Filed 12/13/18 P. v. Wilkes CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. VENIE J. WILKES, Defendant and Appellant.	B281562 (Los Angeles County Super. Ct. No. BA440913-02)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Perry, Judge. Affirmed.

Matthew Missakian, 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, Assistant Attorney General, Marc A. Kohm and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

Venie J. Wilkes (defendant) appeals from a judgment entered following a jury trial that resulted in his conviction of kidnapping to commit robbery (Pen. Code, § 209, subd. (b)(1));[1] kidnapping for carjacking (§ 209.5, subd. (a)); first degree robbery (§ 211); and first degree burglary (§ 459).

Defendant contends his convictions should be reversed because: (1) the statutes for kidnapping to commit robbery and kidnapping for carjacking are unconstitutionally vague, and the standard jury instructions defining these offenses are erroneous; (2) insufficient evidence supports the jury's finding that he committed kidnapping for carjacking, and the trial court erred by not sua sponte instructing the jury on simple kidnapping as a lesser included offense; and (3) section 654 precludes punishment for both kidnapping to commit robbery and first degree robbery. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The People's Evidence

1. The August 17, 2015 Incident

Alma A. (Alma) lived in Los Angeles in a three-bedroom home with her husband, her two-year-old daughter, Kaylen A. (Kaylen), her sister Anna H. (Anna), and Anna's girlfriend, Natalie C. (Natalie). Natalie, who later confessed to her involvement in the crimes, had been living at the residence for the past 11 months.

On August 17, 2015, at approximately 7:00 a.m., Alma was home with Kaylen, lying on her bed when she felt someone jump

---

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

on top of her back. She was three months pregnant at the time. She heard a male voice that she did not recognize state, "don't say anything." Alma looked to her side and saw Kaylen standing by her bedroom door.

The man then tried to tie Alma's hands behind her back with a zip tie, but was unable to do so. The man left the bedroom. Alma stayed in her bedroom with Kaylen. She could hear noises from the other rooms of her house that sounded like "purses opening" and "shuffling things around [in] the office room." Alma had an online business selling purses and kept her merchandise in her home.

The man returned to the bedroom and he placed a bandana over Alma's eyes so that she could not see. He then took her to the living room with her daughter, where she was on her knees for about 10 minutes before she eventually sat down. While Alma was sitting, she felt the man place something "sharp" on her forehead, tapping it three times, and then he "chuckled." The man left the living room. Alma continued to hear noises and "ruffling things."

The man returned to the living, and asked Alma for cash. She responded she did not have any. The man told her to "stop lying" or "things [were] going to get ugly." He then asked if she had a safe. She told him that she did. While Alma was explaining to the man where the safe was located, she heard a female voice state, the "F" word, "I'm getting mad," and "where's the safe." The man reiterated to Alma to, "stop lying" or "things [were] going to get ugly." He also said, "I don't want to hurt you or your baby or your daughter," and that "he does it as a hobby." Alma believed her life and Kaylen's life were in danger. She

heard the sound of the safe open, but knew there were no valuables inside.

The man then handed Alma her cell phone and asked her to call her bank. Alma called her bank "on speaker" so the man could hear her account balance, which was close to $1,500. The man told Alma he was going to drive her to the bank to withdraw the money, and that she should not make a "smart move" because someone inside the bank would be watching her.

The man brought Alma and Kaylen clothes, and allowed them to change. He then guided her, with Kaylen in front of her, outside the backdoor of the house towards the driveway to her vehicle. Alma owned a 2014 Mazda. She believed the individuals took her car keys from her living room; the keys were hanging on a key hook. Alma sat in the back of her vehicle behind the driver's side, Kaylen sat in the back middle seat, and the man sat next to Kaylen behind the passenger's side. Alma was still blindfolded. The female drove Alma's vehicle.

At some point, Alma felt the vehicle come to a stop. She believed the drive was about 20 to 25 minutes. Alma was told to go inside the bank and withdraw her money while Kaylen stayed in the vehicle. Alma went inside the bank, stood in line, and withdrew $1,300 from a teller. She did not make an attempt to ask for help because she believed the man's statement that there was someone inside watching her. Alma then went back to her vehicle, handed the money to the man, and she was instructed to place the bandana back over her eyes.

