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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LLOYD F. POWELL, Defendant and Appellant.	B190245 (Los Angeles County Super. Ct. No. BA 278371)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. Affirmed.

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Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Lloyd Powell of forcible oral copulation and forcible sodomy (counts 1 and 2), during both of which the jury found true the allegation of aggravated kidnapping, and second-degree robbery (count 3).[1] (Pen. Code, §§ 288a, subd. (c)(2); 286, subd. (c)(2); 667.61, subds. (a), (d)(2); 211, 212.5; all further section references are to the Penal Code.) The court imposed an aggregate 38 years-to-life sentence, including 2 upper and 2 consecutive terms based on aggravating factors found by the court.

Powell appeals, contending that (I) insufficient evidence supports the finding that he kidnapped the victim and moved her a substantial distance which substantially increased her risk of harm. Powell also contends that the trial court erred in (II) rejecting his proposed modification to CALCRIM No. 3175 (Jan. 2006 ed.; all further CALCRIM references are to the Jan. 2006 ed.) regarding the aggravated kidnapping allegation, and (III) imposing upper and consecutive terms in violation of *Blakely v. Washington* (2004) 542 U.S. 296. We reject the contentions and affirm the judgment.

FACTS

About 6:00 p.m. on Friday, February 4, 2005, Powell entered an open woman's clothing store on Beverly Boulevard near the Hancock Park area of Los Angeles. Ms. H., the store's owner, was working in a back office, and Ms. B., a sales clerk, was working in the showroom near the sales counter. The store is small, approximately 1200 square feet, with a glass door and windows across the front, an open showroom with dressing rooms along the rear wall, and a door next to the dressing rooms leading into the office. The office door was open during the entire incident, but because the desk and computer are to the left of the door, a person at the desk area cannot see into the showroom, nor can someone in the street or the showroom see the desk area. The office has a metal rear door with a metal screen leading to a parking lot and alley, and,

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[1] The Information charged Michael Green as a codefendant in the count 3 robbery and with being an accessory (§ 32, count 4), but he was not tried with Powell and is not a party to this appeal. The Information further alleged that Powell had seven prior "prison term" felony convictions (§ 667.5, subd. (b)), trial of which was bifurcated. After the jury returned its verdicts, the court granted the prosecution's motion to dismiss all the prior conviction allegations.

facing the parking lot, a window with louvered blinds which were closed. The distance from the showroom sales counter to the office desk is about 28.5 feet. Because the area has a large Jewish population, many people walk by the store on Friday evenings on their way to a nearby temple. The parking lot has much less foot traffic.

When Powell entered the store, Ms. B. greeted him. He walked to the counter, demanded the money with his hand in his shirt, suggesting that he had a gun, and threatened to shoot her. She took the approximately $250 from the cash drawer and placed it on the counter. Powell took the money and asked, "'Where's the rest of the money?'" Meanwhile, in the office, Ms. H., who had heard someone enter the store, looked at a security monitor. She saw Ms. B. take the money from the cash drawer and give it to Powell. Ms. H. immediately ran out the back door, went to a nearby store, and telephoned the police.

After Ms. H. fled, Powell forced Ms. B. into the office, where he had her lie on the floor as he rifled through purses and took $60 from her purse. He continued to demand more money and to threaten to shoot her. She told him that more money was hidden in a bag near the sales counter. Powell forced her back to the sales counter, where he took between $400 and $600 from the bag.

Powell then forced Ms. B. to walk back into the office, where he immediately pushed her against the desk and ordered her to orally copulate him. His pants were down and his penis already was erect. She knelt down and he forced his penis into her mouth. Powell then ordered her to get up and turn around facing the desk. He pulled up her skirt and began to sodomize her.[2] A second man then entered the front of the store and said, "'Sonny, hurry up.'" Powell replied, "'I'm not done.'" After Powell ejaculated, he ordered Ms. B. to hide under the desk. She complied and he left the store through the front entrance. Ms. B. then escaped out the back door.

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[2] At the preliminary hearing, Ms. B. testified that Powell searched the purses during the second trip inside the office, during which she was sexually assaulted. When confronted with this inconsistency at trial, she insisted that the search occurred the first time she and Powell were in the office.

