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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR MANUEL JACOBO, et al.,

Defendant and Appellant.

D060352

(Super. Ct. No. INF062270)

APPEAL from a judgment of the Superior Court of Riverside, James S. Hawkins, Judge. Reversed in part; affirmed in part; remanded with directions.

A jury convicted Victor Manuel Jacobo and Julian Imperial Mendoza of kidnapping Rafael Benitez to commit robbery (Pen. Code,<sup>1</sup> § 209, subd. (b)(1), count 1); burglary (§459, count 2); false imprisonment of Rafael Benitez, Ana Rodriquez, Brian Benitez, and Diego Benitez (§ 236, count 5); and robbery of Rodriguez and Margarita Ortiz (§ 211, count 7). A jury also convicted Mendoza of a separate count of burglary (§

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise specified.

249, count 3); kidnapping Ortiz (§ 207, subd. (a), count 4); and false imprisonment of Ortiz (§ 236, count 6).

The jury found Mendoza personally used a firearm in committing counts 1, 3, 4, 6, and 7 (§12022.53, subd. (b)), and was an armed principal in committing counts 2 and 5 (§ 12022, subd. (a)). In addition, the jury found true Jacobo personally used a firearm in committing counts 1, 2, 5, and 7 (§12022.53, subd. (b)).

The court sentenced Mendoza to prison for 13 years, four months, followed by a life term with the possibility of parole consisting of life with possibility of parole for count 1 plus 10 years for the firearm enhancement; one year, eight months for count 4, eight months for count 5; and one year for count 7. The court stayed Mendoza's sentence on counts 2, 3, and 6 under section 654.

The court sentenced Jacobo to prison for 11 years, eight months, followed by a life term with the possibility of parole consisting of life with possibility of parole for count 1 plus 10 years for the firearm use enhancement, eight months for count 5, and one year for count 7. The court stayed Jacobo's sentence on count 2 under section 654.

Mendoza appeals, asserting: (1) there is insufficient evidence to support his convictions under counts 1 and 4; (2) the court abused its discretion in determining Ortiz was unavailable to testify; and (3) he could not be convicted of both false imprisonment and kidnapping because false imprisonment is a lesser included offense of kidnapping.

Jacobo appeals, raising a number of issues. He contends: (1) the evidence is insufficient to convict him of robbery requiring reversal of counts 1, 2, and 7; (2) the evidence is insufficient to convict him of kidnapping for count 1; (3) the admission of

Mendoza's statement with references to a coparticipant violated his Sixth Amendment rights; (4) the prosecutor committed prejudicial misconduct during closing argument; (5) the jury was not properly instructed on counts 5 and 7; (6) cumulative errors deprived him of due process; (7) he could not be convicted of both false imprisonment and kidnapping because false imprisonment is a lesser included offense of kidnapping; (8) the true finding under section 12022.53, subdivision (b) as to count 5 is improper because false imprisonment is not an enumerated offense of that subdivision; and (9) his sentence under counts 6 and 7 must be stayed per section 654.

Mendoza also joins in Jacobo's arguments to the extent that he would benefit thereby. (Cal. Rules of Court, rule 8.200(a)(5).)

We determine the court erred in finding Ortiz unavailable to testify at trial and reverse Mendoza's convictions under counts 3, 4, and 6. Also, we conclude Jacobo was denied his Sixth Amendment right to confrontation and the prosecutor committed prosecutorial misconduct warranting the reversal of Jacobo's convictions under counts 1, 2, and 7. In addition, we conclude the enhancement for count 5 under section 12022.53, subdivision (b) should be stricken as to Jacobo. We otherwise affirm the judgment and remand the case to the superior court for such further proceedings as may be appropriate.

## FACTS

### Prosecution

Rafael Benitez lived with his wife, Ana Rodriguez, and their two young sons at 88271 Avenue 58 in Thermal, California. The home was divided into two separate

residences. Benitez and his family lived on one side, and Margarita Ortiz lived on the other.

On the evening of May 22, 2008, Benitez was watering down the dirt outside his home when a car pulled up. Mendoza got out of the passenger's side of the car and asked Benitez if he knew directions to a certain street. Benitez replied that he was not familiar with the street. Mendoza then asked Benitez whether he knew a certain person who sold marijuana or methamphetamines. Benitez stated that he did not. When Benitez turned to coil his hose, Mendoza grabbed him around the neck, placed a gun against his back, and ordered him not to move.

Mendoza then told Benitez to get in the car, but Benitez refused. Mendoza threatened Benitez, "Just get in or I'm going to finish you right here." Benitez asked Mendoza who he was looking for, but Mendoza only responded, "Get into the car or I'll kill you right here."

Benitez told Mendoza that he did not know who he was looking for and was merely renting the house with his family. Mendoza told him to walk to the house or he would "burn [him] right here."

Mendoza forced Benitez into the house where his wife was bathing their two sons. Mendoza shouted to Jacobo, who had stayed in the car, and Jacobo came inside as well. Jacobo, however, had left his gun in the car and Mendoza instructed him to go get it. Jacobo returned with a gun. Benitez and Mendoza were in the kitchen. Jacobo pointed his gun at Benitez's back and kept him in the kitchen.

Mendoza asked if anyone else lived at the house, and Benitez told him there was a woman who lived in the other half of the house, but he did not know if she was home. Mendoza then searched the house for phones. He found one on the nightstand in Benitez's bedroom and put it in his pocket. After Benitez assured Mendoza there were no other phones in the house, Mendoza left the house, but kept coming back in. While Mendoza was walking around, he told Jacobo to kill Benitez if Benitez did anything.

Rodriguez came out of the bathroom with her sons and was frightened when she found Jacobo and Mendoza in the kitchen with Benitez. Benitez tried to calm down Rodriguez. Rodriguez saw Jacobo pointing a gun at Benitez. Mendoza directed Rodriguez to go to her bedroom with the kids and stay with them.

Ortiz lived in the other side of the house and arrived home about 8:00 p.m. on May 22, 2008.<sup>2</sup> As she was opening her door, Mendoza pointed a gun at her. Ortiz ran into the living room, where Mendoza caught her. He took her from the living room to the bedroom, where he bound her hands with a telephone cord. He then opened the door to the closet and put her inside.

Mendoza removed a mattress and used it to cover a glass sliding door. After searching the closet, Mendoza took two rings, a chain, two cross pendants, and some cash. While he searched, Mendoza repeatedly told Ortiz to "shut up."

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<sup>2</sup> Ortiz did not testify at trial. Over objection, the court ruled she was unavailable under Evidence Code section 240, and her preliminary hearing testimony was read to the jury.

While Rodriguez was left alone in the bedroom with the boys, she hid in the closet and was able to use a second cell phone<sup>3</sup> to call a neighbor, Daniel Varela, for help.

After receiving Rodriguez's call, Varela called 911.

Sheriff deputies responded to the 911 call. When they arrived, Rodriguez signaled them from the window. As they entered the house, Jacobo disposed of his gun.

Uncertain who was the intruder, the deputies took both Benitez and Jacobo into custody.

Searching for the other suspect, the deputies knocked on Ortiz's door. After about 30 seconds, Ortiz opened the door with her hands still bound. Mendoza had fled through a rear window. The deputies found a gun beneath the rear window.

After calling 911, Varela, his father, and a third man walked toward Benitez's house. Varela could see the Benitez house from his home. The three men found Mendoza crawling through a nearby field. Mendoza offered them money to let him go, but the three men detained him until the deputies arrived. When the deputies found Mendoza, he had Rodriguez's cell phone, two other cell phones, several pieces of jewelry, and \$1,600 cash.