The individuals drove Alma and her daughter back to her home. The man walked Alma back inside the house through the backdoor and sat her down on a chair. He then tied up her hands and feet. The man moved Alma into her bedroom and closed the

door. At that point, Alma yelled, "where's my daughter?" She heard a "bag of chips" inside the room and knew Kaylen was with her. She also heard her vehicle driving away.

Alma was able to untie herself and remove the blindfold. She went to her neighbors' house and called 911. Her house was a "mess." There were papers and drawers on the ground, and her bed was on its side. She also noticed her X-box and its controller and games were missing, as well as a tablet, a watch, and the merchandise for her online business, about 60 purses.

The entire ordeal lasted about three hours.

2. Police Interview with Natalie

On October 21, 2015, during a follow up investigatory interview with detectives at the Los Angeles Police Department, Natalie admitted to her involvement in the crimes.

In the beginning of 2015, Natalie met defendant through her cousin and started using methamphetamine with him. Defendant would supply the drugs. Around July 2015, defendant told Natalie she owed him over $1,000 for the drugs. Natalie became upset because she knew she could not pay him. Rather than wait for her to come up with the money, defendant stated he wanted information on how to get inside Alma's house. Defendant knew Alma had purses in her home. He then gave Natalie a cell phone so he could communicate with her about "getting into Alma's house."

On August 17, 2015, the day of the incident, Natalie received a text message around 7:00 a.m. from defendant that he was going inside Alma's house. Natalie had left the house that early morning and only Alma and Kaylen were still home. A few hours later, she received another text message asking where valuable items around the house were located. Natalie responded

and provided information about items in the home. That afternoon, she received another text from defendant stating that he wanted to meet up. Natalie met defendant at a gas station. Defendant was driving Alma's vehicle.

3. Analysis of Cell Phone Records

On August 18, 2015, the day following the incident, as part of an unrelated investigation, police officers recovered Alma's 2014 Mazda. They also obtained a cell phone during their investigation. The recovered cell phone was registered to Kimohn Roberts (Roberts),[2] the person believed to be the female who assisted defendant. The analysis of the phone records showed Roberts sent and received text messages with defendant about the incident.

Relevant to this appeal, text messages were recovered, dated August 14, 2015, three days before the incident, between Roberts and defendant: Defendant texted, "Aye, so how we going to do this. U take her to the bank and I stay with the daughter. Then what we do after that." Roberts texted back, "We take her back, put the T.V. in the car and then get on." She further texted, "The basics is really on us to get this money." Defendant texted, "Ok. She do anything stupid she dies. Im not playing. I want this money."

The Verdict and Sentencing

Following a jury trial, defendant was convicted of (1) kidnapping to commit robbery (§ 209, subd. (b)(1); count 1); (2) kidnapping for carjacking (§ 209.5, subd. (a); count 2); (3) first degree robbery (§ 211; count 3); and, (4) first degree burglary (§ 459; count 4). The jury found false the allegations that

---

[2] The police were unable to locate Roberts.

defendant personally used a deadly weapon, a sharp object, in the commission of the crimes within the meaning of section 12022, subdivision (b)(1) as to all counts.

The trial court sentenced defendant to life with the possibility of parole for count 1, a consecutive term of life with the possibility of parole for count 2, plus an additional and consecutive upper term of six years for count 3. The trial court stayed the sentence on count 4 pursuant to section 654.

Defendant filed a timely notice of appeal.

DISCUSSION

I. Sections 209 and 209.5 are Not Unconstitutionally Vague and the Jury Instructions Were Proper

Defendant contends the crimes of kidnapping to commit robbery (§ 209) and kidnapping for carjacking (§ 209.5) are unconstitutionally vague based on the United States Supreme Court's decision in *Johnson v. United States* (2015) 576 U.S. _____, 135 S.Ct. 2551 (*Johnson*). He argues it is impossible to understand what is meant by the asportation element of the statutes, which requires the movement of the victim to be beyond that "*merely incidental to the commission of, and increases of the risk of harm to the victim over and above that necessarily present in, the intended underlying offense*" (the asportation element). (§§ 209, subd. (b)(2), 209.5, subd. (b), italics added.)

