

**NOT TO BE PUBLISHED IN THE OFFICIAL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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DATWAN TROY BETHELL,

Defendant and Appellant.

B269854

(Los Angeles County
Super. Ct. No. BA432818)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy, Judge. Reversed in part and affirmed in part.

Jonathan P. Milberg, 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, Zee Rodriguez and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Datwan Troy Bethell of kidnapping to commit robbery, second degree robbery, and battery. Bethell appeals, arguing that his convictions of kidnapping to commit robbery are not supported by substantial evidence. We agree, and reverse those convictions.

BACKGROUND

An information charged Bethell in counts 1 and 2 with kidnapping Alexander Voit and Miranda G.¹ to commit another crime (robbery) (Pen. Code, § 209, subd. (b)(1)²), in counts 3 and 4 with second degree robbery (§ 211) of Voit and Miranda, and in count 5 with sexual battery by restraint on Miranda (§ 243.4, subd. (a)), all occurring on December 27, 2014. Each count included an enhancement for use of a firearm. (§§ 12022.53, subd. (b) [kidnapping & robbery counts], 12022.5, subd. (a) [sexual battery count].) The information also alleged that Bethell had a prior conviction for attempted grand theft (§§ 664, 211).

¹ To protect Miranda G.'s privacy, we use her first name and last initial, and for brevity hereafter use her first name only.

² All further statutory references are to the Penal Code.

Bethell pleaded not guilty. The trial court denied his section 995 motion to set aside the aggravated kidnapping counts in the information.

At trial, Miranda testified that in December 2014, she worked at a medical marijuana dispensary at the intersection of Sunset and Hollywood Boulevards, checking in patients who had a recommendation from a doctor and dealing with their required paperwork, which included a California identification. For patients to enter the dispensary, store personnel observing them on a security camera would buzz them through a locked gate on the street into an alleyway, then buzz them through the locked dispensary door into a lobby or waiting room to fill out paperwork, and finally buzz them into a locked retail room containing the marijuana merchandise. The lobby had a glass window through which patients could see the marijuana merchandise in the retail room.

On the day of the robbery Bethell came in to get a gram of marijuana, but he did not have enough money, and left saying he would be back. Miranda recognized Bethell from serving him a week earlier, and put the gram of marijuana aside for him. Around 8:00 p.m., when the dispensary was about to close, another dispensary employee, Voit, who worked as the dispensary's security guard, buzzed Bethell and another man, both wearing hoodies, through the gate into the alley. Voit opened the lobby door to interact with them. Miranda could see on the camera that Bethell's companion held a gun. The men pushed past Voit and came

in “screaming that they were going to kill us and to shut up.” Bethell had covered his nose and mouth with a white T-shirt, but Miranda recognized him. Both men wore latex gloves.

Bethell and the other man took Voit and Miranda into the retail room and into the dispensary bathroom, where Miranda’s purse was hanging. The bathroom was visible from the lobby. The other robber put the gun to Voit’s head and made him take off his shoes and get into the shower. Bethell took Miranda’s cell phone out of her purse and told her he was taking her identification so they could find her and kill her if she called the police. They asked where the money was, and Voit gave them cash that was kept in an Ajax can in the bathroom.

Bethell, then holding the gun, grabbed Miranda by her hair, pushed her out of the bathroom to the display case in the retail room, and ordered her to put merchandise into a duffle bag. She was slow filling the bag, so he pushed her to the ground and took more merchandise and the money from the tip jar and the register. Bethell hit Miranda in the head several times with his hand and with the gun.

At some point, Bethell pushed Miranda to the ground face down on the other side of the counter (which she testified was not visible in the security video)³ and for a few

³ In closing argument, the prosecutor told the jury that Miranda “recounted to all of us what happened to her, whether or not this part is perfectly clear on the video,

seconds “went up my skirt and shirt,” using both hands to touch her breasts, thighs, buttocks, and vagina (over her underwear). She was crying. The other robber brought Voit out of the bathroom and the robbers tried to disconnect the security camera, but they were unsuccessful. Throughout the robbery, Bethell said, “[S]hut up bitch. I will kill you.”

