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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL ALEXANDER HINOJOSA,

Defendant and Appellant.

C065555

(Super. Ct. No. CR092112)

Defendant Paul Alexander Hinojosa carjacked and kidnapped a father and his three young sons in an attempt to obtain money from the father. The jury convicted defendant of kidnapping for the purpose of robbery (Pen. Code, § 209, subd. (b)(1)¹ (count 1 - victim G.S.)); kidnapping a child under age 14 for extortion (§§ 209, subd. (a), 667.9, subd. (c) (count 2 - victim M.P.)); kidnapping for extortion (§ 209, subd. (a) (counts 3 & 4 – victims R.J & C.J.)); carjacking where a victim was under age 14 (§§ 215, subd. (a), 667.9, subd. (c) (count 5 - victim M.P.)); assault (§ 240) as a lesser

¹ Undesignated statutory references are to the Penal Code.

included offense of assault with a deadly weapon (§ 245, subd. (a)(1) (count 7 – victim G.S.)); felony child endangerment (§ 273a, subd. (a) (counts 9, 10, & 11 - victims M.P., R.J. and C.J.)).²

The jury found that defendant personally used a deadly or dangerous weapon in the commission of all counts for which defendant was convicted except count 7.

The jury found defendant not guilty of witness dissuasion. (§ 136.1 (count 8).)

The trial court found that defendant had served two prior prison terms. (§ 667.5, subd. (b).)³

The court sentenced defendant to an aggregate determinate term of 17 years four months plus four consecutive indeterminate terms of “seven years to Life.”

On appeal, defendant contends (1) the child endangerment counts must be reversed because there was insufficient evidence of “circumstances likely to produce death or great bodily harm”; (2) the sentence imposed on the felony child endangerment counts should have been stayed pursuant to section 654; (3) the prosecutor’s misstatement of reasonable doubt, coupled with the trial court’s overruling of a defense objection to the argument, was reversible error; and (4) the abstract of judgment must be corrected to reflect four life terms with the possibility of parole instead of four terms of “seven years to Life” on counts 1 through 4.

We agree that the sentence imposed by the trial court on the felony child endangerment counts violates section 654. We also agree that a correction to the indeterminate-term abstract of judgment is required, but disagree as to the nature of the

² At the close of its case in chief, the court granted the prosecution’s motion to dismiss count 6, attempted robbery of a person using an automated teller machine. (§§ 211, 212.5, subd. (b), 664, subd. (a) - count 6.)

³ In this bifurcated proceeding, the trial court granted the prosecution’s motion to dismiss allegations that defendant committed the present offenses while released on bail pending trial on a felony charge. (§ 12022.1, subd. (b).)

correction. Accordingly, we modify the judgment, order modification of the determinate-term abstract and correction of the indeterminate-term abstract and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Prosecution Case-in-Chief

On May 2, 2009, G.S. drove his three sons, 15-year-old C.J., 13-year-old R.J., and nine-year-old M.P., to a Woodland car wash to clean the family car. While G.S. and the children were washing the car, defendant approached G.S. and requested a cigarette and money. G.S. explained that he had neither cigarettes nor money. Defendant then asked for a ride to his home on the other side of the city. G.S. refused because his children were with him and defendant would not fit in the car. After persistent requests, G.S. relented and agreed to drive defendant home because rainfall appeared to be imminent. The children seated themselves in the rear seat, while defendant seated himself in the front passenger seat. Defendant began directing G.S.'s driving.

G.S. noticed that defendant seemed abnormally nervous and fidgety. Thereafter, defendant pulled what G.S. believed to be a pistol from beneath his sweatshirt and pointed the gun at G.S.'s rib cage.

Defendant said he would shoot G.S. if he did not do exactly as told. Shocked and scared, G.S. pulled the car to the side of the road. Defendant shouted at G.S. to continue driving, and G.S. complied. G.S. asked defendant to calm down and said he would do what defendant wanted. M.P. began to cry, saying in a scared voice, "Papi, what's happening, what's happening[?]"

Defendant demanded that G.S. drive to a bank and that he withdraw \$600 from his bank account. G.S. did not have money in the bank but he agreed, hoping that driving to town would provide him an opportunity to buy time and decide what to do. Defendant demanded that G.S. give him the driver's license, money, and credit cards from his wallet. Defendant said he wanted the address on G.S.'s driver's license so that, if anything happened to defendant, he could go to G.S.'s house and kill G.S. and his

family. When G.S. asked defendant not to do this in front of the children, defendant replied, "I don't give a shit" or "I don't want to hear that shit." Defendant said he was the one with the gun and could do anything he wanted.

While G.S. drove, defendant waved the gun around, pointing it in turn at G.S. and at the children. All of the children started to cry. Defendant told G.S. to tell the children to shut up "or I'm going to kill every single little fucker." He told the children that if they were not quiet he would take them to a field and shoot them.

C.J. recalled that defendant asked the boys to give him any electronics they had. M.P. tried to sneak his cellular telephone from his pocket so that he could call 911, but defendant noticed, asked M.P. if he had a cell phone and demanded that M.P. hand it over. Instead, M.P. put the phone back in his pocket and told defendant he did not have a cell phone.

