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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOEL LOPEZ BARRON,<br><br>Defendant and Appellant. | B231626<br><br>(Los Angeles County<br>Super. Ct. No. LA059820) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael K. Kellogg, Judge. Affirmed in part, reversed in part, and remanded with directions.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Joel Lopez Barron appeals from a judgment of conviction by jury verdict of kidnapping for rape (Pen. Code, § 209, subd. (b)[1]), forcible rape (§ 261, subd. (a)(2)), and forcible oral copulation (§ 288a, (c)(2)). The jury found true One Strike special allegations that the victim was kidnapped in the commission of the rape and oral copulation (§ 667.61, subd. (b)). Barron challenges the sufficiency of the evidence of kidnapping for both the kidnapping count and the special allegations, and also claims sentencing error. We conclude that there is insufficient evidence of kidnapping to support either the conviction of kidnapping or the special allegations under section 667.61, subdivision (b). We also find sentencing error as to the rape and oral copulation convictions. We shall reverse the judgment insofar as it is dependent on kidnapping, and remand for resentencing.

## FACTUAL AND PROCEDURAL SUMMARY

Joann R. went to a bar in Van Nuys on August 17, 2008, to meet a friend, but he never appeared. She had two gin and tonics, and left the bar about 1:45 a.m. to walk home, a distance of one and one-half blocks. Joann stopped at a gas station store and bought two beers to take home. As she left the store she noticed Barron standing on the corner. As she walked past, Barron approached her and asked in Spanish, "How much?" Joann understood what he said and kept walking.[2] He came closer behind her and repeated the question. After Barron asked two or three times, Joann told him she was not a prostitute. Barron told her that his parents did not love him and that he had nobody. She ignored him and waited for the light at the intersection. When the light changed, Barron was still there. Joann was frightened, so she let him cross the street and stayed at the corner. Barron disappeared after crossing the street. After the light turned green again, she crossed. As she continued walking past some benches at a bus stop, Joann

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[1] Statutory references are to the Penal Code unless otherwise indicated.

[2] All conversations between Joann and Barron were in Spanish.

heard someone ask her in Spanish what time the bus passed. She ignored this, but looked and saw it was Barron. She kept walking and he asked again. Joann continued to walk past businesses as she texted a friend.

When Joann was in front of a market, somebody rushed her from behind. He put his hand over her mouth and nose and she could not breathe. He grabbed the phone out of her hand, and grabbed her. Then the man, whom she identified as Barron, threw her into some bushes. Joann also testified she fell into the bushes. He said he had a gun and threatened to kill her. Barron forced her to orally copulate him, and then he raped her.

Joanne convinced Barron she liked him and wanted him to come to her apartment. He let her get dressed and grabbed her purse and the bag with the beers. Barron held Joann tightly as they walked toward the corner. After they crossed the street, Barron started pulling her toward a very dark street. Joann was very frightened and feared that Barron was going to kill her there. She started crying and fell to her knees on the sidewalk. Barron tried to pull her up and let go of her for a moment. Joann ran onto Sepulveda Boulevard. Barron grabbed her jacket, which ripped as she ran. She fell in the traffic lane of Sepulveda Boulevard, in the lane closest to the sidewalk. Barron pursued her and tried to pick her up. An SUV drove up and its headlights shone on Barron and Joann. The driver of the SUV pointed his vehicle toward Barron. Barron started running away with Joann's purse. She asked the driver for help and told him only that Barron had stolen her purse, because she did not want to reveal she had been raped. The SUV driver drove in the direction Barron had fled.

Joann managed to stand up and get to the sidewalk. Two young men saw her and asked if she was okay. She said she was not, that she had been raped, and asked them to call the police. One of them went to a police officer who was across the street. More than one police car responded. She told an officer what had happened. Joann was taken in a police car for a field identification, where she identified Barron as her attacker. Police also showed her an orange glasses case found in Barron's possession. She said it was hers and it had been in her purse before the attack.

Police officers took Joann to a rape trauma center where she was examined and interviewed by the nurse. Joann suffered bites to her hand and mouth, scrapes on her side and stomach, and bruises on her nose, legs, and arms. Her DNA was taken. Barron also was examined and DNA samples were taken from him. It was stipulated that a sample from Joann's mouth contained DNA from her and from Barron. It also was stipulated that a sample from Barron yielded a mixture of DNA from him and from Joann.

