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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MORRIS HARMON, JR., Defendant and Appellant.	C048591 (Super. Ct. Nos. 02F05116, 02F02326, 00F04127)

In this matter, we affirm the rape (Pen. Code, § 261, subd. (a)(2)) and kidnapping to commit rape (Pen. Code, § 208, former subd. (d) (Stats. 1992, ch. 163, § 101, p. 781), reenacted as Pen. Code, § 209, subd. (b)) convictions of defendant Morris Harmon, Jr., which were based primarily on deoxyribonucleic acid (DNA) evidence. We conclude defendant did not receive ineffective assistance of counsel when his attorneys failed to raise a confrontation clause challenge to a report prepared by the nurse who performed a sexual assault examination on the victim and obtained biological samples for DNA testing. We

further conclude defendant's Fourth Amendment rights were not violated when the DNA profile of biological samples previously taken from him and stored in a convicted offender database was compared with the DNA profile obtained from biological samples taken from the victim. Finally, we conclude the trial court did not err in failing to instruct the jury on lesser included offenses.

FACTS AND PROCEEDINGS

On the evening of February 24, 1996, 17-year-old S.B. attended a party at a friend's house in South Sacramento. Sometime between 10:00 and 11:00 p.m., she left the party on foot for another friend's house in the area. On the way, S.B. was grabbed from behind while on a sidewalk in front of some buildings on Florin Road near a Pizza Hut restaurant. The assailant put one hand over S.B.'s mouth and the other around her waist and began walking her through a breezeway to the back of the buildings. S.B. thought this was one of her friends playing a trick on her and told the person to quit. The assailant, whom S.B. later determined to be an African-American male, told her to "shut up" and "keep walking."

The man dragged S.B. a distance of approximately 224 feet to an area behind the buildings. He threw her on the ground and began pulling her clothes off. S.B. screamed at him to stop. With S.B. lying on her stomach, the man attempted to penetrate her anus with his penis. He was unsuccessful. He then turned

S.B. over and inserted his penis into her vagina. As S.B. struggled, the man hit her on the head with a rock or a brick and with his hand. She "blacked out a little bit." After approximately five minutes, a woman walked into the area behind the buildings and the man got off S.B. and fled.

When S.B. later reported the assault, she indicated the man was approximately 5'6" tall, weighed 150 pounds, and had a shaved head and a "very skinny framed face." However, she also reported the man had a scarf over his face during the assault. She told her sister and the police that somebody *tried to* rape her. When she reported the assault to her mother, she did not say she had been raped. S.B. later explained she had been embarrassed to admit the man succeeded in raping her. S.B. did not know if the man ejaculated in or on her, although she told the police she did not believe he did.

At 5:00 a.m. the next morning, Laurie Parker, a member of the Sexual Assault Forensic Examiner (SAFE) team at U.C. Davis Medical Center (UCDMC), conducted a sexual assault examination on S.B. Parker prepared a report in which she noted no external genitalia findings and indicated she observed no sperm in or around the victim's vagina. Swabs were used to obtain biological samples from the victim's vagina and cervix.

The record contains no indication of further investigation on the case until 2002, when the matter was reopened. Analysts at the Sacramento County District Attorney Laboratory of Forensic Services (the Sacramento Laboratory) detected semen on the vaginal swabs taken from the victim in 1996 and spermatozoa

on one of the vaginal swabs and one of the cervical swabs. Criminalist Mark Eastman of the Sacramento Laboratory extracted DNA from the samples and generated a 13-locus DNA profile. The Sacramento Laboratory then requested a databank search by the California Department of Justice to compare the DNA profile prepared by Eastman with those contained in a convicted offender databank. The search turned up a match with DNA profile obtained from a biological sample taken from defendant while in custody on an unrelated matter.

Police officers arrested defendant and obtained a saliva sample for further DNA testing. Eastman obtained a 13-locus DNA profile from this sample and found that it matched the DNA profile taken from the victim's vaginal swab.

S.B. was unable to identify defendant as the assailant in a photographic lineup. In 1996, defendant was 5'10" tall and weighed 175 pounds. In 1996, defendant lived within one mile of the crime scene.