In all, Benitez was kept captive in the kitchen and his wife and children were kept captive in the bedroom for about two hours.

After his arrest, Mendoza waived his *Miranda*<sup>4</sup> rights, and explained that he drove to the Coachella Valley from Las Vegas in a rental car to "retrieve" an expected three to

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<sup>3</sup> Mendoza took her cell phone.

<sup>4</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

five kilos of heroin, which he planned to give to the person who sent him. The person who sent him, who Mendoza would not name, gave him two guns. Mendoza stated that he did not know the address of the house where he was to go so he met a contact at a local meat market, who disclosed the target house. Mendoza believed a single woman, who was involved in the drug trade, lived at the house. Mendoza admitted tying up Ortiz because she was acting crazy.

#### Defense

Three character witnesses testified that Jacobo is not a violent person.

### DISCUSSION

#### I

#### *THE COURT ERRED IN FINDING ORTIZ UNAVAILABLE TO TESTIFY AT TRIAL*

Mendoza contends the prosecution did not exercise reasonable diligence in attempting to locate Ortiz to testify at trial, and thus, asserts the court erred in determining Ortiz was unavailable at trial and allowing her preliminary testimony to be read to the jury. We agree.

#### A. Background

The prosecution moved in limine to have Ortiz declared unavailable and admit her preliminary hearing testimony at trial. At the Evidence Code section 402 hearing, Judy Smith, an investigative technician with the Riverside County District Attorney's Office, testified that on December 3, 2009, she went to Ortiz's last known address at 88271 Avenue 58 in Thermal. Smith, however, described the house as a mobile home. A woman answered the door and said that she had bought the mobile home from Ortiz, and

Ortiz no longer lived there. Smith did not ask to see any purchase papers associated with the purported sale of the mobile home. Smith also spoke with other neighbors who were outside at the time, but they were unable to provide any information regarding Ortiz. About three weeks later, Smith went to 88271 Avenue 58 and served Rodriguez with a subpoena, but Rodriguez stated she did not know Ortiz well and did not know where she was. Rodriguez's "small"<sup>5</sup> children, however, told Smith that Ortiz was in Mexico.

Smith also ran a local rap sheet on Ortiz, which listed the same address in Thermal as Ortiz's home address. Smith contacted the Border Patrol looking for information about Ortiz, but Ortiz was not in the Border Patrol's system. In addition, Smith did not find any listing for Ortiz in the Department of Motor Vehicles database. Finally, Smith checked to see if Ortiz was in the county jail. She was not.

Smith acknowledged that she did not ask about Ortiz at the local grocery store, post office, hospital, or laundromat. She also did not check with the utility companies, search the telephone book, conduct an internet search, or contact the Mexican embassy in attempting to locate Ortiz. Smith did not speak with a defense investigator who had spoken with Ortiz prior to the preliminary hearing. In addition, Smith did not run the name "Corral" (which was Ortiz's middle name) in any of the databases she checked.<sup>6</sup>

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<sup>5</sup> The record does not indicate the age of Benitez and Rodriguez's children. Smith's use of the word "small" in connection with other evidence in the record implies the children were young.

<sup>6</sup> Smith testified that she was not provided with Ortiz's middle name, but the prosecution knew Ortiz's middle name from her preliminary hearing testimony.

Based upon Smith's testimony and following argument of counsel, the trial court found Smith exercised reasonable diligence in trying to locate Ortiz and secure her presence at trial. The court ruled Ortiz unavailable for trial and allowed the prosecution to introduce her preliminary hearing testimony at trial.

Subsequent to the jury's verdict, a probation officer was able to contact Ortiz. He mailed Ortiz a victim impact/statement of loss letter, and Ortiz responded by mail. Because the probation officer easily located Ortiz, Jacobo, with Mendoza joining, moved for a new trial. The court denied the motion.

#### B. The Law

The confrontation clauses of both the federal and California Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const. art. I, § 15.) This right, however, is not absolute. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295; *People v. Cromer* (2001) 24 Cal.4th 889, 897 (*Cromer*)). "Traditionally, there has been 'an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] which was subject to cross-examination. . . .' [Citation.]" (*Ibid.*) "Pursuant to this exception, the preliminary hearing testimony of an unavailable witness may be admitted at trial without violating a defendant's constitutional right." (*People v. Herrera* (2010) 49 Cal.4th 613, 621.)

Evidence Code section 1291, subdivision (a), provides: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a

party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." A witness is considered "unavailable" if "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) The term "[r]easonable diligence, often called 'due diligence' in case law, 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' " ( *People v. Cogswell* (2010) 48 Cal.4th 467, 477.) Factors we consider in determining whether reasonable diligence has been shown include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored. ( *Cromer, supra*, 24 Cal.4th at p. 904.) In this regard, "California law and federal constitutional requirements are the same." ( *People v. Valencia* (2008) 43 Cal.4th 268, 291-292.)

We independently review a trial court's determination the prosecution's failed efforts to locate a witness are sufficient to justify an exception to a defendant's constitutional right of confrontation. ( *Cromer, supra*, 24 Cal.4th at p. 901.) We conduct a "twofold inquiry" to determine whether the prosecution exercised due diligence to locate a missing witness. ( *Id.* at p. 900.) First, we determine the historical facts: a detailed account of the prosecution's failed efforts to locate the absent witness. ( *Ibid.*) If those facts are in dispute, we "apply a deferential standard of review to the trial court's factual findings." ( *Ibid.*) Second, we determine "whether these historical facts amount to

due diligence by the prosecution," which requires application of an objective, constitutionally-based legal test to the historical facts. (*Ibid.*)

### C. Analysis

After our independent review of the record, we determine the court erred in finding Ortiz unavailable for trial. We are not satisfied the prosecution exercised due diligence in attempting to locate Ortiz.

As a threshold matter, it is unclear if Smith even went to the correct house to find Ortiz. Smith described the house as a mobile home. There is nothing in the record indicating Ortiz lived in a mobile home. Instead, it appears Ortiz lived in a duplex or other type of divided house. We note Smith did state Ortiz's correct address, but her description of the home as a mobile home gives us pause whether she actually went to the correct house. Further, the prosecution did not sufficiently clarify Smith's purported visit to Ortiz's home at the evidentiary hearing.

The trial court's finding of Ortiz unavailable did not include any reasoning to support the decision; thus, we have difficulty ascertaining if the court found Smith did indeed go to the correct house. However, even if we imply that factual finding, apply a deferential standard of review to this factual finding (see *Cromer, supra*, 24 Cal.4th at p. 900), and assume Smith did go to the correct house, we still conclude the prosecution's efforts in trying to locate Ortiz were lacking.

Smith only went to the house twice. The first time, which was just five weeks prior to trial, she found a woman who claimed to have purchased the house from Ortiz, but did not know Ortiz's whereabouts. There is no indication in the record that Smith

attempted to gather any additional information from the purported purchaser. She did not testify that she asked when the home was purchased or if she could have any information about the purchase (e.g., purchase contract or other papers that may have contained contact information for Ortiz). In other words, the record does not support a conclusion that Smith sufficiently explored this lead. (See *Cromer, supra*, 24 Cal.4th at p. 904.) Smith concluded her first visit to the house by talking to a couple of neighbors who did not know Ortiz's whereabouts. She, however, failed to check local hospitals, grocery stores, post offices, or other places Ortiz may have frequented.

