendant threatened him with a gun and walked the frightened victim to his apartment to make sure no rival gang members were hiding there.

We affirmed the defendant's conviction for simple kidnapping: "A rational trier of fact could have concluded that [the victim] was involuntarily moved 15 feet to the inside of his apartment in order to allow defendant to facilitate his search for TMC gang members. [¶] The movement of [the victim] increased his risk of harm in that he was moved from a public area to the seclusion of his apartment. Similarly, by scaring [the victim] into moving away from a public place, it was less likely defendant would have been detected if he had committed an additional crime. These factors support the asportation requirement for kidnapping." (*Arias, supra*, 193 Cal.App.4th at p. 1435) They do in this case as well.

Our analysis requires that we examine "the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. (*People v. Young* (2005) 34 Cal.4th 1149, 1175 . . .) We "'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'"" (*Williams, supra*, 7 Cal.App.5th at pp. 666-667.)

The three Check N Go victims were on a public sidewalk. It was not necessary to move them back into the store in order to rob them of *their* belongings. Indeed, there is evidence one defendant grabbed Rodriguez's cell phone while they were all still on the sidewalk. But it was necessary to move them back into

the store to open the safe and take the store's money. The forced movement facilitated the theft from the safe and also increased the risk the three victims would be harmed and decreased their opportunity for escape. Once inside the employee area, it was less likely defendants would be detected if they committed additional offenses, e.g., taking the victim's personal property. In other words, linear measurement is no longer the sole means to establish "substantial distance" as an element of simple kidnapping. The totality of the circumstances in this case established the asportation element for simple kidnapping. (*Martinez, supra*, 20 Cal.4th at p. 236.)

Defendants' reliance on the *Daniels, supra*, 71 Cal.2d 1119 line of cases is misplaced. In *Daniels*, the Supreme Court concluded, "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 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.' (Pen. Code, § 207.)" (*Id.* at p. 1140; see, e.g., *People v. Mutch* (1971) 4 Cal.3d 389, *Williams, supra*, 7 Cal.App.5th 644, *People v. Washington, supra*, 127 Cal.App.4th 290, *People v. Hoard* (2002) 103 Cal.App.4th 599.)³

³ Exceptions to the general rule in *Daniels, supra*, 71 Cal.2d 1119 typically arise in the context of a kidnapping conviction and an associated sexual assault crime. (See, e.g., *People v. Shadden, supra*, 93 Cal.App.4th 164 [the defendant's conviction of aggravated kidnapping and robbery affirmed; he encountered the employee inside the store, struck her, and moved her nine feet into an enclosed room to commit rape and also took store

The critical distinctions in each of those decisions is that the robbers first encountered the victims inside the business premises and the movement of the victims within the business premises were incidental to the robberies and did not increase the risk of harm to them.⁴ Here, by contrast, the victims were moved without their consent and under threat of harm from a public sidewalk into a closed business. The movement was not merely incidental to the robberies and it increased the risk of harm to the three victims. The analysis and result in *Arias*, *supra*, 193 Cal.App.4th 1428 apply. (See also *People v. James* (2007) 148 Cal.App.4th 446 [moving the victim inside the premises was not merely incidental to the robbery and increased the risk to him].)

property]; cf. *People v. Perkins* (2016) 5 Cal.App.5th 454 [moving sodomy victim from bathroom to bedroom to commit second offense did not increase risk of harm to victim and was insufficient to affirm kidnapping conviction].)

In *People v. Vines* (2011) 51 Cal.4th 830, the restaurant employees were all inside when the robbers arrived and herded them into a freezer. The Supreme Court concluded this movement was not “merely incidental” to the robbery and it also “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.” (*Id.* at p. 871.)

⁴ Cain’s counsel appears to recognize a distinction when she argues, “*Once inside the lobby*, movements within the Check N Go from the front door to the safe presented the classic example of movements that were incidental to the intended robbery.” (Italics added.)

II. Section 654 Does Not Bar Subordinate Consecutive Terms for Robberies as to Cain

As noted above, Cain was sentenced to state prison for a term of 11 years, consisting of the high term of eight years for the simple kidnapping of Foster, plus three consecutive one-year terms for the second-degree robbery convictions of all three victims. He received concurrent terms of five years each for the simple kidnappings of Escalante Rodriguez. Cain contends his sentences for both kidnapping and robbing the same victim violate section 654 because the kidnapping and robbery were part of an indivisible course of conduct committed for the single purpose of taking the money from the store safe. Not so.

Each victim was also robbed of personal property. Rodriguez's cell phone was taken on the sidewalk, but once back inside the store, she and the other two victims were robbed of money and belongings while defendants waited for the safe to open.

"Section 654 precludes multiple punishments for a single act or indivisible course of conduct." (*People v. Hester* (2000) 22 Cal.4th 290, 294.) In determining whether multiple punishments run afoul of section 654, we look to a defendant's intent and objective. "[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Robbing the victims while they were captive in back room was an objective independent of stealing from the store safe. Multiple punishments were not prohibited.

DISPOSITION

The judgments are affirmed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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