

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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.

ALVARO ARAIZA FLORES,

Defendant and Appellant.

E061388

(Super.Ct.No. RIF1300871)

OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey Prevost, Judge.

Modified and affirmed with directions.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Eric A. Swenson and Ryan H. Peeck, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Alvaro Araiza Flores led police on a 12-mile chase and then hid in Maria Deharo's apartment, moving her and her daughter, Jane Doe, into Deharo's

bedroom. He was eventually apprehended and charged with several crimes. The jury convicted him of fleeing or eluding police officers with wanton disregard for safety (Veh. Code, § 2800.2, count 1); misdemeanor false imprisonment of Shannon Wilson (Pen. Code,¹ § 236, count 2); felony false imprisonment of Shannon Wilson (Pen. Code, § 236, count 3); burglary of an occupied dwelling with a person present in the residence (Pen. Code, §§ 459, 460, subd. (a), 667.5, subd. (c)(21), count 4 with special allegation); kidnapping of Maria Deharo (Pen. Code, § 207, subd. (a), count 5); kidnapping of Jane Doe (Pen. Code, § 207, subd. (a), count 6); felony false imprisonment of Maria Deharo (Pen. Code, § 236 count 7); felony false imprisonment of Jane Doe (Pen. Code, § 236, count 8); transportation of methamphetamine (Health & Saf. Code, § 11379, count 9)²; misdemeanor resisting an officer (Pen. Code, § 148, subd. (a)(1), count 10); misdemeanor failing to perform a duty following an accident with property damage (Veh. Code, § 20002, count 11); being under the influence of a controlled substance, a misdemeanor (Health & Saf. Code, § 11550, subd. (a), count 12); and misdemeanor driving under the influence (Veh. Code, § 23152, subd. (a), count 13). On June 13, 2014, defendant admitted suffering four prison priors. The trial court sentenced him to state prison for a total term of 12 years.

¹ All further undesignated statutory references are to the Penal Code.

² The February 24, 2014, minute order states that the jury found defendant guilty in count 9 of a violation of “Section 11370(A) H.S.” The court’s minute order is inaccurate. We will direct the superior court clerk to generate a new minute order reflecting the jury’s finding that defendant was found guilty of violating Health and Safety Code section 11379, subdivision (a), and noting that the February 24, 2014, minute order incorrectly stated that the jury found defendant guilty of Health and Safety Code section 11370, subdivision (a).

Defendant contends: (1) the evidence was insufficient to support his conviction of kidnapping Deharo and Jane Doe in counts 5 and 6; (2) the trial court erred in allowing the prosecutor to modify CALCRIM No. 1215; (3) his convictions of felony false imprisonment of Deharo and Jane Doe (counts 7 and 8) must be vacated, since false imprisonment is a lesser included offense of simple kidnapping; (4) his conviction of misdemeanor false imprisonment of Wilson (count 2) must be vacated, since it is a lesser included offense of felony false imprisonment (count 3); and (5) the abstract of judgment must be amended to show that he was convicted of kidnapping a child under the age of 14 (count 6) and the court was correct when it originally stated it was sentencing defendant to the midterm of eight years. We reject his first two contentions, and the People concede the remaining.

I. STATEMENT OF FACTS

On February 6, 2013, defendant gave Shannon Wilson a ride to a friend's house. En route, they stopped, and Wilson bought a pipe used to smoke methamphetamine. As they drove away from the shop, police followed them. After witnessing defendant run a red light and fail to use his turn signal, Deputy Brenton Ruiz of the Riverside County Sheriff's Department activated the emergency equipment on his patrol car. Defendant did not yield, but continued driving and increased his speed, straddling the lanes and weaving. Believing that defendant had not noticed him, Deputy Ruiz activated his siren. Defendant fled, leading the deputy on a 12-mile pursuit, during which defendant ran red lights and stop signs, drove on the wrong side of the road, and exceeded the speed limit.

Wilson asked defendant to stop, but he refused, telling her to shut up. Wilson was scared because she thought they would crash and she would get hurt.

After 12 miles, defendant jumped out of the moving truck and let it crash into a pole, injuring Wilson. Deputy Ruiz lost defendant as he fled around a corner on foot. Defendant broke into Maria Deharo's apartment. Defendant grabbed Deharo by the arms and picked her up. When she asked what he was doing in her home, he told her to "be quiet if [she] didn't want something to happen to [her]." Deharo was "[v]ery scared." Defendant forced Deharo into the bathroom, a distance of 22 to 25 feet from where he had grabbed her. Inside the bathroom, defendant closed the door and window, and held her there for about 10 minutes.

