

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORIO GOMEZ LOPEZ,

Defendant and Appellant.

2d Crim. No. B282390
(Super. Ct. No. 2013035489)
(Ventura County)

Gregorio Gomez Lopez appeals from the judgment entered after a jury convicted him of two counts of forcible sexual penetration by a foreign object (Pen. Code, § 289, subd. (a)(1)(A)),¹ two counts of forcible oral copulation (§ 288a, subd. (c)(2)(A)), and two counts of forcible sodomy. (§ 286, subd. (c)(2)(A).) As to each count, the jury found true an allegation that appellant had kidnapped the victim. (§ 667.61, subds. (a), (c)(5)-(7), (d)(2).) This allegation is commonly known as “[t]he one strike aggravated kidnapping circumstance.” (*People v. Jones* (1997) 58

¹ All statutory references are to the Penal Code.

Cal.App.4th 693, 699, 703.) The circumstance required the imposition of an alternative sentence of 25 years to life for each offense. (§ 667.61, subd. (a); *People v. Mancebo* (2002) 27 Cal.4th 735, 741 [section 667.61 “sets forth an alternative and harsher sentencing scheme”].) The trial court sentenced appellant to an aggregate term of 125 years to life, consisting of five consecutive terms and one concurrent term of 25 years to life.

Appellant contends that the evidence is insufficient to support the aggravated kidnapping circumstances. We affirm.

Facts

Since the standard of review is substantial evidence (see *post*, pp. 4-5), “we set forth the facts here in the light most favorable to the judgment. [Citations.]” (*People v. Lee* (2011) 51 Cal.4th 620, 625, fn. 5.)

Rebecca L. (Rebecca) was 20 years old. At 3:30 a.m. in November 2013, she left her home in Oxnard to walk to work.

While Rebecca was walking along Oxnard Boulevard, appellant began following her. He was “a large man” who weighed about 230 pounds. In an attempt to get away from him, Rebecca walked into a parking lot. Behind a store in the parking lot, appellant “attacked” her. He hit her in the face with his fists. He choked her and put his fingers down her throat.

Appellant pushed Rebecca backward against a tree. He then pulled her around the tree to an area that “was really dark” (the first location). He pushed her down to the ground, got on top of her, and started choking and hitting her. He removed her pants and underwear. He put his finger inside her vagina five times. He licked her vagina three times.

Appellant carried Rebecca to a second location that was “still dark” and farther away from Oxnard Boulevard. At the

first location, appellant and Rebecca were visible to the occupants of cars passing by. At the second location, they were not visible. Rebecca estimated that the second location was about 25 steps away from the first. But a police officer opined that the distance between the two locations was “a lot more than 25 steps.”

At the second location, appellant pushed Rebecca up against a gate and put his finger inside her anus. He put his penis inside her anus three times and forced his penis into her mouth. He made her rub his penis with her hand until he ejaculated.

Appellant dragged Rebecca to a third location that was farther away from Oxnard Boulevard and houses. Rebecca said that she was less visible to the public at the third location, which was about 15 to 20 steps away from the second location. Appellant pushed her to the ground, slapped, and hit her. He took off his clothes so that he was “totally naked.” When he sat down, Rebecca got up and “ran like hell.” She was able to escape.

A police officer measured the distance between the three locations. The distance between the first and second locations was about 190 feet. The distance between the second and third locations was about 175 feet. The distance from a location designated as “RP6” to the first location was about 16 feet. As the People note in their brief, it is not clear what “RP6” means. The location appears to be at or near the point where appellant initially attacked Rebecca.

Officer Dale McAlpine testified as follows: The movement of Rebecca from the point where appellant initially attacked her (RP6) to the first location “decrease[d] the ability of detection” of the sexual assault. She was taken “behind some trees and out of view . . . from the parking lot.” The movement of

Rebecca from the first to the second location further “decrease[d] the likelihood of detection by other people.” The second location was a “darker area” with “no streetlights or lamps” that was “further from the street.” Finally, the movement from the second to the third location “also decreased the likelihood of detection.” The third location is “much farther away from Oxnard Boulevard. It’s isolated between two major streets. . . . And it’s . . . in the distance for someone being able to hear screams for help.” Between 3:00 and 6:00 a.m., the second and third locations would have been “[v]ery dark.”

