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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANNETTE LASHAY THOMAS, Thomas and Appellant.	B268456 (Los Angeles County Super. Ct. No. BA431045)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis J. Landin, Judge. Affirmed as modified.

Janet J. Gray, under appointment by the Court of Appeal, for Thomas and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Annette Lashay Thomas appeals from the judgment of conviction entered after a jury found her guilty of robbery, carjacking and kidnapping to commit robbery, contending the prosecutor committed misconduct by arguing facts not in evidence, her counsel provided constitutionally ineffective assistance by failing to object to those comments and the court prejudicially erred by failing to instruct on simple kidnapping as a lesser included offense of kidnapping to commit robbery and instructing on flight as evidence of a consciousness of guilt. She also argues the court erred in separately sentencing her for both carjacking and kidnapping to commit robbery. We modify the judgment to correct a sentencing error and, as modified, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

Thomas was charged in a three-count information with the second degree robbery of Juan A.G. Fernandez (Pen. Code, § 211;[1] count 1), carjacking (§ 215, subd. (a); count 2) and kidnapping Fernandez to commit robbery (§ 209, subd. (b)(1); count 3). It was alleged that Thomas had served three prior separate prison terms for felonies (§ 667.5, subd. (b)). Thomas pleaded not guilty and denied the prior prison term allegations.

2. *The Evidence at Trial*

a. *The People's case*

Fernandez, Mayra Rodriguez, an employee of the storage facility at which Thomas first met Fernandez, and Los Angeles Police Officer Jeffrey Pelczar, who arrested Thomas at the

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[1] Statutory references are to this code unless otherwise stated.

storage facility the day after Fernandez had been robbed, testified during the People's case-in-chief.

Fernandez testified he met Thomas in August 2014 at a storage facility at Broadway and Manchester Avenue in South Los Angeles, where they both rented units. Thomas told Fernandez she was homeless and hungry; Fernandez brought her food. Fernandez and Thomas remained in contact with each other thereafter.

Early in the afternoon of October 28, 2014 Thomas called Fernandez and asked him to meet her. They agreed to meet at 73rd Street and Broadway after Thomas finished some business. Thomas told Fernandez to park on 73rd Street because there was less of a police presence there. Once Fernandez had parked, Thomas got into the passenger seat of his car. Fernandez asked if Thomas was hungry. Less than a minute later a tall African-American man, later identified as George Williams, came up behind Fernandez, put a black gun to Fernandez's head and demanded money. Fernandez turned to Thomas and said, "I came here to feed you, and you do this to me?" She responded, "I have nothing to do with this."

In response to Williams's demand, Fernandez tried to give him the money from his wallet. Williams took the wallet and said to Fernandez, "You have to have more money. Give me the money." Fernandez replied he did not have any more money. Williams then told Thomas to pull the keys out of the car's ignition. As she did, Fernandez tried to grab them from her; Thomas responded by punching him in the mouth. Williams told Thomas to watch Fernandez and said to Fernandez, "Don't do anything wrong, or I'll blow your brains." Williams walked around the car and got in the back passenger seat behind

Thomas. He continued to demand more money and told Thomas to take Fernandez's two cell phones, which she did.

Williams directed Thomas to search Fernandez. Fernandez initially tried to hide his second wallet, which contained $2,400, but he ultimately gave it to Williams. As Fernandez started to explain the second wallet, Williams told him to shut up, struck Fernandez on the head with his gun, causing him to start bleeding, and again warned him against doing anything wrong.

At this point Williams got out of the car, went to the driver's side and forced Fernandez into the back seat. Williams took the car keys from Thomas and said they were going to Fernandez's house. Williams asked for the address; Fernandez responded with a false address. As Williams began driving, Fernandez unlocked the car door so he could jump out, but someone relocked it. Thomas warned him, "Don't do anything because he's a really bad guy." Fernandez again unlocked the car door, but Williams was driving too fast for him to jump out. Williams eventually stopped in a parking lot. Fernandez quickly left the car, but Thomas grabbed his collar and pulled him back in. Fernandez managed to free himself and ran away. Williams and Thomas left the area in Fernandez's car.

