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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DANGELO ANTONIO JEROME, Defendant and Appellant.	A119737 (Contra Costa County Super. Ct. No. 050704122)

A jury convicted defendant Dangelo Antonio Jerome of kidnapping to commit robbery (Pen. Code, § 209, subd. (b))[1] and second degree robbery (§ 211). The jury did not find true that defendant personally used a firearm or deadly or dangerous weapon to commit the offenses. The court sentenced defendant on the kidnapping count to a life term with the possibility of parole and stayed the sentence on the robbery count.

We find no merit to defendant's argument that the evidence was insufficient to support his conviction for kidnapping to commit robbery. However, we agree with defendant that the trial court committed prejudicial error by improperly restricting defense counsel's voir dire of prospective jurors. Accordingly, we reverse the judgment and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The charges against defendant were based upon an incident that occurred on the day Sony's PlayStation 3 (PS3) video game was released for public sale. On that day,

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Jeremy Diaz purchased a PS3, three games and one extra controller. Because PS3 was in such demand, Diaz purchased the system and accessories in order to resell them. To do so, Diaz posted several ads on the Internet offering to sell all the items for $4,100, considerably more than he had paid for them.

Following a call received in response to an ad, Diaz and a friend drove to Concord, where Diaz met with defendant inside a store. Diaz had the PS3 and accessories in a shopping bag and showed them to defendant. According to Diaz, he was seeking $4,100 for the items, and defendant did not try to negotiate a lower price. When they left the store, defendant told Diaz that he would "do the deal." Defendant got into his car and told Diaz to get in to finish the sale. Defendant sat in the driver's seat and Diaz sat in the front passenger seat with his left foot inside the car and his right foot outside the car. Diaz held the bag containing the PS3 and accessories in his right hand outside the car.

Defendant received a phone call. Immediately after he hung up, Diaz felt something push in his left rib. He looked down and saw what appeared to be a black automatic hand gun. Diaz felt the gun against his skin and it felt like metal. After he glanced down when he first felt the gun in his ribs, Diaz did not look at it again. Diaz was unfamiliar with guns and was not sure if the gun was fake.

At the same time that Diaz felt defendant poke him with the gun, defendant grabbed the bag containing the PS3 and put it behind the driver's seat. Defendant told Diaz to get into the car and close the door. Defendant drove out of the parking lot, steering with one hand and holding the gun in the other hand. Defendant told Diaz not to do anything silly or call anyone or try anything. He was to be quiet. Diaz asked defendant to let him out because defendant had already taken the PS3. Diaz was scared because defendant still had the gun drawn on him. After about a minute, defendant had gone two or three blocks and drove into another parking lot. He told Diaz to get out of the car, and Diaz jumped out while the car was still moving "ten or five miles per hour. Really slow, like, just kind of barely moving along." After Diaz got out of the car, he

called his friend who drove Diaz's car and picked him up. Both Diaz and his friend spoke with the police about the robbery, but Diaz never recovered the PS3.[2]

On December 1, 2006, City of Concord Police Officer Darrell Holcombe stopped a car matching one that Diaz described to the police. The car was being driven by defendant's brother, and a search of the car revealed numerous pieces of paper containing defendant's name. City of Concord Police Officer Carl Cruz spoke with defendant's brother and then went to the home of defendant's mother. Defendant was living there part time. Officer Cruz arrested defendant with the assistance of several other officers.

The People also presented as part of their case-in-chief evidence of a 1996 robbery incident for which defendant was arrested but never prosecuted. City of Walnut Creek Police Officer William Jeha testified that on September 10, 1996, during his investigation of a reported robbery, he spoke with defendant. After defendant waived his *Miranda* rights, he described to Officer Jeha what happened that day. Defendant pulled out of his pants a baggy containing under an ounce of marijuana and said that the incident was "all about this." Defendant and two of his friends had driven to Walnut Creek Civic Park. Defendant was in the back seat and a friend was driving the car. At the park, they saw the victim and his friend. Defendant told the driver of the car to pull up to the victim and his friend who were both strangers to defendant. The victim asked defendant and his friends if they wanted to buy some marijuana. The victim got into the back seat and agreed to show the marijuana to defendant. Defendant grabbed the bag out of the victim's hands and told him to get out of the car. The victim began to fight with defendant. The driver started the car and began to drive away from the scene during the struggle. As the car was moving, defendant continued to struggle with the victim and again told the victim to get out of the car. The victim opened the car door and jumped out.