Miranda heard her bosses knock (they normally came by at closing time). The robbers asked if it was her boss; she lied and said no. The second robber said, “Sorry for doing this, we love you guys, but now you have to help us get out of here.” Bethell dragged Miranda to the corner by the door, and she tried to show them where to run. Voit ran out with the men, but Miranda ran back, closed the door, grabbed a taser, and shut herself into the bathroom with her computer, contacting a friend through Facebook Messenger and asking her to call the police. After the police arrived, Miranda identified Bethell from the photograph with his paperwork, and later identified his photograph in a photo lineup.

The prosecutor played a security video of the robbery for the jury, which also heard an audio recording of Miranda’s friend’s 911 call. Miranda testified she still felt fear and shame, had turned down some acting opportunities, and had to leave a few jobs because she became frightened after dark.

because she indicated it occurred when she was behind the counter.”

Voit testified (though a Russian interpreter) that on the day of the robbery Bethell came in and then left without buying anything. When Bethell returned around 8:00 p.m. with the other robber, Voit opened the gate, the lobby door, and the door to the retail room, after which he saw the gun in the other robber's hand. The robbers walked Voit and Miranda into the bathroom, asked them where the money was, told them to lie on the floor, searched them and Miranda's bag, and took their phones, wallets, and money. While the man with the gun pointed it at Voit and made him stay on the ground, Bethell aggressively pulled Miranda "like a dog" around the store by her hair, and told her to put goods into a bag. Miranda was crying and screaming, and Voit thought he would be killed. Bethell showed Voit his driver's license and told him that he knew where he lived in case Voit called the police.

The other robber took Voit out of the bathroom while Bethell was trying to disconnect the security camera, and asked him how to turn it off; they were unsuccessful in turning it off. Voit looked closely at Bethell, who slapped him in the face to make him look away. One of Bethell's latex gloves broke, and he took the gloves off and dropped them.

The robbers panicked when they heard the manager ring the doorbell, and told Voit and Miranda to walk them out. The other robber took Voit at gunpoint toward the lobby door leading outside, but when he turned back to pick up Miranda, Voit was able to run out the door. Voit ran out of

the alley toward Sunset, screaming for the police, while the robbers ran in the opposite direction toward Hollywood Boulevard. Voit ran around to the Hollywood Boulevard side where the manager and another man were at the door. The robber with the gun was across the street and Bethell was stepping into the street by the manager, holding the bag of goods. Voit screamed that the men had a gun and ran after Bethell, who ran across the street and jumped into a waiting Infiniti sedan, which took off. The manager and the other man drove after them.

Voit testified that the distance from the retail room entrance to the bathroom was four or five meters, and from the bathroom to the retail room merchandise was one and a half meters. He also testified that the distance from the merchandise to the door leading to the alley was about 30 feet.

Voit identified Bethell on the security video and in court. He had identified Bethell in a photo array. The robbery still affected Voit; he had changed his lifestyle, becoming more cautious and suspicious.

The owner of a cigarette shop next to the marijuana dispensary testified that at 8:00 p.m. on the night of the robbery he was standing outside with his friend the dispensary manager, when he saw two men run onto Hollywood Boulevard. He and the manager ran after them with Voit.

The dispensary manager testified that he saw Voit running after the men and joined in the race. He called 911

and gave them the getaway car's license plate number, and the operator told them not to follow anyone and to wait for the police to arrive.

The police arrested Bethell in January 2015 after he parked the Infiniti illegally in a school zone and the officer ran the license plate number. Bethell's DNA matched the DNA on a broken latex glove recovered from the dispensary.

At the close of the prosecution's case, the defense moved to dismiss the kidnapping for robbery counts for insufficient evidence (§ 1118.1), and the court denied the motion.

