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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT ESTRADA,

Defendant and Appellant.

D060530

(Super. Ct. No. SCD221501)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey F. Fraser, Judge. Affirmed as modified.

INTRODUCTION

A jury convicted Albert Estrada of two counts of kidnapping for robbery (Pen. Code,¹ § 209, subd. (b); counts 1 & 2), two counts of robbery (§ 211; counts 3 & 4), two counts of first degree robbery in an inhabited dwelling (§§ 211, 212.5, subd. (a); counts 5 & 8), one count of first degree burglary of an inhabited dwelling (§§ 459, 460;

¹ Further statutory references are also to the Penal Code unless otherwise stated.

count 6), one count of carjacking (§ 215, subd. (a); count 7), and two counts of felony child abuse (§ 273a, subd. (a); counts 10 & 11). As to counts 1 through 7, the jury found true allegations Estrada personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)). As to counts 8, 10 and 11, the jury similarly found true allegations Estrada was armed with a firearm (§ 12022, subd. (a)(1)).²

The trial court sentenced Estrada to an indeterminate prison term of 34 years to life for counts 1 and 2 and the related firearm enhancements. It sentenced him to a consecutive determinate prison term of 33 years four months for the remaining counts and firearm enhancements, including eight years eight months for counts 3 and 4 and the related firearm enhancements.

Estrada appeals, contending we must reverse his convictions for kidnapping for robbery in counts 1 and 2 because there was insufficient evidence to support the asportation element for these offenses. Alternatively, he contends we must direct the trial court to stay his punishment for robbery in counts 3 and 4 under section 654 because the offenses in counts 1, 2, 3 and 4 were part of a continuous course of conduct sharing a single objective. Estrada additionally contends we must reverse his conviction for

² Notwithstanding the true findings on the firearm enhancement allegations, the jury found Estrada not guilty of one count of being a felon in possession of a firearm (§ 12021, subd. (a)(1); count 12). The prosecutor later learned the acquittal occurred because she put the wrong offense date on the verdict form. The information alleged the offense date was June 20, 2009, and the verdict form identified the offense date as June 12, 2009.

Additionally, as discussed in more detail in part III.A of the Discussion section, *post*, the jury could not reach a verdict on one count of first degree burglary of an inhabited dwelling (§§ 459, 460; count 9). At the sentencing hearing, the trial court dismissed the charge in the interest of justice.

carjacking in count 7 because there was insufficient evidence he took the vehicle from the victim's immediate presence or that he had the intent to take the vehicle when he took the keys to the vehicle. He further contends we must reverse his convictions for robbery in count 8 and for child abuse in counts 10 and 11 because the record shows the jury did not unanimously agree he was a direct perpetrator of these crimes. He alternatively contends we must reverse his conviction for robbery in count 8 because the trial court failed to instruct the jury it could not convict him of robbery if it failed to find he was a direct perpetrator.

We agree the trial court should have stayed the sentences for counts 3 and 4 and direct the trial court to modify the abstract of judgment accordingly. In all other respects, we affirm the judgment.

BACKGROUND

Crimes Against Jose Villanueva and Carlos Espinoza (Counts 1-4)

At around 9:00 a.m. on June 20, 2009, Carlos Espinoza went to his friend Jose Villanueva's apartment. The two men were standing outside talking in the alley behind the apartment building when a Hispanic man approached them and pointed a black revolver at Villanueva's head. The man was approximately 5 feet 2 inches tall and weighed approximately 120 to 125 pounds. He was between 25 to 30 years old and had a bit of facial hair. He also had a tattoo on his neck. He wore blue jeans, a gray hooded sweatshirt and dark sunglasses. He had a black, knit beanie in his back pocket.

The man took their cell phones and told them to turn around. He threatened to shoot them if they turned back around or looked at him. He then directed them to move

approximately 85 feet to the recessed entryway of an apartment building across the alley. The area where he moved them was more secluded than the area where they had first been standing. He told them to open the building's entry gate quickly or he was going to "f—k" them. Villanueva turned back to look at the man and the man threatened to "shoot his head off." Villanueva tried to open the gate, but it was locked. At that point, Espinoza and Villanueva felt trapped because the man stood behind them with a gun, there was a locked gate in front of them, a fence to the left of them, and the window and door of an apartment to the right of them.

When Villanueva could not open the gate, the man started to hit the window of the apartment. A young man peeked out of the window. The young man then whistled and his neighbors started coming out from their apartments. At that point, the man with the gun ran away.