Defendant's hand trembled and he behaved in a nervous and erratic manner. G.S. thought defendant did not know what he was doing and this scared G.S. He believed defendant's gun was real and capable of shooting him. When the car came to an intersection in town, G.S. asked if he could let the children out of the car. Defendant refused and explained that he was "in control of everything."

G.S.'s attention was divided between defendant and the traffic and signal lights on Main Street, and he felt his fear and nervousness interfered with his ability to safely operate the car. G.S. thought about driving to the police department, but he could not safely make a necessary turn and feared that defendant might figure out what he was trying to do. G.S. looked back and saw the children's faces and knew they were very frightened.

Ten to 12 minutes after the incident began, G.S. stopped the car at an intersection on Main Street for a red light. Defendant was looking all around. G.S. put the car in park, tried to grab defendant's gun with his left hand, and punched defendant's face with his right.

G.S. yelled to the children to run and get help. M.P. and R.J. fled from the car. C.J., who had been attempting to choke defendant's neck, fled when G.S. told him to go. The children exited the car using the passenger side door because there were cars to the left. There was also a line of cars behind them at the red light, and the boys ran in the street to the nearest motorists, asking them to call the police. The children then noticed a Ross department store and ran there.

Inside the car, G.S. and defendant continued to struggle over the gun. Using the butt of the gun, defendant repeatedly hit G.S. in the face, causing several swollen and red areas and giving G.S. a headache that persisted for several days. Suddenly, the gun broke into two pieces, cutting G.S.'s finger in the process. G.S. stopped fighting for the broken gun, and defendant fled from the car, still holding onto the gun. G.S. then ran in the direction he had last seen the children, leaving the car behind. There were 10 cars behind him honking, but he was focused on trying to get to his kids. A few minutes later, he was reunited with the children at the shopping center.

Defendant fled through the shopping center to a restaurant where he previously had been employed. After former coworkers refused his requests for a ride, defendant fled to a nearby residential area. He entered a family residence and requested assistance, saying he was running from the police because he had attempted to rob someone. Instead of helping defendant, the family called the police. When defendant tried to run, a family member tackled him and put him in a choke hold. The police arrived shortly thereafter and arrested defendant.

The arresting officers noted that defendant matched the broadcast description of the kidnapping and robbery suspect. An officer asked defendant what he had done with the gun. Initially, defendant denied having a gun; then he claimed to have had only a screwdriver. He eventually admitted having a gun. He then led the officers to the gun where he had hidden it at the restaurant. The weapon, a broken pellet gun, was not loaded with pellets or an air cartridge.

During the abduction, G.S. feared that defendant would shoot the children.

M.P. was really scared during the incident. He wanted to get out of the car, but thought he would be shot. M.P. had nightmares for several days after the incident, and for two months afterwards, M.P. could not sleep by himself. When the family drove past the area where the kidnapping had occurred, M.P. would look down or close his eyes and become visibly frightened.

During the incident, R.J. felt as if he were going into shock. His body was frozen and his vision went black and white. His heart was beating very fast and he was thinking he did not want this to be the last day of his life.

C.J. testified that he was terrified during the incident and did not know what to do. The entire time they were in the car, he was scared of being shot. C.J. thought about jumping out of the car, but he did not want to leave his brothers.

DISCUSSION

I. Child Endangerment

Defendant contends the child endangerment counts must be reversed because there was insufficient evidence of “circumstances likely to produce death or great bodily harm.” We disagree.

“On appeal, the test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. [Citations.] Evidence meeting this standard satisfies constitutional due process and reliability concerns. [Citations.] [¶] While the appellate court must determine that the supporting evidence is reasonable, inherently credible, and of solid value, the court must review the evidence in the light most favorable to the prosecution, and must presume every fact the jury could reasonably have deduced from the evidence. [Citations.] Issues of witness credibility are for the jury. [Citations.]” (*People v. Boyer* (2006) 38 Cal.4th 412, 479-480.)

Section 273a, subdivision (a), provides: “Any person who, *under circumstances or conditions likely to produce great bodily harm or death*, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.” (Italics added.) The prosecution proceeded on the second branch of this omnibus statute, asserting that defendant willfully inflicted unjustifiable mental suffering on the boys.⁴

“It is for the trier of fact to determine whether the act was done ‘under circumstances or conditions likely to produce great bodily harm or death[.]’ [Citations.]” (*Sargent, supra*, 19 Cal.4th at p. 1223.) “[T]he word ‘likely’ . . . means ‘the probability of serious injury is great.’ ” (*People v. Chaffin* (2009) 173 Cal.App.4th 1348, 1352.)⁵ “[T]here is no requirement that the actual result be great bodily injury.” (*Sargent, supra*, 19 Cal.4th at p. 1216.)

⁴ Section 273a, subdivision (a) is an omnibus statute that proscribes essentially four branches of conduct: (1) willfully causing or permitting a child to suffer, or (2) inflicting unjustifiable physical pain or mental suffering on a child, or (3) having the care or custody of any child, willfully causing or permitting the person or health of a child to be injured, or (4) having the care or custody of any child, willfully causing or permitting a child to be placed in such situation that its person or health is endangered. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1215 (*Sargent*).

