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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SANTOS FLORES RANGEL,

Defendant and Appellant.

G046590

(Super. Ct. No. 10NF3017)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed as modified.

Suzanne G. Wrubel, 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, A. Natasha Cortina and Kimberley A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Santos Rangel Flores of carjacking (Pen. Code, § 215, subd. (a); all further statutory references are to this code; count 1), first degree robbery in concert (§§ 211, 212.5, subd. (a); count 2), residential burglary (§§ 459, 460, subd. (a); count 3), and false imprisonment (§§ 236, 237, subd. (a); count 4). The trial court thereafter found true allegations defendant had four prior strike convictions (§§ 667, subds. (d), (e)(2)(A), 1170.12, subds. (b), (c)(2)(A)), four prior serious felony convictions (§ 667, subd. (a)(1)), and served three prior prison terms (§ 667.5, subd. (b)). It struck the section 667.5, subdivision (b) allegations for sentencing purposes and sentenced defendant to prison for 25 years to life for each of the four convictions to run concurrently, plus an additional 20 years under section 667, subdivision (a).

Defendant contends the court prejudicially erred by failing to instruct the jury *sua sponte* on how to evaluate expert witness testimony and on the lesser included offense of misdemeanor false imprisonment, and by instructing the jury carjacking could be a natural and probable consequence of robbery and burglary. He also argues section 654 requires staying the sentences on counts 1 and 3, as well as on count 4 if we reject his claim the jury should have been instructed on misdemeanor false imprisonment. We agree with defendant's section 654 claims and order the sentences on those counts stayed. In all other respects, the judgment and sentence are affirmed.

FACTS

While driving his father's work van containing tools, Antonio Mata picked up a prostitute named Pearl and rented a room at a motel where they "hung out" and smoked methamphetamine but did not have sex. The next day, Pearl called another prostitute named Crystal and, when she arrived, all three smoked methamphetamine and Mata paid her for sex. Throughout this time, Crystal left and returned several times and made phone calls. Mata left briefly to get a drink and when he returned Crystal was not

in the room. Upon hearing a knock, Mata opened the door and defendant and Dimas Romero, who were with Crystal, “rushed” and punched him.

With defendant standing nearby, Romero pinned Mata to the bed and took his wallet, cell phone, ATM card, and the keys to Mata’s father’s van, which was parked outside the motel room. Romero then pushed defendant into the bathroom and punched him in the face after telling him to sit on the toilet and “to shut the fuck up.” While in the bathroom, Mata heard the jingling of the van keys, which Mata now claimed had been in the pocket of his pants that were lying on the bedroom floor (contrary to his earlier testimony that the keys had been taken along with the other items), and someone driving his father’s van away. Defendant remained in the motel room.

At some point, Mata was taken out of the bathroom. Romero slammed Mata’s head into the wall so hard that it left a mark and scared Mata into giving him his PIN number by telling him he used to kill people for a living and would cut off fingers. Frightened, Mata sat in the corner of the room facing the wall as instructed while Romero made telephone calls to sell Mata’s father’s tools. While this was happening defendant was lying on the bed holding a screwdriver, which he and Romero passed back and forth. After all of Mata’s belongings were taken from him, defendant told him he could leave but Mata was too scared to do so.

When police arrived in response to a 911 call, they found Romero standing outside Mata’s room and defendant and Mata inside the room. Defendant appeared to have blood on his shirt and Mata’s van was gone. One of the responding officers described the incident as a “john roll,” where the customer of a prostitute deal is set up to be robbed, which is effective because such customers are less likely to report the crimes due to embarrassment. John rolls are likely to occur in the area where the motel is located due to the high rate of prostitution.

Defendant testified he was only in Mata’s motel room because Romero had invited him in for some pizza. Upon entering the room, defendant saw a

methamphetamine pipe and Mata sitting on a table. Romero was standing outside on the balcony. Mata asked defendant if he had seen two females in a van; defendant responded he had not. When defendant asked Mata why he did not just leave, Mata said because he needed his dad's van or he would get in trouble.

Defendant called his brother Robert Quesada, who was certified as a registered addiction specialist, as an expert on the effects of methamphetamine intoxication. According to Quesada, methamphetamine can cause visual and audio psychosis and people under its influence may have difficulty perceiving and recollecting events. In response to a hypothetical question asking whether a 23-year-old person under the influence of methamphetamine could possibly misperceive the number of persons coming through a door, Quesada answered "yes."