Crimes Against Nava, Zavalza & Cuevas (Counts 5-7)

The same morning, Jose Zavalza went to pick up his cousin from his aunt Maria Nava's house, which was approximately seven miles or a 10-minute drive from Villanueva's apartment building. His cousin, his cousin's wife, and his cousin's young son lived with Nava. Nava's brother, Valentin Cuevas, was also visiting Nava that morning. While Zavalza waited on the couch with Cuevas for his cousin to get ready, some church members stopped by for five to eight minutes and left.

Almost immediately afterwards, someone knocked on the door. Thinking the church members had returned, Nava opened the door. A 25- to 35-year-old Hispanic man stood at the door. He wore a gray hooded sweatshirt, blue jeans and white shoes. She

asked him what he needed, but he did not answer. Instead, he took a revolver out of his pants, put it to her abdomen, and told her to go back into the house. The man backed her into a corner in the dining room. Thinking the gun was a toy, Nava grabbed it. She discovered it was cold and heavy and determined it was real. She and the man struggled over the gun. She released it as he pushed her hard into a wall. He then demanded money and she told him she did not have any because she had paid the rent.

Zavalza did not have a good view of the area where Nava and the man were, but he heard the ruckus. When he got up to see what was wrong, the man swung around and pointed the gun, a black steel .38-caliber revolver, at him and Cuevas.

The man told Zavalza to sit back down, which he did, and told Nava to come out of the dining room and sit next to Zavalza and Cuevas, which she did. The man then demanded money. Nava went to the backyard where her daughter-in-law was, got \$20 dollars from her and gave it to the man. Meanwhile, Zavalza and Cuevas dug in their pockets. Cuevas also gave the man \$20. To get the man out of the house, Zavalza took his keys out of his pocket, placed them on the coffee table, falsely stated his wallet was between the seats of his vehicle and told the man he could go get it. The man took the keys, left the house, got into Zavalza's vehicle and drove away.

Zavalza called 911. He told a 911 operator a very thin Hispanic man in his early twenties walked into the house with what appeared to be a black .38 revolver and demanded money. The man wore a gray sweater, gray pants, dark sunglasses, and a sports team ball cap.

Nava similarly told a 911 operator the man was a short, skinny, dark-complected Hispanic in his early to late 20's. He wore a dark gray, hooded shirt and gray denim pants. She told a police officer the robber was a Hispanic male, in his middle to late 20's, with brown eyes and dark skin. He was about 5 feet 6 inches tall, about 160 pounds, and wore a gray hooded zipper jacket and baggy blue jeans.

San Diego Police Officers Daniel Stanley and Adam Shrom were patrolling the area and responded to the call from a few blocks away. They heard a dispatch stating the suspect took a vehicle and they spotted it approaching them. When the suspect saw them, he pulled over, got out of the vehicle, and walked into a parking lot. He was wearing blue jeans, white tennis shoes, and a gray hooded sweatshirt. He had on a blue baseball cap underneath the sweatshirt.

Officers Stanley and Shrom stopped and got out of their patrol car. Shrom ordered the suspect to stop, but the suspect immediately ran through the parking lot and jumped some fences. As he ran, he removed his clothing. Shrom went into a nearby alley to try to intercept him. Stanley got back into the patrol car, drove around the block, and started coordinating with other officers to set up a perimeter to contain the suspect.

Stanley noticed Estrada sitting on a front porch wearing nothing but a pair of jeans. He stopped his patrol car. He asked Estrada where the suspect went. Estrada pointed west and said the suspect had jumped a fence. As Stanley continued his investigation, a police dispatcher provided an updated description of the suspect, which matched Estrada. Stanley looked for Estrada. He found him across the street on another porch pretending to be asleep and took him into custody.

Estrada had a puncture wound on his left hand and his jeans were torn, both consistent with him having jumped a chain-link fence. In addition, there was a trail of clothing leading from the area where the suspect abandoned the stolen vehicle to the location where Stanley first encountered Estrada, including a black glove, a black-and-orange glove, a blue bandana, a black bandana, a blue long-sleeve T-shirt, a gray hooded sweatshirt, black sunglasses, a blue ball cap, and a black ski mask. There were two \$20 bills in the pocket of the sweatshirt and a loaded .38 caliber revolver in the stolen vehicle.

