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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS NAVA,

Defendant and Appellant.

F067612

(Super. Ct. No. F13901230)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Jean M. Marinovich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Detjen, Acting P.J., Franson, J. and Peña, J.

Defendant Nicholas Nava was convicted by jury trial of kidnapping (Pen. Code, § 207, subd. (a)),¹ assault with a firearm (§ 245, subd. (a)(2)), criminal threats (§ 422), false imprisonment (§ 236), and possession of a firearm by a felon (§ 29800, subd. (a)(1)), with various firearm enhancements. He was sentenced to 22 years in prison. On appeal, defendant contends, and the People concede, (1) the false imprisonment conviction must be reversed because the false imprisonment was a lesser included offense of the kidnapping and (2) the abstract of judgment must be amended. We agree. Accordingly, we reverse the conviction for false imprisonment and order the abstract of judgment amended.

FACTS

On January 20, 2013, the victim was at a friend's house when another friend, Cynthia, arrived. The victim had known Cynthia for a few years and he saw her only now and then. She was married to defendant, whom the victim had met once a few months earlier. Cynthia asked the victim if he would help her move some things from her apartment, and he agreed. They left in her car. She stopped and picked up another friend to help. When they got to her apartment, they entered through the back sliding glass door. The victim had been to the apartment a few times before. Inside, Cynthia got clothes and other things and told the two men to put everything into duffel bags for her. When they finished about 30 minutes later, they left through the back door and walked toward Cynthia's car.

At that point, defendant approached them from the street, pointing a gun at them and cussing. The victim identified himself to defendant, but defendant instructed both men and Cynthia to take the bags and go back in the apartment. The other man ran away,

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

leaving the duffel bag behind. Defendant told the victim to get that bag too and go into the apartment. The victim did as he was told because he was scared.

Cynthia entered first, then defendant, followed by the victim. As the victim entered the apartment, defendant hit him in the face with the gun. The victim got up and continued forward and defendant hit him on the back of the head with the gun. Defendant continued to yell and cuss. He said they were all going to die if the man who ran away called the police. The victim got up again and defendant told him to go into the bathroom. Defendant told him to take his clothes off. The victim removed his shirt, shoes, and socks. Then defendant told him to get on the floor, and he told Cynthia to tie up the victim with black electrical tape. The victim went to his knees and bent forward at the waist. Cynthia looked nervous and said she did not know how to tie him up. Defendant took the tape, set the gun on the sink, and wrapped the tape around the victim's wrists behind his back.

Defendant told the victim not to move. Defendant turned off the light and closed the door. The victim could hear defendant and Cynthia arguing. Defendant checked on the victim every five or ten minutes, still making threats that everyone would die. He kicked the victim a few times. He also brought a spray can and sprayed black paint on the victim's face. Defendant laughed and cussed. He told the victim to get into the shower. When defendant returned in a few minutes, he bound the victim's feet with a different type of tape. He told the victim to walk out of the bathroom. He hopped toward the kitchen. Another man was present and he laughed at the black paint on the victim's face. Defendant put the victim over his shoulder, carried him to Cynthia's car, which was now parked on the grass only 10 or 15 feet from the back door, and put him next to the open trunk. He told the victim to get in the trunk and he complied. Defendant put tape over the victim's mouth and told him everything would be all right if he cooperated. Cynthia also told the victim everything was going to be all right. But he believed they

were going to kill him. Defendant closed the trunk. As the car moved, the victim could hear loud music and Cynthia and a man talking inside the car.

As the car was moving for about 10 minutes, the victim stretched the electrical tape and freed his hands, then struggled to remove the tape from around his feet. He reached around to find the trunk release, and finally opened the trunk. He could see they were in an apartment complex parking lot. He rolled out of the trunk and started running. The other man got out of the car and tried to chase him. The victim jumped a fence. Defendant was driving the car, which was about 15 or 20 feet from him, and Cynthia was in the backseat. They yelled at the victim to come back and told him it was okay. The victim crossed the street and ran past houses. He eventually stopped at a house and knocked on the door, crouching outside to hide himself. The man inside told him to stay there; the police were on their way. The man threw him a bottle of water. When the police arrived, the victim told them what happened, and they took him to the emergency room.

