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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DENNIS MAYFIELD, Defendant and Appellant.	B268348 (Los Angeles County Super. Ct. No. GA092426)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jared D. Moses, Judge. Affirmed.

Jonathan B. Steiner and Joshua Schraer, 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, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Heather B. Arambarri, Deputy Attorney General, for Plaintiff and Respondent.

Penal Code section 209, subdivision (b),[1] penalizes kidnapping an individual to commit robbery if the perpetrator moves "the victim . . . 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 [robbery] offense." (§ 209, subd. (b)(2).) We consider whether *Johnson v. United States* (2015) ___ U.S. ___ [135 S. Ct. 2551] (*Johnson*) requires us to strike down the statute as unconstitutionally vague.

I. BACKGROUND

At trial, the prosecution presented evidence to establish defendant Dennis Mayfield kidnapped the mother of his children, Pamela L. (Pamela), to obtain money from her by robbery. As relevant to the issue we confront, Pamela testified defendant came to her house in February 2014, ostensibly to visit his children. When he arrived, however, he demanded money, they argued, he punched her, and he held a gun to her head and threatened to kill her unless she gave him money. Defendant then forced Pamela and their one-year-old son into a car and they drove to a gas station minimart, where he forced her to withdraw $500 from an ATM.

Defendant testified at trial, and he contradicted Pamela's account of events. He denied he ever hit Pamela, held a gun to her head, or threatened to kill her; in fact, defendant asserted he did not have a gun at all during the time he was with Pamela.

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[1] Undesignated statutory references that follow are to the Penal Code.

According to defendant, it was Pamela who proposed going to withdraw money from the ATM, and she did so voluntarily.

The jury believed Pamela, not defendant—convicting him of kidnapping to commit robbery in violation of section 209, subdivision (b), plus several other charged offenses.[2] The court sentenced defendant to life in prison with eligibility for parole after seven years on the section 209 count of conviction, and a determinate term of 9 years and 8 months in prison as to the other counts on which the jury found him guilty.

II. DISCUSSION

In *Johnson*, the high court held void for vagueness the aptly named residual clause of the Armed Career Criminal Act (ACCA), which defined the statutory term "violent felony" to mean a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." (18 U.S.C. § 924(e)(2)(B).) Defendant argues the California kidnapping statute at issue in this case, which 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" (§ 209, subds. (b)(1), (b)(2)), suffers from the same vagueness problem as the ACCA's residual clause.

Defendant's argument fails, and little more than a careful reading of *Johnson* is necessary to understand why. The residual clause, as construed, required courts to imagine the type of conduct involved in an "ordinary case" of a charged crime and

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[2] The jury acquitted defendant on charges he forcibly raped Pamela and forced her to engage in oral copulation.

then "judge whether that abstraction present[ed] a serious potential risk of physical injury." (*Johnson*, *supra*, ___ U.S. at p. ___ [135 S. Ct. at p. 2557].) Section 209, subdivision (b) does not require courts to engage in a similarly rudderless task because its applicability turns on the assessment of "real-world facts" (*ibid.*)—in this case, defendant's forced movement of Pamela and the risk of harm it created.

A. Legal Background

Section 209 is often referred to as California's "aggravated" kidnapping statute because it requires proof of certain elements not required for a prosecution under the "simple" kidnapping statute (section 207), for example, that the kidnapping is done for the purpose of committing a robbery. (*People v. Martinez* (1999) 20 Cal.4th 225, 232.) In a 1969 decision, our Supreme Court interpreted section 209 as it then read ("Any person who . . . kidnaps or carries away any individual to commit robbery . . . is guilty of a felony . . . .") to exclude from its ambit those kidnappings "in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself." (*People v. Daniels* (1969) 71 Cal.2d 1119, 1125, 1139 (*Daniels*).) In the course of so holding, the *Daniels* court rejected the notion that any attempt to define what movement of a victim must be shown to support a kidnapping conviction (the "asportation element") ran the risk of rendering the statute impermissively vague. (*Id.* at pp. 1128-1129 ["The law is replete with instances in which a person must, at his peril, govern his conduct by such

nonmathematical standards as 'reasonable,' 'prudent,' 'necessary and proper,' 'substantial,' and the like"].)

Almost 20 years later, the Legislature codified the asportation element of aggravated kidnapping largely as formulated in *Daniels* and subsequent cases. (Stats. 1997, ch. 817, § 2, p. 5519 [codified at section 209, subdivision (b)(2)]; see also, e.g., *People v. Martinez*, *supra*, 20 Cal.4th at p. 232 & fn. 4 ["Section 209(b)(2) thus codifies both [*People v. Rayford* (1994) 9 Cal.4th 1] and a modified version of the [*Daniels*] asportation standard . . . . Unlike our decisional authority, it does not require that the movement 'substantially' increase the risk of harm to the victim"].) Since then, appellate courts have routinely assessed the validity of aggravated kidnapping convictions in published decisions without suggestion that the section 209, subdivision (b)(2) asportation formulation derived from *Daniels* is unworkable or too vague to apply. (See, e.g., *People v. Williams* (2017) 7 Cal.App.5th 644, 667-668 [incidental movement of the victims insufficient to support convictions under section 209]; *People v. Simmons* (2015) 233 Cal.App.4th 1458, 1471-1474 [ample evidence of asportation to support section 209 convictions]; *People v. Robertson* (2012) 208 Cal.App.4th 965, 983-987; see also *People v. Vines* (2011) 51 Cal.4th 830, 869-871 [affirming aggravated kidnapping conviction under pre-1997 version of section 209, subdivision (b)].)

B. Johnson *Is Inapposite, and Section 209 Subdivision (b) Is Not Unconstitutionally Vague*

Defendant advances an argument these post-*Daniels* cases have not expressly confronted. Apparently believing the high court's recent decision in *Johnson* represents a marked shift in

constitutional vagueness jurisprudence, he argues section 209, subdivision (b)(2) is unconstitutionally vague because it is impossible to determine the statute's meaning—an impossibility, he claims, that is reflected in "numerous court of appeal decisions which turn on arbitrary interpretations of the phrases 'merely incidental' and 'risk of harm over and above that necessarily present in the underlying offense.'" Defendant's vagueness argument, which is predicated on his misplaced reliance on *Johnson*, is unpersuasive.

"'The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of "life, liberty, or property without due process of law," as assured by both the federal Constitution (U.S. Const., Amends. V, XIV) and the California Constitution (Cal. Const., art. I, § 7).' (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 567 [ ].) 'All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears.' (*Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 484 [ ].)" (*People v. Garcia* (2014) 230 Cal.App.4th 763, 768; see also *People v. Fuiava* (2012) 53 Cal.4th 622, 696.) A statute is void for vagueness if it does not define the proscribed offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (*Kolender v. Lawson* (1983) 461 U.S. 352, 357; accord, *People v. Morgan* (2007) 42 Cal.4th 593, 605.)

In *Johnson*, the United States Supreme Court did not confront the meaning of the ACCA's residual clause for the first

time. Rather, the high court had already held the ACCA's definition of the term "violent felony," which incorporates the residual clause, must be construed according to what is known as the categorical approach. (*Johnson*, *supra*, ___ U.S. at p. ___ [135 S. Ct. at p. 2557].) "Under the categorical approach, a court assesses whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.' [Citation.] [¶] Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves 'in the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." (*Ibid*.)

