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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. MARTIN MACIAS LANDEROS et al., Defendants and Appellants.	B247126 (Los Angeles County Super. Ct. No. VA124534)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed as modified.

Carlos Ramirez, under appointment by the Court of Appeal, for Defendant and Appellant Martin Macias Landeros.

Helen S. Irza, under appointment by the Court of Appeal, for Defendant and Appellant Monica Isabel Garcia

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Martin Macias Landeros and Monica Isabel Garcia appeal from judgments of conviction entered after a jury found them guilty of carjacking (Pen. Code, § 215, subd. (a);[1] count 1), attempted second degree robbery (§§ 211, 664; a lesser included offense of count 2, second degree robbery), and false imprisonment by violence (§ 237; a lesser included offense of count 4, kidnapping for carjacking). The jury found Landeros and Garcia not guilty of assault with a firearm (§ 245, subd. (a)(2); count 3) and found not true the allegation that Landeros personally used a firearm during the commission of the crimes within the meaning of section 12022.53, subdivision (b).

The court, after Landeros waived a jury, found true the allegations that he had suffered a prior serious felony conviction under section 667, subdivision (a)(1), and a prior strike conviction under section 1170.12. After denying Landeros' motion to strike the prior strike conviction, the trial court sentenced Landeros on count 1 to state prison for a term of 15 years, consisting of the middle term of five years doubled pursuant to the "Three Strikes" law, plus five years for the prior serious felony conviction. The trial court stayed the terms on counts 2 and 4 pursuant to section 654. On count 1, the trial court also ordered Landeros to pay a $280 restitution fine pursuant to section 1202.4, subdivision (b), a $280 parole revocation fine pursuant to section 1202.45 (stayed upon successful completion of parole), a $40 court security fee pursuant to section 1465.8, and a $30 conviction assessment pursuant to Government Code section 70373. The court imposed and stayed these fines and fees on counts 2 and 4. The trial court sentenced Garcia on count 1 to state prison for the middle term of five years and imposed the same fines and fees, and on counts 2 and 4 stayed the sentences, fines, and fees.

Landeros and Garcia do not challenge their convictions for carjacking or attempted second degree robbery. They argue that their convictions for false

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[1] Unless otherwise stated, all section references are to the Penal Code.

imprisonment by violence should be reversed because, although the trial court correctly instructed the jury orally on false imprisonment by violence, the trial court erred by not providing the jury with a written copy of the instruction, and because the court did not instruct the jury sua sponte on the lesser included offense of misdemeanor false imprisonment. Landeros and Garcia also challenge the amount of the restitution fines imposed. In addition, Landeros contends that the trial court erred by enhancing his sentence under section 667, subdivision (a)(1). We conclude that the trial court did not commit prejudicial error in instructing the jury and affirm the convictions. We also reduce the amount of the restitution fines and strike the enhancement.

FACTUAL AND PROCEDURAL BACKGROUND

There are two sides to most stories. Here, the two sides were very different.

A. *The Victim's Version*

Javier Marin and his wife operate a used car dealership in Huntington Park. On Sundays the business is open from 8:00 a.m. to 5:00 p.m. On Sunday July 10, 2011 Marin received two telephone calls from potential buyers who said they had been referred to Marin by someone who had previously purchased a car from the dealership. Marin arranged to meet with them right around closing time.

Landeros and Garcia arrived a little after 5:00 p.m. that day, as Marin was in the process of closing and his wife and two sons were in the office. Landeros and Garcia knocked on the office door and Marin went out to meet them. They asked to see a Chevrolet HHR.[2]

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[2] HHR stands for Heritage High Roof, which refers to its "tall retro-wagon styling." Chevrolet produced the compact four-door HHR wagon from 2006 to 2011. (http://www.edmunds.com/chevrolet/hhr.)