Police apprehended Powell the next day. Ms. B. identified Powell in a photographic lineup and at the preliminary hearing and trial. DNA tests linked Powell to sperm found on Ms. B. Powell did not present a defense.

After both sides rested, Powell moved to dismiss the kidnapping allegation pursuant to section 1118.1. Powell's counsel argued that Powell continued to demand money even during the second trip to the office and that Ms. B.'s preliminary hearing testimony showed that he ransacked the purses during the second visit to the rear office, and that the minimal movement thereafter was incidental to the forcible sex crimes and did not increase her risk of harm. The court denied the motion, noting that Powell moved Ms. B. from the open showroom which was easily visible to passersby to the office where she could not be seen, the jury could accept her trial testimony that he rifled the purses during the first, not the second, trip to the office, and that sufficient evidence existed to submit the kidnapping allegation to the jury and to support a true finding.

During a conference to settle the jury instructions, Powell stated that although he wanted the court to give CALCRIM No. 3175, he wanted the first sentence modified by adding the italicized language so that it would read: "If you find [Powell] guilty of the crimes charged in counts 1 and 2, you must then decide whether for each crime the People have proved the additional allegation that [Powell] kidnapped [Ms.] B., *moving her a substantial distance,* increasing the risk of harm to her." The court refused, noting that two other paragraphs of the instruction expressly defined the "moving a substantial distance" requirement.

The court's instruction to the jury pursuant to CALCRIM No. 3175 stated: "If you find [Powell] guilty of the crimes charged in counts 1 and 2, you must then decide whether for each crime the People have proved the additional allegation that [Powell] kidnapped [Ms.] B., increasing the risk of harm to her. [¶] You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime. [¶] To prove this allegation, the People must prove that: [¶] 1. [Powell] took, held, or detained [Ms.] B. by the use of force or instilling reasonable fear; [¶] 2. *Using*

that force or fear, [*Powell*] *moved* [*Ms.*] *B. or made her move a substantial distance;* [¶] 3. The movement of [Ms.] B. substantially increased the risk of harm to her beyond that necessarily present in the forcible oral copulation and forcible sodomy; and [¶] 4. [Ms.] B. did not consent to the movement. [¶] *'Substantial distance' means more than a slight or trivial distance. The movement must be more than merely incidental to the commission of forcible oral copulation and forcible sodomy*. [¶] In deciding whether the distance was substantial and whether the movement substantially increased the risk of harm, you must consider all the circumstances relating to the movement. [¶] The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved." (Italics added.)

During defense argument to the jury, as part of an argument that Powell committed false imprisonment or simple, but not aggravated, kidnapping, Powell's counsel referred to the title to the printed instruction for CALCRIM No. 3175, which states: "SEX OFFENSES: SENTENCING FACTORS – AGGRAVATED KIDNAPPING[.]" Powell's counsel gave several examples of different situations he argued constituted "aggravated" kidnapping, comparison of which with the facts of this case would convince the jury that Powell did not commit "aggravated" kidnapping. In her rebuttal argument, over Powell's objection, the prosecutor argued that despite the instruction's title, she did not have to prove that the kidnapping was "aggravated," but had to prove only the four elements listed in CALCRIM No. 3175.

After deliberating for 52 minutes, the jury submitted the following question: "Can we read a section of . . . 667.61 (a) and d[?]"[3] The court answered: "The law regarding 667.61 (a) and (d) is contained in Jury instruction # 3175[.]" The jury returned its verdicts about 45 minutes later, finding him guilty of robbery and forcible oral copulation and sodomy with aggravated kidnapping findings.

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3 The verdict forms included references to section 667.61, subdivisions (a) and (d).

The court imposed an aggregate 38 years-to-life term based on several sentencing decisions including its finding of eight aggravating circumstances. First, the court imposed a 5-year upper term on the count 3 robbery, which the court denominated the principal term. Next, the court imposed a consecutive 25 years-to-life sentence on the count 1 forcible oral copulation pursuant to the forcible sex crimes "one strike" law based on the jury's aggravated kidnapping finding. (§ 667.61, subds. (a), (d).) Also regarding the section 667.61 enhancements, the court found that only one "one strike" term could be imposed for the two forcible sex crimes (counts 1 and 2) because they were "committed against a single victim during a single occasion." (§ 667.61, subd. (g).) Finally, the court imposed a consecutive 8-year upper term (§ 288a, subd. (c)(2)) on the count 2 forcible sodomy pursuant to section 667.6 (see *People v. Fuller* (2006) 135 Cal.App.4th 1336, 1343).

