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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DONELL THOMAS HAYNIE,

Defendant and Appellant.

C066352

(Super. Ct. No. 09F06156)

A jury found defendant Donell Thomas Haynie guilty of false imprisonment (Penal Code,¹ § 236; count 4), simple assault as a lesser included offense to assault with a deadly weapon by means likely to produce great bodily injury (§ 240; count 5), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 6), and kidnapping (§ 207, subd. (a); count 7). The jury found defendant not guilty of oral copulation by force (§ 288a, subd. (c)(2); count 1), two counts of rape by force (§ 261,

¹ Further undesignated statutory references are to the Penal Code.

subd. (a)(2); counts 2 and 3), and pandering (§ 266i, subd. (a)(1); count 8). In a bifurcated proceeding, the trial court found true allegations defendant had two serious felony convictions within the meaning of section 667, subdivision (a), which also qualified as “strikes” under the three strikes law (§§ 667, subd. (b)-(i); 1170.12). Defendant was sentenced to 85 years to life in prison, consisting of three terms of 25 years to life for counts 4, 6, and 7, plus 5 years for each of his serious felony convictions.²

Defendant appeals, contending his kidnapping conviction must be reversed because the trial court did not instruct the jury on the lesser included offense of false imprisonment, and his conviction for false imprisonment must be reversed because the People cannot establish beyond a reasonable doubt that the kidnapping and false imprisonment convictions are not based on the same act. We shall conclude that defendant is barred under the doctrine of invited error from challenging the trial court’s failure to instruct the jury on false imprisonment as a lesser included offense to kidnapping, and that it is impossible to determine whether the same act forms the basis for both his kidnapping and false imprisonment convictions. Accordingly, we shall reverse defendant’s conviction for false imprisonment (count 4), affirm the judgment in all other respects, and remand the cause with directions.³

² As for the assault (count 5), the trial court indicated that it was “not going to in light of the sentence order any additional time even though probation is suggesting otherwise.”

³ Because we shall reverse his conviction on count 4, we need not consider defendant’s claims of sentencing error as to that count.

FACTUAL AND PROCEDURAL BACKGROUND

I

The Prosecution

At approximately 10:30 p.m. on August 12, 2009, G. A. met her cousin and some friends at a bar in Sacramento. Sometime later, the group was joined by a friend of G.'s cousin and defendant. G. had never seen defendant before that night. After the bar closed, she left with her cousin's friend and defendant in defendant's car. After dropping off her cousin's friend, G. and defendant went to defendant's apartment for a swim. When they finished swimming, they returned to defendant's apartment, and defendant gave G. some dry clothes. G. asked defendant for a ride home. Defendant said he had lent his car to his cousin, and G. fell asleep on defendant's bed.

G. woke up around 6:00 a.m. and asked defendant if his cousin had returned. Defendant said "no," and G. fell back to sleep. She woke up about 9:00 a.m. when she "felt" defendant come into the bedroom. Defendant lay down on the bed and tried to touch her. She told him to get his hand off her, and defendant responded that "he was going to fuck [her] up." When G. reached for her cellular telephone, defendant attempted to take it by wrestling with and choking her. He then dragged her into the bathroom, told her take off all her clothes, and said that he was going to sell her to a pimp. Thereafter, defendant prevented her from leaving the bathroom.

Defendant eventually let G. out of the bathroom and told her to take some blue Ecstasy pills. When she refused, he told her she either had to take the pills or give him a "blow job." When she refused to take the pills, defendant dragged her back into the bathroom and forced her to perform oral sex on him while he held a screwdriver to her body. Thereafter, he fondled her breasts and forced her to have sexual intercourse with him.

When defendant left the bathroom, G. ran out the front door and down the stairs leading to the apartment. Defendant followed her and dragged her back to his apartment

by her hair while repeatedly threatening to kill her. A neighbor who observed the altercation called 911.