⁵ We use this definition of “likely to produce great bodily injury or death” for purposes of our analysis and, therefore, need not further address defendant’s contention that the definition in *People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204 is erroneous. We note that the instruction provided the jury here did not include a definition. In October 2010, CALCRIM No. 821 was modified to provide a definition. It reads in pertinent part: “The phrase likely to produce (great bodily harm / [or] death) means the probability of (great bodily harm / [or] death) is high.” Defendant does not assert instructional error, so we need not address sufficiency of the instruction.

Looking at the evidence in the light most favorable to the judgment, we conclude that a rational jury could have determined that the probability of serious injury was great from the totality of the volatile circumstances and other conditions here. G.S., the children's father and the driver of the car, had what he thought was a firearm aimed at his chest and his children were highly upset. He was distracted while driving and felt his nervousness interfered with his ability to operate the vehicle safely. They were traveling on city streets with other vehicles. Under these circumstances and conditions, the likelihood of a collision causing injury or death to the children was high. Moreover, given the circumstances, the likelihood of resistance by the distracted G.S. could have resulted in a collision. The children could have jumped from the moving car in desperation and been injured, or they could have joined their father in fighting with defendant. When the opportunity presented itself, while they were stopped at the red light, the children left the car by running into the street, where they could have been struck by a vehicle in traffic. A myriad of seriously injurious outcomes were probable on these frightening facts, and it seems miraculous that something more serious did not happen.

Indeed, such circumstances illustrate the reason why before kidnapping was made a statutory basis for first degree felony murder, courts had recognized kidnapping to be an *inherently dangerous felony* for purposes of second degree felony murder. An "inherently dangerous felony" for purpose of the second degree felony murder doctrine "is 'an offense carrying "a high probability" that death will result.'" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 377.) In *People v. Pearch* (1991) 229 Cal.App.3d 1282, a murder case involving simple kidnapping, the court observed, "Threats of serious harm or death made with a show of willingness to carry through on those threats present an inherently dangerous situation." (*Pearch, supra*, 229 Cal.App.3d at p. 1298.) In *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1228, the court held, "kidnapping for ransom, extortion or reward [citation] is an offense carrying 'a high

probability' that death will result. It therefore is an offense inherently dangerous to human life, and supports a conviction for second degree felony murder.”

Defendant contends that the circumstances of the incident as it actually occurred were not likely to produce great bodily harm or death. He points out that G.S. did not violate any traffic laws or come close to causing any collisions. As we have noted, there is no requirement that actual injury result. Likewise, there is no requirement that the “actual result” be erratic driving, a collision, an escape from a moving car, or a fight with defendant. The element of the crime at issue is the infliction of mental suffering “under circumstances and conditions *likely to produce* great bodily harm or death,” not circumstances and conditions which *actually produce* great bodily injury or death. Setting aside the inherent dangerousness and high probability of death associated with kidnapping, and looking at the evidence here in a light most favorable to the prosecution, a jury could reasonably find that the circumstances and conditions we described above were likely to produce great bodily harm or death. The child endangerment counts are supported by substantial evidence.

II. Section 654 Contentions

A. Background

As we have noted, the court sentenced defendant to determinate and consecutive indeterminate terms. Defendant was sentenced to an aggregate determinate term of 17 years four months, consisting of the following:

Count 9 – felony child endangerment: upper term of six years plus one year for its weapon enhancement;

Count 10 – felony child endangerment: one year four months plus four months for its weapon enhancement;

Count 11 - felony child endangerment: one year four months plus four months for its weapon enhancement;

Enhancements: four years for weapon enhancements on counts 1 through 4, and one year for the age enhancement on count 2.

The sentence on count 5, carjacking, was imposed and stayed pursuant to section 654. The court imposed a six-month concurrent sentence on count 7, assault.

Consecutive to the determinate terms, defendant was sentenced on counts 1 through 4 to four consecutive indeterminate terms of “7 years to Life.”

Defendant contends the trial court erred when it refused to stay the sentence on the child abuse counts (counts 9 through 11) pursuant to section 654. He asserts that the conviction on those counts was based on the same conduct underlying the kidnap for extortion counts (counts 2 through 4) against the same victims and that all of these offenses were committed with the singular objective of obtaining money from G.S. On this point, we agree.

At the sentencing hearing, the defense argued that consecutive sentences for the child endangerment counts violated section 654. The trial court rejected the argument, stating, “I do find that the violations of abusing or endangering the health of a child proof presented at trial show separate elements were met for these crimes, separate and apart for [*sic*] the kidnapping for ransom.”⁶ The trial court used the wrong test.

B. Analysis

Section 654, subdivision (a), provides in pertinent part: “An act . . . that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act . . . be punished under more than one provision. . . .”

