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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. OMAR CHAIDEZ, Defendant and Appellant.	B259009 (Los Angeles County Super. Ct. No. BA380010)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Richman, Judge. Affirmed as modified and remanded.

Valerie Mark Kalb, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Omar Chaidez appeals from the judgment entered after a jury convicted him of simple kidnapping, false imprisonment, and being a felon in possession of a firearm. Because false imprisonment is a lesser included offense of kidnapping, we vacate that conviction but otherwise affirm.

FACTS AND PROCEEDINGS

I. Prosecution Evidence

Chaidez was hired as a bail recovery agent to locate and apprehend the fugitive Antonio Medina. Around 4:00 a.m. on July 22, 2010, Chaidez and several other armed agents went to the home of Pamela Torres (Pamela), Medina's girlfriend's sister, looking for Medina. Chaidez with several other armed agents banged on the door, and Chaidez ordered the occupants outside at gunpoint, including Pamela, her husband, and Joaquin Torres (Torres), who was the brother of Pamela and Medina's girlfriend. Torres was in the hallway of the house when the front door was opened and the occupants ordered outside. He did not want to exit the house, but was scared and feared for his life because guns were pointed at him and he was afraid of being shot. The guns had laser pointers which were pointed at Torres and other family members. Torres came outside in only his boxer shorts and was handcuffed and told to sit on the porch.

After searching the house and not finding Medina, Chaidez instructed Pamela, her husband, and their children to return inside the house while Torres remained outside. Chaidez threatened Torres with arrest and deportation, and ordered him into a car that looked like a patrol car. Torres, who was still handcuffed, was driven to a location a few blocks away and taken out of the car to sit on the sidewalk. Chaidez stated he was part of a sheriff's group that searched for people with warrants and showed Torres a photograph of Medina. After Torres fabricated a story about Medina's whereabouts, the armed men drove him back to a corner near his home and released him.

Two days later, Torres contacted the police about the incident, and he and Pamela filed civil lawsuits against Chaidez based on it.

II. Defense Evidence

Chaidez denied handcuffing Torres during the incident.

He falsely told Torres he had called the police about Torres's outstanding warrant but would make sure he was not at the house when they arrived if he agreed to give Medina's location. It was Torres who suggested they go around the block because he did not want his family to hear him give information about Medina.

Chaidez admitted he had a 2007 felony conviction for embezzlement.

III. Conviction and Sentencing

The jury convicted Chaidez in count 1 of simple kidnapping in violation of Penal Code[1] section 207, subdivision (a), in count 3 of false imprisonment in violation of section 236, and in count 5 of being a felon in possession of a firearm in violation of section 12022, subdivision (a)(1).[2] In relation to counts 1 and 3, the jury also found to be true that Chaidez had personally used a firearm within the meaning of section 12022.5, subdivision (a), and in relation to count 1, within the meaning of section 12022.53, subdivision (b).

The trial court sentenced Chaidez to an aggregate term of 13 years and eight months in prison, consisting of: the lower term of three years on count 1 plus 10 years for the firearm enhancement under section 12022.53, subdivision (b); 13 years on count 3, stayed pursuant to section 654; and one-third of the base term of two years, or eight months, on count 5, to be served consecutively. The court awarded various custody credits and imposed various fines, fees, and restitution.

Chaidez appealed.

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[1] All statutory references are to the Penal Code.

[2] After the jury deadlocked on two counts, the court dismissed count 2 charging first degree burglary with a person present in violation of section 459 and count 4 charging impersonating a public officer in violation of section 146a, subdivision (b), as well as the related firearm allegations.

DISCUSSION

I. Simple Kidnapping

At trial, the prosecution offered two theories of asportation: (1) moving Torres from inside the house to out on the porch, and (2) placing him in a car and driving him several blocks away. Chaidez argues at least one of the theories of asportation was legally inadequate, and his conviction for simple kidnapping must be reversed because the court cannot determine upon which theory the jury based its verdict.

