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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. VICTOR BEE et al., Defendants and Appellants.	B280922 (Los Angeles County Super. Ct. No. BA450637)

APPEALS from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed and remanded.

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant Victor Bee.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant Jonathan Woods.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Victor Bee and Jonathan Woods were convicted by a jury of kidnapping and sentenced to 21 years and 22 years in state prison, respectively. On appeal Bee and Woods principally contend the court failed to instruct on the lesser included offense of false imprisonment and omitted a critical element of the kidnapping offense from the written jury instructions. In addition, Bee contends his counsel was constitutionally ineffective in failing to move to sever his trial or obtain a separate jury, while Woods contends the court erred in denying his counsel's requests for a continuance to review late-produced discovery and to give a jury instruction as a discovery sanction. Bee and Woods also argue their respective counsel provided ineffective assistance at the sentencing hearing. We remand to allow the trial court to consider whether to exercise its discretion under a new law, effective January 1, 2019, to strike or dismiss a prior serious felony conviction for sentencing purposes. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

An information filed December 27, 2016 charged Bee and Woods with one count of simple kidnapping (Pen. Code, § 207).[1] It was specially alleged that Bee had suffered two prior serious felony convictions and Woods one prior serious felony conviction within the meaning of section 667, subdivision (a); Bee had suffered two prior serious or violent felony convictions and Woods one prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(j), 1170.12); and Bee

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[1] Statutory references are to this code.

had served one prior prison term for a felony and Woods two prior prison terms for felonies within the meaning of section 667.5, subdivision (b). Bee and Woods pleaded not guilty and denied the special allegations.

2. *The Evidence at Trial*

On the evening of September 27, 2016 Sharese Tenner, Woods's girlfriend, was at a carwash in South Los Angeles cleaning a Lexus she had borrowed from Woods. Bee and Woods, accompanied by two other men, drove into the carwash. As the men pulled into the lot, Tenner fled to the bathroom and shut the door. Woods jumped out of the car, ran after Tenner and pulled open the bathroom door, pushing Tenner back into the room as she tried to leave. Bee remained outside the door. When Woods emerged from the bathroom, he handed what appeared to be a handgun to an unidentified man, who tucked it into his waistband. Woods then pulled Tenner out of the bathroom and held her with his arm tightly around her as they walked toward the car. At some point, Bee picked up Tenner and, with Woods's assistance, dropped her in the backseat of the Lexus. Tenner struggled to get out of the backseat. Woods pushed her back inside. Bee drove out of the carwash. The two other men who had been with Woods and Bee left the carwash in the other car. The incident was captured on several surveillance cameras, including cameras in the hallway outside the bathroom and on the carwash lot; and the recordings were played for the jury. None of the recordings included any sound.

After leaving the carwash Woods drove Tenner and Bee to Bee's girlfriend's home in Compton, a drive that Tenner testified took about 15 to 20 minutes. Bee went inside the house; Woods and Tenner remained in the car for the rest of the night and into

the late afternoon of the following day, except when they went into the house in the morning to shower and use the bathroom.

The day after the incident police officers were alerted to a possible armed kidnapping at the carwash. Officers reviewed the surveillance footage and, after some investigation, located Woods's Lexus later that day at Bee's girlfriend's house. Los Angeles Police Officer Jose Bonilla saw Tenner and Woods leave the house in the afternoon and drive away in the Lexus. He followed in an unmarked vehicle. A second officer in an unmarked vehicle signaled a uniformed Los Angeles County deputy sheriff patrolling the area to initiate a stop of the Lexus. Woods was detained and arrested. When he got out of the car, he shouted at Tenner to "stay quiet" and "not say anything." To Bonilla, who assisted in Woods's arrest, Tenner looked scared; she was physically shaking; and every time she looked at Woods she put her head down in a submissive way, as if she were afraid of him. Bonilla noticed Tenner had fresh scratches and bruises on her neck and face. Photographs of Tenner's injuries were introduced at trial.

Los Angeles Police Officer Angelica Weda interviewed Tenner at the scene. Tenner whispered to Officer Weda, "What took [you guys] so long?" Officer Weda testified Tenner appeared scared. Tenner claimed Woods had loaned her his new Lexus a week earlier and had made threatening phone calls telling her to return it "or else" she would "get it." Tenner intended to have the car cleaned and leave it for him at the carwash. She did not want to have any contact with him. When she saw Woods speed into the carwash, she recognized him and ran to the bathroom to hide but was unable to lock the door. Woods forced the door open, and he and another man beat her up. Tenner told Officer Weda that

Woods had punched her in the face with a closed fist and caused injuries to her face and neck. During the altercation, Tenner told Officer Weda, Woods had showed her a handgun and threatened to hit her in the head with it. A BB gun resembling the gun in the surveillance footage was found in the car Woods and Bee drove to the carwash.

