

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIS LAVELLE MANUEL,

Defendant and Appellant.

B262872

(Los Angeles County
Super. Ct. No. KA106041)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Robert M. Martinez, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Kevis Lavelle Manuel (Manuel) was charged with committing the following crimes: counts one and two—kidnapping in violation of Penal Code section 207, subdivision (a);¹ counts three and four—making criminal threats in violation of section 422; count five—inflicting corporal injury on a spouse or cohabitant after a prior conviction in violation of section 273.5, subdivision (f)(2); count six—human trafficking in violation of section 236.1, subdivision (b); and count seven—human trafficking of a minor in violation of section 236.1, subdivision (c)(2). The information specially alleged that Manuel personally used a handgun during the commission of counts one through four and counts six and seven within the meaning of section 12022.53, subdivision (b); he had been convicted of a violent or serious felony within the meaning of section 667, subdivisions (b) through (j) and section 1170.12; he had been convicted of a serious felony within the meaning of section 667, subdivision (a)(1); and he had served four prior prison terms within the meaning of section 667.5, subdivision (b).

The jury found Manuel guilty on counts one through five and not guilty on count seven. It could not reach a verdict on count six. As a result, regarding count six, the trial court declared a mistrial.

Manuel admitted the priors. He was sentenced to a total of 19 years four months in state prison.

On appeal, Manuel argues that we must reverse the convictions on counts one and two because the trial court violated his state and federal constitutional rights when it failed to instruct the jury regarding the contextual factors in the kidnapping instruction set forth in CALCRIM No. 1215, and when it failed to instruct the jury to consider whether asportation was incidental to another crime.

We affirm.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

FACTS

Evidence At Trial

On May 28, 2014, Manuel questioned Brenita Doe (Brenita),² his intermittent girlfriend, about another man. In the living room of their house, he cussed and yelled at her, accused her of lying, and then hit her in the face and shoulders. Brenita's four children—Marcquis, Dominique, Gabriel and Kjohny—were in the house but in different rooms.³

Brenita ran out of the house and down the street to get help. Manuel “dragged” her back and threw her on the ground in front of the house. After that, he picked her up and took her inside where he repeatedly slapped and punched her. Eventually, he instructed Brenita to put on a short dress and Dominique, who was 12 years old, to put on short shorts. He announced that he was going to prostitute their bodies.

After Brenita and Dominique changed, Manuel forced them into the family's car. He drove them to a Rite Aid and told Brenita to get out and make some money. She got out, went to a bus stop and took a seat. Manuel offered her for sale to passersby. He told them he had Brenita's 12-year-old daughter in his car.

No one accepted Manuel's solicitations. Eventually, he drove Dominique to a 7-Eleven across the street from the Rite Aid and parked while Brenita remained at the bus stop. Manuel got out of the car and told Dominique that if she moved, he would kill her. While making the threat, Manuel pulled a gun part way out of his waistband so it was visible to Dominique. Then he pointed the gun at her head. Subsequently, he tucked the gun back into his waistband and threatened Dominique by saying, “If you scream or if you yell or get out, I'll kill you.”

Manuel made Brenita return to the car and told her to get inside. After she complied, he drove back to the house.

² The trial court concealed Brenita's full name by referring to her as Brenita Doe.

³ Manuel is Kjohny's father but not the father of Marcquis, Dominique and Gabriel.

Shortly thereafter, Manuel drove Brenita and Dominique to some train tracks. He turned off the car and told them to get out. When they refused, he tried to forcibly remove them, but they fought back. He said he was going to kill them. When he could not pull them out, he got back in the car. Eventually, Manuel drove them to a trailer park, after which he drove them home.

At home, Manuel told Brenita to cook food. Later, he told her to get back in the car so they could take another ride. Because she was afraid he would hit her, she complied. He drove to a park.

Dominique told Marcquis to call the police. He spoke to some neighbors and asked them to make the call. One of the neighbors called 911. When Manuel returned home with Brenita, the police were present. He parked in a neighbor's driveway and got out. The police saw Manuel trying to hide. Soon after, they arrested him.

Jury Instructions

The trial court showed the prosecutor and defense counsel the proposed jury instructions. Both sides submitted.

