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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.

RONNIE REVELL BARNES, JR.,

Defendant and Appellant.

E061176

(Super.Ct.No. RIF1400637)

OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey J. Prevost and Becky L. Dugan, Judges.* Affirmed as modified and remanded for resentencing.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and A. Natasha Cortina and Michael Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

* Judge Dugan made the ruling on defendant’s motion to represent himself and Judge Prevost made the rulings on all other issues on appeal.

Defendant Ronnie Revell Barnes, Jr., committed a home invasion robbery. After a trial in which he represented himself and waived a jury, the trial court found him guilty of robbery, as well as kidnapping for robbery and other crimes.

Defendant now contends:

1. The trial court erred by granting defendant's motion to represent himself, because defendant waived his right to counsel involuntarily, to obtain a speedy trial.
2. The trial court erred by conducting part of the trial in defendant's absence.
3. The aggravated kidnapping count was not supported by sufficient evidence of the necessary asportation.
4. Given the sentence for aggravated kidnapping, the imposition of separate and unstayed sentences on the other felony counts constituted multiple punishment in violation of Penal Code section 654 (section 654).
5. The trial court erred at sentencing by ordering defendant to stay away from the victim.
6. The trial court erred in pronouncing the sentence on the aggravated kidnapping count.

We agree that there was insufficient evidence of asportation to support the aggravated kidnapping count. Hence, we will reduce defendant's conviction for aggravated kidnapping to felony false imprisonment and remand for resentencing. We reject defendant's other contentions regarding the conviction.

Defendant's contentions regarding sentencing are moot. However, for the guidance of the trial court, we note that the People concede that the "stay-away" order was erroneous.

I

FACTUAL BACKGROUND

Quyen Ly shared a two-story house in Menifee with one or more roommates.

On December 10, 2013, around 10:30 a.m., the front doorbell rang. When Ly opened the door, defendant pushed his way inside. He was holding a gun. He pointed it at Ly and shut the door.

Defendant asked how many people were in the house. Ly said he was the only one there. Actually, his three-year-old son was asleep in the master bedroom upstairs. Defendant said he would shoot Ly if he found anyone in the house. Because defendant was not wearing a mask, Ly was afraid that defendant would shoot him in any event.

Defendant made Ly go around the house with him, holding him at gunpoint and pushing him from room to room, to make sure that nobody else was there. Defendant found one of Ly's socks and put it on his gun hand.

When they entered the master bedroom, defendant made Ly lie down on the floor. Using electrical cords that he found in the room, he hogtied Ly. He threatened to shoot Ly if he moved. He wanted to tie up Ly's son, too, but Ly convinced him not to.

Defendant asked Ly if he had any cash, jewelry, or a safe. He walked around looking for things to take. Ly saw him take three laptops, a Kindle, and an iPhone. Defendant also took Ly's wallet from a dresser. When he did not find any cash inside, he

was angry; he repeatedly hit Ly in the head with the gun. Ly testified, “I never felt such pain in my life.” Defendant said, “Where’s the money? If you don’t tell me where the money is, . . . [¶] . . . I will shoot your son.” Eventually, defendant left.

One James Gutierrez testified that on December 12, 2013 — i.e., two days later — defendant and an accomplice carried out a strikingly similar home invasion robbery of his house in Riverside. The robbery occurred at 11:00 a.m. Defendant went from room to room to see if anyone else was in the house. He asked for socks, and he put one on his gun hand. He demanded money and jewelry. He made Gutierrez lie on the floor and had his accomplice tie him up with an electrical cord. He also hit Gutierrez in the head with his gun. As defendant fled from Gutierrez’s house, the police apprehended him. He had a loaded handgun.

Defendant’s testimony from his earlier trial for the robbery of Gutierrez was admitted into evidence. In it, defendant admitted committing that robbery and some of the other crimes charged in that trial; however, he denied kidnapping Gutierrez. He also admitted committing “about eight” other robberies.

II

PROCEDURAL BACKGROUND

At trial, defendant represented himself and waived a jury. The trial court found him guilty on seven counts:

Count 1: Kidnapping for purposes of robbery (Pen. Code, § 209, subd. (b)), with a fixed-term enhancement for personally using a firearm (Pen. Code, § 12022.53, subd. (b)).

Count 2: First degree burglary (Pen. Code, §§ 459, 460, subd. (a)), with a variable-term enhancement for personally using a firearm (Pen. Code, § 12022.5, subd. (a)).

Count 4: Second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)), with a fixed-term enhancement for personally using a firearm.

Count 5: Making a criminal threat (Pen. Code, § 422, subd. (a)), with a variable-term enhancement for personally using a firearm.