Defendant was charged with rape and kidnapping to commit rape along with three prior serious felony convictions. At trial, Leslie Schmidt, a nurse practitioner with UCDMC's SAFE team testified about the sexual assault examination conducted on the victim and identified the SAFE report prepared by Laurie Parker. Mark Eastman testified about the DNA match and opined that the chance of a random match based on a 13-locus DNA profile was one in 190 quadrillion in the African-American population. The jury was provided photographs of defendant

taken in or around 1996 that showed him with hair on his head and facial hair. Defendant did not testify.

Defendant was convicted on both counts. He waived jury trial on the priors and the court found them to be true. Defendant was sentenced under the three strikes law to 75 years to life for the rape plus consecutive terms of five years each for three prior serious felony convictions. A term of 33 years to life on the kidnapping charge was stayed pursuant to Penal Code section 654. In a separate matter, defendant received a consecutive term of two years and eight months for failing to register as a sex offender (Pen. Code, § 290, subd. (g)(2)).

DISCUSSION

I

Ineffective Assistance of Counsel

As noted earlier, Laurie Parker conducted the sexual assault examination of the victim at UCDMC. Parker obtained the vaginal and cervical swabs that held the biological samples from which a DNA profile was created and compared with the DNA profile obtained from defendant. Parker did not testify at trial. Instead, her report was admitted into evidence as a business record, and another member of the UCDMC SAFE team, Leslie Schmidt, testified about its contents.

Defendant contends presentation of the examination results, and in particular the DNA evidence, violated his Sixth Amendment right of confrontation. He does not contend the SAFE report is not a business record within the meaning of Evidence Code

section 1271. Instead, he argues this hearsay exception must give way to his constitutional rights. Defendant further contends that, if this issue has been forfeited by counsel's failure to raise a confrontation clause challenge at trial, he received ineffective assistance of counsel.

As defendant suspects, his confrontation clause claim has been forfeited by failure to raise it below. (See *People v. Burgener* (2003) 29 Cal.4th 833, 869.) A timely objection would have given the prosecution an opportunity to present Parker as a witness. Schmidt testified that, at the time of trial, Parker was no longer a member of the SAFE team but was still employed by UCDMC. Presumably, she would have been available to testify. As we shall explain, Parker's presence as a witness at trial would have eliminated a confrontation clause issue. Thus, we address defendant's ineffective assistance claim.

Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to the assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [80 L.Ed.2d 674, 691-692]; *People v. Pope* (1979) 23 Cal.3d 412, 422.) This right "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) "'[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms."

[Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citations.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [Citations.]'" (*In re Avena* (1996) 12 Cal.4th 694, 721.)

Defendant's claim of ineffective assistance is premised on *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*). In *Crawford*, the United States Supreme Court held the confrontation clause prohibits the admission of an out-of-court statement that is testimonial in nature unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. (*Id.* at p. 68 [158 L.Ed.2d at p. 203].) *Crawford* did not define the term "testimonial," but gave examples--grand jury testimony, prior trial testimony, preliminary hearing testimony, and statements taken by officers in the course of interrogation--and observed that these practices have the closest kinship to the abuses at which the confrontation clause was directed. (*Ibid.*) The court noted one formulation of the class of "testimonial" statements would be "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Id.* at p. 52 [158 L.Ed.2d at p. 193].)

Defendant contends the SAFE examination report prepared by Laurie Parker was testimonial in nature, because it was prepared

with an eye toward criminal prosecution. He argues: "[A] sexual assault forensic examiner who gathers evidence and prepares a sexual assault report does do so primarily to collect and document evidence to identify and prosecute a sex offender. Under any definition suggested by *Crawford*, the overriding intent, purpose and substance of a sexual assault forensic examination places it squarely within the Supreme Court's concept of 'testimonial' . . . ."

