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

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD MEZA,

Defendant and Appellant.

C067992

(Super. Ct. No. 10F03744)

Convicted of repeatedly sexually abusing his nine-year-old niece, for which he was sentenced to 42 years to life in prison, defendant Ronald Meza appeals, contending the trial court erred when it: (1) refused to suppress a statement he made to a police officer because the officer did not give him *Miranda*¹ warnings; (2) overruled his objection to his brother's testimony that he saw "guilt" in defendant's eyes; (3) refused to exclude testimony from a prosecution expert on child sexual abuse accommodation syndrome; and (4) instructed the jury with CALCRIM

¹ *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

No. 1193. Defendant also contends the evidence was insufficient to support his conviction of felony false imprisonment by menace.

We conclude that none of the claims of error defendant preserved for appellate review has merit, but we agree the evidence was insufficient to support defendant's conviction of false imprisonment by menace. Accordingly, we will reduce the conviction to misdemeanor false imprisonment and remand for resentencing, but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

From 2007 through 2010, the victim, who was born in November 2000, lived with her mother and father and her father's brother (defendant), who was born in 1968. Defendant did not work most of the time, but the victim's parents both did, so defendant would watch the victim after she got out of school at 2:15 p.m. until her mother came home around 4:00 p.m.

Sometime before January 2010, defendant began touching the victim inappropriately while they were home alone together. In the first incident, which occurred in the victim's room, defendant licked her "front private." Thereafter, the abuse occurred in the living room and (mostly) in defendant's room. When it occurred in defendant's room, he would tell the victim to go there, which she did because she "didn't know if he was going to hurt [her] in any other way." There, he would kiss her on the back, put his penis between her buttocks, and sometimes lick her "front private." When he was done, he would tell her

not to tell her parents, and she complied "[b]ecause [she] was scared he would hurt [her] family."

In June 2010, the victim's mother announced that the salsa she made as a side business was going to be placed in major supermarkets. The victim started to cry, then told her mother she had to go talk to defendant and would be right back. The victim had decided to tell her mother about the abuse because she feared her mother was going to be out of the house more, and the victim wanted the abuse to stop. The victim went to defendant's room and told him she was going to tell her parents what he did to her. Defendant told her not to tell, but they were interrupted by her father. At that point, the victim went to her mother's room and told her mother that defendant had been having sex with her. She did not tell her mother about the licking.

After calling defendant's sister, the victim's mother went and told the victim's father. He became upset and confronted defendant. Eventually, there was a physical altercation, and the police were called. When asked to tell his side of the story, defendant told one of the police officers that about a year earlier, when he was drunk, he had touched the victim, but he did not remember where he touched her or how it happened.

Defendant was originally charged with four counts of committing a lewd and lascivious act on a child under the age of 14 for putting his penis on the victim's buttocks. Around three months later, the victim told her mother about the licking. Subsequently, the charges were amended to include five counts of

committing a lewd and lascivious act on a child under the age of 14, two counts of committing an act of oral copulation on a child 10 years of age or younger, and one count of false imprisonment effected by violence, menace, fraud, or deceit.

In March 2011, a jury found defendant guilty on all counts. The court sentenced him to an aggregate prison term of 42 years to life.

DISCUSSION

I

Custodial Interrogation

Before trial, the prosecutor moved in limine to admit a statement defendant made to Elk Grove Police Officer Winston Gin, arguing that "Officer Gin's brief detention of the defendant did not amount to custody for the purposes of Miranda." In turn, defendant moved to exclude the statement.

The court held an Evidence Code section 402 hearing on the two motions, at which Officer Gin testified. According to Officer Gin, he arrived at the scene at 10:09 p.m. in response to "a call from a young reporting party" who had made "an accusation that her uncle had molested her." Upon arrival, Officer Gin, along with two other officers, observed a loud disturbance between a male and a female and another male. It appeared to Officer Gin "a little like it was going to . . . get physical very, very soon." Accordingly, the officers separated the parties. Officer Gin contacted defendant, who was "the target of all of the verbal abuse from the other two," "removed him from their immediate vicinity," "got him by [Officer Gin's]

police car," and "patted him down for officer safety." Officer Gin directed defendant to come over to the car and asked defendant to have a seat in the back. Officer Gin employed no force, and defendant came voluntarily. Officer Gin did not place defendant in handcuffs, but he did close the door, and defendant would not have been able to open it from inside.