Rodriguez testified she had seen Thomas at the storage facility on a number of occasions with a tall African-American man with whom Thomas appeared to have a relationship. A few days before the incident, Rodriguez saw Thomas holding a black gun.

Officer Pelczar testified he went to the storage facility on the afternoon of October 29, 2014, where he arrested Thomas. Thomas had a black pellet gun and seven cell phones, including the two belonging to Fernandez, in her purse.

b. *The defense case*

Thomas testified on her own behalf and confirmed that Williams had robbed Fernandez and stolen his car, but denied she had been a knowing participant in the crimes. Thomas explained she had been dating Williams for about six months at the time of the incident. He was physically abusive, but she stayed with him because she had no one else.

According to Thomas, after she met Fernandez at the storage facility, he called her several times over the following weeks and paid her to perform oral sex.

On October 28, 2014 Thomas argued with Williams while they were at a restaurant at Broadway and Florence Avenue (one block north of 73rd Street). She called Fernandez and asked him to meet her and give her a ride to the storage facility. When Fernandez called her to let her know he was at the meeting location, she walked there and got into his car.

Williams appeared suddenly next to Fernandez's car. Williams had a gun that Thomas kept at her storage unit, which Williams had taken without permission. Thomas denied taking Fernandez's car key or cell phones; Williams took those items. Although the cell phones ended up in her purse, she intended to return them to Fernandez. Thomas also denied hitting Fernandez or attempting to restrain him. She did warn him that Williams was a very bad person.

After Williams stopped the car in a parking lot, Fernandez leapt out and ran off. Thomas jumped out right after Fernandez, ran across the street and boarded a bus that was just leaving. Thomas assumed Williams had immediately abandoned the car because he got on the same bus. They rode the bus for 90 to 120 minutes, then both got off the bus in Hollywood at Santa

Monica Boulevard and Vine Street. They began arguing. Thomas asked, "What did you do that for?" Williams called her names, hit her and threatened her. Thomas called the police.[2] As she described to the dispatcher what Williams was wearing, Williams "took the gun . . . and slid it." Thomas picked it up and put it in her purse because it belonged to her.

c. *Rebuttal*

Los Angeles Police Officer Luis Bonilla, Officer Pelczar and Rodriguez testified in rebuttal. Officer Bonilla responded to Fernandez's call to the police on October 28, 2014 after he had escaped from Williams and Thomas. He met Fernandez at 70th Street and Western Avenue about 2:10 p.m. Fernandez reported that the incident occurred at 1:30 p.m.

Officer Bonilla estimated the distance between the location where he met Fernandez and the intersection of Santa Monica Boulevard and Vine Street in Hollywood was about 15 miles. It took about 30 minutes to drive from one location to the other. Thomas's call to the police was made about 8:00 p.m.

Officer Pelczar testified Thomas told him she had taken the bus to Hollywood after the incident to visit a relative. Pelczar observed a mark on Thomas's nose but no bruises on her face.

Rodriguez testified Thomas told her on October 29, 2014 that she and Williams had taken Fernandez's car to Hollywood. Williams dropped her off there and took all the money. Rodriguez called the police. Thomas asked Rodriguez to tell them she was not there and let her escape.

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[2] A recording of the call was played for the jury.

3. *The Verdict and Sentence*

The jury found Thomas guilty of all three charged offenses. Thomas waived her right to a court trial and admitted the three prior prison term allegations. The court sentenced her to an indeterminate term of life in prison for kidnapping to commit robbery, imposed the upper term of nine years for carjacking to run concurrently with the life term for aggravated kidnapping and imposed and stayed pursuant to section 654 the upper term of five years for robbery. The court also stayed the three one-year prior prison term enhancements.[3] The court awarded Thomas 437 days of presentence custody credit and imposed statutory fines, fees and assessment.