DISCUSSION

1. Failure to Instruct Sua Sponte on Expert Testimony

Defendant contends the court erred by failing to instruct the jury sua sponte with CALCRIM No. 332 on expert testimony because his brother Robert Quesada testified as an expert. Even assuming error, it was harmless.

Although defendant asserts the "harmless beyond a reasonable doubt" standard prescribed in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] applies, California courts employ the reasonable probability standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, to court errors in failing to give a particular instruction sua sponte (*People v. Breverman* (1998) 19 Cal.4th 142, 178). Regarding defendant's particular claim here, "the erroneous failure to instruct the jury regarding the weight of expert testimony is not prejudicial unless the reviewing court, upon an examination of the entire cause, determines that the jury might have rendered a different verdict had the omitted instruction been given." (*People v. Williams* (1988) 45 Cal.3d

1268, 1320, modified on another point in *People v. Guiuan* (1998) 18 Cal.4th 558, 560-561.) We do not so conclude.

Section 1127b requires the court to instruct sua sponte on expert testimony whenever an expert testifies in a criminal trial or proceeding. Under that statute, such an instruction need only substantially provide that “the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion” but “is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable. [¶] No further instruction on the subject of opinion evidence need be given.”

CALCRIM No. 332, in turn, instructs the jury it “must consider the opinion[], but [is] not required to accept [it] as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert’s knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.”

Here, although the court did not instruct under CALCRIM No. 332, it did instruct the jurors on how to evaluate witness testimony in CALCRIM No. 226, which told them “[y]ou alone must judge the credibility or believability of the witnesses,” “[t]he testimony of each witness must be judged by the same standard,” and to “[c]onsider the testimony of each witness and decide how much of it you believe.” Regarding how to evaluate believability, the omitted instruction would have specifically referred them to CALCRIM No. 226. (CALCRIM No. 332 [“In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally”].) To that

end, CALCRIM No. 226 directs the jurors that they could “believe all, part, or none of any witness’s testimony” and “may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony,” such as the reasonableness of “the testimony when you consider all the other evidence in the case.” This includes the reasonableness of Quesada’s opinion on the effects of methamphetamine in light of his certification as a registered addiction specialist in 2011, his work as a mental health worker addiction specialist, and his current occupation as a drug and alcohol counselor.

Additionally, the court instructed the jury with CALCRIM No. 301 that Quesada’s testimony alone was sufficient to prove any fact but that, before the jury concluded it did, to “carefully review all the evidence.” The court further told the jury how to evaluate conflicting evidence under CALCRIM No. 302. Together these instructions substantially covered all of the matters required by section 1127b and CALCRIM No. 332 and adequately equipped the jury on how to evaluate Quesada’s testimony. We presume the jury followed these instructions absent any contrary indication. (*People v. Gray* (2005) 37 Cal.4th 168, 217.) On this record, any error in failing to give CALCRIM No. 332 was harmless.

Defendant argues “in view of Quesada’s relationship to [defendant] and lack of formal education, it was especially crucial that the jury recognize he was an expert” But Quesada testified about his qualifications as a registered addiction specialist and defense counsel told the jury during closing argument that Quesada was an expert who had testified about the effects of methamphetamine. The prosecutor confirmed Quesada had testified as an expert, noting it was “interesting the only expert . . . in the country the defense could come up with is the defendant’s brother, a guy with a G.E.D. who got a certificate this year. The crime happened last year.” The jury thus knew Quesada had testified as an expert.

Defendant also contends that without CALCRIM No. 332, “the jury likely would have taken Quesada’s testimony less seriously than testimony from an unrelated

party.” But defendant fails to explain how giving CALCRIM No. 332 would have caused the jury to take Queseda’s testimony more seriously, particularly since nothing in CALCRIM No. 332 instructs the jury to give an expert more credence than a lay witness. Rather, it tells a jury to consider the testimony and reject any opinion it finds unreasonable. To determine believability, it then refers the jury to CALCRIM No. 226, which states a witness’s personal relationship with defendant is a valid consideration in evaluating the witness’s testimony. We are thus not persuaded the mere absence of CALCRIM No. 332 “validated any belief that Quesada was not a ‘legitimate’ witness.”

