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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. THOMAS STRINGER, JR., et. al., Defendants and Appellants.	B231835 (Los Angeles County Super. Ct. No. KA088197)

APPEALS from judgments of the Superior Court of Los Angeles County. Mike Camacho, Judge. Affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant Thomas Stringer, Jr.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant Jimmy McCallum.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

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In this joint appeal by Thomas Stringer, Jr., (Stringer) and Jimmy McCallum (McCallum) (collectively "appellants"),[1] Stringer appeals from six counts of second degree robbery (Pen. Code, § 211, counts 1-3, 5, 16 & 17),[2] seven counts of kidnapping to commit a robbery (§ 209, subd. (b)(1), counts 7-12 & 15) and one count of being a felon in possession of a firearm (§ 12021, subd. (a)(1), count 13). The jury found to be true as to Stringer the gang allegations within the meaning of section 186.22, subdivision (b)(1)(A) as to count 13, and section 186.22, subdivision (b)(1)(C) as to counts 1 through 3, 5, 7 through 12 and 15 through 17, the personal and intentional use of a firearm allegation within the meaning of section 12022.53, subdivision (b), as to counts 3, 5 and 9 through 12, and the principal armed with a firearm in the commission of a gang offense allegation within the meaning of section 12022.53, subdivisions (b) and (e)(1) as to counts 3, 5, 9 through 12, and 15 through 17.

McCallum appeals from seven counts of second degree robbery (counts 3, 5, 18, 19, 21, 23 & 25), seven counts of kidnapping to commit robbery (counts 9-12, 20, 22 & 24), and one count of being a felon in possession of a firearm (count 26).[3] The jury found to be true as to McCallum the gang allegations within the meaning of section 186.22, subdivision (b)(1)(A) as to count 26 and section 186.22, subdivision (b)(1)(C) as to counts 3, 5, 9 through 12 and 18 through 25, the personal and intentional use of a firearm allegation within the meaning of section 12022.53, subdivision (b) as to counts 20 through 25, a principal armed with a firearm in the commission of a gang offense allegation within the meaning of section 12022.53, subdivisions (b) and (e)(1) as to counts 3, 5, 9 through 12 and 20 through

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1 Codefendant Gregory Todd (Todd) pled guilty before trial and is not a party to this appeal.

2 All further statutory references are to the Penal Code unless otherwise indicated.

3 The jury found McCallum not guilty of counts 1, 2, 4, 6, 7 and 8 and Stringer not guilty of counts 4 and 6.

25, and the personal use of a deadly or dangerous weapon allegation within the meaning of section 12022, subdivision (b)(1) as to counts 18 and 19.

The trial court sentenced Stringer to an aggregate state prison term of 105 years to life consecutive to a determinate term of 55 years and McCallum to a term of 135 years to life consecutive to a determinate term of 17 years four months.

Appellants contend that (1) there is insufficient evidence to support the aggravated kidnapping counts 7 through 12, 15, 20, 22, and 24, (2) there is insufficient evidence to support the gang allegation, and (3) they suffered ineffective assistance of counsel because their attorneys permitted, and/or failed to object to, the admission of inflammatory, speculative and cumulative gang evidence, thereby violating their Sixth and Fourteenth Amendment rights. Each defendant joins in the contentions and arguments of the other to the extent they accrue to his benefit. (Cal. Rules of Court, rule 8.200(a)(5); *People v. Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5.)

FACTUAL BACKGROUND

Introduction

GameStop stores sell video games, video consoles and accessories. In a two-month period in 2009, five GameStop stores in the Los Angeles area were robbed. Stringer was charged with the robberies of the stores in Tarzana and Baldwin Park, McCallum was charged with the robberies of the stores in Lynwood and on Gage Avenue, and both men were charged with the robbery of the West Covina store.

The robberies

The Tarzana Robbery (counts 15-17, involving Stringer)

On July 25, 2009, near 8:00 p.m., Anthony Francewar (Francewar) and Joseph Pena (Pena) were working at the GameStop store in Tarzana. A Black male, later identified as Stringer, was the only patron in the store. Francewar asked if he needed help. Stringer handed him two games he said he wanted to buy, which Francewar took to a cash register.

While this was occurring, Pena was at the front door preparing to lock up. A dark green Chevy Astro van pulled in front of the store. A man got out of the van and came to the front door. Pena let him in because the man said he had to speak to Stringer. Once

inside, the man pulled a gun from his waistband, held it to Pena's abdomen and said, "This is a robbery. Don't do anything. Come with me." He directed two more accomplices to enter the store, one carrying a green bag and the other a taser gun, and led Pena to the back of the store.

At Stringer's demand, Francewar opened one of the two cash registers. Stringer then pushed Francewar toward a back room where Pena had been taken. A door led from the sales floor to the small back room. Game consoles and video games were stored in a locked stockroom in the rear of the back room. From the front door of the store, a person could see the sales floor, but not the back room or stockroom.

Inside the back room, Pena was forced to empty his wallet, cell phone, and personal and store keys from his pockets. Stringer then taped Pena's wrists behind his back and instructed him and Francewar to lie face down. He tied Francewar's hands with duct tape, and duct taped his feet, eyes and mouth. The man with the handgun pointed it at Pena and Francewar, asked Pena to identify each key that had been taken from him and the associated lock and where the money and game consoles were kept. Pena said the money was in a safe near the cash registers.

