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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NEREO DEL VALLE,

Defendant and Appellant.

G046289

(Super. Ct. No. 09WF1687)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Raymond M. DiGuiseppe, 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, Barry Carlton and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Nereo Del Valle of kidnapping for the purpose of child molestation (Pen. Code, § 207, subd. (b)),¹ and two counts of committing lewd acts with a child under the age of 14 (§ 288, subd. (a)). It found true allegations the acts of child molestation occurred during a kidnapping pursuant to section 667.61, subds. (b), (c)(4), and (e)(1), commonly referred to as the “One Strike” law. The court sentenced Del Valle to concurrent indeterminate terms of 15 years to life for each section 288 conviction as required under the One Strike law, and imposed an 11-year determinate term for kidnapping (§ 208, subd. (b)), which the court then stayed under section 654.

Del Valle contends the trial court erred by failing to instruct the jury he could not be found guilty of kidnapping for child molestation if the victim’s movement was merely incidental to carrying out the child molestation. We affirm.

FACTS

In August 2009, Del Valle worked in a laundromat near the home of 11-year-old K.T. and her family. He sold perfume out of a closet inside the laundromat.

On August 9, K.T., came to the laundromat with her older sister, Y.T., Y.T.’s young daughter and the daughter’s friend, to do some laundry. While they were there, Del Valle tried to sell them perfume, but they declined. K.T. and Y.T. finished their laundry and left the laundromat.

Later that day, K.T. alone returned to the laundromat. Del Valle was standing in the back of the building near the storage closet, and he asked K.T. if she wanted some perfume. This time, K.T., said yes. Del Valle beckoned her to himself. As K.T. walked about 12 steps to Del Valle, he opened the storage closet door, pointed inside, and told her to go get the perfume. When she leaned into the closet to retrieve a

¹ All further statutory references are to the Penal Code.

bottle of perfume, Del Valle pushed her into the closet and he followed her into the closet. He then shut the door behind him and latched the door closed.

K.T. tried to get out of the closet and told Del Valle her mother was waiting for her, but Del Valle would not let her leave. He handed her a bottle of perfume, and then said “give me something.” K.T. did not understand what he meant. She repeated that her mother was waiting for her, but Del Valle would not let her leave. Instead, he reached down her shirt and touched her breasts. Del Valle told K.T. he would give her money whenever she needed it. K.T. again said she needed to go, but Del Valle reached down into her pants and touched her vagina.

When Del Valle bent over slightly, K.T. managed to reach behind him and unlatched the closet door. With the door unlatched, K.T. was able to push her way past Del Valle and move outside the closet. As she moved by him, Del Valle reached for K.T.’s buttocks. Once K.T. was outside the closet, Del Valle told her not to tell anyone what he had done and again offered her money. He also told her to avoid the surveillance cameras. K.T. left the laundromat and went home. Her sister saw K.T. when she got home and noticed that she appeared to be “in shock” and her eyes were red. K.T.’s sister asked what had happened, and K.T. told her what Del Valle had done. They then reported the incident to the police.

Responding police officers questioned Del Valle. He told them K.T. had returned to the laundromat that day to retrieve some laundry she had left behind. She asked him for some perfume, and he directed her to the storage closet. He admitted going into the storage closet with her and closing the door. He also admitted touching her breasts and vagina.

A Child Abuse Services Team (CAST) member interviewed K.T. two days later. A videotape of the interview was played for the jury at trial. K.T.’s CAST statement is nearly identical to her trial testimony. Plus, Del Valle’s DNA was found on K.T.’s breasts.

Del Valle testified on his own behalf at trial. He said he remembered the incident well. He admitted following K.T. into the closet and latching the door behind him. However, he claimed that when K.T. insisted she get some perfume, he touched her breasts and vagina for “just a few moments.” He said he “didn’t even think about” what he had done, and he called his actions “the stupid thing that I did.” When he realized what he was doing was wrong, Del Valle withdrew his hand. He denied planning to touch K.T., and said he touched her on impulse. He denied offering her money, and claimed he gave her the perfume “because of [her] insistence.”

