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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. AUNDRAY C. RICHEY, Defendant and Appellant.	2d Crim. No. B279074 (Super. Ct. No. 1472332) (Santa Barbara County)

Aundray C. Richey appeals a judgment following conviction of kidnapping, misdemeanor assault, genital penetration by a foreign object of an unconscious person, possession of cocaine base for sale, and misdemeanor possession of methamphetamine, with findings of a prior serious felony and strike conviction. (Pen. Code, §§ 207, subd. (a), 240, 289, subd. (d)(1), 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d); Health & Saf. Code, §§ 11351.5, 11377, subd. (a).)[1] We reverse and remand for

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

resentencing regarding count 6, possession of cocaine base for sale, but otherwise affirm. (*People v. Keith* (2015) 235 Cal.App.4th 983, 985 [application of newly amended Health and Safety Code section 11351.5 mitigating punishment].)

FACTUAL AND PROCEDURAL HISTORY

Kidnapping and Assault of J.D.

(Counts 1 & 2)

J.D. and Richey were students at Santa Barbara Community College. J.D. knew Richey casually, and did not have a dating or sexual relationship with him. On December 6, 2014, J.D. and Richey exchanged text messages; Richey asked if she wanted to attend "a kickback" with his friends in Santa Barbara. J.D. agreed to accompany Richey to the gathering which would involve "hanging out" and "drinking." From the text message exchanges, J.D. believed that Ecstasy, alcohol, and marijuana would be available at the party. Nevertheless, J.D. informed Richey that she needed to return home that evening to care for her puppy and to prepare for a final exam.

Richey picked up J.D. and then drove to his Santa Barbara apartment. Several people were sleeping on the apartment floor, but no party was occurring. J.D. and Richey listened to music, drank rum, and used cocaine; she felt "a buzz." As the evening progressed, J.D. became uncomfortable when she realized that others would not be attending.

Richey became "touchy" with J.D. but she did not return his advances. J.D. texted her roommate and asked for a ride home from Richey's apartment. After Richey stated that his cousin would drive J.D. home, she texted her roommate and cancelled the request. When Richey's cousin arrived at the apartment, however, he refused to drive J.D. home. After approximately two

hours, Richey pulled out his futon bed. J.D. announced that she was going home and "not sleeping with [Richey]" or "staying the night." J.D. repeatedly attempted to phone another friend to drive her home, but her cellular telephone service failed.

At approximately 4:00 a.m., Richey asked J.D. to stay the night. She refused and left the apartment. Richey was "frustrated" and "pissed off" with J.D., but he agreed to drive her home.

During the drive to J.D.'s apartment, Richey asked if he could stay with her that evening. When she responded that he could not, he became upset and pulled off the road. J.D. attempted to call her roommate, but again she had no telephone service. Richey then "snatched" her telephone and threw it under his seat. He became angry and J.D. began to cry. Richey then kissed J.D.'s face and touched her vagina over her clothing. J.D. resisted and stated, "[G]et off me," and "[D]on't touch me." She demanded that Richey return her telephone and stop "groping" her. Richey then returned her telephone and asked her to stop crying. (Count 2 [misdemeanor assault].)

As soon as J.D. received her telephone, she opened his vehicle door and "jumped out." Richey grabbed the back of her shirt, but she "jolted forward" and he released his grasp. J.D. walked away quickly and attempted to make a telephone call. Suddenly, Richey, who had followed her, placed her in "a chokehold." J.D. screamed, kicked, and bit Richey as he dragged her backward approximately 10 feet toward his vehicle. J.D. pulled away from Richey and began to run, but he chased and caught her. He placed her in another chokehold and covered her mouth with his hand. J.D. thought she might fall unconscious because she could not breathe due to the chokehold. Richey

dragged her back toward his vehicle but she again broke free. J.D. believed that Richey might rape or kill her and feared that if she was brought back to his vehicle, he could "do whatever" to her. (Count 1 [kidnapping].)

