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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. BOBBY EARL TROTTER, Defendant and Appellant.	B280951 (Los Angeles County Super. Ct. No. TA136069)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen Joseph Webster, Jr., Judge. Affirmed in part and reversed in part.

Waldemar D. Halka, 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, Senior Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

On December 21, 2016, a jury convicted Bobby Earl Trotter of kidnapping to commit robbery (Pen. Code, § 209, subd. (b)(1)),[1] forcible oral copulation (§ 288, subd. (c)(2)(A)), two counts of attempted sodomy by use of force (§§ 664 & 286, subd. (c)(2)(A)), and second degree robbery (§ 211).[2] The jury found on all counts that Trotter had personally used a deadly and dangerous weapon—a screwdriver—to commit the crimes. The trial court subsequently determined that Trotter had suffered a prior conviction of a serious felony and several other prior convictions. Based on the jury's verdict and the trial court's determination regarding Trotter's prior convictions, the trial court sentenced Trotter to two life sentences plus four years for kidnapping to commit robbery, 16 years consecutive to the life sentences on the forcible oral copulation count, 16 years on each of the attempted sodomy counts, one to run concurrently and one stayed, and 10 years for robbery to run concurrently. The trial court suspended the sentences for the deadly weapon enhancements on the remaining counts pursuant to section 654 and awarded Trotter 806 days of custody credit.

Trotter timely appealed. In seven issues, he argues instructional error, ineffective assistance of counsel, cumulative prejudice, and sentencing error. We affirm in part and reverse in part.

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

[2] The Amended Information contained eight counts. The People dismissed counts 3, 7, and 8 at trial.

BACKGROUND

A. Factual Background

William F. arrived at the Artesia public transit center about 4:00 a.m. after work on December 7, 2014, and sat on a bench near his bus stop.[3] Trotter approached William and asked for a cigarette. William responded that he did not have one and refocused his attention on his phone.

About five minutes later, Trotter again approached. Brandishing a sharpened screwdriver, Trotter told William, "get over there and give me your phone or I'm going to kill you," and snatched William's phone. As he held the sharpened screwdriver to William's neck, Trotter marched William behind a dumpster outside of the view of the surrounding area.

Once the two were behind the dumpster, Trotter took William's glasses and wallet. Trotter broke the glasses and threw them in the dumpster and took bank cards and an electronic benefit transfer (EBT) card from William's wallet before discarding it, too. Trotter demanded, and William surrendered, William's debit card personal identification number (PIN). "You better not be lying to me," Trotter told William. "If you're lying to me, I'll kill you."

Trotter shoved William to the ground and demanded that William strip. William complied. Trotter ordered William to orally copulate him. Trotter eventually ejaculated into William's mouth and ordered him to spit the ejaculate into William's leather jacket. Trotter threw the leather jacket over a nearby fence, and then attempted several times—unsuccessfully—to sodomize William. As this all happened, Trotter repeatedly

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[3] We refer to the victim by only his first name for his privacy.

stomped on William's head and threatened to kill him. William begged for his life.

Trotter then ordered William to get dressed, telling him, "You're coming with me." As Trotter walked William out of the station and down the street, William saw two men approaching and took the opportunity to run. Trotter ran the opposite direction.

Trotter was arrested that afternoon when he went to a Metro PCS phone store and threatened to kill one of the store's employees.

B. Procedural Background

The People filed a felony complaint against Trotter on December 17, 2014, alleging one count of kidnapping to commit robbery, two counts of forcible oral copulation, two counts of attempted forcible sodomy, one count of second degree robbery, and one misdemeanor count of indecent exposure. Trotter was separately charged for threatening to kill the phone store employee.

On January 20, 2015, Trotter's attorney in the kidnapping case declared a doubt as to Trotter's competency to stand trial, and the trial court suspended the proceedings pursuant to section 1368, subdivision (c).

In March 2015, a jury convicted Trotter of criminal threats in the phone store case. But on May 6, the trial court learned of the declaration of doubt in the kidnapping case, and suspended the proceedings. On May 26, 2015, the trial court in the phone store case declared doubt as to Trotter's competence; Trotter's counsel concurred.