In an interview at the police station a week after the incident, Tenner told officers she had gone willingly with Woods and had not been taken against her will. Tenner also supplied a written statement to that effect. In several recorded jailhouse conversations between Woods and Tenner, Woods blamed Tenner for his arrest, telling her his life was over because she had spoken to police. Tenner assured Woods she had told police he had done nothing wrong.

At trial Tenner testified in the People's case-in-chief that she was 19 years old (Woods was 30 years old); she and Woods had been dating for nearly two years; and she currently lived with his mother. After hearing rumors that Woods had been cheating on her, she and Woods argued. Tenner, to whom Woods had loaned his Lexus, told Woods a few days before the events charged in the case, "Say goodbye to your car, you're not getting it back." However, on the day of the charged events, Tenner had a change of heart and called Woods on the telephone, telling him she planned to take the car to a carwash and then return it to him. Tenner insisted she was not afraid of Woods. She fled to the bathroom at the carwash because she did not know he was the driver of a car that sped into the carwash and she feared for her safety. When she heard Woods's voice outside the door and realized who it was, she let him in the bathroom. He did not enter by force. She voluntarily returned Woods's car keys and

cell phone to him. He did not force her. Tenner testified she never saw a gun; Woods did not hit, scratch or physically injure her in any way; and the injuries on her face and neck were sustained during a physical altercation she had had with a cousin a few days earlier.

Tenner also claimed at trial that she had left the carwash with Woods and Bee willingly. Although Bee had picked her up and put her in the Lexus, he did so playfully, after she refused to move unless somebody picked her up and took her to the car. She did not feel threatened or object to being moved. In fact, she did not have another car with her and did not want to be left at the carwash alone. She did not attempt to flee the car after Bee put her inside. She was arguing with the other men, and Woods pushed her back into the car so she would not get into more trouble.

Tenner testified that, after they arrived at Bee's girlfriend's home, she and Woods stayed up all night and into the next day talking in the car about their relationship. She was not held against her will. She and Woods were on their way to get something to eat when they were stopped by law enforcement officers. Tenner admitted she asked Officer Weda, "What took you guys so long?" but claimed she was being sarcastic. She also claimed to have told Officer Weda she was not in danger and, if she had been in danger, she would have called the police herself.

Testifying in his own defense, Woods insisted Tenner had called him and told him to meet her at the carwash to pick up his Lexus. Woods drove with Bee and two other men to the carwash. He intended to pick up his Lexus and assure Tenner the rumors she heard about him cheating on her were not true. When he saw Tenner, he jumped out of the car and ran after her. The

bathroom door was not locked, and he opened it. They argued inside the bathroom (out of the view of the surveillance camera). Tenner voluntarily gave him back his car keys and his cell phone. He did not use any force to retrieve his items and did not show her, or threaten her with, a gun. Woods cursed at Tenner for holding his car hostage and told her he intended to leave her at the carwash. Tenner demanded Woods take her with him, and Woods relented. On their way to the car, Tenner started arguing with another man. According to Woods, Bee said, "Let's go." Tenner said, "I'm not going nowhere. I'm not going nowhere right now. And if I'm going to go somewhere, you need to pick me up." So, Bee picked Tenner up and put her in the car. Woods claimed Tenner went with him voluntarily. He testified, "Without a doubt I know she consented to go with me. . . . I don't have no reason to kidnap that girl."

After leaving the carwash, Woods testified, they drove to Bee's girlfriend's house. Bee went inside the house, and he and Tenner stayed up all night talking about their relationship. In the morning Tenner showered and changed inside the house. In the late afternoon they were on their way in Woods's Lexus to get something to eat when Woods was stopped by police and arrested. Woods denied warning Tenner at the time of his arrest not to talk to police. During his recorded telephone calls with Tenner, he simply wanted to make sure Tenner told police what had happened so that he could go home and not be charged unfairly. He did not tell her to lie. To the contrary, Woods insisted, he had urged her to tell the truth, that he did not kidnap her.

Bee exercised his right not to testify. His counsel, like Woods's, emphasized Tenner's testimony and argued Tenner had consented to be moved.

3. *Jury Instructions, Verdict and Sentence*

The court instructed the jury with CALCRIM No. 1215 on the elements of kidnapping: To prove the defendant is guilty of this crime, the People must prove "1. The defendant took, held, or detained another person by using force or by instilling reasonable fear; [¶] 2. Using that force or fear, the defendant moved the other person a substantial distance; [¶] AND [¶] 3. The other person did not consent to the movement." In its oral instructions to the jury, the court included an additional part of CALCRIM No. 1215: "The defendant is not guilty of kidnapping if he reasonably believes that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime." This additional language was omitted from the written instructions provided to the jury.