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[3] Section 667.5 enhancements cannot be stayed; they must be imposed or stricken. (See *People v. Langston* (2004) 33 Cal.4th 1237, 1241 ["[o]nce the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken"].) The failure to impose or strike the section 667.5 enhancements constitutes an unauthorized sentence. (*People v. Vizcarra* (2015) 236 Cal.App.4th 422, 432.) Because the court's intent not to impose the enhancements is clear from the record, we modify the judgment by striking the improperly stayed section 667.5, subdivision (b), enhancements. (See *People v. Bradley* (1998) 64 Cal.App.4th 386, 391 ["[t]he failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction for the first time on appeal"].)

In addition, although the court ordered the prison term for carjacking to be served concurrently with the life term for aggravated kidnapping, the abstract of judgment fails to state whether the carjacking sentence is to run consecutively or concurrently. We order that correction as well.

DISCUSSION

1. *The Prosecutor's Misstatement of the Evidence Does Not Warrant Reversal of Thomas's Convictions*

a. *Proceedings below*

During a break in Thomas's direct testimony, the trial court asked the prosecutor if she intended to cross-examine Thomas regarding any of her prior convictions. The prosecutor responded that Thomas had "quite a few" felony convictions for petty theft with a prior. In addition, the prosecutor stated, it "[l]ooks like she was on probation for grand theft out of Airport when she was arrested on this case. Her probationary status is relevant. She's also ha[d] a case for weapons in a public place," as well as a "recent case out of Pasadena" in which "[p]robation was set to expire . . . on September 29th of 2015."

Defense counsel objected, arguing neither the Pasadena case, which involved drugs, nor the weapons case involved moral turpitude. The prosecutor pointed out that the drug case was "a felony conviction, and she was on probation and had weapons conditions." After further discussion the trial court ruled that the prosecutor could not ask Thomas about the weapons or drug cases but could ask her about the theft cases.

During cross-examination Thomas admitted she had been convicted of a felony. She testified she was not sure if, as a result of her felony status, she was not allowed to own, use or possess any weapons. She later acknowledged she had had "run-ins with law enforcement," many of those involving petty theft "just out of stores."

During her initial closing argument the prosecutor told the jury it "heard about Ms. Thomas's criminal history. You heard about her weapons conditions. She was on probation when this

happened, and she also has other theft cases. She's a convicted felon in the State of California. Now, you get to hear that because you get to use that when you are judging her credibility. Needless to say, her moral compass is a bit off, and it was certainly off on that day when she aided in a pretty scary carjacking." Later, when discussing Thomas's credibility with respect to the call she made to the police, the prosecutor added that Thomas "told you herself she's no stranger to the criminal justice system. Nobody has more motivation to lie than a defendant in a criminal case." Defense counsel did not object to any of these statements.

In his argument defense counsel focused on Fernandez's credibility. He did not mention Thomas's prior convictions, only noting she had made some bad life and relationship choices and would "not win the citizen of the year award." He stated, "I'm not going to ask you to find Ms. Thomas not guilty because she's pure as the driven snow, and I'm not going to ask you to find her not guilty because Mr. Fernandez is lying through his teeth." Rather, he continued, he was asking the jury to find her not guilty because failing to "stop her whacked out boyfriend from assaulting, robbing and stealing from Mr. Fernandez . . . doesn't make her guilty."

In her closing argument the prosecutor did not again discuss Thomas's criminal record.

b. *Prosecutorial misconduct*

i. Governing law

"'"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal

trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.'"' (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1331-1332; accord, *People v. Cortez* (2016) 63 Cal.4th 101, 130.)

