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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDDIE LAMONT ROYAL, JR.,

Defendant and Appellant.

E054640

(Super.Ct.No. SWF019772)

OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner,  
Judge. Affirmed with directions.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, James D. Dutton, and Meredith S.  
White, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION<sup>1</sup>

Defendant Freddie Lamont Royal, Jr., kidnapped Jane Doe, robbed her, and subjected her to a carjacking while forcing her to perform oral sex. A jury convicted defendant of eight counts: count 1, aggravated kidnapping (§ 209, subd. (b)(1)); count 2, kidnapping during the commission of a carjacking (§ 209.5); count 3, carjacking (§ 215, subd. (a)); count 4, robbery (§ 211), counts 5, 6 and 7, aggravated forcible oral copulation (§ 288a, subd. (c)(2), and § 667.61, subd. (d)(2)); and, count 8, evading a police officer (Veh. Code, § 2800.2). It was further alleged defendant suffered a prior conviction that qualified as a prison term. (§ 667.5, subd. (b).) The trial court made a true finding on the prior conviction allegation. The court sentenced defendant to three terms of 25 years to life, plus life, plus a determinate term of seven years eight months.

On appeal, defendant challenges the sufficiency of the evidence sustaining the conviction on count 2, kidnapping for carjacking, and one of the theories underlying the conviction on count 1 for aggravated kidnapping. In the alternative, defendant contends that the omission of an instruction on the law of kidnapping resulted in duplicate kidnapping verdicts. He also asserts the court erred in imposing the sentence, including the fines and penalties.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

## II

### STATEMENT OF FACTS

About 7:00 p.m. on January 10, 2007, Jane Doe drove her brother's red 1989 Honda Accord to the post office in Rubidoux. At the entrance, she passed defendant, wearing an oversized sweater and jeans. Defendant tried to talk to Jane Doe and followed her inside but she ignored him. Defendant slipped his hand under his sweater, grabbed Jane Doe, and pushed his fist against her waist. He told her he had a gun and he threatened to kill her if she resisted. Jane Doe began crying.

Defendant demanded Jane Doe's car keys. He grabbed her cell phone and ordered her into the Honda's passenger seat. Defendant entered the driver's side and Jane Doe begged him to take the car and the \$50 or \$60 in her purse and let her visit her sick grandmother. Defendant opened Jane Doe's purse and removed the money. Defendant said he wanted her and she should comply with his directions. When Jane Doe continued to cry, he reminded her that he had a gun and he commanded her to pull her pants down to her ankles, which she did. Defendant touched her legs and drove to a Rubidoux neighborhood, where he stopped in front of a building. Using Jane Doe's money, he purchased some drugs from a group of five men while Jane Doe remained in the car because she was afraid she would be killed if she tried to leave.

For several hours, defendant drove around about 32 miles on streets and freeways, using the drugs he had purchased. Defendant repeatedly molested Jane Doe. At one stop, he forced Jane to exit the car and rubbed his penis against her underwear and a

sanitary napkin, trying to penetrate her vagina. At other stops, defendant forced Jane to copulate him orally until he ejaculated.

Finally, Jane Doe saw they were being followed by a patrol car with a red light and defendant began speeding until the Honda went off the road into dirt. Defendant left the Honda, threw something away, and began running across the freeway. Jane Doe also exited the car and pulled up her pants as a patrol car arrived on the scene.

In a rural area off a freeway, a sheriff's deputy, Carlos Topete, driving a marked patrol unit, observed the parked Honda. The Honda drove off and, after following for a brief time, the deputy activated his overhead lights to effect a stop. Defendant ignored the lights and accelerated through the streets onto a freeway, where he led the deputy on a high speed chase until leaving the freeway and running into an embankment.

Deputy Topete stopped behind the Honda and saw Jane, crying and disoriented. Her pants were unzipped and her underwear was visible. At the sheriff's station, she was interviewed in detail and later underwent a sexual assault examination.

Defendant was apprehended and interviewed. Initially, defendant denied having kidnapped Jane or engaging in any sexual conduct. Ultimately, he acknowledged that he had forced her into the car and molested her. The reason he took the money was to pay off a drug debt.

