

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW CRUZ LOPEZ,

Defendant and Appellant.

F072230

(Super. Ct. No. VCF269988B)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Stephen Drew,[†] Judge.

Allan E. Junker, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Alice Su, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

*Before Poochigian, Acting P.J., Peña, J., and Smith, J.

[†]Retired judge of the Tulare County Superior Court assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.

Andrew Cruz Lopez pled guilty to various counts after he participated in a home invasion robbery. The primary issue is whether defense counsel was ineffective during plea negotiations, thereby entitling Lopez to withdraw his plea. Specifically, Lopez argues defense counsel should have made a motion to dismiss the aggravated kidnapping charge because the evidence presented at the preliminary hearing was insufficient to support the charge. Lopez reasons that, even though he did not plead guilty to aggravated kidnapping, his plea was coerced because he faced a sentence of life in prison if he was convicted of aggravated kidnapping. Lopez presented this argument to the trial court in his motion to withdraw the plea. The trial court denied the motion.

We conclude that defense counsel was not ineffective because there was sufficient evidence to permit the aggravated kidnapping charge to proceed to trial. Accordingly, the trial court did not abuse its discretion when it denied Lopez's motion to withdraw his plea.

FACTS AND PROCEDURAL HISTORY

The following summary of the events leading to the charges against Lopez are taken from the preliminary hearing. A minor, T.R., was housesitting for Carol Anderson on the day in question. Anderson grew marijuana in her single-wide mobile home pursuant to a doctor's prescription. At about 1:00 p.m., T.R. heard loud banging on the door and hid in the living room. Two men entered the mobile home, pointed a gun at T.R., and ordered him to not move. The two men ordered T.R. to go to the bathroom, which was on the opposite end of the mobile home, and stay there. Someone knocked on the door of the mobile home some time later, and the two men ordered T.R. to come out of the bathroom and answer the door. Pursuant to the instructions of the perpetrators, T.R. told the female at the door everything was fine and the home was not being robbed. The female then left. The two men asked who the female was but T.R. did not know. The two men told T.R. that if anyone else knocked on the door his job was to answer it

and tell whomever was at the door that everything was fine. T.R. was then ordered back into the bathroom.

T.R. apparently called his father to report the robbery. Both of his parents responded to Anderson's mobile home. When T.R.'s mother entered the mobile home, she was confronted by one of the men who repeatedly hit her on the head (approximately 30 times). T.R.'s father was also attacked when he entered the mobile home, apparently causing serious injuries. Anderson also returned to the home and was attacked by the two men.

When interviewed, Lopez admitted he had gone to the mobile home to burglarize it for marijuana. Anderson had a security camera that recorded the events.

The information charged Lopez and his codefendant, David Gage Ortiz, with the kidnapping of T.R. for the purpose of robbery (Pen. Code,¹ § 209, subd. (b)); home invasion robbery (§§ 211, 213, subd. (a)(1)(A)); dissuading a witness by force or fear (§ 136.1, subd. (c)(1)); three counts of assault by force likely to produce great bodily injury (§ 245, subd. (a)(4)); residential burglary (§ 459); and attempted false imprisonment by violence (§§ 236, 664). The enhancements charged against Lopez were (1) personal use of a handgun within the meaning of section 12022.53, subdivision (b) (counts one and two); (2) personal use of a firearm within the meaning of sections 1203.6, subdivision (a)(1) and 12022.6, subdivision (a)(1) (count three); and personal infliction of great bodily injury within the meaning of section 12022.7, subdivision (a) (counts four and five).

After numerous continuances and the severance of the cases against the two defendants, Lopez reached a plea agreement with the prosecutor. Lopez pled guilty to home invasion robbery with the firearm enhancement as charged in count two; witness dissuasion without any enhancement as alleged in count three; and three counts of assault

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

by force likely to produce great bodily injury, with two infliction of great bodily injury enhancements as charged in counts four, five, and six. The indicated sentence was 26 years in prison.