Count 6: Dissuading a witness (Pen. Code, § 136.1, subd. (c)(1)), with a variable-term enhancement for personally using a firearm.

Count 7: Assault with a firearm (Pen. Code, § 245, subd. (a)(2)).

Count 8: Misdemeanor child endangerment. (Pen. Code, § 273a, subd. (b).)

The trial court dismissed count 3, which charged simple kidnapping (Pen. Code, § 207, subd. (a)), because it was a lesser included offense of count 1.

At the request of the prosecution, it also dismissed two 1-year prior prison term enhancements (Pen. Code, § 667.5, subd. (b)).

As a result, defendant was sentenced to a total of 21 years 4 months to life in prison, along with assorted fines, fees, and restrictions.

III

DEFENDANT'S MOTION FOR SELF-REPRESENTATION

Defendant contends that the trial court erred by granting his motion to represent himself.

A. *Additional Factual and Procedural Background.*

At a trial readiness conference, defendant asked to represent himself. He filled out and signed a form petition to proceed in propria persona.

This discussion ensued:

“THE COURT: . . . [Y]ou won’t be able to appeal that you messed up your own case. Now, if [defense counsel] messes it up, you’ll be able to appeal that.

“THE DEFENDANT: I know, but he’s not ready to go to trial.

“THE COURT: No, he’s not.

“THE DEFENDANT: No, I don’t want to go pro per, but the only way I can do that is by representing myself.

[DEFENSE COUNSEL]: Your Honor, I want the record to reflect I informed Mr. Barnes I will not go to trial while there’s still DNA that hasn’t been analyzed.

“THE COURT: Right. Because you don’t know the result of it.

“THE DEFENDANT: Well, I’m still wanting to go to trial. I’ll take a lawyer if a lawyer wants to go to trial without the DNA.

“THE COURT: That’s not an unequivocal desire to represent yourself. You’re saying, ‘I want a lawyer. I need a lawyer. I know I need a lawyer. I just don’t want to wait.’ Is that what you’re saying?

“THE DEFENDANT: Yes, ma’am. [¶] . . . [¶] . . .

THE COURT: Okay. So Mr. Barnes, right now, you don’t have an unequivocal desire to represent yourself. You know you need an attorney. You want an attorney.

You just don't want to waive time. I'll note that. The two issues clash with each other when you don't want to waive time, but you still want counsel.

“THE DEFENDANT: No, it's okay.

“THE COURT: What's okay?

“THE DEFENDANT: I'll just go pro per”

The trial court cautioned defendant about the risks and disadvantages of representing himself, but he insisted that that was what he wanted to do. The trial court then granted his request.

B. *Discussion.*

Defendant argues that his waiver of his right to counsel was not voluntary because he was forced to choose between his right to counsel and his right to a speedy trial.

People v. Frye (1998) 18 Cal.4th 894, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, though not precisely on point, is instructive. There, the attorney who had represented the defendant at the preliminary hearing was allowed to withdraw before trial. The defendant repeatedly waived time so that new counsel could be appointed and could prepare for trial. (*Frye* at pp. 937-938.) On appeal, after his conviction, the defendant argued “that being forced to choose between his right to effective assistance of counsel and his right to a speedy preliminary hearing and trial violated his right to due process.” (*Id.* at p. 938.)

The Supreme Court rejected the defendant's claim because “he expressly consented to every continuance.” (*People v. Frye, supra*, 18 Cal.4th at p. 939.) It added that “constitutional trade-offs” are not necessarily “forbid[den].” (*Id.* at p. 940.) “Some

rights are mutually exclusive. For example, a criminal defendant has a right to remain silent and a right to testify on his own behalf. He cannot do both, and hard choices are not unconstitutional.” (*Ibid.*)

Our case is the flip side of *Frye* — there, the defendant gave up his right to a speedy trial so he could have competent appointed counsel; here, defendant gave up his right to have competent appointed counsel so he could have a speedy trial. Both choices are equally voluntary, however, and under *Frye*, being forced to choose is not a due process violation. Thus, much as in *Frye*, defendant’s claim is barred by his express consent — indeed, his affirmative request — to represent himself.

Defendant relies on *People v. Bolton* (2008) 166 Cal.App.4th 343. There, the trial court allowed the defendant’s appointed counsel to withdraw, based on his assertion that a conflict existed. The defendant then chose to represent himself because otherwise, he would have had to waive the right to a speedy trial. (*Id.* at pp. 349, 351-355.) The court held, “Given the timing of defense counsel’s request to be relieved, *together with the lack of evidence establishing the existence of an actual conflict of interest*, the trial court should not have relieved Bolton’s counsel.” (*Id.* at p. 356, italics added.)