Deharo's 12-year-old daughter, Jane Doe, was in Deharo's bedroom when defendant broke into the apartment. Jane heard sounds "[l]ike people[] running around and then . . . a slam on the door." Jane looked for Deharo but could not find her, so Jane called out for her. Defendant asked Deharo who else was in the apartment, and Deharo said it was her daughter. Defendant walked Deharo out of the bathroom and took her and Jane in the bedroom, a distance of five to six feet. Jane was crying and scared. She believed that defendant "had a weapon[] and he was going to kill [them]." Deharo felt "[a] lot of fear. It wasn't just [her] now. [She] had to . . . protect[] [her] girl." Deharo "obey[ed defendant] out of fear that he would do something to [them]."

While moving Deharo and Jane Doe to the bedroom, Deharo's cell phone rang; however, defendant prevented Deharo from answering it. Once in the bedroom, Jane "was very upset." She "would tell [defendant] to leave, but he would shut [both Jane and

Deharo] up.” He had them kneel down so that police could not see them in the apartment. When Jane tried to leave, defendant pushed her on the shoulder and prevented her from doing so. Deharo grabbed Jane and told her not to go outside.

Deharo’s son, John Doe, was skateboarding outside when he saw police officers and realized they were chasing someone. John went to check on his mom and discovered that she and Jane were in the bedroom with defendant. John thought they looked scared. Defendant told John to get in the bedroom, but he ignored defendant and escaped by running outside.

Police eventually apprehended defendant in Deharo’s apartment. When he was being booked, he said, ““hey, I’m sorry man. I’m a fucking idiot. Tell the little girl I’m sorry too. She looked like she was scared as fuck.”” A search of defendant’s truck produced methamphetamine. Toxicological analysis of defendant’s blood revealed the presence of methamphetamine.

II. DISCUSSION

A. Sufficiency of Evidence of Kidnapping Deharo and Jane Doe

Defendant contends the evidence was insufficient to support his conviction of kidnapping Deharo and Jane Doe. He argues that he did not move them a substantial distance and that, regardless, any movement was “merely incidental to the commission of the associated crime [fleeing or eluding].” We disagree.

1. Standard of Review

When a criminal defendant contends the evidence was insufficient to support his conviction, ““we review the whole record in the light most favorable to the judgment to

determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]’ . . . The conviction shall stand ‘unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].”’ [Citation.]” (*People v. Cravens* (2012) 53 Cal.4th 500, 507-508.)

2. *Kidnapping*

A person is guilty of simple kidnapping if he “forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person . . . into another part of the same county” (§ 207, subd. (a).) Accordingly, in order “to prove the crime of kidnapping, the prosecution must prove three elements: (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.]” (*People v. Dalerio* (2006) 144 Cal.App.4th 775, 781, fn. omitted.) In assessing whether the movement of the victim was substantial rather than slight or trivial, “the trier of fact may consider more than actual distance.” (*People v. Martinez* (1999) 20 Cal.4th 225, 235 (*Martinez*)). The jury may consider the totality of the circumstances surrounding the movement, including such factors as whether the movement increased the risk of harm to the victim, decreased the likelihood of detection, increased the danger inherent in a victim’s foreseeable attempts to escape, or enhanced the attacker’s opportunity to commit additional crimes. (*Id.* at p.

237.) In addition, the jury should consider whether the movement was merely incidental to an associated crime committed by the defendant. (*Ibid.*)

In *People v. Arias* (2011) 193 Cal.App.4th 1428 (*Arias*), the court found that the movement of the victim 15 feet from outside to inside his apartment “increased his risk of harm in that he was moved from a public area to the seclusion of his apartment,” and made it “less likely defendant would have been detected if he had committed an additional crime. These factors support the asportation requirement for kidnapping. [Citations.] [¶] . . . Unlike aggravated kidnapping, asportation for simple kidnapping does not *require* a finding of an increase in harm to the victim or other contextual factors. [Citation.] However . . . the increase of harm and other contextual factors may be considered in determining whether asportation for simple kidnapping has been proved. [Citation.]” (*Id.* at pp. 1435-1436.)

