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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. RAYMOND SHERMAN et al., Defendants and Appellants.	B263502 (Los Angeles County Super. Ct. No. BA406798)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant Raymond Sherman.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant Everett Allen.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant Troy Hammock.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Victoria B. Wilson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Raymond Sherman, Troy Hammock and Everett Allen were convicted of various crimes, including robbery, stemming from an after-hours takeover of a Nordstrom Rack during which 14 employees were held. Defendants appeal their convictions and contend, among other things, that the prosecutor committed misconduct by asking "were they lying" questions. Defendant Sherman, unlike the other defendants, was also convicted of forcible rape, forcible oral copulation and aggravated kidnapping, and he raises several contentions regarding those convictions. We reject these and defendants' other contentions regarding sentencing errors and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

A. *The prosecution's case*

1. The robberies, assault and sexual assaults at Nordstrom Rack

Nordstrom Rack is a large department store in the Howard Hughes Center located off the 405 Freeway. From 2003 to 2006, defendant Sherman worked there as a loss prevention agent. Defendant Allen, who is Sherman's brother, also worked at that store between 2006 and 2007. There are two ways to enter or exit Nordstrom Rack: through the front public entrance and through the third floor employee exit, which leads directly to the parking structure. There is a long, nonpublic hallway off the employee

exit which leads to a "cash room," store manager's room, coffee room and employee restroom.[1]

On the night of January 10, 2013, fourteen people were working at the store: Rochelle Evans, Kameron Davie, Buelynn Sullens, Rachel Klewicki, Aida Mendoza, Priscilla Hernandez, Sean Davis, Luisa "Janet" Bautista, Yoselin Jacinto, Jennifer Cabrera, Dorian McCoy, Laneisha Williams, Nancy Gutierrez, and Rhonda A.

The store closed at 10:00 p.m. The employees commenced with their closing procedures, which included putting money into the safe located in the cash room, which was locked with a key pad.

Once the employees were done with their closing routine, they lined up at the employee exit at 11:00 p.m. Williams armed the store alarm. When one of the employees opened the exit door, Sherman rushed in with a gun and a knife. Allen and Hammock also entered.[2]

Sherman told the employees to lie facedown on the ground and not to "fucking" look at them. Sherman kicked Davie. The employees were ordered to strip down to their underwear, then ushered into the employee restroom and made to stand facing the

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[1] The employee restroom is about half the size of the jury box but deeper in width.

[2] Although the men wore some kind of head or face coverings, employee Davis identified Allen and Hammock as the men with Sherman. Davis said that one man (not Sherman) wore a "stocking cap." According to Davis, Allen also had a gun. Employees Evans and Hernandez heard one man call, " 'Hey, E.' " Bautista heard someone refer to "E," or "G" or "D."

wall. They were told they would be shot or killed if they did not comply.

One man demanded, " 'Who is L.P?' " (loss prevention). When Williams identified herself, someone kicked her. A knife was put to her back, and she was taken to disarm the store alarm.

Sherman also wanted someone to open the cash room and its safe. Sherman pointed at Sullens and said, " 'You, you can,' " and took her to the cash room. After she entered the code, Hammock went into the room with her. When Sullens had trouble opening the safe, Sherman warned her to open it on the count of five or he would " 'start shooting people and it will be on you.' " Sullens managed to open the safe.

Initially, two employees, Bautista and Jacinto, hid in the locker room. Bautista called her husband and told him to call 911. She secreted her phone inside her bra. On discovering Bautista and Jacinto, Allen grabbed Bautista by her hair and fondled her breast. He took her phone and asked if she'd called " 'the cops, bitch?' " She denied it, but he stuck a knife to the back of her head, leaving a puncture wound, and told her she was going to die. Allen "bashed" her head against the doorway. One man "kept on saying, 'Just kill them. Just kill them. They called the cops.' "

Jacinto and Bautista were taken into the hall and told to face the wall. Sullens was pushed into the hall and fell. When Bautista tried to help Sullens, Allen kicked Bautista and said, " 'No one told you to help her, bitch. Stop trying to be a hero.' " Allen told Bautista she would be the first to die, and he hit her with the gun all over her face, neck and shoulders. Allen told Bautista to " '[g]et ready to die, bitch,' " and he put the gun to her

head. Bautista, Jacinto and Sullens were taken into the restroom with the others.

At some point, Sherman took employee Rhonda from the restroom to look for Williams's purse, where Williams had said she put the loss prevention office keys. Rhonda retrieved the keys and gave them to Sherman. Sherman then took her to the loss prevention office. They went through a "combination door" into the stock room, through the stock room, through double doors, and across the sales floor. Sherman unlocked the door to the loss prevention office and led Rhonda to the darker portion of the room. Unbuckling his pants, he asked if she wanted to die. Sensing what was coming, she replied, " 'I'd rather die.' " Sherman raped Rhonda and forced her to orally copulate him, ejaculating into her mouth.[3] After, she heard him breaking "some machines." Sherman returned Rhonda to the restroom with the others. Crying and hysterical, she told them she had been raped. She had semen on her leg, which she wanted to wash off, but the others told her not to.[4]

The employees waited in the small restroom. After not hearing anything for some time, Davie left the restroom and called 911. Police came in to get the employees at 3:00 a.m.

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[3] The next day, Rhonda had a SART examination. Rhonda had some superficial lacerations to her external genital area. The physical examination was consistent with the history Rhonda gave, although the nurse could not say the lacerations resulted from a forceful sexual act.

[4] DNA analysis confirmed that Sherman's semen was on Rhonda's leg and the carpet in the loss prevention office.

2. The investigation

Bautista's husband called the police. He went to Nordstrom Rack, where he waited outside. Officer Joseph Rooney first responded to the scene. He saw a white Ford Explorer backed into a parking space near the employee exit and heard it start. The driver ignored an officer's order to stop. Three people were in the car, but Officer Rooney could only identify Sherman.

Meanwhile, Bautista's husband was monitoring the location of Bautista's phone. At some point, her phone was no longer at the store; it was in Culver City, at Globe Avenue and Washington. At approximately 2:00 a.m., officers went to that location, where they found the Explorer parked sideways in a driveway. They found latex gloves, a knit cap and black ski mask with a visor in the car. Three $20 bills were on the street to the side of the car and, scattered throughout the area, officers found, among other things, cell phones, latex gloves, a knife, a gun registered to Sherman, and, next to the gun, a loaded magazine.

