Filed 2/2/05

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. AARON MARCEL PALACIOS, Defendant and Appellant.	D042461 (Super. Ct. No. SCN144768)

APPEAL from a judgment of the Superior Court of San Diego County, Marguerite L. Wagner, Judge. Affirmed in part, reversed in part, and remanded.

Ward Stafford Clay for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil P. Gonzalez and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

Aaron Marcel Palacios appeals his convictions of attempted murder (Pen. Code,[1] §§ 187, subd. (a), 664, 12022.7, subd. (a)), two counts of kidnapping for robbery (§ 209,

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

subd. (b)(1)) , two counts of kidnapping for carjacking (§ 209.5, subd. (a)), two counts of carjacking (§ 215, subd. (a)) and true findings that he discharged a firearm and personally inflicted great bodily injury in the commission of the attempted murder, the kidnapping for robbery and the kidnapping for carjacking of one victim (§§ 12022.53, subd. (d), 12022.7, subd. (a)). True findings were made that he was armed and personally used a firearm in the kidnapping for robbery (§§ 12022.53, subd. (b), 12022, subd. (a)(1)) and was armed with a firearm in the kidnapping for carjacking of the second victim (§ 12022, subd. (a)(1)).

On appeal, Palacios challenges: the sufficiency of the evidence to support his convictions and the firearm discharge enhancements, restrictions on closing argument, imposition of multiple punishments for the kidnappings for carjacking and robbery, imposition of multiple gun discharge enhancements, and the imposition of consecutive sentences. He also contends imposition of multiple gun discharge enhancements constituted cruel and unusual punishment. The People point out the court failed to independently determine the determinate sentence and thus failed to select a full-strength principal term.

We conclude the court erred by failing to: stay either the kidnapping for robbery or kidnapping for carjacking as to one of the victims; strike the carjacking convictions; stay two of the gun discharge enhancements; and independently determine the determinate portion of Palacios's sentence. We remand for correction of the sentencing errors. In all other respects, we affirm.

FACTS

Victim Brian Jones

About 2:00 a.m. on May 3, 2002, Palacios and Shana Dreiling were loitering in a gas station in Chula Vista when Brian Jones arrived to buy gasoline and cigarettes. Jones had just finished working as the shift manager at a nearby Taco Bell restaurant and was wearing his Taco Bell uniform. Dreiling approached Jones. She asked Jones for a ride, which he refused to give her. She then asked for change to make a phone call. He agreed and went to his car. As he was reaching into the car to get change, Palacios came up behind him, told him he had a gun and "to get in the fucking" car. Jones complied.

Dreiling sat in the front passenger seat and Palacios sat in the rear seat. Palacios directed Jones to drive into the Eastlake area of Chula Vista and when they reached the parking lot of the golf course, he placed a gun at the back of Jones's head and directed him to stop the car and trade places with Dreiling. When Jones undid his seat belt and started to open the door, Palacios became angry and ordered Jones to climb over the center console into the passenger seat while Dreiling ran around the car to the driver's seat. Palacios asked Jones what kind of vehicle Jones's father drove and then told him to take them to his home where they would drop him off. Jones, afraid that Palacios and Dreiling would break into his family's home, instead directed them to a condominium complex where a friend used to live.

When they reached the condominium complex, Palacios told Dreiling to keep driving and to drive south on Interstate 805. He told Jones he would drop him off in a place where he would not immediately be able to call the police. Palacios gave money to

Jones, telling him it was "taxi fare." They exited the freeway near the Mexican border but Palacios then directed Dreiling to drive north.

Palacios kept telling Jones he was not going to hurt him or damage his car, that he just needed the car to go to Los Angeles to "get away from something." Palacios said he was in trouble for something to do with computers. Palacios seemed a little "proud" of that; noting that he had made the "B section" of the newspaper. Palacios, however, was not satisfied with making only the "B section" and told Jones to read the newspaper the next day where he would see Palacios's name on the front page. As they were driving, Palacios also bragged about the bullets in the gun, calling them "black rhinos, like armor-piercing bullets."

Dreiling exited the freeway in the Miramar area and drove to a wooded area. Palacios, apparently familiar with the area, directed Dreiling through several turns until they entered a residential neighborhood in Scripps Ranch and arrived at a park. Palacios ordered Jones to get out of the car and follow Dreiling into the park. Palacios, holding a gun, followed Jones. As they walked down a trail, Palacios kept telling Jones he was not going to shoot or kill him. Palacios asked Jones if he thought he was going to be shot. Jones answered, "Yes." Palacios laughed in response.

Eventually, they reached an area where they were hidden from the view of any homes. Palacios told Jones to take off his clothing, including his Taco Bell uniform. Jones complied but kept on his boxer shorts. When a lighter dropped out of Jones's pants pocket, Palacios demanded Jones pick it up but Jones refused, fearful that Palacios would shoot him in the head. Because Jones was shivering, Dreiling returned to him his

undershirt and shoes. Palacios ordered Jones to lie down on the ground and count to 100. He told Jones when he was done counting, they would be gone.

When Jones had counted to five or six, Palacios fired the gun, hitting Jones in the triceps area of his right arm. Jones lay motionless, pretending to be dead. After awhile, Jones discovered he was alone, walked to a nearby residence, rang the doorbell, and told the resident he had been shot and his car stolen. The resident called the police.

The police initially disbelieved Jones's story, accusing him of being a liar and of being involved in a drug deal that had gone bad.

Jones later received a bank statement indicating his ATM card had been used at a store in Chula Vista for merchandise valued at $4.63.

Victim Grant Carr

At about 9:00 a.m. on the same day as the Jones's incident, Dreiling knocked on the door of Grant and Penelope Carr's residence in Escondido, claiming she was lost and trying to find a street named "Carnitas." Grant[2] walked with Dreiling to a car (Jones's car), which was parked across a portion of the Carr driveway. Palacios was sitting in the car rifling through some papers as if looking for something and suggested to Dreiling, "Why don't we call your grandmother?" Dreiling asked what city they were in. Grant indicated he had a Thomas Brothers Guide and started walking back to his house. As he walked back toward the house, Dreiling asked if she could use the bathroom. Grant agreed but told her to wait a minute while he put his dogs behind a barrier. He locked the

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2 For clarity, we refer to Grant and Penelope by their first names.

door behind him because Dreiling "not knowing which city she was in didn't sound right." He put the dogs behind a barrier and let Dreiling in to use the bathroom.

While Dreiling was in the bathroom, Penelope, who had been in the shower, asked, "What's up, honey?" Grant, concerned about the situation, told her "Shush. There's a girl in the bathroom. I think it's okay, but take this phone and go into the back bedroom, just in case."