The court rejected Woods's request to instruct the jury on the lesser included offense of false imprisonment, finding there had been no substantial evidence presented to support that crime.[2]

The jury found both Woods and Bee guilty of simple kidnapping. In a bifurcated proceeding Bee and Woods admitted the truth of the specially alleged prior convictions, and Woods

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[2] The court stated, "Based on the evidence now, she either went consensually, in which case he's not guilty of anything, or she was taken by force against her consent, in which case it would be a kidnapping and not a false imprisonment since she was moved from the location of the carwash all the way to Compton. So I don't see a false imprisonment in here."

also admitted the truth of the separate prior felony prison term enhancement. The court dismissed one of Bee's prior qualifying strike convictions in furtherance of justice and, finding both men co-participants and deserving of the upper term of eight years for the kidnapping, sentenced Bee to 21 years in state prison and Woods to 22 years in state prison.[3]

DISCUSSION

1. *The Trial Court Did Not Err in Denying a Defense Request for a False Imprisonment Instruction*

a. *Governing law*

A trial court has a duty to instruct sua sponte on those general principles of law that are closely and openly connected with the facts before the court and necessary for the jury's understanding of the case. (*People v. Brooks* (2017) 3 Cal.5th 1, 73; *People v. Simon* (2016) 1 Cal.5th 98, 143.) That duty includes an obligation "to instruct the jury on a lesser included uncharged offense if there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense." (*Simon,* at p. 132; accord, *People v. Waidla* (2000) 22 Cal.4th 690, 733.) Substantial evidence in this regard is evidence from which a reasonable jury could conclude beyond a reasonable doubt the

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[3] The sentences were calculated as follows: On Bee the court imposed the upper term of eight years, doubled under the three strikes law, plus five years for the prior serious felony conviction. The alleged one-year separate prior prison term allegation was not proved. On Woods, the court similarly imposed the upper term of eight years, doubled under the three strikes law, plus the five-year section 667, subdivision (a), prior serious felony enhancement and a one-year separate prior felony prison term enhancement.

lesser offense was committed. (*Simon,* at p. 132; accord, *People v. Manriquez* (2005) 37 Cal.4th 547, 587-588.)

We review de novo the trial court's decision not to provide a lesser included offense instruction. (*People v. Simon, supra,* 1 Cal.5th at p. 133; see *People v. Waidla, supra,* 22 Cal.4th at p. 733 ["[a]n appellate court applies the independent or de novo standard of review to the failure by a trial court to instruct on an uncharged offense that was assertedly lesser than, and included, in a charged offense"].)

b. *There was no substantial evidence to warrant instruction on false imprisonment as a lesser included offense of kidnapping*

The offense of simple kidnapping has three elements: "'(1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance.'" (*People v. Byrd* (2011) 194 Cal.App.4th 88, 101; see *People v. Brooks*, *supra*, 3 Cal.5th at p. 68 [although section 207 does not refer to any particular distance the victim must be moved, "[t]his court has long recognized . . . that the movement, or asportation, of the victim must be 'substantial in character,' not slight or trivial"].) The question of substantial distance is not a quantitative measurement, but should be considered in light of the totality of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 237.)

Felony false imprisonment—the "unlawful violation of the personal liberty of another" (§ 236) effected by violence, menace, fraud or deceit (§ 237, subd. (a))—is a lesser included offense of simple kidnapping. (*People v. Delacerda* (2015) 236 Cal.App.4th 282, 289; *People v. Reed* (2000) 78 Cal.App.4th 274, 284; accord,

People v. Magana (1991) 230 Cal.App.3d 1117, 1120-1121.)[4] It occurs when the victim is "'"compelled to remain where he does not wish to remain, or to go where he does not wish to go."'" (*Reed*, at p. 280; accord, *People v. Von Villas* (1992) 10 Cal.App.4th 201, 255.) The difference between the two crimes is that, unlike kidnapping, false imprisonment does not have an asportation requirement. (*Reed*, at p. 284.)

Bee contends the court erred in refusing to instruct the jury on felony false imprisonment by violence. He asserts the jury could have found the movement of Tenner from the bathroom to the car was so "insubstantial" that it did not amount to asportation. (See *People v. Martinez*, *supra*, 20 Cal.4th at p. 245 ["'[w]here the movements of the victim are slight or insubstantial . . . they cannot constitute kidnapping'"]; *People v. Bell* (2009) 179 Cal.App.4th 428, 436 [same].) As for the additional movement of Tenner from the carwash to Compton, Bee argues Tenner testified she consented to that movement. Accordingly, there was substantial evidence from which a jury could have found Tenner was forced an insubstantial distance to the car (a false imprisonment, but not a kidnapping) but, once in the car, consented to be moved (no additional crime).