Our high court held, “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on

⁶ The prosecution’s theory was that the kidnap was committed for the purpose of extortion, not ransom.

the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Neal v. California* (1960) 55 Cal.2d 11, 19, italics added (*Neal*); disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 334 (*Correa*).) “If, on the other hand, [a] defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ ” [Citation.] (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Although recognizing this test is problematic, our high court determined *stare decisis* policies warranted its continued vitality. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, 1209-1212 (*Latimer*).) This test -- described as the “*Neal* test” or the “intent and objective test” (*Latimer, supra*, at pp. 1209-1210) -- was in play at the time defendant was sentenced, yet the trial court failed to apply it.

Recently, our high court held, “[s]ection 654 prohibits multiple punishment for a single physical act that violates different provisions of law.” (*People v. Jones* (2012) 54 Cal.4th 350, 358.) But in so doing, the court recognized, “what is a single physical act might not always be easy to ascertain. In some situations, physical acts might be simultaneous yet separate for purposes of section 654.” (*Ibid.*) In holding that the possession of a single firearm could be punished only once despite the defendant having been convicted of three firearm offenses associated with the possession, the majority considered, but did not reject the intent and objective test. The court reasoned, “[r]ather than force the court to divine what objective or objectives the defendant might have had in possessing the firearm, we find it better to rely on section 654’s actual language *in resolving this single-act case*. . . . [W]e conclude *this case should be decided on the basis that it involves a single act or omission that can be punished but once*.” (*Jones, supra*, at p. 360, italics added; see *id.* at p. 352.)

In *People v. Mesa* (2012) 54 Cal.4th 191, the court also focused on the acts committed by the defendant rather than his intent or objective. There, the defendant was convicted of three offenses for two separate shootings -- assault with a firearm (§ 245, subd. (a)(2)), felon in possession of a firearm (former § 12021, subd. (a)(1)), and active participation in a criminal street gang (§ 186.22, subd. (a)). (*Mesa, supra*, at pp. 193-195.) Terms consecutive to the assault counts were imposed for both the firearm and gang charges. (*Id.* at pp. 194-195.) The court held that section 654 prohibits punishing the defendant for active participation in a criminal street gang in addition to the assault and firearms charges because the acts upon which the gang crime was based -- possessing and shooting the firearms -- were the same acts underlying the assault and firearms convictions. (*Id.* at pp. 197-198.) In applying section 654, the court rejected application of the intent and objective test in the context of that case, noting “[o]ur case law has found multiple criminal objectives to be a predicate for multiple punishment only in circumstances that involve, or arguably involve, multiple acts. The rule does not apply where, as here . . . , the multiple convictions at issue were indisputably based upon a single act.” (*Id.* at p. 199.)

Thus, the *Neal* intent and objective test remains in play where there are multiple acts involving a course of conduct, such as the present case.⁷

⁷ Our high court recently repudiated another part of *Neal* in *Correa, supra*, 54 Cal.4th 331. There, the court held that the plain language of section 654 does not bar multiple punishment for multiple violations of the same criminal statute, disapproving of dictum in a footnote in *Neal* which suggested the contrary. (*Correa, supra*, at pp. 334, 338.) The court applied this new rule to hold that a felon found in possession of multiple firearms could be punished for each firearm for his convictions of former section 12021, subdivision (a)(1), felon in possession of a firearm. The court in *Correa* discussed the *Neal* intent and objective test (*id.* at pp. 335-336), but did not disapprove of it, noting that the stare decisis considerations which led to the policy decision in *Latimer* not to repudiate *Neal* “do not weigh as heavily with regard to the *Neal* footnote” (*Correa, supra*, at p. 344.)

The question of whether the defendant entertained multiple criminal objectives is a question of fact for the trial court, and the law gives the trial court broad latitude in making this determination. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) The trial court’s findings will be upheld on appeal if substantial evidence supports them. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1368 (*McKinzie*)). We view the evidence in a light most favorable to the People and presume the existence of every fact in support of the court’s determination that the court could reasonably deduce from the evidence. (*Hutchins, supra*, 90 Cal.App.4th at pp. 1312-1313.)

The trial court’s finding that child endangerment and kidnapping have “separate elements” does not justify multiple punishments because it simply reflects the fact that defendant’s conduct was punishable under more than one statute. Whether the crimes have different elements is irrelevant for purposes of section 654. Indeed, if that were the test, section 654 would rarely apply to prevent multiple punishment for multiple crimes committed during a course of conduct. In such situations, courts must look to the *intent and objective* of defendant. This, the trial court did not do.

The People contend the trial court did not violate section 654, but at the same time argue defendant “abducted the children to use them as leverage against [G.S.] to accomplish a robbery.” The People also argue “[defendant] used the presence of the children to extort money from their father, but he enjoyed a separate but simultaneous intent to intimidate and control his victims by brandishing a weapon and threatening them with death”

The People’s argument proves too much. As the argument demonstrates, the reason defendant did those things was precisely for the purpose of instilling fear to facilitate the kidnapping and to obtain money from the father of these children by extortion. Indeed, this was the very argument advanced by the prosecutor to the jury. We consider the prosecutor’s election when determining whether double punishment is barred by section 654. (See *McKinzie, supra*, 54 Cal.4th at p. 1369 [“The Attorney

General concedes . . . that defendant could not be punished for both carjacking and kidnapping for robbery because the prosecutor argued to the jury that the victim’s car was the object of the robbery”].)