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[2] In an attempt to impeach Diaz and his friend, defendant called as a witness City of Concord Police Officer Michael Jaime, who recounted his conversations with them shortly after the robbery.

Testifying in his own behalf, defendant described the events of his encounter with Diaz. He intended to purchase the PS3 and accessories that Diaz had offered to sell on the Internet for his brother. When he met with Diaz, defendant had about $2,000 in one pocket and about $1,700 or $1,800 in another pocket. He planned to offer about $1,700 to $1,800 for the PS3. Diaz had the PS3 in a bag. When defendant looked into the bag, he saw some games and a box that was not laminated or factory sealed. After some small talk, the men walked out of the store and entered defendant's car. Defendant sat in the driver's seat and Diaz sat in the front passenger seat. Defendant denied that Diaz was initially sitting with one leg inside the car and one leg outside the car. Defendant also denied that he grabbed the bag from Diaz's bag or pulled out any kind of gun.

According to defendant, once both men were inside the car they began to discuss the sale price for the PS3 and accessories. Defendant first offered Diaz $1,000, which Diaz rejected. Defendant then offered $1,000 plus one medical marijuana patch containing half an ounce of marijuana that was worth between $400 and $475. Diaz grabbed the marijuana patch from defendant to check it out. As Diaz examined the marijuana, defendant started to drive his car slowly through the parking lot because he did not want to have the marijuana out in front of a public store. When Diaz testified, he denied that he asked for "weed" or a combination of money and "weed" in exchange for the PS3, and he did not remember defendant ever saying anything about making such an exchange.

At some point, defendant said Diaz wanted $2,000 plus the cost of the game and the controller. But defendant only offered $1,000 and the patch of marijuana. Diaz asked defendant if he also had any crystal methamphetamine. Defendant paused and said no. Diaz also asked defendant if that was all the money he had, and defendant replied no, not really. Diaz then "kind of got an attitude," although defendant was willing to pay up to $2,000 if necessary. Before they could agree on a price, Diaz left the car with the shopping bag in his hand.

While Diaz was in the car, defendant never left the parking lot and drove about 150 feet. Defendant denied driving to another parking lot, telling Diaz to get out of the

car, threatening Diaz or pointing any object at him that could have been construed as a gun.

Defendant's testimony essentially conformed to a taped statement he gave after he was arrested. The parties stipulated that during the taped conversation, defendant stated: "I think the Play Station wasn't in the damn box because when [Diaz] got out of the car he was like, well, all right, man, just give me a call back, whatever. Well, I was like, what if I give you a little bit of pot and a little bit of money? And he was like, gnaw, I'm not really feeling that. Just call me whenever you are ready. But he wanted like $4,000. I was trying to talk him down to $1,500, and then [Diaz] just left."

Defendant also testified regarding the 1996 incident. He said the description of his statement provided in Officer Jeha's testimony was "somewhat" accurate. Defendant confirmed that he was arrested after he obtained marijuana from the victim. But he denied that the marijuana was in a baggy that he had personally taken from the victim. According to defendant, the victim wanted to sell the marijuana that was in a paper. The victim handed the marijuana to one of defendant's friends in the front seat of the car. There was an exchange of money but it was not enough. Confrontation about the quality and quantity of the marijuana ensued, at which point defendant asked to see the marijuana. Defendant's friend passed the marijuana to him. At some point, the victim got into the car and sat next to defendant. There was a struggle between defendant and the victim who wanted his marijuana back. The victim started snatching at "the stuff" in defendant's hands, "the stuff" went all over the car; and the driver of the car was spinning around in the parking lot in order to eject the victim from the car. The car door was wide open at that point. Defendant was never charged. Defendant also admitted that in 1999, he was convicted of second degree burglary as a misdemeanor and that in 2000, he was convicted of felony possession of stolen property or receiving stolen property.

Defendant's brother Mark Fisse confirmed that he asked his brother to meet with Diaz to purchase the PS3 and accessories. Fisse also confirmed he did not see defendant in possession of a gun, and that when defendant later met with him, defendant did not have either a shopping bag or the PS3 and accessories.

DISCUSSION

I. Trial Court's Preclusion of Defense Counsel's Proposed Voir Dire Questions Was Prejudicial Error

A. *Relevant Facts*

When defense counsel began her voir dire of potential jurors, she opened by stating: "I'm going to ask some general questions first. [¶] You're going to find out in the course of this trial that the subject matter of this case was a Play Station Three. And the reason I bring this up is because I remember on the news last year when the Play Station Three first came out on the market." At this point, the court interrupted and conducted an unrecorded conference at the bench with both counsel. When defense counsel resumed questioning, she stated: "One of the issues that the Judge brought up a little earlier had to do with police officers. And I want to extend that a little farther and just talk about witnesses in general." Counsel then asked all the potential jurors if they understood that every person who was called as a witness is to be treated in the same way. Counsel asked the jurors if they understood that the court would instruct them on the types of things that could be considered by them in assessing the credibility of witnesses. Defense counsel continued discussing witness credibility when she was again interrupted by the court. "And that list of things that you can consider with respect to the credibility of witnesses. [¶] The Court: Okay, I need Counsel to approach. We need to go in[to] chambers [in] just a moment." Following an unrecorded conference in chambers, defense counsel continued her questioning. She asked the potential jurors as a group to confirm that they would be able to follow the court's instructions regarding the criteria for judging the credibility of all witnesses, including police officers, civilian witnesses and defendant, and that they understood that no witness started out being more credible than any other.

When voir dire was complete, defense counsel stated on the record her understanding of what occurred during the unrecorded conferences with the court during voir dire. According to defense counsel, she had asked the court to allow her to question potential jurors "on how . . . they would be able to deal with evidence of prior bad acts of

my client coming into evidence. And whether or not they would be able to follow the Court's instructions on how they are to view that evidence." Defense counsel explained: "I think that the fact that the Court is allowing in evidence of prior misconduct, specifically the 1996 alleged robbery by Mr. Jerome, that I should have been allowed to ask the jurors whether or not they would be able to follow the Court's instructions that that evidence was coming in for a limited purpose, and that they were not to use that evidence simply to say that my client is guilty, or is a person of bad character. I think questions along those lines do go to cause challenges. And I would have—it's my position I should have been allowed to ask some questions along those lines." The court did not dispute defense counsel's description. Instead, the court stated that in its view, counsel's questioning "got to the point" where she was attempting to pretry the case. The court also did not agree that the kind of specificity that was sought by defense counsel through her proposed questions was appropriate because it invited the potential jurors to prejudge the case and was "a whole lot more questioning than challenges for cause."

At the end of trial, defense counsel moved for a new trial due to the court's refusal to allow her to voir dire potential jurors regarding bias or prejudice based upon their learning of the 1996 incident. Defense counsel pointed out that before jury selection, over her objection, the court ruled that the prosecution could introduce evidence of a 1996 incident under Evidence Code section 1101, subdivision (b), to show defendant's intent and a common plan or scheme. Subsequently, the court informed both counsel that neither counsel could ask prospective jurors anything that appeared to "pretry" the case. Defense counsel sought to ask questions of the prospective jurors on their attitudes toward defendant's past misconduct in order to assess whether the jurors would convict the defendant because of his past wrongs. The court refused to allow any such questioning on the grounds that it would constitute "pretrying" the case. Defense counsel noted that during the prosecutor's opening statement he referred to the 1996 incident, and both defendant and his counsel claim that "the jaws of several jurors drop[ped]" upon that disclosure. By then there was no method to inquire of the jurors' bias.

After a hearing, the court denied the motion for a new trial on the grounds that defense counsel's argument was not supported by the record. The court's memory of the off-the-record discussions was not the same as that of defense counsel, and jurors were presumed to have followed the court's instructions limiting their consideration of the 1996 incident.