J.D. ran along the street and flagged down a passing taxicab. The taxicab driver drove J.D. until he saw a police patrol vehicle. J.D. then spoke with the police officer who took photographs of her arm, sternum, and neck injuries. J.D. was "crying hysterically" and struggling to breathe.

The following afternoon, Richey sent frequent text messages to J.D. stating that he had no memory of the events of the prior evening due to his drug and alcohol consumption. He also apologized when J.D. responded that he chased her, caught her, and placed her "in a headlock."

One week later, Santa Barbara Police Detective Douglas Klug interviewed Richey at the community college parking lot. Richey demonstrated how he held J.D. to prevent her from running into traffic -- one hand around her waist and one hand around her face. Richey did not demonstrate any chokehold. Klug arrested Richey and discovered two bindles of cocaine base and two bindles of methamphetamine on his person. Klug also seized Richey's cellular telephone and discovered text messages concerning drug sales.

Following Richey's arrest and advice of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, police detectives interviewed him. During the interview, Richey stated that he pulled J.D. back toward his vehicle to "take her home or, you know, back to [his] house so she could, you know, get un-drunk and so [he] could get un-drunk." The interview was videorecorded, and at trial the prosecutor played the recording.

Sexual Assault of M.F.
(Count 3)

M.F. and her friends previously smoked marijuana and used cocaine with Richey at his apartment. M.F. did not have a sexual or dating relationship with Richey, however.

In the evening of December 20, 2014, Austin Miller hosted a party in his parents' home. Miller invited M.F. and other teenage girls whom he knew from high school. The girls asked Miller if they could stay overnight following the party. Miller agreed; his parents were out of town that evening.

Later, many uninvited guests, including Richey, appeared at the party. Miller, who by then was "pretty drunk," attempted to confine the party to the outside patio. M.F. consumed shots of vodka and smoked marijuana at the party.

Shortly after midnight, Miller asked the partygoers to leave. He, M.F., C.D., and M.G. cleaned the house and then went to sleep. The three girls slept in Miller's bedroom; he slept in his parents' bedroom.

Shortly after M.F. and the other girls went into the bedroom, Richey appeared and asked, "[W]here am I going to sleep?" Without permission, Richey then laid down beside C.D. and, after a few minutes, touched her buttocks. C.D. moved away from Richey and then exchanged places with M.G. M.G. soon left the bedroom, however, and went to sleep in another room.

M.F. fell asleep but awakened when she felt Richey's fingers inside her vagina. M.F. rose quickly, pushed Richey, and shouted at him.

C.D. awoke when she heard M.F. shout, "I can't believe you did that. What are you doing. I'm leaving. I'm leaving." M.F. then left the bedroom and went upstairs. C.D. followed and

found M.F. crying. M.F. asked C.D. to retrieve her clothing so that she could leave.

M.F. then confronted Richey who denied the incident occurred. In frustration, M.F. then "punched [Richey] in the face a few times" and "keyed" his vehicle when she left.

M.F. called her mother who then reported the incident to the Santa Barbara Police Department. M.F. later had a sexual assault exam. At Detective Klug's request, M.F. made a pretext telephone call to Richey. Richey stated that he had been intoxicated with drugs and alcohol and did not know what happened. M.F. and Richey agreed to meet at the community college parking lot.

When Miller awoke the next morning, Richey was standing by Miller's parents' bedroom door. Miller was unaware that Richey was still inside his home. Miller politely asked Richey to leave and he complied.

Klug later interviewed Richey at the community college parking lot. Richey denied having any sexual interaction with M.F. In a later police interview, Richey admitted sexual contact with M.F. at the Miller residence.