Here, the prosecutor told the jury, “the kidnapping for extortion related specifically to the kids. Essentially the defendant is using the kids and threatening them with force and violence in order to get [G.S.] to give him his wallet and money from the bank. [¶] . . . [¶] . . . It was like he was using the kids to get what he wanted and that’s exactly what he was doing, and that’s extortion.” In rebuttal, the prosecutor reemphasized defendant’s purpose, saying defendant used the children as the “vehicle for the extortion.” In arguing child endangerment, the prosecutor told the jury that defendant’s conduct caused the children mental suffering. It was obvious to the father and to people who encountered the children after they fled from the vehicle that they were “traumatized.” The prosecutor did not argue that defendant had some other separate purpose in terrifying the children.

Consistent with her argument to the jury concerning the kidnapping for extortion charges, the prosecutor argued in her sentencing brief that “[d]efendant was not going to rob the children, he just used them as *pawns to make their father more compliant to his demands.*” (Italics added.) Thus, defendant’s objectives in committing kidnapping for extortion as to each child were not different from his objectives in committing the child endangerment charges. He threatened them to extort money from their father.⁸

⁸ The argument advanced by the prosecutor in the trial court and the People at oral argument on appeal, that defendant did not “need” to kidnap and terrify the children to commit the robbery of G.S., misses the mark. The section 654 issue here pertains to punishment for kidnapping for extortion and child endangerment. Extortion by force or fear and kidnapping are accomplished by instilling fear in the victim. As the court’s instructions correctly stated, extortion by force or threat is accomplished by threatening “to unlawfully injure or use[] force against another person *or a third person*” with the intent “to use that fear or force to obtain the other person’s consent to give the defendant

At oral argument on appeal, the People contended that defendant had an entirely separate objective in committing the child endangerment charges. According to this new theory, defendant intended to intimidate the children to deter the family from reporting him to the police.⁹ Yet, defendant was charged with witness dissuasion, and the prosecutor argued *different acts* supported that charge. In closing argument, the prosecutor pointed out that defendant told G.S., “give me your ID, I want to know where you live,” “he demanded to know where [G.S.] lived because he said if anything . . . happened to him, he was going to go to [G.S.’s] house and kill everybody at the house. [¶] . . . In other words, . . . what the defendant[] was communicating was if you report this to the police and I get arrested, I’m going to come back and get you, so you better not report it. [¶] . . . That was the practical effect of asking for [G.S.’s] identification so he could know where he lived. . . . [G.S.] heard that loud and clear, don’t call the police.”¹⁰ While never mentioning an objective of dissuasion, the prosecutor conceded in her sentencing brief that “there were not separate acts constituting kidnapping and child endangerment . . .”

money or property.” (CALCRIM No. 1830, italics added.) The first element of kidnapping is, “The defendant took, held, or detained another person by using force or by . . . instilling reasonable fear.” (CALCRIM No. 1215.) Defendant’s objective in threatening the children here was the same for his commission of child endangerment and extortion, as well as for the kidnapping.

⁹ In their appellate briefing, the People did not specifically argue that defendant sought to intimidate the children for the purpose of dissuading a report of the crime to the police. Without specifying defendant’s purported objective, the People simply argued defendant “harbored a separate criminal objective when he acted to instill a belief in his victims that he held the ultimate power of life and death over them, as he made clear when he threatened to find the family and kill them if anything happened to him.”

¹⁰ Apparently, the jury did not find the argument compelling. Defendant was acquitted of the witness dissuasion charge.

For purposes of applying section 654, a trial court must consider the acts upon which the prosecutor grounded the prosecution of each charge. (See *McKinzie, supra*, 54 Cal.4th at pp. 1368-1369 [the prosecutor's argument reflected election of the entry into home, rather than his previous entry into the attached garage, as the act upon which the burglary charge and special circumstance were grounded, and the trial court could reasonably conclude that the defendant had a different intent and objective when he earlier entered the garage, kidnapped the victim and took her to a remote location in the trunk of her car, which he took from the garage]; *People v. Siko* (1988) 45 Cal.3d 820, 826 [the prosecution's closing argument did not suggest "any different emphasis" other than the acts supporting the charge of lewd acts with a minor under the age of 14 were the same acts underlying the rape and sodomy].) Otherwise, the punishment for the charge will have no relationship to the acts upon which the jury's verdict is based. Indeed, this court has previously noted that "where there is a basis for identifying the specific factual basis for a verdict, a trial court cannot find otherwise in applying section 654." (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1339, citing *Siko, supra*, 45 Cal.3d at p. 826.) Such is the case when a prosecutor makes an election. Because the prosecutor elected to ground prosecution of the witness dissuasion charge on specified acts and specifically relied on other acts -- the threats to the children -- as acts supporting the jury's guilty verdict on the kidnap for extortion and child endangerment charges, we hold the People to that election in analyzing the applicability of section 654 here.