While securing the area around the Explorer, officers discovered defendant Hammock and Rochelle Sherman[5] (defendants Sherman's and Allen's sister) walking in the area. Hammock had nothing on him. During the patdown, Rochelle got a phone call from "Ray."

The Explorer used in the crimes belonged to Everesha Allen, another sister of defendants Sherman and Allen, and defendant Hammock's girlfriend. The night after the robbery, detectives interviewed Everesha and she told them the following:

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[5] To avoid confusion, we refer to members of defendants Sherman's and Allen's family by their first names.

she had let Sherman borrow the Explorer the previous night.[6] Sherman, Allen, Hammock and Im'Unique Sherman (Rochelle's daughter and Sherman's niece) went to Sherman's house so that Im'Unique could babysit Sherman's children. Later, at approximately 11:30 p.m., Hammock called Everesha and asked her to pick him up in Culver City. Everesha and Rochelle went to pick up Sherman and Allen, using Rochelle's car. At some point, Everesha, Rochelle, Im'Unique and Hammock returned to get the Explorer, but they did not have the car keys. Hammock and Rochelle got out of the car and went to look for street signs, so they could give their location to AAA.

On January 12, 2013, officers arrested Allen, who was with his fiancée, Paula Bradley, at a hotel on Western Avenue. Officers recovered approximately $3,718, some of which was hidden under the carpet and in the toilet, from the room and Allen's person.

Sherman was also arrested on January 12, 2013, at a bus station in Arizona. He had $3,112 in cash and two cell phones.

Almost $10,000 in cash and $5,000 in checks were taken from Nordstrom Rack.

An analysis of cell phone records showed that on the night of the robberies, from approximately 10:00 p.m. to 10:16 p.m., cell phones associated with defendants were either at or near Nordstrom Rack. The last calls made at or near Nordstrom Rack were at approximately 11:18 p.m., and then the phones travelled down the 405 Freeway.

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[6] However, Everesha testified that she did not let anyone borrow her car on January 10, 2013 and indeed had reported it stolen.

Bautista identified Allen from a photographic six-pack. She did so on the basis of his eyes, because he wore a bandana during the robbery.

DNA from items recovered from the Explorer (e.g., the black knit mask and baseball cap) matched Allen's DNA profile. A palm print on the outside driver's side rear door of the Explorer matched Hammock's print.

B. *Sherman's testimony*

Sherman testified in his defense. He admitted to committing the robberies, but he denied that Allen and Hammock were involved. Sherman claimed instead that he had committed the robberies with "Nendel" or "Nadell" Dowers, a homeless crackhead, and Troy Starks. Only Sherman had a gun that night, and it was unloaded. However, he let Dowers and Starks use the gun during the robbery. Sherman also gave his brother Allen's cell phone to Starks to use.

Sherman also denied raping Rhonda. Instead, he claimed that he and Rhonda were in cahoots. In January 2013, he saw Rhonda at the Howard Hughes Center, introduced himself, and she said her name was "Vera." Over four meetings and phone calls, they concocted the robbery scheme, and they also talked about her suing Nordstrom Rack for assault.[7] When Sherman talked to Rhonda over the phone, he used a prepaid cell phone, which he lost the night of the robbery. Rhonda told him that an older, White lady with blonde hair could open the safe. During the robbery, when he took Rhonda to the loss prevention office, his plan was to disable the surveillance equipment. Because

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[7] Rhonda did file a civil lawsuit against the Howard Hughes Center.

Sherman was worried that Bautista had called the police, Rhonda voluntarily orally copulated him to calm him down.

Sherman, Dowers and Starks drove the Explorer to Culver City and left it near Globe Street. Dowers left with the money. Starks and Sherman hid in the area, afraid that police officers were looking for them. Sherman hid the gun, not wanting to get caught with it. He had no idea how the magazine could have been recovered with the gun, because the gun was unloaded and his magazines were at his house.

Sherman called his sister, Rochelle. He did not call anyone from his brother Allen's phone, although Sherman had retrieved that phone from Starks. Sherman got on a bus to Dallas.

C. *Hammock's defense*

Hammock introduced the testimony of an eyewitness identification expert. He also introduced evidence that Sullens was unable to identify him from a photographic line-up three days after the robbery.

II. Procedural background

Sherman, Hammock and Allen were jointly tried for crimes arising out of these events. On March 6, 2015, a jury found them guilty of the following offenses and allegations.

A. *Sherman*

Sherman was convicted of: count 2, forcible rape (Pen. Code, § 261, subd. (a)(2)),[8] with true findings on enhancement allegations (§ 667.61, subds. (a) & (d), (a) & (e), (b) & (e))[9]; count

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[8] All further undesignated statutory references are to the Penal Code.

[9] The jury acquitted Sherman of count 1, forcible rape (§ 261, subd. (a)(2)).

3, forcible oral copulation (§ 288a, subd. (c)(2)(a)), with true findings on enhancement allegations (§ 667.61, subds. (a) & (d), (a) & (e), (b) & (e)); count 4, kidnapping to commit rape (§ 209, subd. (b)(1)) with a true finding on a gun allegation (§ 12022.53, subd. (b)); and counts 5-18, second degree robbery (§ 211), with true findings on gun allegations (§§ 12022, subd. (a)(1), 12022.53, subd. (b)).

B. *Hammock*

Hammock was convicted of counts 5-18, second degree robbery (§ 211) with true findings on gun allegations (§ 12022, subd. (a)(1)).

C. *Allen*

Allen was convicted of: counts 5-18, second degree robbery (§ 211) with true findings on gun allegations (§ 12022, subd. (a)(1)) as to counts 5, 6, and 9-18 and true findings on personal gun use allegations (§ 12022.53, subd. (b)) as to counts 7 (Jacinto), 8 (Davis) and 18 (Bautista); and of count 19, assault with a deadly weapon (§ 245, subd. (a)(1), Bautista).

D. *Sentencing*

Defendants were sentenced on April 8, 2015. After a court trial on prior conviction allegations, the trial court found that Sherman and Hammock each had a prior conviction within the meaning of the "Three Strikes" law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)).

