Filed 12/27/12 P. v. Hicks 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ANTHONY HICKS Defendant and Appellant.	B237736 (Los Angeles County Super. Ct. No. TA1188861)

APPEAL from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Reversed in part and affirmed in part.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Hicks appeals the judgment entered following his conviction by jury of robbery, false imprisonment by violence, kidnapping for the purpose of robbery and criminal threats. (Pen. Code, §§ 211, 236, 237, subd. (b), 209, subd. (b)(1), 422.)[1] The jury found Hicks personally used a firearm in the commission of robbery, false imprisonment by violence and kidnapping for the purpose of robbery. The trial court sentenced Hicks to life with the possibility of parole for kidnapping for the purpose of robbery, plus 10 years for the associated firearm enhancement. (§ 12022.53, subd. (b).) The trial court imposed concurrent terms on the remaining counts.

Hicks contends the conviction of kidnapping for the purpose of robbery is not supported by sufficient evidence, the conviction of false imprisonment by violence must be reversed as a lesser offense included within kidnapping for the purpose of robbery, the concurrent term imposed for robbery must be stayed pursuant to section 654, the trial court erred in failing to award presentence custody credit with respect to the concurrent terms, and the abstract of judgment must be corrected to reflect a conviction of kidnapping for the purpose of robbery in violation of section 209, subdivision (b)(1).

We reject the claim of insufficient evidence to support the conviction of kidnapping for the purpose of robbery but accept the People's concession the remaining claims are meritorious. We also agree with the People's assertion a $40 court security assessment (§ 1465.8, subd. (a)(1)) and a $30 court facility assessment (Gov. Code, § 70373) must be imposed as to counts 1 and 6. We therefore reverse the conviction of false imprisonment by violence in count 3, order the term imposed with respect to count 1 stayed pursuant to section 654, modify the abstract of judgment to reflect custody credit against the concurrent terms, and order a $40 court security assessment (§ 1465.8, subd. (a)(1)) and a $30 court facility assessment (Gov. Code, § 70373) as to counts 1 and 6. In all other respects, we affirm the judgment.

---

[1] Subsequent unspecified statutory references are to the Penal Code.

BACKGROUND

On the morning of July 4, 2011, Saquana Scott was walking on Alondra Boulevard to her home in Los Angeles. She stopped to talk to friends at Thorson Avenue and noticed a white, two-door car across the street. After parting company with her friends, she saw the same car at Alondra Boulevard and Harris Avenue. As she walked on Thorson Avenue, the car drove past Scott and pulled into a driveway, cutting Scott off. Hicks exited the passenger seat and approached her. Initially, Hicks was friendly but he produced a pistol and said: "It's a jack move. Get your ass in the car." Hicks threatened to kill Scott if she did not get into the car. Hicks got into the rear passenger seat and Scott sat in the front passenger seat. Hicks took Scott's purse, put his hand on her neck and put the gun against the back of her head. The car then backed out of the driveway and went south on Thorson Avenue. Hicks repeatedly told Scott to cooperate or he would kill her.

Scott turned in the seat, reached back, touched the gun and asked Hicks, "Are you serious." Hicks said, "What you think this is? A game? This shit is real." The driver turned east on Elizabeth Street and then south on Harris Avenue. Scott said she had $2,000 in her home and asked Hicks and the driver to let her out of the car. The driver appeared interested but Hicks said, "No, we gonna dump this bitch off around the corner."

As the driver proceeded south on Harris Avenue, he took Scott's jewelry, camera, cell phone and the contents of her purse. The driver turned west on Pauline Street and continued to Caress Avenue where Scott was released. Scott opened the door and screamed as she ran from the car.

At about 1:30 p.m., after Scott had been interviewed by police officers, Scott began walking the neighborhood in search of the white car but was unable to locate it. She returned home, changed her clothes and again searched for the car. In an alley behind an apartment building, Scott saw Hicks in the passenger seat of a green car that was backing into a parking spot. When they made eye contact Hicks said, "Oh, so you fucking following me? I'll kill you." Scott ran to a restaurant and called the police.

When Scott left the restaurant, the driver of the green car, Hicks's sister, confronted Scott and prepared to fight. Scott took the keys to the green car and ran. Deputy sheriffs arrived and eventually located Hicks hiding in his sister's apartment. Property taken in the robbery was found in the apartment.

Hicks presented a defense. However, the evidence presented is not necessary to resolve the issues raised on appeal.

