Filed 2/21/18 P. v. Herrera-Ramos CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE HERRERA-RAMOS, Defendant and Appellant.	B277401 Los Angeles County Super. Ct. No. LA082607

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin L. Herscovitz, Judge. Affirmed with directions.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Kenneth C. Byrne and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Under California law, the trial judge in a criminal case must instruct the jury on all lesser-included offenses supported by substantial evidence. Defendant Jose Herrera-Ramos contends the court in this case should have instructed the jury on false imprisonment as a lesser-included offense of kidnapping because the jury could have concluded he did not move his victim a substantial distance. We hold that because the jury appears to have rejected that theory, any error was harmless. We affirm with directions to correct an error in the abstract of judgment.

PROCEDURAL BACKGROUND

By information filed March 22, 2016, defendant was charged with one count of first-degree burglary with person present (Pen. Code,[1] § 459; count 1), two counts of criminal threats (§ 422, subd. (a); counts 2 and 3), and one count of kidnapping (§ 207, subd. (a); count 4). The information also alleged that a prior felony conviction in case No. TA125589, for which defendant was on probation, constituted a strike prior (§ 667, subds. (b)–(j); § 1170.12, subds. (b)–(e)) and a serious-felony prior (§ 667, subd. (a)(1)). Defendant pled not guilty and denied the allegations.

After a bifurcated trial at which he testified in his own defense, a jury convicted defendant of all counts and found the person-present allegation true. Defendant waived jury trial on the prior-conviction allegation.

After a bench trial, the court found the prior conviction true and sentenced defendant to an aggregate term of 15 years in

---

1 All undesignated statutory references are to the Penal Code.

state prison. The court selected count 4 (§ 207, subd. (a)) as the base term, and sentenced defendant to 10 years—the mid-term of five years, doubled for the prior strike (§ 1170.12, subd. (c)(1); § 667, subd. (e)(1)). The court imposed five years for the serious-felony prior (§ 667, subd. (a)(1)), to run consecutively, and four years for count 3 (§ 422)—the mid-term of two years, doubled for the prior strike—to run concurrently. The court imposed and stayed sentence on counts 1 and 2 under section 654. Finally, the court revoked and terminated probation in case No. TA125589 and executed the previously imposed sentence of three years, to run concurrently to the sentence in this case.

Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND

1. The People's Evidence

In 2015, Elsa Sanchez met defendant through Facebook, and in September 2015, she flew to Washington state to meet him in person. Sanchez stayed with defendant for the weekend.

The next month, defendant visited Sanchez in California to celebrate his birthday and conduct gang-related activities. Defendant told Sanchez he belonged to Mara Salvatrucha 13 (M.S. 13) but was conflicted about his membership. Sanchez helped defendant find a room to rent and gave him money, a phone, and clothes. Defendant stayed in California for about a month.

During the visit, defendant met Sanchez's three daughters and spent one night at her home. Defendant asked Sanchez to marry him and offered her a ring, but she said no. He had told his fellow M.S. 13 members that Sanchez was his girlfriend. Sanchez said she wasn't—though defendant considered himself

her boyfriend. When defendant returned to Washington, Sanchez decided "to back off a little bit" in her friendship with him.

When defendant called Sanchez to plan another visit in December 2015, she told him she did not want him in her house. Sanchez was scared of him because he threatened her over the phone. So when defendant arrived, Sanchez picked him up and took him to stay with a friend. They fought because Sanchez did not want to be in a relationship with defendant.

On New Year's Eve, defendant called Sanchez, saying he wanted to come over and spend the evening with her. Sanchez declined: she would be with her mother in Fresno. Defendant called again later to ask what she was doing. Sanchez explained she had decided to stay in, and defendant accused her of lying to him. Defendant next called around 9:00 p.m. Sanchez was at home in the ground-floor apartment she shared with her three daughters. Defendant said he was coming over; he wanted Sanchez to admit she was with someone else. Sanchez replied that she would not let him in. Around midnight, defendant called again, and Sanchez used speakerphone to let her daughter listen in. Defendant was upset that Sanchez had not invited him to spend New Year's Eve with her. He also said there had been a shooting in Los Angeles and it was Sanchez's fault. Sanchez hung up, and she and her daughters went to sleep. When defendant next called at 1:00 a.m., Sanchez didn't answer.

Finally, around 2:00 a.m., Sanchez heard a knock at her bedroom window. She looked out and saw defendant with another man. After a brief silence, Sanchez heard insistent knocking at her front door—knocking loud enough to alert neighbor Juan Pinedo. Sanchez looked through the eyehole, saw defendant and his friend, and tried to block the door with a couch. The friend

left, but defendant kicked down the door. He walked into the apartment and asked Sanchez why she hadn't let him in. She was scared, Sanchez said. Defendant replied that because of her, some of his friends were in the trunk of his car, dead. He invited her to "come and see them" to "see what you did."