Here, the record amply supports the jury’s kidnapping verdicts. The victims were forcibly moved several feet against their will into more private rooms in the apartment, enhancing defendant’s opportunity to commit additional crimes, minimizing the risk of detection, and obscuring the fact that he had taken prisoners. Deharo testified that defendant grabbed her and forced her from the couch in the living room to the bathroom where he closed the door and the window, making it more difficult for her to escape and providing the opportunity to commit additional crimes. Jane Doe testified that defendant forced her and Deharo to move into the bedroom, where he made them kneel to avoid detection by police. This also made it difficult to discover the kidnappings. As John Doe

testified, he became worried when he returned to the apartment and could not find Deharo. Only by opening the bedroom door was he able to learn what had happened.

Moreover, by secluding and confining Deharo and Jane Doe in a bedroom, defendant increased the risk that they could be injured or killed. For example, when the police inevitably stormed the apartment or released the police dog, they would not know there were innocent prisoners present. (*People v. Shadden* (2001) 93 Cal.App.4th 164, 168 [determination of increased risk of harm requires consideration of whether the movement decreased the likelihood of detection and enhanced the defendant's opportunity to commit additional crimes].) Defendant argues there was no increased risk of injury, because Deharo's son told police that defendant was in the apartment with Deharo and Jane Doe. However, prior to John Doe warning the police about the presence of his mother and sister, the police were ignorant of this information and whether defendant was armed and dangerous. Furthermore, the fact that these dangers did not, in fact, occur does not mean that the risk of harm was not increased. (*People v. Rayford* (1994) 9 Cal.4th 1, 14.) While in the vast majority of cases the increased risk of harm is a risk of physical harm, this requirement can also be satisfied by a risk of mental, emotional, or psychological harm. (*People v. Leavel* (2012) 203 Cal.App.4th 823, 834.)

Nonetheless, defendant claims that the movement was merely incidental to his "willfully resisting, obstructing, or delaying a police officer." We conclude that such claim fails when Deputy Ruiz's testimony is considered. According to the deputy, he had lost defendant when defendant fled around a corner on foot. Thus, defendant had succeeded in eluding the police prior to entering the apartment.

The evidence is sufficient to support the kidnapping convictions.

B. Modification of CALCRIM NO. 1215

Defendant faults the trial court for modifying CALCRIM No. 1215 to instruct the jury that “[a] lack of necessity is sufficient basis to conclude a movement is not merely incidental.” He argues that “it was an improper pinpoint instruction, that legitimized the prosecution’s theory of the case while detrimentally affecting the defense.”

1. Relevant Proceedings

Following the close of evidence, the prosecutor sought to supplement CALCRIM No. 1215³ by adding the following: “A lack of necessity is a sufficient basis to conclude

³ CALCRIM No. 1215, in relevant part, provides:

“The defendant is charged [in Count _____] with kidnapping [in violation of Penal Code section 207(a)].

“To prove that the defendant is guilty of this crime, the People must prove that:

“1. The defendant took, held, or detained another person by using force or by instilling reasonable fear;

“2. Using that force or fear, the defendant moved the other person [or made the other person move] a substantial distance;

“[AND]

“3. The other person did not consent to the movement(;/.)

“<Give element 4 when instructing on reasonable belief in consent.>

“[AND]

“[4. The defendant did not actually and reasonably believe that the other person consented to the movement.]

“[In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

“*Substantial distance* means more than a slight or trivial distance. In deciding whether the distance was substantial, you must consider all the circumstances relating to the movement. [Thus, in addition to considering the actual distance moved, you may also consider other factors such as [whether the distance the other person was moved was beyond that merely incidental to the commission of _____ <insert associated crime>], whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, or gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.]

[footnote continued on next page]

a movement is not merely incidental.” This sentence would be added after the paragraph beginning “Substantial distance means more than a slight or trivial distance.” Defense counsel opposed the addition of this sentence on the ground that the current instruction is sufficient, and thus, the proposed sentence was not necessary, and was based “primarily on cases that involve aggravated kidnapping rather than simple kidnapping” In response, the prosecutor noted that the incidental language in CALCRIM No. 1215 is the same regardless of whether the kidnapping was simple or aggravated.

Referencing the 2013 version of CALCRIM No. 1215, which cited *People v. Bell* (2009) 179 Cal.App.4th 428 (*Bell*) under the heading “Instruction Duty,” the trial court concluded: “[S]ince *Bell* instructs us that there does need to be instruction upon movement incidental to an underlying crime, and I do agree that the *Bell* case is similar—sufficiently similar to the case before us, that the jury should be so instructed. [¶] I think that under the holding in [*People v. James* (2007) 148 Cal.App.4th 446 (*James*)] case and the [*People v. Leavel*] case that the prosecution is entitled to an instruction as proposed in the proposed supplemental jury instructions at paragraph one that lack of necessity is sufficient basis to conclude a movement is not merely incidental, and that should probably be integrated into [CALCRIM No.] 1215.”