Thus, *Bolton* suggested that, if there had been an actual conflict of interest, the defendant could have been required to choose between the right to counsel and the right to a speedy trial. Indeed, the court commented: “The tension between a defendant’s right to a speedy trial and the right to the effective assistance of counsel frequently arises when a defendant’s desire to invoke his right to speedy trial conflicts with his attorney’s request for a continuance. [Citation.] Courts that have dealt with this conflict have

reached different results, depending on the circumstances of the particular case.

[Citation.] ‘Implicit in these decisions . . . is the notion that the inherent tension between the right to a speedy trial and the right to competent, adequately prepared counsel is not, in itself, an impermissible infringement on the rights of the accused, including the right to a fair trial.’ [Citation.]” (*People v. Bolton, supra*, 166 Cal.App.4th at p. 356.)

Defendant also argues that his request to waive counsel was equivocal. However, when the trial court indicated that it was not going to grant it, precisely because it was not unequivocal, defendant said, “No, it’s okay,” adding, “I’ll just go pro per” Thus, even assuming it was initially equivocal, he reasserted the request and made it unequivocal.

Finally, in a single sentence, defendant asserts that he was improperly forced to choose between his rights “by the People’s failure to produce the results of the DNA test — potentially exculpatory *Brady*^[1] material — in a timely manner.” However, defendant is not claiming a *Brady* violation and could not. *Brady* “generally requires the prosecution to turn over to the defense all material exculpatory information *in the government’s possession*” (*People v. Hammon* (1997) 15 Cal.4th 1117, 1125.) The prosecution had no duty to turn over any test results unless and until the test results existed.

Similarly, defendant is not claiming that the time that it took to conduct DNA testing, in itself, violated his constitutional right to a speedy trial. (See generally *Penney*

¹ “*Brady v. Maryland* (1963) 373 U.S. 83.”

v. Superior Court (1972) 28 Cal.App.3d 941, 953-954.) While defendant also had a statutory right to go to trial by a date certain (see Pen. Code, § 1382), the prosecution had no obligation to complete any testing (or any other investigation) by that date; the only sanction for its failure to do so was that it could be compelled to go to trial without it. Defense counsel chose instead to wait for the testing to be completed. As the “captain of the ship” (*People v. Rodriguez* (2014) 58 Cal.4th 587, 624), he was entitled to do so, even over defendant’s objection. (*People v. Williams* (2013) 58 Cal.4th 197, 250.)

We therefore conclude that the trial court did not err by allowing defendant to represent himself.

IV

CONDUCTING PART OF THE TRIAL IN DEFENDANT’S ABSENCE

Defendant contends that the trial court erred by conducting part of the trial in his absence.

A. *Additional Factual and Procedural Background.*

Before opening statements, defendant advised the court:

“DEFENDANT BARNES: . . . It’s going to be hard to sit in trial if this officer — because I don’t want to be disrespectful. So I think after his testimony or after he says whether I did it or not, is there any way I can just sit in while he’s testifying? While he’s testifying, is there any way I can just go in the room right there until the judge says fine, because I don’t want to be disrespectful and saying he’s lying about whatever he’s saying? . . .

“THE COURT: Well, why don’t we try and see if you can avoid doing that.

“DEFENDANT BARNES: I can’t. I can’t. I know myself. I can’t.

“THE COURT: Well, I’m going to wait — there may be — if there’s an outburst, we’ll take it up at that time. All right? Because you have every right to be present during the entire trial.

“DEFENDANT BARNES: I know, but I say —

“THE COURT: I want to be sure that you have a chance to ask your own questions.

“DEFENDANT BARNES: I don’t have no — I don’t have a defense. I don’t have no questions. How could I? How could you have a defense for something you didn’t do?

“THE COURT: Well, that’s something that we’re here to figure out. Okay?

“Let’s wait and see how you do, and if you get a little bit agitated or restless, let the deputy know, and we can take a break if necessary. Okay? Because I’d really like to have you present at all stages of the trial, if we can.”

The prosecution’s first witness was Ly. During his direct examination, when he identified defendant as the person who robbed him, defendant exclaimed:

“DEFENDANT BARNES: Get me out of here.

“THE COURT: You’re doing fine so far, Mr. Barnes.

“DEFENDANT BARNES: No, I’m not doing fine. I didn’t rob this person.

“THE COURT: All right. Let’s take a short break.”

After the break, the trial court stated, “Mr. Barnes, what I would propose to do is this. If you still wish to sit out of the courtroom for this particular witness, I will allow

you to do so, but I still want to see if you can maintain your composure for the rest of the trial. So I'm going to have you just sit in the holding cell.”