Once inside the apartment, defendant told G. to take a shower and said he would kill her if the police came. When she finished showering, defendant duct taped her hands, feet, and mouth. Five or ten minutes later, the police knocked at the door. Defendant removed the duct tape, flushed it down the toilet, and threw the roll of tape into a laundry basket. Defendant apologized and told G. to tell the police that it was his cousin and his cousin's girlfriend who had been fighting outside the apartment. When the police entered the apartment, G. initially told them defendant's cousin and his cousin's girlfriend had been fighting outside the apartment. After defendant was taken out of the room, G. told the police what actually had happened and pointed out the duct tape in the toilet and the laundry basket.

G. was taken to the hospital. She had visible bruising and abrasions on her body and adhesive and sliver flecks consistent with duct tape on her body. She also had redness and an abrasion "in the area posterior to the vagina."

II The Defense

Christopher Reed was living with defendant at the time of the incident and sat in the Jacuzzi while defendant and G. swam in the pool. Defendant and G. were talking, hugging, and kissing in the pool; and when they returned to the apartment, they appeared affectionate toward each other. Reed heard them talking and laughing in the bedroom before he fell asleep. At approximately 6:00 a.m., defendant asked Reed to take his mother to work. When Reed returned, defendant asked him to take his brothers to school. Reed returned about 20 minutes later but left again to pick up some money from his estranged wife. Reed did not see G. that morning.

At approximately 9:30 a.m. on August 13, 2009, defendant's neighbor visited defendant's apartment for about five minutes. G. was lying on the couch and did not appear to be in any distress.

Defendant testified that on the night in question, G. left the bar with him and a couple of other men. Defendant invited her to go swimming, and she accepted. G. jumped into the pool wearing her dress, but later removed it and was wearing only her panties. He and G. kissed in the pool, and he penetrated her vagina with his finger. When they returned to defendant's apartment, defendant showed G. the bathroom and gave her a toothbrush and a dry shirt to put on. While defendant was talking to Reed in the living room, G. left the bathroom and went into defendant's bedroom. Defendant joined her there, and they had sexual intercourse. When they were finished, defendant left the bedroom and fell asleep on the couch. Around 6:00 a.m., he asked Reed to drive his mother to work. Reed agreed and returned about 20 minutes later. Defendant then asked Reed to drive his brothers to school, and Reed agreed. When Reed returned, Reed asked defendant if he could borrow his car. Defendant agreed and walked with Reed outside to the car. Defendant was gone about 15 minutes. When he returned, G. was laying on the couch. The two talked, and defendant began wondering where he had left his money. When he was unable to find it, he began questioning G. about the money. She did not appreciate being questioned and refused to show him her wallet. When defendant left the room, G. ran out the front door and down the stairs. Defendant chased after her, and the two scuffled as she screamed for help. Defendant may have pulled her hair a couple of times and choked her, but he denied dragging her by her hair or stomping on her. Eventually, he picked her up and carried her to the base of the stairs leading to his apartment. When two acquaintances walked by, defendant told them, "[T]his bitch stole my money," and they helped him look for G.'s wallet. Defendant followed G. to the apartment and suggested she take a shower because her feet were bleeding. While defendant was not going to let her go until he got his money, he denied duct taping her.

When defendant told G. the police were there, she told him not to answer the door and maybe they would go away. At that point, defendant told her to tell the police that it was his cousin and his cousin's wife who were fighting.

DISCUSSION

I

Defendant Is Barred Under the Doctrine of Invited Error From Challenging the Trial Court's Failure to Instruct the Jury on False Imprisonment as a Lesser Included Offense to Kidnapping

Defendant contends that the trial court committed reversible error by honoring his request not to instruct the jury on false imprisonment as a lesser included offense of kidnapping. As we shall explain, he is barred from raising this claim on appeal.

After the parties and the trial court finished discussing the requested jury instructions, the trial court sought to confirm that the parties were not requesting the jury be instructed on any lesser included offenses except as to count 5, assault with a deadly weapon by means likely to produce great bodily injury. The parties responded in the affirmative.