Trotter was found competent and proceedings were reinstated on November 6, 2015.

The kidnapping case was set for preliminary hearing on June 22, 2016, based on the December 2014 felony complaint. Trotter waived the preliminary hearing.

The probation and sentencing hearing in the phone case was continued several times until June 30, 2016, when the trial court issued an order to show cause why a petition for writ of habeas corpus should be denied. On July 7, 2016, the People filed an information in the kidnapping case with counts identical to those in the felony complaint. On August 30, 2016, the trial court granted the petition for writ of habeas corpus in the phone case, reversed Trotter's conviction for criminal threats, and granted him a new trial on that charge. On September 27, the trial court transferred the phone case to the department presiding over the kidnapping case for a pretrial conference and motion to consolidate. The People filed an amended information on November 22, 2016, alleging the same counts as before and adding a count 8 for criminal threats (§ 422, subd. (a)).

The case was tried to a jury in December 2016. Before the People rested, the prosecutor moved to dismiss counts 3, 7, and 8—one of the forcible oral copulation counts, the indecent exposure count, and the criminal threats count. On December 21, 2016, the jury returned guilty verdicts on all of the remaining counts, and found true on each count that Trotter had personally used a deadly and dangerous weapon in the commission of each of the crimes.

On February 15, 2017, the trial court conducted a bench trial regarding the People's allegations of prior strikes, and determined that Trotter had suffered the prior strikes alleged.

Based on the jury's verdicts and its own findings regarding Trotter's prior strikes, the trial court sentenced Trotter. For

aggravated kidnapping, the trial court sentenced Trotter to life in prison. The life sentence was doubled under section 1170.12 for a prior strike. The trial court added an additional four years to the sentence—one for a prior strike under section 667.5, subdivision (b), and three for deadly weapon allegation under section 12022, subdivision (b)(2)—for a total of two life sentences plus four years. The trial court sentenced Trotter to eight years for forcible oral copulation, doubled for the prior strike under section 1170.12, to be served consecutive to the aggravated kidnapping sentence. On the attempted sodomy by use of force counts, the trial court sentenced Trotter to eight years each, doubled to 16 years under section 1170.12 for the prior strike, one count to run concurrent with the life sentences, and one count stayed pursuant to section 654. The trial court sentenced Trotter to five years for robbery, doubled under section 1170.12 for the prior strike, to run concurrent with the aggravated kidnapping sentence. On each of the counts after aggravated kidnapping, the trial court also imposed and stayed under section 654 an additional three years for the deadly weapon allegation and an additional year for a prior strike under section 667.5.

Trotter timely appealed.

DISCUSSION

I. Kidnapping jury instruction

A. *Instructing on an uncharged crime*

The amended information alleges in count 1 that Trotter committed "KIDNAPPING TO COMMIT ANOTHER CRIME" under section 209, subdivision (b)(1) when he "unlawfully kidnap[ped] and carr[ied] away WILLIAM F. to commit robbery." At trial, the prosecutor requested, and the trial court allowed over Trotter's objection, amendment by interlineation of the

information to add the words "or oral copulation" after "robbery." Based on that amendment, the trial court instructed the jury that "[t]he defendant is charged in Count 1 with kidnapping for the purpose of robbery or oral copulation . . . ." The verdict form for count 1, however, contained only the "robbery" language, and omitted "or oral copulation."

Trotter contends it was error to include oral copulation in the jury instruction on count 1 because Trotter contends it was error for the trial court to allow the prosecutor to amend the information to add that language after Trotter waived his preliminary hearing. (See § 1009; *People v. Peyton* (2009) 176 Cal.App.4th 642, 654 (*Peyton*).) Because it was error to allow amendment of the information, Trotter argues, the jury instruction improperly allowed the jury to base its determination of guilt on a charge that should not have been in the information.