A drug test showed defendant had used marijuana and methamphetamine some days before January 11, 2007. He had used cocaine within a few hours of the test.

Defendant denied the kidnapping, carjacking, robbery, and sexual offenses and claimed Jane Doe had consented. He admitted the evading offense.

### III

#### SUFFICIENCY OF EVIDENCE—COUNT 1

Count 1 charged defendant with aggravated kidnapping on the dual theories of robbery and specified sexual offenses. The jury returned a verdict finding appellant guilty of count 1 as charged on both theories. Defendant contends the evidence was insufficient to show he committed kidnapping with the intent to commit a robbery because the intent to commit robbery was not formed until after the kidnapping began.

“[T]he relevant question is 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. [Citation.]” (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) The court “must resolve the issue in light of the *whole record* . . . [and] judge whether the evidence of each of the essential elements . . . is *substantial* . . . .’ [Citation.]” (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) Substantial evidence is defined as evidence that “is reasonable, credible, and of solid value.” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Robbery is the felonious taking of the personal property from the person or immediate presence of another by means of force or fear. (§ 211.) Aggravated kidnapping with the intent to commit robbery requires that the specific intent to commit robbery be present when the kidnapping commences: “‘. . . kidnapping without intent to rob constitutes kidnapping but not kidnapping for purpose of robbery; and a robbery during a kidnapping where the intent was formed after the asportation is a robbery and not a kidnapping for purpose of robbery.’” (*People v. Curry* (2007) 158 Cal.App.4th

766, 778-779, citing *People v. Davis* (2005) 36 Cal.4th 510, 565-566, accord *People v. Lewis* (2008) 43 Cal.4th 415, 518.) A robbery committed after a kidnapping is not a kidnapping for purposes of robbery. (*People v. Tribble* (1971) 4 Cal.3d 826, 831-832.)

According to defendant, the robbery underlying count 1 was based on the money taken from Jane Doe's purse once defendant was inside the vehicle. Therefore, the only valid theory supporting the verdict was kidnapping for the purposes of commission of the specified oral copulation offenses. (*People v. Green* (1980) 27 Cal.3d 1, 69.) Defendant contends that, viewing the facts in the light most favorable to the judgment, there was no evidence defendant intended to commit the robbery when the kidnapping commenced because he did not take Jane Doe's money until after he had forced her into the Honda and she offered him her money and the car in exchange for her release. Defendant contends this sequence of events demonstrates the specific intent to take Jane's money was not formed until after Jane was abducted for a purpose other than robbery.

Defendant ignores, however, that he explained to the sheriff's deputies that he needed money to pay off the drug dealers to whom he owed money. Although he did not know how much money Jane Doe was holding before he kidnapped her, it is scarcely refutable that he kidnapped her intending to rob her, as well as to molest her sexually. Furthermore, the kidnapping was ongoing from the time defendant detained Jane Doe in the post office until he crashed the Honda and fled. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1159.) In this case, defendant seized Jane Doe's keys and cell phone before he forced her in the car, making his crime one of kidnapping committed for the purpose of a robbery. (*People v. Monk* (1961) 56 Cal.2d 288, 295.)

We reject defendant's related argument that the sentence for count 1 should be stayed. The trial court imposed the sentence based on aggravated kidnapping for two reasons: defendant's dual intents to rob Jane Doe and to force her to engage in oral copulation. Thus, the trial court could impose sentences for both aggravated kidnapping and the sexual offenses.

#### IV

#### SUFFICIENCY OF EVIDENCE FOR COUNT 2

Defendant admits the evidence showed defendant kidnapped Jane Doe to commit a carjacking but he contends insufficient evidence showed defendant violated section 209.5 by committing the kidnapping in order to facilitate the carjacking. Alternatively, he argues only one kidnapping occurred the kidnapping for commission of the sex offenses.