B. ***Analysis***

"It is, of course, well settled that the examination of prospective jurors should not be used ' "to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law." ' " (*People v. Fierro* (1991) 1 Cal.4th 173, 209.) However, as we explained in *People v. Chapman* (1993) 15 Cal.App.4th 136: "Voir dire is critical to assure that the Sixth Amendment right to a fair and impartial jury will be honored. 'Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.' [Citation.] [¶] The exercise of discretion by trial judges under the . . . system of court-conducted voir dire is accorded considerable deference by appellate courts. [Citation.] A trial court has significant discretion with respect to the particular questions asked and areas covered in voir dire. [Citation.] The failure to ask specific questions is reversed only for abuse of discretion. Abuse of discretion is found if the questioning is not reasonably sufficient to test the jury for bias or partiality. [Citations.] [¶] '[W]here . . . the trial judge so limits the scope of voir dire that the procedure used for testing does not create any reasonable assurances that prejudice would be discovered if present, he commits reversible error.' " (*Id.* at p. 141.)

We conclude that reversal is required in this case due to the court's refusal to allow defense counsel to ask potential jurors about their possible prejudice or bias against defendant should they learn of the 1996 incident. "The denial of any examination in this area prevented the court from fulfilling its obligation to remove any prospective jurors who may have been unable to follow the court's instruction[s] and impartially view the

evidence. The trial court failed to guarantee [defendant] his Sixth Amendment right to an impartial jury. The court had no knowledge of whether the potential jurors had prejudices toward an individual [who had allegedly committed a similar uncharged offense] which would prevent them from being fair and impartial in deciding" the current charged offenses. (*People v. Chapman, supra*, 15 Cal.App.4th at p. 141.)

The record does not demonstrate that the court's restriction on defense counsel's questions was limited to the form of the questions to the extent they revealed details of the case. When defense counsel first framed the issue on the record immediately after voir dire, the court did not dispute counsel's characterization that she had been precluded from questioning potential jurors about their possible prejudice or bias against defendant due to evidence of his prior wrongs and whether the jurors would be able to follow the court's instructions concerning "how . . . to deal with [defendant's] prior bad acts." Although the court commented that counsel had mentioned the case involved a video game machine, it stated that it considered the proposed questions to be attempts to ask the jury to prejudge the case and they were not probative in determining whether potential jurors were subject to challenges for cause. The court erred in so ruling.

There is nothing in the record that reflects what occurred in the sidebar and chambers conferences any differently than stated by defense counsel at the conclusion of voir dire. The court expressed no disagreement when defense counsel explained what happened in chambers by saying, "I should have been allowed to ask the jurors whether or not they would be able to follow the Court's instructions that that evidence was coming in for a limited purpose, and that they were not to use that evidence simply to say that my client is guilty, or is a person of bad character." In the circumstances, we "treat the matter as if the proper questions had been asked and objections had been sustained, as the record indicates that this would have been the trial court's ruling, had the questions been asked." (*People v. Ranney* (1931) 213 Cal. 70, 74.) Although the court differently recalled the substance of the chambers discussion when the new trial motion was heard about a month after the verdict, the record made at the close of voir dire provides the only contemporaneous account of those proceedings with any degree of specificity.

The court and defense counsel were aware that the People would introduce evidence of the 1996 incident as part of the People's case-in-chief. Whether a prospective juror would be improperly influenced by knowledge of defendant's prior misconduct, and whether if chosen the juror could limit consideration of that misconduct except as allowed by the court's instructions, were considerations critically important to defendant. " 'There was no fact more fundamental to his defense than that he should select a jury which would not be biased by [the 1996 incident], and regard it as evidence in the case from which they might find or presume his guilt of the charges upon which he was being tried. He had a right to inquire of the panel fully as to existence of any such bias to enable him to secure his constitutional right of trial before a legally qualified jury.' " (*People v. Ranney*, *supra*, 213 Cal. at p. 76.) If allowed, the intended questions would have explored whether jurors could follow the court's limiting instructions regarding their consideration of the 1996 incident. The questions would not have impermissibly asked potential jurors to "prejudge" the case. (*People v. Fierro, supra*, 1 Cal.4th at p. 209.) Nor would the questions allow defense counsel to learn how a particular juror would actually vote at trial, or otherwise constitute an attempt to instruct the jurors in matters of law or compel them to vote a particular way. (*Ibid*.)

The Attorney General argues that voir dire questioning was sufficient because potential jurors could be evaluated for bias and impartiality based upon their expressed willingness to follow the court's general instructions regarding their obligations to apply the law as instructed by the court, and to disregard matter that the court deemed not relevant. However, willingness to follow the court's general instructions does not relieve the failure to question potential jurors concerning any prejudice or bias that may result from their learning of the 1996 incident. (*People v. Carmichael* (1926) 198 Cal. 534, 545, overruled on other grounds in *People v. Bittaker* (1989) 48 Cal.3d 1046, 1086.)