The People argue that kidnapping for robbery and kidnapping for oral copulation "are merely alternative means of violating the same statute, section 209, subdivision (b)(1)." Because the amendment did not allege a violation of a different statute, the People contend, and because the information gave Trotter adequate notice of the conduct for which he was being tried, the amended information provided Trotter sufficient notice to prepare and present his defense.

Trotter replies that kidnapping for robbery is a different crime than kidnapping for oral copulation, and the two could have been charged as separate counts. Trotter points out that before 1998, "each crime was placed in a separate code section and carried completely different punishment." Trotter suggests that aggravated kidnapping "requires different specific intent depending on the underlying listed crime," and therefore requires

notice of each potential means of committing aggravated kidnapping in a charging document. The kidnapping for robbery charge did not, therefore, notify Trotter that he might be tried for kidnapping for oral copulation.

Trotter's argument rests on his contention that the trial court improperly allowed amendment of the information by interlineation at trial. If that amendment was improper, then the jury's verdict could have rested on a legally inadequate theory. (See *People v. Morgan* (2007) 42 Cal.4th 593, 612-613 (*Morgan*).) As we explain, we disagree with Trotter's contentions.

"An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination." (§ 1009.) "It is well settled that where a defendant waives a preliminary hearing, the prosecution may not amend the information to add new *charges*. [Citations.] This is so, even if the amendment would not prejudice the defendant or if the defendant had notice of the facts underlying the new charges." (*People v. Rogers* (2016) 245 Cal.App.4th 1353, 1360, original italics.) Similarly, "the prosecution may not add a conduct enhancement to the information after a defendant has waived a preliminary hearing." (*Id.* at p. 1362.) But where the amendment did not "involve adding a whole new charge[,] [citation] . . . did not affect the potential punishment," and "did not constitute a 'significant variance' from the original charges," the amendment was permissible. (*Id.* at p. 1364; see *Peyton*, *supra*, 176 Cal.App.4th 642.)

" 'Under the generally accepted rule in criminal law a variance [in pleadings] is not regarded as material unless it is of such a substantive character as to mislead the accused in

preparing his defense. . . .' " (*Peyton*, *supra*, 176 Cal.App.4th at p. 659.) *Peyton* involved "four section 269 charges based on either oral copulation by means of force or duress, in violation of section 288a, subdivision (c)(2) or (3), or (d), or sexual penetration by means of force or duress, in violation of section 289, subdivision (a). Each pleading dealt with one victim and with conduct occurring over a very limited time frame. And the only difference between the amended complaint, to which defendant waived his right to a preliminary hearing, and the second amended information, upon which defendant was convicted at trial, is that the bases of two of the four alleged section 269 charges were changed from oral copulation to sexual penetration. [¶] Moreover, the amendments did not prejudice defendant's ability to prepare and present his defense to the charges as originally alleged. Defendant denied engaging in any illegal conduct whatsoever, whether oral copulation or sexual penetration. Nowhere during the trial, whether through cross-examination, direct examination or argument, does it appear that the specific conduct underlying the section 269 charges was of significance." (*Ibid.*, fns. omitted.)

Here, the amendment did not add any charges to the complaint. The amendment did not affect the potential punishment; it merely added a second theory upon which the jury could have determined Trotter committed aggravated kidnapping. Neither did it constitute a "significant variance" from the original charges. The amendment specifically related to conduct that had been alleged in every iteration of the information and the felony complaint; the facts related to aggravated kidnapping all involved a single aggressor, a single victim, and a series of events that occurred over a relatively short

time period. And the specific conduct underlying the kidnapping charge was never at issue in the trial.

We are no more persuaded by Trotter's assertion that kidnapping for robbery and kidnapping for oral copulation are separate crimes because they require different specific intent. While we are aware of no published cases directly on point, the question Trotter presents is analogous to the question our Supreme Court decided in *Morgan*, when it considered whether one charged with malice murder could be convicted of felony murder. In *Morgan*, the defendant argued that malice murder and felony murder, enshrined in different statutes, were two separate offenses. (*Morgan*, *supra*, 42 Cal.4th at p. 616.) The court rejected the argument, finding that the two were merely different theories of first degree murder, not different crimes. (*Ibid.*) The *Morgan* court found no reason for the trial court to have required all of the jurors to agree on a single theory—felony murder or malice—to arrive at a first degree murder conviction. "[J]urors need not unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712; accord *Morgan*, *supra*, at p. 617.) As *Morgan* did not require unanimity of the jury as between felony murder and premeditated murder, we will not create such a requirement for different theories of aggravated kidnapping under section 209, subdivision (b).