Later, Pena told the robbers the password to open the safe. After trying unsuccessfully to open it, the robbers picked Pena up and led him to the front of the store to assist. He too could not open it. The robbers then told him to open the cash registers, which he did. He was then taken back to the back room, told to lie down, tied up, and had duct tape placed over his eyes.

Later, when Pena heard someone say, "Let's get out of here" and no longer heard footsteps, he and Francewar untied themselves and phoned the police. When the police arrived, the items taken from Pena were gone as were numerous cases of game consoles, worth in excess of $10,000. Cash was missing from the register.

Several months after the robbery, Francewar identified Stringer in a photographic six-pack as the robber who posed as a customer and Todd as the person with the gun. Pena could not identify anyone in a six-pack or at trial. A latent fingerprint from duct tape found at the store matched an exemplar of Stringer's fingerprint.

The total distance between the front door of the store and the rear was approximately 64 feet five inches. Pena was moved twice. Initially he was taken a distance of over 70 feet to the back room. He was then brought back to the cash register, a distance of more than 36 feet five inches.

Lynwood robbery (counts 18 & 19 involving McCallum only)

On September 8, 2009, near closing time, Jessica Barrera (Barrera) and Joaquin Campos (Campos) were working at the GameStop store in Lynwood. Near 7:30 p.m., a male talking on his cell phone entered the store. He requested a home system, but only purchased a handheld system with a $100 bill. He remained in the store for 30 minutes, causing Barrera concern that she was going to be robbed.

At some point, another man, later identified as McCallum, entered the store. He grabbed Campos, ordered him to the ground and tasered him. McCallum then took Campos to a room in the back of the store. There was a locked, automatically closing door that led from the sales floor to the back room, which had no windows and could not be seen from the sales floor. In the rear of the back room was a locked room where the game systems were stored (systems room).

McCallum told Barrera to get off of the phone she was on, tasering her until she fell to the floor. He then ordered her to open the two cash registers. She did and gave him approximately $350 from the registers. McCallum then pulled her toward the back room and told her to open the door leading to it, which she did. Barrera and Campos were pushed into the back room. Inside, McCallum turned off the lights. He searched Campos's pockets and found $40 cash and Campos's car keys, but only took the cash. McCallum yanked out the DVR surveillance camera and went to the front of the store to throw it in the parking lot.

When McCallum returned to the back room, he ordered Barrera to open the systems room door. He then ordered her and Campos into that room and took a 360 arcade game console from it. McCallum and the man who purchased the handheld system ran out of the store together, leaving Barrera and Campos in the backroom. The entire incident took no more than five minutes and the victims were not tied up, were not locked in the back room

and were not impeded from leaving the back room. If Barrera had been left alone at the front of the store, she said she would have called 911.

Barrera identified McCallum at a live lineup, at the preliminary hearing and at trial, but could not identify him earlier in a photographic six pack. She also identified Todd in a photographic six-pack as the customer who purchased the game and helped McCallum with the robbery. Campos identified McCallum in a photographic lineup, in a live lineup, and at trial, as the person who robbed and tasered him. Miguel Mendoza, who tried to enter the GameStop store during the robbery and spoke with McCallum at the front door of the store, also identified McCallum at a live lineup, in a photographic six pack and at trial.

Gage Avenue robbery (counts 20-25, involving McCallum only)

On September 11, 2009, near 7:45 p.m., employees Estela Diaz (Diaz), Jeff Guevara (Guevara) and Jovanna Victor (Victor) were preparing to close the GameStop store on Gage Avenue, in Los Angeles. A Black male customer had been in the store for an hour, browsing at the games and on his cell phone. Another Black man, later identified as McCallum, entered the store. Victor asked McCallum if he needed help and was told that he did not. Diaz twice spoke with the first man, but he ignored her. That man purchased a game with a $100 bill. He left the store momentarily and then returned.

McCallum then pushed Victor into the corner in the back of the store and told her to stay there. He grabbed Guevara, who was standing behind the cash register, by the hair, placed a pepper spray can on the counter, grabbed Diaz by her left arm, and pulled both of them to the back of the store. In front of the door to the back room, McCallum lifted his shirt and flashed a gun in his waistband.

McCallum ordered them to open the door leading to the back room where the game systems were stored. That room was separated from the sales floor by a locked door that automatically closed. Guevara unlocked it with a key. They entered the back room, and McCallum pushed the three employees into the bathroom, the door to which was accessible from the back room. The robbers searched the employees' pockets and took Guevara's cell phone and money, Victor's cell phone and Diaz's keys. They then tied the three victims up with zip ties.

After a few minutes, McCallum opened the door and asked where the small systems were kept. Diaz said they were in the systems room with the big systems. Diaz also said that the cash register could only be opened if a transaction was occurring. After the bathroom door was again closed, the victims heard noises such as boxes being moved and one of the robbers on a cell phone.

Diaz managed to untie herself and walked out of the bathroom 10 to 15 minutes later, when the noise had subsided. No one was there, the store was dark and the front door was unlocked. All the new systems were gone from the systems room, and the security DVR was gone. Nothing was taken from the cash registers. Diaz telephoned the police. She said that if the robbers had left her alone on the sales floor, she would have run out of the door and called the police.

A person in the parking lot at the time of the robbery saw four Black males loading a dark blue or green Astro van with white boxes from the GameStop store and then take off.

