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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

MILTON EARL MOORE,

Defendant and Appellant.

E059150

(Super.Ct.No. SWF1100529)

OPINION

APPEAL from the Superior Court of Riverside County. Angel M. Bermudez,  
Judge. Affirmed.

Alan S. Yockelson, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General,  
Arlene A. Sevidal, Andrew Mestman, and Stacy A. Tyler, Deputy Attorneys General, for  
Plaintiff and Respondent.

A jury found defendant and appellant Milton Earl Moore guilty of misdemeanor false imprisonment (Pen. Code, § 236; count 1);<sup>1</sup> a lesser included offense of kidnapping to commit robbery (§ 209, subd. (b)(1)); carjacking (§ 215, subd. (a); count 2); making criminal threats (§ 422; count 4); and unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a); count 5).<sup>2</sup> Defendant was sentenced to a total term of nine years in state prison with credit for time served. Defendant’s sole contention on appeal is that the trial court erred in failing to sua sponte give the jury a unanimity instruction in regard to the carjacking count. We reject this contention and affirm the judgment.

## I

### FACTUAL BACKGROUND

On March 12, 2011, 21-year-old Brett Jensen responded to an internet advertisement for prostitution. He texted the telephone number on the advertisement and began negotiating with a woman a price for a certain sexual service, specifically a “hand job.” When they could not agree on a price, the communication ceased. The next morning, March 13, Jensen received text messages from the same number, asking if Jensen was still interested, and negotiations reinitiated. Through a series of text messages, Jensen agreed to meet the woman in the advertisement at a Motel 6 in Old Town Temecula and pay her \$60 for a “hand job.”

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<sup>1</sup> All future statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> The jury was unable to reach a verdict on count 3, the robbery (§ 211) offense. That count was later dismissed by the People.

At around 9:20 a.m., Jensen arrived at the Motel 6 in his Toyota Tundra truck and texted the woman he was meeting to inform her he was at the site. The woman texted back with a room number. Jensen walked to the room, knocked on the door, and codefendant Jessica Kajioka answered the door.<sup>3</sup> Jensen entered the room, latched the closed door, and placed \$60 on a television stand. Kajioka went towards the back of the room and appeared to be texting on her phone for a few minutes. After about one to two minutes, at the foot of the bed, Jensen removed his pants, and possibly his shirt. Kajioka sat at the foot of the bed and began to touch Jensen's penis with her hand. She then began to orally copulate Jensen, with her breasts exposed, even though they had not agreed on an oral sex act in exchange for \$60. After a few minutes, the door to the room began to shake as if someone was trying to get inside; Jensen heard people yelling, asking what was going on inside the room. Someone also yelled, " 'What are you doing with my wife?' " Jensen was shocked and quickly dressed. Jensen saw two men through the partially open door, which was still secured by the latch. When Jensen asked Kajioka what was going on, she shrugged and laughed.

Jensen unlatched the door, and the two men, one identified as defendant and the other as Sir William Alexander Jeffery, entered the room and charged at Jensen. Jeffery grabbed Jensen by the throat and threw him onto the bed. Defendant appeared upset and asked Jensen what he was doing with his wife. Jensen told defendant that he did not

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<sup>3</sup> Codefendant Kajioka was charged with the same offenses as defendant with the exception of the vehicle theft charge. Codefendant Kajioka is not a party to this appeal.

know Kajioka was defendant's wife. Defendant asked Jensen if he was "going to make this right'?" and asked Jensen for his wallet. Either Jensen gave defendant his wallet out of fear, or either defendant or Jeffery removed Jensen's wallet. The wallet was empty; defendant said that he wanted "more money."

Jensen told defendant he had more money in the bank and he would take defendant there if defendant did not hurt him. Defendant stated he was going to drive; Jensen gave defendant the keys to his truck. Defendant and Jeffery escorted Jensen through the motel to Jensen's truck. Defendant drove while Jensen sat in the front passenger seat; Jeffery sat in the back seat. Defendant drove to a nearby ATM and parked. Jensen and Jeffery walked to the ATM and Jensen withdrew \$240, which he gave to Jeffery. Jeffery assured Jensen that Jeffery would get him his money back and that it would all get sorted out and fixed up. The two men got back into the truck, and defendant drove back to the motel and parked.