Regarding the kidnapping counts, the trial court instructed the jury with CALCRIM No. 1215 as follows:

“The defendant is charged in count 1 and count 2 with kidnapping in violation of Penal Code section 207[, subdivision] (a). [¶] To prove the defendant is guilty of this crime, the People must prove that: [¶]

“1. The defendant took, held, or detained another person by using force or by instilling reasonable fear; [¶]

“2. . . . [U]sing that force or fear, the defendant moved the other person or made the other person move a substantial distance; and [¶]

“3. The other person did not consent to the movement. [¶] In order to consent, a person must act freely and voluntarily and know the nature of the act. [¶] Substantial distance means more than a slight or trivial distance. In deciding whether the distance was substantial, you must consider all of the circumstances relating to the movement.”

DISCUSSION

When the trial court instructed the jury, it read the unbracketed language in CALCRIM No. 1215. It omitted the following bracketed language: “[Thus, in addition to considering the actual distance moved, you may also consider other factors such as [whether the distance the other person was moved was beyond that merely incidental to the commission of [an associated crime]], whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, or gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.]” (CALCRIM No. 1215.) Manuel contends that the trial court had a sua sponte duty to give this bracketed language, and that its failure to do so violated his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution, including his right to due process.

The People contend that Manuel forfeited his objection and that, in any event, there was no error or the error was harmless.

We turn to the issues below.

I. Standard of Review.

Instructional error is a question of law subject to de novo review. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

II. Forfeiture.

Manuel did not object to the trial court’s jury instructions, nor did he request the inclusion of additional language from CALCRIM No. 1215. He has therefore forfeited his objections to the kidnapping instructions, except as provided by section 1259. (*People v. Romero* (2008) 44 Cal.4th 386, 411.)

Section 1259 provides, inter alia, that the “appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.” Manuel relies on this statute to save his appeal.

Conceivably, this statute could apply to claims that an instruction was incomplete as well as to claims that an instruction was legally incorrect. But as applied in case law, the statute is triggered only in the second scenario.

In *People v. Valdez* (2004) 32 Cal.4th 73, 112 (*Valdez*), the defendant argued that the trial court erred when it gave “a truncated version of CALJIC No. 8.81.17, which defines the robbery-murder special circumstance[.]” The court stated, ““Defendant did not request the clarifying language he now contends was crucial and may not now ‘complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete.’ [Citations.] Defendant’s failure to either object to the proposed instruction or request that the omitted language be given to the jury forfeits his claim on appeal. [Citation.]” (*Valdez, supra*, at p. 113.)

There was no mention of section 1259 in *Valdez*, so it is unclear whether that statute was considered. We note, however, that section 1259 was cited by *People v. Mackey* (2015) 233 Cal.App.4th 32, 106 when it stated: “It is settled that ‘a defendant need not object to preserve a challenge to an instruction that incorrectly states the law and affects his or her substantial rights.’ [Citations.] Even so, “““““a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.””””” [Citation.] Because defendants advocate a modification of the instruction rather than complete rejection, the issue has been forfeited.” Moreover, our Supreme Court has repeatedly stated the rule that it expressed in *Valdez*. (*People v. Hill* (1992) 3 Cal.4th 959; *People v. Sully* (1991) 53 Cal.3d 1195, 1218; *People v. Lang* (1989) 49 Cal.3d 991, 1024.)

Because Manuel complains that the instruction was incomplete rather than erroneous, section 1259 does not save his appeal.

III. No Basis for Reversal.

Even if there was no forfeiture, Manuel's appeal would fail.

A. Kidnapping Law.

There are multiple types of kidnapping, including simple kidnapping (§ 207, subd. (a)) and aggravated kidnapping (§ 209, subd. (b)). (*People v. Rayford* (1994) 9 Cal.4th 1, 11 (*Rayford*).

At issue here is section 207, subdivision (a). It provides: "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." Case law explains that "the prosecution must prove ""(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." [Citation.]' [Citation.]" (*People v. Arias* (2011) 193 Cal.App.4th 1428, 1434 (*Arias*)).⁴

The asportation element for aggravated kidnapping has traditionally "require[d] movement of the victim that [was] not merely incidental to the commission of [an underlying offense], and which substantially increase[d] the risk of harm over and above that necessarily present in the [underlying offense]." (*Rayford, supra*, 9 Cal.4th at p. 12.) The increased risk of harm issue included "consideration of 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. [Citations.]" (*Id.* at pp. 13–14.)

In contrast, in the past, the "asportation requirement for simple kidnapping [was] less stringent . . . , and less clear." (*Rayford, supra*, 9 Cal.4th at p. 14.) Case law established that the asportation standard was exclusively dependent on the distance involved. The rule was that "the movement must be 'substantial in character,'" meaning

⁴ In case law, the third element is often referred to as the asportation element. (*People v. Morgan* (2007) 42 Cal.4th 593, 604.)

that it was more than slight or trivial. (*Ibid.*; *People v. Martinez* (1999) 20 Cal.4th 225, 232 (*Martinez*).