Two weeks after the robbery, Diaz identified McCallum as the man with the gun in a photographic six-pack, several months later at a live lineup and thereafter at the preliminary hearing and at trial. She could not identify Stringer or Todd in photographic six-packs. Guevara also identified McCallum in a photographic six pack and at trial. Victor identified Todd as one of the robbers, but could not identify Stringer or McCallum.

Baldwin Park robbery (counts 1-2, 7-8, involving Stringer)

On September 16, 2009, near 2:30 p.m., Jacqueline Eduardo (Eduardo) and James Duran (Duran), the Baldwin Park GameStop store manager, were working in that store. A man was at the game console trying game demos and on a cell phone. He declined offers of assistance. A second man, later identified as Stringer, entered the store and asked Duran about a Madden 210, showing Duran the box and instructions. A third man walked into the store holding a green bag and went straight to the back wall.

Stringer grabbed Duran, who was near the cash registers, and ordered him to the floor. Eduardo was also pushed to the floor, apparently by the third man with the green bag. The Baldwin Park GameStop store had a sales floor and a door leading to a back room. In the back room, there was a systems area behind a grated caging. Next to the back room was

a small bathroom. Stringer took the keys to the back room from Duran's pocket. The two employees were then moved to the back room and told to lie face down on the floor. Stringer, wearing gloves, zip-tied their hands behind their back, pulled them up, patted them down and took Duran's wallet and Eduardo's money. Stringer then ordered the two employees into the adjacent bathroom.

At the same time, the other men removed gaming systems from the locked storage area and placed them in duffle bags. The DVR that recorded the surveillance camera was removed.

Duran and Eduardo were in the bathroom with the lights off for 10 to 15 minutes. They heard the robbers say, "Let's go," opened the door and saw Stephanie Reyes, an off-duty employee who happened to be passing by the store. She saw three men exiting the store, wearing gloves and carrying multiple consoles and games and enter an Astro van, the back end of which had been parked toward the store's front door. When the men sped away, Reyes entered the store.

An inventory check revealed that the surveillance DVR was missing, along with multiple games and most of the premium gaming systems. Also missing was Duran's phone. No money was taken from the cash registers.

Duran said that if he had not been brought to the back room but was left alone on the sales floor, he would have called the police or run outside. He also said that there was no need for him to be moved to the bathroom. The robbers did not need his assistance because the doors were unlocked and they had already taken the keys for access to all of the desired merchandise. Duran said that he was shoved into the back room for the robbers' protection during the robbery.

During the investigation of the robbery, Duran identified Stringer in a photographic six-pack and at trial as the man who grabbed him, ordered him to the ground and searched him. He identified Todd as the third man who entered the store with the green bag. McCallum was not identified. Numerous latent fingerprints were lifted from the Madden 210 game case and instruction booklet Stringer had touched, one matching the exemplar of

Stringer's prints. Investigators also uncovered two pairs of rubber gloves and some zip ties in the back room.

West Covina robbery (counts 3-6 & 9-12, involving Stringer and McCallum)

Near closing time on September 16, 2009, store manager Joshua Beeman (Beeman) was working at the GameStop store in West Covina. In the store at that time were store employees Jose Tejada (Tejada) and Brandon Euell, who was off-duty, and Timothy Luangphinith (Luangphinith), a customer.

At approximately 5:45 p.m., Stringer, talking on the phone, came into the store. Beeman was at the cash register. Two or three minutes later, McCallum entered the store carrying a large green or gray duffle-type bag. Beeman had the feeling there was going to be a robbery and reached for his phone. Before he could, Stringer ordered everyone to the floor. He lifted his shirt and displayed a handgun. He demanded that Beeman open the registers, while McCallum was shutting the front door.

Beeman opened two cash registers. Stringer then walked him to the back door. The victims were moved 34 feet six inches from the sales floor, through a door, to the stockroom in the back. The stockroom was not visible from the sales floor. Appellants needed Beeman's keys to get into the back room. Once inside, McCallum demanded Beeman's cell phone. The cell phones of the other employees and the customer were already on a chair. All of the victims were taken into the restroom, which was another four feet away.

After a few minutes, Beeman opened the restroom door, which had no lock, and went outside where he saw Stringer fiddling with some keys. To speed things along, Beeman said he would cooperate. Stringer ordered Beeman to open the systems door and give him all of the new gaming systems. Stringer did so and gave the systems to McCallum, who placed them in the green bag and left the room. Beeman saw that the security camera was on and saw two Black males in the front of the store grabbing video games that were in drawers behind the cash registers. He could not identify those individuals.

After the game systems were removed, Stringer took Beeman back to the restroom, where he stayed for five minutes with the others. After the robbery, Beeman came out of the bathroom a second time with the other victims and noticed that the DVR was pulled out,

the lights were off, a lot of drawers were open and video games and game systems were gone, more than $1,000 cash was missing, and his PSP, a collectors' item, and Tejada's PSP had been taken. Beeman testified that if he had been left alone in the sales floor, he would have left and called the police.

Beeman identified appellants at the preliminary hearing as being the robbers. He also identified Stringer at a field showup.

Appellants' arrest

Marco Manzano (Manzano) was in his apartment in West Covina, less than a mile from the West Covina GameStop, near the time of the robbery. He looked out his window and saw a Blue Astro van parked in his parking space without his permission. Four nervous and suspicious-appearing Black males were walking toward Manzano's parking space. Manzano called 911.