Once back at the motel, defendant went upstairs with Jensen's car keys while Jensen and Jeffery remained in the vehicle. Jensen and Jeffery then followed defendant to the motel room. Defendant angrily told Jensen to apologize to Kajioka. Jensen apologized to Kajioka after defendant threatened to kill Jensen and gestured as if to hit Jensen with a vodka bottle. At some point, Kajioka left the room. During defendant's threats towards Jensen, where defendant repeatedly was threatening to kill Jensen, Jeffery stepped in to calm defendant down. Defendant eventually told Jensen that Jensen was

going to take defendant to get some beer. The three men then left the motel room again and defendant walked with Jensen back to Jensen's truck. At this point, Jeffery left.

Defendant drove while Jensen sat in the front passenger seat. As they were driving away, they saw Kajioka, and either Jensen or defendant told her to get in the truck. Kajioka entered the vehicle and sat behind Jensen. Defendant then drove away from the motel. After passing a liquor store, defendant stated that they were not going to get a drink but that Jensen was going to take defendant to defendant's mother's house in Moreno Valley. After Jensen protested, defendant told Kajioka to "Get the gun." When Jensen looked at defendant in surprise, defendant smiled and said he was " 'just playing.' " Scared, Jensen opened his truck door and jumped out of the vehicle, which was driving slowly after stopping at a red light. Defendant drove away and Jensen called 911.<sup>4</sup>

Riverside County Sheriff's Deputy Rudy Leso responded to Jensen's location at approximately 10:30 a.m. After speaking with Jensen, Deputy Leso went to the Motel 6; inside the motel room, Deputy Leso found a pair of pants with Kajioka's identification in a pocket.

On March 14, 2011, at 2:25 a.m., San Diego County Sheriff's Deputy Jack Reed saw a Toyota Tundra truck parked in a parking lot, idling with the parking lights on. As Deputy Reed approached the truck in his patrol vehicle, it quickly sped away and exited

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<sup>4</sup> The audio of the 911 call was played for the jury. In the call, Jensen denied knowing who defendant and Kajioka were and did not mention the events that took place at the motel.

the parking lot. Deputy Reed followed the truck, and when he observed the truck failing to stop at a stop sign, Deputy Reed activated his patrol vehicle's lights and attempted to stop the vehicle. However, the vehicle continued to drive away and entered an apartment complex. As the truck rolled through the parking lot, the driver, identified as defendant, jumped out of the vehicle. Deputy Reed yelled at defendant to stop, but defendant threw his jacket on the ground, and then jumped over a fence and escaped. The truck continued to roll until it hit a retaining wall. Defendant was apprehended 10 days later on March 24, 2011.

## II

### DISCUSSION

Defendant contends that the trial court prejudicially erred by failing to give a jury instruction on unanimity under CALCRIM No. 3500<sup>5</sup> as to the carjacking offense, because there were two instances where defendant had conceivably carjacked the victim.<sup>6</sup> He specifically argues that because the prosecution presented evidence of two separate drives in the victim's truck—the first trip to and from the ATM (the ATM trip) and the second trip past the liquor store (the liquor store trip)—there were two distinct courses of

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<sup>5</sup> CALCRIM No. 3500 provides: “The defendant is charged with \_\_\_\_ < insert description of alleged offense > [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.”

<sup>6</sup> The jury was instructed with a unanimity instruction pursuant to CALCRIM No. 3500 as to the robbery offense charged in count 3.

conduct that could be charged as separate carjacking offenses and therefore required the unanimity instruction. The People argue that because the prosecutor elected the liquor store trip as the specific acts giving rise to the carjacking offense, no unanimity instruction was necessary. In the alternative, the People assert any error was harmless.

In a criminal case, the jury must unanimously agree the defendant is guilty of a specific crime. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*); *People v. Diedrich* (1982) 31 Cal.3d 263, 281 (*Diedrich*)). A unanimous verdict, in criminal cases, aims 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.’ ” (*Russo*, at p. 1132, quoting *People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.) Thus, a trial court has a sua sponte duty to give the jury a unanimity instruction where a single crime could be based upon one of several possible acts. (*Diedrich*, at pp. 280-282; see *People v. Madden* (1981) 116 Cal.App.3d 212, 215-217 [explaining the decisional history regarding the need for a unanimity instruction].) “ ‘We review de novo a claim that the trial court failed to properly instruct the jury on the applicable principles of law. [Citation.]’ [Citation.]” (*People v. Lueth* (2012) 206 Cal.App.4th 189, 195.)