The landscape was changed by *Martinez*.

Martinez held that factors other than actual distance “should apply in all cases involving simple kidnapping. [Citation.]” (*Martinez, supra*, 20 Cal.4th at p. 235.) According to the court, “section 207[, subdivision (a)] refers to ‘kidnapping’ in the same respect section 209[, subdivision (b)(1)] uses the word ‘kidnaps,’ which has been interpreted to require consideration of the ‘scope and nature’ of the movement and the increased risk of harm to the victim. [Citation.] The two prongs of aggravated kidnapping are not distinct, but interrelated, because a trier of fact cannot consider the significance of the victim’s changed environment without also considering whether that change resulted in an increase in the risk of harm to the victim. Thus, for simple kidnapping asportation, movement that is ‘substantial in character’ arguably should include some consideration of the ‘scope and nature’ of the movement or changed environment, and any increased risk of harm.” (*Martinez, supra*, at p. 236.) Further, the court explained that prior precedent failed “to appreciate that a primary reason forcible asportation is proscribed by the kidnapping statutes is the increase in the risk of harm to the victim because of the diminished likelihood of discovery, the opportunity for the commission of additional crimes, and the possibility of injury from foreseeable attempts to escape. [Citations.]” (*Ibid.*)

The court stated: “In cases involving simple kidnapping, the instructions currently provide that the victim must have been moved ‘for a substantial distance, that is, a distance more than slight or trivial.’ [Citation.] In view of the foregoing discussion, we conclude it would also be proper for the court to instruct that, in determining whether the movement is “‘substantial in character’” [citation], the jury should consider the totality of the circumstances. Thus, in a case where the evidence permitted, the jury might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent

in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes.” (*Martinez, supra*, 20 Cal.4th at p. 237.) The court clarified that “[w]hile the jury may consider a victim's increased risk of harm, it may convict of simple kidnapping without finding an increase in harm, or any other contextual factors. Instead, . . . the jury need only find that the victim was moved a distance that was ‘substantial in character.’ [Citations.]” (*Ibid.*)

“When an ‘associated crime’ is involved, there can be no violation of section 207 unless the asportation is more than incidental to the commission of that crime. [Citation.]” (*In re Earley* (1975) 14 Cal.3d 122, 129, fn. 9.) As a consequence, “in a case involving an associated crime, the jury should be instructed to consider whether the distance a victim was moved was incidental to the commission of that crime in determining the movement's substantiality.” (*Martinez, supra*, 20 Cal.4th at p. 237.)

The crime of kidnapping continues until such time as the kidnapper releases or otherwise disposes of the victim. (*People v. Burney* (2009) 47 Cal.4th 203, 233.)

B. State Principles.

“[T]he California Constitution requires the trial court to instruct . . . on every material element of an offense” (*People v. Flood* (1998) 18 Cal.4th 470, 480 (*Flood*)), and a trial court's duty is sua sponte (*People v. Bell* (2009) 179 Cal.App.4th 428, 434 (*Bell*)). Also, a trial court must instruct on the general principles of law governing the case. (*Ibid.*) “The proper test for judging the adequacy of instructions is to decide whether the trial court ‘fully and fairly instructed on the applicable law’ [Citation.]” (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)

There is a sua sponte duty to instruct on a particular defense if it appears the defendant is relying on such a defense, or if there is substantial evidence to support such a defense and it is not inconsistent with the defendant's theory of the case. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051.)

State law error in connection with a jury instruction is subject to the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836–837 (*Watson*). The *Watson* court explained that reversal is required “only when the court, ‘after an examination of

the entire cause, including the evidence,’ is of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*Id.* at p. 836.)

C. Federal Principles.

“[T]he United States Supreme Court has held that jury instructions relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violate the defendant’s due process rights under the federal Constitution. [Citations.] Such erroneous instructions also implicate Sixth Amendment principles preserving the exclusive domain of the trier of fact. [Citations.]” (*Flood, supra*, 18 Cal.4th at p. 491.) “[I]nstructional errors—whether misdescriptions, omissions, or presumptions—as a general matter fall within the broad category of trial errors subject to” review under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*Flood, supra*, 18 Cal.4th at p. 499.) Under *Chapman*, constitutional error cannot be held harmless unless a reviewing court concludes that “it was harmless beyond a reasonable doubt.” (*Chapman, supra*, 386 U.S. at p. 24.)