The court denied Sherman's *Romero*[10] motion. The court imposed consecutive sentences on Sherman as follows: count 5, the midterm of three years doubled due to the prior strike to six

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[10] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

years, plus 10 years (§ 12022.53, subd. (b)), plus one year stayed (§ 12022, subd. (a)(1)), counts 6-18, one year doubled to two years, plus three years four months each (§ 12022.53, subd. (b)), plus four months stayed (§ 12022, subd. (a)(1)); count 2, 25 years to life doubled to 50 years to life (§ 667.61, subds. (a) & (d)), plus 50 years to life stayed (§ 667.61, subds. (a) & (e)), plus two terms of 30 years to life, each stayed (§ 667.61, subds. (b) & (e)); count 3, 25 years to life doubled to 50 years to life consecutive to count 2 (§ 667.61, subds. (a) & (d)), plus 50 years to life stayed (§ 667.61, subds. (a) & (e)), plus two terms of 30 years to life, each stayed (§ 667.61, subds. (b) & (e)); and count 4 (stayed), life plus 10 years (§ 12022.53, subd. (b)). Sherman's total sentence therefore was 100 years to life plus 85 years four months.

The trial court imposed consecutive sentences on Allen as follows: count 7 (base term), the midterm of three years, plus 10 years (§ 12022.53, subd. (b)), plus one year stayed (§ 12022, subd. (a)(1)), count 5, one year, plus four months (§ 12022, subd. (a)(1)); count 6, one year, plus four months (§ 12022, subd. (a)(1)); count 8, one year, plus three years four months (§ 12022.53, subd. (b)), plus four months stayed (§ 12022, subd. (a)(1)); counts 9-14, one year each, plus four months each (§ 12022, subd. (a)(1)); counts 15-17, one year each, plus four months each (§ 12022, subd. (a)(1)); count 18, one year, plus three years four months (§ 12022.53, subd. (b)), plus four months stayed (§ 12022, subd. (a)(1)); and count 19, one year. Allen's total sentence was 37 years four months in prison.

As to Hammock, the trial court selected the high term for the base term because Hammock was on parole when he committed the robberies. The court imposed consecutive sentences as follows: count 5, the high term of five years doubled

based on the prior strike to 10 years, plus one year (§ 12022, subd. (a)(1)); and counts 6-18, one year doubled to two years each, plus four months each (§ 12022, subd. (a)(1)). Hammock's total prison sentence therefore was 41 years four months.

DISCUSSION

I. Exclusion of Sherman's statements to the police about the alleged plan with Rhonda

At his arrest, Sherman told detectives that he and Rhonda were accomplices and that he did not sexually assault her. The trial court excluded this statement, rejecting Sherman's theory that the evidence was admissible as a prior consistent statement. Sherman contends that his statements, which he concedes were hearsay (Evid. Code, § 1200), were admissible under Evidence Code section 791. Under the applicable abuse of discretion standard of review (*People v. Kopatz* (2015) 61 Cal.4th 62, 85; *People v. Waidla* (2000) 22 Cal.4th 690, 717), we reject that contention.

Evidence Code section 791, in combination with Evidence Code section 1236,[11] "makes evidence of a witness's prior

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[11] Evidence Code section 1236 provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791."

Evidence Code section 791 provides:

"Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

consistent statement admissible if it is offered after an 'implied charge has been made that [the witness's] testimony at the hearing is recently fabricated . . . and the statement was made before the . . . motive for fabrication . . . is alleged to have arisen.' " (*People v. Brents* (2012) 53 Cal.4th 599, 615.) The exception thus has a "temporal" requirement. (*Id.* at p. 616.) That is, the prior consistent statement must be made *before* the existence of any one of the motives to lie. (*People v. Noguera* (1992) 4 Cal.4th 599, 628; *People v. Hillhouse* (2002) 27 Cal.4th 469, 492.)

Sherman cannot satisfy the temporal requirement. His statement to detectives on January 12, 2013 (when he was arrested) postdated his motive to lie about the sexual assault. His motive to lie arose at the time he committed the crimes on January 10. And it undoubtedly arose at the moment he was arrested. Indeed, Sherman admits that "some motive to exonerate himself of the sexual offense charges existed as early as the commission of the crimes." But he suggests that an "even greater motivation arose" when he was arrested and the rape charges were filed, thereby exposing him to multiple life prison terms. Other than making this bare assertion in his opening

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"(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or

"(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

brief on appeal, Sherman points to no evidence in the record of such a "motivation." (See, e.g., *People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 491-492 [defendant implied at trial that plea agreement provided an additional motive; prior consistent statement admissible].)

In any event, Sherman parses "motive" too finely. His *incentive* to lie might have increased when charged with rape, but his *motive* to do so was no different than when he committed the crimes. There was but one motive and it arose before he made the statements to detectives. The statement therefore was not admissible under Evidence Code sections 791 and 1236.

II. Aggravated kidnapping

Sherman contends that his conviction for aggravated kidnapping should be reversed because (1) the aggravated kidnapping statute (§ 209, subd. (b)) is void for vagueness, and (2) there is insufficient evidence to support the asportation element of the crime. We reject both contentions.

A. *Void for vagueness*

Sherman contends that recent United States Supreme Court authority, *Johnson v. U.S.* (2015) 135 S.Ct. 2551 (*Johnson*), changed the law regarding void-for-vagueness challenges to criminal statutes, and, under this "new" law, the aggravated kidnapping statute (§ 209, subd. (b)(2)), is unconstitutionally vague. We disagree.

Johnson did not change the law concerning "void for vagueness" challenges to criminal statutes. That law is well-settled. (See generally *Kolender v. Lawson* (1983) 461 U.S. 352, 357-358.) *Johnson* merely applied those principles to the Armed Career Criminal Act of 1984 (18 U.S.C. § 924). That act imposed a more severe punishment on a defendant convicted of being a

felon in possession of a firearm if the defendant had three or more prior convictions for a " 'violent felony.' " The act's "residual clause" defined "violent felony" to include any felony involving " 'conduct that presents a serious potential risk of physical injury to another.' " (*Johnson*, *supra*, 135 S.Ct. at pp. 2555 & 2556.)

