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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 been 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 Attorney General does 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

We agree with defendant that the instruction given was wholly inadequate to apprise the jury of the principles germane to the evidence and issues before it. The prosecution theory was felony murder as 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." (Pen. Code, § 189.) 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

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

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 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 all 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 . . .) 'when one of them kills while acting in furtherance of the common design.' (*People v. Washington* (1965) 62 Cal.2d 777, 782 . . . .)" (*People v. Pulido* (1997) 15 Cal.4th 713, 716 (*Pulido*).)

It is this second, " 'complicity aspect' " of felony murder (*Pulido*, *supra*, 15 Cal.4th at p. 720, quoting Robinson, *Imputed Criminal Liability* (1984) 93 Yale L.J. 609, 618, fn. 25) which concerns us here. The jury in this case received *no instruction whatsoever* on this subject. The instruction it received did not address complicit felony murder, but assumed that the *defendant himself* was accused of killing the victim. It began by declaring that "[e]very *person who unlawfully kills*" a human being under certain conditions may be guilty. (CALJIC No. 8.10, italics added.) It then explained that "[i]n order to prove *this crime*, each of the following elements must be proved: . . ." (Italics added.) The People contend that the ensuing elaboration on the conditions for culpability could be readily applied to complicit felony murder. But such a reading is in tension, to say the least, with the introductory language we have just quoted.

Worse, the instruction is critically deficient as a statement of principles governing complicit felony murder. Indeed, as the People construe it, the instruction places no restriction whatsoever on felony murder culpability, but makes the defendant guilty for any "killing" that occurs "during" the commission of the predicate offense. Contrary to

the People's argument, culpability for felony murder does not extend so far when the defendant himself is not the killer. As CALJIC No. 8.27 would have told the jury, if defendant was not the killer he could only be guilty of felony murder if (1) he was aiding and abetting the killer in the latter's perpetration of a predicate offense, or (2) the killer was aiding and abetting defendant in *his* perpetration a predicate offense. Nothing in the instruction here conveyed this fundamental principle to the jury.

Further, while California courts have yet to fully delineate the principles governing complicit felony murder, it is clear that for a nonkiller to be guilty of felony murder, more is required than that he and the killer cooperate at some point in perpetrating a predicate offense. In *Pulido*, *supra*, 15 Cal.4th 713, the court considered whether one who aids and abets a robbery only *after* a killing is guilty of felony murder. (See *id.* at p. 720.) The court held that complicity after the killing is not sufficient "because the killer and accomplice were not 'jointly engaged at the time of such killing' in a robbery [citation]; the killer, in other words, was not acting, at the time of the killing, in furtherance of a 'common' design to rob [citation]." (*Id.* at p. 716.) The court recognized that this statement embraced two alternative formulae, drawn from two lines of cases which diverged somewhat "in their precise language and perhaps in the exact scope of complicity intended." (*Id.* at p. 721.) One formula imputes culpability to a non-killer for a killing committed " 'in furtherance of [the participants'] common purpose to rob.' [Citations.]" (*Ibid*., quoting *People v. Vasquez* (1875) 49 Cal. 560, 563, and citing *People v. Washington* (1965) 62 Cal.2d 777, 783.)[5] The other "appear[s] to state a broader rule of felony-murder complicity, under which the killing need have no particular causal or logical relationship to the common scheme of robbery; accomplice liability

[5] The term "furtherance" seems inapt here, since the Supreme Court has made it clear that felony murder may be found even though the killing did not in fact advance the common felonious cause. (*People v. Billa* (2003) 31 Cal.4th 1064, 1071.) A better statement of the principle might be that the killing must take place in "pursuit" of the common purpose.

attaches, instead, for any killing committed while the accomplice and killer are 'jointly engaged' in the robbery. [Citations.]" (*Pulido, supra,* 15 Cal.4th at p. 722, citing *People v. Perry* (1925) 195 Cal. 623; *People v. Martin* (1938) 12 Cal.2d 466; *People v. Waller* (1939) 14 Cal.2d 693, 703.)[6]

