

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER LEE WHITMORE,

Defendant and Appellant.

G059779

(Super. Ct. No. 20NF0367)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Dorsey Conley, Judge. Affirmed.

Robert V. Vallandigham, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael P. Pulos and Joseph C. Anagnos, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted appellant Christopher Whitmore of rape, false imprisonment, and other crimes. After trial, Whitmore made a motion under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) to replace his appointed counsel; he also moved for a new trial. Because of circumstances related to the ongoing COVID-19 pandemic, Whitmore was not physically present in the courtroom when the trial court heard those motions in late December 2020; instead, Whitmore reluctantly appeared via video for the hearing and at sentencing. The court denied Whitmore's motions and sentenced him to 10 years in prison.

Whitmore contends the trial court erred in overruling his demand to be personally present in the courtroom for the hearing on his posttrial motions and at sentencing. He also contends that the court abused its discretion in denying his *Marsden* motion, and that insufficient evidence supports his conviction for false imprisonment. We find no reversible error and therefore affirm the judgment.

FACTS

Whitmore and P.S. began having sex when P.S. was about 15 years old. Whitmore rented a room in P.S.'s mother's house. He told P.S. he was 28 years old, when he was instead closer to 40. During their relationship, Whitmore verbally abused P.S. and berated her if she talked to other men. P.S. wanted to end things with Whitmore, but she was afraid to do so because they lived under the same roof.

After P.S. turned 18, she asked that her mother order Whitmore to leave their house; her mother did, and Whitmore moved out. P.S. and her mother then reported Whitmore to law enforcement. Whitmore was arrested and ultimately convicted of having unlawful sexual intercourse with a minor.

After reporting Whitmore to the police, P.S. learned he had impregnated her. When P.S. decided to have the baby, her mother forced her to leave their house.

Feeling as though she had nowhere else to go, P.S. returned to Whitmore, who then persuaded P.S. to have his restraining order modified to allow for peaceful contact.

Their relationship soon became violent. On one occasion in December 2018, Whitmore punched P.S. in the face, twisted her arm as if to break it, and then disappeared with their infant son for a week. The following month, after having a disagreement about custody, Whitmore punched P.S. in the stomach and on her legs.

P.S. eventually broke up with Whitmore and refused to talk with him about her personal life. He nevertheless continued to make repeated unwanted sexual advances toward her and tried to find out who she was dating.

In early 2020, Whitmore invited P.S. on a family trip to Disneyland to celebrate their son's second birthday. P.S. accepted the invitation but rejected Whitmore's suggestion that they act as if they were still a couple.

Whitmore drove P.S. and their son from Northern California to Anaheim, where Whitmore and his other family members had rented hotel rooms. P.S. felt uncomfortable sleeping in the same room with Whitmore, so she made plans to spend the night with a male friend.

Later that evening when they were in the hotel room with their son, P.S. told Whitmore that she would not stay in the hotel room with him. Whitmore tried to convince her to stay. P.S. was afraid Whitmore might hurt her, given that he had assaulted her in the past. His size and strength also intimidated her; Whitmore weighed over 200 pounds, was stronger than P.S., and was about six inches taller than her. When P.S. tried to leave, Whitmore stood between her and the hotel room door, forcefully snatched her cellphone from her hand, and pushed her away from the door. All the while, their son was sleeping in one of the beds in the hotel room.

P.S. convinced Whitmore to return her phone so she could cancel an Uber. She then texted the man she had planned to spend the night with, "I'm sorry but I can't go. My BD [baby daddy] is going to put his hands on me if I leave."

As P.S. was sending another text, Whitmore approached her from behind; he hovered over her shoulder and snatched the phone away from her again commenting, “‘It didn’t [look] like you were cancelling an Uber.’” Whitmore then took P.S.’s phone out of its case, threw the phone case at P.S., and hid the phone in his suitcase.

Whitmore took a shower, but P.S. did not try to leave the hotel room because Whitmore could see her from the bathroom. At one point, Whitmore stepped out to check on her. After his shower, Whitmore started yelling at P.S., calling her a bitch, a prostitute, and disgusting. He told her to stop playing the victim and added that she would have to “fuck” him to get her phone back. This went on for about 20 minutes. P.S. did not try to leave, as she was afraid Whitmore would either prevent her from leaving, or from seeing their son if she left.