Nor has defendant shown that because CALCRIM No. 332 was not given, the jury “likely . . . disregarded the hypothetical as . . . something not normally considered significant.” This argument apparently relates to the bracketed portion of CALCRIM No. 332, which provides, “An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert’s reliance on that fact in evaluating the expert’s opinion.” (Italics omitted.) CALCRIM No. 226’s direction that the jury “consider anything that reasonably tends to prove or disprove the truth or accuracy of [the] testimony” including its reasonableness “when you consider all the other evidence in the case” adequately instructed the jury on how to evaluate the hypothetical.

Defendant maintains “[t]here would be no need to ever give an instruction on expert testimony if the guidance contained therein was adequately covered by other instructions.” On the contrary, such an instruction is statutorily required whenever “the opinion of any expert witness is received in evidence.” (§ 1127b.) Whether the failure to give the instruction is harmless is another question. We hold it was under the particular facts of this case.

Defendant relies on *People v. Ruiz* (1970) 11 Cal.App.3d 852, which held the trial court's failure to instruct sua sponte on how to consider expert opinion testimony on the defendant's insanity defense was prejudicial error because the jury's verdict, rendered within 19 minutes after the case was submitted to it for deliberation, showed "that as a result of the failure to instruct upon the manner in which such testimony was to be viewed, a fair consideration of the [experts'] testimony was not given." (*Id.* at p. 865.) In other words, it determined the jury might have rendered a different verdict if the instruction had been given. (See *ibid.*) We reach a different result here based on our conclusion the instructions given substantially satisfied the requirements of section 1127b. Although the defense counsel in *Ruiz* stipulated a section 1127b instruction need not be given because he felt "the basic elements of the instruction have been given in the [c]ourt's other instructions" (*Ruiz*, at p. 860), *Ruiz* never states what these other instructions were or why they did not render the section 1127b error harmless. *Ruiz* is thus not controlling, as "cases are not authority for propositions not considered." (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

2. *Erroneous Instruction on Natural and Probable Consequences*

Defendant argues the court erred in instructing the jury that the carjacking could be a natural and probable consequence of the burglary and robbery because the evidence was insufficient to support such an instruction. We disagree.

Under the natural and probable consequences doctrine, "[a] person who knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133.) "For a criminal act to be a 'reasonably foreseeable' or a 'natural and probable' consequence of

another criminal design it is not necessary that the collateral act be specifically planned or agreed upon, nor even that it be substantially certain to result from the commission of the planned act.” (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 530.) But “the collateral criminal act [must be] the ordinary and probable effect of the common design,” rather than “a fresh and independent product of the mind of one of the participants, outside of, or foreign to, the common design.” (*Id.* at p. 531.) The issue “is a factual question to be resolved by the jury in light of all of the circumstances surrounding the incident.” (*Ibid.*)

Defendant asserts that because burglary and robbery generally occur in areas unrelated to vehicles, they do not naturally and probably lead to carjacking, which requires a specific intent to take a vehicle, because without knowing a vehicle is present when a robbery or burglary occurs, “carjacking constitutes a separate and independent offense by one of the perpetrators, not a natural consequence or escalation of the initial burglary or robbery.”

Citing *People v. Leon* (2008) 161 Cal.App.4th 149, defendant claims the natural and probable consequences doctrine “was expanded beyond the limits of the law.” In that case, while the defendant and his codefendant, both gang members, were committing the burglary of a car in a rival gang’s territory, the victim arrived and shouted he was going to call the police. The defendant stared at the victim and his codefendant fired a gun into the air. The court held that under those facts, witness intimidation was not a natural and probable consequence of the target crimes of vehicle burglary, possessing a concealed firearm by an active gang member, and carrying a loaded firearm by an active gang member. (*Id.* at p. 161.)

Here, in contrast, the jury could have rationally inferred that Romero’s taking of Mata’s keys during the burglary and robbery while defendant stood nearby would naturally and probably lead to the carjacking. To this end, defendant himself notes “[t]he taking of Mata’s keys constituted the beginning of the carjacking” Under these circumstances, “a reasonable person in the defendant’s position would have or

should have known” carjacking was a reasonably foreseeable consequence of the burglary and robbery he aided and abetted. (*People v. Nguyen, supra*, 21 Cal.App.4th at p. 531.)