DNA testing showed Estrada was the predominate contributor to the DNA mixture on the sweatshirt, T-shirt, blue bandana, and black glove and a possible major contributor to the DNA mixture found on the ski mask, black bandana, and black-and-orange glove. He was a possible minor contributor to the DNA mixture found on the ball cap. There was insufficient DNA found on the gun and the sunglasses to reach any conclusions.

Nava identified Estrada as the robber at a curbside lineup and at the preliminary hearing. She also identified the gray sweatshirt officers found as the gray jacket the robber was wearing. Cuevas also identified Estrada at a curbside lineup.

A church member was leaving a home when she saw a man run from an alley and jump a wire fence. The man fell down, got back up, removed his gray sweatshirt, and continued running. The church member next saw the man sitting on the front porch of the house next door to the one she had been visiting. He did not have a shirt on. She continued walking. When she later turned around, she saw he had on a white tank top and was talking to a police officer. The man then walked across the street.

At a subsequent curbside lineup, the church member identified the man as Estrada. She did not attempt to identify Estrada at trial, indicating she did not think she would recognize him because it had been a long time and she had never seen the man before or after the incident. Her minor nephew, who had been visiting homes with her, also identified the man as Estrada at the curbside lineup, but did not attempt to identify the man at trial for the same reasons as his aunt.

Crimes Against the L. Family³ (Counts 8, 9, 10, & 11)

Mr. L. is self-employed as a tow truck driver and mechanic. His home address, home phone number, and cell phone number appear on the side of his tow truck. On June 12, 2009, he received a cell phone call from a restricted number. The female caller requested towing assistance for her car, which she said was parked in front of a department store at a shopping center. Mr. L. went to the shopping center, which was a 15-minute drive from his house. He left his wife and two young foster daughters at home. When he arrived at the shopping center, he searched for the woman for approximately 10 minutes, but did not find her.

After Mr. L. left his home, a tall Hispanic man approximately 28 years old knocked on the door of the home and asked for a business card. When Mrs. L. opened the door to give him a card, he pushed his way into the home. He pointed a black gun at her chest and told her he would not kill her if she sat down. She sat down and grabbed one of her foster daughters. The other daughter was in an upstairs bathroom.

³ The L.s are long-time foster parents. We have omitted their identifying information to protect the identity of their foster children, two of whom were victims in this case.

At that point, another young Hispanic man came into the house. He was short, between 4 feet 9 inches and 5 feet 2 inches tall, and wore a mask covering his entire face except his eyes. He asked if anyone else was in the house. To protect her other foster daughter, Mrs. L. lied and told him no one else was there. However, around that time, her other foster daughter came downstairs and ran to her.

As the taller man stood about four feet from her pointing a gun at her and her foster daughters, the masked man searched the house. He demanded "the black box," which Mrs. L. assumed meant he wanted a safe. She told him that she only had a file cabinet, not a black box. He searched her room and took her jewelry box. He started aggressively demanding money, so she gave him \$900 she kept in the filing cabinet. One of her foster daughters also offered to give him a gold necklace her biological mother had given her on her birthday. He then went upstairs into her son's room and took her son's jewelry as well as handcuffs, a flashlight, and a camera her son used for his security job. When the masked man came downstairs with her son's belongings, he demanded Mrs. L's car keys. However, the taller man with the gun vetoed the idea of taking a car because doing so would make them easier to follow and catch. The two men then left. They told her not to call the police or they would kill her.

Mrs. L. called her husband and told him what happened. He realized the call for service was made to lure him out of the house. He rushed home and found her and their foster children frightened and crying. He immediately called 911. His wife had been afraid to call because of the robbers' threat to kill her. During the call, he handed the phone to his wife. She told the 911 operator both men were dressed entirely in black.

One of the men was tall, in his late 20's, with a medium build. He wore sunglasses and carried a small, black gun. The other one was short, thin and wore a mask over his face.

Vanessa Gonzalez testified Estrada came to her home early in the morning on June 12 and asked her for a ride to a house. She took him there. He went inside and returned with a cell phone. At his behest, she told the person on the other end of the call that her car had broken down and she needed a tow. After that, she returned the cell phone to Estrada and went home. She saw Estrada again the next day at a friend's house. He had a folded wad of money with him. He threw a \$20 bill at her and told her to buy herself something. Sometime before the crimes at the L.s' home, she saw Estrada with a revolver.