After Whitmore fell asleep, P.S. tried to use the hotel phone to call for help, but the phone made a loud dial tone, so she hung up. She also tried to unlatch the door, but that made a loud noise as well. P.S. searched Whitmore’s belongings for her phone without success. She eventually got into bed with their son and fell asleep.

Later that night, Whitmore woke P.S., pulled her into his bed, and then repeatedly raped, sodomized, and orally copulated her, despite her verbal and physical resistance. At one point, he raised his hand as if to hit her, but then said, “You know what, I’m not going to leave any bruises on you for you to show anyone else.”

The next morning, P.S. put on her clothes and told Whitmore she was going downstairs to smoke marijuana. While in the hotel lobby, P.S. gave a note to a hotel employee that read, “Can you please, please call the police to room 326. I am in there with my son and his father, Christopher Whitmore, who took my phone and raped me. Please tell them to hurry. It’s an emergency.”

When the police arrived, they found P.S.’s phone in Whitmore’s briefcase, and they discovered condoms containing Whitmore’s and P.S.’s DNA in a trashcan in the

hotel ice machine room. A sexual assault exam also uncovered Whitmore's DNA on P.S.'s vulva.

A jury convicted Whitmore of rape, sodomy by force, forcible oral copulation, false imprisonment, and violation of a protective order. After trial, Whitmore made a *Marsden* motion to replace his appointed counsel, and he moved for a new trial. Because of circumstances related to the COVID-19 pandemic, Whitmore was not physically present in the courtroom when the trial court heard those motions, but rather appeared virtually for those hearings and at sentencing.

The trial court denied Whitmore's motions and sentenced him to 10 years in prison. Whitmore timely appealed.

DISCUSSION

1. *Whitmore's Virtual Appearance at the Hearings and Sentencing*

Whitmore first contends the trial court erred in overruling his demand to be personally present in the courtroom for the hearings on his posttrial *Marsden* motion, his motion for new trial, and sentencing. Before addressing his arguments, we summarize the proceedings below.

a. *Background*

After trial, Whitmore made a *Marsden* motion to replace his appointed counsel; he also moved for a new trial, asserting P.S.'s testimony was unreliable and inconsistent. The hearing was set for December 17, 2020, but the trial court did not conduct the hearing that day as planned because Whitmore was neither present in the courtroom nor available for an electronic appearance. The court noted the jail where Whitmore was being held was on total lockdown through December 27 due to a spike in COVID-19 cases, and the jail staff were unable to move Whitmore to a private room in the jail to allow him to argue his *Marsden* motion in a confidential setting.

Because Whitmore could not be present, either in person or virtually, the trial court suggested postponing the hearing to December 29, after the lockdown was expected to be lifted. Defense counsel conveyed to the court that Whitmore wanted to be present for the proceedings. The court replied it was not sure a virtual appearance would violate Whitmore's rights but agreed to revisit the issue. The judge reminded counsel he was retiring on December 31. He expressed concern if they did not conduct the hearing before then, the new judge would be at an "extreme disadvantage" in ruling on Whitmore's motions, especially on the new trial motion dealing with credibility issues.

When the case was called again on December 29, the jail lockdown due to COVID-19 had been extended through January 14, 2021, so Whitmore appeared by videoconference from a private room in the jail. Defense counsel reminded the trial court that Whitmore did not consent to appear by video, that he specifically requested to be physically present in the courtroom, and that he wanted the court to continue the hearing until January 14 or whenever the lockdown might end. The judge denied Whitmore's requests, noting he would be retired by January 14, and a new judge who was unfamiliar with the trial and with defense counsel's performance would be tasked with reading the entire trial transcript to evaluate the *Marsden* motion, the new trial motion, and sentencing.

Whitmore appeared by video for most of the December 29 hearing, which was livestreamed to the public. Although he was not able to see the courtroom when the hearing started, the video connection was adjusted, and Whitmore later confirmed he was able to see and hear the judge. For the portion of the hearing relating to Whitmore's *Marsden* motion, the connection was switched to audio-only to ensure the matter was not livestreamed to the public; Whitmore was able to hear, but not see, the judge for that portion of the proceeding.

As noted, after hearing arguments from Whitmore and counsel, the trial court denied the *Marsden* motion and motion for new trial. The court then sentenced Whitmore to 10 years in prison.

b. *Analysis*

Whitmore contends he had a right to be physically present in the courtroom at the *Marsden* hearing, the motion for new trial hearing, and at sentencing, and the trial court erred in forcing him to appear virtually without his consent. For the reasons below, we find no reversible error.