The Attorney General contends that admission of evidence of the 1996 incident could only have marginal effect on the jurors' ability to be impartial because they heard evidence of defendant's 1999 misdemeanor burglary and his 2000 felony conviction for possessing stolen property. But, unlike that information regarding defendant's prior

convictions used to impeach his credibility, evidence of the 1996 incident was presented in the People's case-in-chief. Moreover, the district attorney specifically argued in closing that the earlier incident that defendant "got away with," was so similar to the charged crime that the 1996 incident bore upon defendant's intent to commit the charged offenses and as evidence of a common plan or scheme. Admittedly, the jury was properly instructed that it could consider the 1996 incident only on the issues of defendant's intent and was evidence of a common scheme or plan. But here, "We are concerned with the right of a defendant to ferret out the possible biases or prejudices of individual jurors and thereby ensure a defendant's Sixth Amendment right to an impartial jury." (*People v. Chapman, supra*, 15 Cal.App.4th at p. 142.) The court's instructions to the jury regarding permissible consideration of the 1996 incident "is not a substitute for counsel's right to inquire into the individual juror's attitude toward[s] [defendant] in an attempt to determine the ability of the jurors to be guided by the court's instructions." (*State v. Ziebert* (1978) 579 P.2d 275, 277.)

People v. Cardenas (1997) 53 Cal.App.4th 240, cited by the Attorney General is inapposite. In that case, the appellate court upheld the trial court's refusal to permit questioning of potential jurors regarding their opinion of the three strikes' law. (*Id*. at pp. 246-248.) The court determined the refusal was not error because a defendant "is no more entitled to question jurors about three strikes than he would be for any other sentencing scheme. Regardless of the sentence, the analysis remains the same: The jury's sole responsibility is the determination of guilt or innocence. As such, it is unnecessary, and unwise, to concern them with the ramification of their verdict." (*Id*. at p. 248.)

Unlike *Cardenas*, in this case the proposed questions concerned the ability of potential jurors to be fair and impartial in considering the issue of defendant's guilt or innocence even with knowledge of defendant's involvement in the 1996 incident. "It is well recognized that there may be members of a jury panel who feel that because a defendant has a criminal record it is more likely that he or she is guilty of the offense charged. This does not mean that a prospective juror with an initial feeling of hostility or

a negative reaction in respect to [a defendant with a criminal history] is necessarily disqualified from serving on the jury, but it does require that some opportunity be made available to a defendant to seek inquiry by the court or counsel as to the ability of a juror to be fair and impartial in the case. This is in keeping with the basic premise that voir dire examination should include all questions necessary to insure the selection of a fair and impartial jury." (*People v. Chapman, supra*, 15 Cal.App.4th at pp. 142-143.) Even though jurors learned of defendant's other convictions, he had a right to effectively explore whether they could remain fair and impartial arbiters if they heard he was involved in a similar uncharged incident, and could restrict their consideration of that incident to its proper evidentiary role of proof of intent and common plan or scheme but not his guilt of the charged offense. On this record, we conclude that it was prejudicial error to restrict counsel from asking such questions in voir dire, and reversal is required.

II. Sufficiency of the Evidence Supporting Conviction for Kidnapping to Commit Robbery

Although we are reversing the judgment, we will address the sufficiency of the evidence that supports the conviction for kidnapping to commit robbery "because the double jeopardy clause precludes retrial if the evidence is insufficient." (*People v. Grant* (2003) 113 Cal.App.4th 579, 584.)

In evaluating the sufficiency of evidence, "we do not determine the facts ourselves. Rather, we 'examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

"Kidnapping for robbery, or aggravated kidnapping, requires movement of the victim that is not merely incidental to the commission of the robbery, and which substantially increases the risk of harm over and above that necessarily present in the

crime of robbery itself. [Citations.] These two aspects are not mutually exclusive, but interrelated." (*People v. Rayford* (1994) 9 Cal.4th 1, 12.)