Johnson held the residual clause unconstitutionally vague for two reasons. First, it leaves "grave uncertainty about how to estimate the risk posed by a crime," since it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." (*Johnson*, *supra*, 135 S.Ct. at p. 2557.) Second, the clause provides no guidance as to how much risk is necessary to qualify as a violent felony. (*Id.* at p. 2558.) "It is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." (*Ibid.*) The residual clause thus combined "indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony," rendering it unconstitutionally vague. (*Ibid.*; see generally *People v. Morgan* (2007) 42 Cal.4th 593, 605 [federal and state constitutions require a criminal statute be definite enough to provide a standard of conduct for those whose activities are proscribed and a standard for police enforcement and for ascertainment of guilt].)

Section 209, subdivision (b)(2) does not suffer from a similar constitutional deficiency. The subdivision applies "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."[12] (*Ibid.*) This standard requires the trier of fact to consider the scope and nature of the movement, including the actual distance a victim is moved. (*People v. Vines* (2011) 51 Cal.4th 830, 870 (*Vines*).) The subdivision also requires the trier of fact to consider factors such 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. (*People v. Rayford* (1994) 9 Cal.4th 1, 13.) The subdivision thus does not rely on judicial abstractions but is instead tethered to "real-world" facts. (See *People v. Daniels* (1969) 71 Cal.2d 1119, 1128-1129 [rejecting notion that an attempt to define necessary movement of a victim renders statute vague].)

Sherman, however, cites numerous aggravated kidnapping cases to suggest there exists a lack of uniformity in applying the asportation element of section 209, subdivision (b)(2). Vagueness becomes a problem when there is "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." (*Johnson*, *supra*, 135 S.Ct. at p. 2560.) But mere division about whether the statute "covers this or that crime (even clear laws produce close cases)" does not necessarily implicate vagueness. (*Ibid.*) The cases Sherman cites merely apply a concrete legal standard to real-world facts. (*Id.* at p. 2561 ["As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct; 'the law is full of instances where a man's fate depends

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[12] In 1997, the Legislature modified section 209 to eliminate the requirement the movement be substantial. (See generally *People v. Robertson* (2012) 208 Cal.App.4th 965, 979-980.)

on his estimating rightly . . . some matter of degree' "].) The cases do not represent disagreement about the nature of the inquiry to be conducted when one is accused of aggravated kidnapping.

We therefore reject Sherman's void-for-vagueness challenge to section 209, subdivision (b)(2) and turn to his next contention, whether there is sufficient evidence to support his conviction of that crime.

B. *Sufficiency of the evidence*

In assessing a claim of insufficiency of the evidence, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66; see also *Vines*, *supra*, 51 Cal.4th at p. 869.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) " 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*People v. Zamudio*

(2008) 43 Cal.4th 327, 357; see also *Jackson v. Virginia* (1979) 443 U.S. 307.)

As we have explained, aggravated kidnapping requires movement of the victim that, first, is not merely incidental to the commission of the underlying crime and, second, that increases the risk of harm to the victim over and above that necessarily present in the underlying crime itself. (*People v. Daniels*, *supra*, 71 Cal.2d at p. 1139; see also *People v. Martinez* (1999) 20 Cal.4th 225, 232.) These two elements are interrelated. (*Vines*, *supra*, 51 Cal.4th at p. 870.)

As to the first prong, "the jury considers the 'scope and nature' of the movement, which includes the actual distance a victim is moved." (*Vines*, *supra*, 51 Cal.4th at p. 870.) There is, however, no minimum distance a victim must be moved to satisfy this element. (*Ibid.*; *People v. Martinez*, *supra*, 20 Cal.4th at p. 233; *People v. Rayford*, *supra*, 9 Cal.4th at p. 12.) The second prong refers to whether the movement subjects the victim to an increase in risk of harm above and beyond that inherent in the underlying crime. (*Martinez*, at p. 232.) "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." (*Rayford*, at p. 13.)

Here, the movement of Rhonda to the loss prevention office was not merely incidental to the sexual assaults. Although the actual distance Rhonda was moved is unclear, it is clear that it was some distance from where she had been held with 13 other employees in the employee restroom. Sherman took Rhonda, who

was wearing just her undergarments,[13] from the employee restroom to the loss prevention office, where the sexual assaults occurred. The loss prevention office was "at the other end of the store," and it took "less than, maybe, two minutes" to get there from the employee restroom. To get to that office, Sherman led Rhonda "through a combination door to get into our stock room," through the stock room, and through double doors to the main sales floor. They had to make a slight left through the children's department to get to the loss prevention office. Sherman unlocked the door to the loss prevention office with the key.

The scope and nature of this movement shows it was not merely incidental to the rape. (Compare *People v. Shadden* (2001) 93 Cal.App.4th 164, 167-169 [moving victim nine feet from front counter to a backroom hidden from open view was sufficient to support a conviction for kidnapping to commit rape], with (*People v. Daniels*, *supra*, 71 Cal.2d at p. 1126 [brief movements of victims within their homes from room to room 18 feet, five or six feet, and 30 feet, respectively, were incidental to the associated offenses]; *People v. Hoard* (2002) 103 Cal.App.4th 599.) This movement of Rhonda across the store, to where she was completely isolated from others, was "excess and gratuitous" (*People v. Washington* (2005) 127 Cal.App.4th 290, 299) and designed to separate her from the other employees (see, e.g., *Shadden*, at p. 169 [where movement changes victim's environment, it does not have to be great in distance to be substantial]). The movement was not, as Sherman argues in his brief, a mere attempt to obtain the "privacy that even a rapist

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[13] Sherman did give Rhonda his hoodie to wear when they walked across the main sales floor.

would prefer." This argument is based on the dated notion that rape is a crime about sex. Rather, as it is widely recognized today, rape is a crime of violence.

Second, the movement subjected Rhonda to an increase in risk of harm above and beyond that inherent in rape. Although Rhonda was moved within the confines of the store, the movement from the crowded restroom to the isolated loss prevention office increased the risk of harm to her. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1153 ["The movement thus changed the victim's environment from a relatively open area alongside the road to a place significantly more secluded, substantially decreasing the possibility of detection, escape or rescue."].) Sherman makes the argument that raping Rhonda in the privacy of the loss prevention office somehow "spared" her the anguish of being assaulted in front of others.[14] To the contrary, raping Rhonda in the loss prevention office spared her nothing. It increased the risk of harm to her and decreased the likelihood of detection, because the rape occurred across the store from where the other employees were held, and, it may reasonably be inferred, behind a locked door. The movement to the loss prevention office thus prevented anyone from coming to Rhonda's aid, including the other employees and perhaps even Sherman's accomplices.

