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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES IFEANYI, Defendant and Appellant.	B237688 (Los Angeles County Super. Ct. No. BA377848)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed.

William L. Heyman, 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, Stephanie A. Miyoshi and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Charles Ifeanyi was convicted by jury of attempted kidnapping, in violation of Penal Code sections 664 and 207.[1] The trial court sentenced defendant to the low term of 18 months in state prison.

In his timely appeal from the judgment, defendant makes the following arguments: (1) there was insufficient evidence to support the conviction, which violates defendant's constitutional right to due process under the Fourteenth Amendment; and (2) the trial court committed prejudicial error and violated his right to due process and a fair trial by not instructing on lesser included offenses. Finding no merit in either contention, we affirm the judgment.

FACTS

Defendant had four encounters with 16-year-old Danielle D., with the final incident serving as the basis for the charge of attempted kidnapping. In June 2010, as Danielle was walking from school to her brother's house, she noticed defendant driving a Yukon slowly by her side, staring at her. Defendant offered her a ride, urging her to get into his car several times. Danielle told defendant to leave her alone and walked quickly to her brother's house.

Later that day, Danielle walked from her brother's home to a nearby Chinese restaurant. When she left the restaurant, the Yukon was parked nearby, defendant approached her, and said, "I have some money." Danielle refused defendant's requests to get into the Yukon. When Danielle told a passerby what was happening, defendant returned to his car and drove away.

In August 2010, Danielle was at a bus stop when defendant drove up and told her he would give her a ride. Danielle was talking on her cell phone, ignoring defendant. Defendant exited his car and offered Danielle a ride and money. Danielle intentionally spoke loudly to a friend on her cell phone, so that defendant could hear, telling her friend

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

the license plate number of the Yukon. Defendant left in the car, and Danielle called 911. An officer determined that defendant was the registered owner of the Yukon and wrote him a letter, asking defendant to contact him. A person identifying himself as defendant called the officer and became upset, yelling at the officer, and hanging up on him.

In October 2010, Danielle was walking through an alleyway to her brother's house, when defendant blocked her path with the Yukon. Standing close to Danielle, defendant told her to "come with me" three times, using a demanding tone of voice. Danielle refused and attempted to walk away. Defendant grabbed her arm, jerking her forward. Danielle pulled her wrist away from defendant and moved toward the rear of the Yukon, scared because defendant had touched her. Danielle ran to her brother's house and called 911. She positively identified defendant in a six-person photographic lineup.

Other than brief impeachment evidence regarding Danielle's statement to a police officer in August 2010, no substantive defense was presented.

DISCUSSION

I

Defendant argues the evidence is insufficient to support his conviction of attempted kidnapping in three respects. First, there was no substantial evidence that defendant had the intent to move Danielle a substantial distance against her will. Second, he did not commit any act to move her a substantial distance against her will. Third, Danielle's testimony was inherently improbable and therefore could not constitute substantial evidence. According to defendant, the evidence shows he was attracted to Danielle and wanted to spend money on her, but he had no intention of committing an abduction.

Standard of Review

We review the sufficiency of the evidence in the light most favorable to the judgment for substantial evidence—evidence that is reasonable, credible, and of solid value. (*People v. Maury* (2003) 30 Cal.4th 342, 396 (*Maury*); *People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) We are required to accept logical inferences that the jury might have drawn from the circumstantial evidence. (*People v. Combs* (2004) 34 Cal.4th 821, 849; *Maury*, *supra*, at p. 396; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Elements of Attempted Kidnapping

Section 207, subdivision (a), provides as follows: "(a) Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." Section 664 provides in pertinent part that "[e]very person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished" as prescribed by law.

"Mere preparation to commit a crime does not constitute an attempt to commit it. (*People v. Berger* (1955) 131 Cal.App.2d 127, 130.) There must be some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by extraneous circumstances. (*People v. Staples* (1970) 6 Cal.App.3d 61, 65-66; *People v. Buffum* [(1953)] 40 Cal.2d 709.)" (*People v. Cole* (1985) 165 Cal.App.3d 41, 49 (*Cole*).)

For the crime of attempted kidnapping, the distance "moved is immaterial -- asportation simply is not an element of the offense. *People v. Fields* (1976) 56 Cal.App.3d 954 involved an attempt to force a young girl on the street into a car, which attempt was abandoned by the defendant when she screamed. The court therein affirmed

a conviction of attempted kidnapping even though the victim was never physically moved." (*Cole*, *supra*, 165 Cal.App.3d at p. 50.)

Analysis

Applying the appropriate standard of review, there is no merit to defendant's challenges to the sufficiency of the evidence. The claim that there is no substantial evidence defendant had the intent to forcibly move Danielle is contrary to the record. Over a period of months, defendant attempted to entice Danielle into his car. Despite her persistent refusals, he continued to approach her. Finally, when Danielle was cornered in the alleyway and refused, once again, to go with defendant, he grabbed her by the arm, demonstrating an intent to forcibly move her to another part of the county.

Equally unavailing is the claim that defendant did not commit an act directed at forcibly moving Danielle. To the contrary, trapping Danielle in a small area with his car and grabbing her arm while demanding that she go with him is "a direct, unequivocal act toward kidnapping her." (*Cole*, *supra*, 165 Cal.App.3d at p. 50.) It was Danielle's pluck, not defendant's lack of intent, that kept this from turning into a completed act of kidnapping.