At trial, the prosecutor argued to the jury that the kidnapping and the false imprisonment were based on different acts, as follows:

“Count One is kidnapping, [section] 207. This is what we have. These are the elements. Remember each crime [has] elements. The evidence, everything else is to help you understand whether or not the crime is true as charged. Did this happen. Mr. Nava, the defendant, held or detained [the victim] by using force or instilling reasonable fear. Used that fear to move him, and he didn’t consent. [The victim] didn’t agree to the movement. You don’t kidnap a person by saying, hey, can we go to the store? That is not kidnapping, right? He’s like, yeah, let’s go to the store. You don’t go to the store in the trunk though. Understand that. [¶] ... [¶]

“So [defendant] took, held or detained [the victim] by fear, wasn’t friendly, moved [the victim] a substantial distance. And as [the victim] said, ‘That is not what I wanted to do.’ Yeah, he got in. He was not thrown in. He wasn’t pushed, shoved, whatever, into the trunk. He was bound. And because of fear and force, he got in the trunk. That is not consent. That is kidnapping. [¶] ... [¶] ... He didn’t shoot anybody, but ... he is armed, armed with a gun when he is doing these things. [¶] ... [¶]

“[Section] 236 is the false imprisonment. Very similar to the kidnapping in Count One. The difference is, remember the kidnapping—and here’s the People’s thought, the kidnapping is taking him and driving him away. The [false imprisonment] is distinct, because that is the bathroom. Go into the bathroom, stay in the bathroom, tying you up, closing the door, turning the light off. Periodically coming in to remind you that that is the bathroom. Intentionally restrained or detained [the victim] by violence or menace. Absolutely.

“And two, the defendant made him stay against his will. This is this case. He didn’t want to stay there, remember? It wasn’t his idea to stay in there. He did it because he was afraid.”

DISCUSSION

I. False Imprisonment Conviction

Although the prosecutor argued at trial that the victim’s detention was separated into two distinct crimes, the parties now agree that the false imprisonment was a lesser included offense of the kidnapping, based on an ongoing detention.

Section 207, subdivision (a) defines kidnapping as follows: “Every person who 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 country, state, or county, or into another part of the same county, is guilty of kidnapping.” “[T]he forcible detention of a victim is an element of kidnapping and as long as the detention continues, the crime continues.” (*People v. Thomas* (1994) 26 Cal.App.4th 1328, 1334.) False imprisonment is “the unlawful violation of the personal liberty of another.” (§ 236.) Because a kidnapping cannot be committed without unlawful violation of the personal liberty of another (i.e., detention), false imprisonment is a lesser included offense of kidnapping, and a defendant cannot be convicted of both based on the same act. (*People v. Chacon* (1995) 37 Cal.App.4th 52, 65; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120-1121.)

In this case, the victim was forcibly detained in the bathroom, then the trunk, and his detention continued as he was transported in the car. We agree that the false

imprisonment was a lesser included offense in this case and the conviction must be reversed and its enhancement stricken.

II. Abstract of Judgment

The parties also agree that the abstract of judgment contains two errors: (1) it lists count 1 as a violation of section 270, rather than section 207, and (2) it lists the enhancements for concurrent counts 2, 3, and 4 as stayed. The People note that an amended abstract filed on February 18, 2014, has corrected these errors. We observe, however, that both abstracts fail to reflect the section 12022.5, subdivision (a) enhancement attached to count 1. The verdict form on count 1 shows that the jury found true enhancement allegations pursuant to both section 12022.53, subdivision (b) and section 12022.5, subdivision (a). And the transcript demonstrates that the trial court imposed a 10-year term on the former and a stayed 10-year term on the latter. It is this stayed term on the section 12022.5, subdivision (a) enhancement that is missing from the abstracts.

DISPOSITION

The conviction for false imprisonment (count 4) is reversed and the section 12022.5, subdivision (a) enhancement attached to that count is stricken. The trial court is directed to amend the abstract of judgment (filed on February 18, 2014) to so reflect, and to reflect the stayed 10-year term on the section 12022.5, subdivision (a) enhancement attached to count 1. The clerk of the court is ordered to forward copies of the modified abstract of judgment to the Department of Corrections and Rehabilitation.