"As for the first prong, or whether the movement is merely incidental to the crime of robbery, the jury considers the 'scope and nature' of the movement. [Citation.] This includes the actual distance a victim is moved. However, . . . there is no minimum number of feet a defendant must move a victim in order to satisfy the first prong. [Citation.] [¶] In addition, . . . [the jury considers] the context of the environment in which the movement occurred." (*People v. Rayford, supra*, 9 Cal.4th at p. 12.)

"The second prong . . . refers to whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that inherent in robbery. [Citation.] This includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased." (*People v. Rayford, supra,* 9 Cal.4th at pp. 13-14.)

In support of his request for reversal, defendant essentially relies on *People v. Timmons* (1971) 4 Cal.3d 411. In *Timmons*, the defendant planned to rob two women who delivered money from a bank to a market where they were employed. (*Id*. at p. 413.) On the day of the robbery, the victims arrived at the market with the money from the bank and parked their car in the market's parking lot. (*Ibid*.) The unarmed defendant entered the car, told the victims it was a holdup, and directed one of the victims to drive out of the parking lot. (*Id*. at pp. 413-414.) As one of the victims slowly drove the car five blocks, defendant proceeded to rob the victims of the money from the bank. (*Ibid.*) After securing the stolen money, defendant told the driver to stop and he got out of the car. (*Id.* at p. 414.) In setting aside Timmons's conviction for kidnapping to commit robbery, the California Supreme Court held that "the movement [of the victims' vehicle] was 'incidental to the commission of the robbery.' [Citation.] The car was in fact the moving situs of the robbery in this case; its movement allowed Timmons to relieve the victims of their money with less danger of detection than if he had robbed them in a busy

parking lot, and facilitated his escape by transporting the eyewitnesses to a place where it would be more difficult for them to raise an immediate alarm." (*Ibid.*) Additionally, the court noted that the victims "simply drove their own car for some five blocks along a city street in broad daylight, while Timmons accomplished the robbery. . . . The police were not in hot pursuit, and there was no high-speed chase and consequent reckless driving. On the contrary, it was to Timmons'[s] advantage that the car be driven as innocuously as possible so as to attract no attention from passersby. Neither victim observed any weapon in Timmons'[s] possession, and the court found he was not armed. . . . [N]either victim suffered any harm whatever. [¶] In the circumstances, this brief asportation may conceivably have increased the risk in some slight degree beyond that inherent in the commission of the robberies, but it cannot be said to have 'substantially' increased that risk." (*Id*. at pp. 415-416.) In a footnote, the *Timmons* court acknowledged: "To avoid misunderstanding, we reiterate that in a different set of circumstances a movement of five city blocks might well 'substantially' increase the risk and thereby expose the robber to a prosecution for kidnapping." (*Id*. at p. 416, fn. 2.)

The *Timmons* rationale does not support reversal in this case. As the Supreme Court later clarified in *In re Earley* (1975) 14 Cal.3d 122, where the forcible movement is substantial, as in this case, such conduct is not merely incidental to the commission of the robbery even though it may have been solely to facilitate the commission of the robbery. (*Id*. at p. 130.) The *Earley* court acknowledged (*id*. at pp. 130-131, 132, fn. 14) that to the extent *Timmons* held a five block movement to be brief and incidental to the robbery, it was impliedly overruled by *People v. Stephenson* (1974) 10 Cal.3d 652, 657-661, where the victim was forcibly moved five or six blocks, and *People v. Thornton* (1974) 11 Cal.3d 738, 747, 750, 767-768, where two victims were forcibly moved one block and four blocks, respectively. Similarly, in this case there was substantial evidence that would have supported the jury finding that the forcible movement of Diaz in defendant's car for two or three blocks "was not 'merely incidental to the commission of the robbery' [citation], even though it may have been solely to facilitate the commission of the robbery." (*In re Earley, supra*, at p. 130.) The fact that defendant chose to complete 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 section 209 if that asportation was such that the victim's risk of harm was substantially increased thereby. Clearly, any substantial asportation which involves forcible control of the robbery victim such as that occurring in this case exposes [him] to grave risks of harm to which [he] would not have been subject had the robbery occurred at the point of initial contact." (*People v. Thornton, supra,* at p. 768.)

