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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **ROBERT FRANCIS JARRETT,** **Defendant and Appellant.**	**A133549** **(Contra Costa County Super. Ct. No. 51105907)**

Appellant Robert Francis Jarrett was convicted of simple kidnapping under Penal Code section 207, subdivision (a),[1] based on evidence that he had moved his victim a few feet from the hallway of her house into an adjacent bathroom. The trial court failed to instruct the jury to consider whether that movement was merely incidental to the associated crimes of burglary and false imprisonment. We reverse.

FACTS AND PROCEDURAL HISTORY

On May 26, 2010, appellant broke a window of Shirley Brown's Concord home, entered through a sliding glass door, and stole about $4,000 worth of jewelry. Also on May 26, he entered the recently-vacated apartment of Brandon Sims and would have taken an iPod and music dock had Sims not returned to find him there. Appellant left the apartment when Sims confronted him, falsely claiming that he had been hired by Sims's roommates to clean some windows.

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

Appellant was identified as a suspect in the May 26, 2010 burglaries and Concord Police Department officers spoke to his girlfriend, Cindy Capra, as part of their investigation. On September 22, 2010, Officer Aafedt noticed Capra sitting in a parked Jeep at a shopping mall and stopped to ask her about appellant. Capra told Aafedt that she and appellant were no longer seeing each other, but Aafedt did not believe her and watched the Jeep from across the parking lot until appellant returned. Appellant fled on foot when he saw Aafedt, and though police searched the area, they gave up after about an hour.

That same afternoon, Michelle Simms returned to her Concord home from the grocery store, accompanied by her four-year-old daughter. She saw signs that someone might have broken into her garage and was concerned that the person was still in her back yard. After telephoning her husband, Simms grabbed a large knife from her kitchen. She then walked back to her bedroom to retrieve an air pistol that she kept next to her bed for protection. Simms opened a bedroom closet to see whether one of her cats was inside and appellant jumped out.

Startled, Simms picked up her air pistol. With the pistol in one hand and the knife in the other, she yelled at appellant to "Get the fuck out." Appellant said, "Please don't shoot," and began pleading with her to allow him to stay and hide. He said the police were after him and that they had killed his brother. Simms continued screaming at appellant to leave as she backed out of the bedroom and into the hallway so as to place herself between him and her daughter, who was in the kitchen. Appellant followed Simms into the hallway, pleading with her to quiet down and allow him to stay. Simms continued to point the gun at appellant and to hold the knife out in front of her, but she did not threaten to shoot or stab appellant and did not make any moves to make contact with him.

Simms backed down the hallway with appellant following, until they were less than a foot away from a bathroom door. Appellant lunged at Simms, putting his arm around her neck and his hand over her mouth, and pulled her inside the bathroom. He grabbed her hand that was holding the pistol and held it down, and she began to swing the

knife in her other hand. Appellant pushed Simms up against the shower doors, still holding her neck and her mouth and the hand that was holding the gun. Simms swung the knife wildly, cutting appellant, and appellant told her to stop because she was hurting him. Simms responded that she would not stop until he let her go.

Appellant released his grip on Simms and she told him again to "Get the fuck out." The door of the bathroom was closed. Appellant told her he couldn't leave because he was bleeding and the police would find him more quickly. Simms said she didn't care, but agreed to give him a bandage after he told her he wouldn't leave without one. They walked out of the bathroom and Simms retrieved a bandage from a first aid kit she kept in a hallway closet. Appellant asked her to help him wrap his arm, but did so himself when Simms refused. Simms backed into the kitchen to get her daughter, who was crying, and screamed at appellant to get out. He asked her not to call the police and offered her money as compensation before eventually leaving through the back door.

After appellant left, Simms took her daughter out to her car and got inside. Her husband called her on her cell phone, and after she finished talking to him she saw a police cruiser driving down the street. Simms jumped out of her car and flagged down the cruiser, which was being driven by Officer Aafedt, and told her what had happened. Appellant was discovered by police in some bushes nearby and Simms identified him during an in-field showup.

The district attorney filed an information charging appellant with five felony counts: three counts of first degree residential burglary based on his entry into the homes of Shirley Brown and Brandon Sims and into the bathroom of Michelle Simms, along with charges of false imprisonment by violence and kidnapping as to Michelle Simms. (§§ 459/460, subd. (a), 236/237, subd. (a), 207, subd. (a).) The information included allegations that appellant had been previously convicted of three felonies within the meaning of the Three Strikes law and two felonies within the meaning of the prior serious felony enhancement provision, and had served six prior prison terms. (§§ 1170.12, 667, subd. (a), 667.5, subd. (b).) It also alleged that the Brandon Sims and Michelle Simms burglaries qualified as violent felonies because a person other than an accomplice had

been present. (§ 667.5, subd. (c)(21)). The burglary count involving Brandon Sims was later amended to second degree burglary, because the evidence at appellant's jury trial showed that Sims and his roommates had moved out of the apartment and it did not qualify as an inhabited dwelling as is necessary for first degree residential burglary.

