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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROY JONES, Defendant and Appellant.	A146095 (Alameda County Super. Ct. No. 175707)

Defendant Roy Jones kidnapped Alexandria, the mother of his five children, and held her for 10 days, during which time he tortured her and tried to take her property. Defendant was convicted of torture, kidnapping, kidnapping for ransom, and false imprisonment, among other things. He now appeals arguing (1) he was denied his Sixth Amendment right to counsel; (2) the trial court improperly imposed consecutive sentences for torture and kidnapping for ransom in violation of Penal Code[1] section 654; (3) his conviction for kidnapping must be reversed because it is a lesser included offense of kidnapping for ransom, for which he was also convicted; (4) his conviction for felony false imprisonment must be reversed because it is a lesser included offense of kidnapping. We agree with the last argument but not the rest, and we therefore affirm in part and reverse in part.

[1] All statutory references are to the Penal Code.

I. BACKGROUND

On March 6, 2015, defendant was charged by amended information with: torture (§ 206; count one); kidnapping for ransom (§ 209, subd. (a); count two); kidnapping (§ 207, subd. (a); count three); attempted murder (§§ 187, subd. (a), 664; count four); corporal injury to a relationship partner (§ 273.5, subd. (a); count five); assault with a deadly weapon (§ 245, subd. (a)(1); counts six to nine); false imprisonment by violence (§ 236; counts 10 to 13); child abuse (§ 273a, subd. (a); counts 14 to 18); and false imprisonment of a hostage (§ 210.5; count 19). In connection with counts one through five, it was further alleged defendant personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)), and in connection with counts two through four that defendant personally inflicted great bodily injury on his victim (§ 12022.7, subd. (a)). Additionally, in connection with count five, it was alleged defendant personally inflicted great bodily injury upon his victim under circumstances involving domestic violence. The trial court dismissed counts six and seven during trial. The jury found defendant guilty as to all remaining charges except the attempted murder count, and found all the charged enhancements true. The court denied probation and sentenced defendant to a total term of 31 years 4 months to life.

The charges arose out of defendant's kidnapping, imprisonment, and torture of Alexandria. The couple met in 1996, and had five children together. On January 14, 2015, the two were no longer in a relationship, and their children were visiting defendant. That night, defendant called Alexandria and asked if she could hold a light while he changed a circuit on his car. Alexandria grew tired of holding the light after about two hours, and defendant told her they could get someone else who could help. They then picked up someone Alexandria referred to only as "crack head." The three returned to defendant's house, and Alexandria waited near the front of the garage while defendant went to open the door from the inside. Defendant opened the garage door and said "grab her." "Crack head" placed Alexandria in a chokehold and dragged her through the garage and into the basement.

As Alexandria was dragged through the garage, defendant hit her all over her body. Once in the basement, Alexandria tried to run out the door, but defendant hit her in the head with a hammer. Defendant then accused Alexandria of stealing from him. He instructed her to take off all her clothes, get on her stomach, and crawl to him "like the snake that you are." As Alexandria crawled, defendant cursed at her, and accused her of taking their kids to a shelter and stealing things. Defendant hit Alexandria with a hammer on the back of her left knee. Alexandria tried to run out the door and defendant again hit her in the head with the hammer. Alexandria passed out, and the next thing she remembered was waking up in a bathtub the following morning. She apparently passed out again, and woke up naked in a bedroom.

Defendant kept Alexandria in the bedroom for several days and repeatedly asked her where his pills and money were. Alexandria said she didn't know what he was talking about. Defendant did not believe her and hit her with the hammer and a stick on her knees, shins, feet, and arms. Defendant put boiling hot compresses on Alexandria's eyes, stating he thought it would take the bruising and swelling away. Defendant also put pain medication in Alexandria's mouth, and directed her to swallow it. The pills made Alexandria fall asleep.