Because the HHR was a salvage car, and Landeros and Garcia told Marin that they wanted to finance their purchase, Marin recommended a maroon 2007 Toyota Camry with "clean title." Landeros and Garcia said they wanted to test drive the car, so Marin brought it down from a ramp where he stored it. Landeros went into the back seat of the Toyota Camry, where Marin usually sat during a test drive, Garcia went into the driver's seat, and Marin went into the front passenger seat. Landeros asked Marin to put on his seatbelt, but Marin ignored him. After Landeros' second request, Marin fastened his seatbelt. Marin did not make a copy of Landeros' or Garcia's driver's license or identification. Marin's insurance did not require him to obtain information about potential buyers who test drive one of his cars.

As they were driving through the neighborhood, Marin asked how the couple intended to buy the car, and Landeros said with "cash." This made Marin a little suspicious and nervous, because previously they had told him that they wanted to pay $3,000 down and finance the rest, and so Marin tried to get Garcia to drive back to the dealership. Garcia and Landeros asked if they could drive on the freeway, and Marin told them (falsely) that they could not drive on the freeway because the car did not have dealer plates on it.

Suddenly, Landeros grabbed Marin by the neck, held a nine millimeter semi-automatic handgun to the side of his head, and said, "Don't move you bastard. This is a hold up." Marin grabbed Landeros' hand with his left hand and the barrel of the gun with his right hand, and the two of them struggled. Landeros then told Garcia to take any money Marin had in his possession. Garcia, still driving, reached into Marin's left side pocket and pulled out a work tool that had pliers and a knife folded up in a sheath. Marin had $3,000 in cash with him, but Garcia did not find it. Landeros said, "Stab him, stab him," but Garcia was unable to open up the blade, so she struck Marin three or four times with the tool while the knife was still closed, as Landeros and Marin continued to struggle over the gun. Marin had bruises where Garcia hit him with the tool.

Marin then tried to escape as the car was moving at 20 to 25 miles per hour. He "let go of the gun with [his] right hand, and . . . tried to find the handle on the car door so

[he] could roll out of the car." He was able to "break free" and jumped from the moving car but became caught in the diagonal shoulder harness part of the three-point seatbelt, so that the car began to drag him. Marin's feet were close to the rear tires and dragging on the pavement after his shoes came off. The Camry continued to drag Marin along the pavement for "about a block and a half," while Marin yelled at Landeros and Garcia to let him go, until Garcia finally stopped the car. Marin "stood up and removed the seat belt," and Landeros and Garcia left in the Camry. Some bystanders who were having a barbecue on their front lawn nearby helped Marin and brought him back to the dealership, which was about a mile away.

When Marin got back to the dealership, he told his wife to call the police immediately because the two customers had stolen the car. His clothes were dirty, his shoes were off, he was bleeding, and skin was torn off his feet. He was frightened, shaken, "teary eyed," and "yellowish." His injuries were consistent with "road rash" or having fallen or jumped out of a moving vehicle. The paramedics came and treated Marin for abrasions on his feet and hands, and then took him to the hospital.

Marin found the Camry later that night after he had been released from the hospital. He went looking for the Camry because all of his keys were in the car. He called the police, and in the car deputies found Marin's tool, a can of Modelo beer, and a small "faux leather" pouch of cosmetics. There was blood on the right passenger seat near the floorboard, on the right front passenger door, and on the interior of the post between the front and rear passenger compartments, the headrest, and the right rear passenger seat. Samples taken of blood stains indicated that they came from Landeros and Marin.[3] Detectives found one fingerprint of Landeros on the outside of the rear passenger door.

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[3] A criminologist with the Sheriff's Department concluded that Landeros' blood was found on the rear passenger seat and on the front of the headrest, while Marin's blood was found on the right front passenger seat and the door post.

Marin had never seen Landeros and Garcia before this incident. He identified them for detectives from a six-pack photo display. He also recognized a tattoo on Garcia's arm and identified the tattoo on her arm at trial.

B. *Defendants' Version*

Garcia was a housekeeper, but now she is a prostitute. She works mostly in the valley because "that where everybody goes." She had met Marin three times before July 20, 2011. She met Marin "at the IHOP" where Landeros worked as a supervisor and Marin was having breakfast, and Landeros introduced them. In April or May 2011 and again in June 2011 Garcia engaged in sexual activity with Marin at the Palm Tree Hotel on Sepulveda and Roscoe Boulevards in the San Fernando Valley, where she "practically" lives. She called Marin at his business to make the arrangements for these meetings at the hotel.