The trial court did not err in allowing the prosecutor to amend the information. The kidnapping for oral copulation theory was not, therefore, a legally inadequate basis upon which the jury could have based its aggravated kidnapping verdict. We find no error in the trial court's instruction.

B. *Ineffective assistance of counsel*

Trotter alternatively contends that in the event we determine Trotter forfeited his argument that the aggravated kidnapping jury instruction was improper, we should reverse the aggravated kidnapping charge for ineffective assistance of counsel. Because we did *not* conclude Trotter forfeited his challenge to the aggravated kidnapping jury instruction, we need not reach Trotter's ineffective assistance of counsel claim.

II. Robbery unanimity instruction

A. *Continuous course of conduct*

As William sat on the bus stop bench, Trotter stole his telephone. After Trotter threatened William, held a sharpened screwdriver to William's neck, and forced William to move behind nearby dumpsters, Trotter took contents from the victim's wallet and forced the victim to disclose his debit card PIN number.

Trotter contends, and we agree, that the theft of the telephone and the episode behind the dumpster were two different events, each of which a juror might have relied on to find Trotter guilty of robbery. The prosecutor's closing argument supports Trotter's theory. The prosecutor argued: "There's two robberies in this case. We've charged him with one count, but you're going to see later, the kidnap for robbery comes into play with the second robbery. We'll talk about why. [¶] But the count that's pled as a single robbery . . . happened right here at the bench . . . , when Mr. [F.]'s cell phone was taken from him." Later in the argument, the prosecutor identified the "second robbery": "How this plays into our case is the scene of the second robbery because he was kidnapped for the purpose of robbery or oral copulation." Even further: "[Trotter] could have taken his

wallet there, couldn't he have? Could have searched him, taken everything he had. He didn't do that. Took his cell phone."

Because there were two sets of events upon which the jury could reasonably have based its robbery conviction, Trotter contends the trial court was required to instruct the jury that in order to convict Trotter of robbery, all of the members of the jury had to agree about the specific event that constituted robbery. We agree.

"As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty. [Citation.] There are, however, several exceptions to this rule. For example, no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises 'when the acts are so closely connected in time as to form part of one transaction' [citation], or 'when the statute contemplates a continuous course of conduct or a series of acts over a period of time.' " (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) "Even absent a request [for the instruction], the court should give the instruction 'where the circumstances of the case so dictate.' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1199 (*Riel*).)

Based on *People v. Haynes* (1998) 61 Cal.App.4th 1282 and similar cases, the People urge us to conclude that Trotter's conduct here falls within the "continuous-course-of-conduct" exception to the rule requiring the trial court to give a unanimity instruction. (See, e.g., *People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) While the case law and the nature of robbery—continuing

until a defendant reaches a place of temporary safety—would certainly justify such a finding, the People's theory of a "continuous-course-of-conduct" directly and forcefully contradicts the theory upon which the People tried the case to the jury. Although we believe the prosecutor's argument reflected a misunderstanding of the law, the jury could have based its verdict on either of the two separate robberies the prosecutor identified in his argument. We agree with Trotter, therefore, that under these circumstances, the trial court should have instructed the jury on unanimity with regard to the robbery charge, and it was error not to do so. We do not, however, find Trotter was prejudiced by the trial court's error.

B. *Prejudice*

"The failure to provide a unanimity instruction is subject to the *Chapman* [*v. California* (1967) 386 U.S. 18] harmless error analysis on appeal. [Citations.] Under that standard the question is ' "whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on *evidence* establishing the requisite [elements of the crime] independently of the force of the . . . misinstruction." ' " (*People v. Curry* (2007) 158 Cal.App.4th 766, 783, fn. omitted (*Curry*).)