When Dreiling emerged from the bathroom, she pulled a gun out of her purse, pointed it at Grant's head, and said "she would blow [his] fucking brains out all over the carpet." He said loudly, "Oh, no," so Penelope would hear him. Dreiling then started screaming at him to "Get down," "Get down on the floor." Dreiling asked if there was anyone else in the house. Grant answered no. Once Grant was on the floor, Dreiling opened the front door and Palacios entered. Palacios held the gun two or three inches from Grant's head and told him if he moved or caused any trouble Palacios would shoot him. He told Grant the gun had "dumb-dumb bullets," which he called rhino jackets. Palacios asked if there was anybody else in the house. Grant told him his wife lived there but she had left for work. Palacios wanted to know when she would return home. Palacios told Grant that he and Dreiling would hold Grant or Penelope as a hostage while the other was taken to an ATM machine to remove money from the Carrs' bank account.

Penelope slipped out the back of the house and dialed 911.

Palacios and Dreiling, while holding Grant at gunpoint, ransacked the house. They forced Grant to assist, including by moving items into his and Penelope's cars in the garage. The floor of the residence was strewn with items from boxes and drawers. Grant

made at least 11 trips to the car. He was worried they were going to shoot him since Palacios was concerned about leaving fingerprints and stated he was facing 25 years and had nothing to lose.

After Grant had been emptying boxes for about 20 to 30 minutes there was a "fairly loud but muffled" noise, the sound of the police shooting out the tires of Jones's car. Dreiling "freaked out" and Palacios came running. Palacios told Grant, "You're going to get shot," and then marched Grant to the patio door off the master bedroom. Palacios explained, if there were police outside who were going to shoot someone, that someone would be Grant. Just before Grant reached the patio door, Palacios yelled at him to stop, turn around, and the three of them went to the garage. Palacios looked out the windows located at the top of the garage and said, "There's a fucking cop up there." They returned to the patio door where Palacios told Dreiling to hold Grant out of sight. Palacios leaned around the side of the door, spoke to someone, and then returned inside, saying, "There's a whole fucking SWAT team out there. What the hell is going on?" Both Palacios and Dreiling were "very agitated, very scared." Palacios announced to Grant, "You're going to drive us out of here now."

They returned to the garage where Palacios unloaded the back of a Subaru. Palacios and Dreiling screamed and shouted. As soon as Palacios was in the back seat of the Subaru, he screamed at Grant to drive. Grant opened the garage door and started the car. He looked in his rearview mirror, saw Jones's car in the driveway and told Palacios and Dreiling, "Hey, guys, your car is in the way." They both screamed at him to drive.

Grant put the car in reverse but then noticed garbage cans across the driveway behind Jones's car.

Suddenly, there was a "pop, pop, pop" as the police shot out the tires of the Subaru. Palacios and Dreiling continued to scream, "Drive." Grant braked, telling them, "No. You're caught. They've got you. You're caught. You're facing a robbery, an armed robbery right now." A large armored car pulled in behind the Subaru. Grant turned off the car. When Dreiling put the gun on the floorboard next to her seat, Grant fled. Because the police at first thought he was one of the suspects, they yelled at Grant to get down and sprayed him with mace. Once the police realized he was a victim, they escorted him to a neighbor's garage.

The police attempted to negotiate Palacios's and Dreiling's surrender. Several hours later at about 3:00 p.m., Dreiling took the gun from the passenger side floorboard and held it to Palacios's head. The police fired into the car, killing Dreiling. Palacios was thereafter removed from the car and arrested.

Defense

Palacios did not testify. He presented expert testimony that Jones's gunshot wound was inconsistent with Jones's version of what occurred; it was more likely the wound was inflicted while Jones was standing with his arm held out to the side. Palacios also presented evidence that no blood or bullet fragments were found at the location where Jones stated the shooting occurred.

Sentencing

As to the attempted murder, aggravated kidnappings and the attached firearm enhancements, the court consecutively sentenced Palacios to three 25-year-to-life terms for the firearm discharge enhancements, five life-with-possibility-of-parole terms for the substantive offenses, 10 years for personally using a firearm (§ 12022.53, subd. (b)) and one year for being armed with a firearm (§ 12022, subd. (a)(1)).

Palacios was also convicted of assault with a deadly weapon involving the personal use of a deadly weapon (knife) (§§ 245, subd. (a)(1), 1192.7, subd. (c)(23)); two counts of assault with a firearm involving personal use of the firearm (§§ 245, subd. (a)(2), 12022.5, subd. (a)(1)); robbery involving the discharge of a firearm and the personal infliction of great bodily injury (§§ 211, 12022.53, subd. (d), 12022.7, subd. (a)); robbery involving the personal use of a handgun (§§ 211, 12022.53, subd. (b)); and burglary while vicariously armed (§§ 459, 460, 12022, subd. (a)(1)). As to these convictions, the court, after staying various terms, sentenced Palacios to a total term of three years four months to run consecutively to the life terms and their enhancements.

DISCUSSION

I

Substantial Evidence Supports the Convictions and Enhancements

Palacios contends the evidence is insufficient to support his convictions and the true findings on the gun discharge enhancements.

" 'The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must "review the whole record in the light most favorable to the

judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] [¶] . . . But it is the jury, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt.' " (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 468, quoting *People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139, italics omitted.)

We " ' "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' " (*People v. Davis* (1995) 10 Cal.4th 463, 509; *In re Manuel G.* (1997) 16 Cal.4th 805, 822.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Green* (1997) 51 Cal.App.4th 1433, 1437.) "Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact's verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it." (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1765.)

(A)

Attempted Murder

Palacios challenges the sufficiency of the evidence to support findings that he intended to kill Jones as well as that he premeditated and deliberated the killing.

An attempted murder requires the jury to find the defendant had the specific intent to kill the victim. (*People v. Ramos* (1982) 30 Cal.3d 553, 583; *People v. Morales* (1992) 5 Cal.App.4th 917, 925.) "There is rarely direct evidence of a defendant's intent. Such

intent must usually be derived from all the circumstances of the attempt, including the defendant's actions." (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.)

To convict of attempted first degree murder the jury must also find premeditation and deliberation. (See *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462-1463, fn. 8.) " '[P]remeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' " (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) " ' " 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' " ' [Citation.] The law does not require that an action be planned for any great period of time in advance." (*People v. Rand* (1995) 37 Cal.App.4th 999, 1001.)