The second time Smith went to Ortiz's last known address was to serve Rodriguez with a subpoena. Although she asked Rodriguez if she knew Ortiz, Smith appeared to be satisfied with Ortiz's children's explanation that Ortiz was in Mexico. She did not talk to anyone else about Ortiz's whereabouts during her second visit to the house.

Further, beyond going to Ortiz's last known address twice and talking to a couple neighbors, Smith's effort to locate Ortiz was minimal. Although she ran a rap sheet and checked to see if Ortiz was in the county jail or in the Border Patrol "system," she did not use Ortiz's middle name, which was known to the prosecution at the time, in these searches. If Smith believed Ortiz was in Mexico, she did little, if anything, to confirm her belief. Instead, she merely trusted the word of Ortiz's children. In summary, the prosecution's attempts to locate Ortiz consisted of little more than two trips to her last known residence and cursory searches through a few databases (but failing to use Ortiz's middle name in these searches). In addition, while we agree with the People that the probation officer found Ortiz well after the trial, the fact that he found Ortiz simply by

mailing a letter to her last known address leads us to believe that had Smith gone to Ortiz's house more than just twice, she would have had a better chance of finding her.

We are mindful that a prosecutor need not do "everything possible" to procure a witness (*People v. Lopez* (1998) 64 Cal.App.4th 1122, 1128), but here, we conclude Smith's efforts simply did not satisfy the prosecution's due diligence obligation. (Compare *People v. Wilson* (2005) 36 Cal.4th 309, 341 [two-day effort to locate a witness was sufficient when efforts included visiting witness's last known address, attempting to locate witness's known associates, and checking police, county, and state records with 15 different names witness used]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1297 [the prosecution began trying to locate unavailable witness more than a year before trial, tried to physically locate her 22 times, checked with witness's last employer, reviewed DMV records, and sent a patrol car to the witness's house every night of the trial]; *People v. Hovey* (1988) 44 Cal.3d 543, 562-563 [reasonable diligence had been exercised when, for more than a month, investigators had telephoned the witness, checked his arrest and drivers' license records, consulted police and FBI reports, and attempted to locate the witness's parents and in-laws].)

Because the prosecution did not sufficiently exercise due diligence in attempting to find Ortiz, the court committed error in finding Ortiz unavailable.

#### D. The Error Was Not Harmless Beyond a Reasonable Doubt

Having found error, we must determine whether the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (See *Lilly v. Virginia* (1999) 527 U.S. 116, 139-140 [applying *Chapman* beyond a reasonable

doubt standard to violations of the confrontation clause]; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1444.) We conclude the error was not harmless beyond a reasonable doubt.

In regard to Ortiz, Mendoza was charged with burglary (count 3), kidnapping (count 4), and false imprisonment (count 6).<sup>7</sup> For these counts, Ortiz's preliminary hearing testimony was the primary evidence establishing the crimes. It was convincing testimony from the eyewitness victim of the crimes. By itself, it established all the elements of the crimes charged involving Ortiz. The only other evidence offered at trial that even mentions Mendoza's interaction with Ortiz was Mendoza's statement after he was arrested. This statement, however, failed to adequately describe what occurred between Mendoza and Ortiz. Put another way, Mendoza's statement does not and cannot replace Ortiz's preliminary hearing testimony. As such, we cannot ignore the magnitude of Ortiz's preliminary hearing testimony.

Despite the force of Ortiz's testimony, Mendoza argues the error would be harmless as to counts 3 and 6 because sheriff deputies found Ortiz bound inside her home and Mendoza stated he entered Ortiz's home searching for drugs and tied Ortiz up.<sup>8</sup> Mendoza, however, overstates the evidence absent Ortiz's preliminary hearing testimony.

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<sup>7</sup> Count 7 (robbery) involved not only Ortiz, but also another victim (Rodriguez). Mendoza concedes Ortiz's testimony was not necessary for a jury to convict him under count 7.

<sup>8</sup> The People do not address whether the error was harmless beyond a reasonable doubt as to any count.

At the outset, there is no evidence in the record, absent Ortiz's preliminary hearing testimony, that would support a conviction of kidnapping Ortiz. Accordingly, clearly the trial court's error of admitting Ortiz's preliminary hearing testimony was not harmless beyond a reasonable doubt as to count 4 (kidnapping of Ortiz).

In addition, we are not satisfied that the error was harmless beyond a reasonable doubt as to count 3 (burglary). Deputy Sheriff George Acevedo testified about interviewing Mendoza after his arrest. Acevedo's testimony about Mendoza's statement to him is less than compelling in supporting the conviction for burglary.

The elements of burglary are: (1) entry into a structure currently being used for dwelling purposes (2) with the intent to commit a theft or a felony. (§§ 459, 460; *People v. Anderson* (2009) 47 Cal.4th 92, 101.) Mendoza's statement to Acevedo does not provide much insight as to what occurred inside Ortiz's home. At best, these statements might establish Mendoza traveled from Las Vegas and hoped to find drugs in Ortiz's home. It is not clear beyond a reasonable doubt that this evidence establishes Mendoza intended to take the drugs by force or commit any other felony. It was implied during cross-examination that Ortiz had drug paraphernalia in her home, and perhaps, Mendoza did not go to Ortiz's home with the intent to rob her of anything. Absent Ortiz's preliminary hearing testimony, we cannot be reasonably certain the jury would have disregarded these points on cross-examination.

Further, Acevedo's testimony regarding what Mendoza told him does not establish the circumstances under which Mendoza entered Ortiz's home. If Mendoza was at Ortiz's house to obtain drugs, it is unclear just from Mendoza's statement to Acevedo if he had

been invited into Ortiz's home. Simply put, we are not certain beyond a reasonable doubt that, stripped of Ortiz's preliminary hearing testimony, the jury would have convicted Mendoza of burglary in count 3.

Similarly, we are not satisfied Acevedo's testimony regarding Mendoza's statement was sufficient for the jury to find Mendoza guilty of false imprisonment absent Ortiz's preliminary hearing testimony. "False imprisonment is the unlawful violation of the personal liberty of another." (§ 236.) "Any exercise of express or implied force which compels another person to remain where he does not wish to remain, or to go where he does not wish to go, is false imprisonment." (*People v. Bamba* (1997) 58 Cal.App.4th 1113, 1123 (*Bamba*), citing *People v. Fernandez* (1994) 26 Cal.App.4th 710, 717.) False imprisonment is a misdemeanor unless it is "effected by violence, menace, fraud, or deceit," in which case it is a felony. (§ 237.) Here, Mendoza was charged and convicted of felony false imprisonment of Ortiz. However, without Ortiz's preliminary hearing testimony, the only evidence to support this conviction would be a deputy's testimony that he found Ortiz with her hands tied together and Mendoza's statement he tied up Ortiz because she was acting "kind of crazy." Mendoza's statement, however, does not sufficiently explain what occurred between Mendoza and Ortiz. The evidence of any violence, menace, fraud, or deceit is wanting. Indeed, Ortiz, although tied up, was able to open the door for the deputies. Thus, it is unclear if Mendoza made Ortiz remain where she did not wish to remain or to go where she did not want to go. (See *Bamba, supra*, at p. 1123.) Thus, we are not confident, beyond a reasonable doubt, that error was harmless as to the jury's conviction of Mendoza for false imprisonment (count 6).

The trial court erred in finding Ortiz unavailable and admitting her preliminary hearing testimony at trial. We conclude this error was not harmless beyond a reasonable doubt. Therefore, we reverse Mendoza's convictions for counts 3, 4, and 6. In addition, because we reverse his convictions for counts 4 and 6, we do not address Mendoza's argument that he cannot be convicted of both counts because false imprisonment is a lesser included offense of kidnapping.