When defendant would ask Alexandria where she put his things, she would make something up to avoid getting hit with the hammer. Alexandria heard defendant instruct their children to take a taxi to her house in Berkeley and search it. Alexandria later heard defendant talking to their kids on the phone and telling them to bring back a bag in which she kept all of her paperwork, including the pink slip to her car. Later, defendant made Alexandria write a note stating she was going to sell the car to him.

On January 24, 2015, the 10th day of her captivity, Alexandria was able to contact the police. She communicated with one of her sons, who was also in defendant's house, while defendant was on the phone. She told the son to place his phone in the bathroom. Alexandria then went into the bathroom and used the phone to call 911. The police arrived at defendant's house just after 11:00 p.m. that night. A standoff ensued as the police unsuccessfully tried to get the residents out using a PA system. In the early

morning, after about six hours, the SWAT team breached the front door. When the police entered the living room, they found defendant holding an infant in front of him. An officer opined defendant was using the child as a human shield. The police grabbed the child and arrested defendant.

II. DISCUSSION

A. *Right to Counsel*

Defendant first argues his right to counsel was violated. We disagree. While there was a delay in finding counsel for defendant, that delay was solely due to defendant's failure to make a serious effort to select a lawyer. The trial court exercised great patience and made reasonable efforts to assist defendant in obtaining counsel.

The procedural history supports our conclusion. The information in this matter was filed on February 24, 2015. The following day, defendant's public defender withdrew from the case, concluding defendant was financially ineligible for the public defender's services. The trial court continued the matter to allow defendant to find counsel.

Defendant failed to find a new attorney by the next hearing, which was held on March 4, 2015, and the court entered an order allowing defendant to use the jail phone to find one. Defendant indicated he wanted to contact Darryl Stallworth about representing him. The court indicated it would provide defendant with Stallworth's number and continued the matter to March 6, 2015. At the March 6 hearing, defendant stated Stallworth was "conferring with my family for the monies." Defendant also said he wanted to contact more attorneys, and the court agreed to provide their contact information and issue a "phone order" so defendant could reach them.

Defendant again appeared before the court on March 11, 2015. He stated he had not been able to retain Stallworth because "he needed cash up front." The matter was continued. On March 17, 2015, defendant again appeared without counsel. He stated he had made some phone calls, but did not intend to continue to do so. The court continued the matter to March 19, 2015, and urged defendant to retain an attorney. At the March 19 hearing, the court asked defendant how his attorney search was going, and defendant

responded: "It's not going to happen. They want a retainer up front." The court informed defendant he could use assets other than cash for the retainer, and instructed him to see if he could reach an arrangement with an attorney.

On March 23, 2015, Todd Bequette made a special appearance as defense counsel. He had not yet been formally retained. Bequette returned on April 14, 2015, indicating he had met with defendant and would not be able to make a special appearance at that time. It is unclear from the record why.

The next reported hearing was April 27, 2015, at which time the court stated: "I think the record is clear, that not only is [defendant] not retaining private counsel, it will appear that he's unwilling to do so." The court found defendant was indigent and appointed the public defender's office to represent him over the public defender's objection. The public defender declared a conflict, and the court directed staff to contact "court-appointed" based on that conflict. Defendant was told he would be ordered to reimburse the county for all or part of the cost of his representation. At an April 29, 2015 hearing, the court stated it had intended to appoint Patrick Hetrick to represent defendant, but there was a scheduling conflict because Hetrick would not have time to prepare unless defendant agreed to waive time.

The following day Darryl Billups appeared. He said he was not ready to accept an appointment, explaining defendant insisted on not waiving time, and Billups needed more time to prepare. The court asked, "What if I give you that time?" Then, over defendant's objection, the court continued the matter to May 8, 2015, for "attorney and plea." Defendant stated: "This is going on for 63 days," to which the court responded: "If you start loosening up some of the coins, this wouldn't be going on. It takes two to tango, Mr. Jones." At the May 8 hearing, Billups formally agreed to represent defendant, and the court set the trial date for June 22, 2015.