Landeros, who was also married, had known Marin for eight or nine years prior to July 2011. He also knew Marin's wife and family, and he met Marin's wife and children "more than 20" times at the IHOP. Juan Carlos Contreras, who worked for Landeros for several years at the IHOP in Newbury Park, saw Marin with Landeros at the restaurant in August and September 2011, although it could have been earlier than that.

Landeros calls Marin "Flaco," and Marin calls him "Pancon."[4] The two men met at the IHOP, played cards and chess, and went to the race track together. Landeros calls Garcia "Flaca." He calls Marin's wife "Gorda" but does not know her real name. Landeros and Marin had gone on double dates with strippers and with women that Landeros knew from Mexico.

On July 10, 2011 Landeros and Garcia went to meet Marin to get some of the approximately $9,700 that Marin owed Landeros from bets Marin had placed at an illegal racetrack, rooster fights, and poker games. According to Landeros, he and Garcia went to

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[4] "Flaco" means skinny and "pancon" means fat, but they are more terms of friendship than insults.

Marin's business to collect the money, and then they were going to go out on a double date with another woman Landeros sees "on the side" to get Italian food in Marina Del Rey and walk on the beach.

Landeros, Garcia, and Marin left the lot because Marin's wife was at the dealership. According to Landeros, Marin "had said that he don't want his wife to know about the business, that he owes me money and about Flaca, [Garcia]. So we jumped in the car so she thinks we were test driving the car." Garcia said that she was going to have sex with Marin at the same hotel on Sepulveda and Roscoe and charge him $100. Garcia also said that Marin was going to give her the car instead of money "for being with him." Garcia said that to pay Marin for the car she "was going to give him a little bit at a time and also pay him with sex." Garcia did not have a driver's license.

When Garcia drove the Camry from the lot, Marin told her where to go and where to turn. Marin answered a telephone call and told the caller that they were "around the corner." After a few blocks, Marin told Garcia to park in front of a brown van or truck. Two men got out of the truck and knocked on the rear passenger window where Landeros was sitting.[5] Marin said that they had the money for Landeros and were going to pay him. Landeros lowered the window and one of the men, Perico, "smashed" Landeros in the nose, which began to bleed on his shirt and on the interior of the Camry. Landeros told Garcia to get out of the car, and then he got out of the left side of the car behind the driver's seat. According to Landeros, as he was leaving with Garcia he heard Marin arguing with the two men from the brown van. Landeros walked back to his car, which was a couple of blocks away. He was going to call the police but decided against it because the money Marin owed him was from an illegal gambling debt. Landeros denied pointing a gun at Marin or attempting to take anything from him.

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[5] Landeros had previously seen these two men with Marin and knew them by their nicknames "Perico" and "Oso." "Oso" means "bear" and "perico" means "parrot" or "parakeet."

Garcia said that she got out of the car, "took off" with Landeros, walked back to Landeros' car near the dealership, and went home. She never dragged Marin outside the car, did not see anything happen to Marin, and had no idea how Marin injured his hands and feet.

C. *The Jury's Verdict*

The jury, for the most part, believed Marin's version. The jury convicted Landeros and Garcia of carjacking (count 1), attempted second degree robbery (a lesser included offense of count 2), and false imprisonment by violence (a lesser included offense of count 4). The jury found them not guilty of assault with a firearm (count 3) and found that the allegation that Landeros was armed with a firearm was not true.

DISCUSSION

A. *Failure To Provide the Jury with a Written Copy of CALJIC No. 9.60*

Although they claim instructional error, Landeros and Garcia concede that the trial court correctly read the jury the instructions on both kidnapping for carjacking and the lesser included offense of false imprisonment by violence. Landeros and Garcia argue only that the trial court's failure to give the jury a written copy of the instruction on false imprisonment by violence that the court had correctly read to the jury was "structural and prejudicial error." We find it was neither.[6]

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[6] The People argue that Landeros and Garcia forfeited their right to object to the trial court's failure to give the jury a written copy of the instruction on false imprisonment by violence. The People do not dispute, however, that any failure was inadvertent and that no one realized the mistake at the time of trial. Indeed, the People are even "unclear [about] whether the court in fact provided a copy of *any* of the written instructions to the jury." It is hard for us to see how Landeros and Garcia could have forfeited their right to appeal an issue by failing to object to something they did not know had occurred.