Appellant took the stand at his trial and admitted that he had entered the homes of Shirley Brown and Brandon Sims with the intent to steal. He explained that he had been committing burglaries for more than 20 years to support his drug addiction, and that he had been to prison many times. When he broke into the home of Michelle Simms, however, he had been hiding from the police. According to appellant, he grabbed Simms's arm while they were in the hallway because he was afraid she was going to shoot him, and the two of them stumbled into the bathroom. He let go of her arm and asked her for a bandage when he saw he was a bleeding where she had struck his arm.

The jury found appellant guilty of all counts and returned true findings on the enhancement allegations. The court struck two of the Three Strikes allegations and imposed an aggregate prison term of 25 years 4 months: 10 years for the kidnapping count (the five-year middle term, doubled under the Three Strikes law), consecutive terms of two years eight months each for the Brown and Michelle Simms burglaries (one-third of the middle term, doubled under the Three Strikes law), and consecutive five-year terms for each of the two prior serious felony enhancements. Concurrent sentences of two years each were imposed on the false imprisonment count and the Brandon Sims burglary count.

DISCUSSION

I. *Sufficiency of the Evidence*

Appellant argues that his conviction for kidnapping Michelle Simms under section 207, subdivision (a) must be reversed because the evidence was insufficient to establish that he moved her a "substantial" distance, the standard of asportation required for a conviction under the statute. (See *People v. Martinez* (1999) 20 Cal.4th 225, 237 (*Martinez*).) Although the question is close, we disagree.

In deciding the sufficiency of the evidence, we ask whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Hatch* (2000) 22 Cal.4th 260, 272.) We resolve neither credibility issues nor evidentiary conflict, but look for substantial evidence, that is, evidence that is reasonable, credible and of solid value. (*People v. Elliot* (2005) 37 Cal.4th 453, 466; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) A defendant is not entitled to reversal simply because the facts would support an acquittal. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

Section 207, subdivision (a) provides, "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." A conviction of simple kidnapping under this statute requires proof that the victim (1) was moved by the use of physical force or fear; (2) did not consent to the movement; and (3) was moved for a substantial distance. (*People v. Bell* (2009) 179 Cal.App.4th 428, 435 (*Bell*).) This last element, movement for a substantial distance, is known as asportation. (*Ibid*.)

Under former case law, distance was the sole criterion for determining whether the movement of the victim was substantial for purposes of simple kidnapping. (*Bell*, *supra*, 179 Cal.App.4th at p. 436.) In *Martinez*, *supra*, 20 Cal.4th at page 236, our Supreme Court reconsidered the "distance alone" standard and concluded that "limiting a trier of fact's consideration to a particular distance is rigid and arbitrary, and ultimately unworkable." The court overruled prior law to the extent it "prohibited consideration of factors other than actual distance" (*id*. at p. 237, fn. 6) and held that factors other than distance may be considered: "[I]n determining whether the movement is ' "substantial in character" ' [citation], the jury should consider the totality of the circumstances. Thus, in a case where the evidence permitted, the jury might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable

attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*Ibid.*)

The *Martinez* court cautioned that in some cases, the distance involved is simply too slight to permit a finding of substantial movement of the victim, regardless of the other circumstances that might exist. "[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.) Seizing on this language, appellant argues that the movement of Simms was for a "very short" distance and did not satisfy the asportation element.

The kidnapping charge in this case was based on appellant's movement of Simms from the hallway of her house into her bathroom. Simms testified that she was less than a foot away from the bathroom when appellant pulled her inside from the hallway, and, once inside the bathroom, he pushed her against the shower door. Although the precise distance of this movement was not established at trial, the Attorney General acknowledges it was no more than a few feet.

The movement in this case, though brief, was not so very short as to be insubstantial as a matter of law. (See *People v. Shadden* (2001) 93 Cal.App.4th 164, 169-170 (*Shadden*) [in aggravated kidnapping case, movement of nine feet from counter of video store to back room was sufficient to show asportation].) Taking Simms from the hallway to the more confined space of the bathroom significantly altered her environment: It reduced her opportunity to escape, it made it more likely she would be disarmed by appellant, and it gave appellant a greater opportunity to commit further crimes and avoid detection by the police. Simms was in a much better position to escape and defend herself when she was still in the hallway. Once appellant moved her inside the bathroom, she was more vulnerable, even though ultimately she was not physically harmed. The jury could reasonably conclude that the movement was substantial considering the totality of the circumstances.