"'A defendant's conviction will not be reversed for prosecutorial misconduct' that violates state law, however, 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.'" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071; accord, *People v. Lloyd* (2015) 236 Cal.App.4th 49, 60-61.) Bad faith on the prosecutor's part is not a prerequisite to finding prosecutorial misconduct under state law. (*People v. Hill* (1998) 17 Cal.4th 800, 821; accord, *Lloyd,* at p. 61.) As the Supreme Court has explained, "'[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.'" (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667; see *People v. Sandoval* (2015) 62 Cal.4th 394, 438.)

It is misconduct to misstate the facts or refer to facts not in evidence. (*People v. Linton* (2013) 56 Cal.4th 1146, 1207; *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353.) Nonetheless, the prosecutor "enjoys wide latitude in commenting on the evidence, including urging the jury to make reasonable inferences and deductions therefrom." (*Ellison*, at p. 1353; accord, *People v. Hill*, *supra*, 17 Cal.4th at p. 823.) "A prosecutor's 'argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom.'" (*People v. Edwards* (2013) 57 Cal.4th 658, 736.)

"'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained of comment in an improper or erroneous manner.'" (*People v. Gurule* (2002) 28 Cal.4th 557, 667; accord, *People v. Morales* (2001) 25 Cal.4th 34, 44.) In addressing such a claim, the arguments must be "read as a whole and in light of the evidence before the jury." (*Morales,* at p. 47.)

ii. Thomas forfeited any claim of prosecutorial misconduct

Thomas contends the judgment should be reversed because the prosecutor's statements during closing argument that Thomas was on probation and was subject to "weapons conditions" at the time Fernandez was robbed were not based on evidence introduced at trial and, in fact, referred to matters the prosecutor had been prohibited from using during her cross-examination of Thomas. In addition, by pointing to Thomas's lack of moral compass, Thomas now argues, the prosecutor suggested the jury could consider the evidence of her criminal history not only to evaluate her credibility but also to assess her propensity to commit the charged offenses.

Thomas's counsel did not object to any of the allegedly improper remarks, and Thomas has not demonstrated any objection and proper admonition would have failed to cure the harm. Accordingly, her claim of prosecutorial misconduct is forfeited. (*People v. Centeno*, *supra*, 60 Cal.4th at p. 674 ["[a]s a general rule, '"[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived

impropriety"'"]; accord, *People v. Charles* (2015) 61 Cal.4th 308, 327; *People v. Clark* (2011) 52 Cal.4th 856, 960.)

c. *Ineffective assistance of counsel*

Recognizing the likely forfeiture of her claim of misconduct, Thomas alternatively argues her trial counsel's failure to object to the remarks challenged on appeal constituted ineffective assistance of counsel. (*People v. Centeno*, *supra*, 60 Cal.4th at p. 674 ["'[a] defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel"'].) To prevail on that claim, Thomas "bears the burden of showing by a preponderance of the evidence that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice." (*Ibid.*) Prejudice is established by showing that, but for counsel's unprofessional errors, it is reasonably probable that the result of the proceeding would have been more favorable to the defendant. (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980; *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

On appeal we "'defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] Defendant's burden is difficult to carry on direct appeal, as we have observed: "'Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or

omission.'" [Citation.]' [Citation.] If the record on appeal ""sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected,'" and the 'claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.'" (*People v. Vines* (2011) 51 Cal.4th 830, 871-872, overruled on another ground in *People v. Hardy* (2018) 5 Cal.5th 56, 104; see *People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