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[14] This argument calls to mind the word "chutzpah" and the person who kills his parents and pleads for the court's mercy on the ground of being an orphan. (*Checkpoint Systems v. U.S. Intern. Trade Com'n* (Fed.Cir.1995) 54 F.3d 756, 763, fn. 7.) Sherman's "chutzpah" arises in suggesting that raping Rhonda in privacy was an act of kindness.

III. Instruction on the lesser included crime of simple kidnapping

Sherman contends that the trial court's refusal to instruct the jury on the lesser included offense of simple kidnapping was reversible error. We disagree.

A trial court has a sua sponte duty to instruct on all theories of a lesser included offense which find substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162; see also *People v. Haley* (2004) 34 Cal.4th 283, 312.) Because substantial evidence is required, "the existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense." (*Breverman*, at p. 162.) A court need not instruct on a lesser included offense when a defendant, if guilty at all, could only be guilty of the greater offense, or when the evidence, even construed most favorably to the defendant, would not support a finding of guilt of the lesser included offense but would support a finding of guilt of the offense charged. (See, e.g., *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1367.)

Simple kidnapping is a lesser included offense of aggravated kidnapping. (See *People v. Lewis* (2008) 43 Cal.4th 415, 518, overruled on other grounds by *People v. Black* (2014) 58 Cal.4th 912.) As a type of aggravated kidnapping, the crime of kidnapping for rape is committed only if the defendant formed the specific intent to commit a rape at the time the kidnapping begins. (See *People v. Davis* (2005) 36 Cal.4th 510, 565-566.) In contrast, the crime of simple kidnapping generally requires the same elements as the crime of kidnapping for rape under section 209, subdivision (b), but it does not require the defendant to have the intent to commit a rape at the time the kidnapping began. (§ 207, subd. (a).)

Sherman thus posits that he was only guilty of simple kidnapping because the jury could have believed he moved Rhonda to get the key to the loss prevention office, where he intended to disable the surveillance equipment, and formed the intent to rape her once inside that office. If he did not form the intent until he got to the office, then he was only guilty of simple kidnapping.[15]

There is insufficient evidence to support this theory. Sherman testified that he did not sexually assault Rhonda; rather, the sex was consensual. Thus, according to him, he had *no* intent to rape Rhonda at any point in time. Of course, according to Rhonda, Sherman raped her. Therefore, determining when he formed the intent to do so must be inferred from other evidence. That evidence shows that Williams identified herself as the loss prevention officer. Although Sherman knew that Williams—not Rhonda— was the loss prevention officer, Sherman made Rhonda retrieve the key to the loss prevention office from *Williams's* purse. Sherman then made Rhonda—not Williams—accompany him to the loss prevention office. Notwithstanding Sherman's belief that he could disable the surveillance equipment by himself, it was Williams—not

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[15] Sherman's trial counsel made this argument in closing: "She is removed from the bathroom. The initial purpose of removing her from the bathroom was to have her get the keys from the purse of the L.P. person so that Mr. Sherman would have access to the security room, to the L.P. office. [¶] If you believe that that was the purpose initially, or if you believe that it's a reasonable possibility that that was the purpose to initially move her from the bathroom, then he is not guilty under the jury instructions of kidnapping with the intent to commit rape."

Rhonda—who was more likely to be able to assist him. This evidence shows that Sherman selected Rhonda at the outset with the intent to rape her. He had no reason to take her to that office other than to assault her.

Rhonda thus was either kidnapped for a rape or the rape did not happen. Stated otherwise, if Sherman was guilty of any crime, it was aggravated kidnapping. The trial court did not err in refusing to instruct on simple kidnapping.

IV. Prosecutorial misconduct[16]

Defendants contend that the prosecutor committed misconduct by asking Sherman "were they lying" questions.

A. *Additional facts*

While cross-examining Sherman, the prosecutor asked him whether other witnesses were lying. When, for example, Sherman denied being with Allen and Hammock the night of the robberies, the prosecutor asked about the testimony of other witnesses, including Sherman's family members. She asked, "So now Im'Unique's lying also?" After Sherman responded that Im'Unique could have been telling the truth; he simply was saying *he* did not know if Hammock was in the car, the prosecutor said:

"Q. So let's just make a list here. [¶] You say that Detective Dupree and Detective Marcia lied about whatever you just said? That's what you're telling us; right?

"A. Well, I didn't see my sister's signature on any statement. So—

"Q. So yes or no, are they lying or telling the truth?

"A. Well, I believe they're lying.

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16 Hammock and Allen join this contention.

"Q. Okay, And –

"A. 'Cause they – police lie all the time. Right?

"Q. And Rhonda is lying about being raped. That's what your testimony is?

"A. She was definitely lying."

Later, the prosecutor revisited the veracity issue:

"Q. So who else is lying in this case? You said Detective Dupree, Detective Marcia, Rhonda, Im'Unique was wrong; the magazine just for some weird reason materialized next to your gun. [¶] What else? Who else is lying? You said all police lie. But do you actually have any names of any other police officers that lie? Just so I know who's lying. Who's lying?

"A. Well, I was just being vague.

"Q. Okay. But –

"A. I don't know who's lying. [¶] I know Rhonda is lying.

"Q. Okay.

"A. That's for sure.

"Q. All right. So your testimony is that those are the only people lying and everyone else told the truth?

"A. Well, my testimony is that that gun is my gun and it was buried underneath that brush. So if that's the way they found it, then I'm not sure how it ended up like that."

Thereafter, in her closing statement, the prosecutor referred to Sherman's gall in "com[ing] in here and accus[ing] Rhonda of lying – that is offensive – and that he would accuse all these other victims of not telling the truth about everything that they saw, and that was very troubling."

B. *Any prosecutorial misconduct was harmless.*

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A

prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] . . . Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Generally, to "preserve a misconduct claim for review on appeal, a defendant must make a timely objection and, unless an admonition would not have cured the harm, ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct." (*People v. Martinez* (2010) 47 Cal.4th 911, 956; see also *People v. Chatman* (2006) 38 Cal.4th 344, 380; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 242.) Here, defendants did not object to the prosecutor's "were they lying" questions. Therefore, the issue is forfeited. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 318.) Nonetheless, because defendants raise ineffective assistance of counsel claims, we address the issue.