The trial court properly instructed the jury orally and in writing pursuant to CALJIC No. 9.54.1 on the crime of kidnapping during the commission of a carjacking. Although only the first page of this three-page instruction is included in the clerk's transcript, the reporter's transcript reveals that the trial court read the entire instruction. Landeros and Garcia do not argue that the trial court committed any error relating to the instruction for kidnapping for carjacking, and the jury did not convict Landeros and Garcia of that crime.

The trial court also properly instructed the jury orally pursuant to CALJIC No. 9.60 on the lesser included crime of false imprisonment by violence: "False imprisonment is a lesser to kidnapping for purposes of carjacking. Every person who by violence, menace, violates the liberty of another person by intentionally and unlawfully restraining, confining or detaining that person and compelling that person to stay or go somewhere without his consent is guilty of the crime of false imprisonment by violence, menace in violation of Penal Code section 237. Violence means the exercise of physical force used to restrain over and above the force reasonably necessary to affect the restraint. Menace means a threat of harm express or implied by word or act. False imprisonment does not require that there be confinement in jail or prison. In order to prove this crime, each of the following elements must be proven: 1. a person intentionally and unlawfully restrained, confined, or detained another person compelling him to stay or go somewhere; 2. the other person did not consent to a restraint, confinement, or detention; and 3. the confinement, restraint or defense [*sic*] is accomplished by violence or menace." The trial court told the jurors several times that the court would be providing them with written copies of the instructions. The trial court also told the jury, "don't worry about trying to memorize these instructions. I'll be sending several copies back for you to use while you are back there deliberating."

There is no constitutional right to written jury instructions. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 447 ["[a]lthough providing written [jury] instructions is 'generally beneficial and to be encouraged,' defendant has no federal or state constitutional right to instructions in writing [citation], and the statutory right depends

on an express request"], abrogated on another ground in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14; *People v. Samayoa* (1997) 15 Cal.4th 795, 845 ["the provision of written instructions to the jury (although generally beneficial and to be encouraged) is not guaranteed by, and therefore does not implicate, any provision of the state or federal Constitution"].) There is a statutory right to written jury instructions, but it arises only if the jury makes a request for written jury instructions. Section 1093, subdivision (f), provides: "Upon the jury retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy."

Assuming the trial court failed to include the written instruction on false imprisonment by violence in the group of instructions given to the jury, it was a mistake. Any error, however, was harmless. Because such an error is not structural or of constitutional dimension, we apply the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818. (See *People v. Beltran* (2013) 56 Cal.4th 935, 955 [""[m]isdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error are reviewed under the harmless error standard articulated" in *Watson*'"].) Under this standard, "a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error." (*People v. Mena* (2012) 54 Cal.4th 146, 162.) Neither Landeros nor Garcia has made this showing.

The trial court correctly instructed the jury orally on both kidnapping during carjacking and the lesser included offense of false imprisonment by violence. The jury found Landeros and Garcia guilty of the lesser crime of false imprisonment by violence, which was "a more favorable result" because the jury did not convict Landeros and Garcia of the more serious crime, kidnapping for carjacking. Landeros and Garcia do not argue that had the trial court given the jury a written copy of the jury instruction on false imprisonment by violence, CALJIC No. 9.60, it is reasonably probable that the

jury would have acquitted them of that crime. Landeros and Garcia argue that the jurors "did not have, and what they plainly needed in order to be able to distinguish between the crimes of kidnapping for carjacking and false imprisonment by violence, was CALJIC No. 9.60, which contains a list of the elements that constitute the crime of false imprisonment by violence." The jury, however, had no difficulty distinguishing between the two crimes, and in fact found Landeros and Garcia guilty of the lesser crime.