Conviction and Sentencing

The jury convicted Richey of kidnapping, misdemeanor assault, genital penetration by a foreign object of an unconscious person, possession of cocaine base for sale, and misdemeanor possession of methamphetamine. (§§ 207, subd. (a), 240, 289, subd. (d)(1); Health & Saf. Code, §§ 11351.5, 11377, subd. (a).) In a separate proceeding, the trial court found that Richey suffered a prior serious felony and strike conviction for a 2009 robbery. (§§ 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

The trial court sentenced Richey to a 28-year prison term, consisting of a 12-year term for genital penetration by a foreign object of an unconscious person (count 3); three years four months for kidnapping (count 1); two years eight months for possession of cocaine base for sale (count 6); 10 years for his prior serious felony conviction; and credit for time served for the two misdemeanor counts (counts 2 and 7). The court imposed a $300 restitution fine, a $300 parole revocation restitution fine (suspended), and other fines and fees; ordered victim restitution; and awarded Richey 742 days' presentence custody credit. (§§ 1202.4, subd. (b), 1202.45.)

Richey appeals and contends that: 1) insufficient evidence supports his conviction for kidnapping J.D.; 2) the trial court abused its discretion by excluding evidence that M.F. cheated on her boyfriend and that unknown male DNA evidence was found on her neck; 3) the trial court abused its discretion by denying his motion for a new trial based upon newly discovered evidence; and 4) his sentence for possession of cocaine base for sale must be reversed and remanded for resentencing.

DISCUSSION

I.

Richey argues that insufficient evidence supports his conviction for simple kidnapping of J.D. because her movement was trivial and insubstantial in character. (*People v. Perkins* (2016) 5 Cal.App.5th 454, 470 [movement of victim 10 to 30 feet from bathroom to bedroom insubstantial for aggravated kidnapping].) He relies upon one portion of J.D.'s testimony stating that he "pulled [her] back a good like 5 feet or so" or "a little bit further." Richey asserts that the conviction violates his

state and federal constitutional rights to a fair trial and due process of law.

In reviewing the sufficiency of evidence to support a conviction, we examine the entire record and draw all reasonable inferences therefrom in favor of the judgment to determine whether there is reasonable and credible evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Brooks* (2017) 3 Cal.5th 1, 57; *People v. Johnson* (2015) 60 Cal.4th 966, 988.) Our review is the same in a prosecution primarily resting upon circumstantial evidence. (*Johnson*, at p. 988; *People v. Watkins* (2012) 55 Cal.4th 999, 1020.) We do not redetermine the weight of the evidence or the credibility of witnesses. (*People v. Albillar* (2010) 51 Cal.4th 47, 60; *People v. Young* (2005) 34 Cal.4th 1149, 1181 ["Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact"].) We must accept logical inferences that the jury might have drawn from the evidence although we would have concluded otherwise. (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Albillar*, at p. 60.) Moreover, the testimony of a single witness is sufficient to prove a fact. (*People v. Richardson* (2008) 43 Cal.4th 959, 1030-1031.)

Section 207, subdivision (a) defines the criminal offense of simple kidnapping and provides that "[e]very person who forcibly . . . steals or takes, or holds, detains, or arrests any person in this state, and carries the person . . . into another part of the same county, is guilty of kidnapping." The statute does not refer to any particular distance the victim must be moved. (*People v. Brooks*,

supra, 3 Cal.5th 1, 68.) Our Supreme Court has long recognized, however, that the movement or asportation must be substantial in character and not slight or trivial. (*Ibid.*)

In *People v. Martinez* (1999) 20 Cal.4th 225, 235, our Supreme Court abandoned exclusive reliance on the actual distance that the victim was moved to determine whether the movement was substantial in character. (*People v. Brooks*, *supra*, 3 Cal.5th 1, 68.) *Martinez* adopted a totality of the circumstances standard that takes into account the scope and nature of the movement and any increased risk of harm to the victim. (*Brooks*, at pp. 68-69.) "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*, at p. 237.)

The evidence here sufficiently establishes the asportation element of simple kidnapping pursuant to the totality of the circumstances standard. The "about 10 feet" that Richey dragged J.D. by his chokehold was substantial in character because it increased her risk of psychological harm. (*People v. Shadden* (2001) 93 Cal.App.4th 164, 168 [victim dragged nine feet into a back room of a store].) Richey increased the risk of psychological harm to J.D. because she reasonably feared that she would be assaulted again inside his vehicle. (*People v. Nguyen* (2000) 22 Cal.4th 872, 874 [increased risk of harm may be emotional or psychological]; *People v. Power* (2008) 159 Cal.App.4th 126, 138 [same].)

Moreover, Richey increased the risk of physical harm to J.D. by a foreseeable risk that she would attempt to escape him by fleeing into roadway traffic. Although traffic may have been light at that time of the early morning, there was some traffic. J.D. hailed a passing taxicab and the taxicab driver came upon a patrol vehicle. Richey acknowledged as much when he demonstrated to Detective Klug how he restrained J.D. and explained that he did so to prevent her from "running into traffic." The scope and nature of Richey's movement of J.D. satisfies the asportation element of simple kidnapping beyond a reasonable doubt.

II.[2]

Richey asserts that the trial court abused its discretion by excluding evidence that M.F. had cheated on her boyfriend, and that unknown male DNA was found on her neck during the sexual assault exam. Richey points out that the court precluded his impeachment of M.G.'s opinion that M.F. was not interested in a romantic relationship with him. Richey relies upon this statement by M.G. that supported her opinion that M.F. was not interested sexually or romantically in him: "Because [M.F.] had a boyfriend. . . . His name is Rocket." Richey asserts that M.F.'s admission to the sexual assault nurse that she had sexual relations with her ex-boyfriend (not Rocket) the day of the Miller party tends to prove that she consented to sexual acts with him (Richey). Richey contends that the exclusion of this evidence denied him a fair trial and due process of law pursuant to the state and federal constitutions.

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[2] All statutory references in Part *II.* are to the Evidence Code.

Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) The trial court is vested with wide discretion to determine the relevancy of evidence. (*People v. Alexander* (2010) 49 Cal.4th 846, 904.) In reviewing a relevancy contention, we consider whether the challenged evidence satisfied the requirements of section 210, and whether the trial court abused its discretion pursuant to section 352 by a finding that the probative value of the evidence was not substantially outweighed by the substantial danger of undue prejudice. (*Alexander*, at p. 903-904.) Pursuant to section 1103, subdivision (c)(1), "evidence of specific instances of the complaining witness' sexual conduct . . . to prove consent by the complaining witness" is inadmissible.

The trial court did not abuse its discretion by excluding evidence of M.F.'s recent sexual conduct with her former boyfriend. M.G.'s opinion regarding M.F.'s lack of interest in Richey or M.F.'s sexual history with Rocket or her former boyfriend was collateral to the issues at trial. M.G.'s opinion was irrelevant to whether M.F. consented to sexual conduct with Richey or whether M.F. was unconscious (asleep) when Richey digitally penetrated her.

Likewise, the trial court did not abuse its discretion by excluding evidence of the male DNA found on M.F. during the sexual assault exam. The DNA evidence was irrelevant to whether M.F. consented to sexual activity with Richey or whether she was even conscious at the time. Moreover, the evidence was properly excluded pursuant to section 1103, the rape shield law.

As a general rule, a defendant has no constitutional right to present all relevant evidence in his favor. (*People v. Guillen*

(2014) 227 Cal.App.4th 934, 1019.) Application of the ordinary rules of evidence does not impermissibly infringe on the defendant's right to present a defense. (*People v. Lucas* (2014) 60 Cal.4th 153, 270, overruled on other grounds by *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1258.) Thus, constitutional principles are not offended by rulings that exclude evidence that is repetitive, marginally relevant, or that poses an undue risk of prejudice or confusion of the issues. (*Gonzales*, at p. 1259.) In order for a defendant's constitutional rights to override the application of the ordinary rules of evidence, the proffered evidence must have more than slight relevance to the issues and must be of substantial and significant value. (*Guillen*, at p. 1019.)