Even if we accepted defendant's broad reading of *Crawford*, he would still not be able to establish a claim of ineffective assistance of counsel. Generally, a failure to object to the admission of evidence is a matter of trial tactics. (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) In evaluating a claim of ineffective assistance, "there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' [citations], and we accord great deference to counsel's tactical decisions. . . . [A] reviewing court will reverse a conviction on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.'" (*People v. Frye* (1998) 18 Cal.4th 894, 979-980.)

Defendant contends there could have been no tactical reason for failing to raise a confrontation clause challenge. He argues that, upon a challenge to DNA evidence, the prosecution must establish the foundation for the evidence outside the presence of the jury. Thus, the jury would not be adversely influenced by his assertion of the challenge. He further argues

defense counsel raised a number of other objections to the introduction of DNA evidence, so there could be no tactical reason for not raising a confrontation clause challenge as well.

We disagree. Defendant's argument assumes that, if counsel had raised a confrontation clause challenge, and the challenge had merit, the DNA evidence would have been excluded. That assumption is unwarranted. The best defendant could have hoped for was that the court would exclude the SAFE report and preclude Leslie Schmidt from testifying about it. In that case, counsel may reasonably have assumed the prosecution then would have procured the testimony of Laurie Parker herself. Although we do not know what Parker would have said, there is no reason to believe she would have testified differently than Schmidt about whether the biological samples on the vaginal and cervical swab were obtained from the victim according to normal SAFE team practices. Parker would have been able to use the report to support her testimony. (See *People v. Arreola* (1994) 7 Cal.4th 1144, 1157.)

Under these circumstances, we cannot say the defense would not have preferred introduction of the SAFE report over the testimony of the examining nurse. With the report alone, counsel might have concluded they could plant a seed of doubt as to whether the samples were taken as indicated. Certainly we cannot say counsel had *no* rational tactical purpose for failing to object. Consequently, there was no ineffective assistance of counsel.

II

Suppression of Defendant's DNA Evidence

As described earlier, after a DNA profile was established using the vaginal swabs taken from the victim, this profile was submitted to the California Department of Justice for comparison with a convicted offender database. This comparison turned up a match with defendant.

Defendant contends use of his DNA profile violated his Fourth Amendment rights. He does not challenge extraction of the biological sample itself. Rather, he argues: "Whatever special needs that may have justified the taking of biological samples while [defendant] was incarcerated or on parole, those special needs terminated when [defendant] was discharged from parole. Because special needs did not exist for the state to retain his sample for testing beyond that point, the State's retention and testing of the sample was in violation of the Fourth Amendment." Defendant further argues the saliva sample taken from him after his arrest in this matter was a fruit of the poisonous tree and therefore the DNA results should have been suppressed.

The People contend defendant's Fourth Amendment claim is not cognizable on appeal. They cite *People v. Dial* (2005) 130 Cal.App.4th 657 (*Dial*), where the Court of Appeal concluded the defendant's Fourth Amendment attack on an order imposed at sentencing requiring that he submit a biological sample pursuant to the Forensic Identification Database and Data Bank Act of

1998 (the DNA Act) was not cognizable on appeal. The court explained the DNA Act is self-executing and the defendant was essentially seeking injunctive relief against the officials charged with enforcing the DNA Act without those officials being parties to the action. (*Id.* at pp. 661-662.) Because any rescission of the order would not relieve the defendant of the requirements of the DNA Act, the court concluded there was no need to reach the merits of the defendant's challenge. (*Id.* at p. 662.)

Dial has no bearing on this matter. In *Dial*, the defendant sought to enjoin what he claimed would be a Fourth Amendment violation. The court concluded the defendant would have to bring a separate action against the parties charged with enforcing the DNA Act in order to obtain that relief. In the present matter, defendant claims a violation of the Fourth Amendment has already occurred and he seeks the remedy of suppression for such violation. If, as defendant contends, his rights have been violated, this is the time and place to have the violation adjudicated and remedied. Defendant's claim is therefore cognizable on appeal.