Categories of evidence that are typically sufficient to sustain a finding of premeditation and deliberation include planning activity, motive, and method. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27; *People v. Thomas* (1992) 2 Cal.4th 489, 516-517.) These categories are " 'intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse.' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331-332.) They represent a "synthesis of prior case law," but "are not a definitive statement of the prerequisites for proving premeditation and deliberation in every case." (*People v. Hawkins* (1995) 10 Cal.4th 920, 957, overruled on another point in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) "[I]t is not necessary that [these] . . . 'factors be

present in some special combination or that they be accorded a particular weight.' " (*People v. Sanchez* (1995) 12 Cal.4th 1, 33; *People v. Pride* (1992) 3 Cal.4th 195, 247.)

(1) Planning Activity

Evidence of arming shortly before an intended confrontation with the victim, pointing the gun at the victim and firing at close range is evidence tending to show an individual deliberated and planned to kill his victim. (See *People v. Caro* (1988) 46 Cal.3d 1035, 1050, disapproved on another ground in *People v. Bonillas* (1989) 48 Cal.3d 757, 797-798, as stated in *People v. Whitt* (1990) 51 Cal.3d 620, 657, fn. 29; *People v. Belmontes* (1988) 45 Cal.3d 744, 792; *People v. Miranda* (1987) 44 Cal.3d 57, 87, disapproved on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4 [planning found where the defendant brought his loaded gun into a store and shortly thereafter used it to kill an unarmed victim]; *People v. Brito* (1991) 232 Cal.App.3d 316, 324; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1049.)

Palacios asserts "all prior planning activity pointed to a robbery of Brian Jones, not an attempted murder." Palacios points to his "expressed intent . . . to give him[self] and his accomplice sufficient time to get to Los Angeles before authorities could be notified." He argues, if he "had intended to kill Brian Jones, he would not have [given] him seventeen dollars for cab fare, told him where to later find his car, had him take off his clothes with the exception of his boxer shorts, returned his T-shirt and shoes when he complained of being cold, and repeatedly assured him that he was not going to kill him." Palacios, however, ignores other evidence and inferences favorable to the judgment.

Contrary to Palacios's contention, the planning activity did not merely point to an attempted robbery. Nor did his repeated statements to Jones during the drive that he would not harm Jones negate a finding of premeditation and deliberation. If Palacios had intended only to rob Jones and to provide himself and Dreiling with a head start before Jones contacted the police, it would have been sufficient to leave Jones in an isolated area from which he would have a difficult time contacting the police. Instead, Palacios and Dreiling took Jones to an area that was short distance from a residential area where he could seek help. A reasonable jury could draw an inference Palacios chose the location because it was isolated and would facilitate a murder rather than because he intended to release Jones following a robbery.

Additionally, Palacios forced Jones to undress, giving him only a T-shirt and shoes. Thus, Palacios stripped Jones of any identification (including his Taco Bell uniform). The lack of identification would be meaningful if Palacios intended to kill rather than merely rob Jones. Palacios also required Jones to assume an extremely vulnerable position, lying down on the ground, before firing the gun. Finally, Palacios's comments that he was planning criminal activity likely to make the front page of the newspaper supported an inference Palacios was planning a murder when he made this comments.

Based on this evidence, a reasonable jury could conclude Palacios had formed a plan to kill Jones and premeditated and deliberated both where and how to kill him.

(2) Motive

Elimination of a witness to a crime has been recognized as a motive supporting a finding of premeditation and deliberation. (*People v. Thomas, supra*, 2 Cal.4th at pp. 518-519; *People v. Lucero* (1988) 44 Cal.3d 1006, 1019; *People v. Alcala* (1984) 36 Cal.3d 604, 626, superseded by statute on other grounds as stated in *People v. Falsetta* (1999) 21 Cal.4th 903, 911.) Alternatively, given Palacios's expressed desire to make the front page, the jury could have believed Palacios was motivated by a desire for notoriety.

(3) Method of Attempted Killing

Firing a gun at close range where there is no evidence of provocation or struggle, as in this case, has generally been found sufficient to support a finding of an intent to kill and premeditation and deliberation. (See *People v. Marks* (2003) 31 Cal.4th 197, 230; *People v. Hawkins, supra*, 10 Cal.4th at p. 956; *People v. Bloyd* (1987) 43 Cal.3d 333, 348; *People v. Crandell* (1988) 46 Cal.3d 833, 868, overruled on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) While it is true, as Palacios points out, that he could have, but did not, shoot Jones in the back of the head while Jones laid on the ground, it does not necessarily follow that "the evidence suggested only one logical conclusion: [Palacios] aimed for and struck the back of Mr. Jones's arm intentionally."

Conflicting evidence was presented to the jury as to how the gunshot wound was inflicted. There was evidence that if the trajectory had been slightly different, it easily could have been fatal. Moreover, the shooting occurred late at night in a dark location and there was no evidence suggesting Palacios was a particularly good marksman. Under

these circumstances, a reasonable jury could conclude the nonfatal nature of the wound was not part of Palacios's plan, but rather was fortuitous.

(B)

Kidnappings for Robbery

Palacios was convicted of kidnapping for robbery of both Jones and Grant.

The crime of kidnapping occurs when an individual "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." (§ 207, subd. (a).) Aggravated kidnapping occurs when an individual is kidnapped for certain sexual offenses, robbery, or carjacking. (*People v. Martinez* (1999) 20 Cal.4th 225, 233; §§ 209, 209.5.) "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.)

To convict a person of kidnapping for robbery, the People must prove the movement of the victim was "beyond that merely incidental to the commission of" the robbery and "increases the risk of harm to the victim over and above that necessarily present in" the robbery. (§ 209, subd. (b)(2).)

The requirements of aggravated kidnapping that the movement be not merely incidental to the commission of the underlying crime and increases the risk of harm " 'are not mutually exclusive, but interrelated.' " (*People v. Martinez, supra,* 20 Cal.4th at p. 233.) "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.' " (*Ibid*.) The determination of whether the movement subjected the victim to an increased risk of harm " '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.' " (*Ibid*.)

(1) Jones - Kidnapping for Robbery

Palacios asserts "[t]here was only one kidnaping in this case" of Jones and argues "[j]ust because one of the items of personal property taken was a motor vehicle does not convert one robbery into two." We disagree.

From the evidence presented at trial, a reasonable jury could conclude that Palacios initially kidnapped Jones as part of the carjacking and only later formed an intent to rob him of his personal possessions. This evidence included Palacios's initial directions to Dreiling to drive to the Mexican border, his statements to Jones that he wanted to leave Jones in a place where he would not quickly contact the police and his giving Jones money for cab fare. However, when they reached the border area, Palacios directed Dreiling to drive north. A reasonable jury could conclude at this point Palacios formed a new and separate intent to rob Jones and followed through on that plan by directing Dreiling to a park, forcibly moving Jones a substantial distance from the car to a dark, isolated area where the risk of harm was increased (and, in fact, was realized when

Palacios shot Jones) and at that location robbing Jones of his wallet and other personal possessions.