During this conversation, Sanchez tried to call 911. Defendant snatched the phone from Sanchez's hand and grabbed her. He told her he was going "to take" her. "I'm not going to kill you in front of your daughters," he explained. "I'm going to kill you far away so no one can find you." Defendant promised Sanchez would "die like a bitch …." When defendant grabbed Sanchez, her daughter told him she was going to call the police. Defendant said that if she did, she should also tell them to watch her "for the rest of your life, because I'm never going to leave you alone and I'm going to come back for you guys."

Defendant pulled Sanchez through the broken front door and into the apartment complex's courtyard. She tried to escape, but when she stumbled into a trash can, defendant grabbed her again. Defendant pulled Sanchez to the sidewalk near a parked car, about 45 yards (136 feet) from the apartment. The man Sanchez had seen earlier at her window sat in the driver's seat of the car. Defendant began pulling her toward the open passenger door.

Meanwhile, Sanchez's daughter ran to Pinedo's door and "started banging": she told him someone was taking her mother. Pinedo ran outside. When Pinedo came out, defendant shoved Sanchez to the ground.

On New Year's Day, defendant texted Sanchez, among other things, "the gang is looking for you," "You fucked up. I'm going crazy," and "I'm going to burn your apartment now. I need

to talk to you." He also sent her a photograph of him and another man holding a candle with the message "you're going to die for being a whore." The next day, January 2, 2016, defendant sent Sanchez a picture of someone holding bullets along with the message "now you're going to die."

2. Defendant's Testimony

Testifying on his own behalf, defendant explained that he and Sanchez were "romantic" and had "amorous relations" when he visited her for his birthday in October 2015. In November 2015, he proposed to Sanchez, and she said yes.

On December 31, 2015, defendant had been drinking—and had used heroin and methamphetamine for the first time. He went to Sanchez's apartment to talk to her. When Sanchez didn't answer his knocking, defendant got mad and broke the door. He took Sanchez's phone to see who she had been talking to, but did not drag her from the apartment. Instead, Sanchez had followed defendant to the car, yelling at him. Once they reached the street, defendant returned Sanchez's phone. Defendant did not remember seeing or speaking to Sanchez's daughter.

Finally, defendant testified that he was not a gang member: he said he was only trying to impress Sanchez. Defendant lost his phone from January 1st to January 7th, and he did not send any text messages that week.

3. Rebuttal Evidence

Officer Zoraya Guillermo interviewed defendant about the incident. During the interview, defendant told Guillermo he took Sanchez's phone from her after she threatened to call the police. Defendant also said there were about five cars—not one—and 25 fellow gang members with him at Sanchez's apartment that

evening. Defendant told Guillermo that "he had been blessed into the gang by his cousin." His job in M.S. 13 was to transport money between different states. Defendant said he sent the picture of the bullets to Sanchez as a joke.

DISCUSSION

Defendant contends the court erred by failing to instruct the jury sua sponte on false imprisonment as a lesser-included offense of kidnapping. We conclude any error was harmless because the jury apparently rejected the theory that defendant did not move Sanchez a substantial distance. He also contends, and the People concede, that there is an error in the abstract of judgment in case No. TA125589.

1. Any instructional error was harmless.

"California law requires a trial court, sua sponte, to instruct fully on all lesser necessarily included offenses supported by the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 148–149, 154–155, 162 (*Breverman*).) Instruction on a lesser-included offense is required when a reasonable jury could find that the defendant committed the lesser offense instead of the greater offense. (*Id.* at pp. 162, 177.)

"In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight." (*Breverman*, *supra*, 19 Cal.4th at p. 177.) Accordingly, even evidence that is unconvincing or subject to justifiable suspicion may constitute substantial evidence and may trigger the lesser-included-offense requirement. (*People v. Turner* (1990) 50 Cal.3d 668, 690.) Courts must resolve any doubts about whether the evidence is sufficient to warrant instructions in favor of the accused—and a defendant's testimony, standing alone, is

always substantial evidence. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.) We review de novo the trial court's failure to instruct on a lesser-included offense. (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

To convict a defendant of kidnapping, the prosecution must prove:

- the defendant took, held, or detained another person by force or fear;
- using that force or fear, the defendant moved the other person a substantial distance; and
- the other person did not consent to the movement.

(§ 207, subd. (a); see CALCRIM No. 1215.) Attempted kidnapping (§ 664/207) and false imprisonment (§ 236) are both lesser-included offenses of kidnapping. (*People v. Chacon* (1995) 37 Cal.App.4th 52, 65.) False imprisonment differs from kidnapping in that false imprisonment does not require the victim's movement. (See CALCRIM No. 1240.)

Here, defendant contends the court was required to instruct the jury on false imprisonment because he and Pinedo both testified that Sanchez was not dragged from the apartment—and, if she was not dragged, the jury could have entertained reasonable doubt that the subsequent movement increased the risk of harm. Defendant also suggests that the jury could have concluded that though he moved Sanchez, he did not move her a substantial distance.

"We need not decide whether the court should have instructed differently," however, because any error was harmless. (*People v. Chatman* (2006) 38 Cal.4th 344, 392.) In a noncapital

case, the failure to instruct on a lesser-included offense is reviewed under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Breverman*, *supra*, 19 Cal.4th at p. 178.) We conclude there is no reasonable probability that the result of defendant's trial would have been different if the court had instructed on the lesser-included offense of false imprisonment.