In a related argument, defendant contends the standard jury instructions (CALCRIM Nos. 1203, 1204) defining the asportation element of the statutes are defective as they fail to clarify the phrase, "merely incidental to the commission of."

We reject defendant's argument challenging the constitutionality of the asportation element of the statutes. As to

the jury instructions, defendant has forfeited this issue on appeal because he did not request clarification of the instructions below.

A. Constitutionality of the Statutes[3]

In *Johnson*, the United States Supreme Court considered whether the "residual clause"[4] of the Armed Career Criminal Act (ACCA) was unconstitutionally vague. (*Johnson*, *supra*, 135 S.Ct. at p. 2557.) In deciding whether the ACCA's residual clause covered a crime, courts used "a framework known as the categorical approach" and assessed a crime "'in terms of how the law define[d] the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" (*Ibid.*) Thus, courts had "to picture the kind of conduct that the crime involve[d] in 'the ordinary case,' and to judge whether that abstraction presente[d] a serious potential risk of physical injury." (*Ibid.*) The *Johnson* court concluded the counterfactual nature of this inquiry rendered the ACCA's residual clause unconstitutionally vague because, among other things, there was "grave uncertainty about how to estimate the risk posed by a

---

[3] Defendant's failure to object to the constitutionality of the statutes in the trial court does not forfeit this issue on appeal because a vagueness challenge can be resolved as a matter of law. (*People v. Hartley* (2016) 248 Cal.App.4th 620, 633.)

[4] Under the ACCA, "a defendant convicted of being a felon in possession of a firearm face[d] more severe punishment if he ha[d] three or more previous convictions for a 'violent felony,' a term defined to include any felony that '*involve[d] conduct that present[ed] a serious potential risk of physical injury to another*.'" (*Johnson*, *supra*, 135 S.Ct. at p. 2555, italics added.) That part of the definition of violent felony was also known as the ACCA's "residual clause." (*Johnson*, *supra,* at p. 2556.)

crime" because the residual clause "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." (*Ibid*.)

Defendant contends the asportation element of sections 209 and 209.5 "exhibit the same constitutional infirmity" as the ACCA's residual clause in the *Johnson* decision by "tying the evaluation of both increased risk and victim movement to a 'judicially imagined' vision of how the underlying offense alone might have been committed in some alternate universe." We disagree. Our Fourth District considered and rejected defendant's argument under an analogous statute in its decision, *People v. Ledesma* (2017) 14 Cal.App.5th 830, 839–840 (*Ledesma*). We see no reason to depart from our colleagues' reasoning in *Ledesma*.

In *Ledesma*, the defendant argued the asportation element of the kidnapping to commit rape statute (§ 209) was unconstitutionally vague pursuant to *Johnson*, *supra*, 135 S.Ct. at page 2551, because it was "not sufficiently concrete to give citizens fair warning of the crime." (*Ledesma*, *supra*, 14 Cal.App.5th at p. 835.) As evidence of the vagueness of the statute, the defendant pointed to several Court of Appeal opinions that both affirmed and reversed convictions based on the asportation element of section 209. (*Ledesma*, *supra,* at p. 839.)

The *Ledesma* court disagreed with the defendant's contentions, explaining: "Unlike the categorical analysis courts were required to engage in under the ACCA, the asportation requirement[] in section[] 209 [] require[s] no hypothetical case of the underlying crime that determines the statutes' applicability. Rather, the jury in this case (and in all aggravated kidnapping cases) assessed whether a [defendant's] movement of [a victim]

was merely incidental to the rape and whether that movement substantially increased the risk of harm over and above the risk of harm inherent in rape. This is precisely the type of determination that *Johnson* held was beyond the void-for-vagueness problem presented by the residual clause. (*Johnson, supra*, 576 U.S. at p. ___ [135 S.Ct. at p. 2561] ['As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree"'].)" (*Ledesma*, *supra*, 14 Cal.App.5th at pp. 838–839.)