The defense presented testimony from four witnesses that they saw Bethell at a get-together at the time of the robbery. Bethell testified that he went to the dispensary at 4:30 p.m. on the day of the robbery, and when Miranda started to bag up the marijuana, he realized he did not have enough money and he left. At 8:00 p.m. that night, Bethell was at a barbecue. When questioned by the police, he had denied he had ever been to a marijuana shop *in* the city of Hollywood, and that this was true because the shop was *on* Hollywood Boulevard in the city of Los Angeles. Bethell testified he was on probation for grand theft. Shown the security videotape, he said that was not him on the screen.

In closing argument, the prosecution argued that Bethell committed aggravated kidnapping for robbery because instead of just saying, " 'Stand right there, drop to the ground,' " he forced Miranda and Voit to move around the store, increasing the risk of harm beyond what is

necessarily present in a robbery, and separated Miranda from Voit before she suffered a sexual battery. The defense argued that the case was overfiled, as the evidence showed no more than false imprisonment by violence or false imprisonment, and the identification of Bethell was inconclusive.

The jury found Bethell guilty of two counts of kidnapping to commit robbery and two counts of second degree robbery, and found all the firearm allegations true. The jury (which had requested a readback of Miranda's "testimony of being sexually assaulted") found Bethell not guilty of sexual battery by restraint, instead finding him guilty of the lesser included offense of battery (§ 242). The trial court sentenced Bethell to consecutive life sentences plus 10 years on each of the two aggravated kidnapping counts. On the two robbery counts, the court sentenced Bethell to concurrent sentences of 13 years (Miranda) and 52 months (Voit), which also were to run concurrently with the sentences on the kidnapping counts.⁴ The court imposed a

⁴ The minute order and the abstract of justice do not accurately reflect the trial court's oral pronouncement. As the People points out, both incorrectly state that the sentences on the two robbery counts are to run consecutively. The oral pronouncement that the sentences are concurrent controls, and "[w]hen an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties." (*People*

consecutive six-month sentence on the battery count.
Bethell filed this timely appeal.

DISCUSSION

“On a challenge to the sufficiency of the evidence, our task is to view the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.” (*People v. Williams* (2017) 7 Cal.App.5th 644, 666.) Even indulging as we must every presumption from the evidence in the support of the judgment, we conclude that the evidence is insufficient to support Bethell’s convictions of kidnapping to commit robbery.

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) “Any person who kidnaps or carries away an individual to commit robbery” is guilty under section 209, subdivision (b)(1) of aggravated kidnapping, “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, subd. (b)(2).) “ “ “These two aspects are not mutually exclusive, but interrelated.” ’ ” (*People v. Williams, supra*, 7 Cal.App.5th at p. 667.) To determine whether the movement is merely incidental, the

v. Jones (2012) 54 Cal.4th 1, 89.) We will therefore order that the abstract of judgment be corrected.

jury considers the scope and nature of the movement, including the actual distance (although there is no minimum number of feet a defendant must move a victim for the movement to be more than incidental). (*Ibid.*) To determine whether the movement increased the risk of harm to the victim beyond that inherent in the underlying crime of robbery, the jury considers “ ‘ “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.” ’ ” (*Ibid.*)

“ ‘[W]hen in the course of a robbery a defendant does no more than move his victim around inside the premises in which he finds him—whether it be a residence . . . or a place of business or other enclosure—his conduct generally will not be deemed to constitute [kidnapping for the purposes of robbery]. Movement across a room or from one room to another, in short, cannot reasonably be found to be asportation “into another part of the same county.” (Pen. Code, § 207.)’ ” (*Ibid.*) As we explained in *Williams*, it is common that during a robbery the defendant will briefly confine a victim at gunpoint, or bind and contain the victim, “ ‘ “ ‘or “move[] [the victim] into and le[ave the victim] in another room or place.” ’ ’ ’ ” (*Ibid.*) Such movements are merely incidental to the robbery, and do not substantially increase the risk of harm otherwise present in robbery crimes. (*Id.* at p. 668.) To prosecute for kidnapping in cases in which the victim is forced to the back of the store during the robbery is an “ ‘ “ ‘absurdity.” ’ ’ ’ ” (*Ibid.*)