II. *Failure to Instruct on Incidental Movement*

Appellant alternatively argues that the kidnapping count must be reversed because the court did not instruct the jury to consider whether the movement for the kidnapping was "merely incidental" to the associated crimes of burglary and false imprisonment. We agree.

Simple kidnapping under section 207, subdivision (a) differs from aggravated kidnapping in that it does not require the commission or intended commission of an underlying offense. (Compare §§ 209, subd. (b), 209.5.)[2] When, however, the defendant is charged with both simple kidnapping and an associated crime, "there can be no violation of section 207 unless the asportation is more than incidental to the commission of the crime." (*In re Earley* (1975) 14 Cal.3d 122, 129 & fn. 9, cited with approval in *Martinez, supra*, 20 Cal.4th at p. 237; see also *People v. Diaz* (2000) 78 Cal.App.4th 243, 246 ["even a simple kidnapping requires movement more than incidental to the commission of an 'associated crime' "].) An "associated crime" is "*any* criminal act the defendant intends to commit where, in the course of its commission, the defendant also moves a victim by force or fear against his or her will." (*Bell, supra*, 179 Cal.App.4th at pp. 438-439.)

With respect to the incident involving Michelle Simms, appellant was charged with simple kidnapping, residential burglary, and false imprisonment by force. The burglary charge was not based on his initial entry into Simms's home, but on his subsequent entry into the bathroom with the intent to falsely imprison Simms. (See *People v. Sparks* (2002) 28 Cal.4th 71, 73, 87 [burglary may be based on entry into a room of a house with the intent to commit a theft or felony, even if the initial entry into

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[2] Aggravated kidnapping also has a different standard of asportation, which requires movement of the victim that is "not merely incidental to the commission of the underlying crime and that increases the risk of harm to the victim over and above that necessarily present in the underlying crime itself." (*Martinez, supra*, 20 Cal.4th at p. 232; see also *Bell, supra*, 179 Cal.App.4th at pp. 435-436.)

the house was lawful].)[3] The false imprisonment charge was based on appellant's confinement of Simms in the bathroom "so he could get her quiet and so he can plan." Because the movement that allegedly constituted the kidnapping occurred in the course of appellant's commission of these offenses, the burglary and the false imprisonment were associated crimes of the kidnapping. (See *Bell*, *supra*, 179 Cal.App.4th at p. 439.)

"In a [simple kidnapping] case involving an associated crime, the jury should be instructed to consider whether the distance a victim was moved was incidental to the commission of that crime in determining the movement's substantiality." (*Martinez*, *supra*, 20 Cal.4th at p. 237.) When supported by the facts, such an instruction must be given sua sponte. (*Bell*, *supra*, 179 Cal.App.4th at pp. 434-435.) The standard kidnapping instruction, CALCRIM No. 1215, contains bracketed language allowing the jury to consider "whether the distance the other person was moved was beyond that merely incidental to the commission of [the associated crime]" when determining whether the movement was substantial. But in this case, the court gave CALCRIM No. 1215 without the bracketed language and did not otherwise instruct the jury to consider whether the movement of Simms was incidental to the crimes of burglary and false imprisonment.

A similar omission was held to be reversible error in *Bell*, *supra*, 179 Cal.App.4th at pages 434 through 440, in which the trial court had failed to instruct sua sponte that the jury should consider whether a kidnapping charge was incidental to a charge of recklessly

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[3] Count 3 of the information, which charged appellant with the burglary of Michelle Simms's home, alleged that appellant "did unlawfully enter a dwelling house, and a room within that dwelling house, the bathroom; inhabited by Michelle Simms . . ., with the intent to commit false imprisonment and a felony." The jury was instructed that the entry for burglary can be entry into a "room within a building," and that in order to convict appellant of the burglary of Michelle Simms's home, it must find that he intended to commit false imprisonment when he entered a building or room within a building. (CALCRIM No. 1700.) During closing argument, the prosecutor stated, "For this burglary, inside Michelle Simms['s] home, he's been charged with entering the bathroom with the intent to commit a false imprisonment. [¶] Element one is he entered the bathroom. No doubt about that. [¶] Element two is at the time of the entry the defendant had the specific intent to commit this false imprisonment. . . ."