Consistent with the prosecution's election and the evidence in the record, we conclude that defendant's intent and objective when he threatened the children was to extort money from G.S. Thus, defendant cannot be punished both for the child endangerment convictions and the kidnap for extortion convictions. We must modify the judgment to stay the sentence imposed on counts 9 through 11 and the enhancements associated with those counts pursuant to section 654.

III. Prosecutor's Comment on Reasonable Doubt

Defendant contends the prosecutor's misstatement of reasonable doubt during her rebuttal argument, coupled with the trial court's overruling of a defense objection to the argument, was error requiring reversal. We disagree.

A. Background

During closing argument, defense counsel argued the following: "The decisions you make are not going to have to last for a day, a week, or a month. The decisions you make about the law and the evidence and the facts in this trial is *[sic]* going to have to last with you for the rest of your lives. That is how important the decisions you are going to have to make *[sic]*. It's a very difficult position to be sitting in the judgment of another. ¶ And to give you a little bit more of an idea as to how -- how certain you have to be in regards to your decisions, we used to be able to argue that this decision that you make is as important as who you choose to marry. ¶ We can't make that argument anymore because the divorce rates now are roughly about fifty percent, so if you think about it, it's really kind of a mindblower in that the decisions that you make in this trial are more important than the decision that you've made on who you wanted to spend the rest of your life with. ¶ That is how important these decisions are. That is how important you have to be certain as to the decisions that you actually make. *[Sic.]*"

The prosecutor responded to defense counsel's argument in rebuttal. The following argument, objections and rulings took place at that time:

"[THE PROSECUTOR]: The last thing I want to talk to you a little is about reasonable doubt. [Defense counsel] kind of makes this sound like a huge mountain that is totally unattainable, but that's not the case. ¶ Proof beyond a reasonable doubt is the standard that is used in criminal cases in every courtroom across the nation every single day. It's used in DUI cases. It's used in murder cases. It is the same standard, and it is attained by -- jurors find proof beyond a reasonable doubt in cases all the time. ¶ It's not unreachable, and it's not illusive *[sic]*. I mean, all it is is an abiding conviction.

It's just, you know, the proof is enough to show you that he did it, and tomorrow when you wake up if you think he did it, that's an abiding conviction. [¶] When you think about -- when you are finally done with this case and are able to go home and talk to your friends and family about it, because I'm sure they've all been dieing [*sic*] to know what is this case about and you have to tell them I can't -- I can't tell you, but think about what you wanted to tell them. [¶] When you are finally able to and you've been released from the case and your verdict is in and you're finally able to tell them about what this case is all about, do you want to say 'gosh, I sat on this trial where this man and these kids were kidnapped, and this man tried to rob them, and he had a gun. It wasn't a real gun, but they thought it was.' I mean, if that's how you're going to describe the case and that's how you've been thinking in your head when your friends and family have asked you what's going on, that's how you've been wanting to talk about it, that's proof beyond a reasonable doubt.

“[DEFENSE COUNSEL]: Objection.

“THE COURT: Sustained.

“[DEFENSE COUNSEL]: Move to strike.

“THE COURT: The last statement will be stricken. [¶] The instruction on reasonable doubt is contained. [*Sic.*] Both attorneys have argued what it is, and the instruction is in your packet about what reasonable doubt is and what the People's burden of proof is.”

The prosecutor then continued her rebuttal argument.

“[THE PROSECUTOR]: If you -- an abiding conviction just means you feel good about the decision you've made. Tomorrow when you wake up, you feel good about the decision you made, you feel like you've made the right choice.

“[DEFENSE COUNSEL]: “Objection, Your Honor. Misstatement of the law.

“THE COURT: “Overruled. She can continue.”

The prosecutor then continued.

“[THE PROSECUTOR]: “And the week after, you feel good about the decision you made, and the week after, and the month after, and so on and so forth. I mean, don’t -- well... [¶] The point is that it is really not so high of a standard that you can’t reach it. Okay. An abiding conviction is not, you know, it’s not a decision like who you’re going to marry. Okay. It -- I’m just -- I’ll leave you with this: That the evidence in this case has proved beyond a reasonable doubt that the defendant committed these crimes.”

No objection was made to the prosecutor’s comment about marriage.

B. Analysis

“ ‘The applicable federal and state standards regarding prosecutorial misconduct are well established. “ ‘A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” [Citation.]’ [Citation.]” (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).

A prosecutor commits misconduct when he misrepresents the standard of proof or trivializes the quantum of evidence required to meet the standard of proof. (*Hill, supra*, 17 Cal.4th at pp. 828-829.) “When the claim focuses on the prosecutor’s comments to the jury, we determine whether there was a reasonable likelihood that the jury construed or applied any of the remarks in an objectionable fashion.” (*People v. Booker* (2011) 51 Cal.4th 141, 184-185 (*Booker*); *People v. Pierce* (2009) 172 Cal.App.4th 567, 572 (*Pierce*).