Defendant responded that his problem was not limited to Ly: “I don't want to hear nothing that got anything to do with me. . . . [E]very time they say something that's putting me in there, I'm going to tell them, ‘No, I didn't do it.’”

The trial court then said: “Well, I'm going to go ahead and because of the disruption exclude you from the courtroom during the rest of Mr. Ly's testimony, but we'll bring you back in following the conclusion of that one.”

Defendant was escorted out of the courtroom.

The trial court then stated: “For purposes of the Court of Appeal, I do find that the defendant has been disruptive and speaking out of turn during the course of the testimony of witness Mr. Ly. He did request to be excluded from the courtroom voluntarily during the testimony — actually, during the entire trial, but, again, it's my intent to see if we can have him back for the subsequent witnesses and we'll address that on a witness-by-witness basis if further disruption occurs.”

After Ly's direct examination, the trial court had defendant brought back in. It asked him if he wanted to cross-examine Ly. He said he did, and he proceeded to do so, albeit briefly and without having heard all of the direct. He participated in the remainder of the trial.

B. *Discussion.*

“The involuntary exclusion from the courtroom of a defendant who was representing himself, without other defense counsel present, [i]s fundamental error

requiring reversal without regard to prejudice.” (*People v. Carroll* (1983) 140 Cal.App.3d 135, 141; accord, *People v. Soukamlane* (2008) 162 Cal.App.4th 214, 233; *United States v. Mack* (9th Cir. 2004) 362 F.3d 597, 601-603; see also *Davis v. Grant* (2d Cir. 2008) 532 F.3d 132, 145, fn. 8 and cases cited.) Such exclusion violates the defendant’s right to counsel. (*People v. Carroll, supra*, at pp. 141, 143.) If a self-represented defendant is disruptive, the remedy is not to exclude the defendant; rather, it is to terminate the defendant’s self-representation and appoint counsel. (*Id.* at p. 141; *United States v. Mack, supra*, at p. 601.)

The same principles, however, do not apply “to cases where defendant clearly chooses to represent himself and then clearly, voluntarily, and on the record, refuses to participate in his trial.” (*People v. Carroll, supra*, 140 Cal.App.3d at p. 144.) In that situation, the rule is that “a defendant who has exercised his right of self-representation by absenting himself from the proceedings, may not later claim error resulting from that exercise.” (*People v. Parento* (1991) 235 Cal.App.3d 1378, 1381-1382.) “[A] defendant for an offense not punishable by death is entitled to absent himself from the proceedings [citations]. Further, it is settled that the right of a defendant to represent himself includes the right to decline to conduct any defense whatsoever. ‘The choice of self-representation preserves for the defendant the option of conducting his defense by nonparticipation. [Citation.] A competent defendant has a right to choose “simply not to oppose the prosecution’s case.” [Citation.] . . . ‘If the defendant chooses to defend himself by not participating in the trial, he, unlike his attorney, is free to do so, but once

this choice is made he cannot thereafter claim ineffective assistance of counsel as a basis for reversal on appeal. [Citation.]’ [Citation.]” (*Id.* at p. 1381.)

Defendant therefore argues that the trial court excluded him from the courtroom against his will. The People, on the other hand, argue that defendant absented himself voluntarily.

The trial court found that defendant had “request[ed] to be excluded from the courtroom voluntarily . . . during the entire trial” We need not decide what standard of review applies to that finding, because even if we were to apply a *de novo* standard of review, we would come to the same conclusion as did the trial court.

Defendant started out by asking if, when a police witness testified against him, he could “just go into that room right there.” Then, when Ly identified him, he said, “Get me out of here.” It is hard to imagine a more clear and unequivocal request to be absent from the courtroom. In addition, the trial court stated, “If you still wish to sit out of the courtroom for this particular witness, I will allow you to do so” Defendant responded, “I don’t want to hear nothing that got anything to do with me. . . .”

Admittedly, the trial court also found that defendant “has been disruptive” And he had. He interrupted Ly; he also exclaimed, “I didn’t rob this person.” Moreover, he threatened to disrupt subsequent proceedings, saying, “[E]very time they say something that’s putting me in there, I’m going to tell them, ‘No, I didn’t do it.’” However, the trial court’s finding that he wished to be absent and its finding that he had been disruptive were not mutually exclusive. In context, it is clear that defendant was

asking to be absent, and he was also backing up that request with a threat to disrupt the proceedings if it was not granted.

We do not mean to say that the trial court was absolutely required to exclude defendant from the courtroom. Because the proceeding was a bench trial, not a jury trial, it could have ignored his outbursts (assuming they did not become too frequent, and further assuming that they did not tend to intimidate the witnesses). It would also have been within its rights to terminate defendant's self-representation.