The subscriber of the cell phone used to contact Mr. L. was Miriam Macareno. Macareno gave the cell phone to her cousin, Youset Patino, who was Estrada's girlfriend. According to Patino's preliminary hearing testimony, which was read to the jury because she was unavailable to testify at trial, Estrada came to her house one morning and borrowed the cell phone. He took the phone to a car with a female occupant. He returned the phone to Patino about 10 minutes later. Estrada left about five minutes after that. The driving time from Patino's home to the L.s' home was approximately five minutes.

DISCUSSION

I

Challenges to Convictions for Crimes Against Villanueva and Espinoza

A

Sufficiency of Evidence to Establish Asportation Element of

Kidnapping for Robbery Counts

Estrada contends we must reverse his kidnapping for robbery convictions in counts 1 and 2 because there was insufficient evidence to establish the asportation element for these offenses. We disagree.

When considering a defendant's challenge to the sufficiency of the evidence, we review the entire record most favorably to the judgment to determine whether the record contains substantial evidence from which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. We do not reweigh evidence or reassess a witness's credibility and we presume the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

To satisfy the asportation element for aggravated kidnapping, the movement of the victim must have: (1) been more than merely incidental to the underlying crime, and (2) increased the risk of physical or psychological harm to the victim beyond that inherent in the underlying crime. (§ 209, subd. (b)(2); *People v. Vines* (2011) 51 Cal.4th 830, 869-870 & fn. 20 (*Vines*); *People v. Nguyen* (2000) 22 Cal.4th 872, 885-886; *People v. Martinez* (1999) 20 Cal.4th 225, 232 & fn. 4 (*Martinez*).) To determine whether the

movement was merely incidental to the underlying crime, the trier of fact must consider the nature and scope of the movement, including the actual distance the victim was moved as well as the environmental context in which the movement occurred. (*Vines*, at p. 870; *Martinez*, at p. 233; *People v. Leavel* (2012) 203 Cal.App.4th 823, 833 (*Leavel*.) No minimum distance is required as long as the movement is substantial. (*Vines*, at p. 871, *Martinez*, at p. 233; *Leavel*, at p. 833.) To determine whether the movement increased the risk of harm to the victim, the trier of fact must consider such factors as whether the movement decreased the likelihood of the crime's detection, increased the inherent danger of a victim's foreseeable attempts to escape, or enhanced the perpetrator's opportunity to commit additional crimes. (*Vines*, at p. 870; *Martinez*, at p. 233; *Leavel*, at pp. 833-834.)

"The essence of aggravated kidnapping is the increase in the risk of harm to the victim caused by the forced movement." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152 (*Dominguez*.) Thus, both asportation requirements are necessarily intertwined and determining whether they have been met requires a "multifaceted, qualitative evaluation" of the totality of the circumstances, rather than "a simple quantitative assessment." (*Dominguez*, at p. 1152; accord, *Vines*, *supra*, 51 Cal.4th at p. 870, *Martinez*, *supra*, 20 Cal.4th at p. 233; *Leavel*, *supra*, 203 Cal.App.4th at p. 833.) We must consider how all the attendant circumstances, including measured distance, relate to the ultimate question of increased risk of harm. (*Dominguez*, at p. 1152.) Consequently, a lengthier movement which does not increase the victim's risk of harm may not satisfy the asportation element while a shorter movement which does increase the victim's risk of harm may. (*Ibid.*)

Here, the evidence showed Estrada approached Villanueva and Espinoza in an alley outside Villanueva's apartment building. Estrada pointed his gun at them and demanded their cell phones. After they gave Estrada their cell phones, he told them to turn around and threatened to shoot them if they looked at him. He then ordered them to move a distance of approximately 85 feet across the alley into the recessed entryway of another apartment building, which was not visible from the alley. Once there, Villanueva and Espinoza were effectively trapped on all sides.

A reasonable jury could find from this evidence Estrada's movement of Villanueva and Espinoza was more than merely incidental to the robbery and increased their risk of harm. The movement was not necessary to facilitate the initial robbery of the men. Estrada had already taken the men's cell phones and inferably could have taken their other valuables without moving them. "Lack of necessity is a sufficient basis to conclude a movement is not merely incidental" (*People v. James* (2007) 148 Cal.App.4th 446, 455, fn. omitted; accord, *Leavel, supra*, 203 Cal.App.4th at p. 835.) Additionally, by forcing the men to go from the alley into the more secluded recessed entryway of another apartment building where the men were effectively trapped on all sides, Estrada enhanced his opportunity to commit additional crimes against the men and decreased the likelihood of the crimes' detection. He also increased the inherent danger of any escape the men might have attempted. The movement, therefore, served purposes squarely recognized by the California Supreme Court as supporting a finding the asportation element for aggravated kidnapping was met. (*People v. Corcoran* (2006) 143 Cal.App.4th 272, 280.)

