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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. TY HUDSON, Defendant and Appellant.	C059154 (Super. Ct. No. 06F3312)

APPEAL from a judgment of the Superior Court of Shasta County, Steven E. Jahr, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Brook Benningson, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of Factual and Procedural History and parts I through IV and parts VI through VIII of the Discussion.

A jury convicted defendant Ty Hudson of one count of kidnapping (Pen. Code, § 207, subd. (a))[1] and two counts of false imprisonment (§ 236). On appeal, defendant contends that (1) insufficient evidence of asportation supported the kidnapping conviction, (2) one count of false imprisonment should be reversed because it is a lesser included offense of kidnapping, (3) even if not a lesser included offense of kidnapping, section 654 prohibits a separate sentence for the false imprisonment conviction, (4) the trial court erred by failing to give a unanimity instruction, (5) Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 318 improperly lessened the prosecution's burden of proof, and (6) the trial court's imposition of the upper term for kidnapping violated his right to jury trial as articulated in *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856] (*Cunningham*).

In the published portion of the opinion, we reject defendant's attack on CALCRIM No. 318. In the unpublished portion of the opinion, we reject defendant's other contentions of error. Accordingly, we shall affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

In July 2006, the Shasta County District Attorney filed an information charging defendant with kidnapping (§ 207, subd. (a)), two counts of false imprisonment (§ 236), and corporal

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

injury to a cohabitant (§ 273.5, subd. (a)). The information further alleged that defendant had a prior serious felony conviction (§ 1170.12, subds. (a)-(d)).

Evidence adduced at trial showed that, on December 18, 2005, defendant and his then-girlfriend, Desiray, sat arguing in his truck. The truck was parked in an area known as Johnson Park, which is about two miles east of the town of Burney. When the argument became heated, Desiray got out of the truck and started walking down the highway. When she reached the parking lot of Sam's Pizza, defendant pulled his truck in front of her. Defendant got out and told her, "[Y]ou're not going anywhere. You're a stupid bitch. This is what I do to stupid dumb bitches." Defendant grabbed Desiray and threw her into the truck. Desiray protested that she did not want to go with him and kicked at the door in an unsuccessful attempt to escape.

Defendant drove to Sandpit Road, which is located about three or four miles from where they started in Johnson Park. While driving, defendant slammed Desiray's head against the dashboard with sufficient force that the dashboard cracked. She believed that defendant intended to kill her.

When defendant parked on Sandpit Road, Desiray got out of the truck and took off running. Defendant pursued her. She became exhausted and collapsed. Defendant picked her up and put her back into his truck.

On January 13, 2006, defendant and Desiray were watching a movie while lying on the living room floor of a friend's mobile home. Desiray fell asleep and accidentally hit defendant in the groin. Defendant grew angry and accused her of kicking him intentionally. He slapped her face and choked her. Defendant then threw Desiray against a wall and told her that he was going to kill her. From the choking, Desiray sustained bruising around her neck.

The next day, Desiray showed up soaking wet and upset at the house of her friend, Marilyn Weeks. Weeks invited her in and provided a robe for Desiray to change into. Weeks then saw the bruising around Desiray's neck. As they sat on the bed, Desiray told Weeks about the previous day's attack by defendant as well as the incident on December 18, 2005.

On January 20, 2006, Weeks called the Sheriff's Office. Shasta County Sheriff's Department Deputy Stephen Harper responded and interviewed Desiray. Desiray appeared to be extremely frightened. She told the deputy that she had been involved in domestic violence incidents with defendant on December 10 and 18, 2005, and on January 13, 2006. Asked to recount the December 10 incident, Desiray stated that she could not remember it. She did, however, describe the attacks on her by defendant on December 18 and January 13.

When the deputy asked why she had delayed reporting the incidents, Desiray stated that she feared defendant was going to

kill her. She also stated that she was pregnant with defendant's child. Defendant and Desiray subsequently married.

At trial, Desiray denied that she had ever been attacked by defendant. She also denied that she had the injuries or bruises described by Weeks. She stated that she lied about the attacks because of coercion by a former lover, Hishkama Wilson. Wilson supposedly became jealous upon learning of Desiray's pregnancy, and threatened to injure Desiray, defendant, and their unborn child unless she made false reports against defendant.

Desiray acknowledged that no one else heard the threats made by Wilson. And, Weeks testified that the only person Desiray had ever expressed fear of was defendant.

During trial, the court dismissed the corporal injury charge. The jury convicted defendant on the three remaining counts. A court trial was held on the issue of the prior conviction allegation, which the court found to be true.

The trial court sentenced defendant to an aggregate prison term of 17 years and four months. The sentence comprised 16 years for kidnapping (the upper term of eight years, doubled); a consecutive 16 months for the first count of false imprisonment (one-third the mid-term of two years, doubled); and a concurrent six years for the second count of false imprisonment (the upper term of three years, doubled).

DISCUSSION

I

Evidence of Asportation

Defendant contends the evidence adduced at trial is insufficient to support his kidnapping conviction. For reasons that follow, we disagree.