Standard of Review

“[A]nalyzing evidence, and determining the facts, are functions peculiarly within the expertise of juries. Although appellate courts review the sufficiency of the evidence supporting verdicts, such review is narrowly prescribed. ‘[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a *reasonable trier of fact* could find the defendant guilty beyond a reasonable doubt.’ [Citations.]

[¶] This standard means that when an appellate court determines that the evidence was insufficient, it has concluded that no ‘reasonable’ trier of fact could have found the defendant guilty.” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126-1127.)

“We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] . . . “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.] We do not

reweigh evidence or reevaluate a witness's credibility. [Citation.]' [Citations.]" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]" (*People v. Brown* (2014) 59 Cal.4th 86, 106.) Thus, "[o]n appeal all conflicts must be resolved on the side of the judgment." (*People v. Collins* (1925) 195 Cal. 325, 343.)

The One-Strike Aggravated Kidnapping

Circumstance: Section 667.61, subdivision (d)(2)

Section 667.61 provides for increased punishment for certain sex offenses committed "under one or more of the circumstances specified in subdivision (d)." (*Id.*, subd. (a).) "[S]ection 667.61, subdivision (d)(2), reads in pertinent part as follows: 'The defendant kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense' The plain wording of this enhancement requires two elements: (1) a simple kidnapping (§ 207, subd. (a)); and (2) a substantial increase in the risk of harm to the victim." (*People v. Diaz* (2000) 78 Cal.App.4th 243, 245-246 (*Diaz*).) To convict a defendant of simple kidnapping, the jury must "find that the victim was moved a distance that was 'substantial in character.' [Citations.]" (*People v. Martinez* (1999) 20 Cal.4th 225, 237 (*Martinez*).) This "is called the 'asportation' element. [Citation.]" (*People v. Bell* (2009) 179 Cal.App.4th 428, 435.) "[K]idnapping within the meaning of section 667.61, subdivision (d)(2) requires movement of the victim that is more than incidental to the underlying sex offense." (*Diaz, supra*, at p. 246.)

*Substantial Evidence Supports the
Aggravated Kidnapping Circumstances*

Appellant argues that the evidence is insufficient to support the aggravated kidnapping circumstances because Rebecca was not moved “a substantial distance” and her movement did not result in “a substantial increase in the risk presented.” Appellant asserts: “[T]he lack of evidence of substantial risk of harm was exacerbated by the Government’s [closing] argument, which improperly urged the jury to tally up the *total* distance Rebecca was moved in determining whether there was substantial movement as charged - rather than having to determine, as it should have, whether *each* kidnapping allegation was supported by sufficient evidence that asportation to *that* location substantially increased the risk of physical or psychological harm.” In other words, in determining whether substantial evidence supports the aggravated kidnapping circumstances applicable to the sex offenses committed at the first location, appellant contends that we should consider only the asportation to that location and not the asportation to the second and third locations. Likewise, in determining whether substantial evidence supports the aggravated kidnapping circumstances applicable to the sex offenses committed at the second location, we should consider only the asportation to that location and not the asportation to the third location. No sex offense was committed at the third location.

People v. Kelly (2016) 245 Cal.App.4th 1119, shows that the jury could consider the total asportation beginning at RP6, where appellant initially attacked Rebecca, and ending at the third location. In *Kelly* the defendant orally copulated the victim, forced her into his vehicle, and drove 3.7 miles to a liquor

store, where she escaped. The defendant claimed that the evidence was insufficient to support an “aggravated kidnapping circumstance because the kidnapping did not occur until after the sexual offense had concluded.” (*Id.* at p. 1127.) The appellate court construed section 667.61, subdivision (d)(2) as not requiring that the sex offense occur during or in the commission of a kidnapping. A contrary construction would conflict with the statute’s purpose “to ensure serious sex offenders receive lengthy prison sentences upon their first conviction when their crimes are committed under circumstances elevating their victim’s vulnerability. [Citation.]” (*Id.* at p. 1128.) Furthermore, “[a]lthough the physical act of forcible oral copulation concluded when defendant kidnapped the victim, the offense had not. Rather than releasing the victim or fleeing the scene of the crime, defendant forced her into his vehicle and drove her to a liquor store. Thus, even if the aggravated kidnapping circumstance implicitly required a sex offense occur ‘during the commission of’ or ‘in the commission of’ kidnapping, the circumstance would apply here.” (*Id.* at p. 1129.) The court noted that, “in interpreting statutes that provide enhanced punishment for conduct performed during the commission of a felony, such as section 667.61, courts look to felony murder cases For purposes of felony-murder, a felony sex offense has been held to be continuous as long as the victim has not been disposed of or remains confined [citation], until the perpetrator reaches a place of temporary safety [citation], or as long as the perpetrator maintains control over the victim [citation].” (*Ibid.*)