And in rejecting the defendant's argument that evidence of the statute's vagueness was supported by inconsistencies in the courts' decisions, the *Ledesma* court explained, "California cases on the asportation element of aggravating kidnapping, including those [the defendant] cites, show broad agreement on both the nature of the inquiry required and the relevant factors to evaluate when deciding whether the facts in a case are sufficient to satisfy the asportation element of the aggravated kidnapping statute . . . . [Citations.]" (*Ledesma*, *supra*, 14 Cal.App.5th at p. 839.)

Here, as in *Ledesma*, we conclude the asportation element of sections 209 and 209.5 are not unconstitutionally vague. Unlike the ACCA's residual clause in the *Johnson* decision, the California courts apply the statutes to "real-world facts." We also agree with the *Ledesma* court that there is broad agreement in California case law on both the nature of inquiry required and the relevant factors to evaluate when deciding whether the facts in a given case are sufficient to satisfy the asportation element of the statutes. (See e.g., *People v. Dominguez* (2006) 39 Cal.4th

1141, 1152 [considerations relevant to determining whether there is an increased risk of harm to a victim include whether the movement of the victim decreases the likelihood of detection, increases the danger inherent in the victim's foreseeable attempts to escape, or enhances the attacker's opportunity to commit additional crimes].) Thus, for the purposes of sections 209 and 209.5, the *Johnson* decision changes nothing.

B. Sua Sponte Jury Instruction

Defendant contends the standard jury instructions defining sections 209 and 209.5 (CALCRIM Nos. 1203,[5] 1204[6]) were confusing, and did not adequately instruct the jury on the asportation element of a kidnapping required for both kidnapping to commit robbery and kidnapping for carjacking. He argues the trial court therefore had a sua sponte duty to define the phrase, "merely incidental to the commission of" by requiring the jury to

---

[5] The trial court recited the asportation element in section 209 to the jury as: "As used here, substantial distance means more than a slight or trivial distance. The movement must have increased the risk of physical or psychological harm to the person beyond that necessarily present in the robbery. In deciding whether the movement was sufficient, consider all the circumstances relating to the movement."

[6] The trial court recited the asportation element in section 209.5 to the jury as: "As used here, substantial distance means more than [a] slight or trivial distance. The movement must have been more than merely brief and incidental to the commission of the carjacking. The movement must also have increased the risk of physical or psychological harm to the person beyond that necessarily present in the carjacking. In deciding whether the movement was sufficient, consider all the circumstances relating to the movement."

consider "the 'scope and nature' of the [victim's] movement, the 'context of the environment in which the movement occurred,' and the actual distance moved." Had the urged instruction been given, defendant contends the jury could have found the movement of Alma and Kaylen in this case did not rise to the level of a kidnapping.

Having failed to request further amplification of the phrase "merely incidental to the commission of," defendant's claim has been forfeited on appeal. "'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012 (*Hudson*); *People v. Estrada* (1995) 11 Cal.4th 568, 574.) An exception exists when the trial court gives an instruction that is an incorrect statement of the law. (*Hudson*, *supra*, at p. 1012.) This exception does not apply here.

In any event, the trial court properly instructed the jury on the asportation element of sections 209 and 209.5. Specifically, the court instructed the jury that the movement of the victim had to be "substantial" which it defined to mean "more than a slight or trivial distance." And it instructed the jury that "[t]he movement must also have increased the risk of physical or psychological harm to the person beyond that necessarily present" in the underlying offense. Such language closely tracked the rules for both kidnapping to commit robbery and kidnapping for carjacking. (§ 209, subd. (b)(2) [requiring the movement of the victim to be "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"]; § 209.5,

subd. (b) [same]; see e.g., *People v. Perkins* (2016) 5 Cal.App.5th 454, 469 ["for aggravated kidnapping, the victim must be forced to move a *substantial distance,* the movement cannot be merely *incidental* to the target crime, and the movement must *substantially increase* the risk of harm to the victim"].)

