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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. BYRON CHARLES MOSELY, Defendant and Appellant.	B269711 (Los Angeles County Super. Ct. No. BA423092)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Byron Mosely appeals from the judgment entered following his conviction by jury of committing a lewd act upon a child and kidnapping to commit such an act. He contends the trial court erred in admitting evidence of a prior act of uncharged misconduct. He further argues that his sentence on the kidnapping count should have been stayed pursuant to Penal Code section 654. We find no error and therefore affirm.

FACTUAL AND PROCEDURAL HISTORY

I. *Procedural Background*

The Los Angeles County District Attorney (the People) filed an information on July 24, 2014 charging defendant with committing a lewd act upon a child (Pen. Code, § 288, subd. (a); count one), kidnapping for child molesting (Pen. Code, § 207, subd. (b); count two), and kidnapping to commit another crime, specifically, a lewd act upon a child (Pen. Code, § 209, subd. (b)(1); count three), arising from events occurring on March 28 and 29, 2014. Subsequently, the court granted defendant's motion to dismiss count two.

At the conclusion of trial, the jury convicted defendant on counts one and three as charged. The court sentenced defendant to a determinate term of eight years in state prison on count one and a consecutive indeterminate term of seven years to life on count three. Defendant timely appealed.

II. *Prosecution Case*

A. *March 28, 2014 incident*

On March 28, 2014, the victim, Kayla C., and her sister were playing at the home of their friend, Paris B. Kayla was eight years old and Paris was about nine years old.[1] Defendant was also present at the apartment. Paris's mother testified that she had known defendant since she was a baby and he

[1] The girls testified at trial about twenty-one months later.

was "like an uncle" to her. Defendant would often visit and "help out with the kids or around the house." Paris testified that defendant frequently "used to watch" her and her siblings when her mother was out.

At some point that day, defendant used a van belonging to Paris's mother to drive Kayla, Paris, and Kayla's sister to Kayla's home. Kayla lived with her mother and siblings in the Las Palmas motel, about two blocks from Paris's apartment building. Kayla testified that she asked her mother if she could spend the night at Paris's home. Her mother said yes. Then defendant, Paris, and Kayla drove back to Paris's apartment. Defendant parked the van in the building parking lot and sent Paris upstairs. Paris testified that she came back a few minutes later and saw Kayla sitting on defendant's lap. Kayla did not testify at trial as to any contact with defendant in the van and stated she could not remember certain details about the events of that day.

Paris's mother would not permit Kayla to stay the night, because her children were being punished. She therefore asked defendant to take Kayla home and he agreed.

Kayla testified that after she and defendant left Paris's apartment in the van, instead of taking her home, defendant drove them to a nearby McDonald's to get some food. After leaving the restaurant, Kayla fell asleep in the van; she testified that defendant told her he was taking her home, but when she woke up, they were at a motel. Kayla asked where they were, and defendant told her they were "going to be staying the night" at the motel because the van had broken down. She asked to go home and defendant said they "couldn't because the van wasn't working." She followed his directions to exit the van and go into a motel room.[2]

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[2] Defendant took Kayla to the Fijian motel, located about six blocks south of her home. The manager of the Fijian motel testified that defendant

Once inside, defendant told Kayla to take a bath, which she did. During her bath, defendant walked into the bathroom and "reached his hand and gave me soap." He also told her to put on lotion after the bath, which she did. Defendant then left and Kayla fell asleep on the bed. She woke up "really early in the morning . . . around six or seven," and defendant was lying next to her on the bed. He was dressed and lying on top of the blankets. Defendant then touched her vagina with his hand over her clothing.

Later on the morning of March 29, 2014, Kayla and defendant walked to her home. Kayla told her mother that she had stayed overnight with defendant at a motel. Kayla's mother testified that she knew defendant as Paris's "uncle." When Kayla told her where she had spent the night, they walked over to Paris's residence and called the police.

According to Paris's mother, Ebony B., defendant left with Kayla on the evening of March 28, 2014. He returned to Ebony and Paris's home around 11:00 p.m., about one and a half to two hours later. In the interim, she had placed three phone calls and one text to defendant. When defendant arrived, he was alone and returned the van. She asked defendant if he had taken Paris Kayla home, and he replied "yes." Defendant then took his bicycle and laptop and stated that "he was going home, that he had plumbing to be done at his house and that he had to be there in the morning for it." He then left her apartment on his bicycle.