After placing defendant in his patrol car, Officer Gin went to give assistance to the other two officers, who were dealing with the other man and the woman (the victim's parents). Around 10:15 p.m., Officer Gin returned to the patrol car and spoke with defendant from the front seat. The officer asked defendant for his side of the story, and defendant made a statement in which, in addition to describing the circumstances surrounding the accusation of abuse and the resulting confrontation with the victim's parents, he told Officer Gin that about a year earlier, when he was drunk, he might have touched his niece, although he did not remember where or how he touched her.

The trial court concluded that it did not appear "this [wa]s a detention" because Officer Gin "put [defendant] in the back of the police unit primarily for his safety and the safety of the officers." The court also concluded that it did not appear "to be an interrogation either" but was instead "a pre-investigatory" determination "of essentially what's going on so they can resolve the situation." Accordingly, the court denied defendant's motion to exclude his statement to Officer Gin.

On appeal, defendant contends the trial court erred in refusing to suppress his statement because Officer Gin's

questioning of him in the back of the police car amounted to custodial interrogation that was not preceded by the required *Miranda* warnings. We find no error because we agree with the trial court that defendant was not "in custody" for purposes of *Miranda* when he made the incriminating statement to Officer Gin.

The question in a case such as this is, "whether examining all the circumstances regarding the interrogation, there was a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest,'" or, more specifically, "whether a reasonable person in defendant's position would have felt he or she was in custody." (*People v. Stansbury* (1995) 9 Cal.4th 824, 830.) To make this determination, "[c]ourts have identified a variety of relevant circumstances. Among them are whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable

and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation." (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.) "No one factor is dispositive. Rather, we look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest." (*Ibid.*)

In arguing that he was subjected to a detention equivalent to a formal arrest, defendant relies almost exclusively on the fact that he was "detained in the back of a patrol car." In support of his argument, he cites two cases in which the courts found custodial detention occurred in the back of a patrol car. Those cases are of little assistance, however, because each involved additional facts not present here.

In *U.S. v. Henley* (9th Cir. 1993) 984 F.2d 1040, the defendant "was handcuffed and placed in the back seat of a squad car," then questioned by an FBI agent who "explained that he was investigating a bank robbery and that the officers believed [the defendant's] car had been involved." (*Id.* at p. 1042.) In *U.S. v. Richardson* (6th Cir. 1991) 949 F.2d 851, the defendant "was approached by four officers and informed that he was the subject of a drug investigation. The agents immediately asked for consent to search the automobile [in which the defendant was sitting] and [a nearby] storage locker. When [the defendant]

declined to consent to the search, he was placed in the back of an unmarked police car." (*Id.* at p. 856.)

In contrast to the defendant in *Henley*, defendant here was not handcuffed; in contrast to the defendant in *Richardson*, defendant was not placed in the back of the police car after refusing to consent to a search. These factual distinctions only serve to illustrate that drawing hard and fast rules in this area is pointless: in other words, the fact that a defendant was in the back of a police car when he was questioned is not dispositive of the "custody" question. (See, e.g., *U.S. v. Jones* (10th Cir. 2008) 523 F.3d 1235 [defendant was *not* in custody while questioned in the back of a police car].) Instead, the location of the questioning is only one fact out of many that must be considered in determining under "all the circumstances" "whether a reasonable person in defendant's position would have felt he or she was in custody." (*People v. Stansbury, supra*, 9 Cal.4th at p. 830, italics added.)