"'[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one . . . .' [citation], and 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence' [citation]." (*People v. Centeno*, *supra*, 60 Cal.4th at p. 675.) Defense counsel's failure to object to the prosecutor's reference to facts not in evidence may well have been "a conscious tactical decision and a sensible one at that, taken so as not to draw the jury's attention to remarks that were, in context, fleeting." (*People v. Padilla* (1995) 11 Cal.4th 891, 958, disapproved on another ground in *People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1; cf. *People v. Vines*, *supra*, 51 Cal.4th at p. 878 [failure to ask certain questions of a witness "was a tactical decision to prevent the introduction of or further emphasis on testimony unhelpful or damaging to defendant"]; *People v. Stanley* (2006) 39 Cal.4th 913, 965-966 [failure to request instruction at penalty phase not to draw adverse inferences from the defendant's failure to testify may have reflected a tactical decision not to draw the jury's attention to the fact that he did not testify]; *People v. Medina* (1995) 11 Cal.4th

694, 740 ["counsel may have deemed it tactically unwise to call further attention to defendant's prior offenses by requesting special instructions"].)

Here, defense counsel may well have decided not to object to the prosecutor's brief reference to Thomas being on probation and subject to weapons conditions to avoid drawing attention to those aspects of Thomas's criminal record that were properly introduced during trial or simply so as not to irritate the jury by objecting to a relatively minor point. Because counsel could have had a rational tactical reason for failing to object to the prosecutor's comments, Thomas has not demonstrated she was provided constitutionally ineffective assistance of counsel. (See *People v. Vines*, *supra*, 51 Cal.4th at pp. 871-872; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 746.)[4]

2. *The Trial Court Did Not Err in Failing To Instruct on Simple Kidnapping as a Lesser Included Offense of Kidnapping To Commit Robbery*

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely

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[4] In *People v. Anzalone* (2006) 141 Cal.App.4th 380, on which Thomas relies, the court held that defense counsel's failure to object to the prosecutor's misstatement of the law during closing argument, which could have lessened the prosecution's burden of proof, constituted ineffective assistance of counsel. (*Id.* at p. 395.) Failure to object to the prosecutor's improper statement of the evidence, however, was not, as "[c]ounsel could reasonably have decided it was better to let the comment stand than risk irritating the jury by objecting." (*Ibid.*)

and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' 'That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged.'" (*People v. Smith* (2013) 57 Cal.4th 232, 239, citations omitted; see *People v. Breverman* (1998) 19 Cal.4th 142, 154.) "'This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence.' '[T]he rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither "harsher [n]or more lenient than the evidence merits."'" (*Smith,* at pp. 239-240, citations omitted; accord, *People v. Campbell* (2015) 233 Cal.App.4th 148, 157.) "'[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.'" (*Smith,* at p. 240; see *People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.) We review the record de novo to determine whether substantial evidence supported giving a particular jury instruction. (*People v. Avila* (2009) 46 Cal.4th 680, 705; *People v. Cole* (2004) 33 Cal.4th 1158, 1206.)

Thomas contends her conviction for kidnapping to commit robbery, which carries a mandatory life sentence (§ 209, subd. (b)(1)), should be reversed because the trial court erred in failing to instruct the jury with the lesser included offense of simple kidnapping under section 207, subdivision (a). Simple kidnapping requires proof a person was unlawfully moved by force or fear, without the person's consent, for a substantial distance. (*People v. Arias* (2011) 193 Cal.App.4th 1428, 1435.) Kidnapping to commit robbery "requires the additional element of an intent to rob, an intent which must be formed before the kidnap[p]ing commences." (*People v. Bailey* (1974) 38 Cal.App.3d 693, 699; accord, *People v. Lewis* (2008) 43 Cal.4th 415, 518, disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919.) It also 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." (*People v. Rayford* (1994) 9 Cal.4th 1, 12.)

