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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. PABLO MELENDEZ, Defendant and Appellant.	B230672 (Los Angeles County Super. Ct. No. BA356884)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephan Marcus, Judge. Affirmed in full with directions.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Marc A. Kohm and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Pablo Melendez, appeals the judgment entered following his conviction for kidnapping to commit child molestation, and lewd act on a child (2 counts), with prior serious felony conviction and Three Strikes findings (Pen. Code, §§ 207, subd. (b), 288, 667, subd. (a)-(i)).[1] Melendez was sentenced to state prison for a term of 88 years to life.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

a. *The current charges.*

Cynthia L. was 13 years old at the time of trial. She testified that in May 2009,[2] when she was 12 years old, she regularly spent her after-school hours with her friend Maria. Maria's mother would collect both girls at school, bring them to her house, and Cynthia's mother would pick her up later in the day. Defendant Melendez, who was almost 30 years old, lived with his family in a house behind Maria's house. At the request of Maria's mother, Cynthia and Maria sometimes went to Melendez's house on errands, e.g., to borrow ice or use the microwave. Cynthia never went to Melendez's house without Maria.

During one such visit to the back house, Melendez said Cynthia was pretty and asked if she had a boyfriend. Another time, he asked if she "was down to fuck with him." On one occasion, Melendez grabbed Cynthia's vagina through her clothing and squeezed it. Another time, Melendez grabbed Cynthia's chin and tried to kiss her on the mouth. Cynthia turned her face away and the kiss landed on her cheek.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] All further calendar references are to the year 2009 unless otherwise specified.

On another occasion, Melendez grabbed Cynthia's hand and pulled her into his bedroom, which was in a laundry room located off the kitchen. Asked to estimate the distance between Melendez's bedroom and where she had been standing in the kitchen, Cynthia pointed to a courtroom landmark which the trial court noted was "approximately . . . 13 to 15 feet away." Melendez pushed Cynthia into his bedroom and she fell onto the bed: "[A]fter that he was closing the door. He tried to lock it. That's when I actually jumped off of the bed, and I ran." When she tried to leave the bedroom, Melendez "was blocking the door" and "getting the door handle so I won't open it." Cynthia managed to push Melendez out of the way and run back into the kitchen, where she grabbed Maria and together they fled.

Melendez cautioned the girls that if they told anyone about what had happened he would do something to them or their families. Cynthia told someone at school about what happened and then she spoke to the police.

Maria, who was 12 years old at the time of trial, testified that the first time she visited Melendez's house she had gone by herself: "He told me to go inside his room, and I told him no." Another time, Melendez asked Maria if she took drugs, if she was a virgin, and whether she could "hook him up with Cynthia." Melendez said "if I hooked him up with Cynthia, he would give me stuff around holidays where no one could suspect something." Melendez also told Maria "that, if . . . I ever wanted to fuck, that he will be right there."

Maria was present when Melendez kissed Cynthia on the cheek and when he "touched her in the private." Maria expressly testified she saw Melendez touch Cynthia with his right hand "[i]n her private." Maria eventually related these events to people at school and then to her mother. She did not say anything right away because she was scared "[t]hat my mom will get mad and that he might do something to us."

Cynthia's mother Estela testified about the arrangement whereby Maria's mother would pick up Maria and Cynthia after school, take them to her house, and then Estela would pick Cynthia up later in the afternoon. On one of those rides home, Cynthia asked Estela "if I believed in the threats of cholos." Cynthia said she was frightened because someone had threatened her. She said this man "started to touch her and was kissing her and was fondling her body," and he said "if she spoke, that he was going to do something to us, that he had people outside that he could send." While relating this, Cynthia "was very nervous, very scared. She started to cry."

b. *The past sexual assault allegation.*

Angela R. testified that in 1994, when she was 14 years old, she was a runaway living on the streets. She knew Melendez as a classmate from school. They saw each other late one night as Angela was unsuccessfully trying to arrange for a friend to pick her up. Melendez suggested she try a better pay phone located near Hoover High School and Angela agreed. While waiting for her friend to call, Angela noticed her purse was missing. After pretending to help her look for it, Melendez acknowledged he had taken it. He then said, "I'm not going to give you your purse unless you fuck me." Angela said the purse wasn't that important and walked off. Melendez followed her, said he was only joking and returned the purse.