That Palacios continually and forcibly detained Jones from the time of the initial carjacking at the gas station to the time of the shooting in the park does not preclude conviction for both kidnapping for carjacking and kidnapping for robbery since, under California law, generally, an individual may be convicted of multiple offenses based on the same conduct when the individual's conduct violates more than one statute. (See § 954; *People v. Wiley* (1994) 25 Cal.App.4th 159, 163.)

(2) Grant - Kidnapping for Robbery

Palacios contends the movement of Grant within the confines of the Carr residence was merely incidental to the commission of the underlying robbery and therefore the evidence was insufficient to sustain a conviction of kidnapping for robbery. He relies on *People v. Daniels* (1969) 71 Cal.2d 1119, 1140, where the Supreme Court stated, "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 [aggravated kidnapping]."

Other cases have held that moving a victim around a residence does not generally constitute substantial movement. (See *People v. Mutch* (1971) 4 Cal.3d 389, 397 [movement of victim 30 to 40 feet from one room of the business to another room was incidental to the robbery]; *People v. Williams* (1970) 2 Cal.3d 894, 902 [movement of victim around gas station premises and forcing victim to load a tool box and other

property into a station wagon was incidental to the robbery]; *People v. Hoard* (2002) 103 Cal.App.4th 599, 607 [movement of victims to office in back of jewelry store was incidental to robbery]; *People v. John* (1983) 149 Cal.App.3d 798, 805 [movement of victim from outside residence to interior and within interconnected living quarters was incidental to the robbery]; but see *People v. Shadden* (2001) 93 Cal.App.4th 164, 169 [movement of victim from front of store to back room was not incidental to attempted rape]; *People v. Salazar* (1995) 33 Cal.App.4th 341, 346-347 [movement of victim from motel walkway into motel room was not incidental to a rape].)

Here, Grant was not merely moved from room to room within the residence, but also forced into the garage and to drive away from the residence. This latter movement was not merely incidental to the commission of the robbery. While the distance was not great—Grant estimated the front of the car was about five yards from the front of the garage when he stopped—the movement was nonetheless substantial and not merely incidental to the robbery. As the Supreme Court has stated, " 'there is no minimum number of feet a defendant must move a victim in order to satisfy the first prong.' " (*People v. Martinez, supra,* 20 Cal.4th 225, 233.) It was not necessary to the commission of the robbery to force Grant to drive the car away from the residence. Nor was it necessary to force Grant to drive the car in order to effectuate an escape from the police. Dreiling or Palacios could have driven the vehicle in order to complete the robbery of Grant's car and possessions and their escape. Moreover, forcing Grant to drive the car out of the garage involved a change of environment from the relatively protected environs of the residence into an area exposed to the SWAT team, a factor that tends to

show the movement was substantial and not merely incidental to the robbery. (*Id*. at p. 236.)[3] The movement also greatly increased the risk of harm to Grant. Indeed, Palacios's plan was to put Grant deliberately in harm's way—in plain view of the police snipers—with the hope that his presence would reduce the risk of harm to Palacios and Dreiling. The robbery was still continuing as Grant attempted to drive away since a robbery continues until the robber reaches a place of temporary safety. (See *People v. Fierro* (1991) 1 Cal.4th 173, 225-226.) Thus, there was substantial evidence to support a conviction of kidnapping for robbery.

(C)

Kidnappings for Carjacking

Palacios was convicted of kidnapping for carjacking of both Jones and Grant.

" 'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).) "[T]he crime of carjacking, like the crime of robbery, 'may be established not

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3 "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. Thus, for simple kidnapping asportation, movement that is 'substantial in character' arguably should include some consideration of the 'scope and nature' of the movement or changed environment, and any increased risk of harm." (*People v. Martinez, supra,* 20 Cal.4th at p. 236 [discussing the sufficiency of movement for simple kidnapping].)

only when the defendant has taken property out of physical presence of the victim, but also when the defendant exercises dominion and control over the victim's property through force or fear.' " (*People v. Hoard, supra,* 103 Cal.App.4th at p. 608.)

Kidnapping for carjacking occurs when a person "during the commission of a carjacking and in order to facilitate the commission of the carjacking, kidnaps another person who is not a principal in the commission of the carjacking . . . ." (§ 209.5, subd. (a).) The offense of kidnapping for carjacking requires proof the victim was moved a substantial distance from the vicinity of the carjacking, that the movement be "beyond that merely incidental to the commission of the carjacking," and that the movement increase "the risk of harm to the victim over and above that necessarily present in the crime of carjacking itself." (§ 209.5, subd. (b).)

(1) Taking From Immediate Presence

Palacios challenges the sufficiency of the evidence to support a determination he took the vehicles from the victims' immediate presence, arguing that he, instead, forced the victims to occupy their own vehicles and thus did not commit a carjacking. This argument was rejected in *People v. Gray* (1998) 66 Cal.App.4th 973, 984-985. The *Gray* court, after examining the legislative history of section 215 and examining the law pertaining to robbery, concluded, "the owner or possessor of a vehicle may be deprived of possession not only when the perpetrator physically forces the victim out of the vehicle, but also when the victim remains in the car and the defendant exercises dominion and control over the car by force or fear." (*Gray,* at p. 985; see also *People v. Green* (1996) 50 Cal.App.4th 1076, 1080-1081; *People v. Foster* (1995) 34 Cal.App.4th 766,

769-771 [both upholding, without discussion, carjacking convictions where the victim remained with the vehicle].) Thus, a carjacking may be committed when the owner or possessor of the car remains with the vehicle.

To the extent Palacios suggests that these convictions were not supported by substantial evidence because he intended to only borrow the vehicles, his argument is without merit. Carjacking is committed when an individual intends only a temporary taking. (§ 215, subd. (a).)

(2) The Evidence Was Sufficient

There was sufficient evidence to support both kidnappings for carjacking. Jones was moved a substantial distance—miles from the location where the carjacking occurred—and this movement increased the risk of harm since he was moved from a gas station where other people were present to the isolation of a car and eventually to a location even more isolated from other people. While Grant was not moved such a lengthy distance, the distance was nonetheless substantial. He was moved from his residence into a car and forced to drive the car out of the driveway toward the street. This forced movement was not merely incidental to the carjacking; Dreiling or Palacios could have accomplished the carjacking by driving the car themselves. The movement also substantially increased the risk of harm; Grant was forced into an area exposed to the SWAT team and subjected to officers firing at the car he was driving and to the officers misidentifying him for one of the perpetrators.