DISCUSSION

Del Valle contends the jury instructions failed to properly address the asportation element of aggravated kidnapping. Specifically, he claims the trial court failed to inform the jury a guilty verdict on the kidnapping charge required evidence K.T.’s movement was more than “merely incidental” to the underlying child molestation. We find the instructions as given legally correct and adequate for the jury’s understanding of the case.²

A trial court is required to instruct the jury on general principles of law that are closely and openly connected with the evidence and necessary to the jury’s understanding of the case. (*People v. Flannel* (1979) 25 Cal.3d 668, 681, superseded on other grounds as stated in *In re Christian S.* (1994) 7 Cal.4th 768, 777.) “‘An appellate court reviews the wording of a jury instruction de novo’ [citation], and determines whether ‘the instructions are complete and correctly state the law’ [citation].” (*People v.*

² The Attorney General argues Del Valle forfeited his instructional error claim by failing to object to the instructions as given, or by not requesting amplification of the instructions. However, as Del Valle states, “the contemporaneous objection rule presents no real hurdle here, since the concern at issue implicates appellant’s ‘substantial rights’” under section 1259.

Bell (2009) 179 Cal.App.4th 428, 435 (*Bell*.) The adequacy of the instructions is determined from an examination of the entire charge of the court (*People v. Pena* (1984) 151 Cal.App.3d 462, 475), and whether it is reasonably likely that the trial court's instructions as a whole caused the jury to misapply the law. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) Any one instruction "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) Furthermore, it is presumed "that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." (*People v. Mills* (1991) 1 Cal.App.4th 898, 918.)

Section 207, subdivision (b) provides: "Every person, who for the purpose of committing any act defined in Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, . . . or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping." Section 209 sets forth the punishment for what are sometimes called aggravated kidnappings, including kidnapping for the purpose of child molestation. (§ 209, subd. (b)(1).) Subdivision (b)(2) of section 209 provides: "This subdivision shall only apply 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.*" (Italics added.)

With respect to the kidnapping for child molestation charge, the trial court gave CALCRIM No. 1200 which stated, in pertinent part, "The defendant is charged in Count 1 with kidnapping for the purpose of child molestation in violation of Penal Code section 207[, subdivision] (b). [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] [1.] The defendant persuaded, enticed, decoyed or seduced by false promises or misrepresentations a child younger than 14 years old to go somewhere; [¶] 2. When the defendant did so, he intended to commit a lewd or lascivious act on a child; [¶] and [¶] 3. As a result of the defendant's conduct, the child

then moved or was moved a substantial distance. [¶] *As used here, substantial distance means more than a slight or trivial distance. The movement must have substantially increased the risk of physical or psychological harm to the person beyond that necessarily present in the lewd act with a child (which we also called ‘child molest.)* [¶] *In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.”* (Italics added.)

With respect to the kidnapping for child molestation charge, the trial court also gave CALJIC No. 9.50.1 which explained, “The determination by you of whether a particular distance moved was substantial and increased the risk of harm to the alleged victim depends upon a consideration of the totality of the circumstances involved in the case. [¶] Whether the alleged victim’s movement was merely incidental to the lewd act on a child (also referred to as child molestation) is necessarily connected to whether it substantially increased the risk of harm to the alleged victim. Distance is simply one factor. No minimum distance is required so long as the movement is substantial. [¶] Other factors you should consider are the scope and nature of the movement as well as the context of its environment, including but not limited to whether the movement decreased the likelihood of detection, increased the danger inherent in the alleged victim’s foreseeable attempts to escape, or enhance the attacker’s opportunity to commit other crimes.”

With respect to simple kidnapping as a lesser included offense to the kidnapping for child molestation charge, the court gave CALCRIM No. 1215 which stated, in part, “To prove that the defendant is guilty of the crime of kidnapping, the People must prove that: [¶] 1. The defendant took, held, or detained another person by using force or by instilling a reasonable fear; [¶] 2. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance;

[¶] . . . [¶] *As used here, substantial distance means more than a slight or trivial distance.*”³ (Italics added.)

Del Valle argues these instructions erroneously implied “the defendant’s having moved the victim a ‘substantial distance’ alone is enough” He primarily relies on *Bell, supra*, 179 Cal.App.4th 428 to argue the instructions did not define or explain the phrase “‘merely incidental,’” and failed to convey the point that the jurors had to acquit him if they determined his movement of K.T. was not substantial, taking into account whether this movement was merely incidental to the acts of child molestation. Del Valle’s reliance on *Bell* is misplaced.