Here, defendant has failed to show how under *all* the circumstances a reasonable person in his position would have felt he was being subjected to a detention equivalent to a formal arrest. Viewing the facts in the light most favorable to the People, the evidence here showed that Officer Gin directed defendant to the back of the patrol car to separate defendant from two assailants. Defendant was not forced into the car but went voluntarily. While the back door was closed, and defendant would not have been able to open it, there was no evidence he ever tried to do so; accordingly, for all defendant knew, he

could have opened the door of the patrol car at any time. While Officer Gin did not tell defendant he was free to leave, he also did not tell defendant he was under arrest or that he was not free to leave. Only Officer Gin was involved in the questioning, and all he did was ask for defendant's side of the story.

Under all of these circumstances, we conclude a reasonable person would not have believed he was subject to the equivalent of formal arrest. Accordingly, defendant was not in custody for purposes of *Miranda*, and the trial court did not err in denying his motion to suppress his statement to Officer Gin and instead granting the People's motion to allow that statement into evidence.

II

Lay Opinion Testimony

Defendant's brother testified that after he learned from his wife about defendant's abuse of the victim, he pinned defendant against the wall in the laundry room with his arm against defendant's neck. Instead of fighting back, as he normally would have done, defendant did not defend himself. Defendant's brother then testified that when he looked into defendant's eyes as defendant was pinned against the wall, he saw "guilt."

At that point in the testimony, defense counsel objected and moved to strike, without stating any basis for the objection. The trial court overruled the objection, and the prosecutor continued his examination, eliciting that instead of

looking at his brother "with anger," as he normally would have done when in a fight with him, defendant would "[n]ot really" look his brother in the eye as he was pinned against the wall.

On appeal, defendant contends the trial court erred and violated his federal constitutional right to due process of law because the testimony of defendant's brother that he saw "guilt" in defendant's eye was not permissible lay opinion testimony under Evidence Code section 800. This argument was forfeited, however, because defendant failed to make it in the trial court.

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made *and so stated as to make clear the specific ground of the objection or motion.*" (Evid. Code, § 353, italics added.) "The failure to state the *specific ground* upon which an objection rests waives appellate review of the objection." (*People v. Dorsey* (1974) 43 Cal.App.3d 953, 959; see also *People v. Chatman* (2006) 38 Cal.4th 344, 397 [defendant could not argue on appeal that a question called for improper opinion evidence when he did not object on that basis at trial].)

Here, defense counsel did not state any ground for his objection, let alone the ground defendant now seeks to argue on appeal. Accordingly, defendant's argument is forfeited.²

III

Child Sexual Abuse Accommodation Syndrome Testimony

Before trial, the prosecutor moved to admit the expert testimony of Dr. Anthony Urquiza on the subject of child sexual abuse accommodation syndrome on the ground that Dr. Urquiza's testimony would "dispel specific misconceptions the jury m[ight] hold as to how sexually abused children react to the abuse." At the same time, defendant moved to exclude or limit Dr. Urquiza's testimony. Among other things, defendant requested that the prosecution articulate the misconception that justified admission of Dr. Urquiza's testimony.

At a pretrial hearing, the prosecutor argued that Dr. Urquiza's proposed testimony was relevant because "it is a commonly held belief and myth that [victims of child abuse] will

² In *Chatman*, the Supreme Court explained that an objection to the question of whether the defendant, who was kicking someone, "'seemed to be enjoying it,'" on the ground that the question called for improper opinion evidence, "would have failed" because while "[g]enerally, a lay witness may not give an opinion about another's state of mind," "a witness may testify about objective behavior and describe behavior as being consistent with a state of mind." (*People v. Chatman, supra*, 38 Cal.4th at p. 397.) Here, the gist of the brother's testimony was that defendant looked guilty because he would not look his brother in the eye, contrary to his usual behavior during a fight. Understood in this manner, the testimony was not objectionable as improper opinion testimony, even if defendant had objected, because the brother essentially described defendant's behavior as being consistent with guilt.

tell everyone immediately." Noting that the victim had disclosed additional acts of abuse at a later time, the trial court found "that the testimony of Dr. Urquiza would be relevant and of assistance to the jury."