Melendez then said, "Well, what are you going to do? I know you don't have a place to stay now." He said his apartment complex was nearby and she could sleep there. He promised not to touch her. At the complex, Melendez showed her a place underneath a stairwell. Angela slept for a short time until Melendez returned and woke her up. Angela then started walking away from the apartment complex and Melendez followed her. He kept saying he wanted to fuck her, but Angela refused. Finally, Melendez said: "Well, put it this way. You have one option. . . . Either you're going to fuck me my way, the easy way; or two, I'm going to have to rape you. . . . What will it be?" When Angela again refused, Melendez said, "Fuck you, bitch," and started choking her with both hands. He ripped her shirt and her bra, pushed her to the ground, and raped her. Angela did not immediately go to the police because she was a runaway.

Detective Robert Zaun testified that on March 7, 1994, he was dispatched to take a rape report. Angela told him that on February 21, 1994, she had been raped and she took him to the crime scene. Zaun searched the area and found two buttons on the ground. Angela said they looked like the buttons that had been ripped from her shirt. Zaun subsequently compared the two buttons to the shirt Angela said she had been wearing that night and the buttons were identical.

The parties stipulated Melendez was never prosecuted for raping Angela.

2. *Defense evidence.*

Melendez's father testified his son had been living in his home in May 2009. There was a laundry room located right off the kitchen. A part of the laundry room had been turned into a sleeping area for Melendez. His father testified it was only a couple of feet from the laundry room to the "wash area" of the kitchen. He also testified there was no locking mechanism on the laundry room door.

Melendez's niece also lived with Melendez and his father. She occasionally socialized with Maria and Cynthia. About three weeks before Melendez's arrest on May 21, 2009, Cynthia wanted the niece to ask Melendez if he would be Cynthia's friend.

CONTENTIONS

1. The trial court erred by admitting evidence of Melendez's prior sexual offense against Angela.

2. The trial court erred by instructing the jury that evidence admitted as a "fresh complaint" could prove the truth of the matter asserted.

3. The trial court erred by admitting a police officer's report under the hearsay exception for past recollection recorded.

4. There was insufficient evidence to sustain the kidnapping conviction.

DISCUSSION

1. *Admission of prior sexual offense evidence.*

Melendez contends the trial court erred by admitting Angela's testimony about the 1994 rape. This claim is meritless.[3]

a. *Legal principles.*

Evidence Code section 1101, subdivision (a), provides that, in general, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." But there are exceptions to this general rule, one of which is covered by Evidence Code section 1108, subdivision (a): "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352."[4]

Evidence Code section 1108 allows propensity evidence "to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.)[5] "In a case in which a defendant is accused of a sexual offense, Evidence Code section 1108 authorizes the admission of evidence of a prior sexual offense to establish the defendant's

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[3] Because we conclude this testimony was properly admitted under Evidence Code section 1108, we do not reach the question whether it was also properly admitted under Evidence Code section 1101.

[4] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

[5] In a footnote, Melendez challenges the constitutionality of Evidence Code section 1108, even as he acknowledges the statute was upheld by *People v. Falsetta, supra,* 21 Cal.4th 903.

propensity to commit a sexual offense, subject to exclusion under Evidence Code section 352." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)

"To be admissible under Evidence Code section 1108, 'the probative value of the evidence of uncharged crimes "must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." [Citations.]' [Citation.] 'The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense. Other factors affecting the probative value include the extent to which the source of the evidence is independent of the charged offense, and the amount of time between the uncharged acts and the charged offense. The factors affecting the prejudicial effect of uncharged acts include whether the uncharged acts resulted in criminal convictions and whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses.' [Citation.] 'The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules.' [Citation.] [¶] We will only disturb the trial court's exercise of discretion under Evidence Code section 352 'when the prejudicial effect of the evidence clearly outweighed its probative value.' [Citation.]" (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.)