In *Bell*, the defendant had his ex-wife in his car when police officers arrived to arrest him on a parole violation. He drove away to avoid arrest, with his ex-wife still in the car. After driving about 70 yards, the defendant let her out before resuming what turned into a high speed chase. (*Bell, supra*, 179 Cal.App.4th at p. 431.) He was charged and convicted of evading a police officer while driving recklessly, resisting and obstructing a police officer, simple kidnapping, and hit and run driving with property damage. (*Id.* at p. 433.)

Another panel of this court reversed the defendant’s simple kidnapping conviction because the trial court refused a defense request to include a bracketed portion of CALCRIM No. 1215 which would have directed the jury to determine whether the defendant moved his ex-wife a “substantial distance” by considering the totality of the circumstances, including whether the distance involved “‘was beyond that merely incidental to the commission of the crime of evading a police officer’” (*Bell, supra*, 179 Cal.App.4th at pp. 440-441.) The trial court’s error in *Bell* lay in the determination that evading a police officer was not an associated crime to simple kidnapping, and the

³ The CALCRIM No. 1215 instruction is not strictly relevant in this case because Del Valle was found guilty of the greater kidnapping for child molestation offense and the jury never considered the lesser included simple kidnapping offense.

refusal to give the optional paragraph in CALCRIM No. 1215 defining incidental movement as requested by the defense. (*Id.* at p. 438.)

The holding in *Bell* is limited to cases in which the defendant is charged with simple kidnapping and an “associated crime.”⁴ It has no application to aggravated kidnapping cases such as the case at bar. (See *People v. Shadden* (2001) 93 Cal.App.4th 164, 168.) The reasons are obvious. As the *Bell* court observed, “The asportation element for aggravated kidnapping has two prongs: ‘[A]ggravated kidnapping requires movement of the victim [(1)] that is not merely incidental to the commission of the underlying crime and [(2)] that increases the risk of harm to the victim over and above that necessarily present in the underlying crime itself.’ [Citations.] ‘The two prongs of aggravated kidnapping are not distinct, but interrelated, because a trier of fact cannot consider the significance of the victim’s changed environment without also considering whether that change resulted in an increase in the risk of harm to the victim.’ [Citation.]” (*Bell, supra*, 179 Cal.App.4th at pp. 435-436.)

On the other hand, “the standard for simple kidnapping does *not* require a finding of ‘an increase in harm, or any other contextual factors,’ so long as the evidence shows the victim was moved a substantial distance. [Citation.]” (*Bell, supra*, 179 Cal.App.4th at pp. 436-437.) Moreover, “‘in a case involving an *associated crime*, the jury should be instructed to consider whether the distance a victim was moved was incidental to the commission of that crime in determining the movement’s substantiality.’” (*Id.* at p. 437, italics added.) This is so because when simple kidnapping is alleged and an associated crime is involved, it is important for the jury to determine

⁴ The *Bell* court defined an “associated crime” as “*any* criminal act the defendant intends to commit where, in the course of its commission, the defendant also moves a victim by force or fear against his or her will. It is not more complicated than that.” (*Bell, supra*, 179 Cal.App.4th at pp. 438-439.)

whether more than one crime has been committed, which may not happen in cases where the movement of the victim is incidental to the associated crime. (*Ibid.*)

By way of contrast here, the trial court's charge to the jury correctly defined the asportation element of the aggravated kidnapping alleged. The evidence shows Del Valle coaxed K.T. to the storage closet and forcibly pushed her inside the closet before molesting her. This movement occurred before Del Valle touched K.T.'s breasts and vagina. Plus, Del Valle's decision to molest K.T. in a closed, latched closet decreased the likelihood of his detection, increased the danger inherent in any attempt by K.T. to escape, and enhanced Del Valle's opportunity to commit other crimes.

Furthermore, even if the trial court had a duty to instruct as Del Valle contends, the error was harmless because there is no reasonable probability that the omission affected the outcome of the trial. (*People v. Cole* (2004) 33 Cal.4th 1158, 1208.) Based on the instructions given, the jury understood a conviction required movement of a "substantial distance," considering all of the circumstances relating to the movement. If it had found that distance "merely incidental" to the child molestation, it could not have found Del Valle guilty of kidnapping. Thus, any error in failing to further instruct on that issue could not reasonably have affected the outcome of the trial.

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

FYBEL, ACTING P. J.

IKOLA, J.