It is beyond dispute that the compulsory, nonconsensual extraction of biological samples constitutes a search and seizure subject to Fourth Amendment protection. (See *Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 616 [103 L.Ed.2d 639, 659]; *Schmerber v. California* (1966) 384 U.S. 757, 767 [16 L.Ed.2d 908, 918]; *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 867.) However, "[a]s the text of the Fourth

Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" (*Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 652 [132 L.Ed.2d 564, 574].) "[W]hether a particular search meets the reasonableness standard '"is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."' [Citations.]" (*Id.* at pp. 652-653 [132 L.Ed.2d at p. 574].)

It has been repeatedly and consistently held that the extraction of biological samples from a convicted felon is not an unreasonable search and seizure within the meaning of the Fourth Amendment. (See, e.g., *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1168; *People v. Travis* (2006) 139 Cal.App.4th 1271, 1289-1290; *People v. Adams* (2004) 115 Cal.App.4th 243, 255-259; *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505-506; *People v. King* (2000) 82 Cal.App.4th 1363, 1371-1378.) As this court explained in *Alfaro*: "We agree with existing authorities that (1) nonconsensual extraction of biological samples for identification purposes does implicate constitutional interests; (2) those convicted of serious crimes have a diminished expectation of privacy and the intrusions authorized by the [DNA] Act are minimal; and (3) the [DNA] Act serves compelling governmental interests. Not the least of the governmental interests served by the [DNA] Act is 'the overwhelming public interest in prosecuting crimes *accurately*.' [Citation.] A minimally intrusive methodology that can serve to avoid erroneous convictions and to bring to light and rectify

erroneous convictions that have occurred manifestly serves a compelling public interest. We agree with the decisional authorities that have gone before and conclude that the balance must be struck in favor of the validity of the [DNA] Act." (*Alfaro v. Terhune, supra,* at pp. 505-506.)

Defendant suggests two recent United States Supreme Court decisions, *City of Indianapolis v. Edmond* (2000) 531 U.S. 32 [148 L.Ed.2d 333] and *Ferguson v. City of Charleston* (2001) 532 U.S. 67 [149 L.Ed.2d 205], cast doubt on the foregoing state authorities. However, we need not consider this issue. As noted previously, defendant does not challenge the extraction of biological samples but the retention of those samples after he was discharged from parole. This issue was not raised below. As a general matter, appellate courts will not consider issues or theories raised for the first time on appeal unless the question is one of law to be applied to undisputed facts. (*Johanson Transp. Services v. Rich Pik'd Rite, Inc.* (1985) 164 Cal.App.3d 583, 588.)

The present matter does not involve undisputed facts. In particular, the basic premise of defendant's argument--that he was discharged from parole at the time of the database search--is unclear. In connection with defendant's motion to suppress, defense counsel submitted a declaration in which she asserted biological samples had been obtained from defendant while in custody on four separate occasions: March 4, 1992, February 9, 1993, October 5, 1995, and November 7, 2000. Counsel further declared she did not know which of these samples was used for

the database "hit." Defendant's probation report indicates he was committed to state prison in July 1992 for 16 months. In April 1994, he was committed to state prison for three years. In December 1996, defendant was granted formal probation for three years. On November 7, 2000, he was granted formal probation for four years.

On the day the last biological sample was obtained, November 7, 2000, defendant was placed on formal probation for four years. This probation would still have been in effect at the time of the database search. Because defendant did not raise any argument about the improper retention of biological samples, there was no occasion for the People to present evidence to support the retention. Thus, even if the earlier samples were improperly retained (an issue we do not reach), the last one was not. On the present record, defendant has failed to establish a factual basis for his constitutional challenge.

III

Attempted Rape as a Lesser Included Offense

Defendant contends the trial court erred in failing to instruct the jury on attempted rape as a lesser included offense of rape. He argues a conviction for attempted rape rather than rape was supported by the victim's statements immediately following the assault that the perpetrator attempted to rape her but was unable to gain penetration. Defendant acknowledges his defense at trial was that he was not the perpetrator and he did not pursue a theory of attempted rape. However, he argues the

court had a duty to instruct sua sponte on any lesser included offense supported by the evidence.

"The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request. [Citations.] That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser." (*People v. Blair* (2005) 36 Cal.4th 686, 744-745.) The obligation to instruct on lesser included offenses exists even over the objections of the parties. (*People v. Birks* (1998) 19 Cal.4th 108, 118.)