b. *Trial court's ruling.*

After hearing from Angela in camera, the trial court determined her testimony qualified under Evidence Code section 1108. The trial court reasoned:

"[T]he evidence of the 1994 case is extremely probative. For one thing, it does show the defendant has propensity [*sic*] to engage in conduct involving sexual crimes against women, younger women in particular, although obviously in 1994 he was about the same age [as the victim]. But I think it's not just the age. It's the vulnerability of the individual girls. And in the case of even 1994, that girl was sort of a homeless girl [*sic*]. . . . [I]t was clear she had nowhere to stay that night, and it seems clear to me that the defendant attempted to take advantage of those particular facts. [¶] . . . [¶] And I find it interesting that in each of the situations, both in 1994 and in the present circumstance, the

defendant sort of had a game plan in which he attempted to sort of wear down the individual, attempted to . . . repeatedly seek the sexual favors that he was after and do so in a certain manner by asking and saying he was going to do it and so forth. So I think in both situations what comes out to the court is he took advantage of vulnerable females, and the thing that he did involved matters of a sexual nature.

"Now, I do agree with the defense that the fact that the charge is more serious and that it was a completed act of rape and that it was never filed are certainly issues that the court can consider in terms of prejudicial value and in weighing the [Evidence Code section] 352 issue. However, my response to that is, as the People have pointed out, it appears that in considering 1108 evidence it can be more serious than the present offense. [¶] And even that is arguable. While one could say a completed rape is certainly a very serious offense, one could similarly argue that attempting to commit lewd acts on a child this age when you're 30 years old and attempting to possibly – although I don't know how sure we can be of that – but to attempt to rape a young girl, that some people might argue that's actually more serious because of the child's age than a completed rape against someone approximately their own age. . . . [S]o I find the probative value outweighs the prejudicial value, and under a 352 analysis, I should allow this evidence in. It's very significant evidence. It complies with the 1108 statute."

c. *Discussion*.

Evidence showing Melendez had raped Angela was relevant to the question of whether he committed the charged offenses against Cynthia. "[T]he clear purpose of section 1108 is to permit the jury's consideration of evidence of a defendant's propensity to commit sexual offenses." (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1164.) As for the bar of Evidence Code section 352, we agree with the Attorney General "the record demonstrates that the trial court understood and fulfilled its responsibilities under Evidence Code section 352. . . . After [hearing the parties'] arguments, the trial court expressly weighed the relevant factors, articulated its findings, and ruled on the motion."

" '[W]hen an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers "substantially outweigh" probative value, the objection must be overruled. [Citation.] On appeal, the ruling is reviewed for abuse of discretion.' [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008.) " 'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is . . . "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' " (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) This prejudice "applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual . . . ." (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

Melendez contests the trial court's "vulnerable young girls" analysis: "While Angela was alone late [at] night and vulnerable at the time of her attack, Cynthia was always accompanied by Maria when she went to the back house including during the alleged offenses." But this ignores the added vulnerability arising from the age difference between Melendez and Cynthia, as well as Melendez's attempt to increase that vulnerability by taking her into his bedroom and thereby separating her from Maria.

We cannot say the trial court abused its discretion by reasoning a jury might not find a completed sexual assault by one 14-year-old on another to be flagrantly more serious than a 30-year-old's attempted sexual assault on a 12-year-old. (See, e.g., *People v. Kipp* (1988) 18 Cal.4th 349, 372 [risk of prejudice "was not unusually grave" where the prior "crimes were not significantly more inflammatory than the [current] crimes"].) Moreover, Angela testified as an adult, not as a child, and her testimony was not particularly inflammatory. Nor are we concerned that Angela's rape was committed about 15 years before the charged offenses. Courts have held that longer periods of time were not too remote. (See *People v. Robertson* (2012) 208 Cal.App.4th 965, 992 [34 years]; *People v. Branch* (2001) 91 Cal.App.4th 274, 284 [30 years]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [18-25 years].)