DISCUSSION

1. *The evidence supports the conviction of kidnapping for the purpose of robbery.*

A conviction of kidnapping requires proof that: (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 substantial in character. (*People v. Martinez* (1999) 20 Cal.4th 225, 237; § 207, subd. (a).) Proof of aggravated kidnapping, i.e., kidnapping for the purpose of robbery, requires movement of the victim that is not merely incidental to the commission of the robbery and which substantially increases the risk of harm over and above that necessarily present in the crime of robbery. (*Martinez, supra,* at p. 233; § 209, subd. (b)(2).)

In determining whether there was a substantial increase in the risk of harm, the trier of fact may consider "such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes." (*People v. Martinez, supra,* 20 Cal.4th at p. 233; see also *People v. Rayford* (1994) 9 Cal.4th 1, 12, 13-14.) "The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased." (*Id.* at p. 14.)

Hicks contends the movement of Scott into the car served only to secure her, conceal the commission of the robbery from bystanders who might intervene, and permit the removal of her property without risking her escape. He also claims Scott was held in the vehicle only for the amount of time it took to rob her and the movement did not significantly change Scott's location as she was driven only a few blocks before she was released unharmed. Hicks asserts there was no excess or gratuitous movement of Scott

beyond that necessary to secure her property. He claims the removal of Scott from the public street *decreased* the likelihood she would be harmed or attempt to escape. Thus, the movement of Scott merely facilitated the robbery.

We are not persuaded. With respect to whether the movement was incidental to the robbery, Hicks cites cases in which movement arguably was necessary to commit the robbery. (See *People v. Washington* (2005) 127 Cal.App.4th 290 [movement of victim within a bank to open a vault necessary to commit bank robbery]; *People v. Hoard* (2002) 103 Cal.App.4th 599 [employees of a jewelry store moved 50 feet to a back office where they were bound to permit the defendant to commit the robbery].) Here, the movement of Scott was unnecessary as Hicks could have robbed Scott where he found her on the street. Thus, movement of Scott into the car was not incidental to the robbery.

Regarding increase in the risk of harm, Hicks moved Scott at gunpoint from the relative safety of a city sidewalk to a car driven by his accomplice. Hicks threatened to kill Scott if she did not get into the car and repeatedly threatened to kill her after she was in the vehicle. Thus, the movement itself presented danger that would not have been present had Hicks robbed Scott on the street.

Also, contrary to Hicks's argument, the removal of Scott from the street decreased the likelihood the robbery would be detected, increased the possibility Scott might attempt to escape, and increased the possibility Hicks or his companion might commit other crimes, such as a sexual assault. (See *People v. Salazar* (1995) 33 Cal.App.4th 341, 348 [movement of victim from exterior walkway to a motel room decreased likelihood of detection and presented an opportunity for the commission of additional crimes]; *People v. Dominguez* (2006) 39 Cal.4th 1141, 1153 [victim moved from a relatively open area alongside the road to a place significantly more secluded, decreasing the possibility of detection, escape or rescue]; *People v. Aguilar* (2004) 120 Cal.App.4th 1044, 1048, [victim moved 133 feet into unlit area where there was less likelihood of detection]; *People v. Jones* (1999) 75 Cal.App.4th 616, 629 [victim in parking lot moved 40 feet in order to push her into a car, removing her from public view and increasing the risk defendant could drive away with victim].)

Hicks complains the distance involved was not substantial. However, the movement of Scott from the street to the vehicle substantially altered her environment and, "[w]here movement changes a victim's environment, it does not have to be great in distance to be substantial." (*People v. Shadden* (2001) 93 Cal.App.4th 164, 169.) Moreover, although Hicks minimizes the distance Scott was moved, it appears to have been approximately four city blocks, which is not an insubstantial distance. Also, Scott was not released immediately upon the completion of the robbery as Hicks claims. Her property was taken while the car was on Harris Avenue. The driver thereafter turned onto Pauline Street and proceeded to Caress Avenue before Scott was released.

Hicks's reliance on *People v. Timmons* (1971) 4 Cal.3d 411, is misplaced. In *Timmons*, the defendant entered a car occupied by two individuals, robbed them as the vehicle proceeded slowly for five blocks and then exited the vehicle. *Timmons* noted the victims simply drove their own vehicle along a city street in broad daylight while the defendant committed the robbery. Neither victim observed a weapon and there was no hot pursuit, high-speed chase or reckless driving. *Timmons* concluded "this brief asportation may conceivably have increased the risk in some slight degree beyond that inherent in the commission of the robberies, but it cannot be said to have 'substantially' increased that risk." (*Id.* at p. 416, fn. omitted.)