We do hold, however, that the trial court did not err by giving defendant exactly what he was asking for. Indeed, by granting that request, instead of forcing him to accept appointed counsel, it honored his right to represent himself.

V

THE SUFFICIENCY OF THE EVIDENCE OF

THE ASPORTATION ELEMENT OF KIDNAPPING FOR ROBBERY

Defendant contends that there was insufficient evidence of the asportation element of kidnapping for robbery. Kidnapping for robbery carries a sentence of life with the possibility of parole (Pen. Code, § 209, subd. (b)), so if we accept this contention, defendant's sentence will be shortened substantially.

A. *Applicable Legal Principles.*

“In reviewing a challenge to the sufficiency of the evidence, we ‘review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict — i.e., evidence that

is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.]’ [Citation.]” (*People v. Sandoval* (2015) 62 Cal.4th 394, 423, italics omitted.)

Both kidnapping for robbery and simple kidnapping have an asportation element: The victim must be “carrie[d] . . . into another country, state, or county, or into another part of the same county” (Pen. Code, § 207, subd. (a); see also Pen. Code, § 209, subd. (b)(1) [victim must be “kidnap[ped] or carrie[d] away”].)

Above and beyond the asportation required for simple kidnapping, however, kidnapping for robbery also requires “movement of the victim [that] is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.” (Pen. Code, § 209, subd. (b)(2).)

The rationale behind this heightened asportation requirement is that “some brief movements are necessarily incidental to the crime of armed robbery. Indeed, ‘[i]t is difficult to conceive a situation in which the victim of a robbery does not make some movement under the duress occasioned by force or fear.’ [Citation.] . . . [S]uch incidental movements are not of the scope intended by the Legislature in prescribing the asportation element of the . . . crime.” (*People v. Daniels* (1969) 71 Cal.2d 1119, 1134, fn. omitted.)

“Whether a forced movement of a . . . victim . . . was merely incidental to the [crime], and whether the movement . . . increased the risk of harm to the victim, is difficult to capture in a simple verbal formulation that would apply to all cases.” (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1151.)

“With regard to the first prong, the jury considers the ‘scope and nature’ of the movement, which includes the actual distance a victim is moved. [Citations.] There is, however, no minimum distance a defendant must move a victim to satisfy the first prong. [Citations.]” (*People v. Vines* (2011) 51 Cal.4th 830, 870.) “Measured distance . . . is a relevant factor, but one that must be considered in context, including the nature of the crime and its environment. In some cases a shorter distance may suffice in the presence of other factors, while in others a longer distance, in the absence of other circumstances, may be found insufficient.” (*People v. Dominguez, supra*, 39 Cal.4th at p. 1152.)

With regard to the second prong, the jury ““ . . . consider[s] such factors as the decreased likelihood of detection, the danger inherent in a victim’s foreseeable attempts to escape, and the attacker’s enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased.” [Citation.]” (*People v. Vines, supra*, 51 Cal.4th at p. 870.)²

² Originally, as a matter of judicial construction of Penal Code section 209, the movement had to “substantially increase the risk of harm” to the victim. (*People v. Daniels, supra*, 71 Cal.2d at p. 1139.) Effective January 1, 1998, the Legislature amended Penal Code section 209 so as to expressly require that the movement must “increase[] the risk of harm to the victim” (Stats. 1997, ch. 817, § 2, pp. 5519-5520.)

“These two [prongs] are not mutually exclusive but are interrelated. [Citations.]”

(*People v. Vines, supra*, 51 Cal.4th at p. 870.)

B. *Defendant’s Movement of Ly.*

Ly testified that defendant made him go “around the house.” When asked what he meant by that, he testified that defendant pushed him down a hallway that led to the living room, and defendant “went into the living room to look”; then defendant pushed him back to the staircase, up the stairs, and into the master bedroom (which was immediately at the top of the stairs).³

“There is no rigid “indoor-outdoor” rule by which moving a victim inside the premises in which he is found is *never* sufficient asportation for kidnapping for robbery while moving a victim from inside to outside (or the reverse) is *always* sufficient.

[footnote continued from previous page]

Because the Legislature omitted the word “substantially,” it has been suggested that the amendment changed the standard. (*People v. Robertson* (2012) 208 Cal.App.4th 965, 979-982; accord, *People v. Vines, supra*, 51 Cal.4th at p. 870, fn. 20 [dictum]; *People v. Martinez* (1999) 20 Cal.4th 225, 232, fn. 4 [dictum]; see also *People v. Hoard* (2002) 103 Cal.App.4th 599, 615 [dis. & conc. opn. of Ramirez, J.].) The legislative history, however, indicates that no substantive change was intended. (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 59 (1997-1998 Reg. Sess.) as amended Mar. 10, 1997, pp. 1, 3-4.)