The trial court carefully weighed the Evidence Code section 352 factors before admitting Angela's testimony. We cannot say the trial court's decision to admit this

evidence was an abuse of discretion. (See *People v. Robertson, supra,* 208 Cal.App.4th at p. 991 ["challenge to admission of prior sexual misconduct under Evidence Code sections 1108 and 352 is reviewed under the deferential abuse of discretion standard"].)

2. *Fresh complaint evidence.*

Melendez contends the trial court erred by instructing the jury that evidence of the "fresh complaints" Cynthia made to her mother and Officer Dacia Thompson could be considered for the truth of the matters asserted. The Attorney General acknowledges this jury instruction was incorrect, but argues the error was harmless. We agree with the Attorney General.

a. *Legal principles.*

As the Attorney General concedes, the trial court erred by telling the jury it could consider fresh complaint evidence for the truth of the matter asserted.

"[P]roof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose – namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others – whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred." (*People v. Brown* (1994) 8 Cal.4th 746, 749-750.)

"[E]vidence of a victim's conduct following the alleged commission of a crime, including the circumstances under which he or she did (or did not) promptly report the crime, frequently will help place the incident in context, and may assist the jury in arriving at a more reliable determination as to whether the offense occurred. When introduced for that purpose, evidence of the circumstances surrounding a victim's reporting or disclosure of an alleged crime clearly falls within the bounds of 'relevant evidence,' i.e., evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' (Evid. Code, § 210.) [¶] Of course, only the fact that a complaint was made, and the circumstances surrounding its making, ordinarily are admissible; admission of evidence concerning

details of the statements themselves, to prove the truth of the matter asserted, would violate the hearsay rule. [Citation.]" (*People v. Brown, supra,* 8 Cal.4th 760.) "[I]n light of the narrow purpose of its admission, evidence of the victim's report or disclosure of the alleged offense should be limited to the fact of the making of the complaint and other circumstances material to this limited purpose." (*Id*. at p. 763.)

b. *Error was harmless.*

Melendez argues the trial court's erroneous fresh complaint instruction was prejudicial because the case was so close. We disagree.

This kind of error has been found harmless where the fresh complaint testimony is merely cumulative. (See *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1526 [erroneous admission of fresh complaint evidence without restriction was harmless: "Ana testified about the rape at trial. Thus the jury did not have to rely solely on secondhand statements she made to third parties. Rather, it had the opportunity to hear from Ana directly and to judge her credibility. The statements Ana made to Guzman, Mujica, and Galvan were merely cumulative to Ana's testimony at trial."]; see also *People v. Manning* (2008) 165 Cal.App.4th 870, 880-881 [even if trial court erred by failing to give fresh complaint limiting instruction,[6] error would have been harmless because victim "testified at trial, and the jury did not have to rely on her secondhand statements to other people, but was able to hear her directly and judge her credibility. Her fresh complaint statements were consistent with and cumulative to her trial testimony."].)

Here, the fresh complaint evidence was obviously cumulative. Cynthia herself took the stand and testified Melendez made sexual comments to her, grabbed her vagina,

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[6] "Because of the limited purpose for which the out-of-court statements of victims may be admitted as fresh complaints, past cases have held that the trial court upon request must instruct the jury to consider such evidence only for the purpose of establishing that a complaint was made, so as to dispel any erroneous inference that the victim was silent, but not as proof of the truth of the content of the victim's statement. [Citations.]" (*People v. Brown*, *supra*, 8 Cal.4th at p. 757.)

tried to kiss her on the mouth, and pushed her into his bedroom. Cynthia also testified Melendez threatened to hurt her and her family if she said anything about what happened. Thus, the jury did not have to rely on Cynthia's secondhand statements to her mother or to Officer Thompson, but was able to hear her testimony directly and judge her credibility accordingly. Moreover, this evidence was directly corroborated by Maria's testimony that she saw Melendez kiss Cynthia and touch her vagina.