In voir dire, the topic of delayed reporting of child abuse was discussed with potential jurors. Just before the jury panel was brought in and sworn, defense counsel argued to the court that "every single juror was clear that . . . none of them were operating under a myth that children disclose right away. They all agreed that children disclose molestation in a delayed manner." Based on this, defense counsel renewed the objection to Dr. Urquiza's testimony. The trial court acknowledged that the jurors understood there might be delayed reporting and there might be reasons for such a delay, but the court was "not sure any of them are experts and would understand the reasons for any delay" and thus "Dr. Urquiza's testimony would be enlightening on that issue." Accordingly, the court reiterated its ruling that "Dr. Urquiza would be allowed to testify."

Dr. Urquiza testified about the five aspects of child sexual abuse accommodation syndrome: secrecy, helplessness, entrapment and accommodation, delayed and unconvincing disclosure, and retraction or recantation.

On appeal, defendant contends the trial court erred and violated his federal constitutional right to due process of law in permitting Dr. Urquiza to testify about child sexual abuse accommodation syndrome. Defendant first argues that "because the jurors understood that children often delay[] reporting

molestation, they did not require Dr. Urquiza's expert opinion." But whether the jurors *required* Dr. Urquiza's testimony is not the test we apply in reviewing the trial court's decision to admit Dr. Urquiza's testimony.

"The governing rules are well settled. First, the decision of a trial court to admit expert testimony 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.' [Citations.] Second, 'the admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute [Evidence Code section 801] declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness."' (People v. McAlpin (1991) 53 Cal.3d 1289, 1299-1300.)

Here, defendant has failed to show that it was a manifest abuse of discretion for the trial court to find that Dr. Urquiza's testimony would be of assistance to the jury in understanding the delayed reporting aspect of child sexual abuse accommodation syndrome. Defendant's argument rests on the premise that "the jurors understood that children often delay[] reporting molestation," but the evidence he cites in support of

that premise is wanting. He admits that half of the jurors merely "sat through discussions and questions about delayed reporting and never volunteered that they would have doubts about a child's credibility if she didn't disclose the molest immediately." But the fact that half of the jurors who were eventually chosen did not voluntarily express any such doubts does not mean they did not harbor them. Evidence regarding the child sexual abuse accommodation syndrome is admissible to "disabus[e] a jury of misconceptions it *might* hold about how a child reacts to a molestation." (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744, italics added.) Dr. Urquiza's testimony properly served that purpose here.

Defendant next argues that Dr. Urquiza's testimony should have been excluded because he did not rely on the victim's delayed disclosure to support a material part of his defense. But there is no such requirement for child sexual abuse accommodation syndrome evidence to be admissible. "The testimony is pertinent and admissible if an issue has been raised as to the victim's credibility." (*People v. Patino, supra*, 26 Cal.App.4th at p. 1745.) It was not critical that defendant himself did not argue that the delayed disclosure tended to undercut the victim's credibility, as long as some of the jurors might have questioned the victim's credibility on that basis. Because defendant has failed to show there was no reasonable possibility of such a scenario, he has likewise failed to show any error in the admission of Dr. Urquiza's testimony.

Defendant also argues that the trial court should have excluded Dr. Urquiza's testimony under Evidence Code section 352. He contends that because the testimony was "cumulative to other evidence presented" -- specifically, testimony from a police officer -- it should have been excluded.

There are several flaws in this argument. First, the testimony of the officer *followed* Dr. Urquiza's testimony, so if any evidence was subject to exclusion as cumulative it was the officer's, not Dr. Urquiza's. Second, defendant fails to explain how expert testimony on the delayed reporting aspect of child sexual abuse accommodation syndrome could be deemed cumulative of a police officer's testimony that, in his experience, it is "pretty common" for children to delay reporting sexual abuse. And third, the case defendant cites in support of this argument -- *People v. Willoughby* (1985) 164 Cal.App.3d 1054 -- is inapplicable because that case deals specifically with "evidence of other offenses" (*id.* at p. 1062), which is not what we are dealing with here.

For the foregoing reasons, we find no abuse of discretion in the trial court's admission of Dr. Urquiza's testimony.

IV

CALCRIM No. 1193

The trial court instructed the jury with CALCRIM No. 1193, as follows: "You have heard testimony from Dr. Urquiza regarding child sexual abuse accommodation syndrome. Dr. Urquiza's testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the

crimes charged against him. You may consider the -- this evidence only in deciding whether or not [the victim]'s conduct was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of her testimony." Defendant did not object.

On appeal, defendant contends it was error to give this instruction because the instruction improperly relates child sexual abuse accommodation syndrome to the victim's credibility. We disagree.

Initially, we reject the People's argument that this claim of error was forfeited because defendant did not object to the instruction in the trial court. It is true forfeiture was found in *People v. Guerra* (2006) 37 Cal.4th 1067 -- the case the People cite in support of their argument -- but that case involved the failure to request that an otherwise correct instruction be clarified. (*Id.* at p. 1138.) Here, defendant is not contending CALCRIM No. 1193 should have been clarified, but that it (at least in part) should not have been given at all. As the People ought to know, even in the absence of an objection we may consider the merits of a challenge to a jury instruction, if the instruction affected the defendant's substantial rights. (Pen. Code, § 1259; *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [no forfeiture when "trial court gives an instruction that is an incorrect statement of the law"].)

Defendant contends that under applicable case law, child sexual abuse accommodation syndrome evidence is admissible only "for the very limited purpose of disabusing myths about the

behavior of children who perhaps have been molested, and is not admissible to reflect on the specific facts of a given case." In his view, CALCRIM No. 1193 exceeds this limitation because it "invites the jury . . . to use the words of a medical expert to evaluate the complaining witness'[s] credibility and tip the balance in favor of the prosecution."

This argument has no merit. By its very nature, child sexual abuse accommodation syndrome evidence is relevant because it can assist the jury in assessing the credibility of the victim's claim of abuse. As we have previously noted, child sexual abuse accommodation syndrome evidence is admissible to "disabus[e] a jury of misconceptions it might hold about how a child reacts to a molestation." (*People v. Patino, supra*, 26 Cal.App.4th at p. 1744.) Thus, if the evidence demonstrates that the child victim delayed reporting the alleged abuse, child sexual abuse accommodation syndrome evidence can be admitted to disabuse the jury of the notion that a child who was really abused would have reported the abuse immediately. If the child victim testifies to the abuse at trial, and the jury relies on the child sexual abuse accommodation syndrome evidence in concluding that the child's delay in reporting is not indicative of fabrication, the jury has necessarily relied on the evidence in evaluating the believability of the victim's testimony. Accordingly, the relationship between child sexual abuse accommodation syndrome evidence and the victim's credibility that is reflected in CALCRIM No. 1193 is not improper, and the trial court here did not err in giving the instruction.

False Imprisonment By Menace

As previously noted, defendant was charged with false imprisonment effected by violence or menace. (Pen. Code, §§ 236, 237, subd. (a).) The jury was instructed on that crime and the lesser crime of simple false imprisonment. The jury found defendant guilty of the greater offense.

On appeal, defendant contends the evidence was insufficient to prove the violence or menace element of the greater false imprisonment offense. We agree.

"On appeal the critical inquiry is 'to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.' [Citation.] An appellate court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] In reviewing the evidence, our perspective favors the judgment." (*People v. Matian* (1995) 35 Cal.App.4th 480, 483-484.)

"Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Consistent with the governing law (see *People v. Matian*, *supra*, 35 Cal.App.4th at p. 484), the jury here was instructed that, for purposes of the crime of false imprisonment,

"[v]iolence means using physical force that is greater than the force reasonably necessary to restrain someone" and "[m]enace means a verbal or physical threat of harm," which "may be express or implied." The prosecutor, however, conceded in argument that defendant did not "do anything violent to restrain" the victim and did not expressly threaten her either. Instead, the prosecutor's theory was that defendant impliedly threatened the victim "because when he ordered her to the room she was afraid that he would hurt her if she didn't follow his direction" and he "told her not to tell her parents," which "she took . . . to mean that he would hurt them if she did." According to the prosecutor, "if you say the only way she went in the room is because she was afraid, she thought that he was going to hurt her, and that's why she followed his directions then he is guilty of false imprisonment by violence or menace."