We believe that, whether the legislature intended to change the standard or not, a movement that *insubstantially* increases the risk of harm does not satisfy the statute. This is an application of the general rule that *de minimis non curat lex*. (See *People v. Caldwell* (1984) 36 Cal.3d 210, 220-221.) It would be absurd to have a defendant’s liability to a life term, rather than a maximum of only eight years (Pen. Code, § 208, subd. (a)), turn on whether he or she caused an *insubstantial* increase in the risk of harm.

³ The People assert that defendant “moved Ly all around the first floor of the house” Given Ly’s clarification of what he meant by “around the house,” the record does not support so broad an assertion.

[Citation.] Nonetheless, it has often been held that defendants who have moved their victims within the premises in which they were found did not increase the risk to the victims [citations].’ [Citation.]” (*People v. Simmons* (2015) 233 Cal.App.4th 1458, 1471-1472; accord, *People v. Power* (2008) 159 Cal.App.4th 126, 139 [“Most movements that have been found to be insubstantial or merely incidental to the underlying crime have been within a building [citations], or within the premises of a business [citation].”].)

For example, in *People v. Daniels, supra*, 71 Cal.2d 1119, defendant Simmons was convicted on three counts of kidnapping for robbery, as follows. (*Id.* at p. 1122.)

In one instance, Simmons and his codefendant Daniels knocked on the victim’s door. When she opened it, Simmons pointed a gun at her and asked if she had any money. She said she did not. The defendants then walked her through the kitchen and into the dining room, a distance of 18 feet. They asked her for money again, but she had none. (*Id.* at p. 1123.)

In the second instance, Simmons knocked on another victim’s door. After she opened it, he forced his way in, pulled out a gun, and demanded money. She walked five or six feet to get her purse, then gave him the money that was in it. (*Id.* at pp. 1123-1124.)

In the third instance, Simmons and Daniels rang the victim’s doorbell. When she opened the door, Simmons pulled out a gun and forced her back into the room. He “walked her first towards the kitchen and then towards the bedroom to see if anyone was

there. He then sat her down on the bed and asked for her money. The distance that the parties had covered was about 30 feet.” (*Id.* at p. 1124.)

The Supreme Court held “that the brief movements which defendants Simmons and Daniels compelled their victims to perform in furtherance of robbery were merely incidental to that crime and did not substantially increase the risk of harm otherwise present. Indeed, when in the course of a robbery a defendant does no more than move his victim around inside the premises in which he finds him — whether it be a residence, as here, or a place of business or other enclosure — his conduct generally will not be deemed to constitute the offense proscribed by section 209.” (*People v. Daniels, supra*, 71 Cal.2d at p. 1140.)

In the wake of *Daniels*, the Supreme Court issued a number of opinions granting recall of the remittitur in cases that it deemed similar.

For example, in *People v. Killean* (1971) 4 Cal.3d 423, it stated: “In the course of robbing a jeweler and his companion in the [jeweler]’s apartment, [defendants] Killean and Leahy caused them to move across the threshold and through various rooms in search of valuables. These movements were merely incidental to the robbery and did not substantially increase the risk of harm beyond that inherent in the robbery itself. [Citation.]” (*Id.* at p. 424.)

Likewise, in *People v. Morrison* (1971) 4 Cal.3d 442, the Supreme Court stated: “In the course of robbing one person in the confines of a private residence, Morrison caused her to move up and down the stairs and into various rooms. These movements

were merely incidental to the robbery and did not substantially increase the risk of harm beyond that inherent in the robbery itself. [Citation.]” (*Id.* at p. 443.)

These Supreme Court cases have never been overruled. Unless they can be distinguished, we must follow them. The People argue that “subsequent decisions by the California Supreme Court . . . clarified that the important question is the nature and scope of the movement and not whether a victim was moved within a premises or between premises.” This is a false dichotomy. Whether the victim was moved within or between premises is an aspect — and a very significant one — of the nature and scope of the movement. We recognize that there may be instances in which movement of a victim within a structure can be sufficient to support a conviction, but there must be some facts that distinguish that case from *Daniels*, *Killean*, *Morrison*, and *Washington*.

In just such an effort to distinguish this case, the People argue that the movement of the victim increased the risk of harm to him. It is certainly arguable that forcing Ly to leave the front door area and to go upstairs and into a bedroom made it harder for him to call out for help or to flee.⁴ However, it would seem that this was equally true of two of the three victims in *Daniels*, who were forced at gunpoint to leave their front doors and to go into an interior room.