Moreover, the defense at trial was not that the People had failed to prove one of the elements of the crime of kidnapping for carjacking or false imprisonment by violence, but that Marin's version of what had occurred that day was false. The evidence at trial was that Landeros and Garcia either had committed these crimes as described by Marin, or they had committed no crimes at all (except perhaps soliciting prostitution, which the People did not charge). As counsel for Garcia argued to the jury, "It is a whodunit. Who did these crimes? If there were crimes that were committed against Mr. Marin[,] and Mr. Marin looks like he had some crimes committed against him, the damages and whatnot, but we are not for an instant saying that Miss Garcia or Mr. Landeros were the ones that committed those acts on Mr. Marin." Counsel for Landeros argued that "the question is[,] was a crime committed by these two individuals[?] Was a crime committed by Mr. Landeros? Was a crime committed by Ms. Garcia or was a crime committed by others of Mr. Marin?" Having the elements of false imprisonment by violence in writing would not have guided the jurors in deciding whether to believe Marin or Landeros and Garcia. It might have assisted the jurors in deciding whether to convict Landeros and Garcia of false imprisonment by violence rather than kidnapping for carjacking, but as noted above they did not need any such assistance because that is exactly what they did. Thus, even if the trial court had included the written instruction listing the elements of false imprisonment by violence, it is not reasonably probable the result would have been more favorable.

During deliberations, the jury sent the court a written question that asked, "Can we get clarification on count #4 in regards to the difference between 'Kidnapping for

Carjacking' and 'False Imprisonment by Violence.' If they go together or separate?" The trial court answered the question, "False imprisonment is a lesser included of the charged crime of kidnapping for carjacking."[7] Landeros and Garcia argue that "the combination of the trial court's failure to provide [the] jurors with a written copy of CALJIC No. 9.60 and inadequate response to their subsequent question about the elements of false imprisonment by violence warrants reversal under both the state and federal standards for assessing prejudice." The jury's question, however, did not evidence confusion over the elements of kidnapping for carjacking or false imprisonment by violence, but asked for "clarification" about the relationship between the two crimes, which the court addressed in its answer. The jury did not indicate that it was missing any written instructions, or, more important for purposes of determining whether there was a violation of section 1093, subdivision (f), the jury did not ask the court to supply a copy of CALJIC No. 9.60 or any other written instruction. The trial court's answer to the jury's question was adequate, and the jury understood it well enough to convict Landeros and Garcia of the lesser of the two crimes.

Landeros and Garcia quote a sentence from the Supreme Court's opinion in *People v. Osband* (1996) 13 Cal.4th 622 stating that "as long as the court provides the jury with the written instructions to take into the deliberation room, they govern in any conflict with those delivered orally." (*Id.* at p. 717; see *People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1113 ["[t]he written version of jury instructions governs any conflict with oral instructions"].) The Supreme Court in *Osband*, however, was discussing the situation where the trial court reads the written jury instructions incorrectly, for example where "the court's oral rendering of the instructions varie[s] from the text of the written versions," but provides the jurors with the correct written jury instructions. (*Osband, supra,* at p. 717; see *People v. Crittenden* (1994) 9 Cal.4th 83, 138 ["trial court's slight misreading of the instruction" was not prejudicial where jury received correct

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[7] There is no record of who proposed, agreed to, or objected to this answer to the jury's question. The court and counsel discussed the question off the record.

instruction "in its written form"].) Here, the trial court read the instructions correctly and, because the trial court did not provide the jury with one of the instructions, there was no conflict between the oral and written instructions. Therefore, the sentence from the Supreme Court's opinion in *Osband*, quoted out of context by Landeros and Garcia, does not support their argument that the trial court here committed prejudicial instructional error.