Based on information from bystanders who attempted to follow Barron as he fled, Los Angeles Police Department officers located and detained Barron. After Joann identified him as her assailant, Barron was taken to a police station and interviewed. He admitted pulling Joann into some bushes and taking off her pants and underwear but denied having intercourse with her. He said Joann orally copulated him. A recording of the police interview of Barron was played to the jury.

In an amended information Barron was charged with kidnapping to commit rape and robbery (count 1, § 209, subd. (b)(1)); forcible rape (count 2, § 261, subd. (a)(2)); forcible oral copulation (count 3, § 288a, subd. (c)(2)); and second degree robbery (count 4, § 211). As to counts 2 and 3, it was alleged that appellant kidnapped the victim within the meaning of section 209 in committing these sex crimes, triggering One Strike sentencing under section 667.61, subdivision (b). The first trial ended in mistrial after the jury was unable to reach a verdict. After a second jury trial, Barron was found guilty as charged in counts 1 through 3, but not guilty of count 4. The special circumstance allegation under section 667.61, subdivision (b) as to counts 2 and 3 was found to be true. Barron was sentenced to an aggregate term of 31 years to life in prison. This timely appeal followed.

## DISCUSSION

### I

Barron was convicted of aggravated kidnapping to commit rape (§ 209, subd. (b)(1)). The jury also found true special allegations under the One Strike law (§ 667.61) that he kidnapped Joann in the commission of rape and oral copulation. He challenges the sufficiency of the evidence of asportation, arguing that the movement of Joann was

neither substantial nor substantially increased the risk of harm. He also contends the movement of Joann was merely incidental to the crimes of rape and oral copulation.[3]

Asportation of the victim is a necessary element of aggravated kidnapping to commit rape. Section 209, subdivision (b) applies "if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." (§ 209, subd. (b)(2).) In *People v. Dominguez* (2006) 39 Cal.4th 1141 (*Dominguez*), the Supreme Court examined the two prongs of the asportation element. (*Id*. at p. 1151.) It concluded that the standard is "difficult to capture in a simple verbal formulation that would apply to all cases" (*ibid.*), but that a "multifaceted, qualitative evaluation rather than a simple quantitative assessment" is required. (*Id*. at p. 1152.) In addition, the Supreme Court has repeatedly held that the two prongs of the test "are not mutually exclusive but are interrelated." (*People v. Vines* (2011) 51 Cal.4th 830, 870 (*Vines*); *Dominguez*, *supra*, 39 Cal.4th at p. 1152 [determination of whether victim's forced movement was merely incidental to the robbery "is necessarily connected to whether it substantially increased the risk to the victim"[4]].) The *Dominguez* court held that "[t]he essence of aggravated kidnapping is the increase in the risk of harm to the victim caused by the forced movement." (*Ibid.*)

Various circumstances have been identified as relevant to demonstrate asportation. These include whether the movement decreases the likelihood of detection, increases the inherent danger in a victim's attempts to escape, or enhances the attacker's opportunity to

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[3] At trial and on appeal, kidnap charges were based on Barron's conduct in the sexual assault and not on any movement of the victim after the attacks.

[4] The court in *Dominguez* applied a prior version of section 209, subdivision (b). (*Dominguez*, *supra*, 39 Cal.4th at p. 1151.) In 1997, the Legislature revised the statute to define aggravated kidnapping as kidnapping to commit robbery or specified sexual offenses and also "modified the asportation standard by eliminating the requirement that the movement of the victim 'substantially' increase the risk of harm to the victim. [Citations.]" (*Vines, supra*, 51 Cal.4th at p. 869, fn. 20.)

commit additional crimes. (*Dominguez*, *supra*, 39 Cal.4th at p. 1152.) The *Dominguez* court reiterated that no minimum distance is required to satisfy the asportation requirement, so long as it is "substantial." (*Ibid.*) It explained: "Measured distance, therefore, is a relevant factor, but one that must be considered in context, including the nature of the crime and its environment. In some cases a shorter distance may suffice in the presence of other factors, while in others a longer distance, in the absence of other circumstances, may be found insufficient." (*Ibid.*) The Supreme Court contrasted cases in which movement of a victim between six and 30 feet was found merely incidental to a robbery and thus insufficient to satisfy the asportation element of aggravated kidnapping with cases in which moving a victim a similar distance, but to a secluded location, increased the risk of harm to the victim and satisfied the asportation element. (*Ibid.*) Asportation also is an element of the One Strike allegations based on kidnapping pursuant to section 667.61, subdivision (b).[5] (*People v. Diaz* (2000) 78 Cal.App.4th 243, 246.) It is undisputed that rape and oral copulation are specified predicate sexual offenses under section 667.61, subdivision (c).