In *Earley*, the Supreme Court also distinguished *Timmons* on the "risk of harm" factor by noting that "in *Timmons* one of the victims drove during the daytime and presumably was able to give his undivided attention to driving, whereas here Earley drove at night while wearing sunglasses and holding an apparent weapon in one hand and it may be inferred his attention was divided between driving and watching his victim. Further, [in *Earley*], unlike *Timmons*, the victim observed what he believed to be a gun in the robber's hands, the robber expressly threatened to kill him, the victim did not have a companion with him, and the robber drove from a lighted intersection to dark side streets." (*In re Earley, supra*, 14 Cal.3d at p. 133.)

This case, just like *Earley*, is distinguishable from *Timmons* on the "risk of harm" factor, which is "the essence of aggravated kidnapping." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152.) Despite the daylight hours and short distance defendant drove his car, the jury could reasonably infer that defendant's attention was divided between driving and interacting with Diaz. Defendant steered with one hand while pointing an object at Diaz and threatening him that he was not to do anything silly. Although the jury found that defendant was not armed with either a firearm or a dangerous or deadly weapon, Diaz, alone in the car, believed the object defendant had was a gun and defendant did nothing to dissuade Diaz of that belief. To take advantage of an opportunity to escape, Diaz was forced to jump out of the car while it was still moving. Although Diaz was not injured when he jumped out of the car, the additional risk of his

injury, above and beyond the risk of harm from the robbery, constituted substantial evidence to support defendant's conviction of kidnapping to commit robbery. "[I]t is clear that the movement[ ] increased to some extent the risk of harm beyond that inherent in the commission of the crime of robbery itself," namely, "that an auto accident might occur or that the victim might attempt to escape from the moving car or be pushed therefrom by [defendant]. The fact that these dangers did not materialize does not, of course, mean that the risk of harm was not increased." (*In re Earley, supra*, 14 Cal.3d at p. 132.)

The Supreme Court decisions we rely upon all consider whether the asportation "substantially" increased a victim's risk of harm. However, the statutory crime of kidnapping to commit robbery as codified in section 209, subdivision (b), "does not require that the movement 'substantially' increase the risk of harm to the victim." (*People v. Martinez* (1999) 20 Cal.4th 225, 232, fn. 4.) The statute only requires that the movement "increase" the risk of harm to the victim. (§ 209, subd. (b)(2).) Our Supreme Court has not yet expressed its view on the asportation standard now expressed in the statutory language. (*People v. Dominguez, supra*, 39 Cal.4th at p. 1150, fn. 5.) In light of our conclusion that the evidence here is sufficient to meet the standard set forth by our Supreme Court, we will not address and express no opinion on the asportation requirement expressed in section 209, subdivision (b). (Cf. *People v. Ortiz* (2002) 101 Cal.App.4th 410, 414-415 [statutory offense of kidnapping to commit robbery requires only that the forcible movement increase the risk of harm, and does not require that the movement "substantially" increase risk].)

III. Remaining Issues

Since we have reversed the judgment, we do not reach the following issues: (1) the validity of certain instructions to the jury for which no objection was raised at trial; (2) the court's denial of defendant's requests to continue the sentencing hearing and substitute counsel at sentencing; (3) the court's failure to award presentence conduct credit on the kidnapping to commit robbery conviction; and (4) errors in the probation

report and abstracts of judgment on the indeterminate and determinate sentences. In case of a retrial, we comment briefly on two matters.

Contrary to defendant's contention, the record does not reflect that the trial court ever ruled on any aspect of defendant's motion in limine seeking to introduce evidence of Diaz's use of marijuana and possession of drug paraphernalia. Thus, it appears he may renew this request before a new trial.

Also, the trial court's ruling to admit evidence of the 1996 incident was based not only upon the prosecutor's description of the incident as reported by defendant to the police, but also the victim's description of that incident. However, the victim of that 1996 incident did not testify at the trial. Instead, the People chose to present the circumstances of the 1996 incident to the jury through the testimony of Officer Jeha who recounted only defendant's statement to the police as recorded in the officer's report. If the People again intend to introduce in their case-in-chief only evidence of defendant's statement to the police concerning the 1996 incident, the trial court may wish to reconsider the admissibility of that evidence pursuant to Evidence Code section 1101, subdivision (b).

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings.

____
Siggins, J.

We concur:

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McGuiness, P.J.

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Jenkins, J.