When there are multiple acts presented to the jury that could constitute the charged offense, and the prosecution has not elected one act, “a defendant is entitled to an instruction on unanimity.” (*People v. Dellinger* (1984) 163 Cal.App.3d 284, 301; see *People v. Beardslee* (1991) 53 Cal.3d 68, 92.) “[T]he failure to give a jury unanimity instruction (now CALCRIM No. 3500) is the most common kind of instructional error in

criminal cases.” (*People v. Norman* (2007) 157 Cal.App.4th 460, 467 [the court went on to advise trial judges to make CALCRIM No. 3500 a standard instruction unless there is a reason not to give it].)

Case law, however, has established an exception to this general requirement in two factual situations. (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299.) These situations are referred to collectively as the “continuous conduct” rule. (*Ibid.*; *Diedrich, supra*, 31 Cal.3d at pp. 281-282.) The first is when “ ‘the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]’ [Citation.]” (*Jenkins*, at p. 299; *Diedrich*, at p. 282 [citing examples of pandering, child abuse, bribery, and contributing to delinquency].) The second is “when (1) ‘the acts are so closely connected in time as to form part of one transaction,’ (2) ‘the defendant tenders the same defense or defenses to each act,’ and (3) ‘there is no reasonable basis for the jury to distinguish between them. [Citations.]’ [Citation.]” (*People v. Lueth, supra*, 206 Cal.App.4th at p. 196; see also *People v. Williams* (2013) 56 Cal.4th 630, 682 [unanimity instruction may not be required where the “ ‘criminal acts . . . took place within a very small window of time,’ ” and “ ‘the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.’ ”]; *People v. Riel* (2000) 22 Cal.4th 1153, 1199; *People v. Beardslee, supra*, 53 Cal.3d at p. 93 [“ ‘[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury’s understanding of the case.’ [Citations.]”]; *People v. Stankewitz*

(1990) 51 Cal.3d 72, 100; *People v. Bui* (2011) 192 Cal.App.4th 1002, 1010-1011; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 275.)

Here, the People claim the prosecutor elected the liquor store trip, which took place approximately 30 minutes after the ATM trip, as the specific acts giving rise to the carjacking offense. Defendant responds that the People are mistaken, because the prosecutor never explicitly informed the jury that they should only consider the liquor store trip when determining the carjacking offense.

In regards to the carjacking charge, the prosecutor, in relevant part, argued as follows: “So count 2, carjacking. [¶] . . . [¶] Was the vehicle taken from the immediate presence of a person, the victim, who either possessed it or was a passenger? [¶] Well, it was both. It was his truck, it was in his immediate possession, and while the defendant was choosing where to drive him, the victim was a passenger. So we know that one is there. [¶] The vehicle was taken against the victim’s will. [¶] Again, did you ever hear anything in his testimony saying ‘Oh, sure. I gave it to him. I didn’t want it. I felt he could have it.’ [¶] No. He only jumped out of the vehicle because this guy was just talking about a gun, telling Jessica Kajioaka, ‘Get my gun.’ Now, sure enough, he did follow that up with ‘Oh, I’m just kidding,’ but at that point do you think it makes a difference? How many times had the defendant threatened to kill Brett Jensen before he starts throwing out the word ‘gun’? [¶] At that point it didn’t matter. It was taken against the victim’s will. He had no choice. He certainly wouldn’t have given it to the defendant but for the threats, but for the force. [¶] And that’s where we get to

Element 4: [¶] The defendant used force or fear to take the vehicle or prevent the victim from resisting. [¶] There was no chance the victim was ever going to resist. He was outgunned right from the start. [¶] We know that there was force by virtue of everything that was going on, and we know there was fear by virtue of everything that was going on. The victim had no say in anything that happened that day. [¶] . . . [¶] The intent to take the vehicle must be formed before or during the force or fear. [¶] Okay. So how does that come in? [¶] Well, when they are up in the room—again, all throughout this point there’s been force or fear, but at that point that’s when the defendant decides we’re taking the truck. He’s already taken to the ATM. [*Sic.*] He’s already got the money. What to do with him now? [¶] Well, again throughout that entire second time there was the threats, the raising the bottle and threatening to hit him with a bottle, forcing him to apologize. All this force or fear, that was before. But at that point they decide, ‘You know what, I’m taking the truck.’ And there’s force, escorting him down to the truck and then saying ‘You’re going to drive me here, you’re going to drive me there, and then ‘Get my gun.’ [¶] So the force or fear happened after the intent. The second they walked out of that motel room, that was when he was taking the truck. . . . [¶] . . . [¶] Again, the keys were in his hand up until the point that the defendant said ‘Give me the keys. I’m taking you to the ATM.’ [¶] Throughout that entire time, it was sufficiently within his control up until the point where he had to relinquish those keys because he didn’t have a choice. Up until that point, the victim could not decide where that truck goes. [¶] Once

the defendant took those keys by force or fear, the victim no longer had a choice. That's it."