In *People v. Laursen* (1972) 8 Cal.3d 192, the defendant argued his conduct did not constitute aggravated kidnapping "because the kidnap[p]ing was not committed until after the robbery, that is, the taking of the money, had been accomplished." (*Id.* at p. 199.) Explaining the relationship between a kidnapping and the elements of robbery, the Supreme Court observed it "has consistently recognized that '[r]obbery . . . is not confined to a fixed *locus*, but is frequently spread over a considerable distance and varying periods of time.' [Citations.] The assault of the victim, the seizure of his property and the robber's escape to a location of temporary safety are all phases in the commission of the crime of robbery linked not only by a

proximity of time and distance, but a single-mindedness of the culprit's purpose as well. Accordingly, we conclude that when as in the instant case the finder of fact may have reasonably inferred and accordingly have found that the kidnap[p]ing of an individual was to effect a robber's escape such kidnap[p]ing is proscribed by the provisions of section 209." (*Id.* at pp. 199-200, fn. omitted.)

As had the defendant in *Laursen*, Thomas argues the robbery here had already been completed before any movement of Fernandez occurred and contends it should have been for a properly instructed jury to determine whether the kidnapping pertained to the robbery or if there was some other reason to keep Fernandez in the car while they drove away from the location where Williams had taken Fernandez's money and wallet at gunpoint. However, Thomas does not suggest any purpose Williams and Thomas may have had for forcing Fernandez to remain in the car when they left the original crime scene other than to continue the robbery by going to Fernandez's home to steal additional property or to escape to a place of safety. Nor does she point to any evidence in the record, let alone substantial evidence, that could support a finding Williams and Thomas had any other purpose in keeping Fernandez in the car. (See *People v. Carter* (1993) 19 Cal.App.4th 1236, 1251 ["[i]n cases involving a kidnapping and robbery, courts have held almost without exception that the evidence supported the conclusion the robber had not reached a place of temporary safety so long as the victim remained under the robber's control"]; see also *People v. Cummins* (2005) 127 Cal.App.4th 667, 679.)

Based on this record, there was not substantial evidence to support an instruction on simple kidnapping as a lesser included

offense of the aggravated kidnapping charged. The trial court did not err in failing to instruct sua sponte on that offense. (*People v. Thomas* (2012) 53 Cal.4th 771, 813 ["[a]n instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonable conclude that the defendant committed the lesser uncharged offense but not the greater, charged offense"].)

3. *The Trial Court Did Not Err in Instructing on Flight as Evidence of a Consciousness of Guilty*

The trial court instructed the jury pursuant to CALCRIM No. 372 that flight could be considered as evidence of Thomas's guilt: "If the defendant fled immediately after the crime was committed, that conduct may show that she was aware of her guilt. If you conclude the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself." This instruction and its substantially identical predecessor CALJIC No. 2.52 are authorized in appropriate cases by section 1127c, which requires the court to instruct the jury in any case in which evidence of flight of a defendant is relied upon as tending to show guilt that, if flight has been proved, the jury may infer consciousness of guilt but that flight alone "is not sufficient in itself to establish his [or her] guilt. . . . The weight to which such circumstance is entitled is a matter for the jury to determine." (§ 1127c.)

A flight instruction is properly given "'whenever evidence of the circumstances of [a] defendant's departure from the crime scene . . . logically permits an inference that his movement was motivated by guilty knowledge.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 522; accord, *People v. Lucas* (1995) 12 Cal.4th 415, 470; *People v. Turner* (1990) 50 Cal.3d 668, 694.) Flight does

not require the physical act of running but rather "'"a purpose to avoid being observed or arrested."'" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055, accord, *Abilez,* at p. 522.)

Thomas contends no evidence supported the court's decision to instruct with CALCRIM No. 372 and the instruction is impermissibly argumentative because it suggests she had, in fact, fled the crime scene. Neither argument has merit.

Under Thomas's version of the facts, she jumped out of the car in the parking lot where Fernandez had finally managed to escape and ran to board a bus in order to get away from Williams as soon as she could. Whether that was the true reason she fled the crime scene or whether she and Williams both left Fernandez's car and took the bus to avoid detection was a question for the jury. Moreover, Rodriguez testified Thomas told her the day after the robbery that she and Williams had taken Fernandez's car to Hollywood, which unquestionably constituted flight from the crime scene in South Los Angeles. Under either version of Thomas's action after Fernandez escaped, it is a reasonable inference her purpose in going to Hollywood was to avoid being observed or arrested. (See *People v. Abilez*, *supra*, 41 Cal.4th at p. 522.)

