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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. SHAMAN HAYCRAFT, Defendant and Appellant.	2d Crim. No. B238648 (Super. Ct. No. BA379873) (Los Angeles County)

Shaman Haycraft appeals for the judgment entered after a jury convicted him of attempted kidnapping. (Pen. Code, §§ 207, 664.)[1] The trial court granted probation subject to the condition that appellant serve 365 days in a residential dual diagnosis program. We affirm.

Facts and Procedural History

On the morning of January 9, 2011, appellant jumped out from behind a wall and grabbed Sylvia Rabadi's arms. Rabadi struggled about 10 seconds before appellant let her go. Appellant grabbed Rabadi by the wrist and said "Come on," dragging her towards a vacant parking lot. Rabadi broke free and flagged down a police car as appellant chased her. Appellant tried to flee after the police car made a U-turn and stopped.

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

Los Angeles Police Officer Eduardo Mercado arrested appellant and found a sleeping bag, food, and food wrappers behind the parking lot wall. Appellant said, "I wasn't trying to hurt anybody, just trying to take her to a better place." At trial, appellant stated he had just been mugged by "gangsters" and grabbed Rabadi to take her to a safe place.

Asportation

Appellant argues that the prosecution failed to prove asportation, i.e., substantial movement of the victim. Simple kidnapping requires that the victim be moved by force or fear, that the movement be without the victim's consent, and asportation, i.e., that the victim be moved a substantial distance.[2] (§ 207, subd. (a); *People v. Martinez* (1999) 20 Cal.4th 225, 237.) For attempted kidnapping, actual movement is not an element of the offense. (*People v. Cole* (1985) 165 Cal.App.3d 41, 50.)

Appellant held Rabadi by the arms and told her to "Be quiet" as she struggled to break free. Grabbing her by the wrist, appellant dragged her five feet towards the secluded parking lot where he had a sleeping bag.

Appellant argues that five feet is a trivial distance, but that is not the standard for attempted kidnapping. (*People v. Cole*, *supra*, 165 Cal.App.3d at p. 50.) In *People v. Fields* (1976) 56 Cal.App.3d 954, defendant attempted to force a young girl on the street into his car but abandoned the attempt when the victim threatened to scream. The Court of Appeal affirmed the conviction for attempted kidnapping. (*Id*., at p. 957.) "[T]o require the prosecution to show more than a forcible attempt to move the victim into a motor vehicle in order to prove intent to move the victim a substantial distance,

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[2] The jury was instructed: "Substantial distance means more than a slight or trivial distance. In deciding whether the distance was substantial, you must consider all the circumstances relating to the movement. Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the movement increased the risk of physical or psychological harm, increased the danger of a foreseeable escape attempt, gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection. " (CALCRIM 1215.)

would be to read the crime of attempted kidnapping out of the law. In the absence of any evidence to suggest that defendant contemplated no more than a trivial movement of his victim, the requisite intent to kidnap may be inferred." (*Ibid.*)

The same analysis applies here. The jury reasonably inferred that appellant intended to move Rabadi a substantial distance by grabbing and dragging her towards the parking lot. The fact that Rabadi broke free and flagged down a police car does not exculpate appellant. Because the conviction is for attempted kidnapping, it does not matter how far Rabadi was forcibly moved. (*Ibid*; *People v. Cole*, *supra*, 165 Cal.App.3d at p. 50.)

Prosecutorial Misconduct

Appellant contends that the prosecution engaged in misconduct after defense counsel told the jury that appellant had "an episode" and "was looking for help." In rebuttal, the prosecutor argued "this story that [appellant] gave about, oh, you know, . . . I think he said some gangsters had mugged [him]. That was the story, and I asked him, well, you didn't tell this to the police, did you? And he says no, no, no, of course I did. I told the police. [¶] Here's what's interesting. Officer Mercado, the arresting officer, the officer who was there at the scene, took the stand and was cross-examined by the defense attorney. Did the defense attorney ask one question about this alleged mugging?"

Appellant objected on the ground that it was "shifting [the] burden." The trial court admonished the jury: "The burden remains with the People, Ladies and Gentlemen, to prove the defendant guilty beyond a reasonable doubt."

There was no misconduct. A prosecutor may argue that a defendant has not brought forth evidence to corroborate an essential part of a defense theory. (*People v. Cornwell* (2005) 37 Cal.4th 50, 90; *People v. Varona* (1983) 143 Cal.App.3d 566, 570.) Appellant testified that he had just been mugged but did not mention it to Rabadi or the arresting officer.

Defense counsel told the jury it was "an episode." The prosecutor, in rebuttal, argued: "[Defense counsel] didn't ask the officer one question about the

defendant's alleged story about this mugging because [defense counsel] didn't know about it, because [appellant] made it up on the stand. [¶] If the defendant had really told the police about this on that day, you know for a fact [defense counsel] would have asked that officer: isn't it true?"

It is not misconduct to comment on a defendant's failure to present corroborating evidence providing the comments are not aimed at defendant's failure to testify. (*People v. Miller* (1990) 50 Cal.3d 954, 996; *People v. Guzman* (2000) 80 Cal.App.4th 1282, 1288-1289.) Appellant's citations involve cases in which the prosecutor commented on or asked the jury to consider what a non-testifying witness would have said. (*People v. Hall* (2000) 82 Cal.App.4th 813, 817; *People v. Gaines* (2997) 54 Cal.App.4th 821, 825.) "When a defendant voluntarily testifies, the district attorney may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions , . . . [Citation.] " (*People v. Cooper* (1991) 53 Cal.3d 771, 822.)

Lesser Offense: False Imprisonment

Appellant contends that the trial court erred in not instructing on attempted false imprisonment as a lesser included offense (see *People v. Shadden* (2001) 93 Cal.App.4th 164, 171) but such an instruction is not required where there is no evidence that the offense is less than that charged. (*People v. Mendoza* (2000) 24 Cal.4th 130, 174; *People v. Birks* (1998) 19 Cal.4th 108, 118.) A sua sponte instruction on false imprisonment "is not required where the evidence establishes that defendant was either guilty of kidnapping [or attempted kidnapping] or was not guilty at all. [Citations.]" (*People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1233.)

Appellant's conduct went beyond false imprisonment when he grabbed and dragged Rabadi towards the secluded parking lot. An instruction on attempted false imprisonment would have undermined the defense theory that appellant had just been mugged and wanted Rabadi to get him to safety. We have reviewed the entire record and hold that the failure to instruct on attempted false imprisonment was harmless under any standard of review. (See e.g, *Neder v. United States* (1999) 527 U.S. 1, 17-18 [144

L.Ed.2d 35, 52-53 [overwhelming evidence rendered alleged instructional error harmless beyond a reasonable doubt]; *People v. Breverman* (1995) 19 Cal.4th 142, 177-178 [harmless error].) But for the alleged instructional error, there is no reasonable likelihood that appellant would have received a more favorable result. (*Id*., at p. 178.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

William C. Ryan, Judge

Superior Court County of Los Angeles

Jerry Smilowitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr. and Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Kim Aarons, Deputy Attorney General, for Plaintiff and Respondent.