The fact the building was occupied and some of the residents were at home when the offense occurred does not alter this conclusion. There is no evidence the residents were aware of the men's presence or plight until Estrada thoughtlessly banged on an apartment window in his haste to enter the building. (See *Vines, supra*, 51 Cal.4th at p. 870 [that the dangers from the movement did not actually materialize does not mean the movement did not increase the risk of harm]; accord, *Martinez, supra*, 20 Cal.4th at p. 233, *Leavel, supra*, 203 Cal.App.4th at p. 834.)

Two of the cases upon which Estrada relies, *People v. Hoard* (2002) 103 Cal.App.4th 599 and *People v. John* (1983) 149 Cal.App.3d 798, are factually inapposite because the movement of the victims in these cases was to facilitate the robberies, the movement occurred within a single building or interconnected buildings, and the movement did not increase the risk of harm to the victims. Thus, a qualitative evaluation of the attendant circumstances did not support a jury finding the asportation element had been met.

The other case upon which Estrada relies, *People v. Daniels* (1988) 202 Cal.App.3d 671, does not assist his position. In *Daniels*, the defendant moved the victim twice: once a half block on foot to complete the initial robbery, and once in a car three or four blocks to complete a further robbery. The appellate court concluded the first movement was merely incidental to the initial robbery; however, the second movement of the victim was not incidental because the second movement was for a substantial distance and substantially increased the risk of harm to the victim. (*Id.* at pp. 683-684.) Although Estrada likens the movement in this case to the first movement in *Daniels*, it is more akin

to the second movement because it was not necessary to complete the initial robbery, it was inferably for purposes of committing a further robbery and, for the reasons we previously discussed, a qualitative evaluation of the attendant circumstances supports a jury finding the movement increased the risk of harm to Villanueva and Espinoza. We, therefore, conclude Estrada has not established there was insufficient evidence to support the asportation element for his kidnapping for robbery convictions in counts 1 and 2.

B

Failure to Stay Sentences for Robbery Counts

Estrada alternatively contends section 654 requires us to direct the trial court to stay his sentences for the robberies in counts 3 and 4 because these robberies and the kidnappings for robberies in counts 1 and 2 were part of a continuous course of conduct with a single objective—to take the men's property. We agree.

"[Section 654] prohibits the imposition of punishment for more than one violation arising out of an 'act or omission' which is made punishable in different ways by different statutory provisions." (*People v. Beamon* (1973) 8 Cal.3d 625, 636, fn. omitted.) Section 654 applies " 'not only where there was but one 'act' in the ordinary sense . . . but also where a course of conduct violated more than one statute . . . within the meaning of section 654." ' ' (*People v. Beamon*, at p. 637; *People v. Rodriguez* (2009) 47 Cal.4th 501, 507.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of*

California (1960) 55 Cal.2d 11, 19; disapproved on another ground in *People v. Correa* (2012) 54 Cal.4th 331, 336; *People v. Rodriguez*, at p. 507; *People v. Wynn* (2010) 184 Cal.App.4th 1210, 1214-1215.) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Harrison* (1989) 48 Cal.3d 321, 335; *People v. Wynn*, at p. 1215.) " " " 'A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.' " " " (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1368.)

In *People v. Lewis* (2008) 43 Cal.4th 415, an analogous California Supreme Court case, the defendant was convicted of multiple counts of kidnapping for robbery and robbery where he robbed the victims and moved them to another location to further rob them. (*Id.* at pp. 434-439.) The Court concluded that, under these circumstances, the sentences for the robbery convictions must be stayed under section 654 because "the kidnappings for robbery and the robberies of each victim were committed 'pursuant to a single intent and objective,' that is, to rob the victims of their cars and/or cash from their bank accounts." (*Id.* at p. 519.) As the instant case is analytically indistinguishable from the *Lewis* case, we conclude Estrada's sentence for convictions for robbery in counts 3 and 4 must likewise be stayed.