After entering his plea, Lopez retained new defense counsel to represent him. Four months later, new defense counsel filed a motion to withdraw Lopez's plea. The essence of the motion is the same as the argument on appeal. New defense counsel argued that original defense counsel was ineffective because he should have filed a motion to dismiss the aggravated kidnapping count pursuant to section 995. New defense counsel argued the minimal distance within the mobile home which T.R. was forced to travel was insufficient as a matter of law to prove the movement was not merely incidental to the commission of the robbery. Moreover, the facts did not establish that the risk of harm to the victim increased over and above that necessarily present in committing the underlying offense. New defense counsel argued that, had the motion been successful, Lopez would have had more leverage to obtain a better plea agreement.

The trial court denied the motion, concluding that counsel was not ineffective because any section 995 motion directed at the kidnapping count would have been denied. It sentenced Lopez to a term of 25 years in prison (aggravated term of nine years on the home invasion count, plus 10 years for the firearm enhancement, and one year each for counts three through six and the two great bodily injury enhancements).

DISCUSSION

Lopez renews his argument that defense counsel was ineffective because a section 995 motion directed at the kidnapping count should have been filed. In this court, however, he asserts the trial court abused its discretion when it denied his motion to withdraw his plea.

We begin, however, with the Attorney General's argument that Lopez has waived his right to pursue this appeal. The record indicates that, as part of Lopez's plea, Lopez waived the right to appeal from the ensuing judgment. Lopez argues the waiver is

ineffective because original defense counsel was ineffective when the plea was entered, including the appeal waiver term. Since resolution of this ineffective assistance of counsel argument would necessarily require us to analyze the merits, we proceed to resolve the primary issue on appeal.

Lopez's argument contains five parts or steps. First, Lopez asserts that he only accepted the plea agreement because defense counsel told him that if he rejected it, he would be convicted at trial and would face a sentence of life in prison on the kidnapping charge. Second, he asserts that, if he had known there was a possible defense to the kidnapping charge, or it could have been dismissed by a motion, he would never have accepted the plea offer. Third, there was no merit to the kidnapping charge because the asportation element of the crime was absent. Fourth, defense counsel was ineffective because he neither told Lopez there was a defense to the kidnapping count nor did he make a section 995 motion to dismiss the count. Fifth, because defense counsel was ineffective, the trial court abused its discretion when it denied his motion to withdraw his plea.

We question the first two parts of Lopez's argument. While Lopez certainly testified consistent with these assertions, defense counsel's response to these assertions, if any, is not in the record, making it difficult to thoroughly analyze the issue. While Lopez may recall the conversation as "accept the offer or you will get life in prison," defense counsel likely told Lopez "if you don't accept the offer, and you are convicted of the kidnapping charge, you will face a sentence of life in prison." Such discrepancies are why many cases note the preferred method of bringing an ineffective assistance of counsel claim is not an appeal but a writ of habeas corpus in which additional evidence not contained in the record may be presented. (See, e.g., *People v. Carter* (2005) 36 Cal.4th 1114, 1189.) We also note Lopez had the opportunity to present the testimony of defense counsel when he made his motion to withdraw his plea but chose not to do so.

We need not dwell on these questions because we reject the third and fourth parts of Lopez’s argument. More specifically, we reject the argument that there was no merit to the kidnapping charge. The natural corollary to this conclusion is that defense counsel was not ineffective for failing to make a motion to dismiss the count. Since defense counsel was not ineffective, the trial court did not abuse its discretion when it denied Lopez’s motion to withdraw his plea. We begin our analysis with the applicable law.

Motion to withdraw a plea

Section 1018 provides, in relevant part, that on “application of the defendant at any time before judgment ... the court may ... for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.” “Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea.” [Citation.]” (*People v. Johnson* (2009) 47 Cal.4th 668, 679.) A defendant who wishes to withdraw his plea has the “burden of proving by clear and convincing evidence that he entered his plea unknowingly. [Citations.]” (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) If the only basis of the motion is an assertion by a defendant that he changed his mind about entering the plea, he has not established good cause. (*People v. Archer* (2014) 230 Cal.App.4th 693, 702; *In re Vargas* (2000) 83 Cal.App.4th 1125, 1143-1144.)

“A decision to deny a motion to withdraw a guilty plea “rests in the sound discretion of the trial court”” and is final unless the defendant can show a clear abuse of that discretion. [Citations.] Moreover, a reviewing court must adopt the trial court’s factual findings if substantial evidence supports them. [Citation.]” (*People v. Fairbank, supra*, 16 Cal.4th at p. 1254.)