A

Subdivision (a) of section 207 sets forth the definition of 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."

Asportation is an element of kidnapping that refers to the movement of a victim against his or her will for a substantial distance. Prior to 1999, asportation was determined solely by the actual distance the victim was moved. (*People v. Caudillo* (1978) 21 Cal.3d 562, 572, overruled in *People v. Martinez* (1999) 20 Cal.4th 225, 229 (*Martinez*).) In *Martinez*, the California Supreme Court explained "that the trier of fact may consider more than actual distance" in determining whether the movement of the victim was "substantial in character." (*Id.* at p. 235.) Thus, a jury may consider the totality of the circumstances when deciding whether the movement was substantial. (*Id.* at p. 237.)

The *Martinez* court held that a jury may consider "such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*Martinez*, *supra*, 20 Cal.4th at p. 237, fn. omitted.) Although the jury is allowed to take into account considerations in addition to actual distance, the Supreme Court cautioned that "contextual factors, whether singly or in combination, will not suffice to establish asportation if the movement is only a very short distance." (*Ibid*.)

Cases decided since *Martinez* have held that quite short distances suffice for kidnapping when the movement substantially changes "the context of the environment." (*People v. Diaz* (2000) 78 Cal.App.4th 243, 247.) The *Diaz* court upheld a kidnapping conviction based on a distance of approximately 150 to 300 feet because the victim was moved from a visible street location to a completely dark portion of an adjacent park where the chances of detection were minimized. (*Id*. at p. 248.)

Even distances of just several feet have sufficed to meet the asportation requirement for kidnapping. In *People v. Shadden* (2001) 93 Cal.App.4th 164, a defendant's aggravated kidnapping conviction was affirmed even though the victim was moved only nine feet before defendant began to assault her.

This short movement sufficed for kidnapping because the victim was moved from the front of a video store to a backroom with the door closed. (*Id.* at p. 167.) Because the backroom was out of public view, the risk of harm to the victim was increased. (*Id.* at pp. 169-170.) The court noted the "critical factor" was whether the defendant "secluded or confined" the victim. (*Id.* at p. 170.) Similarly, the Court of Appeal affirmed a kidnapping conviction in a case in which the defendant caused the victims to move about 10 feet from a public area to a small back room with no windows and a solid door. (*People v. Corcoran* (2006) 143 Cal.App.4th 272, 279.) The *Corcoran* court explained that even this short distance substantially increased the danger to the victims due to the back room's lack of visibility. (*Id.* at p. 280.)

In considering the sufficiency of the evidence of asportation, "the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We do not reweigh the evidence or reevaluate a

witness's credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Resolving all conflicts in the evidence and questions of credibility in favor of the verdict, we conclude that substantial evidence of asportation supports defendant's kidnapping conviction.

B

On the charge of kidnapping, the testimony at trial established that defendant moved Desiray several *miles* against her will. Marilyn Weeks recounted that Desiray "had also told [Weeks] about another incident that had happened earlier in December where they had an altercation in Johnson Park and he had driven her out from Johnson Park to Sandpit Road, slamming her head against the dashboard the whole way." The prosecutor immediately followed up on this statement by inquiring about the distance between the location where defendant and Desiray began and the dirt road to which he drove her:

"Q Now, ma'am, five – you said Sandpit Road; correct?

"A [by Weeks] Yes. That's up past Castle Road.

"Q About how far is that from Johnson Park, ma'am?

"A Three, four miles."

This testimony that defendant moved Desiray three to four miles constitutes substantial evidence of the asportation element of kidnapping. (*Martinez*, *supra*, 20 Cal.4th at p. 237.)

Defendant dismisses this testimony by asserting that "Weeks [*sic*] testimony is simply not reliable." Defendant reasons that the prosecution's failure to rely on her testimony in its closing argument rendered it noncredible. Moreover, defendant points out that Weeks's initial testimony about Desiray being driven to Sandpit Road was unresponsive to the question actually asked. We are unpersuaded.

Whether or not the prosecution chose to rely on certain testimony does not inform whether the *jury* relied on it. The jury was entitled to rely on the unequivocal testimony of Weeks to find that defendant had moved Desiray against her will for a distance of three or four miles. (*Martinez, supra*, 20 Cal.4th at p. 237.) The fact that the answer may have been unresponsive to the question makes no difference because defense counsel made no objection to the initial answer or the follow up questions regarding distance. Thus, nothing prevented the jury from considering this evidence of distance. (*People v. Riel* (2000) 22 Cal.4th 1153, 1187.) That it contradicted other evidence presented a factual issue for the jury to decide rather than a legal question for us to resolve. (*People v. Lewis* (2001) 26 Cal.4th 334, 361.) Weeks's testimony provided sufficient evidence of the asportation.

Defendant emphasizes the testimony of Deputy Harper, which indicated that Desiray did not know the name of the dirt road to which defendant took her. Because there are numerous dirt roads

in the Johnson Park area, defendant speculates that "the dirt road could have been mere feet from the location where Desiray was placed into the vehicle." However, even in the absence of Weeks's testimony, we would still conclude that the record contains substantial evidence of asportation.