Our analysis of the evidence of asportation is guided by the familiar standard of review: "'On appeal, an appellate court deciding whether sufficient evidence supports a verdict must determine whether the record contains substantial evidence—which we repeatedly have described as evidence that is reasonable, credible, and of solid value—from which a jury could find the accused guilty beyond a reasonable doubt.' [Citations.] We presume in support of the judgment 'the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" (*Vines*, *supra*, 51 Cal.4th at p. 869.)

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[5] Section 667.61, subdivision (b) provides for a sentence of 15 years to life if crimes specified in subdivision (c) (in this case both rape and oral copulation) are committed under circumstances specified in subdivision (e). Subdivision (e)(1) triggers the 15 years to life sentence where "the defendant kidnapped the victim of the present offense in violation of Section 207, 209, or 209.5."

In this case, we conclude that there was no asportation, and therefore the conviction of kidnapping and the One Strike special findings must be reversed.

Joann testified that Barron rushed her and grabbed her from behind. She said: "I was scared. And then he—then he threw me. I know we both fell towards the bush inside. And I fell on my side, kind of back side." The prosecutor asked: "When you say we both fell in the bush, is he behind you grabbing you as you get into the bushes?" Joann explained: "Well, he was behind me, so when he flew, he—he kind of went like in front of me. So I ended up like on the side, on the ground on the side kind of twisted forward, sideways, and he fell on top of me." She was asked if she "jumped" into the bushes and said: "Well, I don't know if he pushed me, shoved me. I don't remember. But I know I fell in there and he forced me in there because I would not have gone in there on my own." She said Barron also landed inside the bushes. Once she fell into the bushes on her shoulder, Barron got on top of her and covered her nose and mouth so she could not breathe. He told her to shut up or he was going to kill her. Joann said she fell into the lighter area depicted on one of the photographs of the crime scene, People's exhibit 13. The sex crimes occurred in this same location.

We have examined the photographic exhibits of the crime scene admitted at trial. The narrow strip of bushes described by Joann is immediately adjacent to the sidewalk. Joann testified that she fell onto dirt when appellant grabbed her. In the area identified by Joann, there is an opening between, and under, the bushes, so that she was only partially obscured from passersby on the sidewalk.

Our analysis begins with the definition of kidnapping, set out in section 207 which is the basis for the definition of aggravated kidnapping under section 209. "'Section 207, originally enacted in 1872, delineated what is today called "simple kidnapping" and merely restated the common law, which required that the victim be moved across county or state lines. [Citations.]' (*People v. Nguyen* (2000) 22 Cal.4th 872, 882.) Section 207, subdivision (a) now provides . . . that '[e]very person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and *carries the person into another country, state, or county, or into another part of*

*the same county*, is guilty of kidnapping.' 'The language "into another part of the same county" was added in 1905 in response to *Ex parte Keil* (1890) 84 Cal. 309, in which this court held that the forcible removal of a person 20 miles from San Pedro to Santa Catalina Island, both in Los Angeles County, was not kidnapping within the meaning of the statute as it existed at that time. [Citations.]' [Citation.]" (*People v. Morgan* (2007) 42 Cal.4th 593, 605, quoting *People v. Rayford* (1994) 9 Cal.4th 1, 8, fn. 3, italics added.)

In *People v. Martinez* (1999) 20 Cal.4th 225 (*Martinez*), the Supreme Court adopted a new test for asportation under section 207. It overruled the narrow approach of *People v. Caudillo* (1978) 21 Cal.3d 562, which had held that the distance involved was the exclusive factor to be considered in determining whether the movement of the victim was "'"substantial in character."'" (*Martinez*, at p. 233.) Instead, under *Martinez*, the jury may consider the totality of the circumstances, including whether the movement increased the risk of harm to the victim, 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. (*Id*. at p. 237.)