If a crime cannot be committed without also committing another offense, the latter offense is a lesser included offense of the former. (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) Attempted rape is a lesser included offense of rape. (See *People v. Atkins* (2001) 25 Cal.4th 76, 88; *People v. Kelly*, *supra*, 1 Cal.4th at p. 528.) Therefore, the trial court was required to instruct on attempted rape if there is evidence that, if believed by the jury, would absolve defendant of rape but not attempted rape.

The People contend defendant is barred from claiming error in the failure to instruct on attempted rape by the doctrine of invited error. "'[A] defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser

included offense supported by the evidence. [Citations.] In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court's failure to give the instruction.'" (*People v. Horning* (2004) 34 Cal.4th 871, 905.)

In order to support a claim of invited error, the record must reflect deliberate action by the defense to cause the court to fail fully to instruct. Mere failure to object or request an appropriate instruction will not suffice. (*People v. Avalos* (1984) 37 Cal.3d 216, 229.) "Invited error . . . will only be found if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction." (*People v. Valdez* (2004) 32 Cal.4th 73, 115.)

In support of their claim of invited error, the People rely on the following colloquy after most of the evidence had been presented:

"THE COURT: The jurors have stepped out. The Court did receive an instruction packet. It looked pretty straightforward. There was nothing in it that I saw that was surprising. The Court has gone through it and sent some off for typing. The Court has verdict forms drafted up. It appears to the Court it happened or didn't happen, so it's not like there's a bunch of lessers, or anything else. It's guilty or not guilty of rape, guilty or not guilty of kidnapping with intent to commit rape. Is there any comment from counsel over that?

"MS. SCHUBERT [the prosecutor]: My only question to the defense was whether they would be asking for lesser of [Penal

Code section] 220 based on the initial statement by the victim? I'm not asking for it, but--

"THE COURT: From the Court's standpoint as the testimony has come out here, it does not appear to the Court that this is a lesser offense.

"M[S]. WILLIAMS [defense counsel]: It isn't, your Honor."

We see nothing in the foregoing to suggest defendant or his counsel invited the court to exclude instructions on attempted rape or any other lesser included offense. At most, defense counsel agreed with the trial court's assessment that assault with intent to commit rape (Pen. Code, § 220) was not a lesser included offense under the circumstances of this case. Defendant otherwise merely acquiesced in the trial court's assessment that there did not appear to be *any* lesser included offenses. The record does not show the defense caused the court to fail to instruct on attempted rape or that defendant had a tactical purpose for doing so.

Nevertheless, we agree with the People the evidence did not support an instruction on attempted rape. "To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial--that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." (*People v. Blair*, *supra*, 36 Cal.4th at p. 745.)

The victim testified she had been raped and later clarified the perpetrator had penetrated her vagina with his penis. The victim acknowledged that, immediately after the assault, she

made statements that the perpetrator had not been able to penetrate her. When asked why she did not tell anyone she had been raped, the victim responded: "Because it's embarrassing that I allowed somebody else to do something to me."

More important than the victim's testimony, however, was the evidence regarding the biological samples taken from the victim during the SAFE examination. The report prepared by Laurie Parker indicated she obtained four vaginal swabs and two dry mount slides from the victim. In addition, Parker obtained four cervical swabs and two more dry mount slides. Leslie Schmidt testified that vaginal swabs are taken from an area three to four inches inside the vaginal wall to collect the secretions present at that location. Cervical swabs are used to collect samples from the cervical opening beyond the vagina. Schmidt testified that part of the examination involved preparing a wet mount slide using material collected on one of the swabs.

Mark Eastman testified that sperm was found on the vaginal wet mount slide prepared by Laurie Parker. Eastman further testified he did DNA testing on one of the vaginal swabs and one of the cervical swabs. Sperm was found on the vaginal swab. DNA was extracted and Eastman found a match with the DNA from a biological sample obtained from defendant. On the cervical swab, Eastman was unable to obtain a separate sample of male DNA. Instead, he obtained a mixed male and female sample that matched both the victim and defendant.