Deputy Harper testified that Desiray described the dirt road as more secluded than the highway. The "context of the environment" changed from a restaurant parking lot adjacent to a highway to a secluded dirt road. (*People v. Diaz*, *supra*, 78 Cal.App.4th 243, 247.) The seclusion decreased the chances of detection and increased the risks of violence to Desiray. Indeed, Desiray became exhausted when she fled from the spot where defendant parked on the dirt road. She was unable to secure help from anyone before defendant picked her up and carried her back to his truck. Although defendant denies that this evidence has any probative value, it establishes the secluded nature of the location to which defendant took her. Desiray's attempt to escape demonstrates the heightened danger to her arising out of the secluded nature of the dirt road. We conclude that substantial evidence supports the kidnapping conviction.

II

False Imprisonment as a Lesser Included Offense of Kidnapping

Defendant next argues that the trial court erred in imposing a concurrent term for the false imprisonment committed

on the same day as the kidnapping.[2] Our Supreme Court has held, "a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct." (*People v. Reed* (2006) 38 Cal.4th 1224, 1226.) Here, defendant argues that the false imprisonment is a lesser included offense of kidnapping. We reject the contention because the conviction for false imprisonment for which he received the concurrent sentence was based on conduct separate from his kidnapping of Desiray. The trial court did not err in imposing separate sentences for separate criminal acts.

"[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. Reed*, *supra*, 38 Cal.4th at p. 1227.) As the offenses are defined, false imprisonment is a lesser included offense of kidnapping. (*People v. Magana* (1991) 230 Cal.App.3d 1117, 1121.) Thus, commission of a kidnapping also necessarily involves an act of false imprisonment. (*Ibid.*) However, kidnapping does not preclude a subsequent and separate act of false imprisonment. When the later act of false imprisonment is based on a different set of facts than the kidnapping conviction, the prohibition on additional punishment for lesser included offenses does not

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[2] Defendant does not challenge the count of conviction for the false imprisonment committed on January 13, 2006.

apply. "The doctrine of included offenses is applicable only when the same act is relied upon for more than one conviction." [Citations.] [¶] Indeed the notion that a lesser included offense must be part of the greater offense not only legally but factually was recognized in the early cases in which the doctrine was developed. (See *People v. Kerrick* (1904) 144 Cal. 46, 47 . . . .)" (*People v. Randle* (1992) 8 Cal.App.4th 1023, 1030.)

As the Attorney General points out, the kidnapping and false imprisonment convictions were based on separate incidents. First, defendant kidnapped Desiray by forcing her into the truck in the parking lot of Sam's Pizza and driving her to a secluded dirt road. Second, defendant committed false imprisonment by returning her to the truck after she managed to escape and flee along Sandpit Road.

In addition to being temporally distinct, the two incidents also involved separate intents. In kidnapping Desiray, defendant sought to isolate her by driving her to a secluded location. In returning Desiray to his truck after she became exhausted from fleeing, the defendant sought to prevent her from getting away from him. Although defendant professes an inability to see the distinction between removing her from a parking lot next to a highway and recapturing her on a secluded road, we see the kidnapping to be quite different from the new restraint after she became free for long enough to become

exhausted by flight. Defendant was properly convicted of both kidnapping and false imprisonment occurring on December 18, 2005.

III

Section 654's Applicability to the False Imprisonment Conviction

Anticipating our conclusion that the false imprisonment conviction is separate from the offense of kidnapping under the facts of this case, defendant presents the alternate argument that section 654 requires us to stay his sentence for the false imprisonment. Defendant characterizes the kidnapping and false imprisonment on December 18, 2005, as forming the sort of indivisible course of conduct that requires a stay of sentence for the lesser offense. We reject the contention because, as we have explained, the kidnapping and false imprisonment incidents were separate in time and objective.

Section 654 bars multiple punishment for a single act in order to ensure that "a defendant's punishment is commensurate with his culpability and that he is not punished more than once for what is essentially one criminal act." (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1252 (*Kwok*).) To this end, subdivision (a) of section 654 provides, in relevant part: "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."

"Although section 654 literally applies only where multiple statutory violations arise out of a single 'act or omission,' it has also long been applied to cases where a 'course of conduct' violates several statutes. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; *People v. Brown* (1958) 49 Cal.2d 577, 591.) A 'course of conduct' may be considered a single act within the meaning of section 654 and therefore be punishable only once, or it may constitute a 'divisible transaction' which may be punished under more than one statute. (*Neal v. State of California*, *supra*, at p. 19; *People v. Brown*, *supra*, at p. 591.)" (*Kwok*, *supra*, 63 Cal.App.4th at pp. 1252-1253, footnote omitted.)