B. *Investigation*

Officers from the Los Angeles Police Department (LAPD) responded to the 911 call on the morning of March 29, 2014. Kayla reported that her "play uncle" took her to a motel the night before, where they spent the night, and that he touched her. Kayla and defendant were taken to the hospital for

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filled out a registration card at 10:00 p.m. on March 28, 2014 to rent a motel room for that night.

sexual assault examinations. Defendant consented to the examination, which involved collection of evidence samples for forensic DNA testing.

Nurse practitioner Shamsah Barolia conducted a sexual assault examination on Kayla on March 29, 2014. During that examination, Kayla reported that once in the motel room, defendant "asked her to go into the shower and toward the end of the shower he came in and applied some soap." When Kayla came out of the bathroom, defendant was gone, and she fell asleep. When she awoke, defendant "was laying with her in the same bed" and he "made her watch videos of children cussing at each other on his laptop," and also turned on the TV to a channel "where girls were kissing other girls without their panties or bras." Kayla further reported that defendant "touched her on her chest and then kissed her on her ears, and when she turned away, he kissed the other ear. She also said that he touched me on my private part over her clothes." Kayla also told Barolia that defendant squeezed her arm "very hard" and pointed to where her arm was hurting and red. Kayla also mentioned she was "having some stinging pain on her private area."

The investigating LAPD detective interviewed Kayla on March 31, 2014. Kayla told the detective that defendant had been "pinching and squeezing" her vagina over her clothes in the motel room. Kayla also stated that the prior night, before she fell asleep, defendant was "licking and nibbling her ear." Kayla also reported that defendant told her to sit on his lap in the van while parked at Paris's apartment.

During Kayla's sexual assault examination, Barolia collected oral, anal, vestibular, and vulvar swabs.[3] Defendant's sperm was detected in Kayla's

[3] As nurse Barolia explained, the vulvar swabs are taken from the external genital area, and the vestibular swabs are from the inner vaginal area around the urethral opening.

anal and vestibular samples, and his DNA was detected in her vulvar sample. The prosecution's DNA witness acknowledged that DNA, such as found in sperm, could transfer from an individual's hands to a towel or bedsheet, and then to a second individual who came in contact with that item.

C. *Prior Misconduct*

Over defendant's objection, the court allowed evidence of a prior incident involving defendant. S.A. testified that she had known defendant since she was born. In 1980 or 1981, her mother often asked defendant to watch her and her younger brother while she worked an overnight shift. At the time, S.A. was four or five years old. Her mother would put her to bed and leave for work. Defendant would "check every night to make sure I didn't wet the bed." He would take off her pajamas and direct S.A. to put her legs "straight together." Defendant would then remove his clothing, get on top of her and move "up and down, until I was wet." She thought at the time he was causing her to urinate on herself. Defendant would also touch her vaginal area under her clothing with his hands. S.A. also testified as to other occasions in the presence of family members when defendant would tell her to sit on his lap and would be "grinding on my back."

She did not tell anyone until she was thirteen, after she saw an episode of the Oprah Winfrey show and realized she was a victim.

D. *Defense*

Defendant did not present any witnesses at trial. In closing, his counsel argued, among other things, that there was circumstantial evidence to support the inference that the van actually was broken. He also argued that he and that defendant lacked the specific intent necessary for count

three because, if Kayla's testimony was believed, the lewd touching did not occur until eight or nine hours after they arrived at the motel.

DISCUSSION

I. *Admission of Uncharged Acts Under Section 1108*

Defendant argues the court erred in admitting the uncharged acts of sexual misconduct against S.A. We conclude the court did not abuse its discretion in admitting S.A.'s testimony under Evidence Code section 1108.[4]

A. *Legal Principles*

As a general rule, evidence of a person's character, including evidence of specific instances of uncharged misconduct, is inadmissible to prove the conduct of that person on a specific occasion. (§ 1101, subd. (a).) The rule is qualified by section 1101, subdivision (b), which permits admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident."