The foregoing evidence shows sperm from defendant was found well within the victim's vagina. This demonstrates unequivocally that defendant obtained penetration.

Defendant challenges this conclusion, arguing: "It is possible that the assailant ejaculated while attempting penetration and deposited sperm on the victim's external genitalia." According to defendant, because the victim told the examining nurse she had not been penetrated, the nurse had no reason to take samples from deep inside her vagina.

The undisputed evidence established that normal practice in the UCDMC SAFE unit was to take vaginal swabs from three to four inches inside the vagina and cervical swabs from the area of the cervix. There is no evidence to suggest that procedure was not followed in this case. Defendant relies solely on speculation.

Defendant made no attempt at trial to refute that the biological samples used for DNA testing were taken from inside the victim's vagina. The prosecution argued to the jury that the victim's prior statements about not being penetrated may be discounted because of the evidence of sperm found inside her vagina. Defendant did not challenge this assertion but instead argued the sample may have been contaminated between the time it was obtained and the time it was tested and there may have been testing errors. Thus, there was no evidence from which a jury composed of reasonable persons could conclude only an attempted rape occurred. Based on the totality of the evidence, the trial court was under no obligation to instruct on attempted rape.

IV

Lesser Included Offenses of Aggravated Kidnapping

Defendant contends the trial court was required to instruct on two lesser included offenses to aggravated kidnapping--simple kidnapping and attempted aggravated kidnapping. He argues the evidence is such that the jury could have concluded movement of the victim to a location behind the restaurant was not sufficient asportation to support aggravated kidnapping.

The People again argue defendant is precluded from raising this issue because he invited any error in failing to instruct on lesser included offenses. However, as explained above, the People cite nothing in the record to suggest defendant did anything more than acquiesce in the court's decision not to instruct on lesser included offenses.

Kidnapping is defined in Penal Code section 207, subdivision (a), as follows: "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." (See also Stats. 1990, ch. 55, § 1, p. 393.) At the time of the offenses charged in this matter, Penal Code section 208, former subdivision (d), provided for increased penalties in the event the kidnapping was "with intent to commit rape, oral copulation, sodomy, or rape by instrument." (Stats. 1992, ch. 163, § 101, p. 781.) This latter offense, commonly referred to as

aggravated kidnapping, differs from simple kidnapping in the element of specific intent to commit another crime.

Defendant contends the crimes also differ in the element of asportation. He argues aggravated kidnapping requires not only a sufficient movement of the victim but also a movement that substantially increases the risk of harm to the victim. According to defendant, an instruction on simple kidnapping was warranted here "because there was an arguable defect in proof as to whether the asportation element necessary for aggravated kidnapping was established."

In *People v. Daniels* (1969) 71 Cal.2d 1119, 1139, the state high court adopted a two-prong test for kidnapping to commit robbery. The movement (1) must be more than that incidental to the robbery and (2) must substantially increase the risk of harm over and above that present in the crime. "As for the first prong . . . , the jury considers the 'scope and nature' of the movement. [Citation.] This includes the actual distance a victim is moved. However, . . . there is no minimum number of feet a defendant must move a victim in order to satisfy the first prong." (*People v. Rayford* (1994) 9 Cal.4th 1, 12.) "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 robbery. [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." (*Id.* at p. 13.)

In *People v. Rayford*, *supra*, 9 Cal.4th at pages 20, 22, the state high court adopted the *Daniels* two-prong test for kidnapping to commit rape. However, in *People v. Martinez* (1999) 20 Cal.4th 225, 237, the court refused to adopt the *Daniels* test for simple kidnapping. Instead, the movement need only be "substantial in character." (*Id.* at p. 235.) Nevertheless, the court concluded factors other than distance moved, such as increased risk to the victim, may be considered by the jury in deciding whether the movement was substantial in character. (*Ibid.*)

Assuming without deciding that simple kidnapping is a lesser included offense of aggravated kidnapping, there was no evidence presented at trial that would support a conviction for simple kidnapping but not aggravated kidnapping. Defendant argues the jury could have concluded the movement at issue here did not substantially increase the risk of harm to the victim. We disagree.