Landeros and Garcia also cite *People v. Wingo* (1973) 34 Cal.App.3d 974, 984, disapproved in part in *People v. Rist* (1976) 16 Cal.3d 211, 221, 222, fn. 10, and assert that the court held that it is reversible error to provide the jury with some, but not all of the instructions that have been read out loud. This is not really what the court in *Wingo* held. The issue in *Wingo* was based on "the delivery of two written instructions to the jury after it had retired to deliberate." (*Id.* at p. 983.) The jury had asked the trial court to reread two particular instructions and the trial court, over the objections of the defendant, "ordered delivery of the two written instructions to the jury instead of calling them back for the purpose of rereading the instructions." (*Ibid.*) The Court of Appeal held that although former section 1093, subdivision 6, and section 1137 "have reference to *all* of the instructions given since to permit only certain of the instructions given to be taken into the jury room would place undue emphasis on such instructions," the court "perceive[d] no prejudice" because the two instructions were evenly balanced and the trial court had previously read them to the jury. (*Wingo*, *supra*, at p. 984.) The court in *Wingo* did not hold that failing to provide the jury with all instructions that the trial court previously read is reversible error.

B. *Failure To Instruct on the Lesser Included Offense of Misdemeanor False Imprisonment*

Landeros and Garcia argue that the trial court prejudicially erred by failing to instruct sua sponte on misdemeanor false imprisonment, which is a lesser included offense of false imprisonment by violence, which in turn is a lesser included offense of the charged crime of kidnapping for carjacking. They argue that "there was ample

evidence in the record in the instant case that to the extent that Marin was falsely imprisoned, the force that was used was sufficient to establish misdemeanor false imprisonment only, and did not rise to the level of what is required to establish false imprisonment by violence, or was at least sufficient to create a reasonable doubt on this point."

"False imprisonment is the unlawful violation of the personal liberty of another." (§ 236.) False imprisonment, both the crime and the tort, is "'"the nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time . . . ."'" (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 372-373.) "False imprisonment is a misdemeanor unless it is 'effected by violence, menace, fraud, or deceit,' in which case it is a felony. [Citation.]" (*People v. Wardell* (2008) 162 Cal.App.4th 1484, 1490.) "'"Violence" . . . means . . . "'the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint.'"' [Citation.]" (*People v. Reed* (2000) 78 Cal.App.4th 274, 280.) Misdemeanor false imprisonment is a lesser included offense of felony false imprisonment. (*People v. Aispuro* (2007) 157 Cal.App.4th 1509, 1512; *People v. Matian* (1995) 35 Cal.App.4th 480, 487.)

The trial court must instruct, even on its own initiative, "on every form of the lesser included offense that is supported by substantial evidence." (*People v. Nunez and Satele* (2013) 57 Cal.4th 1, 47.) The court's obligation to instruct "'"'on the general principles of the law relevant to the issues raised by the evidence'"'" includes the obligation of "'"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 [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]"' [Citation.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) "An instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense but not the greater, charged offense. [Citation.]" (*People v. Thomas* (2012) 53 Cal.4th 771, 813; see *People v. DePriest* (2007) 42 Cal.4th 1, 50 [instructions

on lesser included offenses "are required only where there is 'substantial evidence' from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense"].)

There is no substantial evidence from which a rational jury could conclude that Landeros and Garcia committed misdemeanor false imprisonment but not felony false imprisonment. If the jury believed Marin (which it did), then Landeros and Garcia falsely imprisoned Marin in the Camry with violence or menace, including grabbing Marin by the neck from behind when Marin was already restrained by a seat belt, striking Marin with the work tool, attempting to rob Marin, and dragging Marin along the road at 20 to 25 miles per hour.[8] If the jury believed Landeros and Garcia, then they did not confine or restrain Marin at all, with or without violence or menace, and they did not commit misdemeanor or felony false imprisonment. Because there is no substantial evidence to support a conviction for misdemeanor false imprisonment, the trial court did not err by failing to instruct the jury sua sponte on that lesser included crime.

C. *Restitution and Parole Revocation Fines*

In sentencing Landeros and Garcia, the trial court imposed on each defendant a restitution fine of $280 pursuant to section 1202.4 and a parole revocation fine of $280 pursuant to section 1202.45 (suspended pending violation of parole).[9] Landeros and Garcia argue that these fines are unconstitutional ex post facto punishments because the

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[8] According to Marin, Landeros and Garcia also imprisoned Marin by fraudulently and deceitfully feigning interest in purchasing one of his cars and arranging for him to take them on a fake test drive. (See *People v. Dominguez* (2010) 180 Cal.App.4th 1351, 1354, 1359 [false statement by defendant that he wanted to take victim to a restaurant was "substantial evidence of fraud or deceit" to support conviction of felony false imprisonment].) The trial court, however, did not include fraud or deceit in its instruction on false imprisonment by violence.