⁴ The People also argue that the movement increased the risk of harm to Ly because it enabled defendant to bind Ly and to gain control of Ly’s son. However, defendant could have bound Ly almost anywhere in the house, and that would have been sufficient to give him control of Ly’s son.

The People also rely on *People v. Simmons, supra*, 233 Cal.App.4th 1458. There, in two separate robberies, the defendant forced the victim or victims to move from outside, in front of a house, to the inside of the house. (*Id.* at pp. 1469-1472.) The court specifically distinguished *Daniels*, noting that there: “The victims were moved within their homes [citation], characterized by the court as ‘brief movements’ that were ‘solely to facilitate’ the defendants’ crimes. [Citation.] The court concluded that ‘when in the course of a robbery a defendant does no more than move his victim around inside the premises in which he finds him — whether it be a residence, as here, or a place of business or other enclosure — his conduct generally will not be deemed to constitute’ aggravated kidnapping. [Citation.] Here, by contrast, the victims were moved from outdoors to inside under circumstances that increased harm and their risk of additional harm.” (*Simmons, supra*, at pp. 1472-1473.) We cannot similarly distinguish *Daniels*.

Finally, the People cite *People v. Vines, supra*, 51 Cal.4th 830 and suggest that it modified or superseded *Daniels*. In *Vines*, during the robbery of a McDonald’s, the defendant made one employee (Zaharko) open a safe; meanwhile, the three other employees went from the front of the store to the back of the store. The defendant then made all four employees go downstairs to the basement and into a walk-in freezer. Finally, he closed the freezer and locked it. (*Id.* at pp. 841-842, 870.) The employees traveled an estimated total of 80 or 90 feet. (*Id.* at p. 870.) Zaharko was injured when he and the other employees used an ax to chop their way out of the freezer. (*Id.* at p. 842.) As a result, the defendant was convicted on four counts of kidnapping for robbery. (*Id.* at p. 839.)

The court held that there was sufficient evidence of the necessary asportation: “As in *Daniels*, defendant’s forcible movement of the victims was limited to movement inside the premises . . . [citation], but unlike in *Daniels*, the movement here took Zaharko — and ultimately the other victims — from the front of the store, down a hidden⁵ stairway, and into a locked freezer. Under these circumstances, we cannot say the ‘scope and nature’ of this movement was ‘merely incidental’ to the commission of the robbery. Additionally, the movement subjected the victims to a substantially increased risk of harm because of the low temperature in the freezer, the decreased likelihood of detection, and the danger inherent in the victims’ foreseeable attempts to escape such an environment.” (*People v. Vines, supra*, 51 Cal.4th at pp. 870-871, italics omitted.)

Thus, *Vines* accepted and applied *Daniels*; it merely distinguished it. Again, however, we cannot distinguish *Daniels* so easily. The victim here traveled a much shorter distance than the victims in *Vines*. Moreover, he was moved around his own house and into his own bedroom, not into a hazardous environment like the freezer in *Vines*, where the victims faced the Scylla of hypothermia and the Charybdis of injury from using an ax to escape. Any increased danger that the victim here faced came from being shut up with a robber armed with a gun, albeit in a bedroom and not at a door. In other words, it was not much greater than the danger inherent in a “standstill” robbery.

⁵ The court emphasized the fact that the stairway would not have been visible to customers waiting at the counter to order food. (*People v. Vines, supra*, 51 Cal.4th at pp. 841, 870, fn. 21.) It is not clear why this was significant, as the McDonald’s was closed at the time. (*Id.* at p. 841.)

Accordingly, we conclude that there was insufficient evidence to support the conviction of kidnapping for robbery.

C. *The Appropriate Appellate Remedy.*

“[A]n appellate court that finds that insufficient evidence supports the conviction for a greater offense may, in lieu of granting a new trial, modify the judgment of conviction to reflect a conviction for a lesser included offense.’ [Citations.]” (*People v. Bailey* (2012) 54 Cal.4th 740, 748, fn. omitted.) “Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citation.]’ [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 155.)

“[S]imple kidnapping is a necessarily included offense of kidnapping to commit robbery [Citation.]” (*People v. Lewis* (2008) 43 Cal.4th 415, 518, disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920.) Moreover, it has been held that “[t]he crime of kidnaping necessarily includes the crime of false imprisonment effected by violence. [Citations.]” (*People v. Gibbs* (1970) 12 Cal.App.3d 526, 547; accord, *People v. Daniels* (1993) 18 Cal.App.4th 1046, 1053.)