The undisputed evidence established that the perpetrator grabbed the victim from a public sidewalk in front of some buildings near a Pizza Hut restaurant on Florin Road in South Sacramento. He walked her 224 feet down a breezeway between two of the buildings to an area behind them and out-of-sight of the public road. This occurred at approximately 11:00 p.m. The space behind the buildings was separated from other buildings in the area by fences and trees. There was nobody else around at the time.

"[W]here a defendant moves a victim from a public area to a place out of public view, the risk of harm is increased even if the distance is short." (*People v. Shadden* (2001) 93 Cal.App.4th 164, 169; see *People v. Diaz* (2000) 78 Cal.App.4th 243, 248-249 [movement from a well-lit area to the back of a recreation center]; *People v. Jones* (1999) 75 Cal.App.4th 616, 629-630 [movement of the victim 40 feet into a car out of public view]; *People v. Smith* (1995) 33 Cal.App.4th 1586, 1594 [movement of the victim 40 to 50 feet from a driveway open to the street to a camper at the rear of the house]; *People v. Salazar* (1995) 33 Cal.App.4th 341, 348 [movement of the victim 29 feet from an outside walkway to a motel bathroom].)

In *People v. Thornton* (1974) 11 Cal.3d 738, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, footnote 12, the state high court concluded, as a matter of law, that movement of one block from the front of a tavern to a group of parked cars where the defendant forced the victim into one of the cars and sexually assaulted and robbed her was sufficient to satisfy the *Daniels* test. (See *Thornton, supra*, at pp. 750, 768, 768-769, fn. 20.) The court also concluded movement of four blocks in the victim's car was sufficient for aggravated kidnapping as a matter of law. (See *id.* at pp. 747, 768, 768-769, fn. 20.)

In the present matter, defendant moved the victim 224 feet from a location on the sidewalk along a city street to the back of a nearby building where he sexually assaulted her. It is undisputed defendant's intent was to rape the victim, as he

proceeded to do. Unlike the public sidewalk, the area behind the building was hidden from public view. Under these circumstances, there was no evidence from which a jury composed of reasonable persons could conclude only a simple kidnapping occurred. No reasonable jury could conclude the risk to the victim was not substantially increased under this scenario. Therefore, the trial court was under no obligation to instruct on simple kidnapping.

As for attempted aggravated kidnapping, there is again no evidence from which a reasonable jury could conclude a completed kidnapping had not occurred. This is not a case in which the defendant attempted to take the victim to a secluded area but she succeeded in escaping before they arrived. Nor is this a case where, upon arrival at a normally secluded location, the defendant found others present or was unable to enter. Defendant succeeded in moving the victim to the back of the building as he had set out to do. Upon arrival, he found nobody to interrupt him. Thus, the only question is whether this movement amounted to aggravated kidnapping. As we have concluded, it did. Thus, there was no factual basis for an attempted aggravated kidnapping instruction.

V

Blakely Error

Defendant was sentenced to an indeterminate term of 33 years to life on the kidnapping offense, stayed pursuant to Penal Code section 654. The mandatory minimum of 33 years was

computed by taking the upper term of 11 years and tripling it under the three strikes law. (Pen. Code, § 667, subd. (e)(2)(A)(i).)

Defendant contends the trial court erred in using the upper term to compute the mandatory minimum term, because the court relied upon facts not submitted to the jury or proved beyond a reasonable doubt, in violation of the Sixth Amendment of the United States Constitution as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*), and *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (*Cunningham*). Under the circumstances of this case, we find no error.

In *Apprendi, supra,* 530 U.S. 466 [147 L.Ed.2d 435], the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490 [147 L.Ed.2d at p. 455].)

In *Blakely*, the Supreme Court applied the rule of *Apprendi* to invalidate a state court sentence. The high court explained "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely, supra*, 542 U.S. at p. 303 [159 L.Ed.2d at p. 413].)