The inculpatory evidence in this case was overwhelming and the defense put on by Melendez was entirely ineffectual. The niece's testimony that Cynthia wanted to be Melendez's friend was hardly damning because that occurred some three weeks *before* the alleged crimes. The father's testimony about the distance from the kitchen wash area to Melendez's bedroom did not necessarily contradict Cynthia's testimony about the distance from Melendez's bedroom to where in the kitchen she had been standing.[7] That Cynthia might have mistakenly believed Melendez was trying to lock the laundry room door, when he was twisting the door handle to keep the door closed, did not undermine Cynthia's credibility.

We conclude the trial court's erroneous fresh complaint instruction could not have affected the verdict in this case.

3. *Past recollection recorded.*

Melendez contends the trial court erred by admitting certain testimony from Officer Thompson under the hearsay exception for past recollection recorded (Evid. Code, § 1237). This claim is meritless.

a. *Background.*

During Cynthia's direct examination, she never provided specific dates for any of the acts allegedly committed by Melendez. The prosecutor did not ask for any specific

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[7] The prosecutor asked Cynthia: "And so how far is his room from the kitchen? And you can point to a place in the courtroom. Like, *if you're where you were in the kitchen, that's where you're sitting, point to a place in the courtroom that's as far as where you were to where his room is*." (Italics added.)

dates and Cynthia did not volunteer any. On cross examination, defense counsel did suggest specific dates that Cynthia immediately agreed to, starting with May 16 as the first time she visited Melendez's house: "Q. Do you remember particularly that May 16th was the day that you went over to Maria's, and both you and Maria went to [Melendez's] house? [¶] A. Yes." Cynthia testified this was the occasion on which Melendez told her she looked pretty, that this was the first of four trips she made to his house on May 16, and that on the third trip Melendez grabbed her vagina. Defense counsel subsequently asked: "[A]s you sit here today, do you recall specifically that his taking your hand and leading you into his bedroom occurred on that first day we're talking about, the 16th, or could it have been the second day, the 17th? [¶] A. I think the second day." Defense counsel asked: "Do you recall how many times you went to his home on that second day, the 17th?" Cynthia answered "Once."

When Officer Thompson was later called to the stand, the trial court interrupted her testimony, called for a bench conference, and said to the prosecutor: "I thought you were putting [Thompson] on to get . . . the dates better or something because [Cynthia] seemed to be completely confused in her memory. She seemed to have memory problems about when this occurred, how many times she visited with this individual, and what dates it occurred. [¶] She was already clear about what happened. In fact, at the time, I said to myself, 'Well, it's true she doesn't seem to know the order in which things happened and all, but she's very clear about what did happen.' So I'm not going to allow [Thompson] to testify about past recollection recorded."

But then the following colloquy occurred:

"[The prosecutor]: [Officer Thompson] will testify . . . that Cynthia told her on May 13th she went over to [Melendez's] house to get ice with Maria, that he grabbed her on her private area over her clothing. He grabbed her by her right arm, led her into the bedroom, threw her on the bed. She jumped off the bed, and [Melendez] locked the door. [¶] Based on your ruling, I think you're saying Cynthia gave us that information with the exception of the date; so how shall I just –

"The Court: Actually, now that I've heard it, because it's not clear about when that event occurred, you can actually connect those two. I'm sort of changing myself mid-stream here, but you can bring out that on May 13th that's what she said happened *because it's not clear from her testimony she had any idea what the date was. And, actually, when the defense counsel questioned her, I did notice [Cynthia] just agreed with whatever he said, whatever date he used, but she didn't know the date*." (Italics added.)