II

Challenge to Conviction for Carjacking Against Zavalza

Estrada contends we must reverse his carjacking conviction in count 7 because there was insufficient evidence that he took Zavalza's vehicle by force from Zavalza's immediate presence, or that he formed the intent to steal Zavalza's vehicle when he took Zavalza's keys. We conclude there is no merit to this contention.

A

Taking by Force from Immediate Presence

" 'Carjacking' is the felonious 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).) "A conviction for carjacking requires proof that (1) the defendant took a vehicle that was not his or hers (2) from the immediate presence of a person who possessed the vehicle or was a passenger in the vehicle (3) against that person's will (4) by using force or fear and (5) with the intent of temporarily or permanently depriving the person of possession of the vehicle." (*People v. Magallanes* (2009) 173 Cal.App.4th 529, 534.)

"A vehicle is within a person's immediate presence for purposes of carjacking if it is sufficiently within his control so that he could retain possession of it if not prevented by force or fear. [Citations.] It is not necessary that the victim be physically present in

the vehicle when the confrontation occurs." (*People v. Gomez* (2011) 192 Cal.App.4th 609, 623.)

In this case, Estrada took Zavalza's keys at gunpoint and then took Zavalza's vehicle as Zavalza watched from the window of Nava's home. At the time of the taking, the vehicle was parked in front of the home, so the jury could have reasonably found it was sufficiently within Zavalza's control for him to have retained possession of it if he had not been prevented from doing so by force or fear. Accordingly, we conclude there is sufficient evidence to support the immediate presence element. (See *People v. Gomez, supra*, 192 Cal.App.4th at p. 624 [the immediate presence element is met when a defendant takes the victim's vehicle while the victim watches from a window 10 feet away fearful of intervening because he was physically assaulted by the defendant 10 to 20 minutes earlier]; *People v. Hoard, supra*, 103 Cal.App.4th at pp. 602, 609 [the immediate presence element is met when a defendant enters a store, takes an employee's keys, ties up the employee in the backroom of the store, and then takes the employee's vehicle from the parking lot outside the store because the employee would have kept possession and control of the car had she not been forced to relinquish its keys].)

People v. Coleman (2007) 146 Cal.App.4th 1363, upon which Estrada relies, is distinguishable. In that case, the defendant entered a store and forced a store employee to give him the keys to the store owner's personal vehicle. (*Id.* at p. 1366.) The appellate court concluded the requirements for a carjacking conviction had not been met because the store employee "was not within any physical proximity to the [vehicle], the keys she relinquished were not her own, and there was no evidence that she had ever been or

would be a driver of or passenger in the [vehicle]." (*Id.* at p. 1373.) In other words, while the evidence showed the defendant took the vehicle from someone's immediate presence, it did not show the defendant took the vehicle from the immediate presence of a person who possessed it within the meaning of section 215, subdivision (a).

Here, there is no dispute Zavalza possessed the vehicle Estrada took. Zavalza testified he owned the vehicle, he drove to Nava's home that morning and parked it in front, and he had the keys for it in his pocket when Estrada committed the robbery in Nava's home. Accordingly, Estrada has not established there is insufficient evidence to support the immediate presence element.

B

Intent to Steal

Estrada also contends there was insufficient evidence he intended to steal Zavalza's vehicle when he took Zavalza's keys. Estrada is correct that "[t]he requisite intent—to deprive the possessor of possession—must exist before or during the use of force or fear." (*People v. Gomez, supra*, 192 Cal.App.4th at p. 618.) However, Estrada is incorrect in asserting nothing in the record permits the inference Estrada formed the intent to take Zavalza's vehicle when he was in Nava's home. The evidence shows Estrada entered the home looking for money and items of value. He left the house as soon as he got Zavalza's keys and immediately took Zavalza's vehicle. Such haste sufficiently supports an inference he intended to take Zavalza's vehicle when he took the keys. (*Id.* at p. 622 ["the act of taking a car by one who steals the keys can imply that the

key thief *intended* to steal the car when he took the keys"'].) Thus, we conclude a reasonable jury could have found Estrada had the requisite intent for carjacking.