Contrary to Bee's suggestion, there was no distinction made at trial between the movement of Tenner from the bathroom to the car and from the carwash to Bee's house in Compton, and no argument offered that carrying Tenner to the car was too insubstantial to be a kidnapping. Moreover, the evidence did not support such a distinction. Tenner testified she

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[4] Absent use of violence, menace, fraud or deceit, false imprisonment is a misdemeanor. (§ 237, subd. (a).)

allowed Woods to enter the bathroom, did not object to being moved from there to the car, and willingly left the carwash with Woods and Bee. As the prosecutor and defense counsel argued at trial, and as the court observed in denying the request for a false imprisonment instruction, either Tenner consented to be moved—in which case no crime occurred—or she did not. If she did not consent, the offense was kidnapping, not false imprisonment. The court did not err in refusing the instruction. (See *People v. Burney* (2009) 47 Cal.4th 203, 252 ["[t]he evidence of an intent merely to detain, rather than transport, the victim was too insubstantial" to support a false imprisonment]; *People v. Kelly* (1990) 51 Cal.3d 931, 951 [instruction on lesser included offense of false imprisonment not required when evidence established that defendant was either guilty of kidnapping or was not guilty at all]; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1233 [same].)

2. *The Court's Failure To Include a Written Instruction on the Defendants' Reasonable Belief in Tenner's Consent Was Harmless Error*

A defendant's "honest and reasonable, albeit mistaken, belief in the victim's consent is a complete defense to the charge of kidnapping." (*People v. Brooks, supra,* 3 Cal.5th at p. 74; accord, *People v. Eid* (2010) 187 Cal.App.4th 859, 878; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28.) Accordingly, when there is evidence the defendant believed the victim had consented to be moved, the jury must be instructed that the People have the burden of proving beyond a reasonable doubt the defendant did not reasonably and actually believe that the victim consented to the movement. (*Eid,* at pp. 878-879 [in light of evidence suggesting the defendant's actual, albeit mistaken, belief in the

victim's consent to be moved, court's failure to instruct the jury on the "conditional element" of defendant's lack of reasonable belief in consent was prejudicial]; see CALCRIM No. 1215, Bench Notes ["court has a **sua sponte** duty to instruct on the defendant's reasonable and actual belief in the victim's consent to go with the defendant, if supported by the evidence," citing cases].)

Emphasizing evidence Tenner told police in a written statement that she had consented to go with Bee and Woods (in contrast to statements she made to Officer Weda on the date Woods was arrested) and testified the same way at trial, as well as Woods's testimony that Tenner had consented, Bee and Woods insist there was substantial evidence to support instructing the jury with the additional language in CALCRIM No. 1215 requiring the jury to find, beyond a reasonable doubt, that the defendants did not have an actual and reasonable belief that Tenner consented to go with them in the car. They are correct: Because there was nothing inherently improbable about Tenner's and Woods's testimony, the trial court properly instructed the jury with the additional language in CALCRIM No. 1215. (Cf. *People v. Martinez* (2010) 47 Cal.4th 911, 954 [trial court correctly concluded defendant in rape trial not entitled to instruction on defendant's good faith and reasonable belief in victim's consent when there was no evidence of victim's "equivocal conduct or that defendant reasonably mistook her conduct for consent"]; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375 [trial court has obligation to give optional language concerning the defendant's reasonable and good faith belief in victim's consent only when the evidence shows a potentially reasonable belief in consent].) Yet, while the court

gave the instruction orally, that language was, for some reason, omitted from the written instructions provided to the jury. The issue before us is whether that omission was error, and, if so, whether it was prejudicial.[5]

Citing *People v. Trinh* (2014) 59 Cal.4th 216, the People contend there was no error at all. Because the full instruction was given orally, they argue, we must presume the jury heard and followed it. That argument misapprehends the holding in *Trinh*. The *Trinh* Court recognized a defendant has no constitutional right to a written version of the court's oral instructions. Nonetheless, "[w]hile the omission of a written instruction is not an error of constitutional dimension, the Legislature has seen fit to ensure as a statutory matter [in section 1093, subdivision (f)[6]] that defendants and juries have the benefit of written instructions upon request." When, as here, the

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[5] Contrary to the Attorney General's contention, Bee did not expressly request the court omit the instruction. Bee's counsel told the court he was "withdraw[ing] [his] request to withdraw the consent part of the kidnapping instruction." Assuming that colloquy was directed to the good faith and reasonable consent aspect of the kidnapping instruction at issue on appeal, as the Attorney General states, it is clear Bee's counsel agreed the evidence supported, and the court should give, this additional portion of CALCRIM No. 1215.

[6] Section 1093, subdivision (f), provides in part, "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."

record reflects the court and counsel intended the jury receive in writing a full set of the instructions given orally at the close of trial, the omission of a complete set of instructions violates section 1093, subdivision (f), a statutory error subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (See *Trinh,* at p. 235.)

In *Trinh* the Court found the failure to give a written copy of its oral instruction to the jury that no inference of guilt may be drawn from the defendant's exercise of his or her right not to testify (CALJIC Nos. 2.60, 2.61), while statutory error, was harmless: "Trinh has pointed to nothing in the record—no evidence of confusion or indications that the jury failed to understand or apply the instructions read to it—that would establish a reasonable probability of a more favorable outcome had the jury received written copies of CALJIC Nos. 2.60 and 2.61." (*Trinh, supra,* 59 Cal.4th at p. 235.)