Moreover, the trial court's ruling here was not a "*blanket exclusion*" that stripped Richey of his defense of consensual sexual behavior. (*People v. Page* (1991) 2 Cal.App.4th 161, 185.) The court permitted Richey to question M.G. whether M.F. was attracted to Richey and to question whether Richey's DNA was found on M.F. during the sexual assault exam.

III.

Richey contends that the trial court abused its discretion by denying his motion for a new trial based upon newly discovered evidence in M.F.'s victim-impact statement that she vomited after she left the Miller residence because she "felt disgusting." Richey asserts that the evidence was relevant to impeach M.F.'s testimony that she was not intoxicated that evening, which bears on her memory of the incident and her "disinhibition and level of aggression." He argues that the denial of his new trial motion deprived him of a fair trial and due process of law pursuant to the state and federal constitutions.

In ruling on a motion for a new trial based on newly discovered evidence, the trial court considers whether: 1) the evidence is newly discovered; 2) the evidence is not merely cumulative; 3) the evidence is such as to render a different result probable on a retrial; 4) the party could not with reasonable diligence have discovered and produced it at trial; and 5) the facts are shown by the best evidence. (*People v. O'Malley* (2016) 62 Cal.4th 944, 1016-1017; *People v. Howard* (2010) 51 Cal.4th 15, 43.) The court has broad discretion in determining a new trial motion. (*O'Malley*, at p. 1016; *Howard*, at pp. 42-43.) "'"A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion."'" (*People v. Thompson* (2010) 49 Cal.4th 79, 140.)

The trial court properly denied Richey's new trial motion because evidence of M.F.'s vomiting was cumulative and of limited relevance. Evidence at trial already indicated that M.F. and the other girls consumed alcohol at least four hours before Richey assaulted her. Moreover, Richey's argument depends upon a chain of possible inferences, i.e., M.F. vomited because she was intoxicated; because she was intoxicated, she was aware that Richey was penetrating her vagina; and because she was intoxicated and aware, she was "disinhibited" and consented to the sexual act.

It is also not reasonably likely that Richey would obtain a different result on retrial. M.F. stated that she vomited in her car because she "felt disgusted." Her statement does not indicate that she vomited because she was intoxicated. (*People v. Beeler* (1995) 9 Cal.4th 953, 1004 [new trial motion determined by the evidence presented, not how it might be developed].) Indeed, this

statement strengthens the prosecution's case that M.F. was the victim of Richey's sexual assault and tends to create sympathy for the victim.

IV.

Richey argues that his sentence for possession of cocaine base for sale must be reversed because during the pendency of his case, the Legislature amended Health and Safety Code section 11351.5 to mitigate punishment for the offense. The Attorney General concedes and requests that the matter be remanded for resentencing.

Effective January 1, 2015, the Legislature reduced the punishment for possession of cocaine base for sale from three, four, or five years, to two, three, or four years in custody. (*People v. Keith*, *supra*, 235 Cal.App.4th 983, 985.) "The 2014 amendment to Health and Safety Code section 11351.5 mitigates punishment, there is no savings clause and the judgment against [Richey] is not yet final." (*Ibid.*) Thus, the amended statute applies to him. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1195-1196, overruled on other grounds by *People v. Rangel* (2017) 62 Cal.4th 1192, 1216; *In re Estrada* (1965) 63 Cal.2d 740, 748 ["[W]here [an] amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed].)

We also note that the abstract of judgment incorrectly states the sentence for count 3 as six years, rather than the second-strike sentence of 12 years imposed during oral pronouncement of sentence.

We reverse the sentence regarding count 6 and remand for resentencing pursuant to the amended version of Health and Safety Code section 11351.5, effective January 1, 2015. The trial

court is directed to prepare an amended abstract of judgment reflecting the new sentence, as well as the corrected sentence regarding count 3, and forward the amended abstract to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Michael J. Carrozzo, Judge

Superior Court County of Santa Barbara

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