Defendant made two timely objections to the prosecutor’s argument. The trial court sustained defendant’s first objection to the prosecutor’s remarks, ordered the comments stricken, and admonished the jury. Defendant does not seek reversal based on those comments. Defendant claims reversible error based on the comments preceding

the second objection, which was expressly grounded on “[m]isstatement of the law,” and the court’s decision to overrule that objection, as well as the comments the prosecutor made thereafter.

Defendant contends that the prosecution’s comment that “an abiding conviction just means you feel good about the decision you’ve made,” was a misstatement of law because it impermissibly reduced the prosecution’s burden of proof to a mere duty to persuade jurors to make a decision about which they felt good. In context, we do not see it that way. The prosecutor’s remarks before *and* after the objection make plain that she was not equating her burden of proof with the creation of good feelings but was illustrating the temporal nature of the term “abiding.”

The prosecutor argued “an abiding conviction just means you feel good about the decision you’ve made. *Tomorrow when you wake up*, you feel good about the decision you made, you feel like you’ve made the right choice. [¶] . . . [¶] *And the week after*, you feel good about the decision you made, *and the week after*, *and the month after*, *and so on and so forth*.” (Italics added.) This argument was responsive to and consistent with defense counsel’s argument that the “decisions you make about the law and the evidence and the facts in this trial is [*sic*] going to have to last with you for the rest of your lives.” The prosecutor’s comments evoked and focused on the concept of permanence. (See *Pierce, supra*, 172 Cal.App.4th at pp. 573-574 [no reasonable likelihood that jury was misled by prosecutor’s remarks evoking permanence].)

The trial court did not err by overruling the defense objection to the prosecutor’s argument. There is not a reasonable likelihood the jury construed or applied the prosecutor’s remarks in an objectionable fashion. (*Booker, supra*, 51 Cal.4th at pp. 184-185.) No reasonable juror would have understood the prosecutor’s argument to mean that, contrary to the court’s instructions, “‘all’ proof beyond a reasonable doubt means is that jurors would wake up and ‘feel good’ about their decision.” The prosecutor’s

argument was neither deceptive nor reprehensible, and it did not constitute misconduct. (*Hill, supra*, 17 Cal.4th at p. 819.)

Defendant contends the prosecutor's statement -- made after trial counsel's second objection -- that an abiding conviction is not like deciding who to marry was improper. No objection was made to this comment. Because a timely objection and admonishment would have cured any harm engendered by the argument, any challenge to those portions is forfeited on appeal. (*People v. Martinez* (2010) 47 Cal.4th 911, 956.)

Defendant contends any objection at that point would have been futile because the court had just overruled defendant's misstatement of law objection. (*Hill, supra*, 17 Cal.4th at p. 820.) But the court, just moments before, had also sustained defendant's first objection. And in ruling on the second objection, the court merely permitted the prosecutor to continue based upon what she had said up to that point. That ruling did not signal that an objection to what might be said thereafter would not be sustained. Defendant has not established futility.

Finally, we conclude the prosecutor's comment was not prejudicial, even under a standard of beyond a reasonable doubt. The evidence was overwhelming. (See *Booker, supra*, 51 Cal.4th at p. 186 [jury properly instructed on the prosecution's burden of proof and evidence of defendant's guilt was overwhelming]; *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1264, 1268-1269 [prosecutor's use of puzzle picture of the Statue of Liberty with missing pieces to illustrate reasonable doubt was misconduct, but the error was harmless, in part, because of the strength of the evidence].)

We reject the assertion made by the defense at oral argument that our high court's decision in *People v. Aranda* (2012) 55 Cal.4th 342 (*Aranda*) suggests a reviewing court cannot consider the strength of the prosecution's case in evaluating whether the error was harmless in this context. In *Aranda*, the court discussed the application of the *Chapman* standard to assess the effect of the erroneous omission of the standard reasonable doubt instruction. (*Aranda, supra*, 55 Cal.4th at pp. 367-374.) Contrasting the issue in *Aranda*,

the court noted that when employing the *Chapman* harmless error test, a reviewing court normally “looks to the ‘whole record’ to evaluate the error’s effect on the jury’s verdict. [Citation].” (*Aranda, supra*, 55 Cal.4th at p. 367.) “[T]he effect of such an error is assessed by asking whether there is a reasonable possibility that the verdict in question was not based upon a finding of guilt beyond a reasonable doubt. If, after examination of the record, the reviewing court concludes beyond a reasonable doubt that the jury must have found the defendant’s guilt beyond a reasonable doubt, the error is harmless. If, on the other hand, the reviewing court cannot draw this conclusion, reversal is required.” (*Ibid.*)

Our high court went on to note that the harmless error analysis is different when the trial court omits instruction on reasonable doubt. “No matter how overwhelming a court may view the strength of the evidence of the defendant’s guilt, that factor is not a proper consideration on which to conclude that the *erroneous omission of the standard reasonable doubt instruction was harmless under Chapman.*” [¶] [A] reviewing court applying the *Chapman* standard to determine the prejudicial effect of the *erroneous omission of the standard reasonable doubt instruction* should evaluate the record as a whole--but not rely upon its view of the overwhelming weight of the evidence supporting the verdict--to assess how the trial court’s failure to satisfy its constitutional obligation to instruct on the prosecution’s burden of proof beyond a reasonable doubt affected the jury’s determination of guilt. If it can be said beyond a reasonable doubt that the jury must have found the defendant’s guilt beyond a reasonable doubt, the error is harmless. If the reviewing court cannot draw this conclusion, reversal is required.” (*Aranda, supra*, 55 Cal.4th at p. 368, italics added.)