Courts have held that a defendant's opportunity to reflect between offenses or the creation of additional risks of harm preclude a finding that the defendant engaged in an indivisible course of conduct for purposes of section 654. (*Kwok*, *supra*, 63 Cal.App.4th at pp. 1254-1256.) For example, the Court of Appeal affirmed separate burglary sentences in a case in which the defendant reentered a residence while pursuing the single objective of stealing. (*In re William S.* (1989) 208 Cal.App.3d 313, 318-319.) Rejecting the appellant's reliance on section 654, the Court of Appeal concluded that "the grave risks of violent confrontation engendered in the initial burglary were

repeated in the second . . . .” (*Id.* at pp. 318-319.) Thus, the *William S.* court explained the rule as follows: “‘[W]hen there is a pause . . . sufficient to give defendant a reasonable opportunity to reflect upon his conduct, and the [action by defendant] is nevertheless renewed, a new and separate crime is committed.’” (*Id.* at p. 317, quoting *People v. Hammon* (1987) 191 Cal.App.3d 1084, 1099.)

Just as the opportunity to reflect between offenses precludes a finding of indivisible conduct, so too the increase in danger by each of a succession of separate acts negates the indivisible conduct rationale. For example, the Court of Appeal upheld separate sentences for two gun shots fired during an attempt to evade police pursuit in *People v. Trotter* (1992) 7 Cal.App.4th 363. Despite the unitary goal of avoiding apprehension, the indivisible course of conduct rationale was held not to apply because “[e]ach shot posed a separate and distinct risk to [the police officer] and nearby freeway drivers.” (*Id.* at pp. 366-368.) Even though the second shot was fired only a minute after the first, defendant properly received additional punishment for a successive crime of violence. (*Ibid.*) The *Trotter* court also noted that the defendant had time to reflect and cease his violent behavior between the two shots. (*Id.* at p. 368.)

In assessing defendant’s contention that his actions against Desiray on December 18, 2005, constituted an indivisible

course of conduct, we apply the substantial evidence standard of review. "Whether the acts of which a defendant has been convicted constitute an indivisible course of conduct is a question of fact for the trial court, and the trial court's findings will not be disturbed on appeal if they are supported by substantial evidence." (*Kwok*, *supra*, 63 Cal.App.4th at pp. 1252-1253.)

Here, the trial court's imposition of separate sentences for the false imprisonment and kidnapping convictions indicates that the court found the offenses did not arise out of an indivisible course of conduct. There is substantial evidence in support of this implicit finding.

After defendant forced Desiray into his truck and drove her to Sandpit Road, she escaped. Desiray "said she took off running in an attempt to get away from [defendant]'s assault. At which time she stated she became exhausted and collapsed." Desiray's flight from the truck divides the initial kidnapping from the later false imprisonment so that section 654 does not apply. The fact that she ran for long enough to become exhausted indicates that defendant also had sufficient time to reflect before engaging in renewed restraint of the victim.

Defendant's false imprisonment also increased the danger to Desiray, who had broken free of his control. As defendant demonstrated by slamming Desiray's head against the dashboard during the kidnapping, he was capable of inflicting great

violence on her in the truck. Returning her to the truck after her escape newly increased the danger of further assault and injury. "'[D]efendant should . . . not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.'" (*People v. Trotter, supra*, 7 Cal.App.4th at p. 368, quoting *People v. Harrison* (1989) 48 Cal.3d 321, 338.)

The kidnapping and subsequent false imprisonment were not a single act or part of an indivisible course of conduct. We note that defendant elsewhere acknowledges that "the evidence adduced at trial established two separate and distinct acts of false imprisonment – one occurring outside the pizza restaurant and another at a later time and in another location, the dirt road, where Desiray ran off and where her liberty was once again restrained." The separate nature of the incidents requires separate punishment for the kidnapping (which subsumed the first false imprisonment) and the subsequent false imprisonment on the dirt road. To apply section 654 to these facts would violate the policy that punishment should be commensurate with culpability. (*People v. Trotter, supra*, 7 Cal.App.4th at pp. 367-368.)

IV

Failure to Give Unanimity Instruction

Defendant contends that the trial court erred in failing to give CALCRIM No. 3500, which instructs a jury that it must

unanimously agree on the facts supporting a conviction. Defendant reasons that the unanimity instruction was required because the facts showed two instances of false imprisonment on December 18, 2005: the first when defendant forced Desiray into the truck at Sam's Pizza and the second when he returned her to the truck on the dirt road. Defendant theorizes that jurors could have split on which of the two false imprisonments they believed defendant committed but still all agreed that he committed a false imprisonment. We reject the argument.

Criminal defendants have the right to remain free of conviction unless a jury unanimously agrees on a verdict of guilt. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "Additionally, the jury must agree unanimously the defendant is guilty of a specific crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.] [¶] This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.'" (*Ibid.*, quoting *People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.)