Woods and Bee argue that, unlike in *Trinh,* this is not a case in which the oral and written instructions merely supplemented, rather than contradicted, each other. Here, the written instructions omitted an essential element of the People's case, creating a discrepancy between the oral instruction on the requirements to prove kidnapping and the written version. And, they correctly observe, when "'a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control.'" (*People v. Mills* (2010) 48 Cal.4th 158, 200; accord, *People v. Wilson* (2008) 44 Cal.4th 758, 803.)

The omission of an essential element of the People's case from the written jury instructions is certainly more problematic than the error in *Trinh.* Nonetheless, we must view the error in

light of the record as a whole to determine whether it is reasonably probable the omission of that element of the crime from the written jury instructions affected the verdict. (*Trinh, supra,* 59 Cal.4th at p. 235.)

Contrary to Bee and Woods's suggestion, the question of their reasonable belief in Tenner's consent was not merely a credibility contest between Tenner and Woods, on the one hand, and Officer Weda, on the other. The video surveillance footage indisputably showed Tenner being moved against her will from the bathroom to the car and then, after being forced into the car, attempting unsuccessfully to flee from the car, unmistakably confirming Weda's recitation of Tenner's earlier description of events. Bee and Woods's protestations that the surveillance camera did not capture the parties' communications are unavailing. Tenner's and Woods's narratives and the surveillance footage of the incident could not be more at odds.

Implicitly recognizing as much, Bee points to a part of the surveillance video showing that he had turned his back to enter the driver's seat when Woods pushed Tenner back inside the car. According to Bee, a properly instructed jury could have found he reasonably believed Tenner had wanted him to pick her up and place her in the car, as she testified, but, unbeknownst to him, had changed her mind once inside the Lexus. However, as discussed, the video surveillance footage showed Tenner forcibly resisted being carried by Bee from the bathroom and placed in the car in the first place. On this record, it is not reasonably probable that the jury would have found that Woods and Bee reasonably believed Tenner had consented to be moved had the oral instruction been included in the written jury instructions.

3. *Bee Has Not Demonstrated His Counsel Was Constitutionally Ineffective for Failing to Request a Severance or Separate Juries*

"When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials." (§ 1098; see *People v. Masters* (2016) 62 Cal.4th 1019, 1048 [section 1098 reflects "a statutory preference for joint trials of jointly charged defendants"]; *People v. Alvarez* (1996) 14 Cal.4th 155, 190 ["[u]nder Penal Code section 1098, a trial court *must* order a joint trial as the 'rule' and *may* order separate trials only as an 'exception'"].) Joint trials are favored because they promote efficiency and avoid the potential for inconsistent verdicts. (*People v. Sánchez* (2016) 63 Cal.4th 411, 563-564; *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 378-379.)

Nonetheless, the trial court retains discretion to order separate trials if necessary to avoid undue prejudice to one of the defendants. (*People v. Sánchez, supra,* 63 Cal.4th at p. 464; *Masters, supra,* 62 Cal.4th at p. 1048.) For example, the trial court may order separate trials in the event of a "prejudicial association," that is, when "'the characteristics or culpability of one or more defendants [is] such that the jury will find the remaining defendants guilty simply because of their association with a reprehensible person, rather than assessing each defendant's individual guilt of the crimes at issue.'" (*Sánchez,* at p. 464.)

Bee contends he suffered prejudicial association by being tried with Woods: It was Woods who beat up Tenner in the bathroom, carried a gun in his waistband and forced Tenner into the backseat after she attempted to flee. Any competent counsel, Bee argues, would have realized that a joint trial with Woods

would have prejudiced Bee, whose participation in the incident was far more limited. The failure to do so, he argues, amounted to ineffective assistance of counsel under the state and federal Constitutions.

To prevail on a claim of ineffective assistance under the state or federal guarantee, the defendant must satisfy a "two-pronged showing: that counsel's performance was deficient, and the defendant was prejudiced, that is, there is a reasonable probability the outcome would have been different were it not for the deficient performance." (*People v. Woodruff* (2018) 5 Cal.5th 697, 736; see *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].) When the ineffective assistance claim is based on the trial counsel's failure to make a motion, the defendant must demonstrate not only that the motion would have been meritorious, but also that it is reasonably probable that absent the omission, a determination more favorable to the defendant would have resulted. (*People v. Mattson* (1990) 50 Cal.3d 826, 876-877; *People v. Gonzalez* (1998) 64 Cal.App.4th 432, 438.)

Bee has not established either prong of his ineffective assistance claim. First, the motion was unlikely to have been granted: Woods and Bee were active participants in the single crime; no other charges were included from this or any other incident; and there was nothing inherently damaging about Bee's association with Woods that was not also presented in the surveillance video, which would have been admissible against Bee in a separate trial. Indeed, but for Woods's testimony and jailhouse telephone calls, which did not implicate Bee, the evidence against both was cross-admissible. (See *People v. Mason*

(1991) 52 Cal.3d 909, 934 [cross-admissibility "dispels any inference of prejudice" from joint trial].)

For the same reasons Bee has not demonstrated prejudice. That Woods may have had a greater motive or played a slightly more significant role in the crime does not mandate severance. (See *People v. Sánchez, supra,* 63 Cal.4th at p. 464 ["[j]oinder is not limited to cases in which each defendant is equally culpable"].) On this record, it is not reasonably probable Bee would have received a more favorable outcome had his counsel moved to sever his trial from Woods's.

Bee's ineffective assistance claim based on his counsel's failure to request a separate jury for him also fails. (See *People v. Thompson* (2016) 1 Cal.5th 1043, 1085 [decision to use dual juries rather than severance is largely a discretionary one, and the failure to do so is not a basis for reversal absent such "gross unfairness" as to deny the defendant due process]; *People v. Taylor* (2001) 26 Cal.4th 1155, 1173-1174.) As discussed, there is nothing in this record to indicate his counsel was deficient in failing to request a separate jury, much less that that omission, and resulting joint trial, deprived Bee of due process.

4. *Woods Waived Any Challenge to the Court's Denial of a Continuance*

On December 22, 2016, before the jury was sworn, Woods's counsel moved for a continuance so he could review transcripts of all of Woods's jailhouse telephone calls. Defense counsel told the court the prosecutor had turned over the transcripts of the telephone calls on December 21, 2016, five days prior to the

scheduled trial.[7] The court indicated it would grant the continuance if Woods consented to waive his right under section 1382 to be brought to trial within 60 days, which was set to expire in a few days' time. Woods replied he would not waive time. The court denied the request.

Woods's counsel repeated his request for a continuance on December 27, 2016, the first day of trial, explaining he had only reviewed a small portion of the 252 telephone calls. Again, the court stated it would grant the continuance if Woods agreed to waive time; it would not grant the request over Woods's objection, particularly when the request was based only on speculation that the calls might aid in his defense.

Citing *Townsend v. Superior Court* (1975) 15 Cal.3d 774, 782, Woods contends the court's refusal to grant his counsel's request for a continuance over his own objection deprived him of his due process right to present a defense. *Townsend* does not assist him. There, defense counsel requested and obtained a continuance over his client's objection. On appeal the defendant contended the continuance deprived him of his speedy trial rights. The *Townsend* Court described the issue: "[T]he case before us presents a confrontation between two of the defendant's rights, the right to a speedy trial constitutionally guaranteed and statutorily implemented and amplified within the framework of Penal Code section 1382 on the one hand, and his Sixth Amendment right to competent and adequately prepared counsel

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[7] Woods does not contend, either below or on appeal, that the prosecutor's eve-of-trial production of the jailhouse transcripts constituted misconduct. He does challenge the court's refusal to instruct the jury with CALCRIM No. 306, concerning late discovery, an issue we address in the next section.

on the other." (*Id.* at p. 782.) The Court resolved the competing rights by holding that when the continuance sought is for the defendant's benefit, and not for counsel's calendar or other reasons, the trial court does not err in granting the continuance. (*Id.* at p. 784; accord, *People v. Lomax* (2010) 49 Cal.4th 530, 556 [when "counsel seeks reasonable time to prepare a defendant's case, and the delay is for defendant's benefit, a continuance over the defendant's objection is justified"]; cf. *People v. Johnson* (1980) 26 Cal.3d 557, 569 [counsel could not waive his client's statutory right to speedy trial and obtain continuance simply because counsel had to attend to other cases and other clients].)

Had the trial court granted the continuance, we may well have been confronted with the same issue presented in *Townsend.* However, the trial court in this case denied the continuance at Woods's request. Woods has therefore waived any claim of error. (See *People v. Lomax, supra,* 49 Cal.4th at p. 556 [defendant "'may not demand a speedy trial and demand adequate representation, and, by the simple expedient of refusing to cooperate with his attorney, force a trial court to choose between the two demands, in the hope that a reviewing court will find that the trial court has made the wrong choice'"].)[8]

In any event, Woods has not demonstrated how the denial of the continuance, if error at all, prejudiced him. (See *People v.*

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[8] If the court's ruling were error, a proposition we highly doubt, it would have necessarily been invited. (Cf. *People v. Hardy* (2018) 5 Cal.5th 56, 99 [a defendant who persuades court not to instruct on lesser included offense may not appeal on ground failure to do so was error; "'the doctrine of invited error bars the defendant from challenging on appeal the trial court's failure to give the instruction'"].)

Doolin (2009) 45 Cal.4th 390, 450-451 ["[a]bsent a showing of abuse of discretion and prejudice, the trial court's denial [of a continuance] does not warrant reversal"].) Although Woods posits that, with more time, trial counsel may have discovered more evidence to support his theory that Tenner had consented to the events at the carwash, he points to nothing in the record to support that contention. (See *People v. Verdugo* (2010) 50 Cal.4th 263, 282 [defendant's "generalized statements" that he could have better prepared for trial "are insufficient to demonstrate prejudice"].) Recognizing this deficiency, he asserts the denial of the continuance was the type of rare structural error that requires automatic reversal. He is wrong. (*Ibid.*; *People v. Barnett* (1998) 17 Cal.4th 1044, 1126 [denial of continuance for further forensic testing not prejudicial absent showing the proposed testing would have produced relevant evidence].)