In sexual offense cases, section 1108 creates an exception to section 1101's prohibition against propensity evidence. Under section 1108, when a criminal defendant is accused of a sexual offense, "evidence of the defendant's commission of another sexual offense or offenses" is not excluded under section 1101 if not inadmissible under section 352. (§ 1108, subd. (a).) It is undisputed that defendant's alleged prior conduct constitutes a qualifying "sexual offense." (§ 1108, subds. (d)(1)(A), (D).) Our Supreme Court has upheld the constitutionality of section 1108, reasoning that "the provision preserves trial court discretion to exclude the evidence if its prejudicial effect outweighs its probative value" under section 352. (*People v. Falsetta* (1999)

[4] All further statutory references are to the Evidence Code unless otherwise indicated.

21 Cal.4th 903, 912–922 (*Falsetta*).) "'By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352, the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (§ 352.) This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence.' [Citation.]" (*Falsetta, supra*, 21 Cal.4th at pp. 917-918.)

We review a challenge to a trial court's decision to admit prior misconduct evidence for abuse of discretion. (See, e.g., *People v. Kipp* (1998) 18 Cal.4th 349, 369-371; *People v. Huy Ngoc Nguyen* (2010) 184 Cal.App.4th 1096, 1116 (*Nguyen*).) A trial court's admission of evidence pursuant to Evidence Code section 352 will "'not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

B. *Factual Background*

Prior to trial, the People moved to admit evidence of prior sexual misconduct committed by defendant against S.A. pursuant to sections 1108 and 352. At the hearing on the motion, defendant's counsel argued that the prior incident alleged by S.A. was highly inflammatory, significantly remote in time, and not sufficiently similar to outweigh the factors in favor of exclusion.

The trial court proceeded to analyze the issue in detail under sections 1108 and 352. Noting that "the main factor affecting the probative value of an uncharged act is its similarity to the charged offense," the court found the

two offenses to be "very similar." Specifically, the court noted the following similarities: "One, the defendant allegedly molested a child of a family he befriended; Two, the alleged victim is a young female child five years old in the prior offense and eight years old in the instant offense; Three, the defendant played a care-taking function to assist the family; And, four, the defendant took advantage of an opportunity to be alone with the alleged victim created by the care-taking role the defendant played." The court also found the fact that the two incidents "are completely unrelated to one another and separated in time" to further add to the probative value of the prior incident.

The court then balanced the probative value against the other relevant factors under section 352. First, it found the uncharged conduct was not significantly more inflammatory than the current offense, noting that "[b]oth incidents are similar in nature," as both "involve conduct where the defendant used his position of trust to take sexual advantage of the child." The court acknowledged that the earlier incident "occurred on a number of occasions as opposed to it being a one-time act as here,"[5] but found that fact would not "cause jurors to abandon their fact-finding role out of some sort of an emotional reaction." Second, the court found little possibility of confusion of the issues, indicating the jury would be properly instructed as to the use of the prior act evidence. Third, considering remoteness of the conduct, the court acknowledged the "32-year gap" between the two offenses was "certainly no small amount of time." But it concluded the time gap was mitigated by the similarity between the two offenses, as well as the "1993

[5] The People's motion to admit the evidence stated that these incidents occurred "almost nightly for four months to a year." At trial, S.A. did not testify as to the specific frequency or duration of defendant's acts, but did state that it was a repeated occurrence.

incident involving [defendant's] own children,"[6] which demonstrated defendant "has not been incident-free from 1982 to the present." Finally, the court found that presentation of S.A.'s testimony would not be "overly consumptive of time." On balance, the court granted the People's motion to admit evidence regarding the prior incident.

C. *No Error in Admission of Incident*

As the trial court properly recognized, admission of a prior incident of sexual misconduct requires a careful balancing under section 352 to determine whether the probative value of the evidence "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." "Without doubt, evidence a defendant committed an offense on a separate occasion is inherently prejudicial. [Citations.] But Evidence Code section 352 requires the exclusion of evidence only when its probative value is substantially outweighed by its prejudicial effect. 'Evidence is substantially more prejudicial than probative . . . [only] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].' [Citation.]" (*People v. Quang Minh Tran* (2011) 51 Cal.4th 1040, 1047.) "In this context, the word 'prejudice' is used in the sense of "'an emotional bias'" [citation] or ""of "prejudging" a person or cause on the basis of extraneous factors"" [citation]." (*Nguyen, supra*, 184 Cal.App.4th at p. 1115.)