Alternatively, the jury could have reasonably determined the robbery and burglary were part of a john roll, given that the crimes occurred in a part of town where john rolls were likely to occur and the facts of the case suggest Mata was set up by Pearl and Crystal. In particular, after hanging out and smoking methamphetamine with Mata for over a day, Pearl called Crystal who in turn made phone calls and left the room and returned several times before bringing defendant and Romero to burglarize and rob Mata, which Mata would be reluctant to report because he had solicited a prostitute and smoked methamphetamine. An inference can be made that Crystal told defendant and Romero about Mata’s father’s van and other belongings, and that defendant was standing guard over Mata by remaining in the motel room while Romero took the keys and carjacked the van. The jury thus could have determined it was reasonably foreseeable a carjacking would occur as a natural and probable consequence of the burglary and robbery.

Defendant acknowledges this possibility but asserts under those facts he “would have known about and been part of a plan to carjack Mata, which would lead to a conclusion of aiding and abetting without any need for the natural and probable consequences doctrine.” In that event, however, any error in instructing the jury with the natural and probable consequence doctrine would be harmless because it would not be “reasonably probable the result would have been more favorable to the defendant had the error not occurred.” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130.) Given defendant’s admission the above facts sufficed for an aiding and abetting determination, his claim no evidence existed to show he knew Romero intended to take Mata’s father’s van lacks merit. Consequently, it is unnecessary to determine whether defendant’s failure to object to the instruction forfeits his claim or whether his counsel was ineffective for not objecting.

3. *Failure to Instruct Sua Sponte on Misdemeanor False Imprisonment*

Defendant asserts the court prejudicially erred in failing to instruct the jury sua sponte on misdemeanor false imprisonment as a lesser included offense of felony false imprisonment. We are not persuaded.

“The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.” (*People v. Blair* (2005) 36 Cal.4th 686, 744.) “That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.” (*Id.* at p. 745.) “To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist.” (*Ibid.*; see also *People v. Breverman*, *supra*, 19 Cal.4th at p. 162.)

“False imprisonment is the unlawful violation of the personal liberty of another.” (§ 236.) “Any exercise of express or implied force which compels another person to remain where he does not wish to remain, or to go where he does not wish to go, is false imprisonment.” (*People v. Bamba* (1997) 58 Cal.App.4th 1113, 1123.) False imprisonment becomes a felony where it is “effected by violence, menace, fraud, or deceit.” (§ 237, subd. (a).) Thus, a trial court need not instruct on a misdemeanor false imprisonment unless there is evidence the victim was unlawfully restrained without the use of violence, menace, fraud or deceit.

Defendant claims such an instruction was required because although he and Romero used force and fear to rob Mata, “the jury could have found that the false imprisonment of Mata did not occur until after the robbery was completed, when Romero told Mata to sit in the corner and face the wall,” and a reasonable factual question existed as to whether that, “without any additional threat or violence, could have constituted

misdemeanor false imprisonment rather than felony false imprisonment.” Defendant notes he did not use threats or force to make Mata stay in the room and even told him he could leave.

To support his argument, defendant analogizes this case to *People v. Matian* (1995) 35 Cal.App.4th 480. There, during his sexual assault of his victim, the defendant squeezed her breast hard enough to cause pain, and possibly bruising. Afterwards she collected her bookbag and prepared to go but the defendant grabbed her arm, yelled at her not to go and that ““nothing happened.”” (*Id.* at p. 485.) He told her to go wash her face. The victim then retreated to a chair. Each time she got up to leave, defendant glared at her and began to rise. She was afraid and did not want him to touch her so she sat down. (*Ibid.*)

Matian found insufficient evidence of menace. (*People v. Matian, supra*, 35 Cal.App.4th at pp. 486-487.) It noted that cases finding menace fell into two categories: those where the defendant used a deadly weapon and those where the defendant verbally threatened harm. (*Id.* at pp. 485-486.) The court found the earlier sexual assaults, coupled with defendant glaring and rising when the victim tried to leave, did not establish menace. There was no evidence of a deadly weapon, a verbal threat or any movement by the defendant suggesting harm. (*Id.* at p. 487.)