5. *Woods Has Not Demonstrated the Court Erred in Denying His Request for CALCRIM No. 306 or That, If Error Occurred, It Was Prejudicial*

At trial Woods's counsel requested the court instruct the jury with CALCRIM No. 306 concerning the People's late production of the transcripts of the jailhouse telephone calls.[9]

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[9] CALCRIM No. 306 provides in part, "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An Attorney for the (People/defense) failed to disclose: ____. <describe evidence that was not disclosed> [within the legal time period]. [¶] In evaluating the weight and significance of that

After exploring with the prosecutor the reason for the delay,[10] the court denied the request for the instruction, explaining, "[T]h[e] instruction, in essence, allows the jury to infer that providing this information late right at the eve of trial was to gain some sort of tactical advantage that would make it more difficult for the other side to counter that. And I think that instruction would be misleading without also putting in the fact that Mr. Woods himself could have gotten the continuance, and didn't want to waive time. So I don't think that the delay is attributable to any effort by the prosecution to gain any kind of tactical advantage. Moreover, I believe that there were remedies short of an instruction of striking the evidence of which your client failed to avail himself. But that's more of his doing than the People's. So your request is denied . . . ."

Section 1054.1, the reciprocal discovery statute, requires the prosecution to disclose to the defense certain categories of evidence "in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in possession of the investigating agencies." The disclosure must be made at least

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evidence, you may consider the effect, if any, on that late disclosure."

[10] The court asked the prosecutor to describe in detail his efforts to obtain the jailhouse calls from the Los Angeles County Sheriff's Department. The prosecutor informed the court he requested the evidence from the Sheriff's Department, including the 911 emergency telephone call, on October 27, 2016 at the time of Woods's arraignment. The prosecutor followed up on December 16, 2017, obtained the materials after 5:00 p.m. on December 20, 2017 and then provided them to counsel the following morning.

30 days prior to the trial unless good cause is shown why disclosure should be denied, restricted, or deferred. (§ 1054.7) "If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately . . . ." (*Ibid.*)

Woods does not challenge the trial court's implicit finding that no violation of section 1054.7 occurred. Rather, he contends the court should have given a modified version of CALCRIM No. 306 that made clear the delay in production was not intentional or dilatory, but, nonetheless, hampered the defense's ability to counter the evidence offered in the taped conversations. (See § 1054.5, subd. (b) [court has discretion to "advise the jury of any failure or refusal to disclose and of any untimely disclosure"].) However, if the prosecutor complied with section 1054.7, the instruction is not warranted; and thus no abuse of discretion could have occurred in failing to give it. (See Bench Notes to CALCRIM No. 306 ["[t]his instruction addresses a failure to comply with Penal Code requirements"]; see generally *People v. Curl* (2009) 46 Cal.4th 339, 357 [trial court's decision on matters relating to discovery reviewed for abuse of discretion].)

Even if a violation of sections 1054.1 and 1054.7 did occur, and the court's refusal to give the CALCRIM No. 306 instruction was error, Woods has not attempted to show he was prejudiced. He contends, generally, that it was possible one or more jailhouse calls not identified at trial may have supported his defense theory that Tenner consented to being transported from the carwash to Compton. As discussed, however, Woods's speculation is insufficient to carry his burden. (See *People v. Verdugo, supra,* 50 Cal.4th at pp. 279-280 [it is appellant's burden to demonstrate he was prejudiced by the court's failure to instruct jury with

CALCRIM No. 306; speculative arguments fall far short of meeting that burden].) Moreover, the evidence against Woods and Bee was overwhelming, including the highly damaging surveillance footage depicting the crime as Tenner had initially related it to Officer Weda. It is not reasonably probable on this record that Woods would have received a more favorable verdict had the instruction been given.

6. *Neither Woods Nor Bee Has Demonstrated Ineffective Assistance of Counsel at Sentencing*

a. *Identification of aggravating factors*

In sentencing Woods to the upper term for kidnapping, the trial court identified as aggravating factors Tenner's age and vulnerability, Woods's attempt to exercise dominance over Tenner to improperly influence her testimony and the leadership role he exhibited in recruiting others to assist in the crime. (Cal. Rules of Court, rule 4.421(a)(3), (4).) As an additional aggravating factor, the court labelled as perjury Woods's trial testimony as to the events at the carwash.[11] Woods's counsel did not object to any of these factors.