(3) Kidnappings for Carjacking and Robbery of Grant

Palacios contends it was improper to convict him of kidnapping Grant for both robbery and for carjacking.

As we noted under part I(B)(1), *ante*, multiple convictions based on the same conduct are generally permitted when the conduct violates more than one statute. (See § 954; *People v. Wiley*, *supra*, 25 Cal.App.4th 159, 163.) Here, since there was sufficient evidence to support both aggravated kidnapping convictions, Palacios could be convicted of both kidnapping for robbery and kidnapping for carjacking.

(D) Firearm Discharge Enhancements - Section 12022.53

Palacios argues there was sufficient evidence to support only one firearm discharge enhancement because he discharged the gun only once.

Section 12022.53, subdivision (d) requires the imposition of "an additional and consecutive term of imprisonment in the state prison for 25 years to life" when the defendant, in the commission of one of the enumerated felonies, personally and intentionally discharged a firearm and proximately caused great bodily injury to a person other than an accomplice. The enumerated felonies include attempted murder and aggravated kidnapping. (§ 12022.53, subd. (a)(1), (3), (18).)

The evidence shows at the time Palacios discharged the gun, he was continuing to forcibly detain Jones and thus, technically, the aggravated kidnappings had not yet terminated. Accordingly, there was substantial evidence to support a finding that Palacios discharged a firearm causing great bodily injury during the course of both the aggravated kidnappings as well as during the attempted murder.

II

Carjacking Convictions Must Be Stricken

Since an individual may not be convicted of both a greater crime and a lesser included offense and carjacking is a lesser included offense of kidnapping for carjacking, therefore, as the Attorney General concedes, the carjacking convictions must be stricken. (See *People v. Ortiz* (2002) 101 Cal.App. 4th 410, 415.)

III

Restrictions on Closing Argument Were Proper

Palacios contends the trial court erred in not permitting defense counsel to argue Jones knew Dreiling, had planned to commit robberies or other crimes with her, and was shot across the street from the residence that he contacted for help because he decided to back out at the last minute. The trial court, in response to an objection by the prosecutor, ruled the argument was improper because it was without evidentiary support.[4]

"[A] trial judge has a duty and right to exercise reasonable control over criminal proceedings including argument to the jury." (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386.) This duty includes limiting "the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044.) An argument based on facts not in evidence

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4 To the extent Palacios contends he was not permitted to argue the shooting occurred elsewhere, this argument is without merit. Defense counsel was permitted to argue the shooting did not occur at the location Jones described and to suggest it occurred near the residence he contacted.

is improper. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 722.) A "defendant's failure to take the stand does not entitle his attorney to engage in purely speculative argument, substituting his own testimony for that of the defendant in order to insulate the theory of the defense from the scrutiny of cross-examination." (*People v. Modesto* (1967) 66 Cal.2d 695, 708, overruled on other grounds in *People v. Sedeno* (1974) 10 Cal.3d 703, 720-721, and *Maine v. Superior Court* (1968) 68 Cal.2d 375, 383, fn. 8.)

Here, there was no evidence presented at trial to show either that Jones knew Dreiling or had planned to commit any crimes. While it is true Jones's credibility was undermined by inconsistencies in his story, the lack of any blood or bullet fragments at the purported scene of the shooting, expert testimony indicating Jones was shot while standing, and the initial police disbelief of Jones's story, these matters did not support the proposed defense argument. Evidence suggesting Jones had fabricated all or parts of his story did not, in the absence of other evidence, have any tendency to prove a specific alternate factual scenario occurred and, in particular, did not tend to prove Jones knew Dreiling and planned to commit crimes with her. Palacios, had he testified, could have provided the necessary evidence or he could have produced witnesses to establish Jones and Dreiling knew each other. As it was, no such evidence was presented. The defense theory was mere speculation. Since the argument was based on speculation rather than on facts presented at trial, the trial court properly precluded it.

IV

Multiple Punishment

Section 654 prohibits multiple punishment for an indivisible course of conduct even though it violates more than one statute. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) Whether a course of conduct is indivisible depends on the intent and objective of the actor. (*People v. Evers* (1992) 10 Cal.App.4th 588, 602; *People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297.) "If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) The determination the defendant had multiple criminal objectives is a factual question and will be upheld on appeal if supported by substantial evidence. (*People v. Herrera*, *supra*, 70 Cal.App.4th 1456, 1466.)

(A)

Multiple Punishments for the Kidnappings for Carjacking and Robbery of Jones Were Proper

While it is true Palacios forcibly detained, that is, kidnapped, Jones continuously from the initial carjacking at the gas station to the attempted murder in the park, a reasonable jury could have concluded Palacios entertained discrete and separate criminal objectives that arose at different times.

From Palacios's statements that while they were driving he (1) would not hurt Jones or damage the car, (2) wanted the car only to drive up to Los Angeles, (3) wanted to drop Jones at a place where he would not immediately contact the police, and (4) the

fact Palacios gave Jones money for a cab fare home, an inference may be drawn Palacios's initial objective was only to kidnap Jones for the purpose of carjacking and that only later did he form a separate plan to rob Jones. In furtherance of this second, separate objective, Palacios had Dreiling drive north, ordered Jones from the car, marched him to a dark and isolated area, and robbed him of his personal possessions, including his wallet and ATM card. Thus, since Palacios entertained multiple objectives, he could be punished for both the kidnapping for carjacking and the kidnapping for robbery of Jones.

(B)

Multiple Punishment for the Kidnappings for Robbery and Carjacking of Grant Were Improper

As we discussed in part I(C)(2), *ante*, it was proper to convict Palacios of both offenses since his conduct violated both the kidnapping for robbery and the kidnapping for carjacking statutes, however, we conclude multiple punishment was improper.

The evidence indicates the plan to force Grant to drive Palacios and Dreiling away from the residence arose only after Palacios discovered the police had surrounded the residence. At that point, Palacios and Dreiling kidnapped Grant to facilitate the robbery and to carjack his Subaru for the purpose of reaching a place of temporary safety. There was but a single act and a single criminal objective underlying both aggravated kidnappings—escape to a place of temporary safety. Therefore, while Palacios could be convicted of both aggravated kidnappings, punishing him for both was improper.

We remand to the trial court to determine which offense should be stayed pursuant to section 654.