William testified that Trotter pointed a screwdriver at him, told him "get over there and give me your phone or I'm going to kill you," and snatched William's cell phone. Trotter then put the screwdriver to William's neck, forced him to walk behind a nearby dumpster, and took William's wallet and eyeglasses. Trotter's only apparent defense to either of the prosecutor's proffered robbery theories was intoxication. Defendant's counsel also briefly asserted the truism that the jury would have to decide whether the snatching of William's cell phone met all of

the elements of robbery or rather qualified as a "lesser included" offense – "just a theft or a larceny."

"The verdicts demonstrate that the jury rejected [Trotter's] defense." (*Curry*, *supra*, 158 Cal.App.4th at p. 784.) This is " 'a case where the jury's verdict implies that it did not believe the only defense offered.' " (*Riel*, *supra*, 22 Cal.4th at p. 1200.) "Given this record, it is reasonable to conclude that the jury believed beyond a reasonable doubt that [Trotter] committed all acts if he committed any. Thus, the failure to give the unanimity instruction was harmless beyond a reasonable doubt." (*Curry*, *supra*, at p. 784.)

III. Cumulative prejudice

Relying on his contentions of instructional error and ineffective assistance of counsel, Trotter contends the cumulative effect of the trial court's errors prejudiced his right to a fair trial. Based on Trotter's arguments, however, we have found a single harmless error, and not a series of trial errors upon which a cumulative prejudice argument might be based. (Cf. *People v. Hill* (1998) 17 Cal.4th 800, 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].) We therefore reject Trotter's cumulative prejudice contentions.

IV. Sentencing issues

A. *Robbery*

Trotter was sentenced to 10 years for second degree robbery under section 211 and an additional four years (stayed under section 654) for enhancements. The 10 years was to run concurrently with Trotter's aggravated kidnapping sentence.

Trotter contends the term imposed for robbery should have also been stayed under section 654 because the aggravated

kidnapping and robbery were "part of one indivisible transaction with the intent and objective to take property from the victim." The People agree. We will remand the case with instructions that the 10 year sentence the trial court imposed for Trotter's violation of section 211 should be stayed pursuant to section 654.

B. *Attempted forcible sodomy*

The trial court sentenced Trotter to eight years for attempted forcible sodomy under section 286, subdivision (c)(2)(A), and doubled it under the "Three Strikes" law, for 16 years on each of the attempted forcible sodomy counts. The 16 years on count 4 was to run concurrent with Trotter's aggravated kidnapping life sentences. Pursuant to section 654, the trial court stayed the 16 years on count 5 and the additional four years for enhancements on each of the two sentences.

Trotter contends section 664 requires the sentence for each of the attempted forcible sodomy counts be reduced by half. The People agree. We will therefore remand the case with instructions that the 16-year terms imposed on counts 4 and 5 each be reduced to eight years.

C. *Conduct credit*

The trial court awarded Trotter 806 custody credits, but no conduct credit. Trotter contends he was entitled to conduct credit under section 2933.1. In his opening brief, Trotter offers a calculation of the credit. The People agree that Trotter is entitled to conduct credit, but disagree that the record supports a means of calculating the credit, and suggest we remand the case to allow the trial court to calculate the credits in the first instance.

The reporter's transcript indicates that the trial court agreed Trotter should have been awarded conduct credit under section 2933.1. Trotter is entitled to additional credit for up to 15

percent of his pre-sentence custody time not spent in a state hospital while declared mentally incompetent to stand trial, but the trial court failed to give him those credits. (See *People v. Ramos* (1996) 50 Cal.App.4th 810, 815-816; see also *People v. Mendez* (2007) 151 Cal.App.4th 861, 864.)

We will remand to the trial court for a calculation of Trotter's conduct credits under section 2933.1.

DISPOSITION

We remand the case to the trial court for resentencing consistent with this opinion. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.