Matian has been criticized, both for suggesting menace requires either a weapon or a direct threat and for finding insufficient evidence of menace on the facts before it. (*People v. Wardell* (2008) 162 Cal.App.4th 1484, 1491; *People v. Aispuro* (2007) 157 Cal.App.4th 1509, 1513; *People v. Castro* (2006) 138 Cal.App.4th 137, 143.) We agree with these criticisms. ““Menace is a threat of harm express or implied by words or act. [Citations.]’ [Citation.] ‘An express threat or use of a deadly weapon is not necessary.’” (*People v. Islas* (2012) 210 Cal.App.4th 116, 123.)

Here, defendant’s defense was that he did not participate in any criminal activity and only arrived at the motel room after the crimes had been committed. Thus,

Mata's testimony was the only evidence upon which a lesser included instruction could have been based. He testified that while Romero was scaring him into giving up his PIN number to his ATM and ordering him to sit in a corner facing the wall, defendant was holding a screwdriver, which defendant and Romero passed back and forth. Although defendant notes he never threatened Mata with the screwdriver and told him he could leave after the robbery was completed, the threat of harm was implied and Mata testified he was scared to leave. If the jury believed this testimony, defendant would have used menace to restrain Mata and would be guilty of felony false imprisonment. But if the jury believed defendant's testimony he was not in the room when the crimes against Mata were committed, then he would not be guilty of false imprisonment. Accordingly, the trial court was under no obligation to instruct the jury on the lesser included offense of misdemeanor false imprisonment.

4. Section 654

Defendant's sentence consisted of 25 years to life on count 2 (robbery in concert) and concurrent terms of 25 years to life on count 1 (carjacking), count 3 (residential burglary), and count 4 (felony false imprisonment). Defendant contends the court erred by not staying the sentences on counts 1, 3, and 4 under section 654, subdivision (a). We agree.

“Section 654 precludes multiple punishments for a single act or indivisible course of conduct.” (*People v. Galvez* (2011) 195 Cal.App.4th 1253, 1262.) When it applies, “the accepted ‘procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable.’” (*People v. Jones* (2012) 54 Cal.4th 350, 353.) “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for

more than one.”” (*People v. Correa* (2012) 54 Cal.4th 331, 336.) “A trial court’s [express or] implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.” (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

a. Residential Burglary

The Attorney General concedes, and we agree, the concurrent sentence for count 3 (residential burglary) must be stayed under section 654 because both it and the robbery were committed with the same objective, i.e., to rob Mata. Thus, section 654 requires the sentence on the burglary count be stayed. (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1527.)

b. Carjacking and False Imprisonment

As to counts 1 and 4 (carjacking and false imprisonment), we requested supplemental briefing on (1) whether the robbery and carjacking were separate crimes or whether both were part of a single robbery in light of *People v. Bauer* (1969) 1 Cal.3d 368 (*Bauer*), and (2) whether the robbery and false imprisonment were separate crimes or part of a single robbery. Having received the supplemental briefing, we conclude robbery and carjacking were separate crimes, as were the robbery and false imprisonment, but that section 654 requires the staying of the sentences for carjacking and false imprisonment.

(1) Carjacking

In his supplemental brief, defendant asserts “the carjacking and robbery were both part of a single robbery and an indivisible course of conduct,” requiring the sentence on count 1 (carjacking) be stayed under section 654. The Attorney General

argues the contrary. Neither addressed whether robbery and carjacking were separate crimes or part of a single crime.