Woods contends the court erred in finding he had perjured himself on the stand based on silent video surveillance footage alone, and his counsel was constitutionally ineffective in failing

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[11] The court stated Woods "committed perjury in the face of overwhelming evidence, in light of five different camera views showing this particular offense. . . . [R]ather than accept responsibility [and] throw himself on the mercy of the court, in which there would have been room for mercy, he went forward and instead created a mockery of these proceedings and did not take early responsibility, which would have been one of the few mitigating factors that would have been in his defense."

to object to the court's use of that factor to enhance his sentence. Although it is not improper for the court to increase a sentence based on a finding the defendant committed perjury (Cal. Rules of Court, rule 4.421(a)(6) [factors in aggravation include a finding the defendant "suborned perjury, or in any other way illegally interfered with the judicial process"]; *People v. Redmond* (1981) 29 Cal.3d 904, 913 ["[a] trial court's conclusion that a defendant has committed perjury may be considered as one fact to be considered in fixing punishment as it bears on defendant's character and prospects for rehabilitation"], disapproved on another ground in *People v. Cortez* (2016) 63 Cal.4th 101, 121; *People v. Howard* (1993) 17 Cal.App.4th 999, 1002 [same]), courts must be exceedingly careful when assessing this factor lest they punish the defendant simply for exercising his or her constitutional right to a jury trial. (See *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363 [98 S.Ct. 663, 54 L.Ed.2d 604] [to punish a person for exercising a constitutional right is "a due process violation of the most basic sort"]; *In re Lewallen* (1979) 23 Cal.3d 274, 278; see also *Howard,* at p. 1004 [the requirement that court make specific findings when enhancing a sentence for perjury protects against a violation of the right to testify, "which 'does not include a right to commit perjury'"].)

Significantly, the trial court relied on two other aggravating factors to impose the upper term, neither of which Woods challenges. (See *People v. Osband* (1996) 13 Cal.4th 622, 728-729 ["[o]nly a single aggravating factor is required to impose the upper term"].) Accordingly, even if the trial court's perjury findings were insufficient or otherwise improper, Woods has failed to demonstrate a reasonable probability that he would have received a more favorable sentence if his counsel had objected to

the court's perjury-related statements. (See *People v. Calhoun* (2007) 40 Cal.4th 398, 410 ["'[w]hen a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper'"]; see also *Strickland v. Washington, supra,* 466 U.S. at p. 697 [if the ineffective assistance claim may be disposed of on prejudice alone, it is appropriate to do so without determining whether counsel's performance was deficient]; *People v. Kipp* (1998) 18 Cal.4th 349, 366-367 [same].)

b. *Imposition of the restitution fine*

Section 1202.4, subdivision (b), provides, "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." Subdivision (b)(1) of that section makes clear the amount of the fine "shall be set at the discretion of the court and commensurate with the seriousness of the offense." If the person is convicted of a felony, the fine shall not be less than $300 or more than $10,000. (§ 1202.4, subd. (b)(1).) Subdivision (b)(2) of section 1202.4 allows the court to set the restitution fine "as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted."

The court imposed a restitution fine of $6,000 each on Bee and Woods, an amount less than the $6,800 both concede would be statutorily permitted under section 1202.4, subdivision (b). Alleging that neither of them is able to pay that amount, Bee and

Woods contend their counsel were ineffective in failing to object to the amount of the restitution fine. (See § 1202.4, subd. (c) ["A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine" but it may be considered "in increasing the amount of the fine in excess of the minimum fine pursuant to paragraph (1) of subdivision (b)"].) However, because the record is silent on the defendants' ability to pay, there has been no showing of error in imposing the fine, much less ineffective assistance of counsel. On this silent record, neither Bee nor Woods has established ineffective assistance of counsel. (See *People v. Salcido* (2008) 44 Cal.4th 93, 172 [ineffective assistance of counsel will often have to be shown by petition for habeas corpus where evidence outside the record can be introduced]; *People v. Cunningham* (2001) 25 Cal.4th 926, 1012, fn. 12 [same].)

7. *A Limited Remand Is Appropriate for the Court To Consider Whether To Strike the Section 667, Subdivision (a), Enhancement*

At the time Woods and Bee were sentenced, the court was required under section 667, subdivision (a), to enhance the sentence imposed for conviction of a serious felony by five years for each qualifying prior serious felony conviction. On September 30, 2018 the Governor signed Senate Bill No. 1393, which, effective January 1, 2019, allows the trial court to exercise discretion to strike or dismiss the section 667, subdivision (a), serious felony enhancement. (See Stats. 2018, ch. 1013, §§ 1 & 2.) Because we cannot conclusively determine from the record that remand would be a futile act—the trial court's imposition of the upper terms notwithstanding—we remand for the trial court to consider whether to dismiss or strike the five-

year section 667, subdivision (a), enhancements imposed on Woods and Bee.

DISPOSITION

The convictions are affirmed, and the matter remanded for the trial court to consider after January 1, 2019 whether to strike the prior serious felony enhancements imposed on Woods and Bee under section 667, subdivision (a), and, if appropriate, to resentence either or both accordingly.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.