“‘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.) Kidnapping is the taking, holding or detaining of a person by force or fear and carrying that person into another country, state or county, or into another part of the same county. (§ 207, subd. (a).) Aggravated kidnapping is the kidnapping of another with the intent to commit robbery or certain sexual offenses. (*People v. Martinez* (1999) 20 Cal.4th 225, 233; § 209.) Kidnapping for carjacking occurs when a person “during the commission of a carjacking and in order to facilitate the commission of the carjacking,” kidnaps another

person under the movement standard applicable to aggravated kidnapping. (§ 209.5, subd. (a).)

Here defendant took Jane Doe's car by force and fear in her immediate presence. (§ 215, subds. (a) & (b).) Defendant also kidnapped Jane Doe by forcibly detaining and moving her. (§ 207, subd. (a).) Using similar reasoning as he used to challenge his conviction for kidnapping to commit robbery, defendant argues kidnapping to commit a carjacking was not established because it cannot be reasonably inferred the movement of Jane Doe was intended to facilitate the defendant's escape during the carjacking. (*People v. Perez* (2000) 84 Cal.App.4th 856, 860-861.)

Defendant asserts, viewed in the light most favorable to the judgment, the evidence did not demonstrate the carjacking and kidnapping were undertaken for the sole purpose of, or, even to facilitate, the stealing of Jane Doe's car, but, rather, demonstrated the taking of the vehicle was intended to facilitate Jane Doe's kidnapping for the commission of sexual offenses. Defendant argues the facts showed he wanted sexual gratification and kidnapped Jane, using her car, to accomplish his purpose. The facts do not show that he kidnapped Jane Doe, and he moved or caused Jane Doe to move with the intent to facilitate the carjacking to escape or to prevent her from sounding an alarm. (CALCRIM No. 1204; *People v. Perez, supra*, 84 Cal.App.4th at pp. 860-861.)

As did the court in *Perez*, we reject defendant's "myopic" approach to interpreting section 209.5 to mean "the offense is committed only if the kidnapping is intended to make it easier to take the victim's car." (*People v. Perez, supra*, 84 Cal.App.4th at p. 860.) The evidence showed that defendant kidnapped Jane Doe with

multiple intents—to rob her, to molest her, and to steal her car. He kidnapped her to facilitate all these crimes. The carjacking also allowed him to escape and to prevent her from alerting the police and reporting defendant’s crimes. The evidence was certainly sufficient to show defendant kidnapped Jane Doe in the commission of a carjacking.

In the alternative, defendant contends it was improper to convict him of kidnapping for both robbery or forced oral copulation (§ 209) and for carjacking (§ 209.5), relying on *People v. Thomas* (1994) 26 Cal.App.4th 1328. *Thomas* involved two counts of kidnapping for robbery and the appellate court held the kidnapping was a continuing offense, a single abduction followed by a continuous period of detention. The present case does not involve two counts of the same crime. Instead, it involves violations of two different statutes. *Thomas* does not apply.

Even if defendant continually and forcibly detained Jane Doe from the time of the initial carjacking at the post office until he fled the Honda, it does not preclude conviction for both kidnapping for carjacking and kidnapping for robbery or forced oral copulation. Multiple convictions based on the same conduct are generally permitted when the conduct violates more than one statute. (See § 954; *People v. Wiley* (1994) 25 Cal.App.4th 159, 163.) Here, sufficient evidence supported both kidnapping convictions. So defendant could be convicted of both kidnapping for robbery or forced oral copulation and kidnapping for carjacking.<sup>2</sup> Hence, there was no instructional error as argued by defendant in section IV of his opening brief.

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<sup>2</sup> A similar sentence was allowed to stand in *People v. Palacios* (2007) 41 Cal.4th 720, 724.

## COUNT 8

Defendant contends his eight-month consecutive sentence on count 8 must be stayed under section 654 because his act of evading the police was part of an indivisible course of criminal conduct. The trial court properly concluded that appellant harbored a separate and distinct intent when he chose to evade the pursuing police officers, and accordingly, his punishment for evading was not subject to section 654.