"Were they lying" questions are not categorically proper or improper. (*People v. Chatman*, *supra*, 38 Cal.4th at pp. 381-382.) Such questions may be proper when, for example, a defendant who is a percipient witness might be able to provide insight on whether witnesses whose testimony differs from the defendant's

are intentionally lying or merely mistaken. (*Id*. at p. 382.) This is especially true when the defendant knows the other witnesses; "he might know of reasons those witnesses might lie." (*Ibid*.) But when argumentative or designed to elicit irrelevant or speculative testimony, "were they lying" questions are improper. (*Id*. at pp. 381-382, 384 [was the safe "lying" argumentative].) "An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer. The question may, indeed, be unanswerable." (*Id*. at p. 384.) Thus, there "is a difference between asking a witness whether, in his opinion, another is lying and asking that witness whether he knows of a reason why another would be motivated to lie." (*Id.* at p. 381.)

Here, to the extent the prosecutor asked questions about Im'Unique's veracity, Sherman knew the witness and could provide insight into her testimony. As to Rhonda, according to Sherman, he would have had specific insight into why Rhonda would lie, as he claimed she was his accomplice who was lying to save herself. Those questions, therefore, were proper. Closer to the line between proper and argumentative are the questions about the veracity of specific detectives' testimony, whether "police lie all the time" and the prosecutor's request that Sherman list the names of other police officers who were lying. (See, e.g., *People v. Zambrano*, *supra*, 124 Cal.App.4th at p. 242.)

Even if those questions were improper, the prosecutor's conduct was harmless under both federal and state law. (See, e.g., *People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 319.) These limited questions did not comprise a pattern of conduct so egregious that it denied defendants due process. (*People v.*

Samayoa, *supra*, 15 Cal.4th at p. 841.) Nor does the prosecutor's closing argument regarding Sherman's accusations about Rhonda show a pattern of egregious conduct. The prosecutor was merely commenting on the credibility of witnesses based on the evidence adduced at trial. (*People v. Martinez*, *supra*, 47 Cal.4th at p. 958.) Such comments do not amount to misconduct.

Nor is it reasonably probable that the jury would have reached a result more favorable to defendants had any misconduct not occurred. (*People v. Zambrano*, *supra*, 124 Cal.App.4th at p. 243.) As to Sherman, he admitted committing the robberies. He also admitted using a gun, although he said it was unloaded. Any improper questions thus could have had no impact on the outcome on robbery counts. Indeed, Sherman concedes that the alleged misconduct would require reversal of only the kidnapping, rape and forcible oral copulation counts.

First, it is not reasonably probable that any improper "were they lying" questions specifically impacted the kidnapping or sexual assault offenses, which Sherman denied committing. The officers' and detectives' testimony had no connection to the kidnapping or sexual assaults. Rather, Sherman's culpability for the kidnapping and sexual offenses depended primarily on the jury's evaluation of his and Rhonda's credibility. Rhonda's version of events was corroborated by her fellow employees, who said that when Rhonda returned to the restroom, she was crying and hysterical, had semen on her leg, and said she'd been raped. There was no evidence, however, corroborating that Sherman knew Rhonda before the night of the robberies.

Nor is it reasonably probable that the questions specifically impacted the robbery offenses. Sherman also denied committing

the robberies with Allen and Hammock. Other than Sherman's denial, the evidence showed that that Allen and Hammock committed the robberies with Sherman. Various employees identified them. Davis identified Allen and Hammock; Sullens identified Hammock;[17] and Bautista identified Allen. Allen's and Hammock's cell phones were used at or near Nordstrom Rack at the time of the robberies. Members of Sherman's and Allen's own family implicated them in the crimes. Everesha told detectives that Sherman borrowed the Explorer the night of the robberies, and, some time after the robberies, she picked Hammock up in Culver City, where the getaway car had been abandoned. Im'Unique also testified that Sherman, Allen and Hammock took her that night, prior to the robberies, to Sherman's house to babysit Sherman's children. Also, Hammock was arrested near the abandoned Explorer. Officers found instrumentalities of the robbery in or near the Explorer, including a mask, gloves, cell phones, Sherman's gun and a knife. When Allen was arrested, he had over $3,700 in cash, some of it hidden. Also, Allen's DNA was on the black knit mask found in the Explorer. Based on this evidence, there is no reasonable probability of a more favorable outcome as to Allen and Hammock, even if we assumed that the prosecutor's questions improperly impugned Sherman's credibility. (See, e.g., *People v. Gonzales and Soliz, supra*, 52 Cal.4th at pp. 319-320 [not reasonably probable "were they lying" questions so undercut the value of testifying defendant's

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[17] Although Sullens identified Hammock, the parties stipulated that Sullens testified at the preliminary hearing that she did not attempt to or deliberately look at the person in the cash room with her.

credibility that it undercut the value that testimony might have had for the other defendants].)

We therefore conclude that any misconduct was not prejudicial. Based on that conclusion, we reject defendants' related contention that trial counsel provided ineffective assistance of counsel by failing to object to the "were they lying" questions. (See generally *People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212 [an ineffective assistance of counsel claim requires a showing of error and prejudice]; see also *Strickland v. Washington* (1984) 466 U.S. 668, 694.)

Moreover, a trial attorney's decision whether to object or to seek a jury admonition is a strategic one, and the failure to do so seldom establishes constitutionally ineffective assistance of counsel. (See, e.g., *People v. Castaneda* (2011) 51 Cal.4th 1292, 1335; *People v. Collins* (2010) 49 Cal.4th 175, 233; *People v. Huggins* (2006) 38 Cal.4th 175, 206.) Indeed, Sherman's trial counsel *did* object to the prosecutor's question, asked during the "were they lying" line of questioning, whether the "gun fairy" got the magazine from Sherman's house and dropped it next to the gun. The trial court sustained counsel's objection on the ground the question was argumentative. Defense counsel could have concluded that additional objections would have drawn closer attention to the questions, causing greater harm. (See *Castaneda*, at p. 1335; *Collins*, at p. 233.) Or counsel could have believed that the prosecutor's aggressive manner of questioning made Sherman more sympathetic. Thus, because there are possible reasonable explanations for counsel not taking additional steps to address any alleged misconduct, "[w]e cannot find on this record that counsel's performance was deficient." (*Huggins*, at p. 206.)