The evidence at trial was that Bethell and the other robber entered the lobby, pushed past Voit into the retail room, and forced both Voit and Miranda into the bathroom, which was visible from the lobby room through the glass window and about four or five meters from the entrance to the retail room. The other robber restrained Voit in the bathroom and Bethell dragged Miranda out of the bathroom by her hair to the merchandise counter, a distance of about 10 feet, ordering her to fill up a bag with merchandise. When she was too slow, Bethell pushed Miranda to the ground and grabbed edibles from the case, refrigerator, and shelves. According to Miranda, at some point he reached up her skirt and blouse for a few seconds, touching her. The other robber brought Voit out of the bathroom to the merchandise area to help Bethell as he tried to disconnect the security camera.

After the robbers heard the knock on the door, Bethell dragged Miranda to the door of the retail room before the robbers ran out into the lobby room and into the alley, and she ran back into the bathroom. The robbers also moved Voit a distance of about 30 feet from the retail room to the outer door, where he was able to run out into the alley.

These distances are not in themselves substantial, ranging from 10 to 30 feet, and all occurred inside the dispensary. Each movement was incidental to the robbery. Bethell and the other robber moved Miranda and Voit from the entrance to the retail room into the bathroom, where Miranda's purse was hanging. Containing Miranda and Voit

inside the bathroom gave the robbers access to Miranda's purse and made it easier to confine them, decreasing the danger inherent in an escape attempt. Further, the move to the bathroom did not decrease the likeliness of detection. Although the bathroom could be seen through the glass window in the lobby, in a larger sense the entire dispensary was concealed from public view. As every client had to be buzzed through two locked doors before reaching the lobby room, during the robbery no one could have observed Miranda or Voit, whether they were in the bathroom or in the center of the retail room.

Bethell moved Miranda the 10 feet from the bathroom to the center of the retail room and ordered her to fill up a bag with merchandise. That movement to get access to the merchandise was incidental to the robbery. So was the movement of Voit out of the bathroom to help the robbers try to disconnect the security camera. And when the robbers took Miranda back to the entrance of the retail room and took Voit 30 feet back to the door to the alley before Voit escaped and the robbers fled, the robbers' purpose in moving them was to have Miranda and Voit show them how best to flee.

The People argues that when Bethell took Miranda the 10 feet from the bathroom to the merchandise counter, he separated her from Voit and increased the risk of harm, pulling her by her hair, cursing and shouting at her, and physically abusing her. This ignores that Bethell cursed at and threatened Miranda, and pulled her by the hair and hit

her (which would fall under the rubric of battery) throughout the robbery, including in the bathroom with Voit close by. As for touching Miranda under her clothes, the jury acquitted Bethell of sexual battery by restraint under section 243.4, which requires that the defendant restrain the victim and touch the victim's intimate parts for the specific purpose of sexual arousal, and convicted him of battery under section 242, which requires only willful touching in a harmful or offensive manner. Bethell's few seconds of battery on Miranda could have occurred anywhere during the course of the robbery, including in the bathroom, where Voit was in the shower stall. The movement of 10 feet to the case wherein the object of the robbery was kept did not enhance the ability to commit battery and thereby increase the risk of harm to Miranda.

All the movement of Miranda and Voit was within the dispensary, was incidental to the purpose of the robbery, and did not increase the risk of harm to either victim. We do not minimize the suffering of either victim during (and following) the robbery, but that suffering resulted from the "force and fear" necessarily present in Bethell's commission of the robbery and inherent in his use of a gun, rather than from the movement itself.

Bethell's convictions of aggravated kidnapping in counts 1 and 2 must be reversed. We therefore need not consider his argument that section 654 required the court to stay his sentence on the robbery counts, because the robbery

and kidnapping arose out of a single continuous course of conduct and shared the same intents and objectives.

DISPOSITION

The convictions on counts 1 and 2 are reversed. The trial court shall amend the abstract of judgment to reflect that the sentences on counts 3 and 4 are concurrent, and shall forward the amended abstract of judgment to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.