Although it may appear the prosecutor was relying on the liquor store trip to support the carjacking offense, we agree with defendant the prosecutor did not explicitly inform the jury that they should consider the liquor store trip to support the carjacking charge. In other words, the prosecutor's arguments show the prosecutor had not explicitly elected the liquor store trip to support the carjacking offense. That is because an entire analysis of the prosecutor's arguments shows the prosecutor was relying on defendant's acts that occurred throughout the 30-minute time period from when he barged into the motel room to when the victim jumped out of his vehicle to support the carjacking charge. Based on an analysis of the record, as well as the prosecutor's arguments, we believe the "continuous course of conduct" exception is applicable to the facts of this case.

Defendant asserts that the "continuous course of conduct" exception does not apply to the facts of this case because the jury rationally could have viewed the two trips as falling into two distinct categories: (1) the ATM trip was to get the victim's money; and (2) the liquor store trip was to deprive the victim of his truck.

In *Russo, supra*, 25 Cal.4th 1124, the defendant was convicted of conspiring to murder his wife; on appeal, he argued the trial court had erred in not instructing the jury that it had to agree on the specific overt act, which supported the conspiracy. Our Supreme Court disagreed, stating: "The key to deciding whether to give the unanimity

instruction lies in considering its purpose. The jury must agree on a ‘particular crime’ [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate ‘when conviction on a single count could be based on two or more discrete criminal events,’ but not ‘where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.’ [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.” (*Id.* at pp. 1134-1135; see *People v. Sapp* (2003) 31 Cal.4th 240, 283-285 [no unanimity instruction required in case involving murder with a special circumstance allegation of financial gain, where the evidence showed, and the prosecutor “wove . . . together,” the two ways the defendant achieved financial gain via the murder of the victim].)

The appellate court’s application of the “continuous course of conduct” exception in *People v. Percelle* (2005) 126 Cal.App.4th 164 is also instructive. In that case, the defendant was charged with one count of attempted use of a counterfeit access card. The defendant had attempted to use the card at a tobacco shop twice in one day, and on appeal he argued that because no unanimity instruction was given, some jurors may have

convicted him based on his first visit to the shop while others may have based the conviction on the second visit. (*Id.* at p. 181.) The appellate court found that the “continuous course of conduct” exception applied: “There is no reasonable basis to distinguish between defendant’s first visit to Discount Cigarettes on September 20, 2002, and his second visit a little over an hour later. Defendant came into the store and asked to buy 60 cartons of cigarettes using the broken card. When [the employee’s] stalling made defendant nervous, he left, informing [the employees] that he would return. When he returned a little over an hour later, he continued his effort to purchase the 60 cartons with the same broken card, urging [an employee] to look for the paper with the price calculations [an employee] had made earlier. Defendant did not proffer a separate defense to the two acts. His defense was based entirely upon an asserted lack of proof—proof that the broken card was indeed a counterfeit access card. There is no conceivable construction of the evidence that would permit the jury to find defendant guilty of the crime based upon one act but not the other. No unanimity instruction was required.” (*Id.* at p. 182; see *People v. Riel*, *supra*, 22 Cal.4th at p. 1199 [where two acts of robbery occurred but only one count was charged, there was no danger some jurors would find defendant committed the first robbery at the truck stop but not the second one in the car, while others would find he committed the robbery in the car but not the earlier one, where the parties never distinguished between the two acts, and the defense was the same as to both]; *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1296 [no unanimity instruction required where the defendant twice robbed the victim of “the same property”

“just minutes and blocks apart,” and “[t]he acts were successive, compounding, part of a single objective of getting all the victim’s cash”].)

Like the successive offenses in *People v. Percelle, supra*, 126 Cal.App.4th 164, defendant’s ATM trip and the liquor store trip were virtually identical: defendant invoking force or fear upon the victim by means of threats to take the victim’s vehicle from the victim’s immediate presence. Evidence of the two trips provided the jury with two theories or factual bases for finding defendant guilty of one continuous transaction or a single discrete crime. (See *Russo, supra*, 25 Cal.4th at pp. 1134-1135; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185.) Furthermore, the two trips “ ‘took place within a very small window of time’ ” (*People v. Williams, supra*, 56 Cal.4th at p. 682), approximately half an hour, and were continuous. Moreover, contrary to defendant’s claim, defendant did not provide differing defenses to the various trips in that time period. He did not deny that he took the victim’s vehicle; rather, his defense was that he did not take the victim’s vehicle against the victim’s will, because he did not use force or fear to take the victim’s vehicle or prevent the victim from resisting and the victim never resisted. There is thus no reasonable basis for differentiating between the various trips with respect to the carjacking charge.

Pointing to a statement made by defendant’s trial counsel during closing argument, defendant’s appellate counsel at oral argument claimed that trial counsel had argued two defenses for the two separate trips. Appellate counsel noted that the force and fear was conceded for the liquor store trip and the defense was that there was no intent to deprive

the victim of the vehicle, unlike the ATM trip. However, read in the context of the entire argument made by defendant's trial counsel during closing argument, we find no likelihood that the jury understood defense counsel was offering two distinct defenses for the two trips.

Defendant's trial counsel, in relevant part, argued: "[Defendant] never took property that was not his own. Mr. Jensen testified that he placed \$60 on the table in the motel room, and he also testified that after getting money from the ATM machine, he gave it to [defendant's cohort]. [¶] . . . [¶] He admits he suggested going to the ATM machine. He admits that he got out—once they get to the shopping center, he gets out of the truck without anybody telling him to. When he gets to the ATM machine, he pulls out his wallet, he pulls his bank card out of his wallet, and he puts it in the ATM machine. It wasn't taken against his will. [¶] . . . [¶] [Defendant] didn't use force or fear to take the property. Based on Mr. Jensen's testimony, [defendant], he never said [defendant] used force on him prior to going to the ATM machine. He didn't instill reasonable fear. . . . [¶] . . . [¶] There wasn't any act that was done against Mr. Jensen's will. Mr. Jensen consented. Again, we have the consent. The same issues I was bringing up before with the kidnapping. He's consenting because he came up with the idea to go to the ATM machine. He walked to these locations on his own. [¶] . . . [¶] With respect to the carjacking charges, I won't go over every element that's already been read to you, but what I will do is point out a couple of issues. [¶] Now the first thing is that it has to be proved that the vehicle was taken against Mr. Jensen's will. And again, based on

Mr. Jensen's testimony, he's the one who suggested going to the ATM. [¶] He admits to the discussion about the back and forth as to who's going to drive. Ultimately, he gives the car—the keys to [defendant]. He never says that he attempts to get the keys to the truck back or the truck back. He never says anything like give me my keys; you can't take my truck; no I'm driving. Never says anything like that. [¶] What about when they return from the ATM, and they are at the motel, and Mr. Jensen's testimony was that [defendant] got out and starts walking up to the room. . . . He testified that nobody told him to stay in the truck, but he stayed in the truck. . . . [¶] . . . [¶] [Defendant] didn't use force or fear to take the vehicle or prevent Mr. Jensen from resisting. He never said that [defendant] used force on him prior to going to the ATM machine. Same thing. When asked about whether or not [defendant] threatened him before going to the ATM, he said, 'Not really. He was not threatened in any way.' [¶] And he never said that [defendant] used force on him to take the truck after they returned from the ATM. Right? He never said that. [¶] [Defendant]—again, [defendant] didn't use force or fear to take the vehicle or prevent Mr. Jensen from resisting. By his own testimony, he admits that [defendant] smiles and says 'I'm playing.' You know, 'There's no gun.' After saying 'Give me the gun.' ”

Defendant's trial counsel then briefly argued: “Regarding the fifth element as to the carjacking charge, again, what's required is that when the defendant used force or fear to take the vehicle, he intended to deprive the other person of possession of the vehicle, either temporarily or permanently. [¶] So let's say the argument is the force or fear is,

you know, the ‘Give me the gun’ followed by ‘Ha-ha, there’s no gun. I’m just playing.’

