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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO DOMINGUEZ, Defendant and Appellant.	H022727 (San Benito County Super. Ct. No. CRF99-37033)

Fernando Dominguez brings this appeal from a judgment convicting him of various criminal offenses arising from the rape and killing of Irma Perez in the early morning hours of August 23, 1997. Charges were originally brought against defendant and another man, Jose Alfredo Martinez, but Martinez died before trial. Defendant argues that numerous errors helped to produce a verdict finding him of guilty of rape, aggravated kidnapping, and first degree felony murder. We have concluded that the verdict must be reversed on two of the three charges. Prejudicial error occurred in connection with the murder charge because, while the evidence suggested that the victim might have died at the hands of Martinez, and the jury explicitly sought guidance concerning the law applicable to such a situation, the instructions addressed only the possibility that defendant himself was the killer. We will also reverse the kidnapping conviction because the movement shown by the evidence did not satisfy the requirements for the "asportation" element of that offense. We find defendant's other claims of error unpersuasive, and therefore affirm the rape conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Irma Perez was last seen alive on the night of August 22-23, 1997, when an officer saw her outside a Hollister bar along with defendant and two other men. She was intoxicated, but said she was okay and was going home. The officer saw her and her three male companions get into a cab.

A cabdriver testified that around 2:00 a.m., he picked up Ms. Perez and three men in Hollister and drove them to a labor camp near Southside Road in San Benito. Two of the men rode in the back seat, while the third rode in the front seat with Ms. Perez, with whom he held hands. At the entrance to the labor camp, the man in the front seat and one of the men in the back seat got out of the cab. The driver turned around and drove Ms. Perez and the remaining man a short distance back down a hill toward Southside Road before stopping again. At that point Ms. Perez got out of the cab and began walking back toward Southside Road and town. The remaining male passenger paid the driver, got out, and began walking after Ms. Perez. After making an entry in his logbook, the cabdriver drove back to town, passing Ms. Perez, who was followed by the man who had paid and then by the other man who had been in the back seat.

On August 26, 1997, a tractor driver unearthed Ms. Perez's partly clad body in a walnut orchard next to Southside Road. Marks in the soil suggested that she had been dragged from a point near the road to the location where the body was found, about 10 rows into the orchard. Near a corner of the orchard, perhaps 25 feet from the road and 10 to 12 feet below it, officers found a pair of shoes and, nearby, a shallowly buried pair of blue jeans together with underwear and a sock. A distance of about 25 yards separated the clothing from the nearest end of the drag marks.

A pathologist testified that Ms. Perez died as the result of strangulation and blunt force injury. He observed bruising of the vaginal walls indicative of "very forceful sexual penetration," and also found evidence that she had been choked, beaten, and dragged. Two criminalists testified that deoxyribonucleic acid (DNA) testing revealed

the presence of semen from two donors, the more recent of whom was defendant. The other, more remote donor was the father of Ms. Perez's children, who testified that he had sex with her on the morning before she disappeared. Martinez was excluded as a donor.

After the discovery of the body, investigating officers failed in initial attempts to question defendant and Martinez because both men had left the labor camp. Defendant was arrested on September 4, 1997, and beginning the next day gave officers a series of what he later admitted were false accounts concerning the events of August 22-23, 1997. A complaint was filed on July 29, 1999, charging defendant and Martinez with murder, kidnapping for rape, rape, rape in concert, and mayhem. By August 2000, Martinez was reported to have a medical condition preventing his attendance at a preliminary hearing. At the trial in January 2001 it was stipulated that he had died of cancer.

Defendant testified that in August 1997 he was staying at the San Benito labor camp while working as an apple picker. On the night in question he, Martinez, Lionel Salcedo, and Ms. Perez left the bar together and rode in a cab to the camp. After they got out, defendant walked with Ms. Perez while expressing his desire to have sex. She at first demurred, saying she did not know him. However, he testified, she eventually did have sex with him at the side of the road. He testified that she acted of her own free will and never told him he "could not do that." He said that after the act of sex was finished, Martinez arrived, upset and angry "because he had been dancing and talking to her before." Defendant had intended to walk her home, but now returned to the camp, leaving her with Martinez, because the latter "was very angry and he told me he wanted to take her."[1]

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[1] Presumably this meant that Martinez expressed the intention to *take her home*. However, further inquiry on this point was cut off when the trial court sustained a seemingly unsound hearsay objection. Assuming the testimony meant that Martinez said he would walk Ms. Perez home, the reported statements fall outside the definition of hearsay because they were not "offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) They were presumably offered not to show what Martinez really meant to do, but to explain defendant's conduct in relinquishing the company of

The case was submitted to the jury on charges of murder (Pen. Code, § 187, subd. (a)), kidnapping for rape (former Pen. Code, § 208, subd. (d)), and rape (Pen. Code, § 261, subd. (a)(2)).[2] The jury returned verdicts of guilty on all three counts. The trial court imposed a sentence of 25 years to life on the murder charge and stayed the sentences on the other counts pursuant to Penal Code section 654. Defendant filed this timely appeal.

DISCUSSION

I. *Felony Murder Instruction*

A. Background

The only instruction given to the jury on the substantive law of murder was the following, which is based upon CALJIC Nos. 8.10 and 8.21: "Every person who unlawfully kills a human being during the commission or attempted commission of rape is guilty of the crime of murder in violation of Section 187 of the Penal Code. In order to prove this crime, each of the following elements must be proved: [¶] The human being was killed and the killing occurred during the commission or the attempted commission of the crime of rape. The unlawful killing of a human being, whether intentional or unintentional or accidental which occurred during the commission or attempted commission of the crime of rape is murder in the first degree when the perpetrator had a specific intent to commit the crime. Specific intent to commit rape and the commission or attempted commission of such crime must be proved beyond a reasonable doubt."

Ms. Perez to Martinez. Moreover, even if they had been offered as evidence of Martinez's real intentions, they would not be categorically barred, because they would be squarely within the "state of mind" exception to the hearsay rule. (Evid. Code, § 1250, subd. (a).)

[2] Charges of rape in concert (Pen. Code, § 264.1) and torture (Pen. Code, § 206) were dismissed on the prosecutor's motion. The kidnapping count was also amended by interlineation to plead the charge under former Penal Code section 208, subdivision (d)—the statute in effect at the time of the offense—rather than Penal Code section 209, subdivision (b)(1). (See statutory history in section III, below.)

The defense requested that the jury be further instructed in the language of CALJIC No. 8.27, which states, "If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of (felony [i.e., rape]), all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental. [¶] [In order to be guilty of murder, as an aider and abettor to a felony murder, the accused and the killer must have been jointly engaged in the commission of the ([rape]) at the time the fatal [blow was struck] [wound was inflicted].] . . ."

The record does not disclose the fate of this request except that the court did not give the requested instruction.[3] After the jury had deliberated for nearly a day, it sent two notes to the court. One note stated, "Elements. [¶] 1. A human being was killed. [¶] 2. Murder occurred." The other stated, "We are unclear of the criteria of the statute. To find Dominguez guilty of felony murder (187). Did Dominguez only need to be present at the time of Irma's death, or did he need to kill her himself. We are clear about the rape element of the crime." The court's handwritten response stated, "I cannot offer anything

[3] The proceedings to settle instructions do not appear in the transcript. However, after reading the instructions to the jury, the court asked in open court whether counsel "agree that I have read all the instructions that we agreed upon," to which both counsel replied, "Yes, Your Honor." The People do not refer to this exchange, perhaps because it appears too vague to establish invited error. The record contains a clear request for CALJIC No. 8.27 and no abandonment of that request, let alone an express withdrawal or a stated tactical reason for withdrawing it. (Cf. *People v. Gallego* (1990) 52 Cal.3d 115, 182-183 [putative error in giving requested instruction was invited and not cognizable on appeal despite absence of articulated tactical rationale, where instruction did not concern matter on which court had duty to instruct sua sponte].)

more than the wording of Insts 8.10 and 8.21 which I previously read."[4] Less than an hour later, the jury returned its verdict.

B. Error

The felony murder doctrine is codified in Penal Code section 189, which defines first degree murder to include "[a]ll murder which is . . . committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289." Although the statute refers only to "murder" so committed, it has long been construed to mean that *any* killing in the course of the commission or attempted commission of an enumerated felony may render the killer guilty of first degree murder. (*People v. Coefield* (1951) 37 Cal.2d 865, 868 [killing in course of robbery "is murder of the first degree by force of section 189 of the Penal Code, regardless of whether it was intentional or accidental"].) In *People v. Dillon* (1983) 34 Cal.3d 441, the Supreme Court reaffirmed that construction, concluding that the statute creates "two kinds of first degree murder" which "differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. From this profound legal difference flows an equally significant factual distinction, to wit, that first degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that

[4] The proceedings leading to the promulgation of this response were not transcribed.

are highly probable, conceivably possible, or wholly unforeseeable." (*Id.* at pp. 476-477, fn. omitted.)