DISCUSSION

I. Substantial Evidence Supports the Aggravated Kidnapping Findings.

Powell contends that insufficient evidence supports the jury's findings pursuant to section 667.61, subdivision (d)(2), that in both forcible sex crimes (counts 1 and 2) he kidnapped the victim and moved her a substantial distance which substantially increased her risk of harm. He argues that "under existing decisional authorities, the slight movement here was both trivial and incidental to the main offenses[]" and thus was insufficient to constitute aggravated kidnapping. The contention lacks merit.

Section 667.61, subdivision (a), requires that the court impose a 25 years-to-life sentence if a defendant commits a specified forcible sex crime, including both forcible oral copulation and forcible sodomy (§ 667.61, subd. (c)(6), counts 1 and 2), under one or more of the circumstances specified in subdivision (d). Section 667.61, subdivision (d)(2), lists one of those circumstances: "The defendant kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense . . . ."

The movement and risk of harm elements (usually discussed together as "asportation") of section 667.61, subdivision (d)(2), are interpreted consistently with similar elements in the substantive crime of aggravated kidnapping for the purpose of committing, among other specified crimes, robbery, rape, oral copulation, and sodomy pursuant to section 209, subdivision (b)(2), which states that it "shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." (*People v. Diaz* (2000) 78 Cal.App.4th 243, 245-248; *People v. Jones* (1997) 58 Cal.App.4th 693, 717; see *People v. Rayford* (1994) 9 Cal.4th 1, 8-11.) Whether the victim's movement satisfied the asportation test is a factual issue which, on appeal, we review for substantial evidence, i.e., whether a reasonable jury could convict the defendant on the totality of evidence. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1149, 1153; *People v. Rayford*, *supra*, 9 Cal.4th at pp. 12, 23.)

Our analysis of whether movement is substantial and increases the victim's risk of harm above that inherent in the underlying crime, and thus is sufficient to constitute aggravated kidnapping, begins with *People v. Daniels* (1969) 71 Cal.2d 1119 and *In re Earley* (1975) 14 Cal.3d 122. Those cases held that kidnapping *for robbery* requires that the movement of the victim must not be merely incidental to the robbery and that the movement must also "'substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself.' (*Daniels*, 71 Cal.2d at p. 1139.)" (*In re Earley*, *supra*, 14 Cal.3d at p. 129.)[4]

Later, the Supreme Court elaborated on the movement and risk of harm elements of aggravated kidnapping in the context of kidnapping *to commit a forcible sex crime*.

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[4] When *Daniels* and *Early* were decided, aggravated kidnapping applied only to kidnapping for ransom, extortion, and robbery, and did not apply to kidnapping to commit any forcible sex crimes. Moreover, those two cases were based on a concern that aggravated kidnapping had been unreasonably expanded, elevating many simple robberies to death penalty cases under then applicable law. (*People v. Dominguez*, *supra*, 39 Cal.4th at pp. 1149-1150.)

In *People v. Rayford, supra*, 9 Cal.4th 1, the court affirmed a conviction for kidnapping to commit rape, explaining that whether the movement is not incidental to the underlying crime and substantially increases the victim's risk of harm depends on the "'scope and nature' of the movement" and "the context of the environment in which the movement occurred." (*Id*. at pp. 12-13.)