[9] The trial court "'*must* impose a parole revocation fine equal to the restitution fine whenever the "sentence includes a period of parole[.]"'. . . [Citation.]" (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 355.)

trial court meant to impose the statutory minimum fine, which at the time of the crimes in 2011 was $200, but instead imposed the statutory minimum fine at the time of sentencing in 2013, which was $280. The People argue that Landeros and Garcia waived this argument by failing to object in the trial court and that the trial court impliedly exercised its discretion in imposing the $280 fines.

Challenges to the imposition of restitution and parole revocation fines may be forfeited by failing to object in the trial court. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 881; *People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218.) Where the trial court exercises discretion in making a sentencing decision, the defendant must object in the trial court to preserve the issue for appeal. (*People v. Tillman* (2000) 22 Cal.4th 300, 302-303; see *People v. Smith* (2001) 24 Cal.4th 849, 852-853; see also *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153 ["appellate courts may not correct a 'discretionary sentencing choice' if the People failed to object at sentencing"].) Where the sentence is "'"unauthorized"'" or in "'"excess of jurisdiction,"'" however, the forfeiture rule does not apply. (*Smith*, *supra*, at p. 852; see *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1205 [unauthorized sentence exception to the forfeiture doctrine applies only where the sentence "'"could not lawfully be imposed under any circumstance in the particular case"'"].) Where the error does "not involve a discretionary sentencing choice" and "is obvious and correctable without reference to any factual issues in the record or remanding for further findings," the sentencing error is "exempt from the waiver rule." (*Smith*, *supra*, at p. 853; see *Talibdeen*, *supra*, at p. 1153.)

The trial court here imposed the $280 restitution fine as follows:

"THE COURT: . . . [Garcia] is ordered to pay a $200 fine —

"THE CLERK: $280.

"THE COURT: $280 fine to the victim restitution fund. [And] $280 pursuant to [section] 1202.45. . . ."

The court then imposed similar $280 restitution and parole revocation fines on Landeros.

It does not appear from this record that the trial court exercised its discretion to impose restitution fines $80 above the 2011 statutory minimum of $200. To the contrary, it is obvious that the trial court meant to impose the statutory minimum of $200, began to impose the statutory minimum of $200, but the clerk mistakenly informed the court that the 2013 statutory minimum of $280 applied. The court was correct; the clerk was wrong. This is pure legal error, "obvious and correctable without reference to any factual issues in the record . . . ." (*People v. Smith*, *supra*, 24 Cal.4th at p. 853.) Moreover, there is no indication that the trial court was making a "discretionary sentencing choice" to impose a fine greater than the statutory minimum. (*Ibid*.) To the extent the trial court exercised its discretion, it was to follow the clerk's erroneous recommendation, which is not an exercise of judicial discretion at all. (See *People v. Clancy* (2013) 56 Cal.4th 562, 580 ["'[t]he imposition of sentence and the exercise of sentencing discretion are fundamentally and inherently judicial functions'"]; *People v. Navarro* (1972) 7 Cal.3d 248, 258, fn. 6 ["actual imposition of sentence is a judicial function which can be performed only by a court"].) Therefore, we conclude that Landeros and Garcia did not forfeit their objections to the restitution and parole revocation fines.

On the merits, the $280 fines cannot stand. The People argue that "imposition of this amount for each fine that was well within the statutory range was a proper exercise of discretion." As explained above, however, the trial court did not exercise discretion to impose a fine above the statutory minimum and "within the statutory range." The record reveals that the trial court meant to impose the minimum fine but accepted erroneous advice regarding what the minimum fine was.