Later on, defense counsel stated, for the record, his objection to the supplemental instruction regarding lack of necessity. However, he acknowledged the prosecutor’s

[footnote continued from previous page]

“<Defense: Good Faith Belief in Consent>”

“right to argue that he believes that if it’s not necessary, then it’s not necessarily included, or merely incidental.”

During closing argument, the prosecutor began: “Unnecessary. Those are the words that I would use to describe the events that unfolded on February 6th, 2013.” Those “[u]nnecessary” events included a 12-mile chase, defendant’s refusal to stop and pull over at Wilson’s request, defendant allowing his vehicle to crash with Wilson still inside, and defendant fleeing into an apartment complex, entering Deharo’s apartment and moving her into the bathroom, and moving Deharo and Jane Doe into the bedroom, where he directed them to get on their knees. In his concluding remarks, the prosecutor stated: “Was the movement incidental to the evasion? Law says a lack of necessity is sufficient basis to conclude a movement is not merely incidental. [¶] That is exactly what we have here, that is why I started out my closing argument with completely unnecessary. When you’re evading police, you don’t have to grab women and make them go places. You don’t have to confine them in rooms. It’s unnecessary, completely unnecessary. And because it’s unnecessary, it’s not incidental.” Defense counsel replied that it was absolutely necessary for defendant to move Deharo and Jane Doe because they may alert the police of his presence. On rebuttal, the prosecutor referenced the jury instructions and told jurors they would “receive a point of law where if the movement is not necessary to the underlying crime, then it is not incidental.

The jury received the modified version of CALCRIM No. 1215 that instructed, “A lack of necessity is sufficient basis to conclude a movement is not merely incidental.”

2. *Standard of Review*

“An appellate court reviews the wording of a jury instruction de novo” (*People v. O’Dell* (2007) 153 Cal.App.4th 1569, 1574), and determines whether an instruction is complete and correctly states the law (*People v. Posey* (2004) 32 Cal.4th 193, 218; *People v. Andrade* (2000) 85 Cal.App.4th 579, 585). “[T]he proper test for judging the adequacy of instructions is to decide whether the jury was fully and fairly instructed on the applicable law [citation].” (*People v. Partlow* (1978) 84 Cal.App.3d 540, 558.)

3. *Analysis*

According to defendant, the trial court erred in modifying CALCRIM No. 1215 because the additional sentence amounted to an argumentative pinpoint instruction on asportation, which “legitimized the prosecution’s theory.” In order to determine whether the modified version of CALCRIM No. 1215 correctly states the law without directing a verdict, we begin with a review of case law defining “asportation.”

“With respect to asportation, aggravated 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. [Citations.] [¶] . . . [¶] The asportation requirement for simple kidnapping has historically been less clear. . . . ‘[W]here only simple kidnapping is involved, it is clear that the victim’s movements cannot be evaluated in the light of a standard which makes reference to the commission of another crime.’ [Citation.] Instead, [the California Supreme Court] inferred from the statutory language that the critical consideration was distance—a term [the Court] attempted to amplify by saying

‘the victim’s movements must be more than slight [citation] or “trivial” [citation], they must be substantial in character to constitute kidnapping under section 207.’ [Citation.]” (*Martinez, supra*, 20 Cal.4th at pp. 232-233.)

While subsequent cases affirmed that the movement must be ““substantial in character,”” no particular distance was controlling. (*Martinez, supra*, 20 Cal.4th at pp. 233-234.) As one appellate court observed, “Jury confusion is understandable. Without a frame of reference, ‘substantial’ has little or no meaning. To only say, as [the standard jury instruction] does, that it is ‘more than slight or trivial’ scarcely helps.” (*People v. Daniels* (1993) 18 Cal.App.4th 1046, 1053, fn. 5.) Thus, the *Martinez* court reaffirmed “that for simple kidnapping asportation the movement must be ‘substantial in character’ [citation], but [held] that the trier of fact may consider more than actual distance.” (*Martinez, supra*, at p. 235.) “[M]ovement that is ‘substantial in character’ arguably should include some consideration of the ‘scope and nature’ of the movement or changed environment, and any increased risk of harm.” (*Id.* at p. 236.) Additionally, the *Martinez* court observed that “in a case involving an associated crime, the jury should be instructed to consider whether the distance a victim was moved was incidental to the commission of that crime in determining the movement’s substantiality. . . . [S]uch consideration is relevant to determining whether more than one crime has been committed, and is amply supported by the case law. [Citations.]” (*Id.* at pp. 237-238.)