(C)

Multiple Punishment for the Firearm Discharge Enhancements - Section 12022.53, Subdivision (d) Was Improper

Palacios contends it was improper to impose punishment for three section 12022.53, subdivision (d) firearm enhancements based on his firing once at a single victim.

Section 12022.53, in pertinent part, states:

> "(a) This section applies to the following felonies:
>
> "(1) Section 187 (murder).
>
> ". . . . . .
>
> "(3) Section 207, 209, or 209.5 (kidnapping).
>
> ". . . . . .
>
> "(18) Any attempt to commit a crime listed in this subdivision other than assault.
>
> "(b) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply.
>
> "(c) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years.
>
> "(d) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), . . . personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an

> additional and consecutive term of imprisonment in the state prison for 25 years to life.
>
> ". . . . . .
>
> "(f) Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d).
>
> "(g) Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person found to come within the provisions of this section.
>
> "(h) Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section. . . ."

The Attorney General argues punishment for three firearm discharge enhancements is mandated by language in subdivision (f) of section 12022.53 stating the enhancements "shall be imposed . . . for each crime." The Attorney General asserts that since there were three crimes (attempted murder, kidnapping for robbery, kidnapping for carjacking), imposition of three firearm discharge enhancements was mandatory.

We note "the word 'impose' encompasses both situations where an enhancement is imposed and then executed and imposed and then stayed." (*People v. Bracamonte* (2003) 106 Cal.App.4th 704, 711.) Thus, the fact subdivision (f) of section 12022.53 states the enhancements "shall be *imposed* . . . for each crime" (italics added), does not necessarily

warrant a conclusion subdivision (f) precludes the staying of enhancements pursuant to section 654 when there is a single discharge of a gun and a single victim. (See *People v. Oates* (2003) 32 Cal.4th 1048, 1055-1056, 1062-1068.) We interpret this language of subdivision (f) to mean that a firearm enhancement may be attached to each qualifying conviction but does not prohibit the application of section 654.[5]

There is a split of authority within the Courts of Appeal as to whether section 654 applies to any enhancements. The California Supreme Court has declined to resolve the issue. (*People v. Oates, supra*, 32 Cal.4th at p. 1066, fn. 7; *People v. King* (1993) 5 Cal.4th 59, 78.) We generally agree with the reasoning of *People v. Reeves* (2001) 91 Cal.App.4th 14, 56, where the court said, "[m]ultiple enhancements for the same criminal conduct run directly counter to section 654's rule against multiple punishment in a way offender-status-based enhancements [i.e., based on recidivist conduct] do not."

We note there are some appellate decisions containing broad statements that

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5 In *People v. Oates, supra*, 32 Cal.4th 1048, the Supreme Court separately discussed whether the language of section 12022.53, subdivision (f) authorized *imposition* of a firearm enhancement for each qualifying offense (*Oates*, at pp. 1055-1056) and whether the defendant could be *punished* for each enhancement (*id*. at pp. 1062-1068).

section 654 does not apply to firearm enhancements,[6] however, these cases address the distinctly different issue of whether imposing punishment for both a homicide committed by a firearm and a firearm enhancement violates section 654.[7] These cases do not address the application of section 654 to multiple firearm enhancements.

Recently, the Supreme Court in *People v. Oates, supra,* 32 Cal.4th 1048, while declining to expressly resolve whether section 654 applied to enhancements, discussed whether multiple section 12022.53, subdivision (d) enhancements were subject to section 654. In *Oates*, the defendant fired twice at a group of five people, injuring one person. He was convicted of five attempted murders and two section 12022.53 enhancements were found true. The Court of Appeal struck one of the enhancements pursuant to

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6 *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1313 ("the express language of the statute indicates the Legislature's intent that section 654 *not apply* to suspend or stay execution or imposition of such enhanced penalties"); *People v. Ross* (1994) 28 Cal.App.4th 1151, 1158 ("Application of section 654 to the facts at hand would severely hamper the efficacy of section 12022.5 subdivision (a) [commission of felony while armed with a firearm] by preventing imposition of the enhancement in many instances of murder and manslaughter"); see also *People v. Myers* (1997) 59 Cal.App.4th 1523, 1529-1535).

7 *People v. Hutchins, supra,* 90 Cal.App.4th 1308, 1312 (the issue was whether "by imposing both a 15-year to life term for the second degree murder and an additional enhancement penalty of 25 years to life pursuant to section 12022.53, subdivision (d), the trial court punished [the defendant] twice for the same conduct—firing the shots that killed the deceased victim"); *People v. Myer, supra,* 59 Cal.App.4th at page 1530 ("our focus is narrowly drawn . . . . Can Penal Code section 654 be applied when an enhancement is imposed pursuant to Penal Code section 12022.55 for discharging a firearm from a motor vehicle, when the defendant is convicted of murder resulting from discharging the firearm from a motor vehicle?"); *People v. Ross, supra,* 28 Cal.App.4th at page 1155 (discussion focused on "whether section 654 may be applied to a firearms enhancement in a homicide which was committed by the use of a firearm").

section 654 on the basis there was only a single injury. The Supreme Court reversed, concluding both enhancements could be imposed without violating the multiple punishment prohibition of section 654. To reach its conclusion, the Supreme Court relied on the multiple violent crime victims exception to section 654. Under that exception, multiple punishments may be imposed based on the number of victims even when there is a single course of conduct or act. (*Oates*, at pp. 1065-1068; see also *In re Tameka C.* (2000) 22 Cal.4th 190, 199-200 [multiple § 12022.5 firearm use enhancements could be imposed for four assaults with a deadly weapon (§ 245, subd. (d)(1)) when defendant fired toward a group of three police officers, missing all the officers but shattering a window that caused serious injury to a bystander]; *People v. King, supra*, 5 Cal.4th 59, 79 [multiple § 12022.5, subd. (a) firearm use enhancements properly imposed when the defendant used a firearm in a single indivisible transaction that resulted in injury to multiple victims].)

The rationale for imposing multiple firearm enhancements is that the number of victims multiplies the risk of harm. (See *In re Tameka C.*, *supra*, 22 Cal.4th at p. 196.) Additionally, in such a situation, multiple victims suffer the harm of being terrorized. While formerly the Supreme Court had limited the number of firearm use enhancements to one per occasion (*In re Culbreth* (1976) 17 Cal.3d 330 (*Culbreth*)), this rule was overruled in *People v. King, supra*, 5 Cal.4th 59. In the course of the *King* decision, the Supreme Court explained the irrationality of limiting the number of firearm enhancements to a "per occasion" basis:

> " 'An armed defendant convicted of robbing seven solitary attendants at seven gas stations on the same street in the same evening may receive seven consecutive sentences and seven consecutive gun use enhancements [under the *Culbreth* rule]. . . . But the armed outlaw who robs a group of seven individuals at one gas station may receive seven consecutive robbery sentences and only one firearm use enhancement. On what basis is a more lenient sentence for the [latter] felon justifiable? Are the "extra" six victims any less terrorized because they were, from the outset, part of a group? Are one felon's criminal actions less blameworthy than those of the others? [¶] . . . [The *Culbreth* rule] is just another way of saying that the more grandiose the perpetrator's original plan, in terms of the number of victims, the less severe will be the punishment—a grotesque rule of law by any standard.' " (*Id.* at pp. 73-74.)