Shortly thereafter, a white Cadillac pulled in front of the Astro van. The four Black men opened the Astro Van and transferred some items in laundry bags to the Cadillac. When done, they closed the door of the Cadillac, and it drove away. The male Blacks then went inside the apartment complex. Manzano described to the 911 operator what he saw.

When the police arrived the Astro van was still in Manzano's parking space, but the four Black men were gone. Manzano identified the Cadillac driver, whose name was Mohammad Musa Mohammad (Musa),[4] in a photograph.

Stringer and McCallum were arrested near Manzano's apartment complex soon thereafter and identified by Manzano at a field showup as two of the men he saw unloading the bags into the Cadillac. They each had cash, Stringer two $100 bills and $265 in smaller denominations. Two cell phones were recovered from them. The cell phones contained gang related text messages and messages coinciding with the robberies from one of those

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[4] We refer to Mohammad Musa Mohammad as "Musa" as another individual involved in the investigation of the charged offenses also has a similar last name of Muhammad.

cell phones to the other. The phone recovered from Stringer had the initials "BT." The cell phone taken from McCallum had a picture addressed to "Goofy."

Officers searched the van and found two pairs of gloves, similar to those found at the scene of the Baldwin Park robbery, a white T-shirt, a black jacket, a baseball cap and two other head coverings similar to those used by the robbers, and a container of pepper spray. Nothing recovered from the van related to McCallum.

The Cadillac was owned by Musa. Surveillance of that car led police to the Ranch Market on Central Avenue and 88th Street, corroborating police information that Swan gang members were committing robberies of tobacco stores and GameStop stores and selling goods to "Mo," at that market, which was owned by Musa. Searches of that market, the Cadillac, Musa's residence, his mother's residence and another vehicle associated with Musa resulted in recovery of four to five thousand video games, GameStop gaming systems, DVD movies, tobacco products and other electronics kept in the refrigerated section of the market. The majority of the items contained GameStop labels. Duran's cell phone and the personal gaming devices taken from the two West Covina GameStop employees were also recovered. Behind the counter in the market, deputies found a green duffel bag containing games and a nine-millimeter handgun registered to Musa, with a full magazine.

Expert gang evidence

Deputy Danny Mendez testified as a gang expert on the Swan Gang. Swan is an acronym for "Slick Wicked Ass Niggers." The deputy had been involved in the investigation of that gang's crimes of murder, attempted murder, drive-by and walk-up shootings, attempted murder on police officers, narcotic sales, and possession of firearms.

Deputy Mendez testified to the habits and culture of gangs and the central role in gang culture of respect and reputation, as well as what gang members do to earn respect. He explained that there was a hierarchy within the gang, from "shot callers" at the top, to street level soldiers, at the bottom, and that gangs engage in violence to maintain their defined territory. By committing crimes, the gang's reputation for violence is promoted so that it is feared by rivals and citizens.

Deputy Mendez described the Swan gang as a Blood criminal street gang. Its territory included the location of the Ranch Market. He established the predicated prior gang offenses for application of the gang enhancement. Red was the gang color and its graffiti was the acronym "FSB," which stood for Family Swan blood.

Deputy Mendez opined that Stringer, McCallum and Todd were active Swan gang members at the time of the charged offenses based upon self-admissions, field interrogation of the three men, their tattoos, their association with known Swan gang members, photographs of one or more of them throwing gang signs, their gang attire, and information obtained from other gang members. Stringer was a member of the 89 Swan gang, a subset of the Swan gang, with the moniker "BT." Todd, a member of the 84 Swan subset, had the moniker "Mumbles." McCallum, a member of the 77 Swan gang and had the monikers "JJ" and "Goofy." These were all cliques of the same gang.

Deputy Mendez also opined that Musa was an associate of the Swan gang based upon his activities in connection with the charged robberies and his contact with Ahmad Muhammad (Muhammad), a member of the Inglewood Family Bloods, a close ally of the Swan gang. Muhammad admitted to being a Swan gang member. Musa was seen loading merchandise with McCallum and Todd. His store was in the middle of 89 Swan gang territory and had interactions with gang members. The merchandise taken from the GameStop stores was found in Muhammad's store. Deputy Mendez was aware of conversations between Musa and Muhammad regarding these robberies. Deputy Mendez explained that the proceeds of the robberies would be funneled through Musa and made its way to Muhammad, who was incarcerated at that time. It was common for "shot callers" to be in prison and getting rich from crimes on the street.

In a hypothetical based upon the evidence in this case and the police reports, Deputy Mendez opined that the crimes committed here were for the benefit of the Swan gang. This opinion was based on the fact that the robberies were coordinated with "careful tactful planning," reflected by the Astro van being backed toward the store for accessibility, zip-tying the victims, placing them in the back of the store and removing the DVR machines.

These acts minimized the amount of time the robbers spent in the store and were "precoordinated."

Deputy Mendez continued that the stolen items had a high street value. It benefitted the gang which sold the items and used the proceeds to further the gang's reputation and the cycle of the gang's violence. The money realized is used to purchase guns and narcotics, which produce a continuous funnel of money to finance gang activities. By displaying guns and taking employees to the back room, the robbers instilled fear of these types of robberies and enhanced the gang's reputation and within the gang that of the members committing the offenses. The gang derived respect, at the core of gang motivation. Gang members commit robberies outside of their territories, in more affluent areas in order to increase their profits. Further, committing crimes outside of the gang's territory where they are unknown makes it more difficult to identify the perpetrators. They do not declare their gang affiliation while committing the crime to further make it more difficult to be identified. Usually gang members call out their gang name when they want an enemy to know who had committed the gang.