But the *Martinez* court explained that a jury need not find any of these contextual factors, it need "only find that the victim was moved a distance that was 'substantial in character.' [Citations.]" It said: "[W]e emphasize that contextual factors, whether singly or in combination, will not suffice to establish asportation if the movement is only a very short distance." (*Martinez*, *supra*, 20 Cal.4th at p. 237.)

A person who commits aggravated kidnapping for the purpose of committing enumerated sex crimes in violation of section 209, subdivision (b)(1) is "Any person who *kidnaps or carries away* any individual to commit robbery [or specified sex crimes] . . . ." (Italics added.) Section 209 thus incorporates the definition of kidnapping in section 207 and repeats the requirement that the victim must be carried away by the defendant. (*People v. Daniels* (2009) 176 Cal.App.4th 304, 327.)

This definition is consistent with the definition of kidnapping in Black's Law Dictionary: "At common law, the forcible abduction or stealing *and carrying away* of a person from one country to another. [Citations.] The unlawful seizure *and removal* of a

person from one country or state against his will. In American law, the intent to send the victim out of the country does not constitute a necessary part of the offense; the *unlawful taking and carrying away* of a human being by force or fraud or threats or intimidation and against his will being the essential elements." (Black's Law Dict. (6th ed. 1990) p. 870, col. 1, italics added.) Black's Law Dictionary defines "asportation" in kidnapping as "the carrying away of the victim." (*Id*. at p. 114, col. 1.)

Section 212.1 of the Model Penal Code (1985), includes removal of a victim "a substantial distance from the vicinity where he is found" in the definition of kidnapping. (Torcia, 2 Wharton's Criminal Law (15th ed. 1994) § 207, p. 519.) Based on this language, Torcia observed: "By this standard, a defendant, who pushes a robbery or rape victim from the sidewalk into a nearby ally or hallway, cannot be guilty of kidnapping." (*Ibid.*) This is our case. Joann was not carried away or removed a substantial distance. Instead, Barron pushed or threw her into bushes and fell on top of her. Whatever else it was, and there was much that it was, Barron's conduct did not constitute kidnapping. (See also Perkins, Criminal Law (3d ed. 1982) chapter 2, § 7, kidnapping, pp. 230-231 [asportation element of kidnapping required taking or carrying the victim away, abducting the victim, or removing the victim from the place where he or she is found].)

Respondent argues that the movement of Joann was substantial even though the distance was not great because she was moved to a location that decreased the likelihood of detection, increased the danger inherent in any attempt to escape, and increased Barron's opportunity to commit additional crimes. Respondent argues that while two men apparently observed Barron and Joann, it was late at night and there were few pedestrians in the area.

Respondent's argument misses the fundamental point that Barron did not carry off or take Joann to a location where the sex crimes were then committed. He pushed or threw her into bushes immediately adjacent to where she had been walking. This evidence does not support the jury's conviction of Barron for aggravated kidnapping or the One Strike findings based on kidnapping.

II

Barron claims sentencing error. He argues the trial court erred by imposing both a determinate sentence, the upper term of 8 years, and a One Strike sentence of 15 years to life (§ 667.61, subd. (b)) on count 2, the rape charge. He asserts the trial court erred by imposing the upper term of 8 years for both the rape and oral copulation counts based on a single factor in aggravation, fear. He also contends the trial court erred by failing to state reasons for imposing a consecutive term for the oral copulation count.

*A. The Sentence*

Barron was sentenced to an aggregate term of 31 years to life in prison. On count one, aggravated kidnapping, the sentence was life in prison; on count two, rape, a consecutive term of 23 years to life (upper term of 8 years plus 15 years to life under section 667.61, subdivision (b)); and on count 3, oral copulation, a consecutive term of eight years.

*B. Improper Sentence on Count 2*

Barron argues that the trial court erred by imposing both a determinate sentence, the upper term of 8 years, and an indeterminate sentence of 15 years to life under section 667.61 for count 2, rape. This is because the 15 years-to-life term under the One Strike law (§ 667.61) is an alternative sentencing scheme rather than an enhancement. In light of our conclusion that there is insufficient evidence of kidnapping to support the One Strike finding, we reverse the sentence on count 2 and remand for resentencing.