The People contend that *Pulido* approved a third formula under which, "regardless of the lack of a causal link between robbery and killing, accomplice liability for felony murder is established, . . . whenever 'the killing is done *during* the perpetration of a robbery in which they were participating.' [Citation.]" (*Pulido*, *supra*, 15 Cal.4th at p. 722, fn. omitted, quoting *People v. Cabaltero* (1939) 31 Cal.App.2d 52, 61 (*Cabaltero*).) This would constitute an extreme form of vicarious liability under which a felon would be guilty of first degree murder for any killing an accomplice happened to cause while the felony was in progress, without regard to the policy considerations thought to underlie the felony-murder rule. (See *People v. Hansen* (1994) 9 Cal.4th 300, 308; *People v. Washington, supra,* 62 Cal.2d at p. 783, quoted in *Pulido*, *supra*, 15 Cal.4th at p. 724 [rule " 'should not be extended beyond any rational function that it is designed to serve' "].) Far from approving such a rule, the Supreme Court in *Pulido* quoted certain harsh criticisms of *Cabaltero*, and later described *itself* as having "criticized" that case. (*People v. Billa , supra,* 31 Cal.4th at p. 1070, fn. 3; see *Pulido*, *supra*, 15 Cal.4th at p. 722, fn. 2.)

Moreover, while *Cabaltero* has been cited many times on related points, we have found no case squarely adopting a rule under which the aider and abettor of a predicate felony is automatically and necessarily guilty of felony murder for any killing that occurs

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[6] The Supreme Court has granted review on the following issue: "Does first-degree felony murder liability attach to the nonkiller accomplice only when the killing is committed 'in furtherance of the common design' of the felony, or instead, when the accomplice is 'jointly engaged' in the felony, a question left open in *People v. Pulido* (1997) 15 Cal.4th 713?" (Supreme Ct. Mins., May 15, 2002, S105058, review granted and issues limited, *People v. Cavitt*, A081492.)

"during" the commission of the felony. The closest thing we have found to an endorsement of such a rule is *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1658-1662 (*Anderson*), and even there the majority impliedly acknowledged that guilt on a theory of complicity in felony murder cannot rest entirely on the fortuity that the death occurred during the commission of the predicate offense. (See *id.* at p. 1658, quoting *People v. Dillon*, *supra*, 34 Cal.3d at p. 465 [Pen. Code, § 189 codifies felony murder rule " '[w]ith respect to any homicide *resulting from* the commission of or attempt to commit one of the felonies listed in the statute' " (first italics added, second italics omitted)]; *Anderson, supra,* 233 Cal.App.3d at p. 1659, fn. 9, [rejecting hypothetical argument based upon death due to plane crash because "[i]t is difficult to ascertain how an airplane randomly crashing into the scene of a robbery is *engaged in the commission* or attempted commission of that crime" (italics added)]; *id.* at p. 1660, quoting *People v. Thompson* (1990) 50 Cal.3d 134, 171 (*Thompson*) [" 'The only nexus required is that the felony and the killing be *part of a continuous transaction*' " (italics added)].)

We thus reject the People's contention that, under *Pulido*, a felony murder conviction can be predicated on the mere fact that a killing by an accomplice occurred "during" the commission of the predicate offense. Rather, under the two rules discussed approvingly in *Pulido*, defendant could be guilty of felony murder based on a killing by Martinez only if (1) the killing occurred while they were "jointly engaged" in a rape or attempted rape; or (2) the killing occurred in pursuit of the common purpose of perpetrating such a rape.

The jury was instructed in neither of these principles. Instead it was left to attempt to extract the applicable law from an instruction which was not intended to address the "complicity aspect" of felony murder at all, and which could only yield the most ambiguous and debatable principles if forced to that purpose. This was error. The jury should have been made to understand that if someone other than defendant killed Ms. Perez, then defendant could be guilty of felony murder only if the killer was jointly

engaged with defendant in the rape of Ms. Perez or was acting in pursuit of a common purpose to rape her, or if defendant was jointly engaged with, or acting in pursuit of, a common purpose by which the killer would rape her.