The prosecution may make the requisite selection of a specific act during closing arguments to the jury. (*People v.*

Jantz (2006) 137 Cal.App.4th 1283, 1292; *People v. Diaz* (1987) 195 Cal.App.3d 1375, 1382-1383.) However, "[i]f the prosecution is to communicate an election to the jury, its statement must be made with as much clarity and directness as would a judge in giving instruction. The record must show that by virtue of the prosecutor's statement, the jurors were informed of their duty to render a unanimous decision as to a particular unlawful act." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539.) Here, the record shows that the prosecution did make a sufficiently clear election of circumstances for which the first count of false imprisonment was charged in order to obviate the need for the trial court to give a unanimity instruction.

The prosecution argued to the jury, during its opening summation, that "the kidnapping [occurred when] the defendant took, held, or detained another person by using force or by instilling reasonable fears. Driving along. She tires of the argument. She wants to get out of the car. She gets out of the car. She begins walking. He then follows in his car. He pulls up in front of her, gets out and orders her, orders her to get back in the car. Stupid bitch. This is what I do to stupid bitches like you. [¶] What does he do? He forcibly grabs her, use of physical force, and then throws her back into the car and then proceeds to bang her forehead against the dashboard of the car." With this argument, the prosecution identified the

circumstances of the kidnapping as occurring outside the Pizza restaurant.

Further argument by the prosecutor noted that defendant faced charges of both kidnapping and false imprisonment for the events on December 18, 2005. With respect to the false imprisonment, the prosecutor focused exclusively on the defendant's recapture of Desiray on the dirt road: "Ty Hudson not only committed the offense of kidnapping, ladies and gentlemen, but he also committed the offense of false imprisonment *when he picked her up from that road and threw her back in the car*." (Italics added.) And, the prosecutor explained that the second count of false imprisonment related to the incident on January 13, 2006: "He committed false imprisonment again in January when while the two were laying there sleeping when she accidentally kneed him in the groin he becomes so enraged" that he attacked her.

The prosecution never suggested that it was relying upon any specific act other than that committed on Sandpit Road to prove the first count of false imprisonment. The prosecutor's argument was an election that eliminated the need for the trial court to instruct the jurors with CALCRIM No. 3500.

V

CALCRIM NO. 318

As given by the trial court, CALCRIM No. 318 instructed: "You have heard evidence of statements that a witness made

before the trial. If you decide that the witness made those statements, you may use those statements in two ways: One, to evaluate whether the witness's testimony in court is believable; and two, as evidence that the information in those earlier statements is true."

Defendant contends the trial court erred by instructing the jury with CALCRIM No. 318 because it "improperly lessened the state's burden of proof" in violation of his federal constitutional rights to jury trial and due process. In his opening brief, defendant asserts that "the instruction effectively tells the jury [that] once they decide the witness made an out-of-court statement, the statement itself is evidence the statement is true!" In his reply, however, defendant acknowledges that "CALCRIM 318 does not issue a mandate on how the evidence is used." Defendant attempts to salvage the argument by asserting that CALCRIM No. 318 "removes from the jury's consideration the opportunity to use the evidence of a prior out-of-court statement as evidence the information in that statement is false." This is a different argument than the mandatory use argument presented in the opening brief, and it violates the rule against raising new arguments in a reply brief. (*People v. Newton* (2007) 155 Cal.App.4th 1000, 1005.) We conclude that neither defendant's original nor recast argument has merit.

At the outset, the Attorney General asserts that defendant forfeited the contention by failing to object to the jury instruction in the trial court. Defendant fails to respond to the forfeiture argument. Even so, we shall review the issue on the merits because his failure to object to the instruction does not preclude review for constitutional error. "The appellate court may . . . review any instruction given, . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259; *People v. Guerra* (2006) 37 Cal.4th 1067, 1138.) Instructional errors resulting in a miscarriage of justice violate the substantial rights of a defendant. (*People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.) Thus, we proceed to examine the instruction to assess whether the trial court erred in giving CALCRIM No. 318.

CALCRIM No. 318 informs the jury that it may reject in-court testimony if it determines inconsistent out-of-court statements to be true. By stating that the jury "may" use the out-of-court statements, the instruction does not require the jury to credit the earlier statements even while allowing it to do so. (See *People v. Anderson* (1989) 210 Cal.App.3d 414, 427-428.) Thus, we reject defendant's argument that CALCRIM No. 318 lessens the prosecution's standard of proof by compelling the jury to accept the out-of-court statements as true.

We also reject defendant's alternate argument that CALCRIM No. 318 disallows the jury from using "the evidence of a prior out-of-court statement as evidence the information in that statement is false." In considering this argument, we heed the well established rule that the "correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Anderson* (2007) 152 Cal.App.4th 919, 928-929, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 538-539.) Here, the trial court gave additional instructions that properly informed the jury of its prerogative to ignore any evidence found to be untrustworthy.

As the Attorney General points out, the jury received CALCRIM No. 226, which provides in relevant part: "You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are[:] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?" CALCRIM No. 226 informed the jury that it could accept or reject any testimony, and in making that determination could also consider past inconsistent statements. CALCRIM No. 226 negates the possibility, imagined by defendant, that the

jury would believe itself bound to rely on out-of-court statements that it found noncredible.