Whitmore is correct that a criminal defendant has a constitutional and statutory right to be present at sentencing and at other “critical” proceedings in the case. That right arises under various provisions of law, including the due process clause of the Fourteenth Amendment to the United States Constitution and section 15 of article I of the California Constitution. (Cal. Const., art. I, § 15 [a “defendant in a criminal cause has the right . . . to have the assistance of counsel for the defendant’s defense [and] to be personally present with counsel”]; *People v. Jennings* (2010) 50 Cal.4th 616, 681-682 (*Jennings*) [due process right to be present arises at stages that are “critical” to the trial’s outcome and if defendant’s presence would contribute to the procedure’s fairness].)¹

The right to be present is also guaranteed by statute. (Pen. Code,² § 977, subd. (b)(1) [defendant in felony cases “shall be personally present . . . at the time of the

¹ The confrontation clause of the Sixth Amendment to the United States Constitution also affords a criminal defendant the right to be personally present at trial if his or her appearance is necessary to prevent interference with his or her opportunity for effective cross-examination. (*Jennings, supra*, 50 Cal.4th at p. 681.) However, Whitmore concedes the confrontation clause is inapplicable to the posttrial proceedings at issue here.

² All further undesignated statutory references are to this code, unless otherwise indicated.

imposition of sentence” and “at all other proceedings” unless that right is properly waived in writing]; § 1193 [“defendant shall be personally present when judgment is pronounced,” unless presence is properly waived].)

Notwithstanding the right to be present, “[t]he use of video conferencing and other electronic communication technology has been found to be permissible in certain circumstances and for certain proceedings in both criminal and civil cases. In general, the use of such technology is subject to constitutional considerations . . . and proper security and reliability of the technology with guidelines for the use established by rules of court.” (*People v. Sekhon* (2018) 26 Cal.App.5th Supp. 26, 29 (*Sekhon*).)

Among such rules are the emergency rules adopted by the Judicial Council in Spring 2020 in response to the COVID-19 pandemic. (See *E.P. v. Superior Court* (2020) 59 Cal.App.5th 52, 55 (*E.P.*) [discussing authority for and adoption of emergency rules].) These rules allow courts to conduct criminal proceedings remotely (i.e., by video, audio, or telephonic means), so long as the defendant consents to the remote appearance. (Cal. Rules of Court, App. I, Emergency rule 3(a).)

In this case, Whitmore made it abundantly clear he did not consent to a remote appearance. Thus, we must determine whether the trial court violated Whitmore’s right to be present by conducting the December 29 hearing while he was appearing remotely without his consent. In other words, does the constitutional and statutory right to be “personally present” at sentencing and for other critical proceedings³ require a physical presence in the courtroom, as opposed to a video or telephonic presence?

Turning first to his federal due process rights, Whitmore has not directed us to any authority holding the federal right to be present requires a physical presence in the

³ Whitmore cites no authority for the proposition that a hearing on a *Marsden* motion or a motion for new trial constitutes a “critical” proceeding so as to trigger a right to be present, but we will assume for the sake of our analysis that he had such a right at the proceedings in question.

courtroom for posttrial motions and sentencing. Requiring a defendant to appear remotely for a posttrial hearing or sentencing during an historic public health crisis does not seem to thwart the fairness of the proceeding, especially since recent developments in videoconferencing technology generally allow participants to see and hear one another without interruption. (See also *United States v. Lattimore* (D.D.C. 2021) 525 F.Supp.3d 142, 150 [rejecting defendant’s argument that video appearance would hamper his ability to participate in suppression hearing and concluding “there is no reason to think that a video hearing would deprive the defendant of any due process rights”]; *United States v. Rosenschein* (D.N.M. 2020) 474 F.Supp.3d 1203, 1209 [“Though presence through a screen is not precisely the same as direct physical presence, the difference between the two is not enough to render the [suppression hearing] fundamentally unfair and does not deprive [d]efendant of due process”]; *Sekhon, supra*, 26 Cal.App.5th Supp. at p. 33 [technological advances in videoconferencing equipment “almost eliminat[e] any concerns of a judge not being physically present in the same courtroom” in vehicle infraction trial].)