evading a police officer under Vehicle Code section 2800.2. The defendant in *Bell* had fled from the police in his car while his soon-to-be-ex-wife was an unwilling passenger; he was convicted of both evading the police and kidnapping based on this conduct. After noting that the failure to instruct on all the elements of a crime is federal constitutional error subject to review under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24, the *Bell* court explained: "The [trial] court's failure to charge the jury on the substantiality of the movement in relation to the evasion offense precluded the jurors from considering whether defendant's driving with [the kidnapping victim] in his car was merely incidental to his offense of evading the police. The People point us to no other jury instructions, jury findings or counsel's arguments showing the jurors knew they had to acquit defendant of kidnapping if they found his movement of [the victim] was *not* substantial, taking into account (as one factor among others) whether his movement . . . was merely incidental to evasion. The error was *not* harmless beyond a reasonable doubt." (*Id*. at pp. 439-440.)

The People argue that *Bell* is incorrect to the extent that it treats the omission of the bracketed portion of CALCRIM No. 1215 as federal constitutional error. They claim the instruction did not omit or misstate an element of kidnapping, because the issue of incidental movement is simply one consideration among many in determining whether the movement was substantial. The People contend that any error in omitting CALCRIM No. 1215's bracketed language must be analyzed under the standard of prejudice for state law error articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836, which asks whether it is reasonably probable the defendant would have obtained a more favorable result absent the error.

Even under the less-stringent *Watson* standard, reversal is required. The movement of Michelle Simms into the bathroom was the basis for three separate felony charges. The underlying purpose of the movement, according to the People's theory of the case, was to keep Simms quiet so appellant could remain in the house and continue to hide from the police. To do this, he had to hold her against her will; i.e., falsely imprison her. He could have done so anywhere in the house, but chose an opportune moment to

move her a few feet into the bathroom. A fully instructed jury might well have concluded that the movement of Simms into the bathroom was merely incidental to false imprisonment and to the burglary that had false imprisonment as its target. (See *Cotton v. Superior Court* (1961) 56 Cal.2d 459, 464 [movement that was "natural" to the target offense was merely incidental to it]; *People v. Aguilar* (2004) 120 Cal.App.4th 1044, 1050-1052, and cases cited therein [discussing aggravated kidnapping cases in which movement necessary to the commission of the underlying offense was deemed "incidental"].)

The People argue that a different result is not reasonably probable because the incidental nature of the movement is only one factor in determining whether the movement of Michelle Simms was substantial for purposes of asportation. (See *Bell*, *supra*, 179 Cal.App.4th at p. 440.) We are not persuaded. The other factors enumerated in CALCRIM No. 1215—the actual distance of the movement, whether it increased the risk of harm or the danger to the victim of a foreseeable escape attempt, or whether it gave the defendant an opportunity to commit additional crimes—did not point inevitably toward a finding of substantial movement. Simms was only moved a few feet. Although it was more difficult for her to escape from the bathroom than from her previous position in the hallway, the greatest danger she faced was in being (essentially) alone in her home with an intruder—something that was true regardless of her position within the home. If the jury had been advised to consider the incidental nature of the movement with respect to the other crimes, that may well have tipped the balance in favor of acquittal on the kidnapping charge.

The kidnapping count must be reversed and the case remanded for a retrial on that charge and/or resentencing.

III. *Section 654*

Section 654 precludes multiple punishment for statutory violations arising out of a single act or omission or an indivisible course of conduct against a single victim. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, 1212.) Appellant submits that the three crimes involving Michelle Simms (kidnapping, false imprisonment, and burglary) were part of

the same course of conduct and that the court erred by imposing punishment for each of them: a 10-year term for the kidnapping, a consecutive two-year-eight-month term for the burglary, and a concurrent two-year term for the false imprisonment. The People commendably concede that on remand, appellant may not be sentenced for more than one of these offenses.

Because the kidnapping conviction must be reversed, we do not consider appellant's alternative argument that in lieu of a stay under section 654, the trial court must vacate his conviction for false imprisonment as a lesser included offense of kidnapping. (See *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120-1121.)

DISPOSITION

The kidnapping conviction (count 5) is reversed. The People may elect to retry appellant on that charge within 60 days of the issuance of the remittitur. (§ 1382, subd. (a)(2).) If the People do not retry appellant for kidnapping, the court shall promptly resentence him on the remaining charges, consistent with the views expressed in this opinion. The court may reconsider the entire sentence and may fashion a new

sentence so long as the aggregate term does not exceed the original sentence of 25 years 4 months. (See *People v. Lai* (2006) 138 Cal.App.4th 1227, 1235.)

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.