The jury was also instructed with CALCRIM No. 220, which explains the prosecution's burden to prove the defendant guilty beyond a reasonable doubt. In relevant part, CALCRIM No. 220 instructed the jury: "In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to acquittal, and you must find him not guilty." Read as a whole, the instructions did not lessen the prosecution's burden of proof by elevating out-of-court statements to unquestionable reliability. The trial court did not commit error by instructing the jury with CALCRIM No. 318.

VI

Allegations of Prosecutorial Misconduct

Defendant advances several claims of prosecutorial misconduct during closing arguments. Specifically, he contends that the prosecutor improperly and prejudicially (1) informed the jury that a conviction would not cause them to wake up "upset and screaming," (2) stated that only "the jury looks out for the victim," (3) misstated the law by telling the jury that the prosecution has "the burden to protect the defendant," (4) erred by stating that the jury could not consider gaps in the

evidence, (5) disparaged defense counsel by characterizing him as "obsessed with . . . protecting the defendant" and being "[t]he defender of criminals and the accused," and (6) that the prosecutor improperly "vouched" for himself.

As the California Supreme Court recently explained, "The standards governing review of misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144; see *People v. Cash* (2002) 28 Cal.4th 703, 733.) Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. (*People v. Frye* (1998) 18 Cal.4th 894, 969.) In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review. [Citation.]' (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328.)" (*People v. Parson* (2008) 44 Cal.4th 332, 359 (*Parson*.)

Here, defendant failed to make any objection or request for a curative instruction during closing arguments. As a consequence, he has forfeited review of each of his claims of prosecutorial misconduct. (*Parson, supra*, 44 Cal.4th at p.

359.) Even assuming that defendant's claims were preserved for review, we would find no reversible error.

A

Defendant asserts that the prosecutor several times improperly appealed to the jury's passion and sympathy. He focuses on the prosecutor's remark that if the jury convicted defendant, jurors would not "wake up in the middle of the night upset and screaming." Defendant characterizes this statement as tantamount to a threat that jurors would experience personal anguish if they failed to accept the prosecution's argument for conviction. We disagree.

Prosecutors are prohibited from inflaming or appealing to the passions or prejudices of jurors. (*People v. Young* (2005) 34 Cal.4th 1149, 1195.) Even so, "[a] prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury." (*Ibid.*, quoting *People v. Pensinger* (1991) 52 Cal.3d 1210, 1251.) We conclude that the prosecutor did not seek to inflame jurors' passions and prejudices, nor could the jury reasonably have been expected to take the comment as a warning of future anguish resulting from a vote for acquittal.

The prosecutor argued, "Now, in a few moments, the defense will speak to you. And at the end of that I get a chance to

speak to you again. The defense may argue that perhaps you throw everything out and let him go. They may say, of course you've got to have an abiding conviction. That means if you convict him – strike that. You want to make sure when you convict him you're not thinking weeks later, months later, I wonder if I did the right thing. And when they say that, keep in mind, ladies and gentlemen, you don't want to say six weeks later, did I let that criminal off? Did I ignore where the evidence was really taking me? Is that what I did? [¶] We will argue to you should you convict this defendant, you will sleep well. This will not trouble you. You will not wake up in the middle of the night upset and screaming. You'll know you did it because of two main reasons: One, because that's what the evidence reveals; and two, because of your own good [sense]. Those are the reasons we will ask you to convict him."

Viewed in context, the challenged comment came during the prosecutor's discussion of the need for jurors to have an abiding conviction of guilt before voting to convict. Rather than seeking a conviction on the basis of irrational prejudice, the prosecutor sought to convince the jury that the evidence sufficed to dispel reasonable doubt. Our quotation from the prosecutor's opening summation fits within the prosecutor's theme of arguing that the evidence supported a conviction despite Desiray's in-court testimony that defendant never assaulted her. The prosecution repeatedly emphasized to the

jury that the People bore the burden of proof, and CALCRIM No. 220 described the level of certainty required for conviction as that of an abiding conviction. The prosecution's attempt to assure the jury that a verdict of guilt would remain justified even in hindsight constituted permissible argument.

B

Defendant argues that the prosecutor misstated the role of the parties and jury within the justice system. He also urges us to find reversible error in the portrayal of the prosecutor as having the burden to protect the defendant and defense counsel as "obsessed" with protecting the defendant. We are not persuaded.