A. The First Movement of Torres Was Sufficient

Chaidez contends the initial movement of Torres from inside the house to the porch was legally inadequate to support his conviction for simple kidnapping because the movement was not "substantial" as a matter of law.

Section 207, subdivision (a), provides "[e]very person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person . . . into another part of the same county, is guilty of kidnapping." In *People v. Martinez* (1999) 20 Cal.4th 225, 237 (*Martinez*), the California Supreme Court held that the asportation in a simple kidnapping must be "substantial in character." The court overruled precedent that had made the asportation standard exclusively dependent on the distance involved, and instead emphasized that "[s]ection 207(a) proscribes kidnapping or forcible movement, not forcible movement for a specified number of feet or yards." (*Id.* at pp. 233, 236.) Rather, the *Martinez* court held, "factors other than actual distance are relevant to determining asportation . . . in all cases involving simple kidnapping." (*Id.* at p. 235.) Thus, "the jury should consider the totality of the circumstances," including "such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*Id.* at p. 237.) Although the *Martinez* court was clear that actual distance was not determinative of whether a movement was "substantial in character," it also "emphasize[d] that contextual factors, whether singly or in combination, will not suffice

to establish asportation if the movement is only a very short distance." (*Ibid*.) The *Martinez* court explained, "[w]hile the jury may consider a victim's increased risk of harm, it may convict of simple kidnapping without finding an increase in harm, or any other contextual factors. Instead, as before, the jury need only find that the victim was moved a distance that was 'substantial in character.' [Citations.] To permit consideration of 'the totality of the circumstances' is intended simply to direct attention to the evidence presented in the case, rather than to abstract concepts of distance." (*Ibid*.)

Here, Chaidez contends that Torres was moved "not more than a few feet," or a "distance of perhaps five to eight feet," and the distance was so short that "it fails as a matter of law to qualify as substantial even assuming contextual factors in support." In addition, Chaidez argues, none of the contextual factors identified in *Martinez* were present because Torres would have been at greater risk of harm had he remained in the house, where he risked being mistakenly shot when the armed men searched it, and his being taken outside decreased the likelihood of an escape attempt, decreased Chaidez's opportunity to commit other crimes, and increased the likelihood of detection.

Martinez made clear there is no minimum distance for simple kidnapping. (*Id.* at p. 236; see *People v. Corcoran* (2006) 143 Cal.App.4th 272, 280 ["measured distance is not alone determinative"].) And we do not read *Martinez* as establishing that movement of "a few feet" or "perhaps five to eight feet" is so "very short" that it could never be the basis for a simple kidnapping conviction. Rather, *Martinez* emphasized that focusing on a particular distance of movement was "rigid and arbitrary, and ultimately unworkable." (*Martinez, supra,* 20 Cal.4th at p. 236.) Accordingly, we decline to hold that a distance of "a few feet" or "five to eight feet" is so short that it fails as a matter of law to qualify as a substantial movement.

A reasonable jury could have found that moving Torres from inside the home to outside, in his underwear after being awoken in the middle of the night, increased his actual and perceived vulnerability given the armed men aiming laser pointers at his chest and surrounding the porch, provided Chaidez enhanced opportunity to commit further crimes such as moving Torres to a more remote location, and increased the risk of any

escape attempt by Torres because he was closer to freedom but more exposed to the armed men. Based on the totality of the circumstances, a jury could reasonably find that Chaidez's initial movement of Torres was "substantial in character." (*Martinez, supra*, 20 Cal.4th at p. 237.)

B. The Court Properly Instructed on Consent with Respect to Second Movement of Torres

Chaidez contends the second movement of Torres, to a location a few blocks away by car, could not support a simple kidnapping conviction because the trial court failed to answer a question the jury posed about consent and gave an improper instruction on consent.