Deputy Mendez spoke with members of the Swan gang who were bragging about the robberies committed by appellants. This reflected that the crimes were committed for the benefit of the gang and empowered the gang.

DISCUSSION

I. Sufficiency of evidence of kidnapping

A. Background

After the preliminary hearing and before trial, appellants filed a motion to dismiss the aggravated kidnapping charges pursuant to section 995. Stringer argued that the robbery occurred before the asportation of the victims, and the movement of the victims was only for minimal distances. McCallum argued that moving the victims to the back room was for the victims' safety, to keep them under control and to avoid detection.

The prosecutor responded that the victims were knocked down, tasered, forced to go to back rooms at gunpoint, bound and zip-tied. They were placed in bathrooms with the

lights off. Appellants ripped out the DVD's attached to surveillance cameras, and took the victims' property after they were gratuitously removed to the secluded areas.

The trial court found that the victims were moved so the robbers could avoid detection, not to reduce risk to the victims. It found that the victims were bound so they would not be detected until the following day, which increased their risk of harm. The movement was not necessary for the taking of the property. The trial court therefore denied the motion to dismiss.

At the close of the People's case, appellants renewed this claim by way of a section 1118.1 motion. They argued that the People failed to prove the asportation element. The trial court denied this motion, finding that the victims were moved a substantial distance from a public area to a nonpublic area with weapons pointed at them. Their cell phones were taken so they could not call for help, and they were bound and tied and the lights in the store turned off. The trial court found this evidence sufficient to submit to the jury the question of whether the movement increased the risk of harm.

B. Contentions

McCallum contends that the kidnapping to commit robbery convictions related to the Gage Avenue and West Covina GameStop store robberies must be reversed because there is insufficient evidence to support them. Stringer raises the same claim regarding his convictions of kidnapping related to the Tarzana, Baldwin Park and West Covina GameStop store robberies.[5] Appellants argue that the evidence was insufficient as a matter of law to prove that the movement of the victims was not incidental to the robberies and substantially increased the risk of harm to the victims. This contention is without merit.

C. Standard of review

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is

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5 The information did not charge either appellant with kidnapping of Francewar during the Tarzana robbery or kidnapping any of the victims of the Lynwood robbery.

reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Hovarter* (2008) 44 Cal.4th 983, 996–997.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

D. Kidnapping for robbery-asportation requirement

"Any person who kidnaps or carries away any individual to commit robbery" is guilty of kidnapping for robbery. (§ 209, subd. (b)(1).) Subdivision (b) of section 209 only applies "if the movement of the victim is [1] beyond that merely incidental to the commission of, and [2] increases the risk of harm to the victim over and above that necessarily present in, the intended" robbery. (§ 209, subd. (b)(2); *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 (*Daniels*); *People v. Rayford* (1994) 9 Cal.4th 1, 12 (*Rayford*).)

"The rationale for [the asportation] requirement is that, given 'the breadth of the statutory definition of kidnapping, . . . it "could literally overrun several other crimes, notably robbery and rape, . . . since detention and sometimes confinement, against the will of the victim, frequently accompany these crimes. . . . It is a common occurrence in robbery, for example, that the victim be confined briefly at gunpoint or bound and detained, or moved into and left in another room or place."' [Citations.] Our Supreme Court concluded that 'such incidental movements are not of the scope intended by the Legislature in prescribing the asportation element of the same crime.'" (*People v. Power* (2008) 159 Cal.App.4th 126, 137–138.)

With regard to the first prong of the asportation requirement, that the movement must be more than merely incidental to the robbery, the jury must consider the "'"scope and nature"'" of the movement, including the distance a victim is moved. The question is whether there was any gratuitous movement of the victims above that necessary to assist the robbers in obtaining the property. (See *People v. Washington* (2005) 127 Cal.App.4th 290, 299, 301 (*Washington*).) There is no minimum distance a defendant must move a victim to

satisfy the first prong.[6] (*People v. Vines* (2011) 51 Cal.4th 830, 870 (*Vines*); *Rayford, supra*, 9 Cal.4th at p. 12.) The kidnapping statute does not speak of movement over any specified distance, and limiting a jury's consideration to a particular distance is "rigid and arbitrary, and ultimately unworkable." (*People v. Martinez* (1999) 20 Cal.4th 225, 236 (*Martinez*).)

We also consider the "context of the environment in which the movement occurred." (*Rayford, supra*, 9 Cal.4th at p. 12.) "This standard suggests a multifaceted, qualitative evaluation rather than a simple quantitative assessment." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152.) Whether movement was incidental is necessarily connected to whether it substantially increases the risk of harm. (*Ibid.*) "[A] movement unnecessary to a robbery is not incidental to it at all." (*People v. James* (2007) 148 Cal.App.4th 446, 455, fn. 6; see *People v. Corcoran* (2006) 143 Cal.App.4th 272, 279–280.) "Lack of necessity is a sufficient basis to conclude a movement is not merely incidental." (*People v. James*, *supra*, at p. 455.)