We consider the prosecutor's statements in the context of his argument. (*Parson*, *supra*, 44 Cal.4th at pp. 360-361) The statements to which defendant objects were made during the part of the argument in which the prosecutor focused on Desiray's recantation to argue that she was attempting to wrongly shield defendant after they married and had a child together. The prosecutor sought to show that defendant received protections that Desiray did not also enjoy. He argued, "[T]here may be some of you sitting there thinking, well, . . . if [the victim] doesn't care what happens to her, why should we? Well, that's precisely why, ladies and gentlemen. . . . This is a wonderful system. We have the great seal of the state of California right up there. We post our wonderful American flag, and we're

reminded constantly of our standards of reasonable doubt, presumption of innocence, et cetera, and I'll get into that in a moment. And we spend a great deal of time talking about the protection of the defendant. The People have the burden to protect the defendant. We have to have a good basis, a belief of a probable cause that a crime has been committed before we can prosecute. If there's something that reveals a possibility of his innocence, we must disclose that immediately to the defendant. The judge has to look out for the defendant making sure everybody is playing by the right rules. Defense counsel is obsessed with, of course, protecting the defendant. They will tell you repeatedly that is their highest obligation. Everybody is looking out for him. So who looks out for her? He won't do it. And she won't do it."

The Attorney General points out that the prosecution does have obligations that can be construed as protecting the defendant--such as the duty to disclose potentially exculpatory evidence to the defense. (See *Brady v. Maryland* (1963) 373 U.S. 83, 87 [83 S.Ct. 1194, 10 L.Ed.2d 215].) It is well established that "[t]he duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial . . . ." (*In re Ferguson* (1971) 5 Cal.3d 525, 531.) Even so, the prosecutor here engaged in hyperbole in stating that the People have "the"

burden of protecting the defendant. Though "hyperbole, we do not think it was misleading to the jury, and it falls within the scope of permissible argument." (*People v. Navarette* (2003) 30 Cal.4th 458, 519.) Indeed, the counterweight to the assertion came in the form of another portion of the quoted argument challenged by defendant, i.e., the prosecutor's statement that "defense counsel is obsessed with . . . protecting the defendant."

Where defendant sees an accusation of mental illness, we see an argument by the prosecutor that reflects the reality of our adversarial criminal justice system. By the end of trial, jurors were well aware that the prosecution urged conviction while defense counsel denied the sufficiency of evidence establishing defendant's culpability. The argument reflecting these respective roles did not constitute misconduct. (*Parson, supra,* 44 Cal.4th at p. 359.)

We disagree with the defendant's characterization of the prosecutor's argument as disparaging toward defense counsel. The prosecutor began his opening summation by respectfully acknowledging that he did not "have the years or skill of my esteemed opposing counsel . . . ." The prosecutor's subsequent references to the duties of defense counsel to provide zealous representation of defendant simply reflected permissible argument about the roles of the advocates at trial.

Defendant, however, takes issue with the prosecutor's reference to defense counsel as "defender of criminals and the accused." Instead of a reference to defense counsel's role in the criminal justice system, defendant sees an equation of convicted defendants with those merely charged with crimes, so that mere representation by the defendant's trial attorney indicated guilt. Reviewing the argument in context, we disagree.

The prosecutor argued, "[K]eep in mind of course [defense counsel] is not a police officer. He is not an investigator of crimes. He's an attorney. The defender of criminals and the accused. So to then replace his judgment for the officer's is again inappropriate. It borders on humorous. Of course, let's look at the facts . . . ." This argument plainly sought to caution the jury about substituting the decisions of Deputy Harper under the circumstances of the investigation with the second-guessing of a partisan advocate at trial. The prosecutor's characterization of such substitution of judgment as "inappropriate" and "humorous" did not nefariously denigrate defense counsel. As we have noted, the prosecutor began his opening summation by noting the experience and skill of his "esteemed colleague." The prosecutor's subsequent comments did not turn respect to disparagement, but focused on clarifying the roles of advocacy by counsel and investigation by the police. We find no error.

We also disagree with defendant's claim that the prosecutor improperly "vouched" for himself when stating: "We have to have a good basis, a belief of probable cause that a crime has been committed before we can prosecute." That the prosecution requires probable cause to bring charges does not coerce a jury into finding that the reasonable doubt standard for conviction has been met. Taken as a whole, the prosecutor's statements focused on the respective roles played by the advocates at trial in order to conclude that it was the jury that would ultimately determine whether defendant was guilty. There is no reasonable probability that the jury could have understood the prosecutor's description of prerequisites for bringing charges as a guarantee that the prosecution's belief alone sufficed for a conviction. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1130.)

C

The next assignment of error focuses on the prosecutor's statement that the jury had the responsibility for holding defendant responsible for the offenses "because nobody else is going to do it" and that there was no one else "who looks out for her." Defendant believes that these statements prejudicially invoked sympathy for the victim by placing the jury in the singular role of protecting her. Our examination of the record compels us to reject the argument.

The prosecutor's statements were made in the context of urging jurors who were convinced of defendant's guilt not to

surrender during deliberations simply on the basis of wanting to finish the trial. The prosecutor argued, "At the end some people may be thinking, well, I don't know, . . . If there are a few people thinking acquittal, I want to be able to go home. I'm getting tired of this case. I may turn around and yield on that guilt thing. We would ask you not to. We would ask you, ladies and gentlemen, that if you believe that this defendant is guilty, that you hang on to that, that you hold that, that you spend your time. Now, feel free to listen to others, obviously, but don't forget to present that feeling and that opinion and stay with it. Because at the end of the day sooner or later you're going to have to hold the defendant accountable because nobody else is going to do it. And at this point in time right here, right now we have the evidence that on December 18th of 2005 and on January 13th, 2006 this defendant frightened the living day lights out of this woman."