Defendant's claim that Danielle's testimony was inherently improbable is no more than a "dispute [over] the persuasive value of the evidence. . . ." (*People v. Letner* (2010) 50 Cal.4th 99, 161 (*Letner*).) "In our limited role on appeal, '[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' ([*Maury*, *supra*,] (2003) 30 Cal.4th [at p.] 403.)" (*Letner*, *supra*, at pp. 161-162.) Accordingly, "we reject defendant's attempts to reargue the persuasiveness of the evidence and conclude that the evidence was sufficient . . . ." (*Maury*, *supra*, at p. 396.)

There is nothing inherently improbable about Danielle's testimony. As is common with most witnesses, her testimony reflects occasional inconsistencies. But viewed as a whole, and taking into account Danielle's age, we find nothing unusual in her testimony that would warrant a conclusion that her testimony was unconstitutionally unreliable.

II

Defendant next argues the trial court erred in failing to instruct the jury on the lesser included offenses of battery and false imprisonment. Defendant contends the trial court had a sua sponte duty to instruct the jury on the lesser offenses and that the doctrine of invited error does not bar the claim.

Duty to Instruct on Lesser Included Offenses

"Like most jurisdictions, California recognizes that an offense expressly alleged in an accusatory pleading may necessarily include one or more lesser offenses. The definition of a lesser necessarily included offense is technical and relatively clear. Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368-369 (*Lohbauer*); *People v. Marshall* (1957) 48 Cal.2d 394, 405-407 (*Marshall*).)" (*People v. Birk* (1998) 19 Cal.4th 108, 117-118, fn. omitted.)

A trial court has a sua sponte duty to instruct the jury on an uncharged offense included in the charged crime if supported by substantial evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Memro* (1995) 11 Cal.4th 786, 871.) "Such instructions are required only when there is substantial evidence that, if the defendant is guilty at all, he is guilty of the lesser offense, but not the greater. [Citations.]" (*People v. Wyatt* (2012) 55 Cal.4th 694, 704.)

"The error in failing sua sponte to instruct, or to instruct fully, on a lesser included offense is not a fundamental structural defect in the mechanism of the criminal proceeding ([*People*] *v. Cahill* [(1993)] 5 Cal.4th 478, 502) which cannot or should not be evaluated for prejudice by reference to 'the entire cause, including the evidence' (Cal. Const., art. VI, § 13). Instead, like the erroneous introduction of an involuntary confession, or the instructional omission of an element of a charged offense or sentencing enhancement, it is a mere trial error, one committed in the presentation of the case to the jury. By the same token, the probable adverse effect of an erroneous failure to provide a lesser offense option in a particular case can readily be assessed by an individualized, concrete examination of the record in that case. Under such circumstances, as in *Cahill*, the error must therefore be evaluated under the generally applicable California test for harmless error, that set forth in [*People v.*] *Watson* [(1956) 46 Cal.2d 818]." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 176, fn. omitted.)

Analysis

The Attorney General argues defendant invited any error when defense counsel, after consultation with defendant, affirmatively asserted that instructions on lesser included offenses should not be given. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1265; *People v. Horning* (2004) 34 Cal.4th 871, 905.) We need not, however, decide whether counsel's determination to forego instructions on anything other than the charged offense rose to the level of invited error, because the record contains no substantial evidence of a lesser included offense, and any error was necessarily harmless.

Defendant asserts that battery and attempted false imprisonment are lesser included offenses of attempted kidnapping. The claim as to battery does not require discussion. Battery (§ 242), which requires the unlawful touching of another, is not an included offense of attempted kidnapping. A kidnapping may be committed without the use of force—section 207 applies to offenses committed by force "or by any other means

of instilling fear." Thus, not every kidnapping, or attempted kidnapping, includes a battery and the trial court had no obligation to instruct on that offense.

It has been held that false imprisonment ("the unlawful violation of the personal liberty of another" as defined in § 236) is a lesser included offense of kidnapping in violation of section 207. (*People v. Ratcliff* (1981) 124 Cal.App.3d 808, 819-820, citing *People v. Apo* (1972) 25 Cal.App.3d 790, 796.) Assuming attempted false imprisonment is a lesser included offense of attempted kidnapping, the record contains no substantial evidence that defendant merely attempted to violate the personal liberty of Danielle and the trial court had no obligation to instruct on the offense.

"[A] lesser included offense instruction on false imprisonment is not required where the evidence establishes that defendant was either guilty of kidnapping or was not guilty at all. (See *People v. Kelly* (1990) 51 Cal.3d 931, 959; *People v. Leach* (1985) 41 Cal.3d 92.)" (*People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1233.) Here, on each of the four occasions defendant contacted Danielle, he attempted to entice her to go with him in the Yukon. There is no evidence defendant intended to merely violate her personal liberty—in each instance, defendant sought to take Danielle with him. Certainly defendant's conduct in grabbing her arm and pulling her during his fourth contact with Danielle shows an intent to carry her to another location, which constitutes an attempted kidnapping. Given this record, the trial court had no obligation to instruct on attempted false imprisonment as a lesser included offenses.

Assuming the record contains substantial evidence of an attempted false imprisonment, any failure to instruct on that offense was nonprejudicial. (*People v. Breverman, supra,* 19 Cal.4th at p. 178.) Defendant engaged in a persistent pattern of attempting to transport Danielle to another location, conduct which shows an intent to kidnap rather than an intent to merely invade her personal liberty. We hold defendant has failed to show that had the jury been given the option of returning a guilty verdict on attempted false imprisonment rather than attempted kidnapping, it would have convicted of the lesser rather than the charged offense. (Cal. Const., art. VI, § 13.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.