Ineffective assistance of counsel

The Sixth Amendment to the United States Constitution provides a defendant with the right to counsel. The due process clause entitles a defendant to a fair trial. The Constitution defines the parameters of a fair trial “largely through the several provisions

of the Sixth Amendment” (*Strickland v. Washington* (1984) 466 U.S. 668, 685.)

“Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled. [Citations.]” (*Ibid.*)

A defendant is entitled to have counsel appointed to represent him if he cannot afford to retain counsel. (*Strickland v. Washington, supra*, 466 U.S. at p. 685.) Not only is a defendant entitled to counsel, he is entitled to effective assistance of that counsel. (*Id.* at p. 686.) Counsel may be ineffective by failing to render adequate legal assistance. (*Ibid.*) “A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.” (*Id.* at p. 687.)

The standard in this state is well established. “Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation prejudiced the defendant, i.e., there is a ‘reasonable probability’ that, but for counsel’s failings, defendant would have obtained a more favorable result. [Citations.] A ‘reasonable

probability' is one that is enough to undermine confidence in the outcome. [Citations.] [¶] Our review is deferential; we make every effort to avoid the distorting effects of hindsight and to evaluate counsel's conduct from counsel's perspective at the time. [Citation.] A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance.... Nevertheless, deference is not abdication; it cannot shield counsel's performance from meaningful scrutiny or automatically validate challenged acts and omissions. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.)

"If the record contains an explanation for the challenged aspect of counsel's representation, the reviewing court must determine 'whether the explanation demonstrates that counsel was reasonably competent and acting as a conscientious, diligent advocate.' [Citation.] On the other hand, if the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation' [Citation.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 623.)

A defendant is entitled to effective assistance of counsel during plea negotiations. (*Lafler v. Cooper* (2012) 132 S.Ct. 1376; *Missouri v. Frye* (2012) 132 S.Ct. 1399.) However, such claims must be analyzed using the *Strickland* framework. (*Missouri, supra*, at p. 1405.)

Aggravated kidnapping

The lynch pin of Lopez's argument is that there was no merit to the aggravated kidnapping count. Kidnapping is defined in section 207, subdivision (a).² Section 209,

²Section 207, subdivision (a) states: "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping."

sometimes referred to as aggravated kidnapping, provides that when a kidnapping involves specifically enumerated circumstances, then greater punishment is imposed. Relevant here is subdivision (b), which provides that aggravated kidnapping includes kidnappings committed for the purpose of committing another specifically identified crime. Among the crimes listed in subdivision (b)(1) is kidnapping an individual to commit a robbery.

The issue in this case is whether Lopez and the coperpetrator kidnapped T.R. within the meaning of section 209, subdivision (b)(1). Subdivision (b)(2) provides the parameters for this issue and states that subdivision (b)(1) only applies “if the movement of the victim 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.”

Analysis

The evidence from the preliminary hearing was summarized above. T.R. was housesitting for Anderson when Lopez and Ortiz broke in armed with firearms. The two found T.R. in the living room and ordered him into the bathroom while they completed their burglary. The bathroom was at the opposite end of the mobile home. When someone came to the front door to check on T.R., Lopez and/or Ortiz ordered T.R. back to the living room to answer the door. T.R. was told to inform the visitor that everything was fine. T.R. did as instructed, and the visitor left. Lopez and/or Ortiz then told T.R. his job was to keep visitors out of the house and then ordered him back into the bathroom. T.R. apparently stayed in the bathroom when his mother, father, and Anderson were beaten by Lopez and/or Ortiz.

Lopez argues these facts fall outside the requirements of section 209, subdivision (b)(2), because T.R. traveled only a modest distance and they did nothing to increase the risk of harm to T.R. To support this argument, Lopez cites *People v. Daniels* (1969) 71 Cal.2d 1119 and *People v. Washington* (2005) 127 Cal.App.4th 290.