Kelly applied the aggravated kidnapping circumstance even though the asportation had occurred after the oral copulation of the victim. It follows that, in deciding whether

the aggravated kidnapping circumstances apply to the sex offenses committed by appellant at the first location, we may consider Rebecca's subsequent movement to the second and third locations. In deciding whether the circumstances apply to the sex offenses committed at the second location, we may consider her movement to the third location. Until Rebecca's escape at the third location, appellant continuously maintained control over her.

The movement of Rebecca was substantial in character. "[I]n determining whether the movement is "substantial in character" [citation], the jury should consider the totality of the circumstances. 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." (*Martinez, supra*, 20 Cal.4th at p. 237.) The distance from RP6 to the first location behind a tree was only about 16 feet, but the first location was darker and less visible to the public than RP6.

The distance between the first and second locations was about 190 feet. According to Officer McAlpine, the second location was a "darker area" with "no streetlights or lamps" that was "further from the street." McAlpine opined that the movement from the first to the second location decreased the likelihood of detection. Rebecca told the police that at the first location she was visible to the occupants of cars passing by. At the second location, she was not visible. "[A] rape victim [or

victim of any sexual assault] is certainly more at risk when concealed from public view and therefore more vulnerable to attack.” (*People v. Hoard* (2002) 103 Cal.App.4th 599, 607.)

The distance between the second and third locations was about 175 feet. Officer McAlpine opined that the movement between these locations also decreased the likelihood of detection. He explained that the third location was “very dark” and “isolated between two major streets.” It was “much farther away from Oxnard Boulevard.”

Thus, the total movement of Rebecca covered a significant distance. By decreasing the likelihood of detection, the movement enhanced appellant’s opportunity to commit additional crimes and therefore increased “the risk of harm above that which existed prior to the asportation.” (*Martinez, supra*, 20 Cal.4th at p. 237.)

The asportation was “more than incidental to the underlying sex offense[s].” (*Diaz, supra*, 78 Cal.App.4th at p. 246.) “[T]he movement was not natural to the crime[s]. [Appellant] could have [committed the sex offenses at RP6] and avoided moving [Rebecca] at all. . . . [A] jury could reasonably conclude [the movement] was an essential part of [appellant’s] plan to avoid detection and to make the crime[s] easier to commit. Accordingly, while the movement was perhaps incidental to [his] particular plan for [committing the crimes], it was not incidental to the actual commission of the crime[s]” (*People v. Salazar* (1995) 33 Cal.App.4th 341, 347; see *Diaz, supra*, at p. 249 [“the forcible movement of the victim into the darkened park and behind a large building was properly found by the jury to have been more than incidental to the sexual assault”]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 169

[“Where a defendant drags a victim to another place, and then attempts a rape, the jury may reasonably infer that the movement was neither part of nor necessary to the rape”].)

The jury reasonably concluded that the movement of Rebecca “substantially increased the risk of harm to [her] over and above that level of risk necessarily inherent in the underlying offense[s].” (§ 667.61, subd. (d)(2).) The jury could consider ““such factors as the decreased likelihood of detection, the danger inherent in a victim’s foreseeable attempts to escape, and the attacker’s enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased.” [Citations.]” (*People v. Vines* (2011) 51 Cal.4th 830, 870.) Here, the danger of “the attacker’s enhanced opportunity to commit additional crimes” did “in fact materialize” as a result of the asportation. (*Ibid.*)

Accordingly, substantial evidence supports the aggravated kidnapping circumstances.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Jeffrey Bennett, Judge

Superior Court County of Ventura

Vanessa Place, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters, Senior
Assistant Attorney General, Scott A. Taryle, Supervising Deputy
Attorney General, Michael Katz, Deputy Attorney General, for
Plaintiff and Respondent.