The second prong of the kidnapping requirement, increased risk of harm to the victim, requires the jury to consider factors such 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. (*Martinez, supra*, 20 Cal.4th at p. 233.) That these dangers do not in fact occur does not mean that the risk of harm was not increased. (*Rayford, supra*, 9 Cal.4th at p. 14.) While in most cases the increased risk of harm is a risk

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6 Courts have reached differing results on what distance constitutes substantial movement. (See, i.e., *People v. Bradley* (1993) 15 Cal.App.4th 1144, 1154, disapproved on other grounds in *Rayford, supra*, 9 Cal.4th at p. 21 [movement of 50 to 60 feet from open street to inside closed dumpster area substantial movement]; *People v. Reyes Martinez* (1993) 14 Cal.App.4th 1412, 1418 [improper to instruct that movement of 500 feet was substantial movement]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 169 [movement of nine feet substantial distance when it changed the victim's environment]; *People v. Smith* (1995) 33 Cal.App.4th 1586, 1594 [movement of 40 feet from a public to private area was substantial].)

of physical harm, this requirement can also be satisfied by a risk of mental, emotional, or psychological harm. (*People v. Leavel* (2012) 203 Cal.App.4th 823, 833–834; *People v. Nguyen* (2000) 22 Cal.4th 872, 885–886**.)**

E. Movements of victims here increased harm and was not incidental

In the case before us, we cannot conclude as a matter of law that there was insufficient evidence of asportation. There was substantial evidence that the movements of the robbery victims were not solely incidental to the robberies and substantially increased their risk of both physical and emotional harm. Instead, the movements went far beyond that which was necessary to accomplish the robberies. In reaching this conclusion, we are guided by the principle that the two prongs of aggravated kidnapping "are not distinct, but interrelated, because a trier of fact cannot consider the significance of the victim's changed environment without also considering whether that change resulted in an increase in the risk of harm to the victim." (*Martinez*, *supra*, 20 Cal.4th at p. 236.) We therefore consider both elements of asportation simultaneously.

The victims were moved a substantial distance; between approximately 30 feet and 70 feet. As previously stated, there is no minimum number of feet that a robbery victim must be moved to satisfy the asportation requirement. (*Vines*, *supra*, 51 Cal.4th at p. 870.) Movement of as little as nine feet has been found to be a substantial distance. (*People v. Shadden*, *supra*, 93 Cal.App.4th at p. 169; see also fn. 6, *ante*.)[7] Whether a particular distance is substantial is not based solely on the number of inches and feet that the victim is moved, but on an overall evaluation of the "context of the environment in which the movement occurred." (*Rayford*, *supra*, 9 Cal.4th at p. 12.)

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[7] As stated in *People v. Dominguez* (2006) 39 Cal.4th 1141, 1152, "[D]raging a store clerk nine feet from the front counter of a store to a small back room for the purpose of raping her . . . might, under the circumstances, substantially increase the risk of harm to the victim and thus satisfy the asportation requirement."

The movement here, most, if not all, of which was not needed to facilitate the robberies, was not only substantial in terms of distance, it changed the victims' environment and increased their risk, which we compare to the risk in a stand-still robbery. (See *People v. Jones* (1997) 58 Cal.App.4th 693, 714.) The victims were moved by force and/or armed threat from the sales floor, which was visible from the store entrance, to a closed-off back room, which had no windows and was not visible from the sales floor or front entrance of the store. Movement involving forcible control of the victim satisfies the risk of harm requirement. (*Id*. at p. 713.) As a result, the victims were isolated in a place where they could not be seen and where the robbers had more time and were free to hurt them or commit other crimes with less fear of intervention by someone who might be passing by or entering the store. Moving the victims to an isolated area, restraining them and threatening them with firearms also increase the risk of psychological or emotional trauma. The victims of the Tarzana, Gage Avenue and West Covina robberies were further isolated as they had their cell phones taken and were unable to communicate with anyone outside. The victims could only speculate as to what might happen to them.

The victims of the Tarzana, Gage Avenue, and Baldwin Park robberies were tied up with either zip ties or duct tape, likely to cause them greater emotional trauma and fear, not knowing what was in store for them or how they could escape their restraints. During the Tarzana robbery, with the handgun pointed at him, Pena was forced to lie face down on the ground with his wrists duct-taped behind his back. Later, the robbers unnecessarily placed duct tape over his eyes, which was not likely to make identification of the robbers more difficult as Pena had already seen them.

After being taken to the back rooms, the victims of Gage Avenue, Baldwin Park and West Covina robberies were all forced into an adjacent bathroom. Even if we assume that the movement into the back room was to assist in the robberies, the forcible movement of the victims into the bathroom was gratuitous, doing nothing to facilitate accomplishment of the robberies. Before being moved into the bathrooms, the employees were already in a secluded area of the back room. The robberies could have been accomplished without further movement. There were at least four accomplices who could have held the victims at

bay. There was no reason to move them to another room to take their personal possessions. Moreover, the victims were not needed to assist in obtaining the property, as the robbers simply needed to take their keys, as they did with Duran during the Baldwin Park robbery.

Appellants rely on *Daniels* and *Washington* to support their claim. In *Daniels*, our Supreme Court, in the context of several home-invasion robberies, concluded that "when 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, as here, or a place of business or other enclosure—his conduct generally will not be deemed to constitute the offense proscribed by section 209." (*Daniels, supra,* 71 Cal.2d. at p. 1140.)