V. Sentencing issues as to Sherman

Sherman raises the following issues concerning his sentence: (1) his juvenile adjudication did not qualify as a strike; (2) using his juvenile adjudication as a prior serious or violent felony violated *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*); (3) the trial court abused its discretion by denying his *Romero* motion; and (4) the restitution fine violated *Apprendi*.

A. *Sherman's 1995 juvenile adjudication qualified as a "strike" under the Welfare and Institutions Code*

The amended information alleged that Sherman had a prior juvenile adjudication of second degree robbery. After finding that allegation true, the trial court used it to sentence Sherman as a second-strike offender. Sherman now contends that this was improper because the juvenile adjudication was not a qualifying strike under Welfare and Institutions Code section 707, subdivision (b) at the time he committed it in 1995. (§ 667, subd. (d)(3)(B) & (D).) As we explain, this contention has been rejected. (*People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817 (*Andrades*); *People v. Bowden* (2002) 102 Cal.App.4th 387.)

The Three Strikes law, section 667, subdivision (d), provides that a juvenile adjudication qualifies as a strike if four requirements are met. Here, the requirement Sherman places at issue is in subdivision (d)(3)(D). Section 667, subdivision (d)(3)(D) requires that "[t]he juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code." At the time Sherman's juvenile petition for

robbery was sustained in 1995, robbery was not an offense listed in Welfare and Institutions Code section 707, subdivision (b). (See, e.g., *Andrades*, *supra*, 113 Cal.App.4th at p. 825.) Sherman thus reasons he could not have been adjudged a ward "because" he committed "an offense listed" in subdivision (b) of the Welfare and Institutions Code, given that the offense was not so listed at the time of adjudication.

This argument was considered and rejected by *Andrades*. *Andrades* pointed out that Proposition 21 was enacted in 2000, and, among other things, added simple robbery to offenses listed in that subdivision. (*Andrades*, *supra*, 113 Cal.App.4th at p. 825.) Proposition 21 also "modified the cutoff date of the Three Strikes law" by adding section 667.1, a lock-in provision.[18] (*People v. Bowden*, *supra*, 102 Cal.App.4th at p. 390.) Thus, an offense committed after Proposition 21's passage qualifies as a strike if it was a serious felony within the meaning of the Three Strikes law as of March 8, 2000. (*Id*. at p. 391; *People v. James* (2001) 91 Cal.App.4th 1147, 1151.) Stated otherwise, after passage of Proposition 21, "determination of whether a prior offense constituted a strike [is] based on whether it was a strike when the current offense was committed, not when the prior offense was committed." (*People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1179; see also *Andrades*, at pp. 826-827.)

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[18] Former section 667.1 provided: "Notwithstanding subdivision (h) of Section 667, for all offenses committed on or after the effective date of this act, all references to existing statutes in subdivisions (c) to (g), inclusive, of Section 667, are to those statutes as they existed on the effective date of this act, including amendments made to those statutes by this act."

Andrades explained why, under Proposition 21 and section 667.1, a robbery committed before its passage nonetheless falls under Welfare and Institutions Code section 707, subdivision (b) for the purpose of the Three Strikes law: "On its face, section 667.1 applies to 'all references to existing statutes in subdivisions (c) to (g), inclusive, of Section 667.' Nothing in the language of section 667.1 limits its application or excepts paragraph (D)'s reference to Welfare and Institutions Code section 707, subdivision (b). There is no ambiguity in section 667.1; it applies to 'all references to existing statutes in subdivisions (c) to (g), inclusive.' This clearly includes paragraph (D)." (*Andrades*, *supra*, 113 Cal.App.4th at p. 829.)

We agree with *Andrades* and *Bowden*. Because Sherman's current offenses were committed in 2013, long after the passage of Proposition 21, his 1995 juvenile adjudication for robbery qualifies as a strike.

B. *The juvenile adjudication qualified as a strike under* Apprendi

Sherman was sentenced as a second-striker based on the prior juvenile adjudication. Although he contends that this was constitutional error under *Apprendi*, *supra*, 530 U.S. 466 and its progeny, he concedes that our Supreme Court rejected that argument in *People v. Nguyen* (2009) 46 Cal.4th 1007. *Nguyen* held that "the Fifth, Sixth, and Fourteenth Amendments, as construed in *Apprendi*, do not preclude the sentence-enhancing use, against an adult felon, of a prior valid, fair, and reliable adjudication that the defendant, while a minor, previously engaged in felony misconduct, where the juvenile proceeding included all the constitutional protections applicable to such matters, even though these protections do not include the right to

jury trial." (*Nguyen*, at p. 1019.) We are bound to follow *Nguyen*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

C. *The* Romero *motion*

Next, Sherman contends that the trial court abused its discretion by denying his *Romero* motion. We disagree.

In the furtherance of justice, a trial court may strike or dismiss a prior conviction allegation. (§ 1385, subd. (a); *Romero*, *supra*, 13 Cal.4th at p. 504.) A court's ruling on a *Romero* motion is reviewed under the deferential abuse of discretion standard; that is, the defendant must show that the sentencing decision was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 375, 378.) It is not enough to show that reasonable people might disagree about whether to strike a prior conviction. (*Id.* at p. 378.) The Three Strikes law "not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm . . . [T]he law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Ibid*.) Only extraordinary circumstances justify finding that a career criminal is outside the Three Strikes law. (*Ibid*.) Therefore, "the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Ibid*.)

When considering whether to strike prior conviction allegations, the factors a sentencing court considers are "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, 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." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The trial court below carefully considered and balanced these factors. In looking at the circumstances of Sherman's current crimes, the court noted that Sherman "not only acted as the leader, he was the leader." The court was "hard-pressed" to fathom how Sherman could be outside the spirit of the Three Strikes law. In the interests of justice, and after balancing the factors, the court therefore declined to strike the prior conviction.