Thomas's related contention the flight instruction is impermissibly argumentative has been expressly rejected by the Supreme Court in *People v. Loker* (2008) 44 Cal.4th 691 in the context of CALJIC No. 2.52, CALCRIM No. 372's predecessor. The *Loker* Court held, "[T]his instruction 'properly advise[s] the jury of inferences that c[an] rationally be drawn from the evidence.'" (*Loker*, at p. 706; accord, *People v. Johnson* (2015) 61 Cal.4th 734, 774 [CALJIC No. 2.52 "is not unnecessary or argumentative, nor does it permit the jury to draw impermissible

inferences about defendant's guilt or state of mind"]; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 128.)

4. *The Court Properly Imposed Concurrent Sentences for Kidnapping and Carjacking*

Although convicted of three felony offenses—kidnapping to commit robbery, carjacking and robbery—the trial court imposed sentence on Thomas only for the aggravated kidnapping and carjacking; the sentence for robbery was stayed pursuant to section 654, which prohibits punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct. (See *People v. Capistrano* (2014) 59 Cal.4th 830, 885-886; *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)[5] Thomas contends all three offenses were intertwined and under section 654 the court should have stayed the sentence for carjacking as well as for robbery.

The question whether section 654 applies in a particular case is one of fact for the trial court, which is vested with broad latitude in making its determination. (*People v. Archer* (2014) 230 Cal.App.4th 693, 703; *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1378.) We review the trial court's express or implied finding that section 654 does not apply for substantial evidence (*People v. Brents* (2012) 53 Cal.4th 599, 618; *People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1005), viewing the evidence in the

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[5] Section 654, subdivision (a), provides in part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

light most favorable to that determination (*Ortiz*, at p. 1378; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143).

"The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, [s]he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Harrison* (1989) 48 Cal.3d 321, 335; accord, *People v. Pinon* (2016) 6 Cal.App.5th 956, 968; see *People v. Rodriguez*, *supra*, 235 Cal.App.4th at p. 1007 ["it is well established that a defendant may harbor 'separate and simultaneous intents' in committing two or more crimes, for purposes of section 654"].) """The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple." [Citation.] "A defendant's criminal objective is 'determined from all the circumstances . . . .'"" (*People v. Sok* (2010) 181 Cal.App.4th 88, 99; see *Britt*, at p. 952.)

Here, substantial evidence supports the trial court's implied finding that, even though the crimes were intertwined, Thomas had separate objectives when she aided and abetted the

aggravated kidnapping of Fernandez and the carjacking.[6] After robbing Fernandez of his money and phones while in the parked car, Williams and Thomas forced Fernandez to ride with them in the car as a means to continue the robbery by driving to his house for more money and property—kidnapping to commit robbery. When Fernandez escaped by jumping from the car, Williams and Fernandez stole the car in order to flee to a place of safety—carjacking. Because there is substantial evidence Fernandez's car was not initially an object of the robbery, it was not error to punish Thomas separately for the statutory violation committed in pursuit of each objective. (See *People v. Harrison*, *supra*, 48 Cal.3d at p. 335; cf. *People v. McKinzie* (2012) 54 Cal.4th 1302, 1369 ["defendant could not be punished for both carjacking and kidnapping for robbery because the prosecutor argued to the jury that the victim's car was the object of the robbery"] disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3 .)

DISPOSITION

The judgment is modified to strike the three prior prison term enhancements under section 667.5, subdivision (b). As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment that also

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[6] "'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a); accord, *People v. Lopez* (2003) 31 Cal.4th 1051, 1055.)

includes a notation the sentence for carjacking is to run concurrently with the term for kidnapping to commit robbery and to forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.