In *Washington*, the defendants, in the course of robbing a bank, took the branch manager and teller from their work stations, a distance of approximately 25 feet and 45 feet, respectively, to the vault to open it for the robbers. After the vault was opened, the robbers had the teller lie on the ground as the manager removed the money and gave it to the perpetrators who placed it in a bag. The robbers then left, stating: "'Thank you very much. Have a nice day,'" and walked out the back. (*Washington*, *supra*, 127 Cal.App.4th at p. 296.) The Court of Appeal found those movements to be insufficient to support a conviction of kidnapping for robbery because they were incidental to the commission of robbery. The movements occurred entirely within the bank, each victim was moved the shortest distance possible to the vault, and the victims' movement was necessary to open the vault and complete the robbery. "[R]obbery of a business owner or employee includes the risk of movement of the victim to the location of the valuables owned by the business that are held on the business premises." (*Id.* at p. 300.)

We find *Washington* to be readily distinguishable. First, we observe that the determination of the two requirements for the asportation element of kidnapping for robbery turns upon the specific facts presented. (*Rayford*, *supra*, 9 Cal.4th at p. 12 ["context of the environment in which the movement occurred"]; *People v. Dominguez, supra,* 39 Cal.4th at p. 1152 ["This standard suggests a multifaceted, qualitative evaluation rather than a simple quantitative assessment"].) Hence, the facts of one case are of little assistance in resolving another.

Second, we find the facts of *Washington* to be significantly different from the facts before us. In *Washington*, all of the victims' movement was for the exclusive purpose of opening the vault. When the vault was opened, the movement stopped and the perpetrators left. As discussed in detail above, the victims of kidnapping here did not need to be moved to the back room to accomplish the robbery as the robbers merely had to take their keys to open that room. Further, most of the victims were then tied up by duct tape or zips and/or moved to an adjacent bathroom. These movements were not necessary to the taking of the merchandise.

The recent Supreme Court opinion in *Vines* is instructive. It made clear that *Daniels* is not always applicable to robberies involving movement of victims within a residence or business. In some cases, as in the case before us, movement within a home or business can constitute asportation for kidnapping. *Vines* stated: "As in *Daniels*, defendant's forcible movement of the victims was limited to movement *inside* the premises of the Watt Avenue McDonald's (citation), but unlike in *Daniels*, the movement here took Zaharko—and ultimately the other victims—from the front of the store, down a hidden stairway, and into a locked freezer. Under these circumstances, we cannot say the 'scope and nature' of this movement was 'merely incidental' to the commission of the robbery. Additionally, the movement subjected the victims to a substantially increased risk of harm because of the low temperature in the freezer, the decreased likelihood of detection, and the danger inherent in the victims' foreseeable attempts to escape such an environment." (*Vines, supra,* 51 Cal.4th at pp. 870–871.)

II. Sufficiency of gang evidence

A. Background

The information in this case alleged that all of the charged robberies and aggravated kidnappings were committed for the benefit of, at the direction of or in association with a criminal street gang in violation of section 186.22, subdivision (b)(1). The jury found the gang allegation to be true with respect to each of those charges.

B. Contention

Appellants contend that there is insufficient evidence to sustain the gang enhancement. They argue that there is no evidence appellant committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang or that the robberies were committed with the intent to promote, further or assist in criminal conduct by gang members. This contention is without merit.

C. Standard of review

The same standard for assessing the sufficiency of the evidence to support a criminal offense, as set forth in part IC, *ante*, is applicable in assessing the sufficiency of the evidence to support a sentence enhancement. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) Specifically, it is applicable to ascertaining the sufficiency of the evidence to justify a jury finding on a gang enhancement. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321–322 (*Villalobos*).)

D. The street gang enhancement

The gang enhancement in section 186.22, subdivision (b)(1) imposes additional punishment when a defendant commits a felony "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." It applies to gang-related crimes. (*People v. Castenada* (2000) 23 Cal.4th 743, 745.) Not every crime committed by gang members is related to a gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).)

1. Specific intent

We begin with the easier question. Did appellant commit the charged offenses "with the specific intent to promote, further, or assist in any criminal conduct by gang members?" (§ 186.22, subd. (b)(1).) As stated in *Villalobos, supra*, 145 Cal.App.4th at page 322, "As to the second prong of the enhancement, all that is required is a specific intent 'to promote, further, or assist in any criminal conduct by gang members.' [Citation.] Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime."

Here, the gang expert testified that appellants and Todd were active Swan gang members based upon their self-admissions, field interrogations, their association with known Swan gang members, gang attire and tattoos, photographs of one or more of them throwing gang signs, and information provided by other gang members. In each of the five robberies, witnesses identified at least two of them as the perpetrators. It is reasonably inferable from their common gang membership that appellants knew that they were committing robberies with fellow gang members and therefore intended to "assist[ ] gang members in the commission of the crime." (*Villalobos*, *supra*, 145 Cal.App.4th at p. 322.)

2. Benefit of, direction of, or association with gang

Appellant argues that as a matter of law there is insufficient evidence that the robberies and kidnappings were committed for the benefit of, at the direction of, or in association with a criminal street gang. While we find this to be a close case, we conclude that there was sufficient evidence to allow the jury to make that determination.

What makes this case close is that absent the gang expert's testimony, there was not a scintilla of evidence to suggest that the robberies and kidnappings were gang-related. There was no evidence that any of the victims had any clue that the robbers were gang members. The robberies did not occur in Swan gang territory. The fact that they were perpetrated by members of the Swan gang was not publicized; gang signs were not thrown, the Swan gang's name was not yelled or mentioned, gang graffiti was not left behind, and the victims' gang affiliation was not solicited by the question, "Where you from?" The charged offenses were not even the type of crimes that Deputy Mendez indicated the Swan gang committed. In short, nothing in the commission of the crimes themselves suggests that they were gang-related or that they benefitted the Swan gang.