[¶] Let’s say that’s the force or fear. According to his testimony, he does end up getting out of the truck. So, for argument sake, let’s say it’s that. Well, again, that argument, or that element requires that when—when the force or fear is used, there has to be intent to take—to deprive the other person of the—of the—of the vehicle; right? [¶] And, so essentially, if [defendant’s] driving along and comes to a stoplight and says that [there’s no gun], that’s not really a use of force or fear to try to—to take the vehicle from him. [¶] Now, if he had parked on the side of the road, said, ‘Give me the gun,’ and then turned to Mr. Jensen and said, ‘Now get out,’ that’s different; right? Because that shows that he, at the time of using any type of force or fear, he’s trying to deprive Mr. Jensen of the vehicle. Mr. Jensen just gets out of the vehicle on his own; right? [¶] So what I’m suggesting is that the way this evidence came out, the way it plays out, there really isn’t evidence of an intent to permanently deprive Mr. Jensen of the vehicle by use of force at that moment or fear.”

Trial counsel’s statements, as laid out above, do not suggest that defendant had conceded to the force or fear element for the liquor store trip and his defense for that trip was no intent to permanently deprive the victim of his vehicle. An examination of defendant’s trial counsel’s arguments, as well as the entire record on appeal, demonstrates that defendant did not offer two legally distinct defenses to the ATM trip and the liquor store trip. In both instances, defendant’s defense was that there was no force or fear, because the victim had consented and did not resist on each instance, and

therefore there “really” was no “evidence of an intent to permanently deprive [the victim] of the vehicle by use of force at that moment or fear.”

Defendant also argues the facts in support of possession were distinct in each trip, thereby giving the jury two easily distinguishable fact patterns when determining possession. He contends defendant possessed the truck by controlling it while the victim was inside during the ATM trip but that during the liquor store trip, the victim jumped out of the truck. We do not see two factually distinct fact patterns as to how defendant came to possess the victim’s vehicle. Defendant, by force or fear, took possession of the victim’s truck in both incidents. The question for the jury was not when defendant possessed the victim’s vehicle but whether defendant intended to permanently or temporarily deprive the victim of his vehicle by use of force or fear. (§ 215, subd. (a) [“ ‘Carjacking’ is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear”]; *People v. Duran* (2001) 88 Cal.App.4th 1371, 1376-1377 [a taking occurred when the defendant imposed his dominion and control over the car by ordering the victim to drive].) Here, we see no reasonable factual distinctions between the two trips on the charge of carjacking. In sum, the jury could not have rationally distinguished between the two trips, such that defendant was denied his right to a unanimous verdict. Therefore, a unanimity instruction was not required.

Even if we assume, for the sake of argument, the trial court erred in failing to sua sponte instruct the jury with a unanimity instruction, any error is harmless beyond a reasonable doubt because the evidence shows that the jury could not reasonably disagree in its finding defendant committed a carjacking. (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853 (*Thompson*) [“Failure to give a unanimity instruction is governed by the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 . . . , which requires the error to be harmless beyond a reasonable doubt. [Citation.]”]; see *People v. Haley* (2004) 34 Cal.4th 283, 314.) “Where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that [the] defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless.” (*Thompson*, at p. 853.) The failure to give a unanimity instruction is also harmless “if the record indicate[s] the jury resolved the basic credibility dispute against the defendant and would have convicted the defendant of any of the various offenses shown by the evidence to have been committed.” (*People v. Jones* (1990) 51 Cal.3d 294, 307.)

Viewing the record with this standard in mind, we are satisfied defendant was not prejudiced even if the trial court erred by failing to instruct the jury with a unanimity instruction under CALCRIM No. 3500. The trial court here instructed the jury with CALCRIM No. 3515 that it must decide each count separately. The trial court also instructed the jury with CALCRIM No. 3550, that all 12 jurors must agree to the

decision. Moreover, defendant offered a single defense to the carjacking offense: that there was no force or fear because the victim voluntarily gave defendant his car keys and truck and the victim did not resist. In other words, defendant did not offer legally distinct defenses to each trip, but instead asserted that he did not use force or fear. It appears the jury resolved the credibility dispute against defendant and convicted him of the carjacking offense. Accordingly, we conclude that any error by the trial court for failing to instruct the jury sua sponte with a unanimity instruction pursuant to CALCRIM No. 3500 was harmless beyond a reasonable doubt.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

MILLER

J.