II. Sufficient Evidence Supports the Kidnapping for Carjacking Conviction; No Duty to Instruct on Simple Kidnapping

Defendant contends his kidnapping for carjacking conviction is not supported by sufficient evidence because (1) he did not commit a carjacking, and (2) he did not kidnap two-year-old Kaylen to "facilitate" the carjacking. For these same reasons, he argues the trial court had a sua sponte duty to instruct the jury on the lesser included offense of simple kidnapping.

A. Sufficiency of the Evidence

"'To determine whether sufficient evidence supports a jury verdict, a reviewing court reviews the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Smith* (2014) 60 Cal.4th 603, 617.) "'"[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" [Citation.]' [Citation.]" (*People v. White* (2014) 230 Cal.App.4th 305, 315, fn. 13.)

1. Carjacking

Defendant contends he did not commit a carjacking because at the time he took Alma's car keys, the vehicle was not in her "immediate presence" because it was parked in the driveway. We reject this contention. Defendant is mistaken as to the law and the evidence.

Section 215 defines "Carjacking" as the "taking of a motor vehicle in the possession of another, from his or her person or immediate presence . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).) The "taking" element in carjacking is analogous to a "taking" in a robbery. (See *People v. Lopez* (2003) 31 Cal.4th 1051, 1063 (*Lopez*) [reversing carjacking conviction because the vehicle had never been moved].) Slight movement of the vehicle, even a very short distance, will suffice. (*Id.* at p. 1060.) And a vehicle is in a person's "'immediate presence'" if it is "'"'so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it.'"' [Citations.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 989.)

Defendant's contention is based on his belief that the "taking" element of carjacking was satisfied when Alma was no longer in possession of her *car keys*. This argument makes no sense. As noted above, a "taking" occurs for purposes of a carjacking when a vehicle is *moved*. (*Lopez*, *supra*, 31 Cal.4th at p. 1063.) Thus, the taking of Alma's car keys had nothing to do with the carjacking in this case.

Instead, the jury here could reasonably infer that defendant committed a carjacking because at the time defendant

moved the vehicle, the vehicle was in Alma's "immediate presence" since she was inside it. (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1365 (*Ortiz*) [kidnapping for carjacking conviction affirmed when victims were inside the vehicle during carjacking].) Sufficient evidence supported the jury's finding that defendant committed a carjacking.

2. Facilitation of Carjacking

Defendant contends Kayen's kidnapping did not facilitate the carjacking. He argues he kidnapped Kaylen to ensure Alma would comply with his instructions at the bank. Again, defendant misconstrues the law and evidence.

Section 209.5 provides that a "Kidnapping in Commission of Carjacking" occurs when "[a]ny person who, during the commission of a carjacking and in order to facilitate the commission of the carjacking, kidnaps another person who is not a principal in the commission of the carjacking." (§ 209.5, subd. (a).) "The intent that the kidnapping facilitate the carjacking must be present when the original asportation began." (*Ortiz*, *supra*, 208 Cal.App.4th at p. 1365.) "'Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense.' [Citations.]" (*Ibid.*)

The court's ruling in *Ortiz*, *supra*, 205 Cal.App.4th at page 1366, is instructive. There, the defendants were convicted of violating section 209.5 after they stopped a car, pushed two people inside of it, and drove away with the people inside. (*Id.* at pp. 1359, 1361–1362.) One of the victims said he believed he was kidnapped because he had not paid a large drug debt. (*Id.* at p. 1361.) On appeal, the defendants argued there was insufficient evidence to show they kidnapped the victims in order to facilitate the carjacking because the primary purpose for the

kidnapping was for the ransom. (*Id.* at p. 1365.) The Court of Appeal disagreed, concluding the jury could reasonably infer the defendants kidnapped the victims for the dual purposes of taking them (for ransom) *and* taking the car. (*Id.* at pp. 1365–1366.) The court continued, "[d]efendants do not cite any cases holding, nor are we persuaded, that the sole, or primary, intent of a section 209.5 offense must be to facilitate a carjacking. Rather, based on the plain language of section 209.5, we believe that offense requires there be *an* intent that the kidnapping facilitate a carjacking, even if there are other concurrent intents for the kidnapping." (*Ortiz, supra,* at p. 1366.)

