Filed 12/9/14 P. v. McFadden CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOHNATHAN RICHARD MCFADDEN,<br><br>Defendant and Appellant. | B253957<br><br>(Los Angeles County<br>Super. Ct. No. SA083734) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie E. Brown, Judge. Affirmed.

Ron Nelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Louis W. Karlin, Deputy Attorney General, for Plaintiff and Respondent.

---

Defendant appeals his conviction for one count of kidnapping (Pen. Code,[1] § 207, subd. (a)) and one count of assault (§ 245, subd. (a)(4)). He challenges the sufficiency of the evidence on his conviction for kidnapping, contending the asportation of the victim was insufficient. We affirm.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

On April 4, 2013, the victim, Brittany R., was at home in her apartment. She shared the two-bedroom apartment with a roommate, Gloria. At the time, Brittany R. was dating defendant. They had met at a night club about five months before and he frequently stayed at her apartment, but they did not live together.

Defendant was staying over that night, and they went to bed between 1:30 a.m. and 2:00 a.m. Brittany R. was awakened around 4:30 a.m. because defendant had turned on the television. She asked him to turn off the television, but he ignored her. Brittany R., a registered nurse, needed to report for work early the next day. She asked defendant why he would not turn off the television, and he responded, "'I'm horny and you're not doing anything about it.'" She asked him why he was behaving the way he was, and Brittany R. got out of bed because defendant was scaring her.

She asked defendant, "'Johnathan, why are you acting like this?'" Defendant responded, "Don't call me by my name." He grabbed her by the wrist and pulled her onto the bed. Defendant hit her several times with a closed fist on the face. Brittany R. yelled for help and called for her roommate. Gloria opened the door to Brittany R.'s room and saw what was happening. She asked what was going on, and defendant told her to "'[s]tay out of it'" and that Brittany R. had "'started it.'"

Gloria left the room and called 911. Defendant kept hitting Brittany R. and started choking her. She pried his hands off and called to Gloria, saying, "'[h]e's going to kill me.'" Defendant kept hitting her. Gloria came back into the room and sprayed defendant with pepper spray. At this point, defendant and Brittany R. were on the floor. The pepper spray did not stop defendant from hitting her. Brittany R. got away from defendant and ran through the

---

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

living room and to the front door of the apartment. The front door, which is the only exit from the apartment, was about 40 feet from her bedroom.

Brittany R. opened the front door, took two steps outside and yelled for help. Defendant pulled her back into the living and shut the door. Defendant threw her against the couch. She ran back into her bedroom and shut the door. Defendant pushed the door open and began hitting her again. After hitting her another five or 10 times, defendant stopped and told her to get up and go into the bathroom. He told her to get into the shower although she had her clothes on. Brittany R. was bleeding from her nose and mouth. Defendant said, "'[n]ow do you see what you're made of.'" She took off her clothes and washed the blood off her face in the shower. Defendant stood watching her. Gloria opened her bedroom door and asked if she was okay. Defendant replied, "'[s]he's fine. She just ran into the door.'" Brittany R. was still in the shower when the police arrived.

The police officer came into the bathroom and asked if Brittany R. had any clothes into which she could change. Brittany R. would not leave the bathroom until defendant had left the apartment.

Brittany R.'s injuries took a month to heal, and she was not able to work during this time.

An information filed July 16, 2013 charged defendant with one count of kidnapping in violation of section 207, subdivision (a), and one count of assault by means likely to produce great bodily injury in violation of section 245, subdivision (a)(4). The information further alleged as to counts 1 and 2 that defendant had suffered a prior strike conviction pursuant to section 667, subdivisions (b) through (i) and section 1170.12, subdivisions (a) through (d).

The jury found defendant guilty on both counts. The trial court sentenced defendant to 17 years, consisting of the middle term of five years on the kidnapping offense, doubled pursuant to the "Three Strikes" law, plus five years for defendant's prior prison term and a consecutive two-year term for the assault.

## DISCUSSION

Defendant contends insufficient evidence supports the kidnapping conviction.

In order to establish a kidnapping under section 207, subdivision (a), the prosecution must prove "'(1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance.' [Citation.]" (*People v. Bell* (2009) 179 Cal.App.4th 428, 435.) In determining whether the third element, asportation, has been satisfied, a trier of fact may 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." (*People v. Martinez* (1999) 20 Cal.4th 225, 237.)

Kidnapping requires that the perpetrator move the victim in a substantial manner by use of force or fear, without the person's consent. (*People v. Arias* (2011) 193 Cal.App.4th 1428, 1434–1435; see *People v. Martinez*, *supra*, 20 Cal.4th at pp. 235–236.) In assessing whether the movement of the victim was substantial rather than slight or trivial, *Martinez* explained that "the trier of fact may consider more than actual distance." (*Martinez*, at p. 235.) The jury may consider the totality of the circumstances surrounding the movement, including such factors as whether the movement increased the risk of harm to the victim, decreased the likelihood of detection, increased the danger inherent in a victim's foreseeable attempts to escape, or enhanced the attacker's opportunity to commit additional crimes. (*Id*. at p. 237.) As *Martinez* observed, "[t]o permit consideration of 'the totality of the circumstances' is intended simply to direct attention to the evidence presented in the case, rather than to abstract concepts of distance." (*Ibid.*) In addition, the jury should consider whether the movement was merely incidental to an associated crime committed by the defendant. (*Ibid*.) *Martinez* emphasized that focusing on a particular distance of movement was "rigid, arbitrary and ultimately unworkable" and section 207, subdivision (a) did not limit the asportation element to a "specified number of feet or yards." (*Martinez*, at p. 236.)

In *Arias, supra*, 193 Cal.App.4th 1428, the court found that the movement of the victim 15 feet from outside to inside his apartment "increased his risk of harm in that he was moved from a public area to the seclusion of his apartment" and made it "less likely defendant would have been detected if he had committed an additional crime. These factors support the asportation requirement for kidnapping." (*Id*. at p. 1435; see *People v. Shadden* (2001) 93 Cal.App.4th 164, 168–169 [movement of nine feet to the back of a store meets asportation requirement of kidnapping]; *People v. Smith* (1995) 33 Cal.App.4th 1586, 1594 [movement of victim from driveway "open to street view" to camper increased risk of harm to victim].)

We review the record in the light most favorable to the judgment below. (*People v. Johnson* (1980) 26 Cal.3d 557, 576–578.) "'The test is whether substantial evidence supports the [verdict], not whether the evidence proves guilt beyond a reasonable doubt.'" (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) The fact that circumstances can be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932–933.) Ultimately, a defendant "bears an enormous burden" when challenging the sufficiency of the evidence. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.)

Here, the record amply supports the jury's kidnapping verdict. As stated in *Martinez, supra*, 20 Cal.4th 225 "nothing in the language of section 207[, subdivision] (a) limits the asportation element solely to actual distance."[2] (*Martinez*, at p. 236.) The focus is not on the quantity of movement but its quality; hence, the standard is whether the movement is "substantial in character," not substantial in terms of distance. (*Id*. at p. 237; *People v. Caudillo*, *supra*, 21 Cal.3d at p. 573.) Hence, although Brittany R. went only two steps outside of her apartment before defendant grabbed her and pulled her back into the apartment, his conduct increased the danger to her and increased the likelihood defendant's assault on her

---

[2] In *People v. Caudillo* (1978) 21 Cal.3d 562, the Supreme Court held that whether an asportation was substantial in character was solely dependent on the actual distance involved. (*Id*. at pp. 572–573.) In *People v. Martinez*, *supra*, 20 Cal.4th 225, the Supreme Court reiterated that substantial distance is a key consideration for simple kidnapping, but it expressly overruled *Caudillo* to the extent that case prohibited "consideration of factors other than actual distance." (*Martinez*, at p. 237, fn. 6.)

would not be detected. Indeed, defendant continued to hit her once he brought her back into the apartment and ordered her to shower to wash off evidence of the attack. As stated in *People v. Arias*, *supra*, 193 Cal.App.4th 1428, "[t]he movement of [the victim] increased [the] risk of harm in that he was moved from a public area to the seclusion of his apartment. [Further], by scaring [the victim] into moving away from a public place, it was less likely defendant would have been detected if he had committed an additional crime." (*Id*. at p. 1435.) In addition, by moving her back into the apartment, defendant eliminated Brittany R.'s chance to escape. If Brittany R.'s roommate had not been there to call the police, defendant's attack would likely have continued much longer and Brittany R.'s injuries may have been even more severe. As pointed out in *People v. Smith*, *supra*, 33 Cal.App.4th 1586, where movement changes the victim's environment, it does not have to be great in distance to be substantial. (*Id*. at pp. 1593–1594.) In *People v. Shadden*, *supra*, 93 Cal.App.4th 164, the defendant hit and dragged the victim nine feet from an open area to a closed room. *Shadden* held that the distance was substantial because it changed the victim's environment. (*Id.* at p. 169.)

Thus, the two steps Brittany R. made outside her apartment—before defendant pulled her back inside the apartment—were substantial for purposes of kidnapping because absent the intervention of police, those steps may have meant the difference between life and death or severe injury.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

I concur:

CHANEY, J.

Rothschild, P.J., dissenting and concurring:

I respectfully dissent from the affirmance of the judgment as to the kidnapping count and otherwise concur.

The kidnapping is described in the majority's opinion: "Brittany R. opened the front door, took two steps outside and yelled for help. Defendant pulled her back into the living room and shut the door." (Maj. opn. *ante*, at p. 3.) The majority reasons that this movement "increased the danger to her and increased the likelihood defendant's assault on her would not be detected" and thus he is guilty of kidnapping. (Maj. opn. *ante*, at pp. 5-6.)

In my view, the majority does not give sufficient consideration to the very short distance involved in the movement.

Distance cannot be ignored in assessing whether a kidnapping has occurred. In *People v. Martinez* (1999) 20 Cal.4th 225, our high court held that an assessment of the evidence of asportation may include "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 [and] decreased the likelihood of detection." (*Id*. at p. 237.) The court made clear, however, that these contextual factors are not a substitute for consideration of the distance the victim is moved: "[W]e emphasize that contextual factors, whether singly or in combination, *will not suffice to establish asportation if the movement is only a very short distance*." (*Ibid*; italics added.) Two steps "is only a very short distance." That is where the analysis must start and, in this case, end. The defendant is certainly guilty of assault but not of kidnapping.

I would reverse the conviction for kidnapping and affirm the conviction for assault.

ROTHSCHILD, P. J.