Trial resumed and Thompson read from her police report as follows: "The victim stated that on 5/13/09 at approximately 1415 hours, she and her friend, witness [Maria], went to the rear house to ask . . . for some ice. The victim stated that the suspect was standing in the front porch. The girls asked the suspect if they could have some ice, and he stated it was okay for them to go inside to retrieve it. [¶] When the two girls stepped inside, the suspect told the witness . . . to go get the ice from the kitchen. The witness went to the kitchen to get the ice, and that is when the suspect grabbed the victim from behind and grabbed both her hands and stated, 'Are you down to fuck with me?' [¶] The victim stated that she attempted to get away but the suspect would not let go and continued – " At this point, defense counsel interrupted with an objection and the trial court ruled: "I'm going to sustain it. I think we've clearly crystallized the date and stuff."

b. *Discussion*.

Evidence Code section 1237 provides:

"(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, *the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately*, and the statement is contained in a writing which:

"(1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;

"(2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;

"(3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

"(4) Is offered after the writing is authenticated as an accurate record of the statement.

"(b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party." (Italics added.)

Melendez contends Thompson's testimony was improper because the "insufficient present recollection" element was missing: "Cynthia testified fully to the events at issue and had a sufficient independent recollection of the facts without resort to Thompson's recounting of her interview." But while this was true regarding the sexual acts committed by Melendez, it was not true regarding when precisely those acts occurred. As the trial court pointed out, Cynthia obviously did not remember on what particular days of the month the alleged assaults had occurred. Cynthia's testimony during the prosecutor's direct examination avoided the calendar issue entirely, and then on cross examination Cynthia readily agreed to whatever dates defense counsel suggested. This cross examination testimony, if left unimpeached, would have damaged Cynthia's credibility because May 16 was a Saturday and May 17 was a Sunday, which contradicted her assertion the visits to Melendez's house had taken place *after school*. Hence, the point of introducing the police report was that it pinned down the events as having occurred on May 13, 2009, in the middle of a school week.

Melendez complains the May 13 date appears at the very outset of the police report, yet Thompson was allowed to continue reading other parts of the report which "pertain[ed] to the very same details Cynthia recounted in her previous testimony." However, the trial court sustained defense counsel's objection as soon as it was made and Thompson did not reference any of Cynthia's statements describing the specific illegal acts for which Melendez was on trial.

The past-recollection-recorded hearsay exception requirements were satisfied and the evidence was properly admitted.

4. *Sufficient evidence of kidnapping*.

Melendez contends his kidnapping conviction must be reversed because there was insufficient evidence to prove the asportation element of that crime. This claim is meritless.

a. *Legal principles.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that 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. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

The reviewing court is to presume the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Ochoa, supra,* 6 Cal.4th at p. 1206.) Even if the reviewing court believes the circumstantial evidence might be reasonably

reconciled with the defendant's innocence, this alone does not warrant interference with the trier of fact's verdict. (*People v. Towler* (1982) 31 Cal.3d 105, 118.) It does not matter that contrary inferences could have been reasonably derived from the evidence. As our Supreme Court said in *People v. Rodriguez*, *supra*, 20 Cal.4th 1, while reversing an insufficient evidence finding because the reviewing court had rejected contrary, but equally logical, inferences the jury might have drawn: "The [Court of Appeal] majority's reasoning . . . amounted to nothing more than a different weighing of the evidence, one the jury might well have considered and rejected. The Attorney General's inferences from the evidence were *no more inherently speculative* than the majority's; consequently, the majority erred in substituting its own assessment of the evidence for that of the jury." (*Id*. at p. 12, italics added.)

Melendez's jury was told it had to find the following elements in order to convict him for the crime of kidnapping for the purpose of committing child molestation (§ 207, subd. (b)): "To prove that the defendant is guilty of this crime, the People must prove that the defendant persuaded, hired, enticed, decoyed, or seduced by false promises or misrepresentations a child younger than 14 years old to go somewhere; when the defendant did so, he intended to commit a lewd or lascivious act on the child; and as a result of the defendant's conduct, the child then moved or was moved a substantial distance. [¶] As used here, substantial distance means more than a slight or trivial distance. The movement must have substantially increased the risk of physical or psychological harm to the person beyond that necessarily present in the molestation. In deciding whether the movement was sufficient, consider all the circumstances relating to the movement."

b. *Discussion*.