Though the offenses here did not appear gang-related, our Supreme Court has found, based on expert testimony, that an offense that does not appear on its face to be gang-related can nonetheless benefit a gang. Based principally on gang expert testimony, *Albillar* concluded that a rape committed by three gang members benefitted the gang because a violent brutal attack on a victim elevates the attacker's status within the gang and enhancing

the gang's reputation, as reports of such conduct raises the level of fear in the community. (*Albillar, supra,* 51 Cal.4th at pp. 60–62.)

"California law permits a person with 'special knowledge, skill, experience, training, or education' in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*id*., § 801). Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (*Id*., subd. (a).) The subject matter of the culture and habits of criminal street gangs . . . meets this criterion." (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*); *People v. Vang* (2011) 52 Cal.4th 1038, 1044.) An "[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation . . . can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[ ] criminal street gang' within the meaning of section 186.22(b)(1)." (*Albillar, supra,* 51 Cal.4th. at p. 63; see also *Gardeley, supra,* at pp. 617–618.) That is the case here.

Deputy Mendez gave his expert opinion that the charged robberies benefitted the Swan gang. He supported this opinion by the facts that the robberies reflected "careful tactical planning" and were precoordinated, and the items stolen had high street value which benefitted the gang which sold them to further its reputation and buy guns and narcotics. The crimes were committed outside of gang territory in more affluent neighborhoods where they could maximize profit and elude identification and capture. He testified to the gang culture that committing crimes enhances the gang's reputation for violence so that it is feared by rivals and the community.

Further, Deputy Mendez testified to a direct connection between the Swan gang and the robberies. Appellants and Todd were active members of that gang (or subsets of it). After the West Covina GameStop robbery, Musa drove his Cadillac, met the Astro Van and took the stolen merchandise from it to his car. Deputy Mendez testified that Musa owned the Ranch Market, located in Swan Gang territory, and which was reputed to be purchasing goods stolen by Swan gang members from GameStop stores and tobacco stores. Searches of the market, the Cadillac, and cars and residences associated with Musa yielded thousands

of video games, GameStop game systems, DVD movies, tobacco products and electronics. At the market the stolen items were found concealed in the refrigerated section. Most of the items contained GameStop labels. Cell phones taken from GameStop employees during the West Covina GameStop robbery were also recovered. Deputy Mendez testified that he heard conversations between Musa and Muhammad, a Swan gang member and likely shot caller of that gang who was incarcerated. The deputy explained that the proceeds of the robberies were funneled through Musa to Muhammad. He also heard members of the Swan gang bragging about the robberies committed by appellants, reflecting that the crimes were committed for the benefit of, and empowered, the gang.

III. Ineffective assistance of counsel

A. Background

The information alleged that the charged offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang. The People's gang expert testified to gang culture and habits and that appellants and Todd were gang members at the time of the robberies.

B. Contentions

Appellant contends that 15 different gang-related statements admitted in evidence were irrelevant, inflammatory, speculative and cumulative of other evidence and that he suffered ineffective assistance of counsel by reason of his counsel's failure to object to this evidence.[8] This contention is without merit.

C. Principles of ineffective assistance of counsel

The standard for establishing ineffective assistance of counsel is well settled. The "'defendant bears the burden of showing, first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that

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[8] Given our analysis of this contention, we need not recite the specific evidence appellants challenge.

the verdict would have been more favorable to him.'" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052–1053; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.)

"'"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" [Citation.] "[W]e accord great deference to counsel's tactical decisions" [citation], and we have explained that "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation]. "Tactical errors are generally not deemed reversible, and counsel's decision-making must be evaluated in the context of the available facts."'" (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) Whether to object to evidence is a tactical decision of counsel to which deference is given. (*People v. Lucas* (1995) 12 Cal.4th 415, 444.)

We will indulge in a "strong presumption" that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. (*Strickland v. Washington, supra*, 466 U.S. at p. 689; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

D. No ineffective assistance

Here, the record fails to indicate the reasons for appellants' counsels' decisions not to object to the admission of the challenged evidence. Further, the record fails to indicate that a request was made of counsel for an explanation of why the objections were not made, and the evidence challenged does not appear to be such that no satisfactory explanation could be given. Hence, we reject this contention on the ground that there is no showing that counsel's actions were deficient.

We also observe, without deciding, that it is unlikely that the result would have been more favorable to appellants had the objections been interposed for it is unlikely that all or most of them would have been sustained. Gang evidence may be admitted if otherwise relevant. (*People v. Perez* (1981) 114 Cal.App.3d 470, 477.) While gang evidence is carefully scrutinized before admitting it because of its inflammatory capacity (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Carter* (2003) 30 Cal.4th 1166, 1194) it is not insulated from the general rule that all evidence is admissible if relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192; see also *People v. Hernandez, supra,* 33 Cal.4th at p. 1049; Evid. Code, §§ 210, 352.) Such evidence is often relevant to, and admissible regarding, a charged offense, as evidence of identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt. (*People v. Hernandez, supra,* at p. 1049.) When the gang enhancement is alleged, as it is here, gang evidence is necessarily admissible to prove its elements.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