The People concede that "to the extent that this Court believes the record affirmatively discloses that the trial court intended to impose the minimum fine because it first articulated a lesser fine . . . , then the fines should be reduced to $200 each as to each appellant." Because we conclude this is exactly what the record discloses, we accept the People's concession and reduce each fine to $200.

D. *Enhancement of Landeros' Sentence for Prior Serious Felony Conviction*

As noted above, the trial court, after denying Landeros' motion to strike pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, imposed a five year enhancement on his sentence pursuant to section 667, subdivision (a)(1), for a prior felony conviction Landeros had suffered in 1991 for assault with a firearm. In 2003, however, the court reduced the 1991 conviction to a misdemeanor, allowed Landeros to withdraw his guilty plea, and dismissed the information or complaint pursuant to sections 17 and 1203.4. Landeros argues that, pursuant to the Supreme Court' recent decision in *People v. Park* (2013) 56 Cal.4th 782, the trial court here erred by failing to strike this conviction, ignoring "the prior reduction from a felony to a misdemeanor," and using the conviction "to improperly enhance [his] prison term by five years pursuant to the provisions of section 667, subdivision (a)(1)." The People concede that the holding of *Park* is controlling, that "once a felony offense is reduced to a misdemeanor pursuant to . . . section 17, subdivision (b), that offense no longer qualifies as a felony conviction for purposes of section 667[, subdivision] (a)(1)," and that Landeros' five-year sentence enhancement must be stricken.

In *Park* the Supreme Court held that if a trial court properly exercises its discretion and reduces a "wobbler" offense[10] from a felony to a misdemeanor under section 17, and then dismisses it pursuant to section 1203.4, the conviction "no longer qualifie[s] as a prior serious *felony* within the meaning of section 667, subdivision (a), and [cannot] be used, under that provision, to enhance defendant's sentence." (*People v. Park*, *supra*, 56 Cal.4th at p. 787.) The court explained that "when a wobbler is reduced to a misdemeanor in accordance with the statutory procedures," the offense does "not qualify as a prior serious felony for purposes of enhancement under section 667[, subdivision]

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10 A "wobbler" is a crime "involving conduct that varies widely in its level of seriousness" that is "chargeable or, in the discretion of the court, punishable as either a felony *or* a misdemeanor . . . ." (*People v. Park*, *supra*, 56 Cal.4th at p. 789.) Landeros' 1991 conviction for assault with a deadly weapon was a wobbler. (*Id.* at p. 790.)

(a)." (*Id.* at p. 795; see *People v. Culbert* (2013) 218 Cal.App.4th 184, 193 [prior felony conviction for making a criminal threat in violation of section 422, subsequently reduced to a misdemeanor pursuant to section 17, subdivision (b)(3), and dismissed pursuant to section 1203.4, did not qualify as a prior serious felony within the meaning of section 667, subdivision (a)].) Therefore, under *Park*, the trial court erred by enhancing Landeros' prison sentence pursuant to section 667, subdivision (a), based on Landeros' prior conviction for assault with a deadly weapon that the court in 2003 had properly reduced to a misdemeanor.[11]

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[11] The reduction of a felony conviction to a misdemeanor under section 17 does not preclude its use as a prior conviction for purposes of the Three Strikes law, which "explicitly provides that the determination of whether a prior offense constitutes a strike is not affected by the 'suspension of imposition of judgment or sentence.' (§§ 667, subd. (d)(1)(A), 1170.12, subd. (b)(1)(A).)" (*People v. Park*, *supra*, 56 Cal.4th at p. 794.) The lawmakers who drafted that law "made clear their intent to bring within the reach of the Three Strikes law a defendant whose wobbler was reduced to a misdemeanor after the time of initial sentencing." (*Ibid.*)

DISPOSITION

The restitution fines of $280 pursuant to section 1202.4, subdivision (b), and the parole revocation fines of $280 pursuant to section 1202.45 imposed on each defendant are reduced to $200. The five-year enhancement imposed on Landeros' sentence pursuant to section 667, subdivision (a)(1), for a prior felony conviction is stricken. As modified, the judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

SEGAL, J.*

We concur:

WOODS, Acting P. J.

ZELON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.