## II

### *SUBSTANTIAL EVIDENCE SUPPORTS THE KIDNAPPING CONVICTIONS IN COUNT 1*

Both Mendoza and Jacobo argue there was insufficient evidence of asportation to support a conviction for kidnapping for robbery of Benitez (count 1).<sup>9</sup> We disagree.

#### A. Standard of Review

When considering a defendant's challenge to the sufficiency of the evidence, we review the entire record most favorably to the judgment to determine whether the record contains substantial evidence from which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. We do not reweigh evidence or reassess a witness's credibility and we presume the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) If the circumstances reasonably justify the jury's findings, reversal is not warranted

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<sup>9</sup> Because we reverse Mendoza's conviction for kidnapping Ortiz (count 4) on the grounds the court erred in finding Ortiz unavailable at trial and allowing her preliminary hearing testimony to be read to the jury, we do not address Mendoza's argument there was insufficient evidence of asportation to support a conviction on that count.

merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

#### B. Asportation

Kidnapping for robbery is a form of aggravated kidnapping that has an asportation requirement distinct from simple kidnapping. (*People v. Rayford* (1994) 9 Cal.4th 1, 14 (*Rayford*)). "[A]ggravated kidnapping requires movement of the victim that is not merely incidental to the commission of the underlying crime and that increases the risk of harm to the victim over and above that necessarily present in the underlying crime itself." (*People v. Martinez* (1999) 20 Cal.4th 225, 232; § 209, subd. (b)(2).) "These two aspects are not mutually exclusive, but interrelated." (*Rayford, supra*, 9 Cal.4th at p. 12.)

To determine whether the movement is more than incidental to commission of the underlying offense, relevant considerations include the scope and nature of the movement, and the context of the environment in which the movement occurred. (*Rayford, supra*, 9 Cal.4th at p. 12.) "This standard suggests a multifaceted, qualitative evaluation rather than a simple quantitative assessment." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152 (*Dominguez*)).

Although the distance of movement is a relevant factor, there is no minimum number of feet the victim must be moved. (*Rayford, supra*, 9 Cal.4th at p. 12.) To determine whether the movement increased the risk of harm beyond that inherent in the underlying offense, relevant considerations include the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. (*Id.* at p. 13.) The risk of harm may

include "psychological trauma to the victim beyond that to be expected from a stationary" offense. (*People v. Nguyen* (2000) 22 Cal.4th 872, 886.) The fact that the dangers do not in fact materialize does not mean the risk of harm was not increased. (*Rayford, supra*, 9 Cal.4th at p. 14.)

Here, the evidence shows Mendoza encountered Benitez while Benitez was in front of his house, watering down the dirt. When Benitez turned around to coil his hose, Mendoza grabbed him around the neck, stuck a gun in his back, and told him not to move. After Benitez told Mendoza he did not know about any drugs and was renting the house with his family, Mendoza ordered Benitez to get in the car. Benitez refused so Mendoza forced him into his house.

Once in the house, Jacobo kept a gun on Benitez, preventing him from leaving the kitchen while Mendoza searched the house. In addition, while Mendoza was going in and out of the house, Mendoza told Jacobo to shoot Benitez if he tried anything. In all, Benitez was kept captive in the kitchen for about two hours.

The jury could have found the movement of Benitez into his house was more than merely incidental to the robbery. At that time, Benitez was not Mendoza's intended robbery victim. (See *People v. James* (2007) 148 Cal.App.4th 446, 457 (*James*) [movement of victim from outside to inside a bingo parlor was not incidental to the robbery of a different individual who was already inside the bingo parlor].)

Mendoza contends the movement of Benitez is incidental, however, because if he and Jacobo would have found Benitez in his house, they would have kept him there. Thus, Mendoza argues the movement of Benitez "played no significant or substantial part

in the planned offense, and it had no bearing on the evil at hand" and thus must be incidental. We are not convinced.

Mendoza's argument he would have kept Benitez in the house if he found him there is unavailing. Kidnapping involves movement. (*Rayford, supra*, 9 Cal.4th at p. 14.) It is undisputed Mendoza forced Benitez into the house at gunpoint. Thus, it is immaterial what Mendoza would have done if he found Benitez in the house.

Essentially, Mendoza's argument reduces to the proposition that because the movement was unnecessary to the robbery, it must be incidental. This is not necessarily true. (See *People v. Corcoran* (2006) 143 Cal.App.4th 272, 279-280 [holding a movement that was unnecessary to the target offense and did not facilitate it was not merely incidental to it].) Again, we must consider the entire circumstances in which the crime takes place. (See *Rayford, supra*, 9 Cal.4th at p. 14; *Dominguez, supra*, 39 Cal.4th at p. 1152.) Here, substantial evidence supports the jury's finding that Benitez's movement was not merely incidental.

Relying on *People v. Washington* (2005) 127 Cal.App.4th 290, Jacobo argues Benitez's movement was incidental to the robbery because the property sought was in the house. Unlike the circumstances in *Washington*, in which the appellate court held that movement of bank employees to a vault room out of public view did not satisfy the asportation standard because that movement was necessary to obtain the money and complete the robbery, in the present case, there was no need to move Benitez to take property from Benitez's house. In *Washington*, "there was no excess or gratuitous movement of the victims over and above that necessary to obtain the money in the vault."

(*Id.* at p. 299.) Here, the movement of Benitez to inside his house was unnecessary to Mendoza's desire to obtain drugs from the house. Benitez told Mendoza he was unaware of any drugs and Mendoza did not take Benitez around the house looking for the drugs. Mendoza's forced movement of Benitez was clearly "excess and gratuitous."

In addition, although the record is silent as to the actual distance Mendoza forced Benitez to move, the jury also could have found the movement substantially increased the risk of harm to Benitez. Benitez was taken from outside where he could be viewed by at least one of his neighbors to inside his house where neighbors could not see what was happening. Further, by taking him inside the house, Mendoza better assured that Benitez would not do anything to resist Mendoza and Jacobo because of the presence of Benitez's wife and children. Substantial evidence supports the jury's finding that the movement of Benitez substantially increased his risk of harm. (See, e.g., *Dominguez, supra*, 39 Cal.4th at p. 1152.)

Mendoza counters with three assertions. First, Mendoza argues he moved Benitez a short distance and this distance is insignificant by any standard. Mendoza, however, ignores there is no set distance a victim must be moved to prove kidnapping. (See *Rayford, supra*, 9 Cal.4th at p. 12.)

Second, Mendoza insists the mere fact Benitez was moved outside to inside does not satisfy the asportation requirement. (See *James, supra*, 148 Cal.App.4th at p. 456.) We agree, but there is substantial evidence, as we discuss above, beyond the mere movement of Benitez from outside his home to inside his home to satisfy the asportation requirement in this matter. Further, contrary to Mendoza's claim, there is evidence that at

least one neighbor could see Benitez's house from his house. Thus, the jury reasonably could have concluded the movement from outside his house to inside his house could have prevented bystanders from seeing Benitez and trying to rescue him. (See *Dominguez, supra*, 39 Cal.4th at p. 1153 [victim moved from a relatively open area alongside the road to a place significantly more secluded, decreasing the possibility of detection and escape]; *People v. Aguilar* (2004) 120 Cal.App.4th 1044, 1048 [victim moved into an unlit area where there was less likelihood of detection].)