In *Cunningham,* the Supreme Court applied *Apprendi* and *Blakely* to California's determinate sentencing law and held that

by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Id*. at p. ___ [166 L.Ed.2d at p. 864], overruling on this point *People v. Black* (2005) 35 Cal.4th 1238, vacated in *Black v. California* (2007) ___ U.S. ___ [167 L.Ed.2d 36].)

The People contend *Apprendi* and its progeny do not apply to this case because, when a defendant is a third strike offender, the statutory maximum is life in prison. According to the People: "The United States Supreme Court has made clear that, unlike using facts to impose a sentence above the statutory maximum, a sentencing court's reliance on sentencing facts to impose a greater mandatory minimum sentence which a defendant must serve does not implicate the Sixth Amendment and is not subject to *Blakely's* requirements."

In support of their argument, the People cite *McMillan v. Pennsylvania* (1986) 477 U.S. 79 [91 L.Ed.2d 67] (*McMillan*) and *Harris v. United States* (2002) 536 U.S. 545 [153 L.Ed.2d 524] (*Harris*). In *McMillan*, the Supreme Court found no due process violation in a statute providing that anyone convicted of certain enumerated offenses who is found by the sentencing judge to have visibly possessed a firearm during the offense is subject to a minimum term of five years. (*McMillan*, *supra*, 477 U.S. at pp. 81, 90-91 [91 L.Ed.2d at pp. 73, 79].) In *Harris*, the defendant was convicted of violating a federal drug law and

sentenced under a statute providing for additional punishment in the event a firearm was used in furtherance of the crime. That statute provided for an additional term of not less than five years if the defendant carried a firearm, seven years if he brandished a firearm, and 10 years if he discharged a firearm. The sentencing judge found by a preponderance of the evidence that the defendant brandished a firearm in furtherance of the offense and imposed a seven year term. (*Harris*, *supra*, 536 U.S. at pp. 550-552 [153 L.Ed.2d at pp. 533-534].) The Supreme Court concluded this sentence did not violate *Apprendi*. (*Id.* at pp. 568-569 [153 L.Ed.2d at p. 545].)

These cases do not stand for the proposition asserted by the People. They have nothing to do with the imposition of a mandatory minimum term on an indeterminate sentence. In both cases, the finding of the sentencing judge subjected the defendant to a higher *determinate* term, and the term imposed was less than the statutory maximum the judge could have imposed. (See *McMillan*, *supra*, 477 U.S. at pp. 81-82 [91 L.Ed.2d at p. 73]; *Harris*, *supra*, 536 U.S. at p. 551 [153 L.Ed.2d at p. 534].)

As defendant points out, acceptance of the People's argument would mean that, once the defendant commits an offense that renders him subject to an indeterminate life term, selection of the mandatory minimum falls outside of *Apprendi*. Thus, a defendant convicted by a jury of second degree murder and thereby subject to a sentence of 15 years to life could instead be sentenced to a term of 25 years to life based on

factual findings by the sentencing judge that would support a conviction for first degree murder.

In the present matter, the maximum term to which defendant was subject based solely on his conviction for kidnapping was not life in prison. It was an indeterminate term of 25 years to life. (Pen. Code, § 667, subd. (e)(2)(A)(ii).) Defendant would have been eligible for parole in no more than 25 years. By imposing the upper term of 11 years, the trial court raised the mandatory minimum term to 33 years. This change in the minimum term has a direct impact on the term defendant will ultimately serve in prison and therefore implicates *Apprendi*.

Nevertheless, we conclude *Apprendi* is inapplicable under the circumstances of this case. The rule of *Apprendi* and *Blakely* does not apply when a defendant's prior record is used to increase his or her punishment for a new offense. (*Apprendi*, *supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455]; accord, *United States v. Booker* (2005) 543 U.S. 220, 231 [160 L.Ed.2d 621, 641-642].) At sentencing in this matter, the trial court cited as the sole basis for imposition of the upper term defendant's three prior convictions. Therefore, defendant's Sixth Amendment rights were not violated.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

SCOTLAND, P.J.

ROBIE, J.