The factors to be considered by a trial court in conducting a section 352 analysis depend upon "'the unique facts and issues of each case' [citation]." (*Nguyen, supra*, 184 Cal.App.4th at p. 1116.) However, guided by the

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[6] The People's trial brief contained an allegation that in November 1993, defendant "was charged with sexually molesting his biological sons. That case was eventually dismissed after preliminary hearing."

Supreme Court's discussions in *Falsetta, supra*, 21 Cal.4th at p. 917 (regarding section 1108) and *People v. Ewoldt* (1994) 7 Cal.4th 380, 404-406 (regarding section 1101, subdivision (b)), courts have largely considered the following five factors as crucial to admissibility: "(1) whether the propensity evidence has probative value, e.g., whether the uncharged conduct is similar enough to the charged behavior to tend to show defendant did in fact commit the charged offense; (2) whether the propensity evidence is stronger and more inflammatory than evidence of the defendant's charged acts; (3) whether the uncharged conduct is remote or stale; (4) whether the propensity evidence is likely to confuse or distract the jurors from their main inquiry, e.g., whether the jury might be tempted to punish the defendant for his uncharged, unpunished conduct; and (5) whether admission of the propensity evidence will require an undue consumption of time. [Citation.]." (*Nguyen, supra*, 184 Cal.App.4th at pp. 1116-1117; see also *People v. Branch* (2001) 91 Cal.App.4th 274, 282; *People v. Harris* (1998) 60 Cal.App.4th 727, 738-740.) We address each factor in turn.

1. *Probative Value*

Evidence of a "'prior sexual offense is indisputably relevant in a prosecution for another sexual offense.' [Citation.]" (*People v. Branch, supra,* 91 Cal.App.4th at p. 282; see also *Falsetta, supra*, 21 Cal.4th at p. 920 ["evidence of a defendant's other sex offenses constitutes relevant circumstantial evidence that he committed the charged sex offenses"].) Moreover, the "probative value of 'other crimes' evidence is increased by the relative similarity between the charged and uncharged offenses." (*Falsetta, supra*, 21 Cal.4th at p. 917.)

Defendant here challenges the trial court's conclusion that the two acts were "very similar." In particular, the court noted that both S.A. and Kayla

were young girls, both younger than nine years old at the time of the incident, and in both instances defendant befriended a family with young children, used that friendship to take on a caretaking role over those children, and then used an opportunity created by that caretaking role to be alone with the alleged victim and to sexually molest her. We agree that the acts bear significant similarities. Defendant points out that in the current case, he did not befriend the family of the victim (Kayla), but rather the family of her friend (Paris). However, the record ably supports the trial court's conclusion that on both occasions, defendant was able to gain access to the victim through his "position of trust." In the instant case, defendant's relationship with Paris's family enabled him to develop a position of trust as an "uncle" figure to the children and adults in that family and their friends. This position created the opportunity for him to drive Kayla home alone. His abuse of that position is remarkably similar to the conduct alleged by S.A. In addition, while the prior conduct involved additional alleged acts, in both instances defendant engaged in sexual fondling of the victim when she was sleeping or had recently awoken.[7]

Further, the probative value of evidence of uncharged misconduct also is strengthened when "its source is independent of the evidence of the charged offense." (*Ewoldt, supra*, 7 Cal. 4th at p. 404; *Falsetta, supra*, 21 Cal.4th at p. 917.) Here, S.A. was a witness entirely unrelated to the charged offense, thus bolstering the probative value of her testimony.

[7] We also note that while there was no testimony as to any skin-to-skin contact between defendant and Kayla (as alleged by S.A.), the presence of defendant's DNA and semen in and on Kayla's genitalia could support an inference of such contact.

2. *Inflammatory nature*

Defendant next contends that the evidence of the prior conduct was more inflammatory than the testimony regarding the charged conduct. We disagree. Defendant notes that the acts alleged by S.A. were more extensive and occurred on a repeated basis. While true, the evidence related to those acts came from the fairly brief testimony of a single, adult witness. By contrast, two young children and their mothers testified as to the events surrounding the charged conduct, along with multiple law enforcement and trauma center witnesses. Further, the charged conduct included not only lewd touching but defendant's act of keeping the victim in a motel room overnight against her wishes. As such, it was not an abuse of discretion for the trial court to conclude that S.A.'s testimony was not stronger or more inflammatory than the evidence supporting the charged conduct.