Section 954 sets forth the general rule that a defendant may be convicted of multiple offenses committed together. Nevertheless, “there is an exception to the general rule permitting multiple convictions. ‘Although the reason for the rule is unclear, this court has long held that multiple convictions may not be based on necessarily included offenses.’” (*People v. Ortega* (1998) 19 Cal.4th 686, 692, overruled on another point in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1229; *Bauer, supra*, 1 Cal.3d at p. 375 [double conviction prohibited “where offense is necessarily included in another”].) When deciding whether a defendant’s multiple convictions are proper, we apply the statutory elements test. (*People v. Reed, supra*, 38 Cal.4th at p. 1231.) “Under the elements test, a court determines whether, as a matter of law, the statutory definition of the greater offense necessarily includes the lesser offense.” (*People v. Parson* (2008) 44 Cal.4th 332, 349.) “[W]e look to the two statutes to determine whether in the defendant’s commission of the greater offense, his or her actions necessarily would satisfy all of the elements of the lesser offense.” (*People v. Rundle* (2008) 43 Cal.4th 76, 143, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Carjacking is not necessarily included in robbery and thus a person may be charged and convicted of both based on the same conduct. (§ 215, subd. (c); *People v. Ortega, supra*, 19 Cal.4th at p. 700; see also *In re Travis W.* (2003) 107 Cal.App.4th 368, 373 [although carjacking (§ 215, subd. (a)) and robbery (§ 211) have similar definitions, “there are differences. Robbery can involve any type of personal property, while carjacking deals with a single form of property. Also, robbery requires an intent to permanently deprive the victim of possession of the property, while carjacking can be committed with the intent of temporary dispossession. By virtue of these differences, neither carjacking nor robbery is a necessarily included offense of the other”]; *People v.*

Dominguez (1995) 38 Cal.App.4th 410, 419 [“Carjacking is not a necessarily lesser included offense to robbery, or vice versa”].)

Whether the sentence for carjacking should be stayed under section 654 is a different question. In *Bauer*, the defendant entered the victims’ house, took numerous items of personal property which he loaded into one of the victims’ cars, and then took the car to effect an escape. The defendant challenged the trial court’s decision to punish him for both the robbery and auto theft. *Bauer* held that “where a defendant robs his victim in one continuous transaction of several items of property, punishment for robbery on the basis of the taking of one of the items and other crimes on the basis of the taking of the other items is not permissible.” (*Bauer, supra*, 1 Cal.3d at p. 377.) *Bauer* rejected the Attorney General’s argument that separate punishment was appropriate because the defendant had formed the intent to steal the car only after the other items had been taken: “The fact that one crime is technically complete before the other commenced does not permit multiple punishment where there is a course of conduct comprising an indivisible transaction. [Citations.] And the fact that one of the crimes may have been an afterthought does not permit multiple punishment where there is an indivisible transaction.” (*Ibid.*)

People v. Smith (1992) 18 Cal.App.4th 1192 similarly held section 654 barred separate punishment for auto theft based on the same course of conduct for which he was convicted on robbery and kidnapping-for-robbery charges. The defendant had accosted the victim in his apartment and stole his cash, two VCR’s, and a stereo receiver; drove the victim several blocks to a bank; and withdrew more money with the victim’s ATM card. After releasing the victim, the defendant then drove to Arizona. (*Smith*, at pp. 1194-1195.) According to *Smith*, “*Bauer* can be read to suggest that *when* the defendant forms the intent to take the property is irrelevant to the question of multiple punishment as long as the force or fear which is the central element of robbery [citation] continues uninterrupted.” (*Id.* at p. 1198.) *Smith* concluded, “the facts of this case are

indistinguishable from *Bauer*,” requiring “the sentence on the auto theft count be stayed” under section 654. (*Id.* at p. 1199; see also *People v. Dominguez, supra*, 38 Cal.App.4th at pp. 414-415 [under *Bauer*, section 654 precluded separate punishments for the defendant’s convictions for robbery and carjacking where the defendant approached the victim’s parked van, pointed a gun at the victim, said, “[g]ive me everything you have,”] then drove away in the van after the victim handed over his personal belongings].)

Defendant contends his case is stronger than *Bauer* and *Smith* because the evidence showed Romero had the intent to take Mata’s van before entering the motel room. Defendant reasons that under the prosecution’s theory this was a classic “john roll,” where prostitutes set their johns up to be robbed, Romero and defendant knew Mata had a van with work tools since Mata had used the van to pick up Pearl, who thus knew its contents. She in turn called in Crystal, who thereafter brought Romero to the motel room. From these facts, a reasonable trier of fact could find, as defendant argues, that Romero intended to both carjack and rob Mata when he entered the motel room, given that the force or fear used to commit those crimes continued uninterrupted. (*Smith, supra*, 18 Cal.App.4th at p. 1198.)