The trial court instructed the jury on simple kidnapping using CALCRIM No. 1215, but did not give the portion of the instruction defining consent. At the end of the first day of deliberations, the jury sent out two questions including one asking, "What exactly does 'consent' mean? If the witness felt threatened by the weapons is he really 'consenting' to leave? (Even if he says that he'll go around the corner?) Does consent have to be verbal or can it include an action?"

The next morning, the trial court read the jury's questions to counsel and suggested it would read the definition of consent from CALCRIM No. 1215 previously omitted, noting that portion of the instruction should have been given initially.[3] Chaidez's counsel argued the court should also specifically answer whether consent could be nonverbal as well as verbal, but the prosecution argued that the court should wait to see if the jury could resolve the issue with the CALCRIM No. 1215 instruction on consent. Over defense counsel's objection, the trial court agreed with the prosecution, reasoning that the jurors could ask more questions if they wished.

Before giving the supplemental instruction, the trial court told the jury "hopefully it will answer your question. If it does not, you can ask another question." The court then instructed the jury:

[3] Chaidez concedes that the supplemental instruction cured any error from the trial court's failure initially to define consent for the kidnapping charge.

"In order to consent, a person must act freely and voluntarily and know the nature of the act. [¶] The defendant is not guilty of kidnapping . . . if he reasonably and actually believed that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of kidnapping. The defendant is not guilty of kidnapping if the other person consented to go with the defendant. The other . . . person consented if he one, freely and voluntarily agreed to go with or to be moved by the defendant. [¶] Two, was aware of the movement and three, had sufficient maturity and understanding to choose to go with the defendant. The People have the burden of proving beyond a reasonable doubt that the other person did not consent to go with the defendant. If the People have not met this burden, you must find the defendant not guilty of this crime. [¶] Consent may be withdrawn if at first a person agreed to go with the defendant. That consent ended if the person changed his or her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant. [¶] The defendant is guilty of kidnapping, if, after the other person withdrew consent, the defendant committed the crime as I defined it. . . ."

The trial court then repeated to the jury that it could ask more questions if it had any.

Chaidez argues the trial court abused its discretion under section 1138 when it failed to answer directly the jury's question whether consent could be nonverbal as well as verbal.

Under section 1138, "[a]fter the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of . . . the prosecuting attorney, and the defendant or his counsel . . . ." Thus, section 1138 "imposes upon the court a duty to provide the jury with information the jury desires on a point of law." (*People v. Smithey* (1999) 20 Cal.4th 936, 984-985.) "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 section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." "But a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* . . . whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) We review a trial court's actions under section 1138 for abuse of discretion. (*People v. Eid* (2010) 187 Cal.App.4th 859, 882.)

When the trial court realized that it had inadvertently omitted the portion of CALCRIM No. 1215 on consent, it not only gave the omitted instruction but informed the jurors twice that they could ask additional questions if the supplemental instruction did not answer their questions. It did more than "figuratively throw up its hands and tell the jury it cannot help." (*Beardslee*, *supra*, 53 Cal.3d at p. 97.) It told the jury it was willing to help, if additional help was needed.

Chaidez argues he tricked Torres into getting into the car by telling him police were coming to pick him up. He argues the trial court failed to explain to the jury that fraud alone cannot vitiate consent to asportation.[4]

"'[A]sportation by fraud alone does not constitute general kidnapping in California.'" (*People v. Majors* (2004) 33 Cal.4th 321, 327 (*Majors*).) In *Majors*, the defendant, posing as a security guard, falsely accused the victim of shoplifting and ordered her into a van. (*Id.* at pp. 324-325.) The court held, "in those cases in which the movement was found to be by fraud alone, and not force or fear, the circumstances suggest the victim exercised free will in accompanying the perpetrator. By contrast, the threat of arrest carries with it the threat that one's compliance, if not otherwise forthcoming, will be physically forced. Thus, the use of force is implicit when arrest is threatened." (*Id.* at p. 331.)