In sum, the felony murder rule makes the perpetrator of an enumerated offense *automatically* guilty of murder when he personally causes the death of another in the course of committing the target offense. The rule goes further, however, by extending culpability beyond the actual killer to persons "jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate" the predicate felony. (*People v. Martin* (1938) 12 Cal.2d 466, 472.) As the Supreme Court has now clarified, culpability for felony murder based on a killing by a co-felon requires "both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death" (*People v. Cavitt* (2004) 33 Cal.4th 187, 193 (*Cavitt*). "The causal relationship is established by proof of a *logical nexus, beyond mere coincidence of time and place,* between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of *one continuous transaction*." (*Id.* at p. 193, italics added.)

The trial court here plainly erred by failing to provide the jury with any guidance whatsoever on this " 'complicity aspect' " of felony murder. (*People v. Pulido* (1997) 15 Cal.4th 713, 720, quoting Robinson, *Imputed Criminal Liability* (1984) 93 Yale L.J. 609, 618, fn. 25.) We need not consider whether the court had a duty to instruct on this point on its own motion, because such a duty plainly arose when defense requested CALJIC No. 8.27, the standard pattern instruction on this point. (See Pen. Code, § 1093, subd. (f) [upon party's request, court "shall" instruct jury "on any points of law pertinent to the issue"].)[5] Even if the defense had not requested an instruction, a duty to instruct arose

[5] The duty to instruct on request arises whenever the requested instruction is supported by evidence "substantial enough to merit consideration." (*People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) Of course this formulation requires some adjustment where the prosecution bears the burden on the point at issue; in that situation, the question is whether the record affords any substantial basis to doubt that the

when the jury itself sought guidance. (Pen. Code, § 1138 [when jurors express a "desire to be informed on any point of law arising in the case, . . . the information required must be given. . . ."].) When such a request is made, the trial court is under "a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. *Where the original instructions are themselves full and complete, the court has discretion* under [Penal Code] section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.]" (*People v. Beardslee* (1991) 53 Cal.3d 68, 97, italics added.) However, "a court must do more than figuratively throw up its hands and tell the jury it cannot help." (*Ibid*.) Here the record fails to establish that the court did more than "throw up its hands and tell the jury it [could not] help."[6]

Under *Cavitt*, the jury should have been instructed that in order to convict defendant of felony murder based on a killing perpetrated by Martinez, jurors had to find beyond a reasonable doubt both a causal connection and a temporal one between the

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prosecution's burden has been sustained. Otherwise the rule would impermissibly require the defendant to come forward with affirmative evidence before he would be entitled to an instruction focusing on a contended weakness in the prosecution case. In any event, defendant here was entitled to an instruction on complicit felony murder if only because his own testimony raised the question whether Martinez had killed the victim independently of any rape perpetrated by defendant.

[6] The jury's inquiry and the court's response were discussed at sentencing when defense counsel expressed concern over the whereabouts of the notes from the jury. In an apparent attempt to informally settle the record, defense counsel stated, "[T]he tenor of the note was that if the jury found that [defendant] was present at [the] time of the killing, could that be a basis for a guilty verdict?" The court added, "And the Court answered that by merely referring back to the instruction, the number, that defined the crime. [¶] . . .[¶] . . . [T]he Court merely made a notation, [p]lease read instruction such and such . . . [¶] . . . [¶] . . . which states the law. . . . [¶] . . . [¶] . . . And we felt that we didn't want to comment directly on that point. And the law is very clear, that *he has to do an act, as the instruction read*." (Italics added.) We fail to discern how the instruction conveyed the meaning thus attributed to it, which in any event bears little resemblance to the principles governing complicit felony murder.

felony committed or attempted by defendant, and the killing. (*Cavitt*, *supra*, 33 Cal.4th at p. 196.) The temporal relationship did not require that defendant be present at the time of the killing, but required that the felony and the killing constitute part of one continuous transaction. (*Ibid*.) The causal element consists of a logical nexus, established by the evidence, between the felony and the killing. (*Ibid*.) The causal element was not present if the connection between the felony and the killing consisted only of a mere coincidence of time and place.

The question here is whether we can declare beyond a reasonable doubt that a jury so instructed would have found defendant guilty of felony murder. (See *People v. Sakarias* (2000) 22 Cal.4th 596, 625; *People v. Hughes* (2002) 27 Cal.4th 287, 351-353.) We cannot so state in the face of the jury's own inquiry to the court, i.e., "Did Dominguez *only need to be present* at the time of Irma's death, or did he need to kill her himself?" (Italics added.) This question establishes directly and without need of inference that the jurors were seriously considering the possibility that defendant's involvement in the killing did not go beyond mere presence at the scene. We must assume that the jury was led to ask this question not by idle curiosity, but by a failure on the part of the prosecution to persuade one or more jurors that defendant had anything to do with the killing beyond being present. Under *Cavitt*, of course, neither of the alternatives posited by the jury correctly stated the law. Defendant did not have to kill the victim himself, but neither could he be convicted based on mere presence at the scene. The jury's question thus revealed that it was contemplating two factual scenarios, one compatible with guilt and one not. The question itself raises a strong possibility that the jury ultimately adopted the scenario inconsistent with guilt, and yet returned a guilty verdict. That possibility alone precludes a finding of harmless error.

The People nonetheless urge us to declare the error harmless because, they contend, the jury must have understood the instructions it received as requiring that defendant be the "actual killer" of Ms. Perez. In this view, the jury parsed the

instructions given, concluded that defendant could only be guilty if he himself was the killer, and found that he was in fact the killer, obviating any issue of complicit felony murder. But the People's reading is not the only one the jurors could reasonably adopt. It relies on the reference in the first part of the instructions to the culpability of a "person who unlawfully kills" the victim during the commission of a rape. (CALJIC No. 8.10.) Immediately following this section, however, is an enumeration of the elements of culpability, *entirely in the passive voice*, authorizing a finding of guilt based on findings that a "human being *was killed*" and the "unlawful killing . . . *occurred* during the commission or attempted commission of the crime of rape." (See CALJIC No. 8.21.) (Italics added.) The People's construction hinges on the premise that this later language would necessarily be understood as logically subordinated to the earlier language, and thus to address only a killing by the perpetrator of the predicate felony, because the two portions are bridged by the phrase, "In order to prove *this crime* . . . ." (Italics added.)

It may well be that any careful and impartial lawyer or judge would adopt this construction. But the question is how it was understood and applied by lay jurors. More precisely, the question is whether we can state beyond a reasonable doubt that the jury adopted the People's construction. Again we are constrained by the fact of the jury's inquiry addressed to the very point at issue. If the People's reading was so unmistakably correct, the jury would never have had occasion to ask whether defendant could be guilty if he were "only . . . present at the time of Irma's death." By so asking, the jurors explicitly confessed that they found the instructions confusing and their application uncertain. There is simply no way to assume that when denied assistance by the court, they returned to their deliberations and correctly found the answer that had theretofore eluded them.[7]

[7] Further evidence that the jurors' perplexity centered on the very point at issue is found in their other note to the court, which was not interrogative in itself but which apparently accompanied the request for further instruction. That second note contained a

The People also contend that the failure to instruct on principles of complicit felony murder was harmless because the evidence of record proves, "far beyond a reasonable doubt, that [defendant] was complicit in Perez's murder." The question, however, is not whether we believe the record so demonstrates but whether we can say beyond a reasonable doubt that the jury, if properly instructed, would have so found. In fact we cannot answer either question in the affirmative. The whole theory of the prosecution appears to have been that defendant himself killed Ms. Perez. Once the jury expressed doubt about it this hypothesis, it was deprived not only of legal guidance, but of any solid evidentiary basis on which to determine what involvement, if any, defendant had in the killing. Defendant himself provided the only direct account of the events of that night, and while the jurors rejected his testimony that he had consensual sex with Ms. Perez, they evidently took other parts of his testimony seriously enough to doubt the prosecution's hypothesis that he killed her.

The People assert that the evidence showed that Ms. Perez had been raped with extreme force and that other evidence raised the likelihood that she had been beaten before she was raped. The People cite no record support for the latter assertion, which is now being made in this court for the first time, and we have found none.[8] The finding that Ms. Perez was raped, and the evidence that the rape may have been particularly brutal, would have supported a finding that the rape left Ms. Perez in a weakened state which contributed to her death. Such a finding would certainly establish the requisite causal connection. (See *Cavitt*, *supra*, 33 Cal.4th at p. 204 [binding of victim and leaving her alone with alleged killer established requisite causal relationship between defendants'

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list of two "[e]lements," i.e., "1. A human being *was killed*. [¶] 2. Murder *occurred*." (Italics added.)

[8] We have searched not only the trial record but materials outside that record, such as the probation report, and have failed to find any basis for respondent's assertion.

participation in robbery and killing].) However if the jury did not believe defendant participated in the killing itself it might well not have believed that he inflicted the injuries on which the People rely in contending that he brutally raped her. Again, the jurors' inquiry suggested that they might have found that defendant's involvement stopped at mere presence. More to the point, they were not told that they had to find a causal connection between defendant's rape and Ms. Perez's killing. Once they entertained the possibility that Martinez was the killer, as their note to the court established they did, any attempt to determine the relationship—if any—between the rape and the killing was inherently tinged with conjecture. Had the jury been instructed that such a relationship had to be found, it could well have entertained a reasonable doubt about its presence.

The People assert that under *Cavitt*, defendant was "guilty of felony-murder, as a matter of law, once the jury found that [defendant] had [kidnapped] and raped Perez." This contention apparently rests on suggestions in *Cavitt* that the requisite logical nexus will rarely be lacking where the intended victim of the predicate felony is also the victim of the killing. Thus the court endorsed one appellant's concession that "cases that raise a genuine issue as to the existence of a logical nexus between the felony and the homicide 'are few indeed,' " adding that it was "difficult to imagine how such an issue could ever arise when the target of the felony was intentionally murdered by one of the perpetrators of the felony." (*Cavitt, supra,* 33 Cal.4th at p. 204, fn. 5.) In a separate concurrence Justice Chin asserted the same point even more strongly: "This requirement [of a logical nexus] will rarely be significantly at issue in a felony-murder case. Rarely will a killing during a felony have no connection to that felony, but merely be coincidental. Indeed, it may be only in law-school-type hypotheticals . . . that the required causal relationship might be missing. Such scenarios are exceedingly unlikely in real life. And certainly if, as is usually the case (and was here), the felony's target was killed, it is hard even to

hypothesize a factual scenario in which there would be no connection between the felony and the killing." (*Id.* at p. 213 (conc. opn. of Chin, J.).)

We believe these passages are intended only to say that where the evidence shows a killing following closely upon a jointly committed felony, it will rarely fail to also establish the requisite causal connection between those two events.[9] Certainly the court did not intend to create a presumption of guilt or to confer, as the People's argument would suggest, an unprecedented appellate power to declare a defendant guilty "as a matter of law." Rather the court meant to signal the rarity of situations in which the circumstances surrounding a jointly committed felony and a following murder are insufficient to establish a logical nexus between the two.

Nonetheless, as the court observed, the circumstances connecting the felony to the killing must be *shown* by sufficient *evidence* to justify a reasonable inference that the relationship went beyond mere coincidence of time and place: "The causal relationship is established by *proof* of a logical nexus." (*Cavitt, supra,* 33 Cal.4th at p. 193, italics added.) Such a nexus is not found in the air; it depends on "objective *facts* that connect the act resulting in death to the felony the nonkiller committed . . . ." (*Id.* at p. 205, italics added; see *id.* at p. 211 (conc. opn. of Werdegar, J.).) The court's remarks about the rarity of cases in which the required connection is lacking must be understood in light of the fundamental requirement that all facts necessary to guilt be affirmatively shown by the evidence. Where the circumstances surrounding the felony and the killing are not clearly shown, it remains entirely competent for the jury to say that it is unable to

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[9] We also observe that the quoted passage from the majority opinion refers to situations in which "the target of the felony was intentionally murdered by *one of the perpetrators of the felony*." (*Cavitt, supra,* 33 Cal.4th at p. 204, fn. 5, italics added.) For this language to apply here, it would have to appear that Martinez aided and abetted, or was otherwise guilty of, defendant's rape of Ms. Perez. The evidence was far too sketchy for us to declare that the jury must have so found.

determine with the requisite degree of confidence that a causal connection has been shown.

Thus if the evidence here affirmatively revealed the circumstances surrounding the rape and the killing of Ms. Perez, the case might be found to fall squarely within the template of *Cavitt* itself, where the non-killer felons left the victim in a weakened and endangered state. Or the evidence might show some other connection beyond a coincidence of time and place. In that event, of course, we would not hesitate to declare the instructional error harmless beyond a reasonable doubt. Instead, however, the evidence failed entirely to establish articulable "objective facts" establishing a causal connection between the rape of Ms. Perez and her killing. In the absence of a specific factual scenario, probably or necessarily found by the jury, we are powerless to say that the jury must have found, or that a properly instructed jury would have found, the requisite nexus. This is not to say that a finding of such a nexus by a properly instructed jury could not be sustained on this record. We say only that the circumstances surrounding the rape and killing were so vaguely delineated by the evidence that a properly instructed jury could well have failed to find the requisite connection beyond a reasonable doubt.

In other words, once the jury posited Martinez as the killer, the evidence provided little if any basis to posit *any* particular factual scenario. The jury could well entertain a reasonable doubt not because the evidence affirmatively showed the killing to be logically divorced from the rape, but because the evidence failed to establish, with the requisite degree of confidence, concrete circumstances reflecting a connection between the felony and the murder beyond coincidence of time and place. No such factual vacuum was presented in *Cavitt* or any of the cases it considered, real or hypothetical. Given that the present case *does* present such a vacuum, we cannot say beyond a reasonable that a properly instructed jury would have been persuaded beyond a

reasonable doubt that the requisite nexus was present. We are therefore compelled to reverse.

II. Mayberry Instruction

Defendant contends that the trial court erred by failing to instruct the jury concerning the defense described in *People v. Mayberry* (1975) 15 Cal.3d 143, 155, where the court held that a defendant lacks the requisite intent to commit rape, and cannot be guilty of that offense, if he acts under a "reasonable and bona fide belief that [the] prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse." The defense is embodied in CALJIC No. 10.65, which defendant contends the trial court should have read to the jury on its own motion.

Of course, "[t]he trial court has a sua sponte duty to instruct on defenses where there is substantial evidence to support the instruction. [Citation.]" (*People v. Felix* (2001) 92 Cal.App.4th 905, 911.) However, a *Mayberry* instruction "should not be given absent substantial evidence of *equivocal conduct* that would have led a defendant to reasonably and in good faith believe consent existed *where it did not*." (*People v. Williams* (1992) 4 Cal.4th 354, 362, italics added.) Here the jury was properly instructed that rape requires an act of sexual intercourse with another "*against that person's will* by means of force, violence, duress, menace, or fear of immediate and . . . unlawful bodily injury." (Italics added.) The record provides no basis for finding this element proven while sustaining a *Mayberry* defense, which goes to the defendant's state of mind. There was no evidence that Ms. Perez gave an *ostensible but ineffectual* consent. Accordingly there was no error in failing to give a *Mayberry* instruction sua sponte.

We find support for this conclusion in *People v. Burnett* (1992) 9 Cal.App.4th 685. The defendant there testified that the prosecutrix accosted him on the street and consented to have sex with him. The prosecutrix testified that the defendant abducted her, took her to a place of seclusion, and raped her. The trial court refused to give a *Mayberry* instruction, saying, " 'this isn't a matter of a jury inferring a reasonable good

faith belief from what she testified, but that they would have to disregard her testimony and it seems to me if they do that, they are going to acquit him on the consent instruction.' " (*Id.* at p. 690.) The Court of Appeal agreed: "When a *Mayberry* defense is raised, the jury will *first consider the victim's state of mind* and decide whether or not there was consent to the acts. *If they determine that there was no consent*, the jury will view the events from the defendant's perspective to determine whether the manner in which the victim expressed lack of consent was so equivocal as to cause the accused to assume that there was consent *where in fact there was none*. [Citation.] [¶] . . . [Citation.] . . . [Citation.] . . . A jury viewing the evidence from appellant's perspective would have found no basis to conclude that Maria D.'s conduct misled appellant into an *erroneous* belief that she consented to have sex with him. . . . *Appellant did not testify that he erroneously deduced consent* from Maria D.'s lack of struggle or failure to attempt to escape, and the substance of his testimony negates that possibility. [¶] . . . *[I]f the jury had credited appellant's testimony it would have found that the prosecution had failed to prove lack of consent*, and it would have acquitted on that basis." (*Ibid.*, fn. omitted, italics added.)

Defendant contends that a *Mayberry* instruction was required under *People v. May* (1989) 213 Cal.App.3d 118, but that case differs materially from this one. The victim herself testified there, giving an "enigmatic" account of her behavior toward the defendant. (*Id.* at p. 126.) The court noted that she gave few "manifestation[s] of nonconsent." (*Ibid*.) The jury could thus have believed her testimony, at least in material part, and still have concluded that the defendant reasonably thought she had consented to have sex. Here there was no basis for the jury to conclude that the victim seemed to consent without actually intending to do so.

Similarly, there was no evidence here from which the jury could find that Ms. Perez outwardly manifested consent *without intending to actually consent*. The only evidence on the subject was defendant's testimony that after initial expressions of

reluctance, she voluntarily removed her clothes and engaged in sex. There was simply no basis for the jury to credit this testimony and yet conclude that Ms. Perez did *not* in fact consent. In the absence of evidence of a discrepancy between her conduct and her actual state of mind, any manifestation of consent by her was evidence of actual consent. There was no evidence from which to infer that her state of mind differed from her manifest intentions. Accordingly, had the jury believed defendant's testimony on that subject, there would have been no basis to find that the act occurred against her will.

Defendant asserts than Ms. Perez behaved equivocally by accompanying him and his companions to the labor camp despite at least two opportunities to go home. But again, if the jury believed that this conduct constituted an outward manifestation of consent, by itself or with other evidence, then it had no basis to reject the defense theory of *actual* consent. The real gist of the argument seems to be that, once she behaved equivocally, Ms. Perez could not effectively withhold her consent. A similar point was emphatically rejected in *People v. Williams, supra,* 4 Cal.4th at page 363, where the Court of Appeal had held a *Mayberry* instruction warranted by the fact, among others, that the victim " 'willingly accompanied [Williams] to the hotel after spending several hours in his company, [and] that she did not object when the hotel clerk handed him a bedsheet.' " Quoting the dissent in that decision, the Supreme Court declared that viewing such antecedent conduct as sufficient grounds for a *Mayberry* defense would " 'revive the obsolete and repugnant idea that a woman loses her right to refuse sexual consent if she accompanies a man alone to a private place.' " (*Ibid*.)

We detect no error in the failure to give a *Mayberry* instruction.

III. *Asportation*

A. Background

Defendant contends that the facts apparently found by the jury were insufficient to establish the asportation, or movement, necessary to convict him of kidnapping for purposes of rape. Although the law on this subject is fraught with uncertainty, we are

compelled to conclude that defendant is correct and that the facts here were insufficient to support a conviction for kidnapping for rape.

As presented to the jury in closing arguments, the prosecution theory was that defendant, with or without the assistance of Martinez, forced Ms. Perez from Southside Road down a 12-foot embankment into the walnut orchard, where he (or they) raped and murdered her before dragging her body some 250 feet further into the orchard to the location where it was eventually discovered.[10] The prosecutor impliedly placed the rape where her shoes and jeans were found, near a corner of the orchard at the intersection of Southside and Hospital Roads. Testimony suggested that these items were found about 25 feet from Southside Road.[11] The People seem to accept for purposes of appeal that the

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[10] This theory is reflected in the following excerpts from the prosecutor's jury argument: "You heard testimony from Lieutenant Covell regarding finding the victim's jeans the next day. There was testimony from Lieutenant Covell also that indicates there was a 10- to 12-foot drop where she was raped and murdered."

"[S]he went walking down Southside Road. We know where her clothes were found. We know where her body was located. [Defendant] had to take her down . . . 10 or 12 feet down. He took her off the road. [¶] She didn't voluntarily go with him, no. She was unlawfully moved by the use of physical force. . . . The movement was for a substantial distance[,] more than that being slight or trivial, meaning a couple of feet. Something like that. It's more. It's substantial, because it was into an orchard and down a 12-foot embankment. [¶] . . . [H]e took her into an orchard, down a gully. No cars could see her. Into the orchard in the rural part of the county that is clearly secluded."

"[Defendant] and Jose Alfredo Martinez, who eventually caught up, took her into that field, down that 10- to 12-foot gully and brutally raped her and killed her. . . . [¶] . . . [¶] And after [defendant] raped her, him and Martinez beat her. They drug her. They drug her into that field further and then buried the body . . . ."

[11] This testimonial estimate is roughly consistent with distances the jury could have extracted from a drawing of the scene, admitted apparently without objection or limitation, which included certain measurements. Although the distances here at issue were not set forth in the drawing, they could easily have been calculated once the scale was determined from the distances given. Our own calculations by this method reveal a horizontal distance of some 19 feet from the edge of the road to the shoes, 32 feet from the edge of the road to the jeans, and 26 feet from the shoes to the jeans. Elementary geometry yields the further information that, assuming a vertical distance of 12 feet and horizontal distances of 20 feet and 30 feet respectively, the actual distances to the shoes

rape as found by the jury occurred on near the embankment immediately adjacent to Southside road. The People do not contest that the kidnapping conviction rests on a movement as short as 10 to 12 feet, but contend that such a movement was sufficient here to support conviction.

B. Thumbnail History of California Kidnapping Law

The California Supreme Court has acknowledged the "decidedly nonlinear" history of California kidnapping law. (*People v. Rayford* (1994) 9 Cal.4th 1, 14 (*Rayford*).) In no respect has that history been less "linear" than in connection with the asportation requirement, whose development resembles less a coherent picture gradually emerging from painstaking judicial or legislative elaboration than a continually shifting kaleidoscope of confused and conflicting conceptions, baffling proclamations, and inconsistent results supported by perplexing, even self-contradictory rationales.
The oldest and most "historically orthodox" form of kidnapping is found in Penal Code section 207, subdivision (a), which was first enacted in 1872. (*People v. Knowles* (1950) 35 Cal.2d 175, 193 (*Knowles*) (dis. opn. of Edmonds, J.).) The gravamen of that offense, now commonly known as "simple kidnapping," is the taking of a person by force or fear and "carr[ying]" him or her "into another country, state, or county, or into another part of the same county." (Pen. Code, § 207, subd. (a).) This in substance is the crime as it existed at common law and under the earlier Jewish law. (*Knowles, supra,* 35 Cal.2d at p. 193 (dis. opn. of Edmonds, J.).)

Beginning in the early 20th Century, various American jurisdictions began recognizing, as a distinct and more serious offense, kidnapping undertaken *for ransom*. (*Knowles, supra,* 35 Cal.2d at pp. 193-194 (dis. opn. of Edmonds, J.).) In 1901 California joined this trend by adopting Penal Code section 209, which went further than

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and the jeans from the nearest respective points on the road, were about 23 feet and 32 feet.

most jurisdictions by criminalizing the taking away of a person not only for ransom or extortion but also for robbery. (*Knowles, supra,* 35 Cal.2d at p. 194.) In 1933, as part of a nationwide response to a perceived "epidemic" of kidnappings for ransom, the California Legislature amended Penal Code section 209 to make violations of that section punishable by death when the victim suffered bodily harm.[12] (*Knowles, supra,* 35 Cal.2d at p. 180 (maj. opn.).) The amendment also modified the definition of the offense, extending culpability to " '[e]very person who carries away any individual by any means whatsoever *with intent to hold or detain, or who holds or detains*, such individual for ransom, reward or to commit extortion or robbery.' " (*Id.* at p. 180 (maj. opn.), quoting former Pen. Code, § 209, Stats. 1933, ch. 1025, § 1, p. 2617.) In 1950 a divided court held that this language marked a "deliberate abandonment of the requirement of movement of the victim" under the statute, thereby " 'chang[ing] the offense . . . from one which required the asportation of the victim to one in which the act of seizing for ransom, reward, or to commit extortion or robbery became a felony.' [Citation.]" (*Ibid*., quoting *People v. Raucho* (1935) 8 Cal.App.2d 655, 663.)