Section 654 precludes multiple punishments for a single act or for a course of conduct consisting of indivisible acts. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) Whether a course of criminal conduct depends on the intent and objective of the actor. When all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be found to have harbored a single intent and therefore be punished only once for the offenses. (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 129.) However, when a defendant harbors “multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]” (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1211-1212.) “This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken.

[Citation.]” (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

“Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them.” (*People v. Jones, supra*, 103 Cal.App.4th at p. 1143.) The trial court’s decision is reviewed in the light most favorable to the respondent and the reviewing court will presume the existence of every fact the trial court could reasonably deduce from the evidence. (*Ibid.*)

Here, the trial court made an explicit finding with respect to the application of section 654 to count 8. The trial court determined section 654 did not preclude punishment for the evading count because defendant’s act of fleeing from the police was, “a completely separate and independent act from the other acts. It occurred at a different time and different place.” Later in the sentencing hearing, the trial court reiterated this principle, stating, “The fleeing, evading the police was a separate independent crime that was [committed] at a different time, a different place and involved a completely different set of objectives.”

The evidence supports this finding. With the other offenses, defendant had different intents and objectives—to commit the robbery and to molest Jane Doe—which had nothing to do with defendant’s later effort to evade capture. Nor was defendant’s intent to evade incidental to the intents he harbored on the other crimes. Defendant’s intent to evade arose when the deputy began to follow the Honda, part of a separate and distinct objective which was not incidental to or indivisible from his other criminal objectives,

even if the kidnapping was a continuous and ongoing offense. The purpose of section 654 is “to insure that the defendant’s punishment will be commensurate with his criminal liability.” (*Neal v. State of California* (1960) 55 Cal.2d 11, 20; *People v. Correa* (2012) 54 Cal.4th 331, 341.) Defendant cannot be insulated from punishment for any offenses he commits while he is committing a “continuing” offense. Multiple punishment is not prohibited where the defendant harbors separate but simultaneous objectives. (*People v. Latimer, supra*, 5 Cal.4th at pp. 1211-1212.) Although defendant was committing the kidnapping, when the officer tried to pull him over, he developed a separate and independent objective to evade the police. Even if it was simultaneous to his continuous objective to kidnap the victim, section 654 would not bar punishment. The trial court properly imposed a consecutive sentence on count 8.

## VI

### SENTENCING ERRORS<sup>3</sup>

The parties agree defendant’s sentence on his robbery conviction was erroneous. Defendant was charged and convicted of second degree robbery. The court sentenced him to six years in prison on this count, and referred to the robbery as “first degree.” The

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<sup>3</sup> Defendant was sentenced to prison for the aggregate term of life, plus 75 years to life, plus seven years and eight months. The sentence was calculated as follows: on count 2, kidnap for carjacking, the term of life with the possibility of parole; on counts 5, 6, and 7, aggravated forcible oral copulation, consecutive terms of 25 years to life, to run consecutive to count 2; on count 4, robbery, the upper term of six years; on count 8, evading a peace officer, a consecutive term of eight months; plus one year for the prior prison term. Sentence on count 2, aggravated kidnapping, was imposed and ordered to run concurrent with the life term on the kidnap for carjacking count. The remaining count, carjacking (count 3), was dismissed as it was a lesser included offense of kidnapping for carjacking.

punishment for second degree robbery is two, three, or five years. (§ 213, subd. (2).) The punishment for most convictions of first degree robbery is three, four, or six years. (§ 213, subd. (1)(B).) Thus, the court's imposition of a six-year term was unauthorized. The trial court explained why it had chosen the upper term punishment for appellant's robbery conviction. In light of the aggravating factors mentioned by the trial court, it is clear that the court thought six years was an appropriate punishment for appellant's crime. Accordingly, there is no reasonable likelihood the trial court would impose a sentence other than the upper term that is actually available, which is five years.

Pursuant to *People v. Alford* (2010) 180 Cal.App.4th 1463, when the trial court imposes an unauthorized sentence, remand is unnecessary if the reviewing court can determine the term the trial court would most assuredly have imposed. (*Id.* at pp. 1469, 1472-1473.) A remand is unnecessary, and this court orders the abstract of judgment modified to reflect a five-year term on the robbery conviction, instead of a six-year term.