The following court day, the trial court again raised the issue of lesser included offenses. In particular, the court indicated that it thought the jury should be instructed on false imprisonment as a lesser included offense to kidnapping (count 7).

“THE COURT: . . . [¶] . . . [W]e have had some dialogue by e-mail back and forth about the instructions and my thinking about a lesser false imprisonment [instruction] as to Count 7, the kidnap charge. [¶] The reason I think that is because we already had a discussion about the different acts that potentially had constituted a 236 [false imprisonment] as charged.

“[PROSECUTOR]: Correct.

“THE COURT: And then the reason why I think that we need to give a lesser to 236 [false imprisonment] on the kidnap is the jury could find that [defendant] did not

commit a kidnap for the conduct that occurred outside, and thus find him guilty of false imprisonment in the lesser-included offense.

“[PROSECUTOR]: Basically if they found it was not a substantial distance but the other element [*sic*] were satisfied.

“THE COURT: Yes. That he detained her against her will, so that they could find him guilty of that. And I think the People are -- I still, unless the defense is going to demand that I not give a lesser -- [¶] I don't know if -- I didn't ask [defense counsel] about this yet because we just got together this morning. [¶] Do you have any position about the giving of a lesser on Count 4. I'm sorry. On count 7, the kidnap?

“[DEFENSE COUNSEL]: Submitted your Honor, No.

“THE COURT: You do or don't want to give one? If you don't want to give one then I won't give a lesser. But I'll have to give -- I think it is wise to make the election.

“[¶] . . . [¶]

“[DEFENSE COUNSEL]: We are not requesting it, your Honor.

“THE COURT: Are you specifically asking me not to give the lesser then of false imprisonment?

“[DEFENSE COUNSEL]: Are you indicating that he is still charged with the false imprisonment?

“THE COURT: He is charged with false imprisonment in Count 4. He is charged with the kidnap in Count 7, and so they could find him not guilty of a kidnap but find him guilty of a lesser false imprisonment to the kidnap.

“[DEFENSE COUNSEL]: Can I explain to him what's happening?

“THE COURT: Yes.

“[DEFENSE COUNSEL]: We are asking that it not be read.

“[¶] . . . [¶]

“[DEFENSE COUNSEL]: Unless my client is requesting if there is a lesser on Count 4 [false imprisonment], then you add the lesser on Count 7 [kidnap].

“THE COURT: I don’t know what the lesser would be on a Count 4 [false imprisonment]. What lesser are you asking for? 236?

“[PROSECUTOR]: I don’t believe there is one.

“[DEFENSE COUNSEL]: I don’t believe there is one either. I just -- [¶] . . . And my concern is the confusion if -- this is a life case anyway, and if he is already charged with [false imprisonment] in Count 4, I don’t think it would be necessary or useful to the defense to have the lesser in Count 7.”

Defendant contends the trial court committed reversible error by failing to instruct the jury on false imprisonment as a lesser included offense to kidnapping because the jury was left with an “unwarranted all-or-nothing choice’ between a conviction for kidnapping and acquittal.” The People respond that under the invited error doctrine, defendant may not raise this issue on appeal because “[f]rom [defense counsel’s] remarks, it is apparent that [she] was pursuing a deliberate all-or-nothing strategy in the hopes of securing an acquittal on the kidnapping charge.”

False imprisonment is a lesser included offense of the crime of kidnapping. (*People v. Magana* (1991) 230 Cal.App.3d 1117, 1120-1121.) In criminal cases, the trial court must instruct on lesser included offenses “if there is substantial evidence the defendant is guilty of the lesser offense, but not the charged offense.” (*People v. Moyer* (2009) 47 Cal.4th 537, 556.) “ “[A] defendant[, however,] may not invoke a trial court’s failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence. [Citations.] In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court’s failure to give the instruction.” [Citations.]” (*People v. Beames* (2007) 40 Cal.4th 907, 927.)