The error was compounded when the court refused to elaborate on the governing law in the face of the jury's obvious perplexity about the application of the felony murder rule to a factual hypothesis on which they had received no guidance despite its being clearly presented by the evidence. Penal Code section 1138 provides that when jurors "desire to be informed on any point of law arising in the case, . . . the information required must be given. . . ." Under this statute, the trial court "has 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.] . . . [Citation.] . . . [A] court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97, first italics added.) Here the record fails to establish that the court did more than "throw up its hands and tell the jury it cannot help."[7]

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[7] 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 governing principles we have noted.

C. Prejudice

The People contend that even if the court erred in its instructions concerning felony murder, reversal is not warranted because the error was harmless beyond a reasonable doubt. We agree that this is the correct standard (*People v. Sakarias* (2000) 22 Cal.4th 596, 625 (*Sakarias*); *People v. Hughes* (2002) 27 Cal.4th 287, 351-353), but we do not agree that it is met here.

The People contend that if Martinez killed Ms. Perez, his doing so "could not possibly be deemed an independent act, with 'no causal relation' to the rape." On the contrary, if the jury was not convinced that defendant was the killer, it might well have been unable to find the requisite nexus, or any nexus, between his conduct and the killing. The jury knew that the victim was last seen in the presence of two men, presumably defendant and Martinez. It knew that she was brutally beaten and that she was sexually penetrated with great force. It found that defendant, who admittedly had sexual relations with her, committed the crime of rape. It does not follow that if Martinez killed her, he did so as a result of, in furtherance or, or while jointly engaged in, defendant's rape of Ms. Perez, or that he did so while defendant was assisting *him* in an attempted rape. The jury could have believed, and the jury's question implied, that Martinez might have killed her during a separate, subsequent assault in which defendant did not participate. Nor need the assault have been sexual in nature; Martinez might have killed her, as defendant's testimony might be understood to imply, in a fit of jealous rage. In any of these scenarios the jury might have found that the killing was independent of any felony committed (or aided and abetted) *by defendant*.

The fact that the record invites speculation on these matters is hardly grounds for finding the error harmless. On the contrary, the many constructions to which the evidence is prone provides all the more reason to hold prejudicial the court's refusal to furnish appropriate guidance with respect to felony murder complicity.

The People suggest that if Ms. Perez was killed by Martinez after defendant had concluded his assault against her, the killing could be deemed to have occurred in the course of defendant's rape so as to support the verdict on felony murder. Citing *People v. Castro* (1994) 27 Cal.App.4th 578, 585 (*Castro*), and *Thompson, supra,* 50 Cal.3d at pp. 170-171, defendant contends that a killing is deemed to occur during the commission of a rape if the rape and killing are part of a "continuous transaction."

The jury might well have been entitled to reach the conclusion urged here by the People. However it was given no occasion to do so, since it was not instructed on the principles now cited. It was emphatically a task for the jury, and not for this court, to "decide whether or not the murder was committed 'in the perpetration of' [citation] . . . [citation] . . . the specified felony." (*Sakarias*, *supra*, 22 Cal.4th at p. 624, quoting Pen. Code, § 189.) Nor do the cited cases justify a conclusion that the misinstruction here was harmless. In *Castro*, the court rejected a defense contention that a weapons enhancement *should have been stricken* (i.e., the issue withdrawn from the jury) because the defendant had completed his rape of the victim when he assaulted her with a knife. The court noted that for purposes of felony murder, a killing occurs "in the commission of" a rape "so long as the rape and murder are part of a continuous transaction" (*Castro, supra,* 27 Cal.App.4th at p. 585), and concluded that "for the purpose of felony murder, the commission of rape may be deemed to continue so long as the culprit 'maintains control over the victim' " (*id.* at p. 586). It cited the examples of *People v. Guzman* (1988) 45 Cal.3d 915, 952 (*Guzman*) (overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), in which the killing was "committed 'almost immediately following the rape,' as the victim got up and began to walk away," and *People v. Thompson*, *supra*, 50 Cal.3d at pages 171-173 and 176, in which the killing was "committed within one or two hours after a violation of [Penal Code] section 288 . . . while the victim was still under the culprit's control, either bound or locked in a trunk." (*Castro, supra,* 27 Cal.App.4th at p. 585; see also *Sakarias*, *supra*, 22 Cal.4th at pp. 625-

626 [harmless error to instruct that if defendant entered home with burglarious intent, subsequent murder in home was in course of burglary; jury impliedly adopted other theories supporting first degree murder charge and evidence suggested no interruption or abandonment of burglarious plan].)