Finally, Mendoza argues the evidence of asportation is insufficient because he did not move Benitez to a dangerous foreign location. There is no such requirement under California law. Instead, "[t]he essence of aggravated kidnapping is the increase in the risk of harm to the victim caused by the forced movement." (*Dominguez, supra*, 39 Cal.4th at p. 1152.) On the record before us, we are satisfied substantial evidence supports the jury's finding that the risk of harm to Benitez increased because of his forced movement.

### C. Jacobo's Intent

Jacobo argues he did not have the specific intent to commit a robbery when Benitez was first moved; thus, he cannot be convicted of kidnapping Benitez. (See *People v. Davis* (2005) 36 Cal.4th 510, 565-566.) We disagree.

Jacobo was an aider and abettor of Mendoza. As such, he shares Mendoza's intent to commit robbery when he "knows the full extent of the perpetrator's criminal purpose and gives aid and encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

Here, the evidence shows Jacobo drove Mendoza to Benitez's house. Both Mendoza and Jacobo were armed. Jacobo never expressed any disapproval of Mendoza's actions and went back to the car to retrieve his gun, to better control Benitez in the house. Based on this evidence, it was reasonable for the jury to infer Jacobo was aware of Mendoza's intent to commit robbery and gave aid and encouragement to him. We thus are satisfied that substantial evidence supports Jacobo's conviction of kidnapping.<sup>10</sup>

### III

#### *APPELLANTS CAN BE CONVICTED OF BOTH KIDNAPPING AND FALSE IMPRISONMENT*

Appellants argue they cannot be convicted of both kidnapping Benitez in count 1 and false imprisonment of Benitez and his family in count 5. We are not persuaded.

False imprisonment is a lesser included offense of kidnapping. (*People v. Chacon* (1995) 37 Cal.App.4th 52, 65.) Here, Mendoza and Jacobo were charged with kidnapping for robbery of Benitez. This consisted of taking Benitez from outside his house to inside his house. They were also charged with falsely imprisoning Benitez, his wife, and two children. This occurred after Benitez was forced inside the house. Benitez was kept in the kitchen while his wife and children were kept in another room. Thus, the prosecution did not charge appellants with two crimes based upon the same acts.

Appellants, however, argue if the jury found they had kidnapped Benitez, they necessarily would have found them guilty of false imprisonment on the same act. To

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<sup>10</sup> For the same reasons, we reject Jacobo's contentions substantial evidence does not support his convictions for burglary in count 2 and robbery in count 7.

ensure this did not occur, Jacobo argues the court should have sua sponte instructed the jury under CALCRIM No. 3500.<sup>11</sup> We determine this argument is without merit. Even if the court erred by failing to give this instruction, the error was harmless.

"The right to a unanimous jury in criminal cases is guaranteed by the California Constitution. [Citations.] . . . [¶] It is established that some assurance of unanimity is required where the evidence shows that the defendant has committed two or more similar acts, each of which is a separately chargeable offense, but the information charges fewer offenses than the evidence shows. [Citation.] [A unanimity] instruction is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed. . . . [I]t is generally agreed that under such circumstances, a unanimity instruction of some kind is required to ensure the defendant's constitutional right to a unanimous verdict." (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 611-612.)

"[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Where no election is made, the court has a duty to instruct sua sponte on the unanimity requirement. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.)

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<sup>11</sup> CALCRIM No. 3500 states: "The defendant is charged with \_\_\_\_\_ [in Count \_\_\_\_] [sometime during the period of \_\_\_\_\_ to \_\_\_\_\_]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

We review the failure to provide a unanimity instruction under the *Chapman* harmless error standard. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 186.) Under that standard, we ask " 'whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on evidence establishing the requisite [elements of the crime] independently of the force of the . . . misinstruction.' " (*Id.* at p. 188.)

We conclude that the error in failing to instruct the jury on unanimity was harmless beyond a reasonable doubt. The evidence supporting the jury's conviction of Jacobo for false imprisonment of Benitez and his family was overwhelming. Two of the victims testified they saw Jacobo with a gun. Jacobo kept Benitez in the kitchen at gunpoint. Rodriguez testified that she was frightened when she saw Mendoza and Jacobo, and she was told to stay in her bedroom with her children. Mendoza also had a gun while he walked through the house. There is no evidence that any of the four victims were permitted to walk freely in the house. Further, the victims were confined out of fear that Jacobo or Mendoza would shoot them. We strain to imagine stronger evidence of false imprisonment.

Further, Jacobo's defense to the false imprisonment count was practically non-existent. During closing argument, Jacobo's counsel argued Benitez and his family were not falsely imprisoned, but instead, cooperating with Mendoza and Jacobo in a drug deal. Such an argument is utter speculation. We find nothing in the record that would allow the jury to infer Benitez and his family were involved in a drug deal with Mendoza and Jacobo. Jacobo's defense to false imprisonment therefore was no defense at all. "Where the record indicates the jury resolved the basic credibility dispute against the defendant

and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. [Citation.]" (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853, citing *People v. Jones* (1990) 51 Cal.3d 294, 307.)

Accordingly, we are satisfied any error of failing to provide a unanimity instruction is harmless beyond a reasonable doubt.

#### IV

#### *THE PROSECUTOR'S MISCONDUCT AND TESTIMONY CONCERNING MENDOZA'S STATEMENT RENDERED THE TRIAL UNFAIR AS TO JACOBO*

Jacobo contends the prosecutor committed prejudicial misconduct during her closing argument by: (1) claiming both appellants were guilty based on Mendoza's statement to Acevedo, (2) contending Ortiz did not appear at trial because she was afraid of the appellants and/or the appellants threatened her, and (3) placing the prestige of her office and her own personal belief behind the charges. The People argue Jacobo forfeited most of these claims by failing to object at trial. In addition, the People assert that, even if we do not find Jacobo forfeited these issues, he cannot establish he was prejudiced by any of the misconduct. We conclude the prosecutor committed prejudicial misconduct by arguing Jacobo's guilt based on Mendoza's statement.

##### A. The Prosecutor's Closing Argument

During her closing argument, the prosecutor placed Jacobo and Mendoza together in Las Vegas and used this "fact" as the foundation to establish their guilt:

"On that day the defendants, Mendoza and Jacobo, drove down here from Las Vegas. They drove to Coachella Valley to do a job. And

when they left Las Vegas they didn't necessarily know what that job was going to be. [¶] Once they arrived here, they met up with a contact person at Toro Loco in Coachella. And this contact person explained to them what their job was. . . . The job was to steal heroin. [¶] . . . [¶] . . . they kidnapped [Benitez] with the intent of going into that house and robbing drugs from the house. [¶] . . . [¶] . . . Defendant Jacobo knew that Mendoza intended to commit the crime. I think he knew what Defendant Mendoza intended to do. He also had a gun, he drove down here from Las Vegas, too. [¶] . . . [¶] . . . When they [Mendoza and Jacobo] met with the contact person and the contact person explained what the job was, the minute that they took any affirmative action carrying out the job, they formed the intent to commit the job. [¶] As I just discussed, the motive behind this kidnapping was those drugs. And so it wasn't just a simple kidnap, it was a kidnap for a higher purpose, to get the heroin."

During closing argument, the prosecutor also implied Ortiz did not appear at trial because she was afraid of Mendoza and Jacobo: "I'm sure that you can all imagine reasons why [Ortiz] is not here. It may be the same reason that Rafael Benitez sat there on the stand, for about a minute, when I asked him to identify the defendant and he looked at them and looked at me, and he didn't want to do it, and you knew you could see him thinking to himself, 'Am I going to do it or not?' " Mendoza's trial counsel objected to this argument, but the court overruled the objection.