III

Challenges to Crimes Against the L. Family

A

Absence of Unanimous Jury Verdict on Direct Perpetrator Theory

1

During deliberations, the jury submitted five notes to the trial court. In the morning of the first full day of jury deliberations, the jury requested and received a read back of Mrs. L.'s and Detective Estrella's testimony relating to the crimes against Mrs. L. and her foster children (counts 8, 9, 10 & 11). The jury sent a second note that morning asking, "Does the crime of robbery and burglary for counts (8, 9) require that the defendant physically be within the inhabited dwelling unit?" (Capitalization altered.) After consulting with counsel, the trial court responded, "Please refer to jury instructions: 1600, 1602, 1700, 1701." (Capitalization altered.) These instructions define robbery (CALCRIM No. 1600), degrees of robbery (CALCRIM No. 1602), burglary (CALCRIM No. 1700), and degrees of burglary (CALCRIM No. 1701).

Toward the end of the day, the jury sent a note asking, "If the defendant is guilty of robbery and/or burglary do we have to also find that the person was in the dwelling unit and armed with a firearm?" (Capitalization altered.) The trial court responded, "If you find defendant guilty of the underlying charge, address the allegations. If you find defendant not guilty of the underlying charge[,] do not address the allegations."

The next morning the jury sent a note asking, "To convict a suspect of Penal Code sec[ti]on 211 (robbery) does the person have to be physically present during the commission of the crime or [is] his involvement in setting up the crime all that is necessary to convict him of robbery?" (Capitalization altered.) After receiving this note, the trial court and counsel discussed the possibility the jury was considering whether to convict Estrada under an aider and abettor theory, even though the jury had only been instructed on a direct perpetrator theory. Estrada objected and suggested a mistrial might be appropriate if the jury was incorrectly instructed. The trial court was reluctant to instruct on a different theory of culpability at that point, but also did not want to instruct the jury Estrada had to be physically present during the robbery in order to be guilty because that was legally incorrect.

Just before the lunch break, the trial court sent the jury a note indicating, "Court and counsel are discussing the matter." The trial court and counsel researched the issue over the break and continued discussing the issue when they returned from it. The prosecutor argued aiding and abetting did not depend on any new facts not produced at trial and the trial court could reopen the case for additional argument by defense counsel after the trial court instructed the jury on aiding and abetting.

The trial court ultimately agreed to Estrada's request that the trial court provide no further information. The trial court sent a note to the jury stating, "The court has no further instructions on this matter." Twenty-five minutes later, the jury sent a note stating it had reached decisions on all counts except the count 9 burglary charge. As to count 9, the jurors' votes were split six to six.

Estrada contends we must reverse his conviction for robbery in count 8 and felony child abuse in counts 10 and 11 because the convictions depend on a finding Estrada was a direct perpetrator of the crimes against the L. family and the jury's notes combined with the jury's inability to reach a verdict on count 9 demonstrate the jury did not unanimously agree on this point. We disagree.

The jury's notes, by themselves, show only that the jury thoughtfully considered the nature of Estrada's role in the crimes against the L. family during its deliberations. Nothing in the notes indicates the jury could not or did not reach a unanimous verdict. To the contrary, after the trial court informed the jury there were no further instructions, the jury promptly returned its verdicts, demonstrating it was able to unanimously decide counts 8, 10 and 11 based on the existing instructions.

Estrada, nonetheless, contends the jury's inability to reach a verdict on count 9, considered in the context of the jury's notes, indicates at least six jurors voted to convict Estrada of counts 8, 10 and 11 on some theory other than a direct perpetrator theory. We reject this contention for three reasons. First, largely because of Estrada's objection, the trial court never instructed the jury on any theory other than a direct perpetrator theory.

Second, as the People point out, we cannot conclusively divine any meaning from a jury's failure to unanimously agree on a count. "A hung count is not a 'relevant' part of the 'record of [the] prior proceeding.' [Citation.] Because a jury speaks only through its verdict, its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle. . . . Unlike the pleadings, the jury

charge, or the evidence introduced by the parties, there is no way to decipher what a hung count represents. Even in the usual sense of 'relevance,' a hung count hardly 'make[s] the existence of any fact . . . more probable or less probable.' [Citation.] A host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few—could work alone or in tandem to cause a jury to hang. To ascribe meaning to a hung count would presume an ability to identify which factor was at play in the jury room. But that is not reasoned analysis; it is guesswork. Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return." (*Yeager v. United States* (2009) 557 U.S. 110, 121-122, fn. omitted.)