Here, as in *Ortiz*, the jury could reasonably infer from all the evidence that defendant's intent in kidnapping Kaylen was to exert control over Alma for the *dual purpose* of stealing her vehicle and forcing her to obtain money from her bank. The evidence showed defendant led Kaylen to Alma's vehicle at the same time as Alma, who was blindfolded. Defendant then sat Alma in the back seat behind the driver's seat, and Kaylen in the middle back seat, between Alma and himself. Defendant needed Alma to comply so that he could use her vehicle as his transportation to the bank. Thus, the jury could reasonably infer that defendant positioned Kaylen next to Alma in the vehicle to instill fear in Alma so that she did not physically attempt to take control of the vehicle. Defendant's assertion that it is not unreasonable for the jury to have found otherwise is irrelevant. Our standard of review is whether there is substantial evidence to support the verdict. Under these set of facts, there can be no doubt the kidnapping facilitated the carjacking.

B. Sua Sponte Jury Instruction

Defendant contends the trial court erred because it did not sua sponte instruct the jury on simple kidnapping.[7] We find no error.

California law requires a trial court to "instruct fully on all lesser necessarily included offenses supported by the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 148–149.) "On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*Id.* at p. 162.) "On appeal, we review independently the question whether the trial court failed to instruct on defenses and lesser included offenses." (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

"'Generally, to prove the crime of [simple] kidnapping, the prosecution must prove three elements: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance. (§ 207, subd. (a).)'"[8] (*Ortiz*, *supra*, 208 Cal.App.4th at p. 1368.)

Here, given that the kidnapping of Kaylen occurred simultaneously with the carjacking, this is not a simple kidnapping case. The ruling in *Ortiz*, *supra*, 208 Cal.App.4th at

---

[7] Both parties agree simple kidnapping is a lesser included offense of kidnapping for carjacking. (See *Ortiz*, *supra*, 208 Cal.App.4th at p. 1368.)

[8] Section 207 provides: "(a) Every 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." (§ 207, subd. (a).)

pages 1368–1369, is on point. As noted above, the defendants there pushed the victims into the vehicle and drove away with them inside. (*Id.* at p. 1368.) At trial, the defendants requested a jury instruction on simple kidnapping, but the court refused. (*Id.* at p. 1367.) On appeal, the defendants contended the trial court erred by not instructing the jury on simple kidnapping as a lesser included offense of kidnapping during carjacking. (*Id.* at p. 1366.) The Court of Appeal affirmed the trial court's ruling, noting the fact that a kidnapping occurred simultaneous with, and during a carjacking, was "overwhelming" evidence to support a reasonable inference that the defendants kidnapped the victims to facilitate the carjacking, and did not commit a simple kidnapping. (*Id.* at p. 1368.) The facts in this case easily support a similar conclusion. This is not a simple kidnapping, and a sua sponte instruction on that offense is not applicable.

III. Section 654 Does Not Preclude Imposing Separate Sentences

Defendant contends his sentence for first degree robbery in count 3 violates section 654 because his acts of kidnapping to commit robbery and first degree robbery were "pursuant to a single intent and objective: to get [Alma's] money and valuables." We disagree.

A. Standard of Review

A trial court is vested with broad latitude to decide if section 654 applies in a given case. Its findings will not be reversed on appeal if there is substantial evidence to support them. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) We view the evidence in the light most favorable to a respondent and presume in support of the sentence the existence of every fact the

trial court reasonably could have deduced from the evidence. (*People v. Tarris* (2009) 180 Cal.App.4th 612, 627.)