The Legislature thereupon amended Penal Code section 209 to distinguish between kidnapping for ransom or extortion, which could be committed merely by "hold[ing] or detain[ing]" the victim, and kidnapping for robbery, which could only be accomplished by "kidnap[ping] or carr[ying] away" the victim. (Stats. 1951, ch. 1749, § 1, p. 4167.) Almost immediately, however, the Supreme Court vitiated this distinction by declaring that in cases of kidnapping for robbery, "[i]t is the fact, not the distance, of

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[12] "Bodily harm" was so broadly defined that it was held to be more-or-less inherent in any sex crime. (*People v. Chessman* (1951) 38 Cal.2d 166, 185 (*Chessman*), quoting *People v. Brown* (1947) 29 Cal.2d 555, 560 ["The forcible rape itself was bodily harm"].) As a result the death penalty could be levied against one who moved a person in connection with a robbery and then committed forcible sex offenses against that person. (*Chessman*, *supra*, 38 Cal.2d at pp. 172, 185, 193; *People v. Wein* (1958) 50 Cal.2d 383, 391, 392-393, 412.)

forcible removal which constitutes kidnaping . . . ." (*Chessman, supra,* 38 Cal.2d at p. 192; see *Rayford*, *supra*, 9 Cal.4th at pp. 14-15.) In that case the court upheld a capital sentence based, in one count, on moving a victim 22 feet from her own car to the defendant's. (*Chessman*, *supra*, 38 Cal.2d at pp. 186, 192.) A few years later the court sustained findings of aggravated kidnapping based on movements "ranging from a few feet up to more than 50 feet." (*People v. Wein, supra,* 50 Cal.2d at pp. 399-400.) The asportation in one count consisted of the defendant " 'help[ing]' " one victim " 'up on the bed,' " a distance of four or five feet. (*Id.* at p. 412 (dis. opn. of Carter, J.).)

Three years later, in *Cotton v. Superior Court* (1961) 56 Cal.2d 459 (*Cotton*), the court "implicitly declined to extend the *Chessman/Wein* rule to [Penal Code] section 207 simple kidnapping." (*Rayford*, *supra*, 9 Cal.4th at p. 15.) The court in *Cotton* ordered an indictment dismissed insofar as it charged simple kidnapping based on shoving or dragging participants in a labor dispute over short distances. In holding such movements insufficient to support prosecution, the court held that if Penal Code section 207 were understood to apply in such cases, every assault could be prosecuted as a kidnapping "as long as the slightest movement was involved." (*Cotton, supra,* 56 Cal.2d at p. 465.) Accordingly, where a movement was "incidental" to an alleged assault, "Penal Code, section 207 should not have application, as the Legislature could not reasonably have intended that such incidental movement be a taking '. . . from one part of the county to another.' " (*Ibid*.)

In 1969 the court repudiated *Chessman* and *Wein*, explicitly overruling the latter. (*People v. Daniels* (1969) 71 Cal.2d 1119, 1139-1140 (*Daniels*).) The court declared that the amendments to Penal Code section 209 in 1951 were intended "to exclude from its reach not only 'standstill' robberies [citation] but also those in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself. [Citations.]" (*Daniels, supra,* 71 Cal.2d at p. 1139.)

This requirement has now been codified, if somewhat infelicitously, in Penal Code section 209, subdivision (b)(2).[13] However, the amendment accomplishing that result had not taken effect when the offenses here were committed. Further, at that time kidnapping for *rape* was not included in Penal Code section 209, but was instead found in Penal Code section 208, subdivision (d) (§ 208, subd. (d)). (Stats. 1990, ch. 1560, § 1, p. 7329; see Stats. 1997, ch. 817, §§ 1 [repealing provision], 2 [amending Pen. Code, § 209, subd. (b) to, inter alia, include kidnapping for rape]; 18 [disclaiming any exculpatory effect from repeal].) Accordingly, the standard of asportation applicable to the present offenses is the "two-part *Daniels* . . . test" (*Rayford*, *supra*, 9 Cal.4th at p. 20), i.e., whether the movement (1) was more than "merely incidental to the commission of the robbery," and (2) whether it "substantially increase[d] the risk of harm over and above that necessarily present in the crime of [rape] itself." (*Daniels*, *supra*, 71 Cal.2d at p. 1139.)

C. Analysis

Consistent with *Daniels*, the jury here was instructed that kidnapping for rape consists in relevant part of the unlawful movement of a person, by force or fear, "for a substantial distance where the movement is not merely incidental to the commission of

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[13] We say "somewhat infelicitously" because the statute omits the requirement, as stated in *Daniels*, that the movement must " '*substantially*' increase the risk of harm to the victim. [Citation.]" (*People v. Martinez* (1999) 20 Cal.4th 225, 232, fn. 4, italics added.) The Legislature's own recitals support an argument that this omission was inadvertent, for the Legislature declared an intention to adopt "the two-prong test of asportation for kidnapping, as set forth in [*Daniels, supra*,] 71 Cal.2d [at p.] 1139 . . . pursuant to the decision of the California Supreme Court in [*Rayford, supra*,] 9 Cal.4th [at p.] 20." (Stats. 1997, ch. 817, § 17, No. 12 West's Cal. Legis. Service, p. 4460.) Nothing in *Rayford* hints at a relaxation of the *Daniels* requirement of a *substantial* increase in the risk of harm to the victim. Indeed, on the page cited by the Legislature, the court adopted the defendant's argument on the very question "whether the increase in risk of harm to the victim must be 'substantial.' " (*Rayford, supra,* 9 Cal.4th at p. 20.) The 1997 attempt to codify *Daniels* thus stands as yet another in a lengthy succession of futile or counterproductive attempts to draw an intelligible line between punishable "asportation" and penally inconsequential movement of the victim.

the rape and where the movement substantially increases the risk of harm to the person over and above that necessarily present in the crime of rape itself." The question is whether the jury's finding that these conditions were met can be sustained on the present record. The question, however, is not the sufficiency of the evidence to support the facts found, but the sufficiency of the facts apparently found (as reflected in the argument of the prosecutor below and the arguments of both parties on appeal) to support the verdict of guilt. We have concluded that the movement thus established—20 or 30 feet from a road to the bottom of a roadside embankment—was, as a matter of law, merely incidental to the commission of the rape and was thus insufficient to support a separate conviction for aggravated kidnapping.

It must be conceded at the outset that the *Daniels* test has yielded neither a clear test for asportation nor a consistent body of results in the many published decisions attempting to apply it. A core difficulty lies in its characterization of asportation as movement that is *not* "merely incidental to the commission" of the underlying offense. (*Daniels*, *supra*, 71 Cal.2d at p. 1139.) In the present context, the meaning of this phrase presents a decidedly vexing problem, which the published decisions do little to solve, and much to exacerbate.

To say that something is "incidental" to something else is to assert an association, correlation, or concomitance between the two things. But the word usually conveys the further connotation that the relationship is peripheral or insignificant. Thus the leading dictionary of English defines "incidental" as "[o]ccurring or liable to occur in *fortuitous or subordinate conjunction* with something else of which it forms *no essential part*; *casual*." (Oxford English Dict. (2d ed. 1989) <http://dictionary.oed.com> [as of Dec. 14, 2004] italics added; see American Heritage College Dict. (3d. ed. 1997), p. 687 ["1. Occurring or likely to occur as an unpredictable or minor accompaniment. 2. Of a minor, casual, or subordinate nature . . . ."].)

A certain inherent tension may be seen to exist between the concept of a thing that *tends to accompany* another thing, and one that is inessential or insignificant in relation to that other thing. Traits that tend to accompany things are often, at least in some contexts, characteristic, significant, or essential to them. In this light, the term "incidental" contains at least the germ of an oxymoron; it may be applied to a common (arguably "essential") trait or concomitant, yet may designate that trait as minor or secondary (and in that sense "inessential"). Given this inherent potential for paradoxical applications, courts and legislatures might do well to eschew the term "incidental" whenever a simpler term can be found. Instead, however, "incidental" is widely used throughout the law, with context generally determining which of its two aspects dominates its application. In many if not most settings, it is given the meaning of secondary, inessential, or minor.[14] In some contexts, however, emphasis is placed on the relational aspect of the term.[15]

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[14] See *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 514, 417 [filling wetland to permit widening of adjacent road was not an "incidental public service" permitted under the Coastal Act]; *San Bernardino Valley Audubon Society v. City of Moreno Valley* (1996) 44 Cal.App.4th 593, 602 [construing provision of federal endangered species act authorizing the "take of endangered species 'incidental to, and not the purpose of, the carrying out of an otherwise lawful activity' "]; *Davis v. Pine Mountain Lumber Co.* (1969) 273 Cal.App.2d 218, 222-223 [occasional short drives of forklift from one lumber yard to another constituted "incidental" use for purposes of Vehicle Code exemption for vehicles " 'only incidentally operated or moved over a highway' "; citing and quoting *Kelly v. Hill* (1951) 104 Cal.App.2d 61, 65]; *People v. Adame* (1967) 250 Cal.App.2d 380, 384 [search is "incidental to an arrest" if limited in specified respects]; *Southern Cal. Gas Co. v. ABC Construction Co.* (1962) 204 Cal.App.2d 747, 752 [applying rule that "incidental" third party beneficiary cannot sue to enforce contract]; *Currie v. Stolowitz* (1959) 169 Cal.App.2d 810, 814 [applying statute permitting contractor to perform work for which he lacks required license if work is "incidental and supplemental to the performance of work" for which he is licensed]; *Meadows v. Emett & Chandler* (1948) 86 Cal.App.2d 1, 3-4 [contract of hire providing for commission on "incidental personal business"]; *Medico-Dental etc. Co. v. Horton & Converse* (1942) 21 Cal.2d 411, 420 [restrictive covenant was "not incidental or subordinate to the main object of the lease" and had to be deemed a dependent covenant].

[15] See *HIH Marine Ins. Services, Inc. v. Gateway Freight Services* (2002) 96 Cal.App.4th 486, 494 [airline's agent, in holding cargo for delivery to consignee, was

In the context of the movement required for aggravated kidnapping, the term "incidental" cannot be intended in the merely associative sense because a movement *not* "incidental" in this sense, i.e., one wholly dissociated from the target offense, would fall outside the statutory description of aggravated kidnapping: carrying away the victim "to commit" the target offense. (Pen. Code, § 209(b)(1); cf. former Pen. Code, § 208(d) [defining crime as "kidnap[ing] with the intent to commit rape"].) It would seem to follow that the requirement of a movement that is "not merely incidental" means one that is essential, necessary, or instrumental to the offense, i.e., *more than* secondary, minor, or inessential. In this view, moving a rape victim across a room (or similar space) to a bed would be "merely incidental" because it serves only the comfort and convenience of the perpetrator, who would presumably commit the offense without it. Moving a rape victim from a crowded bar into a dark alley, in contrast, would be "more than incidental" because essential to the commission of the rape; without it, the rape would not occur.

This reading of the term "incidental" might furnish a suitable rule of decision had it not been peremptorily rejected in *People v. Earley* (1975) 14 Cal.3d 122, 130 (*Earley*), footnote 11. The court there disapproved certain cases insofar as they "suggest[ed] that movement is not 'merely incidental' to a robbery where the movement is 'necessary' or 'essential' to the commission of the robbery or 'an important part of [the defendant's] criminal objective, without [which] the crimes would not have been committed.' [Citations.]" (*Ibid*.) "Although one definition of 'incidental' is 'nonessential,' [citation]" the court continued, "that manifestly was not the sense in which the word

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performing service "incidental to air carriage" so as to be entitled to limitation of liability in air waybill]; *Fraenkel v. Trescony* (1957) 48 Cal.2d 378, 380-381 [contractor's licensing exemption for construction "incidental to farming"]; *State Comp. Ins. Fund v. Ind. Acc. Com.* (1952) 38 Cal.2d 659, 660-663 [altercation "incidental" to employment so as to be covered by workers' compensation]; *Robbins v. Yellow Cab Co.* (1948) 85 Cal.App.2d 811, 814 [injury while picking up paycheck not sustained while "performing service growing out of and incidental to employment" so as to make workers' compensation exclusive remedy].

'incidental' was used in *Daniels*. Movement across a room to facilitate a robbery might be essential to the commission of the robbery but be incidental thereto within the meaning of *Daniels*." (*Ibid*.)[16] Unfortunately, while the *Earley* court seemed prepared to proclaim unequivocally what "manifestly was not" contemplated by the *Daniels* formula, it was less willing, indeed it failed entirely, to supply any prescriptive standard in place of the one thus denounced. The main effect of the quoted passage is to bar lower courts from applying the dictionary meaning of "incidental" while denying them any meaningful guidance in its place. The court itself later acknowledged that its decisions "offer little guidance" as to what constitutes a "substantial" distance under *Daniels*. (*Rayford*, *supra*, 9 Cal.4th at p. 14.) This statement is no less accurate today than when it was made.

Not surprisingly, lower courts have groped for sensible results with little success. In *People v. Salazar* (1995) 33 Cal.App.4th 341, 346-349 (*Salazar*), the court held that the defendant's "dragging [the victim] 29 feet from [a] motel hallway through [a] motel room and into [a] motel bathroom" was not merely incidental to the rape of the victim, and was sufficient to establish kidnapping for rape. In seeking to explain this holding the court writhed perceptibly on the horns of the dilemma created by *Earley*, offering several dubious and seemingly paradoxical rationales, including that (1) the movement was "not natural to the crime" because the defendant could have raped the victim on the walkway "and avoided moving her at all"; (2) the movement "was not necessarily related to the rape crime itself," but "a jury could reasonably conclude it was an essential part of

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[16] In *People v. Williams* (1970) 2 Cal.3d 894, the Supreme Court itself had quoted, with seeming approval, definitions of "incidental" including " 'Subordinate, non-essential, or attendant in position or significance: as a: occurring merely by chance or without intention or calculation; occurring as a minor concomitant: . . . b: being likely to ensue as a chance or minor consequence . . . c: lacking effect, force, or consequence . . . d: presented purposefully but as though without consideration or intention. . . .' " (*Id.* at p. 902, fn. 2, quoting Webster's Third New Internat. Dict. (1961) p. 1142.)

Salazar's plan to avoid detection and to make the crime easier to commit"; and (3) "while the movement was perhaps incidental to Salazar's particular plan for rape, it was not incidental to the actual commission of the crime itself." (*Id.* at p. 347.) The court sought to distinguish cases cited by the defendant on the ground that they "involved an alleged kidnapping in the course of a robbery where movement was necessary to complete the crime and where the movement was essentially in a confined area." (*Ibid*., fn. omitted.) In contrast, the court wrote, the jury in that case "could find the movement crossed significant boundaries (from the public walkway into the motel room bathroom) and was not a necessary or a natural part of committing the rape." (*Ibid.*, citing *People v. Williams, supra,* 2 Cal.3d 894; *People v. Killean* (1971) 4 Cal.3d 423; *People v. Smith* (1971) 4 Cal.3d 426.)

The *Earley* dilemma also bedeviled the court in *People v. Shadden* (2001) 93 Cal.App.4th 164 (*Shadden*), which concluded that dragging a video store owner nine feet into a rear storeroom was sufficient asportation to sustain a conviction of kidnapping for rape. Rejecting a contention that the movement was incidental and insubstantial, the court observed that (1) rape does not necessarily require movement; (2) the fact that the defendant dragged a victim to a place other than where he found her supported an inference "that the movement was neither part of nor necessary to the rape [citations]"; (3) the jury could also infer "that the movement was not incidental to the attempted rape because Shadden only began the sexual attack after he moved her [citations]"; and (4) the movement did not have to be "great in distance" because it "change[d] the victim's environment." (*Id.* at p. 169.)

The *Salazar* and *Shadden* decisions both seem to embrace two irreconcilable conceptions of the term "incidental."[17] On one hand they seem to suppose that a

[17] These cases were both criticized, on grounds similar to those discussed here, in *People v. Hoard* (2002) 103 Cal.App.4th 599, 605-607.

movement is, or is more likely to be, "merely incidental" if it is *necessary*, inherent, or " 'natural' " to the commission of the crime. (*Salazar*, *supra*, 33 Cal.App.4th at p. 347, quoting *Cotton, supra,* 56 Cal.2d at p. 464.) Thus, in order to be more than "merely incidental," the movement must in some sense be *extraneous* to the target offense. In *Salazar* the court asserted—somewhat fancifully in our view—that the defendant "could have raped [the victim] on the walkway outside the motel room door and avoided moving her at all." (*Salazar*, *supra*, 33 Cal.App.4th at p. 347.) Similarly the court stated that the movement "was not necessarily related to the rape crime itself," and "was not a necessary or natural part of committing the rape." (*Ibid*.) Yet at the same time the court stated that "a jury could reasonably conclude [that the movement] was an essential part of Salazar's plan to avoid detection and to make the crime easier to commit." (*Ibid*.) Similarly the court in *Shadden* suggested that the movement was incidental because it was not inherent in the crime of rape, but in a later section of the opinion emphasized the important if not instrumental role of the movement in "ma[king] it less likely for others to discover the crime," "decreas[ing] the odds of detection [citation]," and "enhanc[ing] [the defendant's] opportunity to rape and injure [citations]" the victim. (*Shadden*, *supra*, 93 Cal.App.4th at pp. 169, 170.)

The first half of this seeming paradox—the notion that the movement must somehow be extraneous to the target offense—seems linguistically and logically untenable for reasons we have already stated. Yet it finds some support in Supreme Court decisions. In *People v. Stanworth* (1974) 11 Cal.3d 588, 598 (*Stanworth*) (overruled on another ground in *People v. Martinez, supra,* at p. 237; see *People v. Nguyen* (2000) 22 Cal.4th 872, 879), the court found a movement of slightly less than 30 feet "merely incidental" to a rape and robbery, in part because it "was accomplished for the specific purpose" of perpetrating those crimes. In *People v. Williams*, *supra*, 2 Cal.3d at p. 902, the court held the evidence insufficient to satisfy *Daniels* where the victim's movements in and near a service station "appear[ed] to have been brief and to

have been solely to facilitate the commission of the crime of robbery." Yet the other half of the paradox—the more tenable premise that an *essential* movement is more and other than "incidental"—also finds support. Thus in *People v. Thornton* (1974) 11 Cal.3d 738, 768, the court found sufficient movement to sustain two convictions of kidnapping for robbery, writing, "The fact that in each case defendant chose to consummate the robbery at a location remote from the place of initial contact does not render the subsequent asportation 'merely incidental' to the crime, for *it is the very fact that defendant utilized substantial asportation in the commission of the crime which renders him liable to the increased penalty of [Penal Code] section 209* if that asportation was such that the victim's risk of harm was substantially increased thereby." (*Ibid*., italics added.)

The foregoing cases may be harmonized by ignoring the facilitative aspect of the movement and noting instead the *actual distances* involved. Thus in *Earley* the court wrote, "*Brief* movements to facilitate either robbery or robbery and rape are incidental thereto within the meaning of *Daniels*. [Citations.] On the other hand movements to facilitate the foregoing crime or crimes that are for *a substantial distance* rather than brief are not incidental thereto within the meaning of *Daniels*. [Citations.]" (*Earley*, *supra*, 14 Cal.3d at pp. 129-130, italics added.) The court catalogued, by distance and type of movement, cases in which the movement was too slight and those in which it was "substantial."[18] This approach suggests that the function of the movement in

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[18] The court wrote, "Brief movements to facilitate either robbery or robbery and rape are incidental thereto within the meaning of *Daniels*. (See, e.g., *People v. Stanworth*, *supra*, 11 Cal.3d 588 . . . [25 feet from road to field]; *People v. Mutch* [1971] 4 Cal.3d 389, 397-399 . . . [30 to 40 feet from one room to another in business establishment]; *People v. Williams*[,] [*supra,*] 2 Cal.3d [at p.] 902 . . . [around gas station premises]; *People v. Daniels*, *supra*, 71 Cal.2d 1119, 1122 et seq. . . . [5 to 30 feet within own homes].) On the other hand movements to facilitate the foregoing crime or crimes that are for a substantial distance rather than brief are not incidental thereto within the meaning of *Daniels*. (See *People v. Thornton, supra,* 11 Cal.3d 738, 747, 750, 767-768 [movements of victims one block and four blocks]; *People v. Stephenson,* 10 Cal.3d 652, 657-661 . . . [five or six blocks].)" (*Earley, supra,* 14 cal.3d at pp. 129-130.)

"facilitating" the target offense is a red herring; the significant factor is the actual duration of the movement and the distance traversed.[19] The court has repeatedly rejected any categorical limitation on distance, however, and has reiterated fairly recently that "there is no minimum number of feet a defendant must move a victim" in order to establish that the movement is sufficient to satisfy *Daniels*. (*Rayford*, *supra*, 9 Cal.4th at p. 12.)

The courts' refusal to adopt a quantitative test and their failure to articulate a coherent qualitative one might suggest that this entire area of the law needs to be revisited by the Legislature, which might take a fresh look at the necessity and underlying purpose of these statutes. Certainly the offense of kidnapping *for ransom* is sui generis and ought to be distinctly addressed by the criminal law. It is by no means clear that the same is true for aggravated kidnapping to commit some target offense such as rape and robbery. Arguably the purposes of Penal Code section 209, subdivision (b) could be better served by creating aggravated forms of the target offenses, or sentence enhancements for those offenses, predicated on the forcible movement of the victim, *for the purpose* of committing the target offense, in a manner which significantly increases the risk of harm beyond that to which the victim would be exposed without such movement.

Pending some such revision, we are forced to simply compare the facts of this case to those in seemingly analogous cases and to consider whether the reasoning in those cases warrants a parallel result here. Defendant contends the case is indistinguishable from *Stanworth*, *supra*, 11 Cal.3d 588, where the evidence was held insufficient to support a conviction of kidnapping for robbery. The People contend that we should instead find the movement sufficient, as the courts did in *Salazar*, *supra*, 33 Cal.App.4th

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[19] Again we note that a movement with no tendency to facilitate the offense would appear not to satisfy the statutory definition of aggravated kidnapping as movement "to commit" a target crime. (Pen. Code, § 209, subd. (b)(1).)

341, and *People v. Jones* (1999) 75 Cal.App.4th 616 (*Jones*). We find none of these cases precisely analogous, but we believe *Stanworth* is closer to the facts here, and that the reasoning in *Salazar* and *Jones* is less readily applied to these facts.

In *Stanworth* the defendant was convicted of simple and aggravated kidnapping based on separate incidents. The latter charge was supported by evidence that as the victim walked along a road in the early evening, the defendant grabbed her from behind, held an ice pick to her throat, threatened her, and dragged her about 25 feet into an open field, where he bound, raped, and robbed her. (*Stanworth*, *supra*, 11 Cal.3d at p. 597.) The court held that the movement "cannot be regarded as substantial and was merely incidental to the commission of those crimes." (*Id*. at p. 598.)

Here, as in *Stanworth*, the victim was moved a short distance from a roadway to another outdoor location. The only distinction we observe is that the movement here was not only away, but also downhill, from the road. The descent, however, was a mere 10 to 12 feet. We have examined photographs of the site and do not believe this movement significantly reduced the likelihood of detection by anyone passing on the roadway. It was basically a movement from one secluded outdoor location to another only slightly more secluded. The actual distance traversed was less than in any of the cases we have examined except *Shadden*, and in contrast to that case the movement did not significantly change the victim's environment. (See *Shadden*, *supra*, 93 Cal.App.4th at p. 169.) We cannot meaningfully distinguish the present case from *Stanworth*, and must therefore conclude that the movement was not substantial, but was merely incidental to the commission of the target offense.

The cases cited by the People do not support a contrary result. As we have noted, the defendant in *Salazar* moved the victim 29 feet from a public walkway into a private motel room and an even more private inner bathroom. In addition to making possible a crime the defendant could not otherwise practicably carry out, this movement *significantly* changed the victim's environment from outdoor and public to indoor and

private. Similar factors drove the decision in *Shadden*, where the movement, though for a minimal distance, took the victim "from an open area to a closed room," supporting an inference that it "changed her environment." (*Shadden*, *supra*, 93 Cal.App.4th at p. 169.) The court relied on *Salazar* and on *People v. Smith* (1995) 33 Cal.App.4th 1586, 1594-1595, where a sufficient asportation was reflected in the movement of the victim "40 to 50 feet from a driveway, which was open to street view, to the interior of a camper located at the bottom of a driveway behind a house." (*Id.* at p. 1594.) The *Smith* court, which was apparently applying the test for simple kidnapping due to pleading peculiarities, noted that factors affecting the substantiality of a given movement include not only the linear distance traveled but also the character of the movement, including "locations and boundaries traversed, the distance of movement in context with the purpose served, and the locations involved. [Citations.]" (*Id.* at pp. 1593-1594.)

In *Jones*, *supra*, 75 Cal.App.4th at page 622, the defendant walked the victim at knifepoint 40 feet across a school parking lot and pushed her inside her car, whereupon she escaped. In holding this a sufficient asportation the court paid scant attention to the "more than incidental" prong of the *Daniels* test, simply declaring 40 feet to be "by no means an insubstantial distance." (*Id.* at pp. 628, 629.) Otherwise the court concentrated exclusively on the additional (albeit interrelated) requirement that the movement substantially increase the risk of harm to the victim. (*Id.* at pp. 629-630; see *Rayford*, *supra*, 9 Cal.4th at p. 12; Pen. Code, § 209, subd. (b)(2).) In this regard the "critical factor" was the pushing of the victim into her car, which removed her from public view and placed her in a situation where the defendant could carry out his intention to "drive away with her." (*Jones, supra,* 75 Cal.App.4th at p. 630.)

None of the facts relied upon in *Jones* has parallels here. Ms. Perez was not forced into an enclosure which concealed her from public view. Instead of being taken from a position of very high public visibility to very low visibility, as in *Jones*, Ms. Perez was moved from a location with little chance of observation to one with a marginally

lower chance. One photo, apparently taken from where the shoes were found, seems to show a clear line of sight to the top of the embankment; a roadside reflector-style marker is visible, suggesting that anyone standing by the road would have had a clear view of the spot where the photo was taken. Further, while the aggravated kidnapping charge in *Jones* rested on the movement of the victim for purposes of robbery, the finding of a sufficient asportation there was supported by evidence of an intention to commit further (i.e., sex) crimes. (*Jones*, *supra*, 75 Cal.App.4th at p. 630.) Here there is no evidence that, at the time of the asportation, defendant intended any further harm to the victim than is inherent in the offense of rape.

After our initial opinion in this matter, the Supreme Court directed us to reconsider it in light of *People v. Johnson* (1980) 26 Cal.3d 557, 578, which states the familiar standard of review governing challenges to the sufficiency of the evidence: "[T]he 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." By its terms, however, this standard functions only to determine the *operative facts* for purposes of appeal. Here the operative facts are not disputed. As the People again concede in their supplemental brief, the asportation in question consisted of a movement of approximately 25 feet from a roadside down an embankment and into an orchard. It was not suggested by the prosecutor below, and is not contended by the People on appeal, that the jury could have found that the dragging of Ms. Perez deeper into the orchard was part of any asportation by defendant *for purposes of rape*. The operative facts appear to be those we have discussed, regardless of the standard of review.

We also note that after our original opinion was filed, our analysis of the caselaw was rejected in *People v. Aguilar* (2004) 120 Cal.App.4th 1044, 1052, where Justice Gilbert concluded that "*Rayford* set a clear and coherent standard" under which "[t]he

interpretation of 'incidental' depends on the facts of the particular case." We fail to see how a coherent rule of law can be predicated on a term that changes its meaning depending on the evidence. We reiterate our plea that the Supreme Court, or perhaps better yet the Legislature, reexamine the whole question of aggravated kidnapping and provide some administrable guidelines concerning the point at which movement of the victim becomes sufficiently consequential to justify conviction of a separate and additional crime.

Here we conclude that the evidence was insufficient to satisfy the *Daniels* test and that the conviction of kidnapping for rape must be reversed.

IV. *Officer's Opinion of Guilt*

Defendant contends that error occurred by virtue of the testimony of Sergeant Stephens that he had "no doubt . . . that Jose Alfredo Martinez and Fernando Dominguez drug that body though that orchard." Since the trial court acknowledged that this was improper testimony, there is no possibility of the error recurring on any retrial. In any event we discern no judicial error because the testimony was elicited by defense counsel, no objection or motion to strike was asserted at that time, and when counsel did object the court appropriately admonished the jury.

V. *Prior Convictions*

Defendant contends that the trial court erred in ruling that the prosecution could use defendant's convictions for burglary and attempted burglary for impeachment. He contends, not that the convictions were inadmissible, but that their admissibility was a question entrusted to the trial court's discretion, which the court failed to exercise because it erroneously believed that it had no discretion. The argument is based upon the following colloquy:

"[Defense Counsel]: . . . [Defendant] intends to testify, and I want to talk a little bit about what could be used to impeach. I—I know from the evidence that's been submitted to me, I believe he has been convicted of this first degree burglary.

"THE COURT: Yes.

"[Defense Counsel]: And he has been convicted of a felony attempted burglary.

"THE COURT: Two different matters.

"[Defense Counsel]: Yeah, in '99.

"THE COURT: Yes.

"[Defense Counsel]: He has also been convicted of a felony in possession of cocaine. I—I would—I don't know without conceding, but probably there would be a ruling that some of these could come in, the moral t[u]rpitude offenses. I mean I'd just like to—

"THE COURT: I don't believe the Court has any discretion on the felony convictions.

"[Defense Counsel]: That they have to come in to impeach.

"THE COURT: I think so.

"[Defense Counsel]: Right. That's not unanticipated. . . . [¶] . . . . [I]f the Prosecutor intends to use any other acts of misconduct which may be admissible under *Wheeler*, I'd just like to know what he intends to use and we can talk about that. [¶] And also, I would just like to have it made clear that if a prior conviction is going to be used, that the law is simply the fact of the conviction and the nature of the conviction can come in. . . ."

There followed a lengthy discussion of the nature of the evidence the prosecution might seek to introduce concerning defendant's criminal history. It was confirmed that the burglary was a residential burglary; the attempted burglary was a vehicular burglary; and that both burglaries occurred, or the convictions were sustained, in 1999. The court ruled that the prosecution could not "go into the facts and descriptions" of any admissible offenses unless defendant denied having sustained the convictions. When the prosecutor expressed the desire to introduce a misdemeanor conviction, the court said, "[A]s I understand the law, it's somewhat more complicated to impeach with a misdemeanor

than a felony. The felony, it's just the statute is very clear." The prosecutor then said, "I will leave those two then, two felonies, and make it easy."

There was no further discussion of the point. When defendant testified, he admitted on direct examination that he had sustained convictions in 1999 for burglary and attempted burglary.

Defendant now contends that the trial court erred in its expressed belief that it lacked discretion to exclude the burglary convictions. Assuming the stated belief was mistaken, the trial court's expression of it cannot by itself constitute error. " '[I]t is judicial action, and not judicial reasoning or argument, which is the subject of review; . . .' " (*In re Pratt* (1980) 112 Cal.App.3d 795, 911, quoting *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 330.) Here, the relevant error, if any, would be the admission of evidence of prior convictions. But the admission of evidence may be charged as error only if a timely objection on a proper ground was made and overruled. (Evid. Code, § 353, subd. (a).) Defendant never objected on any particular ground to the evidence of prior convictions. He merely inquired into what evidence the prosecutor intended to offer, and what part of that evidence the court was inclined to admit. Viewing this proceeding charitably as a motion in limine, it could satisfy the requirements of Evidence Code section 353 only if defendant "specifi[ed] [a] legal ground for exclusion." (*People v. Morris* (1991) 53 Cal.3d 152, 190, overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; see *id.* at p. 188.) But defendant at no time objected to the evidence on any particular ground; indeed he did not object to the fact of the burglaries at all.

Defendant contends that he was excused from objecting because "a defendant cannot be faulted for failing to make a motion which the court has already declared that it will deny." But the court did not declare any such thing. It first said, "I *don't believe* the Court has any discretion" to exclude the burglaries, and when defense counsel suggested that "they have to come in to impeach," replied, "I *think* so." (Italics added.) This was

hardly a declaration that an objection under Evidence Code section 352, if clearly presented, would have been categorically overruled, particularly if the court's attention were drawn to authorities establishing that it retained discretion despite the seemingly mandatory language of Article I, section 28, subdivision (f), of the California Constitution. (See *People v. Castro* (1985) 38 Cal.3d 301, 306-313.)

In short, the record fails to establish any error in the admission of the prior convictions. At most it establishes an expression of opinion, in which defense counsel apparently concurred, replying "Right" to the court's "I think [the priors have to come in to impeach]." No question is raised in this court of ineffective assistance of counsel, and we express no opinion on that subject. It is enough for present purposes that the record fails to establish any judicial action or inaction on which a finding of reversible error could rest.

VI. ***Cumulative Error***

Defendant argues that if the errors he asserts are not sufficient individually to warrant relief, their aggregate effect establishes such cumulative prejudice that reversal is required. Except as we already found reversible error, we reject this contention.

VII. ***Restitution Fines***

Defendant contends that the abstract of judgment must be amended to strike certain restitution fines which, according to the transcript of the sentencing hearing, were not imposed when sentence was pronounced. Since the judgment is being reversed as to two of the three counts, a new, superseding abstract of judgment will be required in any event, seemingly rendering this contention moot.

VIII. ***Conduct Credits***

Defendant originally contended that the trial court erred in failing to allow 89 days conduct credit for presentence custody pursuant to Penal Code section 4019. He now concedes that this point is moot in view of the trial court's intervening issuance of an amended abstract of judgment awarding the credits.

DISPOSITION

The judgment is affirmed with respect to count 3 (rape). The judgment is reversed with respect to counts 1 (murder) and 2 (kidnapping for rape). Retrial is barred on count 2.

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.

Trial Court:	San Benito Superior Court Superior Court No.: CRF99-37033
Trial Judge:	The Honorable Manuel Rose
Attorneys for Defendant and Appellant Fernando Dominguez	Dallas Sacher under appointment by the Court of Appeal for Appellant
Attorneys for Plaintiff and Respondent	Bill Lockyer, Attorney General Robert R. Anderson, Chief Assistant Attorney General Ronald A. Bass, Senior Assistant Attorney General Laurence K. Sullivan, Supervising Deputy Attorney General John H. Deist, Deputy Attorney General