Recently, in *People v. Dominquez, supra*, 39 Cal.4th 1141, the Supreme Court affirmed a kidnapping to commit rape conviction, explaining the movement and risk of harm elements: "[*Rayford*] suggests a multifaceted, qualitative evaluation rather than a simple quantitative assessment. Moreover, whether the victim's forced movement was merely incidental to the rape is necessarily connected to whether it substantially increased the risk to the victim. 'These two aspects are not mutually exclusive, but interrelated.' (*Rayford*, at p. 12.) [¶] *The essence of aggravated kidnapping is the increase in the risk of harm to the victim caused by the forced movement*. (*Rayford, supra*, 9 Cal.4th at p. 22.) We have articulated various circumstances the jury should consider, such as whether the movement decreases the likelihood of detection, increases the danger inherent in a victim's foreseeable attempts to escape, or enhances the attacker's opportunity to commit additional crimes. (*Id*. at p. 13.) In finding insufficient evidence of asportation, the Court of Appeal below focused too narrowly on a subsidiary aspect of the analysis, measured distance, rather than considering how all the attendant circumstances related to the ultimate question of increased risk of harm. Although any assessment of the *Daniels/Rayford* test necessarily must include a consideration of the actual distance the victim was forced to move (*Rayford, supra*, 9 Cal.4th at p. 12), we have repeatedly stated no minimum distance is required to satisfy the asportation requirement (*ibid*.), so long as the movement is substantial (*id*. at p. 23)." (*People v. Dominquez, supra*, 39 Cal.4th at p. 1152, italics added.)

Several cases have affirmed aggravated kidnapping to commit rape convictions or findings in situations similar to ours. (*People v. Dominguez, supra*, 39 Cal.4th at pp. 1149-1155 [victim moved 10-12 feet down a slope from a road, then about 25 feet to where rape occurred]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 167-170 [store

clerk dragged 9 feet from cash register into small back room where sexual assault and a robbery occurred]; *People v. Diaz*, *supra*, 78 Cal.App.4th at pp. 248-249 [victim dragged 150-300 feet from a sidewalk into a secluded area of a park]; *People v. Salazar* (1995) 33 Cal.App.4th 341, 344-349 [victim dragged 29 feet from motel corridor into bathroom in one of the rooms].) Indeed, in discussing the asportation element of aggravated kidnapping, the Supreme Court cited *Shadden*, the case factually closest to ours, with approval. (*People v. Dominguez*, *supra*, 39 Cal.4th at p. 1152.)

Applying these principles to the facts before us, we conclude that sufficient evidence supports the jury's aggravated kidnapping findings. The sales counter was in the middle of an open showroom and was clearly visible through the glass door and windows to pedestrians walking by on the sidewalk. In contrast, although the office door was open, no one could see from the sidewalk or the showroom to the desk area where the sexual assaults occurred, and the office was essentially invisible from the rear parking lot, which had far less foot traffic, because the window blinds were closed after 6:00 p.m. on February 4, and the rear door was metal, not glass. Moving Ms. B. from the sales counter to the office desk thus substantially increased the risk of sexual assault, and reduced the possibility of escape, detection, or rescue.[5] Moreover, Powell moved the victim despite apparently having a confederate act as a lookout in front of the store. We reject Powell's argument that because of the lookout the victim was at no greater risk of harm in the office than at the sales counter. Even with a lookout, Powell was far less likely to be interrupted while attacking Ms. B. in the rear office where no one could see him than if he did so in plain view at the sales counter of an open store, acts almost guaranteed to attract notice.

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[5] As the trial court explained in denying Powell's motion to dismiss, the jury was entitled to believe the victim's trial, as opposed to her preliminary hearing, testimony that Powell ransacked the purses during the first, not the second, trip inside the office, and thus rationally could conclude that the sexual assaults were not afterthoughts to the theft from the purse. We do not address whether the evidence of asportation would be sufficient if Powell ransacked the purses during the second rather than the first trip to the office.

All of the cases Powell cites in which the court found the movement of the victim was only incidental to the crime are distinguishable. All involved kidnapping to commit *robbery* where victims were moved inside a business or home where the movement did not substantially increase the risk of harm. Thus *Daniels*, the leading case on the asportation requirement, involved moving robbery victims around inside their own homes. (*People v. Daniels*, *supra*, 71 Cal.2d at pp. 1123-1124, 1140.) Likewise, *People v. Hoard* (2002) 103 Cal.App.4th 599, 602-607, and *People v. Washington* (2005) 127 Cal.App.4th 290, 295-303, involved moving employees within businesses to complete robberies where there was no evidence or allegations that the defendants kidnapped the victims to commit forcible sex crimes.