D. Analysis.

According to Manuel, *Martinez* mandates the giving of a contextual factors instruction and an associated crime instruction any time a defendant is charged with simple kidnapping. In our view, if the trial court had been asked to instruct on the contextual factors and had refused, any error would have been harmless. If the trial court had been asked to give an associated crime instruction, it could have properly refused the instruction because it was not warranted by the evidence.

1. Contextual Factors Instruction.

The parties debate whether the trial court was required to instruct on the contextual factors.

Martinez did not state whether a trial court must instruct on the contextual factors, nor did it state that the contextual factors are subelements of the asportation element. Also, *Arias* held that the contextual factors “may be considered in determining whether asportation for simple kidnapping has been proved. [Citation.]” (*Arias, supra*, 193

Cal.App.4th at pp. 1435–1436.) It could be argued that instruction on the contextual factors is permissive rather than mandatory, and that it sufficed under *Martinez* for a trial court to instruct the jury to consider the totality of the circumstances. On the other hand, it is reasonable to read *Martinez* as requiring instruction on the contextual factors. Without it, a jury would not be directed to consider the factors relevant to an increase in the risk of harm. Simply telling a jury to consider the totality of the circumstances is, arguably, too vague to provide guidance.

Because of Manuel’s forfeiture, we decline to resolve the parties’ debate as to whether a trial court must instruct on the contextual factors. Given the posture of this appeal, it suffices to point out that any hypothetical instructional error would not have been prejudicial under *Watson* or *Chapman*. The evidence established that Manuel moved Brenita and Dominique from their home to a Rite Aid, to a 7-Eleven, back to their home, to a set of train tracks, to a trailer park and back to their home. Then he moved Brenita to a park and back home. Contrary to what Manuel suggests, the movement increased the risk of harm absent asportation: it gave him an increased opportunity to commit additional crimes and avoid detection because he could have made good on his threats to kill Brenita and Dominique at the train tracks without leaving evidence of such crimes at their house, and without neighbors hearing any cries for help or any gunshots. Further, because he used a car to transport Brenita and Dominique, that increased the risk of danger to them if they tried to escape while in transit from one place to the other. Beyond a reasonable doubt, the jury would have concluded that Manuel moved Brenita and Dominique a substantial distance even if the jury had been instructed on the contextual factors regarding asportation.

2. Associated Crime Instruction.

In his opening brief, Manuel cites *Bell* and argues that the “physical assault of Brenita, and the making of the criminal threats, occurred during the kidnap[pl]ings,” and they qualify as associated crimes despite the lack of complete temporal overlap with the kidnappings. He refined his argument in his reply brief, arguing: The kidnapping commenced when he dragged Brenita back into the house. Because he thereafter

inflicted corporal injury on her, that crime was associated with the kidnapping. In the midst of the kidnapping, he threatened to kill Dominique at the 7-Eleven and threatened to kill Brenita at the train tracks, which supported counts three and four respectively. Thus, those crimes were also associated. Finally, because the kidnappings continued until Manuel released Brenita and Dominique, the interim crime of human trafficking was also associated.

Manuel's argument is unavailing.

In *Bell*, the court held that “an ‘associated crime,’ as that phrase was used by the *Martinez* court, is any criminal act the defendant intends to commit where, in the course of its commission, the defendant also moves a victim by force or fear against his or her will.” (*Bell, supra*, 179 Cal.App.4th at pp. 438–439.)

While the crimes of making criminal threats and inflicting corporal injury on a spouse or cohabitant may have occurred during the kidnappings, they did not occur at the same time Manuel was moving Brenita and Dominique by force or fear. Thus, they were not associated crimes within the meaning of *Martinez* and *Bell*. Even if they were associated, the continued movement of Brenita and Dominique after the completion of those crimes was not incidental to those crimes.

The human trafficking crime may well have been an associated crime given that it is committed when a person violates the personal liberty of another with the intent to force them into prostitution (§ 236.1, subd. (b)), and Manuel was committing this crime when he drove Brenita and Dominique to the Rite Aid, and possibly when he drove Dominique to 7-Eleven. But even if it was an associated crime, Manuel's movement of Brenita and Dominique continued after he had finished engaging in human trafficking, making it more than incidental to the underlying crime.

Given these considerations, we conclude that the evidence did not support the giving of the associated crime instruction.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT