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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ALONZO BERNARD JOHNSON, Defendant and Appellant.	B278183 (Los Angeles County Super. Ct. No. GA087078)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Villalobos, Judge. Affirmed as modified.

Kevin D. Sheehy, 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, Paul M. Roadarmel, Jr. and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Alonzo Bernard Johnson was convicted of first degree residential robbery (Pen. Code,[1] § 211), kidnapping to commit robbery (§ 209, subd. (b)(1)), and first degree burglary (§ 459). He argues that the trial court should have granted his motion for acquittal on the charge of kidnapping to commit robbery, that his presentence custody credits were improperly calculated, and that multiple minute orders and the abstract of judgment include errors. We affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

On August 6, 2012, Johnson entered the home of 79-year-old Carol Gibson and approached her in the kitchen. Johnson struck Gibson repeatedly and forced her into her adjacent bedroom, demanding money and jewelry, threatening her with a knife, and attempting to tie her up. Interrupted by the arrival of Gibson's grandsons, Johnson grabbed jewelry from Gibson's dresser and fled. Gibson suffered a subarachnoid hemorrhage, a nasal fracture, and a ruptured eardrum.

Johnson was apprehended shortly afterwards. His DNA was consistent with DNA on the interior band of a hat he had left behind at Gibson's home.

For these actions, Johnson was convicted of first degree residential robbery and kidnapping to commit robbery, with findings as to each count that he personally used a deadly and dangerous weapon within the meaning of section 12022, subdivision (b)(1), and that he personally inflicted great bodily injury on a person who was 70 years of age or older (§ 12022.7, subd. (c)).

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

Johnson was also convicted of first degree burglary with a person present based on his June 22, 2012 burglary of the home of Justina Malovrazich.

In a bifurcated proceeding, the trial court found true that Johnson had three prior strikes, three serious felony priors, and three prison priors. The trial court sentenced Johnson to 95 years to life in state prison. Johnson appeals.

DISCUSSION

I. Kidnapping to Commit Robbery

Johnson argues that the trial court should have granted his motion for acquittal on the kidnapping to commit robbery charge because there was insufficient evidence to satisfy the asportation element of that offense. In reviewing a challenge to the sufficiency of the evidence, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The record must contain substantial evidence, which is "evidence that is reasonable, credible, and of solid value . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid.*) In applying this test, we presume in support of the judgment the existence of every fact the trier of fact could reasonably have deduced from the evidence. (*Ibid.*) "'We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.]" (*Ibid.*) Applying this standard, we find the asportation evidence sufficient to support the conviction for kidnapping to commit robbery and conclude that the trial court did not err when it denied Johnson's motion for acquittal.

Section 209, subdivision (b)(1), provides that "[a]ny person who kidnaps or carries away any individual to commit robbery, rape [or other specified crime] . . . shall be punished by imprisonment in the state prison for life with the possibility of parole." "Kidnapping for robbery requires asportation, i.e., movement of the victim that is not merely incidental to the commission of the robbery and that increases the risk of harm over that necessarily present in the crime of robbery itself." (*People v. Delgado* (2013) 56 Cal.4th 480, 487.)

With respect to the first element, whether the movement was more than merely incidental to the commission of the intended crime, the trier of fact "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" this element. (*People v. Vines* (2011) 51 Cal.4th 830, 870 (*Vines*).) "'Incidental' means 'that the asportation play no significant or substantial part in the planned [offense], or that it be a more or less "'trivial change[ ] of location having no bearing on the evil at hand."'" [Citation.]" (*People v. James* (2007) 148 Cal.App.4th 446, 454 (*James*).) "[T]he fact that the movement of a robbery victim *facilitates* a robbery does not imply that the movement was merely incidental to it." (*Ibid.*) "[W]hat matters is the scope and nature of the movement." (*Id.* at p. 457.)

For the second element, whether the movement increased a victim's risk of harm, the trier of fact considers "'"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. [Citations.] The fact that these dangers do not in fact materialize does not, of

course, mean that the risk of harm was not increased.'" [Citation.]" (*Vines*, *supra*, 51 Cal.4th at p. 870; accord, *People v. Dominguez* (2006) 39 Cal.4th 1141, 1152 (*Dominguez*).) The increased risk of harm may be physical or psychological in nature. (*People v. Nguyen* (2000) 22 Cal.4th 872, 885-886.)

These two elements "'are not mutually exclusive, but interrelated.' [Citation.]" (*Dominguez*, *supra*, 39 Cal.4th at p. 1152.) Whether the victim's forced movement was merely incidental to the crime is "necessarily connected" to whether it increased the risk of harm. (*Ibid.*) "This standard suggests a multifaceted, qualitative evaluation rather than a simple quantitative assessment." (*Ibid.*) Ultimately, "[t]he essence of aggravated kidnapping is the increase in the risk of harm to the victim caused by the forced movement." (*Ibid.*) In measuring this risk, "each case must be considered in the context of the totality of its circumstances." (*Ibid.*)

The evidence was sufficient to satisfy the asportation element of kidnapping to commit robbery. After Johnson surprised Gibson in her kitchen, he struck her across the side of her face with a phone. He hit her so hard that she "went flying" into the sink. Johnson demanded Gibson's money, and Gibson told him that her purse was in the car. Johnson said, "Never mind your money. I want your jewelry," and struck her across the other side of her face. At some point, her eyeglasses fell to the kitchen floor. Gibson felt "woozy" from the blows.

Johnson grabbed Gibson, pushed her into the bedroom, and shoved her face down on her bed. He hit her in the head again, called her profane names, and demanded money and jewelry. She saw that Johnson was holding a paring knife from her kitchen. She urged him to leave because her grandchildren were

on their way; he told her to shut up, called her more names, and told her that he would cut her and kill her. He struck Gibson's face over and over with a closed fist; she described it as "a constant barrage." Johnson repeatedly told Gibson not to look at him and to shut up. Several times he threatened to kill her if she was not silent.

Johnson got on top of Gibson and held a cord in his hand. He told her to put her hands behind her back, but she resisted. As she fought, she wondered how much longer she would be able to struggle, and how many more blows she could take, before she lost consciousness. The attack ceased only when Johnson was discovered by Gibson's grandson.

This evidence supports the court's determination that there was sufficient evidence that Gibson was moved more than incidentally and that the movement increased the risk of harm to her. Although the house was small and the distance covered was slight, pushing Gibson into the bedroom and onto her bed effectively moved her to a more secluded area, increasing her risk of harm. Indeed, in the bedroom, Johnson struck Gibson again and again, got on top of her, tried to tie her up, and threatened to kill her with a knife. (See *Dominguez*, *supra*, 39 Cal.4th at p. 1152 [risk factors include whether movement "enhances the attacker's opportunity to commit additional crimes"].) The movement sharply decreased the risk of detection by others. When Johnson and Gibson were in the kitchen, a person standing outside the front door could have seen them through the glass panes adjacent to the door, but once Gibson was on her bed she could not be seen without entering the home and walking to the bedroom.

Johnson argues, however, that Gibson was moved no more than was necessary to commit the robbery, and that thus the movement was merely incidental. "A movement necessary to a robbery may or may not be merely incidental to it. Lack of necessity is a sufficient basis to conclude a movement is not merely incidental; necessity alone proves nothing. [Footnote.]" (*James*, *supra*, 148 Cal.App.4th at p. 455.) While moving Gibson to a more secluded location may have aided Johnson in the commission of the robbery, and thus arguably may have been "necessary," this does not mean the movement was "incidental" to the robbery or that it did not increase the risk of harm from the crime. Johnson asserts that "[w]hatever harm Gibson was being exposed to and suffered in the bedroom was inherent in the robbery process," and that the force and fear applied to her in the bedroom were merely incidental to the robbery and did not substantially increase the risk of harm to her beyond that necessarily present in the robbery itself, but a reasonable fact-finder could reach the opposite conclusion on the evidence presented at trial.

Johnson finally argues that the distance he moved Gibson was much shorter than the distances the victims were moved in other cases in which the movement was deemed incidental. "Measured distance . . . is a relevant factor, but one that must be considered in context, including the nature of the crime and its environment." (*Dominguez*, *supra*, 39 Cal.4th at p. 1152.) More significant than the distance traveled is the nature of the movement. "Where movement changes the victim's environment, it does not have to be great in distance to be substantial." (*People v. Shadden* (2001) 93 Cal.App.4th 164, 169.) Johnson may have moved Gibson only an estimated eight to 10 feet, but he moved

her from an open space in her kitchen—a location where she could be observed from outside the front door—to her bedroom, which was largely concealed from view from the front of the house. This reasonably could be construed as a potentially dangerous change in environment. (See *id*. at p. 169 [jury reasonably could find that going from open area to a closed room nine feet away materially changed the rape victim's environment].) Johnson points out that the bedroom was not much more concealed or private than the kitchen, as a portion of that room could be seen from the front of the house, but only a small portion of the bedroom was visible from the front of the house, and that portion did not include Gibson's bed. The movement was sufficient to ensure that Gibson was no longer visible from the front of the house, and thus it reduced the likelihood of detection by others. The evidence was sufficient to permit a reasonable fact finder to conclude that Johnson committed kidnapping to commit robbery.

II. Presentence Custody Credits

The parties agree, as do we, that Johnson's presentence custody credits were incorrectly calculated. Johnson was awarded 1,472 days of actual credit, although the records indicate that he served 1,482 days prior to sentencing. He received 220 days of conduct credits, but under section 2933.1 he was entitled to 222 days of conduct credits. We modify the judgment accordingly.

III. Errors in the Judgment and Abstract of Judgment

Johnson has identified several errors in the judgment and abstract of judgment. First, although the jury acquitted Johnson on count 4, a charge of second degree commercial burglary, the court's minute order from May 4, 2016, records a verdict of guilty on that count. Second, although the trial court ordered no direct victim restitution, both the minute order from the sentencing hearing and the abstract of judgment include an order of direct victim restitution in the amount of $3.333.18. Finally, although the court orally pronounced an indeterminate sentence of 31 years to life for count 3, kidnapping to commit robbery, the abstract of judgment erroneously lists that sentence twice. The sentence is correctly set forth under item 6.c, as 31 years to life, and erroneously recorded under item 5 as a sentence of life with the possibility of parole.

When there is a discrepancy between the court's oral pronouncement and the minute order or abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) On remand, to correct these errors, the trial court shall modify the minute orders to state the correct verdict on count 4 and the proper restitution award, and also prepare a new abstract of judgment reflecting the actual restitution award ordered by the trial court and the correct sentence on count 3.

DISPOSITION

The judgment is modified to reflect 1,472 days of actual custody credits in addition to presentence credits in the amount of 222 days, for a total of 1,704 days of presentence custody credits. The trial court is directed to modify its minute orders and to prepare a corrected abstract of judgment in accordance with this opinion. The court shall forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.*

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