The problem is this inference is contrary to the court’s implied finding that, as the Attorney General asserts, defendant and Romero did not form the intent to take the car until “after they had beaten Mata, taken his wallet, taken his identification and taken his ATM card.” According to the Attorney General, “Mata testified that it was only after he was in the bathroom that he heard his keys being moved around, and that prior to then they had last been in his pants pocket.” Although Mata also testified Romero took the van keys at the same time he took his wallet, cell phone, and ATM card, “we review the court’s determination of [defendant’s] ‘separate intents’ for sufficient evidence in a light most favorable to the judgment, and presume in support of the court’s conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence.”

(*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271.) Thus, we must agree with the Attorney General that *Bauer* is distinguishable because here, the evidence supports a finding defendant and Romero did not know “they were going to steal Mata’s van at the time they robbed him of his other belongings.”

Nevertheless, as in *Bauer*, even if defendant and Romero formed the intent to carjack the van after robbing Mata of his other belongings, the robbery was still ongoing and the carjacking was part of an indivisible transaction. As noted above, the force and fear used to commit both crimes continued uninterrupted. (*Smith, supra*, 18 Cal.App.4th at p. 1198.) The robbery continued even after Mata was taken out of the bathroom, with Romero scaring Mata into giving up his PIN number to his ATM account and calling around to find buyers for the tools in the van. Additionally, “[i]n California, ‘[t]he crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety.’” (*People v. Anderson* (2011) 51 Cal.4th 989, 994.) Here, defendant never made it to such a place, as he was still in the motel room with Mata when the police arrived. There was thus no support for the court’s finding that section 654 did not apply and the sentence for the carjacking must be stayed. (See *Smith, supra*, 18 Cal.App.4th at p. 1199.)

(2) *False Imprisonment*

As with robbery and carjacking, both defendant and the Attorney General fail to discuss whether the robbery and false imprisonment were separate crimes or part of a single crime. But under *Bauer*, double conviction is allowed for these two offenses because they were not “necessarily included in another.” (*Bauer, supra*, 1 Cal.3d at p. 375.) Felony false imprisonment prohibits the “unlawful violation of the personal liberty of another” (§ 236) “effected by violence, menace, fraud, or deceit” (§ 237, subd. (a)). Robbery, on the other hand, “is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against

his will, accomplished by means of force or fear.” (§ 211.) They are not necessarily included in one another.

False imprisonment is separately punishable if it is not done solely to facilitate the robbery. In *People v. Foster* (1988) 201 Cal.App.3d 20, the defendant robbed several people in a convenience store. After having obtained all of the money, the defendant locked the victims in the store’s cooler, apparently to facilitate his escape and to prevent their calling the police. (*Id.* at p. 23.) Although *Foster* noted that locking the victims in the cooler posed a risk to their safety, it actually held the false imprisonment was separately punishable because it was not incidental to committing the robbery, which had already been accomplished. (*Id.* at pp. 27-28.)

The Attorney General argues the same applies here. The contention lacks merit because unlike in *Foster*, the robbery of Mata was ongoing while he was being falsely imprisoned in the bathroom. Defendant and Romero may have already taken Mata’s wallet, cell phone, and ATM card when defendant was forced into the bathroom, but they were still in the process of taking his other belongings, including the keys to the van, the van itself, and the items inside the van. (*Smith, supra*, 18 Cal.App.4th at p. 1198.) This continued after Mata was taken out of the bathroom, at which time Romero scared Mata into giving up the PIN number to his ATM account. Romero also began calling people to discuss selling the tools from the van. And, as noted above, defendant never reached a place of relative safety, having been found by police in the motel room with Mata. There appears no factual basis for concluding that falsely imprisoning Mata in the bathroom or the motel room was in any sense divisible, either in time or in intent and objective, from defendant and Romero’s objective of taking Mata’s belongings. Accordingly, Mata’s false imprisonment was incidental to the robbery and section 654 requires the sentence on count 4 (false imprisonment) be stayed as well.

DISPOSITION

The judgment is modified to stay execution of the sentences on counts 1 (carjacking), 3 (residential burglary), and 4 (false imprisonment) pursuant to section 654. As modified, the judgment is affirmed. The trial court is directed to correct its minutes to reflect section 654 stay on count 1, 3, and 4, prepare an amended abstract of judgment, and forward a copy to the Department of Corrections and Rehabilitation.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.