Critically, while the court in this case did not instruct on false imprisonment, it *did* instruct on the lesser-included offense of attempted kidnapping—and asportation is not an element of attempted kidnapping. (*People v. Cole* (1985) 165 Cal.App.3d 41, 50.) The jurors, therefore, did not face an all-or-nothing choice. If they doubted the asportation evidence, they could have convicted defendant of attempted kidnapping. By convicting defendant of the greater offense, the jury necessarily rejected the theory that Sanchez had not been moved a substantial distance. (See *People v. Chatman*, *supra*, 38 Cal.4th at p. 392; *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1369 [failure to instruct on simple kidnapping as lesser-included offense of kidnap for carjacking not prejudicial where jury rejected lesser-included offense of false imprisonment].) Yet as defendant noted at oral argument, this alone does not resolve the issue, because while false imprisonment is a general intent crime, attempted kidnapping requires specific intent.

Every California crime requires the union of act and intent (§ 20)—and intent can be either general or specific. When a person willingly commits an illegal act, he has acted with general intent, even if he does not intend to break the law. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1214–1215.) To commit a specific intent crime, on the other hand, the person must do more than simply commit the act: he must do so with a specified mental

state. A person acts with specific intent when he is aware of and desires the consequences of his actions. (*People v. Hood* (1969) 1 Cal.3d 444, 456–457.) And whereas kidnapping and false imprisonment are both general intent crimes, attempted kidnapping—like all attempt crimes—is a specific intent offense. Why? Because the defendant must intend to commit the target offense. (§ 21a.)

Applying those principles here, to find defendant guilty of kidnapping, the jury had to find he *actually* moved Sanchez a substantial distance. (§ 207, subd. (a).) To convict him of the lesser-included offense of attempted kidnapping, the jury would have had to conclude defendant *intended* to move Sanchez a substantial distance but moved her an insubstantial distance instead. To convict him of false imprisonment (§ 236), the jury would have had to conclude defendant didn't *actually* move Sanchez a substantial distance **and** didn't *intend* to move Sanchez a substantial distance but *did* move her an insubstantial distance. That is, while the movement required for the two lesser-included offenses is the same, a would-be kidnapper must *aspire* to greater movement whereas a false imprisoner need not. This distinction is unhelpful to defendant.

Defendant testified—and Pinedo appeared to agree—that he did not drag Sanchez from her apartment. Instead, Sanchez followed him to the car. The testimony, if believed, could have negated all the elements of kidnapping—but it also would have negated all the elements of false imprisonment. Accordingly, it did not provide a basis for the jury to convict defendant of false imprisonment instead of kidnapping.

Based on its verdict, then, the jury believed Sanchez's version of events. And in that version of events—regardless of

how far he ultimately moved her—defendant explicitly told Sanchez that he planned to put her in the car and drive away. Against this backdrop, the jury could not conclude defendant dragged Sanchez even an insubstantial distance without also concluding he intended to move her further. Yet had it believed that, the jury could have convicted defendant of the lesser-included offense of attempted kidnapping. We conclude, therefore, that it is not reasonably probable defendant would have achieved a more favorable result if the court had instructed on the lesser-included offense of false imprisonment. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

2. The court is directed to correct the abstract of judgment in case No. TA125589.

"An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, "[c]ourts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases" (*ibid.*), may order correction of an abstract of judgment that does not accurately reflect the oral pronouncement of sentence (*id.* at pp. 185–188). Defendant notes, and the People properly concede, that the court misspoke when executing the previously-suspended sentence in case No. TA125589.

When a court grants probation, it must impose and stay a probation revocation restitution fine under section 1202.44. When the court revokes probation, the probation revocation restitution fine becomes effective. (§ 1202.44.) The court may not increase the fine when revoking probation. (*People v. Perez* (2011) 195

Cal.App.4th 801, 805 [correcting probation revocation restitution fine to reflect the amount stated when probation was granted].)

Here, when the court revoked defendant's probation in case No. TA125589, it executed a $300 *parole* revocation fine. This differed from the judgment in two ways. First, the correct amount of the fine is $240, the amount imposed and stayed when probation was granted. Second, the fine is a probation revocation restitution fine under section 1202.44—not a parole revocation restitution fine under section 1202.45.

We therefore direct the trial court to amend the relevant minute order and abstract of judgment in case No. TA125589 and the relevant minute order in this case to correct the error. (See *People v. Guiffre* (2008) 167 Cal.App.4th 430, 434–436 [correcting fine to probation revocation restitution fine where trial court mistakenly referred to fine as restitution fine under § 1202.4, subd. (b)].)

DISPOSITION

The judgment is affirmed.

Upon issuance of the remittitur in this case, the court is directed to correct the minute orders in this case and in case No. TA125589 and the abstract of judgment in case No. TA125589 to delete the $300 parole revocation restitution fine (Pen. Code § 1202.45) and replace it with a $240 probation revocation restitution fine (Pen. Code § 1202.44), and to send a certified copy of the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

CURREY, J.*

---

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