3. *Remoteness in time*

As the trial court acknowledged, there was a substantial time gap—over 30 years—between the incident alleged by S.A. and the current offense. But this factor is subject to counterbalancing considerations. "No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible. . . . [¶] Remoteness of prior offenses relates to 'the question of predisposition to commit the charged sexual offenses.' [Citation.] In theory, a substantial gap between the prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses. However, ... significant similarities between the prior and the charged offenses may 'balance[ ] out the remoteness.' [Citation.] Put differently, if the prior offenses are very similar in nature to the charged offenses, the prior offenses have greater probative value in proving propensity to commit the charged offenses."

(*People v. Branch*, *supra*, 91 Cal.App.4th at pp. 284-285; see also, e.g., *People v. Frazier* (2001) 89 Cal.App.4th 30, 41 [15–or 16–year gap]; *People v. Soto* (1998) 64 Cal.App.4th 966, 977, 991-992 [more than a 20–year gap].)

Here, as discussed above, the trial court did not err in determining that the substantial similarity between the two acts sufficiently outweighed the remoteness of the uncharged offense. Moreover, the court noted the alleged incident by defendant in 1993 as a factor mitigating the remoteness, as that allegation tended to support defendant's predisposition to commit the charged sexual offense. While defendant notes that the only information regarding the 1993 incident was the brief statement in the People's trial brief, the trial court was nevertheless entitled to consider this allegation as part of its analysis. Under these circumstances, it was unlikely the jury disbelieved the evidence regarding the charged offenses but nevertheless convicted defendant on the strength of S.A.'s testimony regarding the uncharged conduct, or that the jury's passions were inflamed by the evidence of the latter.

4. *Likelihood of confusion*

As defendant points out, the likelihood of confusion is increased where, as here, defendant was never charged with or convicted of, the alleged conduct with S.A. (See *Falsetta, supra*, 21 Cal.4th at p. 917 [prior conviction lessened prejudicial impact by "ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses, and that the jury's attention would not be diverted by having to make a separate determination whether defendant committed the other offenses"].) This factor therefore weighs against admission, although the trial court found the potential prejudice decreased because the jury would be instructed as to the

appropriate use of the prior act evidence.[8] Defendant suggests that it "was simply not possible to defend" against S.A.'s "outlandish accusations which occurred more than three decades prior." He offers no further explanation or examples. This contention lacks merit, particularly given the fact that the alleged victim testified at trial and was therefore available for cross-examination and that her testimony was limited to the alleged misconduct.

5. *Consumption of time*

Finally, there was little danger that the presentation of evidence related to defendant's prior misconduct would require an undue consumption of time. The evidence consisted of the testimony of a single witness, S.A., and was limited to a discussion of the alleged sexual misconduct by defendant against her. Thus, the court was well within its discretion to determine that this factor supported admissibility.

In sum, we find the trial court did not abuse its discretion in balancing the factors and admitting the evidence of defendant's prior sexual misconduct under sections 1108 and 352.

II. *Multiple Punishment*

Defendant contends the trial court erred in refusing to stay his sentence for count three pursuant to Penal Code section 654. We disagree.

Penal Code section 654, subdivision (a), provides: "An act or omission that is 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 in no case shall the act or omission be punished under more than one provision." In the seminal decision interpreting this statute, the Supreme Court held that "[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of

[8] The jury was so instructed, using CALJIC 2.50.01.

section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19 (*Neal*), overruled in part on another ground as stated in *People v. Correa* (2012) 54 Cal.4th 331.) While the Supreme Court has acknowledged that the "intent and objective" test set forth in *Neal* is a "'judicial gloss'" that was "'engrafted onto section 654,'" and noted that "[w]hether it should have been is debatable," it has nevertheless declined to expressly overrule it. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211, 1215-1216 (*Latimer*).)