In addition, the prosecutor claimed during closing argument: "Now the district attorney's office charged this complaint or information as we saw fit and I will argue to you why in count 1 kidnapping for robbery is the charge that is most appropriate to the behavior that the defendants engaged in." Neither appellant objected to this argument.

The prosecutor also expressed her personal opinion about the evidence: "So, overall, when I stood here on Wednesday and I opened this case before you, I was very

confident in my case. I had read the police reports -- and you'll notice that some of the statements that I made in my opening weren't exactly what happened once we listened to the testimony."

Finally, the prosecutor told the jury she believed in her "heart of hearts" that the defendants were guilty. Both appellants' respective trial counsel objected and moved for a mistrial. The prosecutor admitted she committed error. The court denied the motion for a mistrial, ruling an admonition was sufficient to correct the harm, and then admonished the jury to disregard the prosecution's belief of guilt.

#### B. The Law

"Closing argument in a criminal trial is nothing more than a request, albeit usually lengthy and presented in narrative form, to believe each party's interpretation, proved or logically inferred from the evidence, of the events that led to the trial. It is not misconduct for a party to make explicit what is implicit in every closing argument."

*(People v. Huggins (2006) 38 Cal.4th 175, 207.)*

" ' ' [A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.]" [¶] . . . 'A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests,

and in exercising the sovereign power, of the state.' " (*People v. Hill* (1998) 17 Cal.4th 800, 819-820.)

However, " '[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." ' " (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

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.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Also, a prosecutor may not vouch for the credibility of a witness by referring to evidence outside the record, or by invoking the prestige or reputation of the district attorney's office. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336-337.)

### C. The Prosecutor's Use of Mendoza's Statement to Argue Jacobo's Guilt

Prior to trial, Jacobo moved to exclude Mendoza's postarrest statements that implicated him. The court agreed and ruled the prosecution had to admonish Acevedo not to mention "they" and simply to speak in terms of only one person.

During the prosecution's case-in-chief, Acevedo testified in part as follows:

"Q: Did [Mendoza] admit to you he had a gun on him?

"A: Yes.

"Q: And did he tell you what kind of gun it was?

"A: He mentioned there was a .38 and a .22.

"Q: Okay. He didn't necessarily specify which one was on him?

"A: No.

"Q: Did he indicate to you whether the gun that he was using fell from his grasp at any point?

"A: I remember him saying when he jumped out of a window is when--

"Q: The gun--

"A: --the gun fell out.

"Q: And what did he say with regard to that? Was there anything in particular?

"A: Just that they were given two guns and that's it.

"Q: Who were they given - - I mean, rather, who was he given the gun by?

"A: The person that sent him to do that particular job."

Jacobo's trial counsel did not object to Acevedo testifying that "they" received guns.

At the conclusion of trial, the court instructed the jury, "Now, you've heard evidence that defendant Julian Imperial Mendoza made a statement before trial. You may consider that evidence only against him and not any other defendant." Despite this instruction, the prosecutor, solely based upon Mendoza's statement to Acevedo, argued: (1) Jacobo and Mendoza received guns and a job from an unnamed person in Las Vegas; (2) Jacobo and Mendoza left Las Vegas together with the purpose of stealing heroin from a home in California; (3) Jacobo and Mendoza met with a contact person in Coachella

who described the target house; and (4) the motive behind the crimes was to obtain drugs. There is absolutely no evidence supporting any of these arguments without Mendoza's statement to Acevedo. Thus, Jacobo's claim of prosecutorial misconduct is related to his claim that Acevedo's testimony about Mendoza's statement violated his Sixth Amendment right to confrontation.

*1. Acevedo's Testimony About Mendoza's Statement Implicates Jacobo's Sixth Amendment Right to Confrontation*

Related to his contention the prosecutor committed prejudicial misconduct with her reliance on Mendoza's statement to argue Jacobo's guilt, Jacobo asserts Acevedo's reference to "they" received guns in Las Vegas violated his Sixth Amendment right to confrontation.

In *People v. Aranda* (1965) 63 Cal.2d 518, 528-530 (*Aranda*),<sup>12</sup> the California Supreme Court held that a nontestifying defendant's statements which inculpate a codefendant are generally unreliable and violate the codefendant's rights of confrontation and cross-examination, anticipating a later ruling to the same effect by the United States Supreme Court in *Bruton, supra*, 391 U.S. 123. "Broadly stated, the rule of *Bruton v. United States* . . . declares that a nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and

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<sup>12</sup> To the extent the judicially declared rule of practice set forth in *Aranda, supra*, 63 Cal.2d 518, requires the exclusion of relevant evidence that would not be excluded under federal constitutional law, it was abrogated in 1982 by Proposition 8. (Cal. Const., art. I, § 28, subd. (d); *People v. Fletcher* (1996) 13 Cal.4th 451, 465 (*Fletcher*.) To the extent *Aranda* corresponds with *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*), it was not abrogated by Proposition 8. (*People v. Orozco* (1993) 20 Cal.App.4th 1554, 1564.)

hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120 (*Anderson*); superseded by statute with respect to the felony-murder special circumstance as stated in *People v. Letner* (2010) 50 Cal.4th 99, 163, fn. 20.)

"[W]hat is material for *Bruton-Aranda* analysis is not how the statement under review should be classified in the abstract . . . but rather whether on the facts of the individual case it operates to inculcate the other defendant." (*Anderson, supra*, 43 Cal.3d at p. 1123; italics omitted.) More recently, our Supreme Court also concluded that "editing a nontestifying codefendant's extrajudicial statement to substitute pronouns or similar neutral terms for the defendant's name will not invariably be sufficient to avoid violation of the defendant's Sixth Amendment confrontation rights. Rather, the sufficiency of this form of editing must be determined on a case-by-case basis in light of the statement as a whole and the other evidence presented at the trial." (*Fletcher, supra*, 13 Cal.4th at p. 468.)

The People argue Jacobo failed to demonstrate Acevedo's reference to "they were given two guns" violated *Bruton, supra*, 391 U.S. 123. They contend there is no evidence to establish who was with Mendoza when he was given the guns in Las Vegas. Further, the People insist the jury could not infer, simply from Acevedo's testimony and Jacobo's presence at the scene of the crimes, that Jacobo was with Mendoza in Las Vegas. The People also assert Jacobo could have joined Mendoza at any point during Mendoza's trip from Las Vegas to California. Thus, the People claim Acevedo's use of the word "they" was consistent with *Fletcher, supra*, 13 Cal.4th 451 because the use of a

neutral pronoun supports the inference that Jacobo was just one of a large group of individuals, anyone of whom could have been the other person mentioned in Mendoza's statement to Acevedo.

The People, however, fail to point out who these other individuals might be. Nor could they credibly do so. There is no evidence that Mendoza traveled with someone else or was in Las Vegas with some other person when he received his job. In other words, there was no group of people to whom Acevedo's use of "they" received guns could have implicated.

More egregiously, the prosecutor made certain that the only inference the jury could draw from Acevedo's improper testimony about Mendoza's statement was that Jacobo and Mendoza came together from Las Vegas. This was the cornerstone of her closing argument. The prosecutor explained to the jury that Mendoza and Jacobo drove from Las Vegas to Coachella to do a job, met with someone in Coachella who pointed out the target house, and then Jacobo and Mendoza drove to that house to steal heroin. As the People concede, except for Mendoza's statement to Acevedo, there was absolutely no evidence Jacobo was with Mendoza in Las Vegas. In addition, the court had ruled Mendoza's statement to Acevedo could not be used against Jacobo. It told the prosecutor to admonish Acevedo to avoid any reference to "they." The court also instructed the jury it could not consider Mendoza's statement in deciding Jacobo's guilt. Ignoring the court's order and the requirements of the Sixth Amendment, the prosecutor relied on Mendoza's statement to Acevedo to argue Jacobo's guilt throughout her closing. We are surprised the prosecutor did so.

Considering these circumstances, the People's argument that the use of the pronoun "they" was consistent with *Fletcher, supra*, 13 Cal.4th 451 is fatally flawed. "[R]edaction that replaces the nondeclarant's name with a pronoun or similar neutral and nonidentifying term will adequately safeguard the nondeclarant's confrontation rights unless the average juror, viewing the confession in light of the other evidence introduced at trial, could not avoid drawing the inference that the nondeclarant is the person so designated in the confession and the confession is 'powerfully incriminating' on the issue of the nondeclarant's guilt." (*Id.* at p. 467.) Here, Mendoza's statement was so powerfully incriminating it became the foundation of the prosecutor's closing argument. In using Mendoza's statement this way, we conclude the prosecutor committed misconduct.

## 2. *Forfeiture and Ineffective Assistance of Counsel*

The People argue Jacobo forfeited any appeal as to Acevedo's testimony regarding Mendoza's statement. Generally, they are correct. (See *People v. Jennings* (2010) 50 Cal.4th 616, 654 [failure to object waives appellate review of alleged error based on *Aranda-Bruton*].) Also, typically to appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*People v. Price* (1991) 1 Cal.4th 447; see also *People v. Rowland* (1992) 4 Cal.4th 238, 274.) Here, Jacobo's counsel did not make the necessary objections. Accordingly, we conclude he forfeited these issues.

To avoid forfeiture, however, Jacobo argues that his trial counsel was ineffective by failing to object. To show that trial counsel's performance was constitutionally defective, an appellant must prove: (1) counsel's performance fell below the standard of reasonableness, and (2) the "deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*)). It is the defendant's burden to prove the inadequacy of trial counsel, and defendant's burden is difficult to satisfy on direct appeal. Competency is presumed unless the record affirmatively excludes a rational basis for trial counsel's choice. (*People v. Ray* (1996) 13 Cal.4th 313, 349; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260.) We reverse on the ground of inadequate assistance on appeal only if the record affirmatively discloses no rational tactical purpose for counsel's act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

"Competent counsel is not required to make all conceivable motions or to leave an exhaustive paper trail for the sake of the record. Rather, competent counsel should realistically examine the case, the evidence, and the issues, and pursue those avenues of defense that, to their best and reasonable professional judgment, seem appropriate under the circumstances." (*People v. Freeman* (1994) 8 Cal.4th 450, 509.) Further, "a mere failure to object to evidence or argument seldom establishes counsel's incompetence." (*People v. Ghent* (1987) 43 Cal.3d 739, 772)

Here, in regard to Acevedo's testimony, the People offer a potential justification for Jacobo's trial counsel's inaction: the prosecutor's follow up question cured any potential error. We are unconvinced. While the prosecutor's follow up question

ultimately referred only to Mendoza receiving the guns, the question, at first, made reference to another individual as well: "Who were they given -- I mean, rather, who was he given the gun by?" Thus, the prosecutor's follow up question somewhat highlighted Acevedo's mistake in using the term "they." We fail to see how a reasonable attorney could believe the prosecutor's follow up question rectified any *Bruton* problem.

The People also argue Jacobo's trial counsel chose not to object to the prosecutor's closing when she argued Jacobo's guilt based upon Mendoza's statement because he decided to point out the prosecution's lack of evidence during his closing argument. This argument, however, overlooks the fact that Jacobo's trial counsel had to address the issue in closing argument because he allowed the prosecutor to improperly use Mendoza's statement throughout her closing argument. The prosecutor should never have been permitted to use Mendoza's statement to argue Jacobo's guilt in the first instance. Indeed, a pretrial ruling and jury instructions clearly informed her that she was not to do so. Jacobo's trial counsel, nevertheless, allowed the prosecutor to continually exacerbate the potential Sixth Amendment violation of Acevedo's testimony by arguing Jacobo's guilt based on Mendoza's statement. His attempt to correct the prosecutor's misconduct in his closing was feeble at best and could not provide an antidote to the jury, which the prosecutor poisoned with her improper closing argument. This was not the result of a reasonable attorney's tactical decision, but instead, was an attempt to recover from a grievous mistake that allowed the prosecutor to trample on Jacobo's constitutional rights.

Indeed, we struggle to contemplate any reason why Jacobo's trial counsel failed to object. This was not a situation where trial counsel could have been worried about

irritating the jury by objecting. Nor was there any evidence offered at trial that minimized or otherwise altered the impact of Mendoza's statement. The statement strongly implicated Jacobo and was the *only* piece of evidence linking Jacobo with Mendoza in Las Vegas and establishing in any way that Jacobo was aware of Mendoza's job to steal heroin. Yet, the prosecutor repeatedly made these arguments during her closing. We cannot imagine any tactical reason for Jacobo's trial counsel's failure to object, and thus, we determine this is one of those rare situations in which counsel could have had no reasonable purpose for failing to object.

Having concluded Jacobo's trial counsel's performance fell below the standard of reasonableness, we next determine if Jacobo was prejudiced by his counsel's performance. (See *Strickland, supra*, 466 U.S. at pp. 687-688.) Prejudice flowing from criminal defense counsel's deficient performance is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*In re Hardy* (2007) 41 Cal.4th 977, 1018.) Reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Id.* at pp. 1018-1019; see *Strickland, supra*, at pp. 693-694, 697-698 ["reasonable probability" does not mean "more likely than not," but merely "probability sufficient to undermine confidence in the outcome"].) A more favorable outcome under this analysis includes a hung jury. (Cf. *People v. Soojian* (2010) 190 Cal.App.4th 491, 519-521.)

On the record before us, we conclude a reasonable probability for a more favorable outcome exists if Jacobo's trial counsel would have objected. Had he objected to Acevedo's testimony, perhaps the prosecutor would have been deterred from using

Mendoza's statement to argue Jacobo's guilt. In addition, it is reasonably possible that an objection to Acevedo's testimony would have greatly reduced the likelihood the jury could or would infer Jacobo was in Las Vegas with Mendoza. Mendoza's statement conveniently and convincingly plugged holes left in the evidence that failed to explain Jacobo's connection to Mendoza prior to the night in question as well as Jacobo's knowledge of Mendoza's job of obtaining heroin. Indeed, absent the statement, Jacobo appears to be more of a passive accomplice of Mendoza rather than one who was involved in the planning stage of the crimes.

Also, had Jacobo's trial counsel objected to either Acevedo's testimony or the prosecutor's closing, there is a reasonable probability the court could have found a mistrial as to Jacobo. We simply cannot say, without serious doubt, there is not a reasonable probability, absent Mendoza's statement and the prosecutor's argument based on that statement, that a different outcome would have occurred.<sup>13</sup>

The People contend, however, Jacobo was not prejudiced because the case against him was overwhelming. We agree that the evidence was overwhelming as to false imprisonment in count 5. Jacobo held Benitez at gun point in the kitchen and ensured Benitez's wife and children remained in the bedroom. Regardless of any testimony concerning Las Vegas or Jacobo's knowledge of the job to steal heroin, we are satisfied the evidence overpoweringly establishes Jacobo's guilt of false imprisonment. That said,

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<sup>13</sup> This conclusion does not undermine our determination that substantial evidence supports Jacobo's convictions under counts 1, 2, 5, and 7, which involved a different standard of review.

the combination of Acevedo's testimony and the prosecution's misconduct in arguing Jacobo's guilt based on Mendoza's statement prejudiced Jacobo on his other counts. (See *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795 ["We therefore conclude the combined effect of the two errors substantially impaired his constitutional right to a fair trial."].) We simply are not confident in the outcome of the trial as to counts 1, 2, and 7 with these errors, and therefore, we reverse Jacobo's convictions under those counts.