We are similarly hard-pressed to find an abuse of the trial court's discretion. That Sherman committed his prior strike when he was 16 and remained free of any arrests or convictions until the current offenses was certainly a factor the court could consider. But the court's failure to be persuaded by it does not evidence an abuse of discretion.

D. *The restitution fines*

Finally, Sherman contends that the trial court violated his rights to a jury trial and to proof of facts beyond a reasonable doubt when it imposed a $10,000 restitution fine under section 1202.4, subdivision (b). He relies on *Southern Union Co. v. U.S.* (2012) 567 U.S. 343 [132 S.Ct. 2344], to support his contention that jury findings were required on whether he had the ability to pay a restitution fine above the statutory minimum. The statutory fine imposed in *Southern Union Co.*, however, was tied to the number of days the statute was violated, which number was found by the trial court and not by the jury. It was this finding by the court that *Southern Union Co.* found violated *Apprendi*, *supra*, 530 U.S. 466.

But, as found by Justice Turner in *People v. Kramis* (2012) 209 Cal.App.4th 346, 351, "*Apprendi* and *Southern Union Co.* do not apply when, as here, the trial court exercises its discretion within a statutory range." In 2013, former section 1202.4, subdivision (b)(1) set a statutory range of $280 (the minimum) to $10,000 (the maximum). All the court below did was select an amount within that range. "The trial court did not make any factual findings that increased the potential fine beyond what the jury's verdict—the fact of the conviction—allowed." (*Kramis*, at p. 352.)

VI. Hammock's upper term sentence

Because Hammock was on parole at the time he committed the current offenses, the trial court selected the upper term on count 5. Under *Apprendi*, *supra*, 530 U.S. 466, *Blakely v. Washington* (2004) 542 U.S. 296 and *Cunningham v. California* (2007) 549 U.S. 270, Hammock contends that imposing the upper term violated his the Fifth, Sixth and Fourteenth Amendment rights. However, he recognizes that his contention has been rejected (*People v. Towne* (2008) 44 Cal.4th 63) and that we are bound by that precedent (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455).

VII. Allen's consecutive sentences for the assault with a deadly weapon and for the robberies

The trial court sentenced Allen to consecutive sentences on counts 18 (robbery of Bautista) and 19 (assault with a deadly weapon on Bautista).[19] Allen now contends that the sentence on the assault should have been stayed under section 654.

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[19] Allen's counsel requested a low term sentence as to the base count and to run the sentences concurrently. The trial court generally said at the time of sentencing that it was choosing

Section 654, subdivision (a), provides that an act or omission punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but not under more than one provision. The section thus bars multiple punishments for offenses arising out of a single occurrence where all were incident to an indivisible course of conduct or a single objective. (*People v. Correa* (2012) 54 Cal.4th 331, 335 ["the relevant question is typically whether a defendant's ' "course of conduct . . . comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654" ' "]; *People v. Jones* (2012) 54 Cal.4th 350, 358 ["Section 654 prohibits multiple punishment for a single physical act that violates different provisions of law."]; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1368, abrogated on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1262.) Whether a course of criminal conduct is divisible depends on the actor's intent and objective. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) If all the offenses were merely incidental to, or were the means of accomplishing one objective, the defendant may be found to have harbored a single intent and therefore may be punished only once. (*People v. Capistrano* (2014) 59 Cal.4th 830, 885; *People v. Sok* (2010) 181 Cal.App.4th 88, 99-100.) But if the defendant harbored multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be

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consecutive sentences because "there were different victims, and each suffered separate acts." Allen's counsel did not argue that the sentence on count 19 should be stayed under section 654.

punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. (*Jones*, *supra*, 103 Cal.App.4th at p. 1143; *Sok*, at p. 99.)

Whether section 654 applies is a question of fact for the trial court, and its findings will not be reversed on appeal if there is any substantial evidence to support them. (*People v. Capistrano*, *supra*, 59 Cal.4th at p. 886; *People v. Jones*, *supra*, 103 Cal.App.4th at p. 1143.) A trial court's implied finding of a separate intent and objective for each offense will be upheld on appeal if supported by substantial evidence. (*People v. McKinzie*, *supra*, 54 Cal.4th at p. 1368.)

When the crimes are robbery and assault, "[t]he rule is that . . . a defendant . . . can be punished for both crimes if the assault was not incident to the robbery and was motivated by a separate criminal objective [citation], but if the assault was committed in order to accomplish the robbery, then the defendant can be punished for only one of the crimes." (*People v. Martinez* (1984) 150 Cal.App.3d 579, 606, overruled on other grounds by *People v. Hayes* (1990) 52 Cal.3d 577, 628, fn. 10; see also *In re Jesse F.* (1982) 137 Cal.App.3d 164, 171.) "[A] separate act of violence against an unresisting victim or witness, whether gratuitous or to facilitate escape or to avoid prosecution, may be found not incidental to robbery for purposes of section 654." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 193.) "When there is an assault *after* the fruits of the robbery have been obtained, and the assault is committed with an intent other than to effectuate the robbery, it is separately punishable." (*In re Jesse F.*, at p. 171.)

There is more than substantial evidence that Allen harbored multiple criminal intents, independent of and not merely incidental to each other, with respect to the assault and to the robbery. When Allen discovered Bautista and Jacinto in the locker room, he took Bautista's phone. When Bautista denied calling the police, he violently pressed a knife against her neck, leaving a wound, and bashed her head against the door. Then, when Bautista tried to help Sullens, Allen kicked and beat Bautista with a gun, telling her not to be a hero. Thus, by the time Allen assaulted Bautista, he had already taken her phone, and, moreover, there is no evidence that assaulting Bautista was connected to robbery of the cash from the safe. Instead, the evidence shows that Allen assaulted Bautista to punish her for calling the police, not to prevent her from so doing. Similarly, he punished Bautista for trying to be a "hero." These acts were gratuitous and had nothing to do with furthering the robbery. (Compare *People v. Nguyen*, *supra*, 204 Cal.App.3d at p. 191 [section 654 "cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense"], *In re Jesse F.*, *supra*, 137 Cal.App.3d at p. 171, with *People v. Flowers* (1982) 132 Cal.App.3d 584, 590 [assault during a robbery to quiet victim and to counter victim's resistance was for purpose of facilitating robbery; section 654 applied].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BACHNER, J.*

We concur:

EDMON, P. J.

LAVIN, 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.