The rationale for imposing punishment with multiple firearm enhancements when there are multiple victims does not apply when there is but a single victim and a single discharge of the firearm. In this situation, only one victim is at risk of being harmed, only one victim is terrorized. The risk of harm does not multiply because the defendant, pursuant to the charging preferences of the prosecutor, technically may be committing multiple offenses at the instant he fires the gun.

Nor does punishing Palacios with three firearm discharge enhancements comport with the legislative scheme of imposing more severe punishment for more serious firearm conduct. Under section 12022.53, the Legislature has proscribed punishment ranging from 10 years for the personal use of a firearm (§ 12022.53, subd. (b)) to 20 years for the discharge of a firearm without great bodily injury (§ 12022.53, subd. (c)) and to a life term for the discharge of a firearm causing great bodily injury or death (§ 12022.53, subd. (d)). Similarly, in other firearm enhancement statutes, the punishment depends on the conduct involved. Thus, while the Legislature has provided for a one-year additional

term if the defendant was *armed* with a firearm during the commission of a felony (§ 12022, subd. (a)(1)), the punishment increases to three, four or ten years if the defendant *used* a firearm (§ 12022.5, subd. (a)). In other words, the various firearm enhancements reflect the Legislature's determination firearm enhancements be commensurate with the defendant's culpability.

Palacios discharged his gun and therefore he should be held accountable and be punished for that conduct. However, the fact the aggravated kidnappings were technically ongoing at the time he discharged the gun does not make Palacios more culpable so as to justify imposing three times the punishment. The discharge of the gun was not made more dangerous or more harmful merely because the aggravated kidnappings had technically not yet ended. There was only one victim and only a single act of discharging a firearm. Palacios's punishment should be commensurate with his conduct, that is, he should be punished once for his discharge of the firearm, not three times.[8]

We conclude the two section 12022.53, subdivision (d) enhancements for the Jones kidnapping for carjacking and the Jones kidnapping for robbery must be stayed.[9]

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8 We note the evidence would have supported firearm *use* enhancements under section 12022.53, subdivision (b) for the two aggravated kidnappings. Such enhancements would have been more commensurate with Palacios's conduct during the kidnappings, that is, the use of his gun to force Jones's compliance. The People, however, did not allege use enhancements as to these kidnappings.

9 Palacios's argument that imposition of punishment for multiple firearm discharge enhancements constitutes cruel and unusual punishment is rendered moot by our decision that he should be punished only once for discharging the firearm.

V

Propriety of Sentences Under
Blakely v. Washington

Palacios contends the consecutive sentencing in this case violated the United States Supreme Court decision in *Blakely v. Washington* (2004) ___ U.S. ___ (*Blakely*) [124 S.Ct. 2531].

In *Blakely*, the Supreme Court held any fact (other than the fact of a prior conviction) that increases the punishment for a crime beyond the "statutory maximum" must be found by a jury, rather than a sentencing judge. (*Blakely, supra,* 124 S.Ct. at p. 2537.) The court defined "statutory maximum" as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Ibid*., italics omitted.)

Preliminarily, we reject the Attorney General's argument that Palacios forfeited his claim of *Blakely* error by failing to request that a jury determine the sentencing factors. This rule that a defendant must object at the time of sentencing or waive the claim on appeal generally results in the "prompt detection and correction of error" and "reduce[s] the number of unnecessary appellate claims." (*People v. Scott* (1994) 9 Cal.4th 331, 351.) However, before *Blakely*, California courts and federal courts consistently had held a defendant has no constitutional right to a jury trial regarding the imposition of consecutive sentences. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *U.S. v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *U.S. v. Lafayette* (D.C.Cir. 2003) 337 F.3d 1043, 1049-1050; *U.S. v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *U.S. v. Davis*

(11th Cir. 2003) 329 F.3d 1250, 1254; *U.S. v. Chorin* (3d Cir. 2003) 322 F.3d 274, 278-279; *U.S. v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *U.S. v. White* (2d Cir. 2001) 240 F.3d 127, 136.) Moreover, since *Blakely* was decided after Palacios's sentencing, we may not say he knowingly and intelligently waived his right to a jury trial. (See *Blakely, supra,* 124 S.Ct. at p. 2541 [noting that "[i]f appropriate waivers are procured" a state may utilize judicial fact finding in its sentencing scheme].) We decline to find a waiver under these circumstances.

However, we reject Palacios's argument the consecutive sentencing here violated *Blakely*. The trial court imposed consecutive sentences because the offenses involved separate acts or threats of violence. The court's imposition of separate punishments for the separate offenses did not result in exceeding the statutory maximum for each offense. Further, contrary to Palacios's argument, section 669 does not create a presumption of concurrent sentences, that is, that a court must sentence concurrently unless additional findings are made justifying consecutive sentences. (See *People v. Reeder* (1984) 152 Cal.App.3d 900, 923 ["While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required."].) Section 669 merely gives the court discretion to impose concurrent or consecutive sentences and provides that if the court fails to specify a sentencing choice, concurrent sentences apply. Section 669 does not set a "statutory maximum" of concurrent sentences.

We conclude the sentencing here did not violate *Blakely*.

VI

Determinate Sentencing

Here, when the court imposed the determinate term, it ran all counts (that it did not stay) consecutively to the indeterminate term; all the determinate counts were to be served at one-third of the middle term for that count.

When a court imposes a determinate sentence, the court must select one count as the "principal" count and impose the full lower, middle, or upper term for that count. If the court chooses to run other counts consecutively to the "principal" term, those "subordinate" counts are imposed based on one-third of the middle terms. (*People v. Felix* (2000) 22 Cal.4th 651, 655; § 1170.1, subd. (a).) When there are both indeterminate and determinate terms, the court must independently calculate both terms; and " 'neither term is "principal" [n]or "subordinate." ' " (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1094.) Thus, even though a determinate term is served consecutively to a indeterminate term, the court, when calculating the determinate term, must select one count to be the principal term that is served for the full amount of the upper, middle, or lower term.