Here, unlike in *Aranda*, the trial court properly instructed on reasonable doubt. The trial court read the standard reasonable doubt instruction during the preliminary instructions. It reread the instruction as part of the predeliberation instructions. And the

trial court reinforced the primacy of that instruction after sustaining defendant's first objection to the prosecutor's closing argument. *Aranda* does not help defendant here.

The evidence showing that defendant kidnapped and terrorized a father and his young sons for the purpose of obtaining money from the father was overwhelming. Considering the "whole record," including the overwhelming evidence of guilt, we conclude that even if the prosecutor's argument was misconduct, any error was harmless beyond a reasonable doubt.

IV. Correction of the Abstract

Defendant contends, and the People concede, the abstract of judgment must be corrected to reflect sentences on counts 1 through 4 of "life with the possibility of parole." We agree that the abstract needs to be modified, but disagree with the parties that it should not reflect the minimum term of seven years imposed by the trial court.

The abstract of judgment in this case consists of two Judicial Council forms. One form (form CR-292) sets forth defendant's indeterminate terms and the other (form CR-290) sets forth defendant's determinate terms. Box 5. on form CR-292 indicates "LIFE WITH THE POSSIBILITY OF PAROLE" and leaves a blank to fill in the counts. Box 6. provides alternative boxes to reflect the minimum term for the various indeterminate sentences for which parole is possible. The clerk checked box 6.c., and filled in the blank for the minimum term by typing the number "7," so that the form reads "7 years to Life on counts 1, 2, 3, 4." This accurately reflects the trial court's pronouncement during the sentencing hearing.

The punishment for violation of section 209, subdivisions (a) and (b), where no person suffers death or bodily harm, is "imprisonment in the state prison for life with the possibility of parole." Section 3046, subdivision (a)(1) provides that the minimum parole eligibility for a life term is seven years whenever the minimum term is not specified.

In *People v. Jefferson* (1999) 21 Cal.4th 86 (*Jefferson*), our high court discussed how trial courts should pronounce such sentences in the context of addressing what term

to double when a person with one strike is convicted of a gang-related attempted deliberate and premeditated murder. The court observed that the term of imprisonment for attempted deliberate and premeditated murder is life with the possibility of parole (§§ 664, 187, 189). (*Jefferson, supra*, 21 Cal.4th at p. 93.) The court further observed that normally, the minimum term for an indeterminate term of life imprisonment for attempted deliberate and premeditated murder is seven years as provided in section 3046 (*Jefferson, supra*, at p. 96), but section 186.22, subdivision (b)(4) provides a mandatory minimum term of 15 years for gang-related attempted murder. (*Jefferson, supra*, at p. 100.)

As for pronouncing judgment and what should be reflected in the abstract, our high court wrote, “The Court of Appeal in this case . . . held that the trial court's oral pronouncement of sentence should not have included the minimum term established by sections 186.22 and 3046, because the question of when defendants should be released on parole is ‘a matter addressed by the Board of Prison Terms in determining the prisoner’s parole eligibility.’ The Court of Appeal therefore modified the judgments by striking each defendant’s 15-year minimum term. The Attorney General contends that the Court of Appeal was wrong and that it is not improper for the trial court to include, as part of a defendant’s sentence, the minimum term of confinement the defendant must serve before becoming eligible for parole. . . . [W]e agree with the Attorney General. By including the minimum term of imprisonment in its sentence, a trial court gives guidance to the Board of Prison Terms regarding the appropriate minimum term to apply, and it informs victims attending the sentencing hearing of the minimum period the defendant will have to serve before becoming eligible for parole. Thus, when the trial court here pronounced defendants’ sentences, it properly included their minimum terms” (*Jefferson, supra*, 21 Cal.4th at pp. 101-102, fn. 3.) Based on our reading of *Jefferson*, it is appropriate to check both box 5. on the indeterminate-term abstract, indicating that defendant has been

sentenced to life with the possibility of parole *and* box 6.c., specifying the mandatory minimum term -- here, seven years.

DISPOSITION

The judgment is modified to stay the sentence imposed on counts 9, 10, and 11 and the associated enhancements pursuant to Penal Code section 654. As modified, the judgment is affirmed.

The trial court is directed to prepare an amended determinate-term abstract of judgment (form CR-290), indicating that defendant's sentence on counts 9, 10 and 11 have been stayed, and correcting the indeterminate-term abstract of judgment (form CR-292) to reflect terms of life with the possibility of parole on counts 1 through 4 in box 5. of form CR-292, but specifying the minimum term of seven years on those counts in box 6.c. The court is further directed to forward certified copies of the amended and corrected abstracts to the Department of Corrections and Rehabilitation.

MURRAY, J.

We concur:

HULL, Acting P. J.

ROBIE, J.