Critically, none of the cited cases turned on questions of the defendant's possible *complicity* in a felony murder *perpetrated by another*, nor did any of them present such vague circumstances as the present record or offer so little basis to determine what facts were actually found by the jury. The paucity of factual detail coupled with the apparent involvement of at least two actors created ample grounds for the jury to entertain a reasonable doubt whether the rape by defendant and the killing were parts of a single continuous transaction.

Defendant asserts that the jury was sure to find a continuous transaction in light of evidence that two people dragged Ms. Perez from the place where some of her clothing was found to the place where her body was found. However the sole basis for such a finding was the testimony of Sergeant Stephens that he saw two sets of footprints in the orchard. He acknowledged that only one shoe print was visible in the numerous photographs he took, and that only one (the same) was distinct enough to be measured. He made no notation in any written report concerning this observation, or apparently about any footmarks, and did not speak of these matters to anyone except Sergeant Williams, who died prior to trial. While the jury was certainly entitled to believe his testimony, we cannot find that testimony sufficient on appeal to let us declare the instructional error harmless beyond a reasonable doubt, particularly in light of our own examination of the photographs to which his testimony apparently referred. Those photographs depict a disturbance of the plowed earth in the orchard, but are highly ambiguous with respect to the cause of the disturbance and far from compelling evidence that more than one person was involved. We are therefore unable to say beyond a

reasonable doubt that the instructional error was not instrumental in bringing about the verdict of guilty on the charge of felony murder.

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.)

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.[8] 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.[9] Defendant seems to accept for purposes of appeal that the rape as found by the jury occurred on near the embankment immediately adjacent to Southside road. Defendant does not contest that the kidnapping conviction rests on a movement as short as 10 to 12 feet, but contends that such a movement was sufficient here to support conviction.

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[8] 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 . . . ."

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

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 most jurisdictions by criminalizing the taking away of a person not only for ransom or extortion but also for robbery. (*Id*. 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.[10] (*Id.* at p. 180 (maj. opn.).) The amendment also modified

[10] "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*),

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 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*, 9 Cal.4th 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.).)

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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.)

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 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.]" (*Id.* at p. 1139.)

This requirement has now been codified, if somewhat infelicitously, in Penal Code section 209, subdivision (b)(2).[11] However, the amendment accomplishing that result had

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[11] 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 *People v. Daniels*, 71 Cal.2d 1119, 1139 . . . pursuant to the decision of the California Supreme Court in *People v. Rayford*, 9 Cal.4th 1, 20." (Stats. 1997, ch. 817, § 17, No. 12 West's Cal. Legis. Service, P. 4460.) Nothing

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 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

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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.' " (*Id.* 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.

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 May 11, 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 with 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.[12] In some contexts, however, emphasis is placed on the relational aspect of the term.[13]

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*

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[12] 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, below]; *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].

[13] 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 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" 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, 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 '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*.)[14] Unfortunately, while the *Earley* court seemed prepared to

[14] 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.)

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, 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 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 (1970) 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, 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."[15] On one hand they seem to suppose that a 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

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

"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 or 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* (1999) 20 Cal.4th 225, 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 *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."[16] This approach suggests that the function of the movement in "facilitating" the target offense is a red herring; the significant factor is the actual duration of the movement and the distance traversed.[17] 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.)

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[16] 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*, 2 Cal.3d 894, 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.)

[17] 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).)

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. The People contend 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. Defendant contends that we should instead find the movement sufficient, as the courts did in *Salazar*, *supra*, 33 Cal.App.4th 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 traversed 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.

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 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. Diest, Deputy Attorney General