Daniels is primarily noteworthy because it overruled *People v. Chessman* (1951) 38 Cal.2d 166 and redefined the asportation requirement of aggravated kidnapping. The definition adopted is essentially identical to the requirements of section 209, subdivision (b)(2). (*People v. Daniels, supra*, 71 Cal.2d at p. 1140 [crime is not kidnapping if “movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself”].) Our Supreme Court also held that, in the case before it, movements within a residence for short distances were all incidental to the commission of the robbery.

The defendants in *Daniels* had been convicted of a string of rapes and robberies wherein they forced themselves into the homes of women who were alone and stole from some and raped others. During the commission of the offenses, the victims were moved from one room to another, distances estimated in the different crimes as between 5-to-6 feet, 18 feet, and 30 feet. “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 [of aggravated kidnapping]. Movement across a room or from one room to another, in short, cannot reasonably be found to be asportation ‘into another part of the same county.’ [Citation.]” (*People v. Daniels, supra*, 71 Cal.2d at p. 1140.)

In *People v. Washington, supra*, the defendants were convicted of various crimes related to a bank robbery, including two counts of aggravated kidnapping. These two counts involved the bank manager, who was moved approximately 25 feet from her office to the vault, and a teller, who was moved approximately 15 feet from her teller station to the vault. While in the vault, the robbers took cash and then fled.

Relying principally on *Daniels*, the appellate court concluded the evidence was insufficient to support the aggravated kidnapping charges. “We reach this conclusion

because the movement occurred entirely within the premises of the bank and each victim moved the shortest distance between their original location and the vault room. Thus, there was no excess or gratuitous movement of the victims over and above that necessary to obtain the money in the vault. Also, given that the cooperation of two bank employees was required to open the vault, the movement of both [the bank manager] and [the bank teller] was necessary to complete the robbery. After appellants took the money from the vault, they left quickly and without incident. [¶] On these facts, it must be concluded the brief movement of [the bank manager] and [the bank teller] to the bank's vault room was incidental to the robbery within the meaning of *Daniels* and thus was insufficient to support a conviction of kidnapping for the purpose of robbery.” (*People v. Washington, supra*, 127 Cal.App.4th at p. 299.)

Washington also cited *People v. Martinez* (1999) 20 Cal.4th 225, in which our Supreme Court provided the following explanation of aggravated kidnapping:

“With respect to asportation, aggravated kidnapping requires movement of the victim that is not merely incidental to the commission of the underlying crime and that increases the risk of harm to the victim over and above that necessarily present in the underlying crime itself. [Citations.] ‘These two aspects are not mutually exclusive, but interrelated.’ [Citation.]

“In determining ‘whether the movement is merely incidental to the [underlying] crime ... the jury considers the “scope and nature” of the movement. [Citation.] This includes the actual distance a victim is moved. However, we have observed that there is no minimum number of feet a defendant must move a victim in order to satisfy the first prong.’ [Citations.]

“The second prong of the *Daniels* test refers to whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that inherent in [the underlying crime]. [Citations.] This includes consideration of 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. [Citations.] [Citations.]” (*People v. Martinez, supra*, 20 Cal.4th at pp. 232-233.)

The issue decided in *Martinez* related to the asportation requirement of simple kidnapping, and the facts are therefore not relevant to the issue before us.

The Attorney General cites *People v. Nguyen* (2000) 22 Cal.4th 872, 886, for the proposition that psychological harm was included within the concept of increased risk of harm to the victim required by section 209, subdivision (b)(2). She also cites *People v. Timmons* (1971) 4 Cal.3d 411, 415, for the proposition that a robber may be found guilty of kidnapping even though he does not take his victim outside the premises in question. “We explained in *Daniels* [citation] that when a robber merely moves his victim around inside the premises in which he finds him, ‘his conduct *generally* will not be deemed to constitute the offense proscribed by section 209.’ (Italics added.) The emphasized qualifier means, however, that there may be circumstances in which a robber can properly be convicted of kidnapping even though he does not take his victim outside the premises in question. And by the same token, there may be circumstances in which a robber who does take his victim outside the premises—or finds him outdoors and moves him from one place to another—cannot properly be convicted of kidnapping. [Citations.]” (*Id.* at p. 415.)