The prosecutor's argument cannot reasonably be understood to have incited passions or sympathies but to caution jurors convinced of guilt not to vote according to mere expediency. (*People v. Lenart*, *supra*, 32 Cal.4th at p. 1130.) Similarly, we reject the challenge to the prosecutor's comment that: "Everybody is looking out for him. So who looks out for her? He won't do it. And she won't do it." The prosecutor simply noted what the jury had already observed: a victim who recanted her earlier accusations against a defendant who she thought

would kill her. In urging the jury to convict defendant on the strength of the evidence against him, the prosecutor committed no error. (*Parson*, *supra*, 44 Cal.4th at p. 359.)

D

Defendant next challenges the prosecutor's argument that "though you may desire [additional investigation by Deputy Harper], you can't say since I don't have that I'm going to acquit." Defendant argues that the prosecution removed the jury's prerogative to consider his "defense regarding the absence of evidence the People could have and should have produced." We reject the contention.

The challenged statement was made as part of the prosecutor's argument that if the jury was convinced that the evidence adduced at trial proved guilt beyond a reasonable doubt, it had to convict. The prosecutor stated, "[T]he defense again glosses over what is reported by Deputy Harper. During that time period no one would have been there. And the defense says he didn't go to Sam's Pizza and investigate. So the defense wanted [Deputy] Harper on January 20th to go back to an area which by his own experience having patrolled the area is not replete with people to ask if anyone had noticed something on December 18th. It's a disadvantage of passing time. Of course if you're the defense you want to emphasize it. Absolutely you want to emphasize it completely. You want to be able to say they didn't investigate. In fact, defense counsel

puts his own mind in place of Deputy Harper. What does he say? I don't think that that officer took that seriously. Well, really? [¶] Ladies and gentlemen, keep in mind of course [defense counsel] is not a police officer. He is not an investigator of crimes. He's an attorney. The defender of criminals and the accused. So to then replace his judgment for the officer's is again inappropriate. It borders on humorous. Of course, let's look at the facts, ladies and gentlemen, that – what was he supposed to do? Somebody would say he could have tried. . . . Remember there's a difference between that which is required and that which is desired. He is not required for that. And though you may desire it, you can't say since I don't have that I'm going to acquit. No. You must look at what you do have and go from there."

The prosecution has the prerogative to point out that the adduced evidence proved guilt beyond a reasonable doubt even if the police might have conducted additional investigation of the charged offenses. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1303 [holding that an argument which "urges the jury to focus on what the prosecution believes is the relevant evidence is not improper"].) Hence, we find no misconduct.

E

Our conclusion that the prosecutor did not commit misconduct in closing arguments to the jury compels us to reject

defendant's assertion that his attorney rendered ineffective assistance of counsel by failing to object or request that the jury be admonished to disregard the challenged statements. (*Parson*, *supra*, 44 Cal.4th at p. 368.)

VII

Cunningham Challenge

Relying on *Cunningham v. California, supra,* 549 U.S. 270, defendant argues that his upper term sentence for kidnapping violates the Sixth and Fourteenth Amendments because none of the aggravating factors cited by the trial court were found by a jury.

Defendant fails to acknowledge that he was sentenced on June 26, 2008 — after the Legislature amended section 1170 to remove the presumption of a middle term and provide the trial court with broad discretion to impose the lower, middle or upper term by simply stating its reasons for imposing the selected term on the record. (Stats. 2007, ch. 3, § 2.) As a result of the amendment, the upper term, rather than the middle term, is now the statutory maximum that may be imposed without additional factfinding. (*People v. Sandoval* (2007) 41 Cal.4th 825, 850-851 (*Sandoval*).) Since defendant was sentenced under the amended statute, *Cunningham* is inapposite to the facts of this case.

Defendant argues *Sandoval* was wrongly decided. Recognizing that we are bound to follow this California Supreme Court

decision (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), defendant explains that he is raising the claim of sentencing error in order to preserve the issue for federal review. Following *Sandoval*, we find no error in the trial court's imposition of the upper term for kidnapping.

VIII

Correction of Abstract of Judgment

Our examination of the record has revealed a clerical error in the abstract of judgment. The trial court's pronounced sentence included a concurrent six-year prison term for the second count of false imprisonment. However, the abstract of judgment erroneously lists the sentence for this count as consecutive to the sentence for the first count of false imprisonment. Accordingly, the abstract of judgment must be corrected. We shall order the abstract amended to correct the error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [reviewing court has authority to order correction of the abstract of judgment to reflect oral pronouncement of sentence].)

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment to reflect that the sentence for the second count of conviction for false imprisonment shall run concurrently with the sentence for the first count of conviction for false

imprisonment. The court shall send a certified copy of the same to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

SIMS, J.

We concur:

SCOTLAND, P. J.

RAYE, J.