In *People v. Corcoran* (2006) 143 Cal.App.4th 272 (*Corcoran*), the Appellate Court affirmed an aggravated kidnapping conviction when the victims were moved *after* the attempted robbery had been aborted. (*Id.* at pp. 279-280.) The court concluded that

“the movement of the victims had nothing to do with facilitating taking cash from the [establishment]; defendant and his accomplice had aborted that aim, and their seclusion of the victims in the back office under threat of death was clearly ‘excess and gratuitous.’” (*Ibid.*) “In other words, the court in *Corcoran* held that a movement that was *unnecessary* to the target offense and *did not facilitate* it was not merely incidental to it.” (*James, supra*, 148 Cal.App.4th at p. 455.)

In *James*, the defendant moved an employee working outside the business to the locked door of the business and used him to gain access. Once the door was open, the defendant moved the outside employee into the building and forced him to lie on the floor with other works for an hour while they robbed the managers of the business who were held inside a cage. (*James, supra*, 148 Cal.App.4th at p. 449.) Relying on *Corcoran*’s premise (“a movement that was *unnecessary* to the target offense and *did not facilitate* it was not merely incidental to it” (*James, supra*, at p. 455) the defendant in *James* argued that “a movement which was necessary to, and facilitative of, a robbery must necessarily have been merely incidental to it.” (*Ibid.*) Rejecting his argument, the court opined: “The conclusion is logically erroneous and legally unsound. *Corcoran*’s holding was simply that a movement that is *not* necessary to a robbery is also *not* merely incidental to it.^[4] Defendant argues that a movement *necessary* to the robbery must therefore be merely *incidental* to it. This is the *inverse* of the *Corcoran* holding, which

⁴ “Indeed, a movement unnecessary to a robbery is not incidental to it at all.”

does not logically follow from the statement itself.^[5] . . . A movement necessary to a robbery may or may not be merely incidental to it. Lack of necessity is a sufficient basis to conclude a movement is not merely incidental; necessity alone proves nothing.^[6]” (*James, supra*, at p. 455.) The court found that the movement of the outside employee into the building took place after “defendant’s purported purpose in moving [the employee] had been fulfilled.” (*Id.* at p. 457.)

Considering the above, the modification requested by the prosecutor was legally correct. However, a legally correct instruction may be refused if there is no evidence to which it may properly relate. (*People v. Robinson* (1999) 72 Cal.App.4th 421, 428.) Here, the evidence showed that neither Deharo nor Jane Doe was involved in the police chase. By the time defendant encountered them, he had already lost Deputy Ruiz. Nonetheless, defendant argues that the modification referenced “facts gleaned from the evidence in such a way that the instruction is really argument disguised as a statement of law.” We disagree. Instructing the jury that “lack of necessity is sufficient basis to conclude a movement is not merely incidental” did not diminish the prosecution’s burden

⁵ “That the inverse of a true statement is not necessarily true is easy to see by example. The statement, ‘if an animal is a collie, it is a dog’ is true. Its inverse, ‘if an animal is not a collie, it is not a dog,’ is untrue, as there are many other breeds of dog. Similarly, the statement, ‘if there are not clouds in the sky, it is not raining’ is true, but its inverse, ‘if there are clouds in the sky, it is raining’ is not.”

⁶ “A similar logical error appears in *People v. Hoard* (2002) 103 Cal.App.4th 599, 605-606 . . . in which the court criticizes another case, *People v. Salazar* (1995) 33 Cal.App.4th 341 . . . which held that a movement that was not necessary to the commission of a rape was not incidental to it. The *Hoard* court states, ‘Stated affirmatively, according to *Salazar*, necessary movement is incidental movement.’ (*Hoard, supra*, at p. 605.) The conclusion simply does not follow.”

of proof, or prevent the jury from considering the defendant's claim that the movement of Deharo and Jane Doe was merely incidental to the commission of willfully resisting, obstructing, or delaying a police officer. Rather, the language gave the jury a framework within which to determine whether the movement was incidental to defendant's other crime. While the prosecution argued that it was not, i.e., the movement was unnecessary, defense counsel argued that it was "absolutely necessary" for defendant to move Deharo and Jane Doe in order to avoid having the police find him.