Here, Hicks did not enter a car driven by Scott and direct her to continue driving. Rather, he abducted her at gunpoint. As previously indicated, this change in environment presented dangers that are not inherent in the crime of robbery. Thus, *Timmons* does not assist Hicks.

In sum, the evidence supports the jury's finding the movement of Scott was not merely incidental to the robbery and substantially increased the risk of harm beyond that inherent in the crime of robbery.

2. *The conviction of false imprisonment by violence must be reversed.*

Hicks contends the conviction of false imprisonment by violence in count 3 must be reversed because it is a lesser offense included within kidnapping for the purpose of robbery in count 5. The People concede the point, noting the prosecutor did not distinguish the acts required to convict Hicks of kidnapping for the purpose of robbery from the acts required to convict Hicks of false imprisonment by violence. Thus, the conviction of false imprisonment by violence should be reversed. (See *People v. Shadden, supra,* 93 Cal.App.4th at p. 171; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120-1121; *People v. Patrick* (1981) 126 Cal.App.3d 952, 965.)

The People's concession is well taken. We shall therefore reverse the conviction of false imprisonment by violence in count 3.

3. *The concurrent term imposed on count 1 must be stayed.*

Hicks contends the concurrent sentence for robbery in count 1 should be stayed pursuant to section 654 because it was part of the same continuous course of conduct punished in count 5, kidnapping for the purpose of robbery. The People concede the point and it appears their concession is appropriate. (See *People v. Lewis* (2008) 43 Cal.4th 415, 519 [section 654 bars punishment for both kidnapping for the purpose of robbery and robbery of the same victim].) We shall order the concurrent term imposed for robbery stayed pursuant to section 654.

4. *Hicks is entitled to custody credit on the concurrent sentences.*

Hicks was awarded 179 days of presentence custody credit against the indeterminate sentence imposed for kidnapping for the purpose of robbery in count 5. The trial court did not award Hicks presentence custody credit against the concurrent sentences. Hicks contends, and the People concede, he is entitled to the same presentence custody credit on each sentence. (*People v. Schuler* (1977) 76 Cal.App.3d 324, 330 ["It is a basic rule that where an accused person is held in custody on a number of charges and upon conviction he is ordered to serve concurrent sentences, the time to be credited pursuant to section 2900.5 must be credited to each of them"];

People v. Edwards (1981) 117 Cal.App.3d 436, 450 [defendant is entitled to conduct credit under section 4019 as to concurrent determinate terms].)

We accept the People's concession and shall order the abstract of judgment modified accordingly.

5. *The abstract of judgment must be corrected to reflect a violation of section 209, subdivision (b)(1) in count 5.*

Hicks contends, and the People concede, the abstract of judgment should be corrected with respect to count 5 to reflect a violation of section 209, subdivision (b)(1), rather than section "29(B)(1)." The People's concession is well taken. We shall order the abstract of judgment corrected. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [clerical errors may be corrected at any time].)

6. *The abstract of judgment must be modified to reflect additional assessments.*

The trial court ordered Hicks to pay a $40 court security assessment (§ 1465.8, subd. (a)(1)) and a $30 court facility assessment (Gov. Code, § 70373) as to count 5 only. The People contend the abstract of judgment must be modified to reflect similar assessments as to counts 1 and 6. The point is well taken.

Section 1465.8, subdivision (a)(1), states "an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses . . . ." Government Code section 70373, subdivision (a)(1) states an assessment in the amount of $30 "shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses . . . ."

Because these assessments are mandatory, their omission constitutes an unauthorized sentence which may be corrected at any time. (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1530; *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249.) We shall order the abstract of judgment amended to include a $40 court security assessment and a $30 court facility assessment as to counts 1 and 6.

DISPOSITION

The conviction of false imprisonment by violence in count 3 is reversed; the concurrent term imposed on count 1 is ordered stayed pursuant to section 654; Hicks is awarded presentence custody credit of 179 days with respect to the concurrent sentence imposed on count 6; and, as to counts 1 and 6, a $40 court security assessment (§ 1465.8, subd. (a)(1)) and a $30 court facility assessment (Gov. Code, § 70373) are ordered imposed. In all other respects, the judgment is affirmed. The clerk of the superior court shall prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting these modifications.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.