[4] In the alternative, Chaidez argues his trial counsel was ineffective for failing to request a pinpoint instruction on fraud for the kidnapping charge.

Here Chaidez, posing as a "warrants department" agent, falsely told Torres he would be arrested if he did not leave with him. Like the defendant in *Majors*, Chaidez clearly used fraud, but the fraud involved a threat of arrest which, in *Majors*, implicitly includes the threat of force. (*Id.* at p. 331.) Thus, Chaidez induced asportation by more than "fraud alone."

II. Ineffective Assistance of Trial Counsel

Chaidez contends he received ineffective assistance of counsel because his trial counsel failed to object to nonresponsive testimony from Yolanda Franco, Torres's attorney in his civil case, or to prosecutorial misconduct.

Franco testified the civil court found Chaidez's actions to be egregious and awarded Torres $550,000 in punitive damages after his counsel asked if Torres sought damages in his civil lawsuit and how much he received. Chaidez argues that his counsel was further ineffective by asking Franco how much Torres received in damages and Franco responding "$550,000."

Chaidez also raises his trial counsel's failure to object to the prosecution's repeated references to Chaidez as "the felon" or "our felon" during closing argument.

"The burden of proving ineffective assistance of counsel is on the defendant." (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) A criminal defendant must show both deficient performance—"that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates," and prejudice—"that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Price* (1991) 1 Cal.4th 324, 386; see *Strickland v. Washington* (1984) 466 U.S. 668, 687.) In evaluating a defendant's showing that "counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms" (*Strickland*, *supra*, at p. 688), an appellate court accords "great deference to the tactical decisions of trial counsel in order to avoid 'second-guessing counsel's tactics and chilling vigorous advocacy by tempting counsel "to defend himself or herself against a claim of ineffective assistance after trial rather than to defend his or her client against criminal charges at trial . . . ."'" (*In re Fields* (1990) 51 Cal.3d

1063, 1069-1070.) "'However, "deferential scrutiny of counsel's performance is limited in extent and indeed in certain cases may be altogether unjustified. '[D]eference is not abdication' [citation]; it must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions."'" (*Id.* at p. 1070.)

"'Reviewing courts 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.] . . . . "'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, 876.) Thus, "[i]n the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel . . . unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926.)

Here, we cannot say that there could be no conceivable reason for trial counsel's decisions not to object. Chaidez's trial counsel may have determined that Franco revealing how much Torres received from the civil litigation would undermine his credibility because it would show he had a financial incentive to lie about the kidnapping. Likewise, counsel may have decided objecting to the prosecution's references to Chaidez as a felon would have reinforced them. "Whether to object at trial is among 'the minute to minute and second to second strategic and tactical decisions which must be made by the trial lawyer during the heat of battle.' [Citation.] Although trial counsel may have the duty to protect the record when their client's trial interests are truly at stake, they have

no duty to object simply to generate appellate issues." (*People v. Riel* (2000) 22 Cal.4th 1153, 1202; see *People v. Thompson* (2010) 49 Cal.4th 79, 127, fn. 16 ["a defendant cannot automatically transform a forfeited claim into a cognizable one merely by asserting ineffective assistance of counsel"].)

III. Lesser Included Offense of False Imprisonment

As the Attorney General aptly concedes, false imprisonment is a lesser included offense of kidnapping. (*People v. Gibbs* (1970) 12 Cal.App.3d 526, 547.) Because we affirm Chaidez's conviction for kidnapping, we agree with the parties that his conviction for false imprisonment must be vacated. Accordingly, we do not reach Chaidez's arguments concerning his sentence on the false imprisonment count.

DISPOSITION

We vacate the conviction for false imprisonment. The case is remanded to the trial court to issue an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED

CHANEY, J.

WE CONCUR:

ROTHSCHILD, P. J.

JOHNSON, J.