The Sixth Amendment guarantees a criminal defendant the right to assistance of legal counsel. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144.) A criminal defendant who does not require appointed counsel also has a Sixth Amendment right to the counsel of his or her choice. (*Ibid.*; accord *People v. Ortiz* (1990) 51 Cal.3d 975, 982

[criminal defendant's right to counsel of his or her choice is among "the most sacred and sensitive of our constitutional rights"].) The United States Supreme Court has long recognized "a defendant should be afforded a fair opportunity to secure counsel of his own choice." (*Powell v. Alabama* (1932) 287 U.S. 45, 53.) "[C]ounsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." (*Rothgery v. Gillespie County* (2008) 554 U.S. 191, 212.) "In addition, counsel, 'once retained, [must be] given a reasonable time in which to prepare the defense.' [Citation.] Failure to respect these rights constitutes a denial of due process." (*People v. Courts* (1985) 37 Cal.3d 784, 790.)

Here, defendant complains he was without any representation for 73 days, from the date of his first appearance in superior court to when Billups was appointed counsel on May 8, 2015. During this period, defendant contends, he had no counsel to argue he should be released on bail, to review police reports or other items of discovery, or to ascertain whether all discovery had been provided by the prosecution. Defendant further argues the delay in the appointment of counsel impacted his constitutional and statutory right to a speedy trial, since the statutory period for the commencement of trial did not commence running until the appointment of counsel. Defendant acknowledges he had difficulty retaining an attorney before May 8. But he argues, the trial court should have appointed an attorney on an interim basis during this period to assist him in whatever needed to be done in his case.

But defendant alone was responsible for the delay in the appointment of counsel. As recounted above, the trial court gave defendant every opportunity to employ counsel of his choice. Among other things, the court obtained the numbers of various attorneys and ordered defendant be permitted to make phone calls to contact them. In spite of the trial court's efforts, defendant failed to make a sincere attempt to retain counsel. Defendant balked at paying a retainer or making other arrangements to pay counsel, despite the public defender's finding he was not indigent. And at one point early on in the process, defendant indicated he did not intend to contact any more attorneys about representing him. As the trial court found, defendant was the one who dragged out the

process. Eventually, the court was forced to find defendant indigent and appoint an attorney for him. This record does not support a finding that defendant's Sixth Amendment right to counsel was violated. We also observe critical proceedings were not held while defendant was without counsel. The only prejudice that flowed from defendant's failure to find counsel was delay, and that delay was of defendant's own making. Reversal is not warranted under these circumstances.

B. *Sentencing Error*

Next, defendant asserts the trial court erred by sentencing him to consecutive terms for count one, torture, and count two, kidnapping for ransom. Defendant contends the consecutive sentence was imposed in violation of section 654. We find no error.

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

The statute "prohibits punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct. [Citations.] '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.' [Citations.] On the other hand, if the defendant entertained multiple criminal objectives that were independent and not incidental to each other, he or she 'may be punished for each statutory violation committed in pursuit of each objective' even though the violations were otherwise part of an indivisible course of conduct. [Citation.] ' "The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple." [Citation.] "A defendant's criminal objective is 'determined from all the circumstances . . . .' " ' " (*People v. Sok* (2010) 181 Cal.App.4th 88, 99.) A trial court's determination

under section 654 must be affirmed if it is supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

Defendant argues the evidence is uncontradicted he had only one objective in committing torture and kidnapping for ransom: he was attempting to recover money and other items from Alexandria. Defendant asserts that, on at least two occasions, he sent their two eldest sons to Alexandria's house to look for certain items. According to defendant, the evidence also shows he made Alexandria sign a paper to sell her car to him.

While it may be reasonable to find defendant had only one objective in committing counts one and two, that is not the only reasonable inference that may be drawn from the evidence. The trial court could have also reasonably concluded defendant had distinct and separate objectives in committing torture and kidnapping for ransom. As defendant argues, there is evidence supporting a finding he committed kidnapping for ransom to retrieve certain items. But there is also substantial evidence defendant engaged in torture for a different purpose. For example, the object of the crime could have been to demean or punish Alexandria because defendant believed she had stolen from him. The record supports such a conclusion. Defendant beat Alexandria with a hammer, forced her to take off her clothes and crawl to him like a snake, and placed boiling hot compresses on her eyes. Given defendant's erratic behavior, it was not unreasonable to conclude he engaged in these actions to inflict pain, rather than to induce Alexandria to turn over certain items or assets.