Moreover, considering this complex area of the law, it was prudent to provide the jury with this modification. In *Bell*, the appellate court held that the trial court prejudicially errs when it fails to instruct the jury that, in determining whether defendant's movement of the victim was substantial, they may consider whether the movement was merely incidental to the targeted offense. (*Bell, supra*, 179 Cal.App.4th at p. 439.) However, CALCRIM No. 1215 provides no guidance regarding whether movement is incidental to another crime. The jury is merely told that in addition to considering the *Martinez* factors, they must also consider "[whether the distance the other person was moved was beyond that merely incidental to the commission of _____ <insert associated crime>]" (CALCRIM No. 1215.) As such, the pattern instruction fails to provide a meaningful way to evaluate the adequacy of physical distance by itself, a question the jury is tasked with resolving. The modification provided in this case properly aided the jury in their deliberations.

C. Counts 7 and 8 Must Be Vacated

Defendant contends, and the People concede, that his convictions of felony false imprisonment of Deharo and Jane Doe (counts 7 and 8) must be vacated since false imprisonment is a lesser included offense of simple kidnapping (counts 5 and 6). We agree.

“False imprisonment is the unlawful violation of the personal liberty of another.” (§ 236.) Personal liberty is violated when the victim is compelled to remain where she does not wish to remain, or to go where she does not wish to go. (*People v. Reed* (2000) 78 Cal.App.4th 274, 280.) False imprisonment is a lesser included offense of simple kidnapping, the only difference being the element of asportation necessary to prove kidnapping. (*People v. Magana* (1991) 230 Cal.App.3d 1117, 1120-1121; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547.) Because defendant was separately charged and convicted of false imprisonment of Deharo and Jane Doe based on the same conduct supporting his kidnapping convictions involving them, and because false imprisonment is a lesser included offense of kidnapping, his false imprisonment convictions involving Deharo and Jane Doe (counts 7 and 8) should be vacated. (*People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1147 [“A defendant cannot be convicted of both an offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act.”]; *Magana, supra*, at pp. 1120-1121.)

D. Count 2 Must Be Vacated

Defendant contends, and the People concede, that his conviction of misdemeanor false imprisonment of Wilson (count 2) must be vacated, since it is a lesser included offense of felony false imprisonment (count 3). We agree.

While false imprisonment involves “the unlawful violation of the personal liberty of another,” (§ 236) it becomes a felony when it is “effected by violence, menace, fraud, or deceit” (§ 237). The violence necessary to commit felony false imprisonment is “*the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint.*” (*People v. Babich* (1993) 14 Cal.App.4th 801, 806.) Misdemeanor false imprisonment is a lesser included offense of felony false imprisonment. (*Id.* at p. 807.) Therefore, defendant’s misdemeanor false imprisonment of Wilson (count 2) should be vacated.

E. Correction of Abstract of Judgment

Defendant contends, and the People concede, that the abstract of judgment must be amended to show that he was convicted of kidnapping a child under the age of 14 (count 6), and the court was correct when it originally stated it was sentencing defendant to the midterm of eight years.

The information alleged, the evidence showed, and the jury found that defendant kidnapped Jane Doe, who was 12 years old. Kidnapping is punishable for three, five or eight years in state prison (§ 208, subd. (a)), unless the victim is under the age of 14; then it is punishable for five, eight, or 11 years in state prison (§ 208, subd. (b)). Here, the court sentenced defendant to the middle term of eight years. Later, the Department of

Corrections sent a letter to the court inducing it to amend the abstract of judgment to reflect an eight-year upper term sentence pursuant to section 208, subdivision (a), rather than the originally imposed eight-year middle term pursuant to section 208, subdivision (b). This was erroneous. Therefore, the abstract of judgment must be corrected to properly reflect an eight-year middle term.

III. DISPOSITION

The judgment is modified and the matter is remanded to the trial court with directions to (1) vacate the convictions for felony false imprisonment of Deharo and Jane Doe (counts 7 and 8) and misdemeanor false imprisonment of Wilson (count 2); (2) have the superior court clerk generate a new minute order reflecting that the February 24, 2014, minute order incorrectly stated the jury found defendant guilty of Health and Safety Code section 11370, subdivision (a), and instead, the jury found defendant guilty of Health and Safety Code section 11379, subdivision (a); (3) correct the abstract of judgment to reflect that defendant was sentenced to the mid-term of eight years on count 6; and (4) forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

J.

We concur:

RAMIREZ

P. J.

CODRINGTON

J.