B. Trial Court's Ruling Regarding Section 654

At the sentencing hearing, the parties disputed whether section 654 barred defendant from being punished for both first degree robbery and kidnapping to commit robbery. Defense counsel argued the text messages between defendant and Roberts referring to getting money from the bank prior to the incident showed it was defendant's intent to take money from both Alma's residence and her bank. Thus, he argued the robbery at the bank was part of one continuous robbery. The trial court disagreed, ruling defendant's intent for the "home invasion robbery" was separate from his intent for "the kidnapping in taking the victim to the bank." It explained, "[t]he initial plan was to go into the house, take purses and money, and then the crime mushroomed into something much more severe—not that a home invasion of a young mother in her condition was not a severe case—to include the kidnapping, taking the child to the bank and actually stealing the car."

C. Analysis

Section 654 provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a); *People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*).) This prohibition against multiple punishment extends to situations in which several offenses are committed during "'a course of conduct deemed to be indivisible in time'" or in which the defendant had only a single intent and all of the offenses were incidental to that

one objective. (*Harrison, supra*, at p. 335.) However, "a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment." (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11.) Courts must consider whether the defendant had an opportunity to reflect upon and renew his intent before committing the next offense and whether each offense created a new risk of harm. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1255.)

Here, defendant argues that the text messages refute the trial court's finding that he committed separate offenses to which separate punishments applied. The question before us is not whether the evidence would have permitted a different determination, but whether substantial evidence supports the trial court's finding. It does. (*Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 867 ["If the evidence gives rise to conflicting inferences, one of which supports the trial court's findings, we must affirm"].)

The evidence showed defendant intended to rob Alma of items in her home. However, defendant became dissatisfied when he discovered Alma had no money in hand or valuables in her safe. Frustrated with the situation, defendant told Alma to "stop lying," "thing are going to get ugly," and "he does it as a hobby." Defendant then escalated his efforts to obtain money. He made Alma call her bank so he could hear her account balance. Defendant led Alma and Kaylen to her vehicle and took her to the bank to withdraw the money, keeping Kaylen hostage so Alma would refrain from seeking help. Alma complied, withdrew her money, and gave it to defendant. Although the two incidents occurred in rapid succession, defendant had the opportunity to

reflect upon and renew his intent before committing the second offense of kidnapping to commit robbery, and the second offense created a new risk of harm. (See *Harrison*, *supra*, 48 Cal.3d at p. 335.)

Defendant's reliance on *People v. Lewis* (2008) 43 Cal.4th 415, 519 (*Lewis*), disapproved of on other grounds by *People v. Black* (2014) 58 Cal.4th 912, 919–920, for the proposition that section 654 precludes separate punishments for both robbery and kidnapping to commit robbery is misplaced. *Lewis* is factually distinguishable. In that case, the defendant engaged in a crime spree wherein he intended to kidnap *motorists* and their vehicles and rob them of their cars and/or cash from their bank accounts. (*Lewis, supra,* at pp. 434–439.)

This case is more analogous to the facts in *People v. Smith* (1992) 18 Cal.App.4th 1192, 1194–1195 (*Smith*), where the Court of Appeal affirmed the defendant's double punishment for robbery and kidnapping to commit robbery. In *Smith*, the defendant robbed the victim of cash and electronic equipment in his home, and then kidnapped the victim and drove him to a bank several blocks away where the defendant used the victim's ATM card to obtain additional cash. (*Smith*, at pp. 1194–1195.) He argued that the trial court's imposition of separate sentences on the robbery offense was barred by section 654. (*Smith, supra*, at p. 1197.) The court disagreed, explaining, "'the two crimes for which [defendant] was sentenced involved multiple objectives, were not merely incidental to each other, and were not part of an indivisible court of conduct.'" (*Id.* at p. 1198, relying on *People v. Porter* (1987) 194 Cal.App.3d 34, 38.)

As in *Smith*, the trial court here reviewed the evidence and concluded, "They went in to do the robbery and then they didn't

get enough, in their mind . . . and they decided, 'Well, let's make her take . . . us to the bank.'" Substantial evidence supported the imposition of separate sentences under section 654 for both kidnapping to commit robbery and first degree robbery.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT