

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL BRUNO MANDOCK,

Defendant and Appellant.

E053742

(Super.Ct.No. SWF025152)

OPINION

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge. (Retired judge of the Tulare Mun. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed in part; affirmed in part as modified.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Heidi T. Salerno, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Samuel Bruno Mandock of simple kidnapping (count 1—Pen. Code § 207, subd. (a))¹ and false imprisonment (§ 236). The trial court granted defendant 36 months of probation with a requirement that he serve 365 days in jail; that he pay the costs of preparation of the probation report in an amount to be determined by the probation department, but not to exceed \$1,095; that he pay probation supervision costs in an amount to be determined by the probation department, in an amount between \$591.12 and \$3,744; that he pay booking fees in the amount of \$414.45; a conviction fee of \$30 for each of his two convictions; and that he pay a security fee of \$40 for each of his two convictions.

Defendant appeals contending the court erred in admitting the recording of his in-custodial statements in violation of *Miranda*;² in failing to issue a sua sponte jury instruction on the principles of aiding and abetting with respect to the charge of kidnapping; in permitting his separate conviction for false imprisonment because it is a necessarily lesser included offense of kidnapping; and in imposing the above enumerated fines and fees without making a determination of defendant's ability to pay, the sufficiency of the evidence to support the amounts, and in making some of them conditions of his probation. We direct the trial court to strike defendant's conviction on count 2 for false imprisonment. We likewise strike imposition of the booking fee and the

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

² *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

conviction and security fees imposed as to defendant's count 2 conviction. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On March 21, 2008, at approximately 3:30 p.m., a resident living on Main Street in Lake Elsinore witnessed a silver four-door sedan pull up to his neighbor's home, blocking the driveway so that no vehicles could leave. Four White or Hispanic men between the ages of 18 and 22 exited the vehicle; two entered the neighbor's house through the front door while the other two entered through the back. The resident heard a commotion and then witnessed the men removing another man involuntarily from the home. The latter individual appeared to be tied up with his arms behind his back; the other men threw him into the trunk of the car and sped off. The resident initially believed the men were officers because two of them had a holster-type belt like officers would wear. Nonetheless, none of the men announced themselves as officers. The resident gave the license plate number of the vehicle to law enforcement.

On the same date, at around the same time, another neighbor witnessed two White men in their mid-20s pass between her home and enter the adjacent home through the rear door. She heard someone say, "This is the police department." She then witnessed them throw the victim "hog-tied" into the trunk of a car, shut the trunk, and drive off down the alley behind their home. Another man came out within a few minutes and took off in the victim's black car that was parked in the driveway. The police department is about a mile and a half away from her home; there is a sign a block away directing people how to get to it.

Matthew Graham, the resident of the home from which the victim was taken, testified that on the same date and time as testified to above, he had five people at his home; one of them was the victim. Three or four White men in their 20s came into the house, told the victim he was under arrest, threw the victim on the couch, handcuffed him, and took him outside. One of them had a utility belt with a “big thing of mace and handcuffs. And I thought he was, like, a bounty hunter” The utility belt was one like officers wear with a “handcuff holder, and I think . . . a giant knife and a can of mace.” The individual with the utility belt was the one who handcuffed the victim. One or two of the men were punching the victim in the face, head, and body.

The victim reluctantly testified against defendant, his friend. The victim had been taken in previously by the family of Ryan Thomas, one of the other individuals involved in the victim’s kidnapping. Nevertheless, the victim had stolen Thomas’s father’s car a day or two before the kidnapping. On the same date and time as testified to above, defendant, Thomas, and another individual came into Graham’s home; defendant handcuffed the victim face down on a couch, they dragged him to Thomas’s car, put him in the trunk, and drove him to Thomas’s father’s home. While he was face down on the couch, he was repeatedly stricken, though he could not say by whom. Defendant told him to get into the trunk of the car. All of them, including defendant, put him in the trunk; “I leaned against the bumper, and they put me in, you know, my legs, my arms, and pushed me so they could close the trunk.” The victim never heard any of them tell him he was under arrest.

A deputy from the San Diego County Sheriff's Department released the victim from the trunk in the City of Valley Center. The victim initially lied to the deputies, telling them he voluntarily placed the handcuffs on himself and entered the trunk of the car. He recanted immediately upon being informed that law enforcement had statements from several percipient witnesses. The victim incurred knots all over his head, required stitches to his lip, had bruises on his back and ribs, and cuts on his wrists from the handcuffs.

San Diego County Sheriff's Deputy James Bennetts received a call from the Riverside County Sheriff's Department that day, requesting assistance regarding a suspected kidnapping. He was posted on the outside of a gated community in Valley Center where the address for Thomas's silver Honda Civic was registered; two other units were posted inside the community at the address of the home to which the car was registered. When he saw the vehicle enter the community, he followed it; he activated his lights when the car approached the registered address. The driver was identified as Thomas, the passenger as Tyler Rothermel. Another officer asked if the victim was still in the trunk; Thomas replied that he was. The officer ordered Thomas to pop the trunk; the victim was inside lying on his back with his hands handcuffed behind him. It was approximately 5:00 p.m. when the victim was released from the trunk.

Defendant arrived at the Valley Center residence in Thomas's father's black Honda prior to the arrival of Thomas's car. When the Deputy removed the handcuffs from the victim's wrists, defendant stated the handcuffs were his. The victim had a laceration to his right wrist and an abrasion to his left wrist, presumably from the

handcuffs. The officers immediately provided the victim with water, because it was a hot day and the victim appeared hot and sweaty. The victim admitted stealing the black Honda and “spoofed the plates.”

Riverside County Sheriff’s Department Investigator William Stens responded to both the Lake Elsinore and Valley Center addresses on March 21, 2008, in response to the alleged kidnapping. Valley Center is approximately 45 miles from Lake Elsinore; it takes around an hour to travel between them. There are at least six readily identifiable posted signs for law enforcement agency locations between the Lake Elsinore address and the Riverside/San Diego County borders.

DISCUSSION

A. MIRANDA

Defendant contends the trial court erred in declining to exclude evidence, an audio recording, of defendant’s in-custody statements to an interrogating officer in purported violation of the dictates of *Miranda*. Specifically, defendant maintains that defendant invoked his right to counsel such that the interview should have been terminated immediately and, therefore, all defendant’s subsequent inculpatory statements should have been excluded from the evidence adduced at trial. The People respond that defendant’s ostensible invocation of his right to counsel was ambiguous, that the officer merely requested clarification, and defendant thereafter spontaneously related his version of events. Thus, the People assert defendant never clearly invoked his right to counsel, and his statements were properly admitted at trial. We agree with the People.

Nevertheless, even if the court erred in allowing the recording to be played at trial, any error was harmless.

In their in limine motion filed March 11, 2011, the People sought admission of defendant's in-custodial statements at trial. On March 15, 2011, defendant moved to suppress the interrogation. The People produced a transcript of the interview.

After bringing defendant to an interrogation room, Deputy Stens and defendant engaged in the following colloquy: "Stens: Alright, [defendant], I'm Investigator Stens, this is my partner, Investigator Deans. We're with the Riverside County Sheriff's Department. Ummm, obviously, you're in custody, we brought you here, so we got to read you your rights, alright?"

"[Defendant]: Kind of.

"Stens: You have the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer; one will be appointed to represent you before any questioning if you wish one. Do you understand each of these rights I've explained to you?"

"[Defendant]: Ahhh, yeah, about a lawyer, ummmm, when could I call him?"

"Stens: What do you mean, when can you call him?"

"[Defendant]: Like, can I call a lawyer, 'cuz I know a lawyer that I, am I being arrested?"

"Stens: Yeah.

"[Defendant]: I am being arrested?"

“Stens: Uh huh. (Affirmative)

“[Defendant]: Along with the other two?

“Stens: Uh huh. (Affirmative)

“[Defendant]: 'Kay. So, when can I like make a phone call for a lawyer?

“Stens: You can make a phone call from the jail.

“[Defendant]: Okay.

“Stens: Okay?

“[Defendant]: Alright. That's what I wanna do now.

“Stens: Okay. You don't wanna talk to us then?

“[Defendant]: Well, what do you want to talk about?

“Stens: Wanna talk about what happened. Get your side of the story. And we weren't there, we're trying to piece everything together and figure out what happened.

“[Defendant]: Pretty much blacked out the whole scenario but I can tell you why I went.

“Stens: Okay. So you want to tell us your side of the story?

“[Defendant]: I'll tell you why I went.”

Defendant then went on to give a rather lengthy narration of the events of the day. He told the officers his old friend, the victim, got out of jail and defendant invited the victim to stay with him. Defendant's house was broken into; his roommate's money was stolen. At a party two weeks earlier, the victim kept going in and out of a room in which defendant's girlfriend had left her wallet; half her money was stolen. Thomas later called him and told him the victim stole his cousin's vehicle. They then received a call from

someone who told them where the victim was. Defendant grabbed his handcuffs and told Thomas to come pick him up.

Defendant stated: “So; I was like, maybe if I can go in there, sneak in there, I’ve seen dog and all that stuff and how fast they move and I just came in really quick, put him on the floor, handcuffed him up, he got roughed up alittle [*sic*] bit ‘cuz he was getting crazy and they were all doing drugs in the house . . .” Defendant told the victim, “‘You’re under arrest, you’re under arrest, I’m citizen’s arresting your ass.’” Everyone else then said, “‘Get him out of here, get him out of here’ so we get him out. Take him, going to put him in the back of the car. Back of the car, no, no, let’s put him in the trunk.” Defendant then blacked out.

Defendant called his father and explained what they had done. His father warned him he could get in trouble for kidnapping. Defendant responded, “‘Well I’m not driving that car, I, I didn’t put him in there. I’m, I’m driving the car home.’ I justified, I brought this guy, you know, I’m bringing him, I’m bringing [him] to the guy that’s he got the car stolen from, you know.”

Defendant admitted driving the stolen car “home.” He admitted handcuffing the victim. Defendant stated: “I took justice into my hands. I shouldn’t have but I didn’t think that way, you know. . . . I can’t take back what was done, you know, but there was no intent on hurting the guy. . . . We didn’t, we didn’t know that, you know, cops were gonna be waiting and everything that all this was going down like how it was. We thought that we were gonna get him there and . . . Ryan’s dad, Bill could tell him, you know, like, ‘why, why do you do this?’ you know.” When asked why he did not simply

call the police, defendant responded that he did not have the number and did not believe they would show up in time to recover the stolen vehicle anyway.

The trial court denied defendant's motion to suppress, noting that although defendant mentioned calling an attorney, "[a]nd then some more questions were asked, but they tend to be clarifying questions. I do not find that to be an invocation of Miranda. I will not keep it out on that basis." During trial, the recording of the interview was played in its entirety, and copies of a transcription of the recording were distributed to the jury. During deliberations, the only request made by the jury was for the CD and transcripts of the interview.

"No person . . . shall be compelled in any criminal case to be a witness against himself" (U.S. Const., 5th Amend.) "[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege" (*Miranda, supra*, 384 U.S. at pp. 478-479.) These procedural safeguards include a police advisement that the individual has the right to remain silent; that anything he says may be used against him in a court of law; that he has the right to the presence of an attorney; and that if he cannot afford one, one will be appointed free of charge. (*Id.* at p. 479.)

Whether a suspect invokes his right to counsel is an objective inquiry. (*Davis v. United States* (1994) 512 U.S. 452, 458-459.) "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' [Citation.]" (*Ibid.*) The

suspect “must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” (*Ibid.*; see *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1124.)

When considering a claim that a statement was inadmissible at trial because it was obtained in violation of the *Miranda* rights, the scope of review is well established. ““We must accept the trial court’s resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.]” (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) ““[W]hen two or more inferences can reasonably be deduced from the facts,” either deduction will be supported by substantial evidence, and “a reviewing court is without power to substitute its deductions for those of the trial court.” [Citation.]’ [Citation.]” (*In re Eric J.* (1979) 25 Cal.3d 522, 527.) The reviewing court then independently determines whether the challenged statement was obtained in violation of *Miranda*. (*People v. Farnam* (2002) 28 Cal.4th 107, 178.)

In order to invoke the right to counsel at an interrogation, a defendant must ask for “the *particular* sort of lawyerly assistance that is the subject of *Miranda*.” (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 176-177, italics added.) Such an invocation “requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*.” (*Id.* at p. 178.) “Invocation of the *Miranda* right to counsel ‘requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.’ [Citation.] But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the

circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. [Citation.]” (*Davis v. United States, supra*, 512 U.S. at p. 459.)

Defendant’s statements that he wanted to know when he could call an attorney were not clear and unambiguous requests for the assistance of an attorney “*in dealing with [his] custodial interrogation by the police.*” (*McNeil v. Wisconsin, supra*, 501 U.S. at p. 178.) The statements did not unequivocally convey the impression to a reasonable officer that defendant wanted an attorney immediately in dealing with his interview *at that moment*. Rather, they could reasonably be construed as a request to know when defendant could speak with a particular attorney he already had in mind, not a request for an attorney in dealing with the matter immediately before him.

Indeed, Deputy Stens’s statement that defendant could speak with the particular attorney he had in mind by phone when he was returned to jail could reasonably be construed as an offer to immediately allow defendant to return to the jail to do just that, i.e., Deputy Stens’s willingness to terminate the interrogation without delay if that was what defendant was requesting. When defendant stated “that’s what I wanna do,” Deputy Stens did not attempt to further question defendant regarding the case, but merely asked if that meant he wanted to instantly cease the interview. Instead of saying that he did, defendant asked Deputy Stens what Deputy Stens wished to speak to him about. Deputy Stens told him they wanted to hear his side of the story. Without further prodding, defendant immediately launched into the lengthy narrative discussed above. At no point did defendant clearly request counsel in dealing with his interrogation. Likewise, Deputy

Stens did not initiate defendant's spontaneous recital of the events of that day with particularized questioning. We agree with the trial court that Deputy Stens's statements and questions were clarifications of defendant's requests, and that defendant did not clearly invoke his *Miranda* rights. Thus, the recording of defendant's in-custody statements was properly admitted at trial.

Nonetheless, even assuming error, we find admission of the recording harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [admission of involuntary confession subject to harmless error analysis]; *People v. Sims* (1993) 5 Cal.4th 405, 446-447 [admission of statement obtained in violation of *Miranda* subject to harmless error analysis under California Constitution].) Our factual history *ante*, reflects the status of the evidence without the admission of defendant's statements during interrogation. That evidence included the testimonies of multiple, non-interested parties: that several young men entered the residence, bound the victim, removed him from the residence, took him to the car, threw him in the trunk, and sped away. The victim testified defendant was the individual who handcuffed him, told him to get in the trunk, and actually helped put him in the trunk. Defendant drove off in the stolen car. Defendant arrived at Thomas's father's house before Thomas, the rationale inference of which suggests he knew where defendant was being taken. Defendant spontaneously informed the officer who removed the handcuffs from the victim's wrists that they belonged to him. Defendant presented no defense of mistaken identity.

Instead, defendant argued that he had engaged in a lawful citizen's arrest. The court instructed the jury with the law regarding a lawful citizen's arrest.³ However, without the recording, the only evidence even remotely connected with defendant's defense was one witness's testimony that he *initially* believed the men to be police, but that they never announced themselves as officers. Another witness testified that she heard someone say, "This is the police department." The resident of the home testified he thought defendant was a bounty hunter, and that the individuals told defendant he was under arrest; the resident of the home never testified that defendant announced he was making a citizen's arrest. The victim testified no one ever said they were making a citizen's arrest. The victim was beaten. The evidence reflects defendant passed at least six posted signs for law enforcement agencies on his 45-mile, one-hour journey to meet up with the others. The status of the evidence without the recording overwhelmingly presented the picture of defendant's intimate involvement in a conspiracy to kidnap the victim to recover the stolen vehicle, and exact revenge for its taking. Thus, we conclude

³ CALCRIM No. 1226 reads, in pertinent part: "The defendant is not guilty of kidnapping if he was making a lawful citizen's arrest. [¶] A lawful citizen's arrest occurs when: One, a person who is making the arrest acts because a felony has been committed; two, that person has reasonable cause to believe the person arrested committed the . . . felony Three, the person making the arrest must, without unnecessary delay, take the person arrested before a magistrate or deliver him to a peace officer; four, the person making the arrest must not use more force than is . . . reasonably . . . necessary to make the arrest. [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not making a lawful citizen's arrest. If the People have not met this burden, you must find the defendant not guilty of kidnapping and false imprisonment."

beyond a reasonable doubt that any error in the admission of defendant's statements made no difference in the verdict.

B. AIDING AND ABETTING INSTRUCTION

Defendant contends the trial court erred in neglecting to give a sua sponte jury instruction on aiding and abetting. He maintains that because he did not drive or ride in the vehicle in which the victim was taken to Valley Center, he did not participate in the asportation element of the kidnapping; thus, he could not be convicted as a principal. Moreover, he maintains that, as such, his defense that he was engaging in a lawful citizen's arrest would have been correspondingly enhanced had such an instruction been given. We hold substantial evidence did not support the instruction.

“Even absent a request, the trial court must instruct on the general principles of law applicable to the case. [Citation.] The general principles of law governing a case are those that are commonly connected with the facts adduced at trial and that are necessary for the jury's understanding of the case. [Citation.] The trial court must give instructions on every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case. [Citation.] Evidence is ‘substantial’ only if a reasonable jury could find it persuasive. [Citation.] The trial court's determination of whether an instruction should be given must be made without reference to the credibility of the evidence. [Citation.] The trial court need not give instructions based solely on conjecture and speculation. [Citation.] [¶] Instructions on aiding and abetting are not required where ‘[t]he defendant was not tried as an aider and

abettor, [and] there was no evidence to support such a theory.’ [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1200-1201.)

“In order to establish a kidnapping under section 207, subdivision (a), the prosecution must prove “(1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person’s consent; and (3) the movement of the person was for a substantial distance.” [Citation.]’ [Citation.] In determining whether the third element, asportation, has been satisfied, a trier of fact may consider ‘not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim’s foreseeable attempts to escape and the attacker’s enhanced opportunity to commit additional crimes.’ [Citation.]” (*People v. Arias* (2011) 193 Cal.App.4th 1428, 1434-1435.) “Unlike aggravated kidnapping, asportation for simple kidnapping does not *require* a finding of an increase in harm to the victim or other contextual factors. [Citations.]” (*Id.* at p. 1435.)

First, although not argued to the jury, defendant’s handcuffing of the victim, participation in the movement of defendant from the interior of Graham’s home to Thomas’s car, and help in placing defendant inside the trunk of that vehicle, were sufficient to support the element of asportation for purposes of the conviction of defendant as a direct perpetrator. As noted above, “nothing in the language of section 207(a) limits the asportation element solely to actual distance.” (*People v. Martinez* (1999) 20 Cal.4th 225, 236.) “[I]n a case where the evidence permitted, the jury might

properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*Id.* at p. 237, fn. omitted; see *People v. Shadden* (2001) 93 Cal.App.4th 164, 169 [movement of victim nine feet sufficient to support asportation element]; *People v. Smith* (1995) 33 Cal.App.4th 1586, 1594 [movement of 40 to 50 feet sufficient to support asportation element].)

Although we do not know the actual distance defendant helped move the victim, it is reasonable here to infer that it was at least nine feet. Moreover, defendant's actions certainly increased the risk of harm to the victim, decreased the likelihood of the perpetrator's detection, and enhanced the opportunity of defendant and his friends to commit additional crimes against the victim. Defendant and his friends removed the victim from the home in which at least four other individuals were present, handcuffed him, placed him in the trunk of a car, and left the scene. Furthermore, it is reasonably inferable from defendant's placement of the victim in the trunk of Thomas's car and subsequent arrival at the compatriots' mutual destination, that defendant knew where his companions were taking the victim. Thus, defendant directly helped perpetrate the asportation element of the kidnapping by handcuffing defendant, placing him in the vehicle, and plausibly driving as a look out for the actual transportation vehicle. Indeed, defendant was not tried as an aider and abettor, but solely as a direct perpetrator. Neither the prosecution's nor the defense's theory of the case posited defendant as anything other

than a direct perpetrator. Thus, insufficient evidence supported a contention that defendant acted as an aider and abettor to the kidnapping rather than as a direct perpetrator.

Second, it is not settled that even when an individual has not directly participated in each element of a crime, an instruction on aiding and abetting is required.⁴ “Defendant cites no [binding] authority for the proposition that when a ‘key element’ of a crime is performed by another person, any accomplice is merely an aider and abettor.” (*People v. Cook* (1998) 61 Cal.App.4th 1364, 1368).) “[O]ne who engages in conduct that is an element of the charged crime is a perpetrator, not an aider and abettor, of the completed crime. . . . If the defendant performed an element of the offense, the jury need not be instructed on aiding and abetting, even if an accomplice performed other acts that completed the crime.” (*Id.* at p. 1371.) “In this case, the uncontradicted evidence . . . was that defendant provided the ‘force or fear’ necessary to accomplish the [kidnapping]. As such, he was one of the direct perpetrators of the offense of [kidnapping], even if he did not physically” move the victim. (*Ibid.*) Therefore, no aiding and abetting instruction was required.

Defendant cites *Cook v. Lemarque* (E.D. Cal. 2002) 239 F.Supp.2d 985, 996, for the proposition that the rule established in *People v. Cook* is unconstitutional: “Due process requires that all elements of the offense be proven against the defendant.

⁴ Counsel acknowledge this precise issue is currently before the California Supreme Court in *People v. Delgado* (2011) 193 Cal.App.4th 1202, review granted June 29, 2011, S192704.

However, the [*People v.*] *Cook* rule allows the prosecution to prove an offense by establishing only one element as to a particular defendant, effectively removing the necessity of proving all required elements and thereby lessening the burden of proof. Pursuant to the [*People v.*] *Cook* rule, if a crime is completed, then the prosecution need only prove that a defendant committed one element in order for the defendant to be found guilty of the entire crime, so long as another actor committed the remaining elements. Under [*People v.*] *Cook*, in such a case, aiding instructions are unnecessary.” (*Id.* at p. 996.) However, we are not bound by the decisions of lower federal courts. (*People v. Clark* (2011) 52 Cal.4th 856, 967; *People v. Racklin* (2011) 195 Cal.App.4th 872, 876; *In re Douglas* (2011) 200 Cal.App.4th 236, 248; *People v. Cleveland* (2001) 25 Cal.4th 466, 480, declined to follow on another ground in *People v. Thompson* (2010) 49 Cal.4th 79, 137.)

In *People v. Sassounian* (1986) 182 Cal.App.3d 361, 404, the defendant made a similar argument. The court noted that “[i]f any theory of the prosecution’s case was based upon aiding and abetting, then this contention would have merit”; however, since “the defendant was not tried as an aider and abettor, but as one of the direct and active participants in this crime[;] [a]ll of the evidence presented by the People demonstrated that” he was a principal; and neither party argued aiding and abetting to the jury, the court did not err in declining to issue a sua sponte instruction on aiding and abetting. (*Id.* at pp. 404-405.) Here, the prosecution’s theory of the case was that defendant was a direct perpetrator of the crimes; all the evidence presented demonstrated he was a principal, and neither party argued he was merely an aider and abettor of the crimes.

Finally, even the California Supreme Court has noted in dicta the nebulous distinction between a direct perpetrator and an aider and abettor: “It is often an oversimplification to describe one person as the actual perpetrator and the other as the aider and abettor. When two or more persons commit a crime together, both may act in part as the actual perpetrator *and* in part as the aider and abettor of the other, who also acts in part as an actual perpetrator. . . . In either case, both participants would be direct perpetrators as well as aiders and abettors of the other. The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices’ actions as well as their own. It obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role.” (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120.) Here, where the People’s theory of the case presented defendant as a direct perpetrator; the evidence sufficiently established his direct perpetration of the offenses; neither party argued his conduct under an aiding and abetting theory; and defense counsel did not request instruction on aiding and abetting, we hold the court did not err in declining to so instruct the jury on its own motion.

C. FALSE IMPRISONMENT AS A LESSER INCLUDED OFFENSE OF KIDNAPPING

Defendant contends that because false imprisonment is a lesser necessarily included offense of kidnapping, defendant’s conviction for false imprisonment must be reversed. The People concede the issue. We agree and, therefore, reverse defendant’s conviction for false imprisonment.

“The law prohibits simultaneous convictions for both a greater offense and a lesser offense necessarily included within it, when based on the same conduct. [Citation.] ‘When the jury expressly finds defendant guilty of both the greater and lesser offense . . . the conviction of [the greater] offense is controlling, and the conviction of the lesser offense must be reversed.’ [Citation.]” (*People v. Milward* (2011) 52 Cal.4th 580, 589; see *People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1147; *People v. Pearson* (1986) 42 Cal.3d 351, 355, *People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) False imprisonment is a lesser necessarily included offense of simple kidnapping. (*People v. Morrison* (1964) 228 Cal.App.2d 707, 713; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547-548; *People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 820-821 [when both counts relate to same act]; *People v. Martinez* (1984) 150 Cal.App.3d 579, 598-599, overruled on another ground in *People v. Hayes* (1990) 52 Cal.3d 577, 628, fn. 10; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120-1121; *People v. Straight* (1991) 230 Cal.App.3d 1372, 1374; *People v. Daniels* (1993) 18 Cal.App.4th 1046, 1053; *People v. Chacon* (1995) 37 Cal.App.4th 52, 65; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 380.)

Here, the People argued at sentencing that instructions on false imprisonment were given as a lesser necessarily included offense of count 1, and that the count 2 charge of false imprisonment was based on separate conduct. However, the record belies the People’s contention below. No instructions on lesser included offenses were given with respect to the kidnapping charge. The People adduced no evidence below that the imprisonment of the victim was, in any way, separate from the overriding goal of kidnapping him. Thus, the trial court should have instructed the jury with CALCRIM

No. 3519 (for use when lesser included offenses and greater crimes are separately charged). Because the jury convicted defendant for both the greater and lesser crime, we must strike his conviction on the lesser. Therefore, defendant's conviction for false imprisonment is stricken.

D. FEES AND FINES

Defendant contends the court's orders directing defendant to pay several fees and fines were unaccompanied by the requisite determination of defendant's ability to pay, lacked sufficient evidence to support the amount of the fee or fine, and/or were improperly imposed as conditions of his probation. We shall address each fee or fine separately.

1. *PROBATION REPORT FEE*

Defendant contends the court erred in imposing a fee, not to exceed \$1,095, for the cost of preparing the probation report. In particular, defendant maintains the court failed to notify him he had the right to a hearing to determine his ability to pay such a fee, and that no evidence supported the court's implicit order that he had such ability. We hold defendant forfeited the issue by failing to raise it below.

Section 1203.1b, subdivision (a) permits the sentencing court to order defendant to pay the reasonable costs of the preparation of any presentence probation report: "The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court

shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver." (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072, fn. 2.) "[F]ailure to object in the trial court to statutory error in the imposition of a probation fee under section 1203.1b [forfeits] the matter for purposes of appeal." (*Id.* at p. 1072.)

Here, defendant was notified the probation office was seeking that defendant "[p]ay [the] costs of pre-sentence probation report in an amount and manner to be determined by Probation Department, not to exceed \$1095.00." At the sentencing hearing, defense counsel argued that the court should grant defendant probation and impose minimal jail time. The court noted, "if I'm going to adopt, as modified, the findings of probation, would [defendant] waive a reading of those?" Defense counsel replied that he would. The court ordered defendant to "pay the cost of the presentence probation report in an amount and manner to be determined by the Probation Department, not to exceed \$1,095." Thus, the sentencing court offered defense counsel ample opportunity to request a hearing on defendant's ability to pay the probation report fee.

We agree with *Valtakis* that the Legislature could not have intended "that a defendant and his counsel may stand silent as the court imposes a fee . . . like the \$[1,095] here—and then complain for the first time on appeal that some aspect of the statutory procedure was not followed." (*People v. Valtakis, supra*, 105 Cal.App.4th at p. 1075.) This is particularly so when defendant had prior warning of the fee. Moreover, we note that the court did not actually order defendant to pay \$1,095, but an amount "not

to exceed \$1095.” The probation report indicates that the amount would be determined by the “Probation Department.” We note section 1203.1b, subdivision (c) provides that “[t]he court may hold additional hearings during the probationary or conditional sentence period to review the defendant’s financial ability to pay the amount, and in the manner, as set by the probation officer, or his or her authorized representative, or as set by the court pursuant to this section.” “At any time during the pendency of the judgment rendered according to the terms of this section, a defendant against whom a judgment has been rendered may petition the probation officer for a review of the defendant’s financial ability to pay or the rendering court to modify or vacate its previous judgment on the grounds of a change of circumstances with regard to the defendant’s ability to pay the judgment.” (§ 1203.1b, subd. (f).) Thus, to the extent defendant does not have the ability to pay the fee, the interest of judicial economy would be better served if defendant simply filed a petition with the court at the time the probation department actually set, if it ever does, the amount of the fee.

Defendant maintains that the holding in *People v. Valtakis*, *supra*, and, hence, the People’s reliance on it in the present case, has been disapproved of in *People v. Pacheco* (2010) 187 Cal.App.4th 1392. *Pacheco* held, in part, that appellate challenges to the sufficiency of the evidence supporting the amount of the fees imposed at sentencing are not forfeited for failure to object below. (*Id.* at p. 1397.) We find *Pacheco* readily distinguishable. First, and most importantly, the court in *Pacheco* actually imposed *definitive* fees, in contradistinction to the present case wherein, as noted above, the court merely directed that defendant pay the costs in an amount not to exceed \$1,095. Thus,

there is no certainty in the present case that defendant will actually ever be ordered to pay any definitive fee. Second, the fees imposed in *Pacheco* were not for the costs of the preparation of the presentence probation report; instead, the fees imposed were a criminal justice administration fee, a probation supervision fee, an attorney fee, a court security fee, and a booking fee. (*Id.* at pp. 1396-1397.) Third, in *Pacheco*, a couple of the fees were impermissibly imposed as conditions of the defendant's probation, making them independently erroneous. (*Id.* at pp. 1402-1404.) Here, since the court did not impose any definitive fee, the fee was not imposed as a condition of probation, and defendant has resort to other remedies both before or after any such fee is actually ever imposed, we conclude defendant forfeited the issue and the court committed no error.

2. *PROBATION SUPERVISION FEE*

Similarly, the probation officer's report reflects the recommendation that defendant "[p]ay the costs of probation supervision in an amount to be determined by Probation. Based on the level of supervision, the cost will range from \$591.12 to \$3,744.00." The court ordered defendant to "[p]ay the cost of probation supervision in an amount to be determined by the Probation Department based on the level of supervision. The cost will range from \$591.12 to \$3,744."

For the same reasons discussed above, we find defendant forfeited his right to object to the sentencing court's proposed imposition of the costs of probation supervision in an amount of between \$591.72 and \$3,744. The court did not actually impose any such fine, and defendant may petition the court for a determination of his ability to pay if the probation department actually does impose such a fee.

3. *BOOKING FEES*

Defendant contends the sentencing court erred in ordering defendant to pay a booking fee without making a determination of his ability to pay, and in an amount that was not supported by sufficient evidence. The People concede that the booking fee should be set aside for the same reasons as expounded by defendant.

The probation officer's report recommended the court order defendant to pay booking fees in the amount of \$414.45 pursuant to Government Code section 29550. The court ordered defendant to "[p]ay booking fees in the amount of \$414.45."

Government Code section 29550, subdivision (c) provides: "Any county whose officer or agent arrests a person is entitled to recover from the arrested person a criminal justice administration fee for administrative costs it incurs in conjunction with the arrest if the person is convicted of any criminal offense related to the arrest, whether or not it is the offense for which the person was originally booked. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, including applicable overhead costs incurred in booking or otherwise processing arrested persons." Government Code section 29550, subdivision (d)(2) specifically provides that the court may only impose upon a defendant a criminal justice administration fee *as a condition of probation* if it is "based on his or her ability to pay."

"[A] prerequisite to the imposition of a booking fee, . . . under Government Code section 29550, subdivision (c) . . . is a finding, whether express or implied, of the defendant's ability to pay. Such a finding must be supported by substantial evidence. Further, a booking fee must not exceed the actual administrative costs of booking, as

further defined in the relevant statutes.” (*People v. Pacheco, supra*, 187 Cal.App.4th at p. 1400.) Where there is no evidence in the record to support a defendant’s “ability to pay a booking fee, *particularly as a condition of probation*, or of the actual administrative costs of his booking” the fee cannot stand. (*Ibid.*, italics added.) The sentencing court in *Pacheco* imposed all of the fines and fees as conditions of the defendant’s probation. (*Id.* at pp. 1395-1396.)

Here, the court does not appear to have imposed the booking fee *as a condition of probation*. Rather, the court’s order was based upon the probation officer’s recommendation, which specifically enumerated 16 specific conditions of probation and a number of separate, non-probation related orders; the latter is the portion where the booking fee was proposed. Likewise, in the minute order from the sentencing hearing, the distinctively itemized conditions of defendant’s probation do not include the booking fee. Rather, it is listed under a separate section denoted “further order[s].” The express language of the statute and its legislative history make clear that the fee imposed under Government Code section 29550 is mandatory; in other words, it must be imposed regardless of whether a defendant even receives probation. Thus, we disagree with both parties’ underlying contention that the court was required to make a determination of defendant’s ability to pay the fee, because the court did not order payment *as a condition of probation*. In other words, defendant could not be found in violation of his probation for any future failure to pay the booking fee. Rather, the booking fee would remain separately, civilly enforceable. (Govt. Code, § 29550, subd. (d)(1); see Pen. Code, § 1203.1b, subd. (d).)

Nevertheless, no evidence was adduced that the \$414.45 fee imposed was at all reflective of the actual administrative costs incurred in booking defendant. Therefore, the order requiring him to pay a booking fee in the amount of \$414.45 is unauthorized and must be reversed.

4. *SECURITY AND CONVICTION FEES*

Defendant contends the sentencing court erred in imposing a conviction fee of \$30 for each of his two felony convictions and a security fee of \$40 for each of his convictions *as a condition of his probation*. He maintains payment of these fees should be removed *as conditions of his probation*. The People concede the matter. Like the booking fee discussed above, we disagree that these fees were imposed *as conditions of his probation*. Rather, the probation officer recommended imposition of the fees as an order separate from the conditions of defendant's probation. Similarly, the minute order reflects that these fees were imposed as "further orders[s]" after the court had specifically enumerated the conditions of defendant's probation. Nevertheless, since we have stricken defendant's conviction on count 2, the security and conviction fees imposed for that count must also be stricken.

DISPOSITION

Defendants conviction on count 2 for false imprisonment (§ 236), the lesser included offense of his conviction for the count 1 offense of simple kidnapping (§ 207, subd. (a)), is reversed. The trial court is directed to strike the conviction and security fees imposed for defendant's count 2 conviction. Further, the order requiring defendant to pay booking fees in the amount of \$414.45 is reversed as unauthorized. The trial court is

directed to determine, in accordance with applicable statutes, whether the booking fee should be imposed in this or any amount. The trial court is directed to issue an amended abstract of judgment and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. (§§ 1213, 1216.) In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.