#### D. Jacobo's Remaining Contentions of Prosecutorial Misconduct

While we find the rest of the prosecutor's arguments during closing argument challenged by Jacobo improper, we do not believe they rise to the level of misconduct that prejudiced Jacobo. For example, Mendoza's trial counsel argued Ortiz did not appear at trial because she was somehow involved the sale of illegal drugs. No evidence in the record supports this argument. In response, the prosecutor implied Ortiz did not appear at trial because she, like Benitez, was afraid of the appellants or had been intimidated by them. While there is little evidence to support the prosecutor's argument, it would not be unreasonable for the jury to infer victims of a violent crime (like kidnapping or robbery) would be hesitant to testify against their attackers. Indeed, Benitez appeared reluctant to identify either appellant at trial. When the prosecutor asked him to do so, he looked over at the jury box, and the prosecutor had to ask him to look around the courtroom to see if he recognized anyone. Benitez responded that he could not remember well.

"Although the remarks of a defense counsel do not justify retaliation by the prosecution, such remarks must be considered in assessing the prejudicial effect of the prosecutorial misconduct." (*People v. Perry* (1972) 7 Cal.3d 756, 789, overruled on

other grounds in *People v. Green* (1980) 27 Cal.3d 1, 28-34; overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) Here, in the context of the parties trying to explain Ortiz's absence to their advantage, we determine Jacobo was not prejudiced by the prosecutor's explanation why Ortiz did not appear at trial.

We also conclude the prosecutor's reference to the police reports and her statements of her confidence in her case do not rise to the level of prejudicial misconduct. The prosecutor should not have referenced the police reports, but we agree with the trial court that this reference did not suggest her confidence in her case was based on evidence outside the record. Indeed, in her closing she implies her thoughts on the case based on the police reports were incorrect. The prosecutor's confidence in the case was based on the evidence in the record, not other knowledge or facts not known to the jury. As such, we conclude this did not amount to prejudicial misconduct.

Jacobo also contends this case is analogous to *People v. Alvarado* (2006) 141 Cal.App.4th 1577 (*Alvarado*), and therefore, we should determine the prosecutor's use of the prestige of her office during closing argument was prejudicial misconduct. We disagree.

In *Alvarado*, the defense counsel suggested during closing argument that a prosecution witness was coached by certain police "officers and possibly by the prosecutor." (*Alvarado, supra*, 141 Cal.App.4th at pp. 1582-1583.) The prosecutor stated in rebuttal closing argument, " I have a duty and I have taken an oath as a deputy District Attorney not to prosecute a case if I have any doubt that the crime occurred. [¶] The defendant charged is the person who did it. To insinuate, suggest, or to say outright

that I would risk my job, my profession, multiple police officers . . . to suggest that any of us would put our professional career on the line because this thug took some kid's bike is offensive and it is preposterous.' " (*Id.* at p. 1583; italics omitted.) The court concluded the prosecutor committed misconduct because the only inference that could be drawn from the comments was the prosecutor would not have charged Alvarado unless he was guilty, the jury should rely on the prosecutor's opinion to convict the defendant, and the jurors should believe the subject prosecution witness for the same reason. (*Id.* at p. 1585.)

Here, unlike *Alvarado*, the prosecutor did not use the prestige of her office to bolster the credibility of a witness. Instead, the prosecutor stated her office charged the defendants appropriately and would explain why the evidence supported the crimes charged: "Now the district attorney's office charged this complaint or information as we saw fit and I will argue to you why in count 1 kidnapping for robbery is the charge that is most appropriate to the behavior that the defendants engaged in." The prosecutor then continued to review the evidence at trial and explain why the jury should convict the defendants based on the evidence. To the contrary, in *Alvarado*, the defense attorney questioned the testimony of a witness, and the prosecutor used the prestige of her office to bolster the credibility of that witness. (*Alvarado, supra*, 141 Cal.App.4th at p. 1583.) Here, the prosecutor did no such thing.

While the prosecutor did not use the prestige of her office to bolster the credibility of a witness, the combination of her references to the district attorney's office correctly charging the defendants coupled with her statement that she believed in her "heart of

hearts" that appellants were guilty causes us concern. However, the court gave an appropriate admonition, and Jacobo has not shown he was prejudiced by these arguments.

#### E. Conclusion

The cumulative effect of the prosecutor arguing Jacobo's guilt based on Mendoza's statement to Acevedo, as well as Acevedo's testimony that "they" received guns, rendered the trial fundamentally unfair as to Jacobo for counts 1, 2, and 7. (See *People v. Cuccia*, *supra*, 97 Cal.App.4th at p. 795.) We therefore reverse Jacobo's convictions under these counts. However, we determine that overwhelming evidence supports Jacobo's conviction for false imprisonment (count 5) and these errors did not prejudice Jacobo on that count. While the remaining prosecutor's statements challenged by Jacobo are improper, we do not believe they rise to the level of prejudicial misconduct.<sup>14</sup>

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<sup>14</sup> Although Mendoza, in his opening brief, joined in the arguments advanced by Jacobo, he did not supply any additional argument on any of the issues raised by Jacobo. Joinder may be broadly permitted (Cal. Rules of Court, rule 8.200(a)(5)), but each appellant has the burden of demonstrating error and prejudice. (*People v. Coley* (1997) 52 Cal.App.4th 964, 972; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["Because of the need to consider the particulars of the given case, rather than the type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice."].) To the extent Mendoza's cursory joinder was an attempt to claim the prosecutor committed prejudicial misconduct, his reliance solely on Jacobo's arguments and reasoning is insufficient to satisfy his burden on appeal. We found prejudicial misconduct based on the prosecutor's use of Mendoza's statement in closing to argue Jacobo's guilt. Mendoza cannot claim error from the use of his statement against him. Because we determine the rest of the prosecutor's conduct was not prejudicial misconduct, we also conclude Mendoza's claim of error, if any, must fail. Further, from our review of the record, it is not apparent how any of the other issues raised by Jacobo apply to Mendoza.

V

*THE FIREARM USE ENHANCEMENT*

Jacobo contends, and the People concede, the firearm use enhancement under section 12022.53 must be stricken because false imprisonment under section 236 is not one of the enumerated offenses to which the enhancement attaches. We agree. False imprisonment is not a designated offense under section 12022.53, subdivision (a), and therefore, the enhancement does not apply. (See § 12022.53, subd. (a).)

VI

*JACOBO'S OTHER CONTENTIONS*

Because we reverse Jacobo's convictions under counts 1, 2, and 7, we do not reach his claims that: (1) the jury was not properly instructed on count 7; and (2) his sentence under counts 5 and 7 must be stayed under section 654.

DISPOSITION

We reverse Mendoza's conviction under counts 3, 4, and 6. We reverse Jacobo's convictions under counts 1, 2, and 7. We order the superior court to strike the

enhancement under section 12022.53 on count 5 as to Jacobo. We otherwise affirm the judgment. We remand this matter back to the superior court for such further proceedings as may be appropriate.

HUFFMAN, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.