Two additional points are relevant to our analysis. First, Lopez argues defense counsel was ineffective because he failed to make a motion pursuant to section 995 to have the kidnapping count dismissed. “In a proceeding under section 995, the superior court’s role is similar to that of an appellate court reviewing the sufficiency of the evidence to sustain a judgment. [Citations.] The superior court merely reviews the evidence; it does not substitute its judgment on the weight of the evidence nor does it resolve factual conflicts. [Citation.]” (*People v. McDonald* (2006) 137 Cal.App.4th 521, 529.) ““The purpose of a motion to set aside the accusatory pleading under ... section 995 is to review the sufficiency of the indictment or information on the basis of the record made before the grand jury in the one case or the magistrate at the preliminary hearing in the other.”” [Citation.] ““An information will not be set aside ... if there is

some rational ground for assuming the *possibility* that an offense has been committed and the accused is guilty of it.” [Citation.]’ [Citation.]” (*People v. Ramirez* (2016) 244 Cal.App.4th 800, 813.) Because Lopez argues a section 995 motion would have been successful, he is required to meet the burden he would have had in the trial court because defense counsel’s conduct must be evaluated by the obstacles he faced in the trial court. We do not apply the review this court would undertake on denial of such a motion since no motion was ever made. (*Ramirez, supra*, at p. 813 [appellate court disregards trial court’s ruling and directly reviews determination of magistrate holding defendant to answer].)

The second point is that the trial court, in denying Lopez’s motion to withdraw his plea, specifically stated that, after reviewing the preliminary hearing transcript, if a section 995 motion had been made, it would have been denied. Because the trial court that would have been considering such a motion in the first instance indicated a section 995 motion would have been denied, Lopez faces a daunting task to convince this court the trial court would have been required to grant a section 995 motion.

Lopez simply cannot overcome this obstacle. It is true T.R. was never removed from the mobile home, but he was ordered at gunpoint into the bathroom and later ordered to answer the door. Although this incident did not result in any harm, a trier of fact could conclude it increased the risk of harm faced by T.R., for instance, if the person who called at the mobile home had insisted on entering the residence. Nor can it be argued that having T.R. answer the door was reasonably necessary to complete the robbery. Lopez and Ortiz could have ignored the visitor or simply left the mobile home when the visitor knocked on the door. By requiring T.R. to answer the door, his risk of harm was dramatically increased.

Moreover, T.R. was forced to wait in the bathroom while Lopez and Ortiz not only searched for marijuana, but also while the two men beat his parents and Anderson causing severe injuries at least to T.R.’s parents. The potential psychological harm T.R.

was exposed to while waiting in the bathroom while his parents were beaten was potentially significant, especially since he called to inform them of the robbery.

Because T.R. was forced into the bathroom, and then required to return to the living room to address a visitor, and then again forced to return to the bathroom, this is a case in which the trier of fact could conclude the movement was beyond that incidental to the commission of the robbery. Moreover, he was exposed to an increased risk of harm by being required to address a visitor to the mobile home and to remain in the bathroom while his parents were beaten. Since the only question before the trial court was whether a rational ground existed for assuming the offense was committed, we reject Lopez's assertion that a motion to dismiss the aggravated kidnapping count would have been granted, and therefore original defense counsel was ineffective for failing to make the motion. As stated above, since original defense counsel was not ineffective, the trial court did not abuse its discretion when it denied Lopez's motion to withdraw his plea.³

We acknowledge that, at trial, Lopez would have had a potentially tenable argument that he did not kidnap T.R. However, that argument may well have been rejected by the jury, thus leading to the realistic possibility that if he went to trial he faced a sentence of life in prison. Since Lopez would have faced a life sentence had the case proceeded to trial, he would have found himself in the same position during plea negotiations even if defense counsel had made a motion to dismiss the kidnapping count. Logic compels the conclusion Lopez would have accepted the plea bargain to avoid a potential life sentence. Therefore, he did not have any valid basis to withdraw his plea, and the trial court did not err in denying his motion.

³We also question whether Lopez could establish any prejudice as a result of original defense counsel's failure to make a motion to dismiss the aggravated kidnapping count. If the motion was successful, Lopez asserted he would have been able to negotiate a more advantageous plea bargain. This is pure speculation since the evidence against Lopez appeared to be overwhelming, and he did not plead guilty to the aggravated kidnapping charge.

DISPOSITION

The judgment is affirmed.