“Both simple kidnapping and aggravated kidnapping (except kidnapping for ransom or extortion) have an asportation element. [Citation.] But the standard for proving the asportation element of simple kidnapping is not the same as that for aggravated kidnapping.” (*People v. Bell* (2009) 179 Cal.App.4th 428, 435.) “[F]or simple kidnapping asportation[,], the movement must be ‘substantial in character’

[citation]” (*People v. Martinez, supra*, 20 Cal.4th at p. 235.) “[T]he increase of harm and other contextual factors may be considered in determining whether asportation for simple kidnapping has been proved. [Citation.]” (*People v. Arias* (2011) 193 Cal.App.4th 1428, 1436.) However, “asportation for simple kidnapping does not *require* a finding of an increase in harm to the victim or other contextual factors. [Citation.]” (*Id.* at p. 1435, italics added.)

The People have asked us, if we find insufficient evidence to support the conviction for aggravated kidnapping, to reduce it to felony false imprisonment. Significantly, they do not ask us to reduce it to simple kidnapping. We deem this to be a concession that, at least on this record, if there is insufficient evidence of the asportation element of aggravated kidnapping, then there is likewise insufficient evidence to support the asportation element of simple kidnapping. We therefore do not discuss the issue further.

Accordingly, we will modify defendant’s conviction on count 1 by reducing it from kidnapping for robbery to felony false imprisonment. We must remand for resentencing.

VI

PENAL CODE SECTION 654

Defendant contends that the imposition of separate and unstayed sentences on counts 2, 4, 5, 6, and 7 constituted multiple punishment in violation of Penal Code section 654.

Penal Code section 654, subdivision (a), as relevant here, states: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

“““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.” [Citation.]” (*People v. Capistrano* (2014) 59 Cal.4th 830, 885.)

“““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.’ [Citation.]” [Citation.]’ [Citations.]” (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1368, disapproved on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

Because we are reversing and reducing defendant’s conviction on count 1, count 2 is now the count that provides for the longest potential term of imprisonment.⁶ Thus, the

⁶ Specifically, the potential penalties are (see *People v. Kramer* (2002) 29 Cal.4th 720, 723-724 [in determining which count provides for the longest potential term of imprisonment for purposes of section 654, enhancements must be included]):

Count 1 (simple kidnapping): Three, five, or eight years. (Pen. Code, § 208, subd. (a).)

Count 2 (first degree burglary): Two, four, or six years (Pen. Code, § 461, subd. (a)), plus an enhancement of three, four, or ten years (Pen. Code, § 12022.5, subd. (a)).

[footnote continued on next page]

issue is no longer whether the other counts can be punished separately from the kidnapping; rather, it is whether they can be punished separately from the burglary.

When the trial court sentenced defendant, it was not called upon to make any factual findings correlating his intent in committing the burglary to his intent in committing the other crimes. Thus, we have no such findings to review. It can and will make such findings on remand. Accordingly, we conclude that defendant's actual contentions regarding 654 are moot, and it would be premature for us to consider those contentions as they may apply in light of our modification of the judgment.

VII

UNAUTHORIZED "STAY-AWAY" ORDER

At sentencing, the trial court said, "I'll make a stay-away order that you not have any contact with the named victim in this matter during the period of incarceration or parole."

[footnote continued from previous page]

Count 4 (second degree robbery): Two, three, or five years (Pen. Code, § 213, subd. (a)(2)), plus a ten-year enhancement (Pen. Code, § 12022.53, subd. (b)).

Count 5 (making a criminal threat): Sixteen months, two years, or three years (Pen. Code, §§ 18, subd. (a), 422, subd. (a)), plus an enhancement of three, four, or ten years.

Count 6 (dissuading a witness): Two, three, or four years (Pen. Code, § 136.1, subd. (c)(1)), plus an enhancement of three, four, or ten years.

Count 7 (assault with a firearm): Two, three, or four years. (Pen. Code, § 245, subd. (a)(2).)

Defendant contends that this order was unauthorized. Because we are remanding for resentencing, this contention is moot. However, for the guidance of the trial court on remand, we note that the People concede the point.

VIII

THE SENTENCE FOR AGGRAVATED KIDNAPPING

Defendant contends that the trial court erred by sentencing him on count 1 (kidnapping for robbery) to seven years to life in prison; he claims that it should have sentenced him to life in prison with the possibility of parole. The People contend that the trial court's oral pronouncement of judgment was correct, but they concede that the sentencing minute order and the abstract of judgment are erroneous. Again, however (see parts V & VI, *ante*), because we are reducing defendant's conviction on count 1, the asserted error is moot.

IX

DISPOSITION

Defendant's conviction on count 1 (kidnapping for robbery) is modified so as to reduce it to felony false imprisonment. On remand, the trial court shall resentence defendant in a manner not inconsistent with this opinion.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

CODRINGTON
J.

SLOUGH

J.