On appeal, defendant contends "[t]he problem with the prosecutor's theories . . . was that none of [defendant]'s actions ever implied that he would harm [the victim] or her parents." In other words, just because the victim might have been afraid does not mean he falsely imprisoned her by menace; instead, for there to be menace, the victim's fear had to have been caused by some action on defendant's part that implied a threat of harm.

For their part, the People contend there was "sufficient evidence from which a reasonable jury could have found that . . . [defendant] confined [the victim] against her will" through "implied threat[s] of harm" because: (1) the victim

"went with [defendant] into the rooms where the molestations occurred because she was afraid he would hurt her in some way or because she feared he would hurt her parents"; (2) defendant "repeatedly told [her] not to tell anyone"; and (3) defendant "was a large man in his 40's, [while the victim] was a 9 year old girl." The People also argue that "the sexual assaults themselves impl[ied] a threat of physical harm" because the victim "resisted these assaults perpetrated on her by a larger older male."

In *People v. Aispuro* (2007) 157 Cal.App.4th 1509, the appellate court found sufficient evidence of menace where the defendant "accosted . . . two young girls, laid his hands on them, caused them to cry, did not respond to their requests that he not hurt them, ordered them to sit in the middle of the street and when they initially resisted, told them 'If you don't, then I will do something.'" (*Id.* at p. 1513.) According to the appellate court, "[t]hese words alone, in context, constituted evidence of an implied, if not express, threat to harm them." (*Ibid.*)

This case is distinguishable from *Aispuro* because defendant made no express verbal threat like "I will do something" to the victim in order to get her to go to his room. Indeed, there is nothing in this case that is comparable to the threat in *Aispuro*. Here, the victim was a 9-year-old girl who was home alone with defendant, who was her uncle and who was much older

and obviously much larger than she.³ After sexually molesting her in her room the first time, to get her to go into his room for further abuse he would tell her to go there, and she would comply "because [she] didn't know if he was going to hurt [her] in any other way." When defendant was done with the victim, the first few times he told her "don't tell [her] parents," and she complied "[b]ecause [she] was scared he would hurt [her] family." After that, she "just . . . knew not to tell [her] parents."

Unlike the verbal threat in *Aispuro*, none of defendant's actions or words reasonably can be construed as implying that he would harm the victim and/or her parents if she did not comply with his direction to go to his room. The victim clearly was afraid of the possibility that defendant would harm her or her parents, and the jury reasonably could have found that she complied with defendant's command to go to his room because of that fear. But the victim never testified that she was afraid because of what defendant did or said. When asked if defendant "look[ed] mean" when he told her to go to his room, the victim responded, "He just said go into my room." When asked if she thought she had a choice, she answered, "I -- I just decided to go in his room because I didn't know if he was going to hurt me in any other way." When asked why she was scared defendant would hurt her family, she testified, "Because I -- I just

³ According to the probation report, defendant is five feet seven inches tall and weighs 215 pounds.

didn't know -- I mean I would -- just didn't want them to get hurt because of what he did to me." And on cross-examination, the victim admitted that defendant never threatened her and never told her "if you tell I'm going to hurt you or anything like that."

On all of the facts presented, we conclude there was no substantial evidence that defendant's words and actions implied a threat of harm if the victim did not comply with his directions. Accordingly, the evidence was insufficient to support his conviction of felony false imprisonment offense by menace. The facts do support his conviction of the lesser included crime of misdemeanor false imprisonment (i.e., without menace). Accordingly, the judgment must be modified.

DISPOSITION

The judgment is modified to reduce defendant's false imprisonment conviction to misdemeanor false imprisonment, and the case is remanded to the trial court for resentencing and amended abstract of judgment. The judgment is otherwise affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.