Here, the record clearly reflects that defendant and his counsel expressed a deliberate tactical purpose in resisting an instruction on false imprisonment as a lesser included offense of kidnapping, the very instruction he now complains should have been

given. As the trial court mentioned, there were two potential false imprisonments in this case -- one outside the apartment and one inside. Rather than run the risk of the jury finding defendant guilty of two counts of false imprisonment, defendant and his counsel elected to forego an instruction on the lesser included offense of false imprisonment as to the kidnapping offense, hoping the jury would find him not guilty of kidnapping and guilty of, at most, one count of false imprisonment. Unfortunately for them, things did not go as they had hoped, and the jury found defendant guilty of kidnapping and false imprisonment. Having made the tactical decision to take an all-or-nothing approach on count 7, the kidnapping offense, we find that any error was invited, and that defendant therefore is barred from invoking such error as a basis for reversing his conviction.

II

Defendant's False Imprisonment Conviction (Count 4) Must Be Reversed Because It Is Possible the Same Act Forms the Basis of His Kidnapping and False Imprisonment Convictions

Defendant next contends that his conviction for false imprisonment (count 4) must be reversed because the record does not establish beyond a reasonable doubt that the basis for that conviction was the "pre-kidnapping" false imprisonment. The People agree, and so do we.

As the trial court instructed the jury, "The People have presented evidence of more than one act to prove that the defendant committed [the false imprisonment] offense." During his closing argument, the prosecutor explained that the evidence he presented on false imprisonment "deals with two separate points in time. One, when she was being held in the bathroom. . . . [¶] . . . [¶] . . . [T]he other way he could be guilty of this is after she had fled. When he dragged her back into the apartment and he kept her there and he duct taped her. . . . So technically there could almost be two counts. There are just to [*sic*] ways that you can come to a conclusion on this case." As for the kidnapping offense, the prosecutor told the jury, "This is when she fled from the apartment and when

he attacked her. He detained her when he grabbed her by the hair, when he grabbed her around the neck and when he pulled her back up to the apartment.”

“Generally, there is no limit to the number of convictions arising from a defendant's act or course of conduct. (§ 954.) But an exception exists for lesser included offenses. ‘[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.’ [Citation.] In such cases, a defendant may not be convicted of both the greater and the lesser offense. [Citation.]” (*People v. Milward* (2011) 52 Cal.4th 580, 585.) As previously discussed, false imprisonment is a lesser included offense to kidnapping. (*People v. Magana, supra*, 230 Cal.App.3d at pp. 1120-1121.) The standard for determining the factual bases for multiple convictions is beyond a reasonable doubt. (*People v. Coelho* (2001) 89 Cal.App.4th 861, 876.)

As defendant asserts and the People concede, here, it is impossible to determine beyond a reasonable doubt that defendant’s convictions for kidnapping and false imprisonment are not based on the same conduct. Accordingly, defendant’s conviction for false imprisonment must be reversed. (See *People v. Milward, supra*, 52 Cal.4th at p. 589 [“The law prohibits simultaneous convictions for both a greater offense and a lesser offense necessarily included within it, when based on the same conduct”].)

DISPOSITION

The judgment of conviction for false imprisonment (count 4) is reversed, and the judgment is otherwise affirmed. The cause is remanded to the trial court to permit the People to decide whether to retry defendant on the false imprisonment count (count 4). If the People fail to bring defendant to a new trial within 60 days of the remittitur in the trial court (or any extended time limit resulting from defendant’s time waiver [§ 1382, subd. (a)(2)]), or if the People file a written election not to retry defendant, the remittitur shall include a direction to strike the false imprisonment conviction (count 4). (See *People v. Jones* (1997) 58 Cal.App.4th 693, 720.) Upon finality of the judgment, the trial court

shall resentence defendant accordingly and send a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

BLEASE _____, Acting P. J.

We concur:

HULL _____, J.

DUARTE _____, J.