C. *Kidnapping*

Defendant was convicted of both kidnapping in violation of section 207 and kidnapping for ransom in violation of section 209. He now argues his conviction for simple kidnapping cannot stand because it is a necessarily included offense of kidnapping for ransom. The argument is unavailing.

"In California, a single act or course of conduct can lead to convictions 'of any number of the offenses charged.' [Citations.] However, a judicially created exception to this rule prohibits multiple convictions based on necessarily included offenses." (*People*

v. Ramirez (2009) 45 Cal.4th 980, 984.) "To ascertain whether one crime is necessarily included in another, courts may look either to the accusatory pleading or the statutory elements of the crimes. . . . 'The elements test is satisfied if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, such that all legal elements of the lesser offense are also elements of the greater. [Citation.] In other words, " '[i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' " ' " (*People v. Robinson* (2016) 63 Cal.4th 200, 207.) "Simple kidnapping is not a lesser and necessarily included offense to a violation of section 209, subdivision (a) [(kidnapping for ransom)] since the latter can be accomplished without asportation and the former cannot." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 368, fn. 56; *People v. Bigelow* (1984) 37 Cal.3d 731, 755, fn. 14.)

Defendant appears to concede this point on reply, arguing that even if kidnapping is not a necessarily included offense of kidnapping for ransom, there was clearly only one kidnapping. Defendant reasons that since he had only one intent or objective for this one kidnapping, he should not stand convicted of two kidnappings. But as discussed, in California, a single course of conduct "can lead to convictions 'of any number of the offenses charged.' " (*People v. Ramirez*, *supra*, 45 Cal.4th at p. 984.) To the extent defendant is asserting the trial court committed sentencing error under section 654, his argument also fails as his sentence for the kidnapping count was stayed.

D. *False Imprisonment*

Finally, defendant meritoriously argues his conviction on count 10 for false imprisonment must be vacated because it is a lesser included offense of kidnapping.

The parties do not appear to dispute that false imprisonment is a lesser included offense of kidnapping. (*People v. Magana* (1991) 230 Cal.App.3d 1117, 1120–1121; *People v. Chacon* (1995) 37 Cal.App.4th 52, 65.) The Attorney General nevertheless argues the rule against multiple convictions for lesser included offenses does not apply here because defendant's convictions for false imprisonment and simple kidnapping were not based on the same act or course of conduct. According to the Attorney General,

defendant's conviction for kidnapping is based solely on his actions as an aider and abettor in helping "crack head" put Alexandria in a chokehold and dragging her into the garage. The Attorney General contends the false imprisonment conviction is based on different conduct, specifically the 10 days during which defendant imprisoned Alexandria in his home.

We disagree with the Attorney General's contention that the kidnapping and false imprisonment of Alexandria occurred at different times. " '[F]orcible detention of a victim is an element of kidnapping and as long as the detention continues, the crime continues.' " (*People v. Chacon* (1995) 37 Cal.App.4th 52, 60; see *Parnell v. Superior Court* (1981) 119 Cal.App.3d 392, 407–408.) As the forcible detention of Alexandria continued until she was rescued by the police, the kidnapping and false imprisonment offenses in this case occurred simultaneously.[2]

For these reasons, defendant's conviction for false imprisonment must be reversed.

III. DISPOSITION

Defendant's conviction on count 10 for false imprisonment is reversed. We affirm in all other respects. We remand so the trial court may amend the sentence and correct the abstract of judgment.

[2] The Attorney General also argues false imprisonment is not a lesser included offense of kidnapping for ransom. In light of the above findings, we need not and do not reach the issue.

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Margulies, Acting P.J.

We concur:

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Dondero, J.

_____
Banke, J.