Melendez contends his kidnapping conviction must be reversed because there was insufficient evidence to sustain the asportation element. He argues "the asportation of Cynthia a few feet into an adjacent bedroom but still within earshot of her friend Maria did not satisfy the elemental components of 'substantial distance.' " Melendez points out that, although Cynthia estimated the distance was between 13 and 15 feet, and although

she testified Melendez tried to lock the door, according to Melendez's father there was no lock and the "bedroom door was just a couple of feet from the wash area adjacent to the kitchen." Hence, "there is insufficient evidence that the relatively brief movement of Cynthia . . . removed her from public view to a secluded area or in any other manner *substantially* increased the risk, beyond that inherent in the commission of the underlying offense of lewd conduct . . . ."

We disagree.

California case law formerly provided that "the 'actual distance' the victim was moved was the sole factor for determining whether the evidence showed asportation for purposes of simple kidnapping. [Citations.] The rationale was that, because simple kidnapping entails no underlying crime, 'the victim's movements cannot be evaluated in the light of a standard which makes reference to the commission of another crime.' [Citation.] [¶] [However, this case law was overruled by *People v. Martinez* (1999) 20 Cal.4th 225] to the extent it 'prohibited consideration of factors other than actual distance' [citation] because 'limiting a trier of fact's consideration to a particular distance is rigid and arbitrary, and ultimately unworkable' [citation]. *Martinez* established a new asportation standard for simple kidnapping – one that took into account 'the "scope and nature" of the movement . . . , and any increased risk of harm' – thereby bringing the standard closer to the one for aggravated kidnapping. [Citation.] *Martinez* required a jury to 'consider the totality of the circumstances' in deciding whether a victim's movement is substantial. [Citation.] 'Thus, in a case *where the evidence permitted*, the jury might properly consider not only the actual distance the victim is moved, but also such factors as 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.' [Citation.]" (*People v. Bell* (2009) 179 Cal.App.4th 428, 436.)

As a consequence of this new interpretation of section 207's asportation element, the actual distance traveled by a victim is no longer the sole relevant factor. Hence, in *People v. Morgan* (2007) 42 Cal.4th 593, our Supreme Court noted that after *Martinez* it would be entirely proper for a prosecutor to deliver the following closing argument: "[W]hat constitute[s] a 'substantial distance' 'is a question of fact for you,' and . . . '[n]o one is going to tell you a particular number of feet is a kidnapping. We don't say 20 feet is a kidnapping, 40 feet, three miles. It is a juror's determination as to whether or not that distance is slight or trivial, or whether or not it is substantial.' " (*Id*. at p. 608.)

Here, a reasonable jury could have concluded Melendez not only substantially increased the risk of physical harm to Cynthia by taking her into his bedroom and closing the door, but that he also substantially increased the risk of psychological harm by cutting Cynthia off from Maria.[8]

There was sufficient evidence to sustain the asportation element of kidnapping.

5. *Abstract of judgment must be corrected.*

Although unremarked upon by the parties, the abstract of judgment contains a clerical error because it reflects a kidnapping conviction for having violated section 209, rather than a kidnapping conviction for having violated section 207. Accordingly, we will order the trial court to correct the abstract. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [it is proper and important to correct errors and omissions in abstracts of judgment]; *In re Candelario* (1970) 3 Cal.3d 702, 705 ["It is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts. . . . The court may correct such errors on its own motion or upon the application of the parties."].)

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[8] Melendez himself acknowledges this point when he writes in his appellate brief: "As the prosecutor stated during her closing argument: Maria and Cynthia were on the 'buddy system.' Because Maria had been the recipient of provocative comments from appellant in the past, she would never go to appellant's house alone. Similarly, Cynthia testified that she never went to appellant's house without being accompanied by Maria."

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.