The court erred by failing to select one of the counts in the determinate sentencing as the principal count to be served full term. On remand, the court must select one count in the determinate sentence as the principal count and select whether to impose the lower, middle, or upper term for that count.

DISPOSITION

We remand for resentencing as follows: the carjacking convictions must be stricken; the punishment for the kidnapping for robbery *or* the kidnapping for carjacking of Grant Carr must be stayed pursuant to section 654; the section 12022.53, subdivision (d) firearm discharge enhancements for the kidnapping for carjacking and the kidnapping for robbery of Jones must be stayed pursuant to section 654; the court must determine the principal count among the determinate sentences. In all other respects, we affirm the judgment.

CERTIFIED FOR PUBLICATION

_____

MCCONNELL, P. J.

I CONCUR:

_____

HUFFMAN, J.

McDONALD, J., Concurring and Dissenting.

I concur with the majority opinion except its conclusions substantial evidence supports the convictions of kidnapping for robbery and kidnapping in the commission of carjacking with respect to Grant Carr, and Penal Code section 654[10] does not apply to the multiple aggravated kidnapping convictions with respect to Brian Jones.

Aaron Marcel Palacios was convicted of kidnapping Carr for robbery (§ 209, subd. (b)) and kidnapping Carr during the commission of carjacking (§ 209.5). Section 209, subdivision (b) provides that "(1) Any person who kidnaps . . . any individual to commit robbery . . . shall be punished by imprisonment in the state prison for life with possibility of parole." The penalty for simple kidnapping is a determinate term of three, five or eight years (§ 208, subd. (a)) and the penalty for robbery in an inhabited dwelling is a determinate term of three, six or nine years (§ 213). Perhaps because the penalty for kidnapping for robbery so greatly exceeds the combined penalties for kidnapping and robbery, section 209, subdivision (b)(2) provides that kidnapping for robbery applies "only . . . 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 [of robbery]."

Section 209.5 provides "(a) Any person who, during the commission of a carjacking and in order to facilitate the commission of the carjacking, kidnaps another person . . . shall be punished by imprisonment in the state prison for life with the

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10 All statutory references are to the Penal Code.

possibility of parole." The penalty for simple kidnapping is a determinate term of three, five or eight years (§ 208, subd. (a)) and the penalty for carjacking is a determinate term of three, five, or nine years (§ 215, subd. (b)). As with kidnapping for robbery, perhaps because the penalty for kidnapping in the commission of carjacking so greatly exceeds the combined penalties for kidnapping and carjacking, section 209.5, subdivision (b) provides that kidnapping for carjacking applies only "if the movement of the victim is beyond that merely incidental to the commission of the carjacking, the victim is moved a substantial distance from the vicinity of the carjacking, and the movement of the victim increases the risk of harm to the victim over and above that necessarily present in the crime of carjacking itself." Furthermore, presumably because carjacking is a form of robbery, section 215, subdivision (c) provides "[a] person may be charged with a violation of this section [carjacking] and Section 211 [robbery]. However, no defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211."

With reference to victim Carr, the record shows Palacios and Shana Dreiling entered the Carr home for the purpose of stealing as much personal property as could be loaded into the Carrs' automobile parked in the garage, and the Carrs' automobile; if Palacios's initial robbery plan did not include the Carrs' automobile, he would not have had Carr load the household personal property into the Carr's automobile. The movement of Carr in the course of the robbery was limited to movements within the house, including movement into the attached garage, entry of which was available directly from inside the house; forcing Carr into the driver's seat of his automobile; and Carr's backing

his car out of the garage into the driveway a distance of approximately 15 feet. The movement of Carr then ceased. Although the majority opinion states Carr was "forced . . . to drive away from the residence" (maj. opn., *ante,* at p. 18), that movement was not possible. The Carrs' driveway within 15 feet of the entrance to the garage was blocked by Palacios's automobile, which had been parked in the driveway, garbage cans and the armored vehicle of the Swat Team; the tires of Carr's automobile had also been flattened by police gunfire.

Under these circumstances, Palacios was guilty of robbery and of carjacking, but not of kidnapping for robbery or kidnapping for carjacking. The movement of Carr during this incident was incidental to the commission of the robbery because it was limited to movement within the confines of the residence and driveway and therefore there was no kidnapping for robbery. (*People v. Daniels* (1969) 71 Cal.2d 1119, 1140; *People v. Mutch* (1971) 4 Cal.3d 389, 397; *People v. Williams* (1970) 2 Cal.3d 894, 902; *People v. Hoard* (2002) 103 Cal.App.4th 599, 607; *People v. John* (1983) 149 Cal.App.3d 798, 805.)

Furthermore, there was no kidnapping of Carr in the commission of the carjacking because an element of that crime requires "the victim [be] moved a substantial distance from the vicinity of the carjacking" (§ 209.5, subd. (b)). Carr was not moved a substantial distance from the vicinity of the carjacking, which took place in his garage.

The evidence in this case supports only a robbery and carjacking conviction in connection with victim Carr. However, a penalty may be imposed for only one of those

convictions. (§ 215, subd. (c).) Palacios's two convictions for aggravated kidnapping of Carr should be reversed.

Palacios was also convicted of kidnapping Brian Jones in the commission of carjacking and kidnapping Jones for robbery. The trial court, affirmed by the majority opinion, concluded section 654 did not apply and imposed separate consecutive sentences of life with the possibility of parole for each of these convictions. Palacios's objective in kidnapping Jones, which resulted in a continuous act of kidnapping over a period of several hours, cannot reasonably be separated into discrete objectives--other than by speculating on his state of mind during the different periods of the continuous course of conduct--to show substantial evidence supports the conclusion section 654 is inapplicable. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.)

The People speculate Palacios had two separate and distinct objectives in the kidnapping of Jones in the commission of the carjacking and the kidnapping of Jones for robbery: the first objective was to temporarily deprive Jones of possession of the automobile to drive to Los Angeles, and the second objective was to permanently deprive Jones of his clothing and wallet. The People's position is difficult to accept. If Palacios highjacked Jones's automobile only to get to Los Angeles, it is hard to believe he did not intend permanently to deprive Jones of the automobile; it is equally hard to understand why he kept Jones in the automobile--the only reason to keep Jones in the automobile would have been to complete the theft by also taking Jones's personal property, including his wallet. The People's position is not persuasive to establish separate and distinct objectives during the continuous conduct of kidnapping and robbery.

The sentence for either the kidnapping of Jones for robbery or kidnapping Jones in the commission of carjacking should be stayed under section 654.

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MCDONALD, J.