*C. High Terms For Rape and Oral Copulation*

At sentencing, when asked by defense counsel to state reasons for imposing the high term for the sex offenses, the court cited Joann's fear and Barron's threats to kill her. Barron cites *People v. Scott* (1994) 9 Cal.4th 331, 350-351, in which the Supreme Court ruled that a sentencing court may not use a fact constituting an element of the offense to aggravate a sentence. He contends that his use of fear was not beyond that which was necessary for the accomplishment of his criminal purpose, distinguishing *People v. Karsai* (1982) 131 Cal.App.3d 224, overruled on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 592, fn. 4.

California Rules of Court, rule 4.420, subdivision (d) provides: "A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term." The elements of rape include "the requirement that the act of sexual intercourse 'was accomplished by means of force, violence, or fear of immediate and unlawful bodily injury.'" (*People v. Maury* (2003) 30 Cal.4th 342, 426.) "The elements of forcible oral copulation are: A person participated in an act of oral copulation with the victim; the act was accomplished against the victim's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim . . . ." (*People v. Scott* (2000) 83 Cal.App.4th 784, 794, fn. 4, quoting section 288a, subd. (c)(2).)

"A sentencing factor is only an element of the offense, however, if the crime as defined by statute cannot be accomplished without performance of the acts which constitute such factor." (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1262.) It is unclear from the record whether the trial court relied on a factor which may not be used as the basis for imposition of the high term as explained in *People v. Burbine*, *supra*, 106 Cal.App.4th at p. 1262. On remand, the trial court is to resentence Barron on counts 2 and 3. The high term may be chosen if based on a factor which, under the circumstances, was not essential to the accomplishment of the rape and oral copulation.

*D. Consecutive Sentence on Count 3 (Oral Copulation)*

Barron argues the trial court abused its discretion because it failed to state any reasons for imposition of a consecutive sentence for count 3, forcible oral copulation, citing section 667.61, subdivision (i). That statute states that for the predicate offenses enumerated in section 667, subdivision (c), "the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6." Barron cites the trial court's statement that the crimes occurred "so quickly, it happened in the same location. You've got one single occasion with various sexual acts that are proscribed by law which means there can only be one life term." Barron reasons that in light of the court's finding that the crimes occurred on

a single occasion with a single victim, mandatory consecutive sentencing was not applicable under section 667.61, subdivision (i) and therefore the court was free to impose either a concurrent or consecutive sentence for count 3. He contends that a factor in aggravation used to impose an upper term cannot be used as the basis for imposing a consecutive sentence. (*People v. Davis* (1995) 10 Cal.4th 463, 552.)

Respondent's position is that the trial court failed to make the requisite determination for imposition of consecutive sentences under section 667.61, subdivision (i). It contends it is apparent that the court was applying an older version of the statute that did not contain that subdivision. Respondent argues that the court's finding that counts 2 (rape) and 3 (oral copulation) were committed on the same occasion is not dispositive because this finding was made under former section 667.61, subdivision (g), which was found to have a narrower meaning than the standard for determining separate occasions in section 667.6, in *People v. Jones* (2001) 25 Cal.4th 98, 104-106. The trial court expressly relied on that case in calculating the sentence.

The trial court found that the rape and oral copulation were committed on the same occasion. It stated: "I find count two and three separate acts, separate violations, but a single occasion. . . . But my analysis was it happened so quickly, it happened in the same location. You've got one single occasion with various sexual acts that are proscribed by law which means there can only be one life term." But the court did not then state the basis for the imposition of consecutive sentences after making this threshold finding. Consecutive sentences under section 667.61, subdivision (i) must be imposed only "if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6."[6] (§ 667.61, subd. (i).) In light of the trial

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[6] Section 667.61, subdivision (i) reads: "For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), or in paragraphs (1) to (6), inclusive, of subdivision (n), the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6."

court's finding that these crimes involved a single victim on a single occasion, mandatory consecutive sentencing under sections 667.6, subdivision (d) and 667.61, subdivision (i) would be improper. It is in the discretion of the trial court to impose consecutive sentences under section 667.6, subdivision (c) "if the crimes involve the same victim on the same occasion." On remand, the trial court is to exercise its discretion under section 667.6, subdivision (c) with an explanation of its reasoning.

## DISPOSITION

The conviction for kidnapping for rape in count 1 and the true findings on the One Strike allegations based on kidnapping on counts 2 and 3 are reversed for insufficient evidence. The convictions on counts 2 and 3 are affirmed. The case is remanded for resentencing on counts 2 and 3 consistent with the views expressed in this opinion.

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

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.