Ultimately, however, we need not decide whether there was a federal due process problem,⁴ because the People concede there was a state law error. We agree. The statutes in question—sections 977 and 1193—use the phrase “personally present,” and California courts have interpreted similar statutes as requiring a physical presence in the courtroom. (See *E.P., supra*, 59 Cal.App.5th at pp. 58-59 [juvenile’s right under Welf. & Inst. Code § 679 “to be present” at juvenile delinquency proceeding means physically present in the courtroom; hearing could not be conducted via videoconferencing without juvenile’s consent]; *In re J.G.* (2008) 159 Cal.App.4th 1056,

⁴ “Courts generally should avoid resolving constitutional issues if a case can be decided on statutory grounds.” (*E.P., supra*, 59 Cal.App.5th at p. 54, fn. 4 [declining to decide whether juvenile delinquent had a constitutional right to be physically present at his juvenile court hearings, and instead resolving matter on statutory grounds].)

1064-1069 [§ 3041.5, subd. (a)(2), which affords inmates the right “to be present” at parole suitability hearing, and § 2911, subd. (e), which affords inmates the right to “personally appear” before the parole hearings board, require a physical presence in the courtroom, such that regulation calling for a telephonic hearing was void]; see also 63 Ops.Cal.Atty.Gen. 193 (1980) [felony defendant’s arraignment in municipal court may not be conducted by two-way video between jail and court; “the term ‘personally present’ necessarily connotes physical or bodily presence and excludes any lesser connotation of presence by electronic imagery or transmission of sound”].)

Assuming the trial court violated state law in forcing Whitmore to appear remotely without his consent, that brings us to the question of prejudice. Violations of the state right to be present are reviewed under the *Watson* reasonable probability standard: the matter is reversible only if it is reasonably probable the result would have been more favorable to the defendant absent the error. (*People v. Mendoza* (2016) 62 Cal.4th 856, 902 (*Mendoza*); *People v. Cunningham* (2015) 61 Cal.4th 609, 635; *People v. Davis* (2005) 36 Cal.4th 510, 532-533; see *People v. Watson* (1956) 46 Cal.2d 818, 836.)⁵

⁵ Relying on this court’s opinion in *People v. Sanchez* (2016) 245 Cal.App.4th 1409 (*Sanchez*), Whitmore contends the harmless error standard does not apply and that the error is subject to per se reversal. *Sanchez* is distinguishable. In *Sanchez*, the defendant was present when judgment was originally imposed, but the trial court refused to allow him to attend the resentencing hearing on remand after one of his convictions was overturned. (*Id.* at p. 1414.) We ordered part of his sentence vacated and remanded the matter to the trial court for resentencing, with the defendant to be present at the hearing. (*Id.* at p. 1418.) This case is different because Whitmore attended his sentencing hearing by video and was able to participate. In *Sanchez* it was impossible to conduct a harmless error analysis since the defendant did not attend the hearing. Here, by comparison, we can analyze whether it is reasonably probable Whitmore would have received a more favorable result had he been physically present in the courtroom. (See also *Mendoza, supra*, 62 Cal.4th at p. 901 [“The high court has never suggested that a defendant’s improper absence from any critical stage of the proceedings constitutes structural error requiring reversal without regard to prejudice”].)

Applying that standard here, we conclude the error in conducting the hearing while Whitmore was appearing remotely was harmless. There is no indication in this record that Whitmore’s physical presence in the courtroom would have benefited his case in any way or otherwise altered the outcome, nor does the record reflect any difficulties or irregularities attributable to Whitmore’s remote appearance. To the contrary, the record shows he was able to effectively understand and participate in the hearing, he was adequately represented by and able to communicate with his defense counsel, and he was permitted to address the trial court at length. Although he was not able to see the courtroom when the hearing began, the connection was adjusted and Whitmore confirmed he was able to see and hear the judge (except for the *Marsden* hearing, which was by audio only). Finally, there is no indication that the trial court gave any greater consideration to statements of participants who appeared in person.

The fact of the matter, as confirmed by reliable medical and scientific data, is that the COVID-19 pandemic prevented trial courts throughout California from holding in-person hearings safely in December 2020. Although a video appearance is not the same as actual physical presence, the difference between the two under the circumstances present here was not enough to create reversible error in this case.

2. *Whitmore’s Marsden Motion*

Whitmore’s second challenge on appeal relates to the denial of his postverdict *Marsden* motion.

Marsden established a defendant’s right to raise the issue of ineffective assistance of counsel by means of a motion to discharge his or her attorney and appoint a new one. “““When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney’s inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate

representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.”” (*People v. Memro* (1995) 11 Cal.4th 786, 857, overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181 fn. 2.)