Finally, to accept Estrada's contention would involve an impermissible inquiry into the jury's mental or subjective reasoning processes. (*People v. Lindberg, supra*, 45 Cal.4th at p. 53 [a jury's verdict may not be challenged by inquiring into the jury's mental or subjective reasoning processes].) Generally, a court may not scrutinize the internal operations of a jury even when, as here, the jury produces apparently inconsistent verdicts. (*People v. Guerra* (2009) 176 Cal.App.4th 933, 942-943.) "If what went on in the jury room were judicially reviewable for reasonableness or fairness, trials would no longer truly be by jury, as the Constitution commands. Final authority would be exercised by whomever is empowered to decide whether the jury's decision was reasonable enough, or based on proper considerations. Judicial review of internal jury deliberations would have the result that "every jury verdict would either become the

court's verdict or would be permitted to stand only by the court's leave." ' ' " (*Id.* at p. 942.)

The authorities upon which Estrada relies are distinguishable in that they involve convictions on legally or factually inadequate theories that might have been valid on other alternative theories never presented to the jury. (See, e.g., *Chiarella v. U.S.* (1980) 445 U.S. 222, 235-236; *Cole v. State of Ark.* (1948) 333 U.S. 196, 200-202; *Cola v. Reardon* (1st Cir. 1986) 787 F.2d 681, 692-693.) As these authorities hold, if we conclude a conviction is invalid on the theory or theories presented to the jury, we may not affirm a conviction based on a theory not presented to the jury. (See, e.g., *People v. Kunkin* (1973) 9 Cal.3d 245, 251 [a court cannot reconcile a jury's verdict with the substantial evidence rule by looking to legal theories not before the jury].) We are not, however, faced with such a choice in this case as Estrada has not argued the jury could not have properly convicted him, or there was insufficient evidence to support a conviction, on a direct perpetrator theory.

B

Failure to Instruct Jury It Could Only Convict Estrada of Count 8 Robbery If It Found Estrada Was a Direct Perpetrator

Estrada alternatively contends we must reverse his conviction for robbery in count 8 because the trial court failed to instruct the jury that it could only convict Estrada of count 8 if it found Estrada was present in the L.s' home during the crime. We disagree.

Estrada rests his contention on the faulty premise that the prosecutor's reliance on a direct perpetrator theory during the trial and in closing argument precluded the trial

court from instructing the jury on an aider and abettor theory once the jury began its deliberations. In a criminal case, the trial court must generally decide upon and inform counsel what jury instructions it will give before closing argument; however, the trial court may instruct the jury on the applicable law any time during the trial the trial court finds such instruction necessary for the jury's guidance. (§§ 1093, subd. (f), 1093.5; *People v. Ardoin* (2011) 196 Cal.App.4th 102, 127.) Additionally, when a trial court receives a jury question, the trial court has a statutory obligation to help the jury understand applicable legal principles and clear up any instructional confusion the jury expresses. (*Ardoin*, at pp. 127-128; § 1138.) Consequently, where, as here, the evidence supports two theories of culpability, the prosecutor opts to pursue only one theory, and the court instructs on only that theory, but the jury raises a question about the other theory during its deliberations, the court can instruct the jury on the other theory. " '[T]he court is not *precluded* from giving any instruction for which there is evidentiary support. The fact that a party did not pursue a particular theory does not preclude the trial judge from giving an instruction on that theory where it deems such an instruction to be appropriate.' " (*Ardoin*, at p. 128.) Nonetheless, a caveat to trial court's discretion in such instance is that the trial court must reopen the case to allow the parties to argue the other theory. (*Id.* at p. 129.) This caveat was not an impediment here because the People acknowledged the need for additional argument if the trial court gave an aiding and abetting instruction.

To the extent the trial court erred in not following this course of action, Estrada forfeited any challenge to the error by inviting it. "When a defense attorney makes a "conscious, deliberate tactical choice" to [request or] forego a particular instruction, the invited error doctrine bars an argument on appeal that the instruction was [given or] omitted in error.'" (*People v. McKinnon* (2011) 52 Cal.4th 610, 675.) In this case, when the jury's final question revealed the possibility some jurors believed Estrada was an aider and abettor rather a direct perpetrator, the prosecutor requested further instructions and argument on aiding and abetting. Defense counsel objected to this course of action and ultimately requested the trial court provide no further instructions, to which the trial court acceded. Defense counsel had an obvious tactical reason for his objection and request because there was strong evidence Estrada set up the robbery. Accordingly, Estrada may not now complain about the results of defense counsel's choice.

DISPOSITION

The trial court is directed to modify the abstract of judgment to stay the sentences for counts 3 and 4 and to forward a copy of the modified abstract of judgment to the California Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

McDONALD, J.