The counterfactual nature of this inquiry is what gave rise to the vagueness problem that *Johnson* held fatal to the residual clause. The high court reasoned there was "grave uncertainty" about how to estimate the risk posed by a crime in an imagined, ordinary case because it was unclear how to determine what kind of conduct is involved in an ordinary case of a crime. (*Johnson*, *supra*, ___ U.S. at p. ___ [135 S. Ct. at p. 2557].) In addition, the *Johnson* court explained the residual clause's "serious potential risk of physical injury" standard was "imprecise," and that imprecision left too much uncertainty about how much risk is necessary for a crime to qualify as a violent felony when the standard is applied not to "real-world facts" but rather to a "a judge-imagined abstraction." (*Id.* at p. 2558.)

Johnson reinforced its conclusion that the residual clause was unacceptably indeterminate by highlighting the Supreme Court's own "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause" in its

prior cases, as well as similar difficulties encountered by lower federal courts. (*Johnson*, *supra*, ___ U.S. at p. ___ [135 S. Ct. at pp. 2558-2560].) Importantly, however, the high court explained that the interpretive difficulties encountered in prior cases were evidence of vagueness not because courts had been divided "about whether the residual clause covers this or that crime" but because the cases reflected a "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." (*Id.* at p. 2560.)

In this case, the language of section 209, subdivision (b)(2) requires juries and courts to apply a legal standard to real-world facts, and that makes all the difference for purposes of resolving the constitutional question presented. Unlike the residual clause in *Johnson*, there is no hypothetical "ordinary" case that determines the statute's applicability—rather, the jury in this case (like juries in all aggravated kidnapping cases) assessed whether defendant was guilty of aggravated kidnapping based on the evidence, specifically, the evidence concerning his movement of Pamela on the day in question. That is precisely the type of determination that is beyond void-for-vagueness reproach according to *Johnson* itself. (*Johnson*, *supra*, ___ U.S. at p. ___ [135 S. Ct. 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 on his estimating rightly . . . some matter of degree'"]; accord, *Welch v. United States* (2016) ___ U.S. ___, ___ [136 S. Ct. 1257, 1262 ["The Court's analysis in *Johnson* thus cast no doubt on the many laws that 'require gauging the riskiness of conduct in

which an individual defendant engages *on a particular occasion*"].)

That there are Court of Appeal opinions both affirming and reversing aggravated kidnapping convictions is not, as defendant believes, evidence the statute can be applied only by "guesswork." As *Johnson* recognizes, "even clear laws produce close cases" (*Johnson*, *supra*, ___ U.S. at p. ___ [135 S. Ct. at p. 2560]), and the existence of what some might view as divergent results from case to case is not sufficient reason to conclude a criminal statute is vague. Rather, it was the more fundamental "disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider" (*ibid.*) that served to confirm the residual clause at issue in *Johnson* was "hopeless[ly] indetermin[ate]" (*id.* at p. 2558). By contrast, there is broad agreement in California case law on both the nature of the inquiry required and the relevant factors to evaluate when deciding whether the facts in a given case are sufficient to satisfy the asportation element of the aggravated kidnapping statute. (See, e.g., *People v. Dominguez* (2006) 39 Cal.4th 1141, 1152 [considerations relevant to assessing whether there is an increased risk of harm to a victim include whether movement of the victim decreases the likelihood of detection, increases the danger inherent in the victim's foreseeable attempts to escape, or enhances the attacker's opportunity to commit additional crimes].)

Thus, for purposes of the aggravated kidnapping statute, *Johnson* changes nothing. As *Daniels* explained more than 40 years ago, "[t]he law is replete with instances in which a person must, at his peril, govern his conduct by such nonmathematical standards as 'reasonable,' 'prudent,' 'necessary and proper,'

'substantial,' and the like," and "standards of this kind are not impermissively vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind." (*Daniels*, *supra*, 71 Cal.2d at pp. 1128-1129.) Ordinary people can understand the conduct prohibited by the kidnapping to commit robbery statute, and it does not encourage discriminatory enforcement. We therefore reject defendant's void-for-vagueness challenge.

DISPOSITION

The judgment is affirmed.

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BAKER, J.

We concur:

TURNER, P.J.

KIN, 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.