“[T]he decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney during the trial is within the discretion of the trial court.” (*Marsden, supra*, 2 Cal.3d at p. 123.) We review the court’s decision declining to relieve appointed counsel under the deferential abuse of discretion standard. (*People v. Earp* (1999) 20 Cal.4th 826, 876.)

During the *Marsden* hearing, Whitmore asserted that the following acts or omissions constituted deficient performance: (1) encouraging him not to testify; (2) failing to investigate family court documents, which supposedly would have revealed numerous lies by P.S.; (3) failing to investigate and present his phone records to show how text conversations with P.S. “really went”; (4) failing to challenge P.S.’s “lie[s] to the nurse” who performed the sexual assault exam; (5) failing to present a case-in-chief; and (6) failing to impeach P.S. with preliminary hearing testimony.

After allowing Whitmore to fully state his complaints, defense counsel responded point-by-point: (1) she advised Whitmore not to testify to avoid impeachment and because P.S. had already been thoroughly impeached (see *People v. Trotter* (1984) 160 Cal.App.3d 1217, 1224 [“Advising a client not to testify does not in and of itself constitute inadequate trial assistance”; “it implies a tactical decision”]); (2) counsel did in fact receive and review the family court documents; (3) counsel worked to unlock and extract data from Whitmore’s phone, took snapshots of relevant texts once she was able to do so, and cross-examined P.S. about texts that were helpful to the defense; (4) counsel did confront P.S. with conflicting statements she made to the forensic nurse, but made the tactical decision to steer clear of certain testimony; (5) counsel suggested she did not put on an affirmative case because her investigation yielded either unhelpful information or

inadmissible evidence; and (6) counsel did impeach P.S. with preliminary hearing testimony.

These were reasonable explanations for the allegedly deficient acts and omissions. The trial court invited Whitmore to rebut them, but he declined to do so. We find no abuse of discretion in the denial of his *Marsden* motion.

3. *The False Imprisonment Conviction*

Whitmore's final contention is that there is insufficient evidence to support his conviction for felony false imprisonment. Again, we are not persuaded.

Our review of any claim of insufficiency of the evidence is limited. We review ““the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.””

(*People v. Romero* (2008) 44 Cal.4th 386, 399.) “The pertinent inquiry is ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” (*Ibid.*)

“It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence.” (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) “Given this court's limited role on appeal, defendant bears an enormous burden in claiming there was insufficient evidence to sustain his conviction for operating a chop shop. If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves.” (*Ibid.*)

“False imprisonment is the unlawful violation of the personal liberty of another.” (§ 236.) The offense rises to the level of a felony when “effected by violence, menace, fraud, or deceit.” (§ 237.) Because the statute is in the disjunctive, false imprisonment is a felony if committed using either violence or menace. (*Ibid.*)

In this context, “violence” means using physical force greater than the force reasonably necessary to restrain someone. (*People v. Reed* (2000) 78 Cal.App.4th 274, 280.) “The additional force required for felony false imprisonment, as opposed to misdemeanor false imprisonment, may come in the form . . . of simply pulling a victim toward a location when the victim’s liberty has already been violated. . . . [S]uch additional and unnecessary force may also arise from sexual assaults suffered by the victim during the course of the defendant’s contact with the victim.” (*People v. Ghipriel* (2016) 1 Cal.App.5th 828, 834.)

“Menace” is a threat of harm express or implied by words or act; an express threat or use of a deadly weapon is not required. (*People v. Islas* (2012) 210 Cal.App.4th 116, 123.) A jury properly may consider a victim’s fear in determining whether the defendant expressly or impliedly threatened harm. (*Id.* at p. 127.)

Whitmore contends the evidence does not show he used violence or menace to prevent P.S. from leaving the hotel room. Viewing the evidence in the light most favorable to the prosecution, we disagree. As noted above, when P.S. tried to leave the hotel room, Whitmore pushed her away from the door and forcefully snatched her cell phone from her hand. P.S. was intimidated by Whitmore’s size and strength, and she was afraid he would hurt her or prevent her from seeing their son if she tried to leave. P.S. was also especially vulnerable in several respects: she was less than half Whitmore’s age, she was shorter and weighed less than him, and he had a history of verbally abusing her, physically assaulting her, and absconding with their child. A reasonable jury could conclude from this evidence that Whitmore violated P.S.’s liberty by violence or menace. Substantial evidence supports the judgment.

DISPOSITION

The judgment is affirmed.

GOETHALS, J.

WE CONCUR:

O'LEARY, P. J.

SANCHEZ, J.