II. The Court Properly Instructed the Jury Pursuant to CALCRIM No. 3175.

Powell contends that the trial court erred by rejecting his request to modify CALCRIM No. 3175 by adding the italicized language so that the first sentence read: "If you find [Powell] guilty of the crimes charged in counts 1 and 2, you must then decide whether for each crime the People have proved the additional allegation that [Powell] kidnapped [Ms.] B., *moving her a substantial distance*, increasing the risk of harm to her."[6] Powell argues that failing to do so was prejudicial, as evidenced by the prosecutor's argument, the jury's question, and the court's response. The contention lacks merit.

"In a criminal case, a trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citation.]" (*People v. Earp* (1999) 20 Cal.4th 826, 885.) "[T]he correctness of jury instructions is to be determined from *the entire charge of the court, not from a consideration of parts of an instruction* or from a particular instruction." (*People v. Wilson* (1992) 3 Cal.4th 926, 943, italics added, internal quotations and citations omitted.) Although a decision whether to give a

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6 Although courts have no sua sponte duty to modify instructions, Powell preserved this issue by requesting the rejected modification below. (*People v. Holloway* (2004) 33 Cal.4th 96, 154.)

particular instruction in a particular case is a mixed question of law and fact, it is primarily legal, and on appeal we review the decision independently. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) Errors in instructing the jury are reviewed under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836, under which reversal can be ordered only if the error resulted in a "miscarriage of justice." (*People v. Wims* (1995) 10 Cal.4th 293, 314-315.)

Applying these principles to the facts before us, we conclude that the trial court did not err by refusing Powell's proposed modification to CALCRIM No. 3175. Powell does not dispute that the instruction as a whole correctly states the asportation element of aggravated kidnapping. He argues that not including his requested modification to the instruction's first sentence could have misled the jury to ignore the requirements, expressly stated in two later paragraphs, that the movement must be substantial, more than slight or trivial, and more than merely incidental to the commission of the forcible sex crimes. We disagree. The first sentence merely introduced the instruction, explaining to the jury that, if it convicted Powell of the charged forcible sex crimes, it then had to determine whether he kidnapped the victim to commit those crimes, increasing the risk of harm to her. The introduction was not inaccurate because it did not include every required element of aggravated kidnapping where all those elements were expressly and correctly defined in the following paragraphs. No rational juror, reading the instruction as a whole, would conclude that he could find Powell committed aggravated kidnapping without moving her a substantial, not slight or trivial, distance which was not incidental to committing the sex crimes themselves.

Nor does consideration of the prosecutor's rebuttal argument, the jury's question, or the court's response alter our conclusion. The prosecutor's argument correctly stated that she did not have to prove that the kidnapping was "aggravated," but needed to prove only the four elements of the kidnapping allegation stated in the instruction, which did not include the word "aggravated" anywhere in its text. Moreover, the jury's question did not indicate confusion about the instruction, but merely sought clarification of a correctly stated but (as our discussion in section I discloses) somewhat difficult to

apply legal rule. The court's response correctly referred the jury back to the instruction, which correctly stated the asportation element. The jury deliberated for a total of less than 1 hour and 40 minutes, a short period demonstrating neither confusion nor a close case.

III. The Court Properly Imposed Upper and Consecutive Terms Without a Jury Finding Aggravated Sentencing Factors.

Powell contends the court erred in imposing upper and consecutive terms without a jury finding aggravated sentencing factors in violation of *Blakely v. Washington*, *supra*, 542 U.S. 296. He concedes correctly that we must reject this claim as we do under *People v. Black* (2005) 35 Cal.4th 1238 (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), but raises it to preserve the issue for federal review.[7]

We reject the Attorney General's argument that Powell waived this issue by not raising it in the trial court. Unlike the defendant in *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103 (upon which the Attorney General relies), who waived a *Blakely* challenge by failing to raise it at his sentencing which occurred *after Blakely* but *before Black*, Powell was sentenced *after Black*, at which point a *Blakely* objection would have been futile under controlling law that the court was compelled to follow. Under these circumstances, Powell did not waive the issue. (*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784-785.)

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[7] The United States Supreme Court has granted certiorari in a case presenting this issue. (*Cunningham v. California*, cert. granted Feb. 21, 2006, No. 05-6551, ___ U.S. ___ [126 S.Ct. 1329, ___ L.Ed. ___].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, Acting P.J.

JACKSON, J.*

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* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)