However, "[d]ecisions since *Neal* have limited the rule's application in various ways. Some have narrowly interpreted the length of time the defendant had a specific objective, and thereby found similar but consecutive objectives permitting multiple punishment. (E.g., *People v. Harrison* [1989] 48 Cal.3d [321,] 334-338 [multiple sex crimes each have the separate objective of achieving additional sexual gratification]; *People v. Perez* [1979] 23 Cal.3d [545,] 551-554 [similar]; *People v. Trotter* (1992) 7 Cal.App.4th 363, 368 ['each shot [fired at the same victim] evinced a separate intent to do violence'].)" (*Latimer, supra*, 5 Cal.4th at pp. 1211-1212.)

One line of cases, cited by the Attorney General here, relies on the Supreme Court's statement that "a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment." (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11, disapproved on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896.) Under these cases, "a finding that multiple offenses were aimed at one intent and objective does not necessarily mean that they constituted "one indivisible course of conduct" for purposes of section 654. If the offenses were committed

on different occasions, they may be punished separately. [Citation.]" (*People v. Goode* (2015) 243 Cal.App.4th 484, 492-493.) Often, divisibility turns on whether "the defendant had an opportunity to reflect" between offenses and whether "each successive offense created a new risk of harm." (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1254-1255 [permitting punishment for burglary that was committed with the intent to facilitate subsequent crimes]; *People v. Massie* (1967) 66 Cal.2d 899, 908.) Where the defendants' acts are "temporally separated" they "afford the defendant opportunity to reflect and to renew his or her intent before committing the next [offense], thereby aggravating the violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

Defendant relies on another line of cases springing from the language in *Neal*, *supra*, 55 Cal.2d at p. 19, that where "all of the offenses were incident to one objective, the defendant may be punished for any one such offenses but not for more than one." These cases apply Penal Code section 654 to bar multiple punishment for an offense such as kidnapping and a second offense, where the kidnapping was done for the purpose of committing the second offense. (See, e.g., *Latimer, supra*, 5 Cal.4th at p.1216; *People v. Jackso*n (1995) 32 Cal.App.4th 411, 414 [staying punishment for kidnapping offense where the "kidnapping was for the purpose of committing a sexual offense, provided the sexual offense was punished and the acts comprised an indivisible transaction arising out of a single course of conduct"]; *People v. Burns* (1984) 158 Cal.App.3d 1178, 1181; *People v. Galvan* (1986) 187 Cal.App.3d 1205, 1219.)

"The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be

upheld on appeal if there is any substantial evidence to support them." (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

Defendant urges that we should bar punishment on the kidnapping count. Because he was convicted of kidnapping with the specific intent to commit lewd conduct, he argues that the kidnapping was necessarily done with the same intent and objective as the subsequent lewd conduct

However, the trial court concluded that Penal Code section 654 did not bar punishment on both counts, relying on the "significant time gap" between the kidnapping in the evening and defendant's commission of lewd acts early the next morning, "accentuated by defendant leaving the location and returning the van." Accordingly, the court found the two crimes were "divisible." Substantial evidence supports the court's determination that the two crimes were divisible, rather than a continuous course of conduct, and thus subject to separate punishment. Crucially, not only were the crimes separated by many hours, but defendant left the motel, returned the van to Paris's residence, retrieved his belongings, and returned to the motel on his bicycle. As such, the court was entitled to find that defendant had the opportunity to reflect and to renew his intent prior to the second offense, creating a separate risk of harm upon his return to the motel and initiation of the lewd contact with Kayla. These circumstances distinguish this case from the kidnapping cases cited by defendant, which applied Penal Code section 654 to a continuous course of conduct between the kidnapping and the assault. (See, e.g., *Latimer, supra*, 5 Cal.4th at p. 1206 [defendant kidnapped victim, drove her into the desert, then raped her]; *People v. Flores* (1987) 193 Cal.App.3d 915, 917 [defendant kidnapped child, took him to motel room, and sexually assaulted him].)

We also reject defendant's assertion that there was insufficient evidence to establish that his lewd conduct occurred in the early morning on March 29, 2014, and thus many hours after the kidnapping began. The court's determination that there was a multi-hour time gap was supported by substantial evidence, including Kayla's testimony at trial that defendant touched her after she woke up early the next morning.

We therefore conclude that substantial evidence supports the trial court's imposition of separate punishment on both counts.

DISPOSITION

Affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.