## VII

### THE PRISON PRIOR

Defendant argues the trial court abused its discretion when it imposed the additional year for his prison prior because the trial court mistakenly thought the one-year sentence was mandatory and the trial court did not understand that it had discretion to strike the punishment under section 1385. The record does not support this contention.

At the sentencing hearing, the trial court indicated its tentative sentence, which included a one-year term for appellant's prison prior: "And then with respect to the prison prior, it's a one-year mandated under Penal Code Section 667.5." Defendant

argues that the court's use of the word, "mandated" indicates the trial court did not understand its discretion to strike the enhancement under section 1385. But, the use of the word "mandated" was correct when viewed in context. Section 667.5, subdivision (b), states: "Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence . . . is imposed . . . , in addition and consecutive to any other sentence therefore, the court shall impose a one-year term for each prior separate prison term" served for any felony "provided that no additional term shall be imposed under this subdivision for any prison term" served "prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction and prison custody." The statute indicates the one-year term "shall" be imposed, and thus, under section 667.5, subdivision (b), the one-year term is mandated.

A trial court's authority to strike the enhancement is not included in section 667.5, subdivision (b); instead, that authority is found in section 1385. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 395-396.) Thus, in the context of the trial court's comment, the use of the word "mandated" was a correct statement of law. Further, a trial court is presumed to understand and properly exercise its sentencing discretion. (*People v. Moran* (1970) 1 Cal.3d 755, 762; *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527.) "[I]n light of the presumption on a silent record that the trial court is aware of the applicable law, including statutory discretion at sentencing, [the reviewing court] cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of [its] discretion." (*Gutierrez*, at p. 527.) The trial court's use of the word "mandated" when discussing the provisions of section 667.5 is not enough to

overcome the presumption that the trial court understood its discretion with respect to striking the punishment under an entirely different Penal Code provision, i.e. section 1385. Accordingly, the imposition of the one-year term on defendant's prison prior should be affirmed and a remand is unnecessary.

Even if the record demonstrated the trial court misunderstood its discretion with respect to the prison prior, a remand is unnecessary. Given the numerous aggravating factors cited by the court and the fact that defendant was on probation for this prior conviction when the new offenses were committed, it is not likely that the trial court would choose to strike the prison prior enhancement. Because the record demonstrates the trial court would not have stricken defendant's prison prior enhancement even had it recognized an ability to do so, this court need not remand the case for resentencing to reach the same result. (*People v. Thompson* (1989) 209 Cal.App.3d 1075, 1086.)

## VIII

### THE CRIMINAL CONVICTION ASSESSMENT FEE, THE COURT SECURITY FEE, AND THE SECTION 667.6, SUBDIVISION (F), FINE

We agree with the parties the criminal conviction assessment fee and the court security fee should be reduced because of the court striking one of defendant's convictions. Because defendant was convicted of seven, not eight, offenses, the criminal conviction assessment fee should be reduced to \$210, and the court security fee should be reduced to \$280.

The \$20,000 fine, pursuant to section 667.6, subdivision (f), must be stricken. The fine specified in section 667.6, subdivision (f), applies to defendants sentenced under

subdivision (a) or (b) of the same statutes. Subdivisions (a) and (b) require enhanced sentences for defendants with current convictions for enumerated sex offenses and with either one (subdivision (a)), or two (subdivision (b)), previous convictions for the same enumerated sex offenses. (See § 667.6, subd. (e) [list of enumerated sex offenses].) Defendant does not have any qualifying prior convictions and thus cannot be ordered to pay the fine in subdivision (f), as he was not sentenced pursuant to subdivision (a) or (b). Accordingly, this fine should be stricken.

IX

DISPOSITION

We order the abstract of judgment be modified to reflect a five-year term on the robbery conviction, to correct the criminal conviction fee and the court security fee, and to strike the fine imposed pursuant to section 667.6, subdivision (f). The amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON

J.

We concur:

McKINSTER

Acting P. J.

MILLER

J.