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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL GUADALUPE FONSECA, Defendant and Appellant.	B188308 (Los Angeles County Super. Ct. No. BA271919)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Kathleen Kennedy-Powell, Judge. Affirmed.

Rita L. Swenor, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Gabriel Fonseca appeals from the judgment entered following a jury trial that resulted in his conviction of six counts of second-degree robbery and three counts of felony false imprisonment.[1] He contends: (1) there was insufficient evidence to support the convictions for false imprisonment; (2) the trial court erred in failing to sua sponte instruct on the lesser included offense of misdemeanor false imprisonment; and (3) imposition of the upper term violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). We affirm.

FACTUAL AND PROCEDURAL HISTORY

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence adduced at trial established that defendant perpetrated a series of beauty salon robberies beginning at 12:30 p.m. on September 24, 2004, when he robbed a hairstylist working at Jackie's Beauty Salon. At 1:40 p.m. that same day, defendant robbed a hairstylist at Ambriz Beauty Salon. And at 6:00 p.m. defendant and an accomplice robbed the co-owners of Mira Mar Beauty Salon. At about 5:20 p.m. the next day, defendant robbed two stylists working at Leslie's Beauty Salon. Because defendant's contentions on appeal involve only the events transpiring at the Mira Mar Salon, we give a detailed recitation of only the evidence relating to that incident.

When defendant and codefendant Carlos Sillas entered the Mira Mar Beauty Salon at about 6:00 p.m. on September 24, 2004, it was near closing time. Salon owner Diana Carrillo was working on client Maria Martinez while co-owner Martha

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[1] Defendant and two others also were charged with multiple counts of robbery. He received an eight year sentence. Codefendant Carlos Sillas was charged with several counts of robbery and false imprisonment, and firearm enhancements. A new trial was declared as to Sillas.

Castillo was sitting nearby watching television. Testifying at trial, Martinez, Castillo and Carrillo had slightly varying recollections of the ensuing events.

Martinez recalled seeing one of the two men who entered the salon point a gun at Carrillo. Frightened, Martinez tried to get out from under the hair drier where she was sitting, but the gunman told her to not move and threatened to harm her if she did not comply. When the gunman later ordered Martinez to go into the bathroom located in the back of the salon, she was in shock and did not at first comply but after the gunman repeated the command and one of the stylists urged her to go, she complied. Martinez testified that the gun was never pointed at her. In court, Martinez was unable to identify defendant or Sillas as either of the two men who entered the salon that day.

Carrillo recalled that at about 10:30 or 11:00 a.m. on the day of the robbery, defendant came into the salon and purchased a soda. When defendant returned with Sillas at about 6:00 p.m. that day, Carrillo and Castillo were sitting in adjacent styling chairs. After stating that Sillas wanted a haircut and needed to see a style book, defendant went into the bathroom located in the back of the salon. After a few minutes, while defendant was still in the bathroom, Sillas walked up to Carrillo and put a handgun against her throat.[2] Carrillo could not remember Sillas saying anything, but she recalled Castillo asking Sillas what he wanted and telling him to take the money. While Sillas continued to hold the gun at her throat, defendant came out of the bathroom and went to the cash register, which was located in the front of the salon, and looked around. Carrillo next recalled defendant ordering the three women into the bathroom. Carrillo was frightened. As she walked into the bathroom, Carillo noticed defendant handling her purse and Castillo's purse, which they had left by the cash register. The women stayed in the bathroom between 5 and 10 minutes because they were afraid to come out. Eventually, Castillo opened the door and they all went back

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[2] Carrillo testified that she could not distinguish a toy gun from a real gun, but the gun Sillas was holding appeared to be real and neither People's exhibit 2 nor 25 looked like that gun.

into the salon. Carrillo saw that defendant and Sillas were gone and the purses were on the floor; Carrillo's wallet was there, but the money and cell phone that had been in Carrillo's purse were missing.[3] The salon's cordless telephone also was missing. Carrillo called 911 from another cell phone that had been charging. A few days later, Carrillo identified defendant and Sillas as her assailants from a photographic lineup shown to her by the police. At trial, Carrillo was 100 percent confident in her identification.

Like Carrillo, Castillo also recalled defendant purchasing a soda at the salon in the late morning on September 24, 2005. On one or two prior occasions, Castillo had seen defendant and Sillas on the street in front of the salon. That day, defendant returned to the salon at about 6:40 p.m., this time accompanied by Sillas. Castillo recalled that neither man asked for a haircut but defendant sat down in the waiting area across from the cash register while Sillas went into the bathroom at the back of the salon. Castillo, meanwhile, was sitting in a styling chair watching television. But when she heard Carrillo say, "Maria, Maria, look at the gun. Look." Castillo looked over and saw Sillas holding a black gun against Carillo's neck. Defendant, meanwhile, was still sitting in the waiting area, apparently watching the door. Sillas said something which Castillo could not understand. Castillo said, "Leave her alone. Leave her alone. What are you doing to her? If you want money, go over there. That's where the cash register is." Sillas responded, "Oh, then you're the one who has the money," and turned the gun from Carrillo toward Castillo and touched her pants with his hand. While Sillas kept the gun trained on Castillo, defendant walked to the cash register. Castillo's and Carrillo's purses were nearby. Then, Sillas walked to the register, too. While both men were standing at the unopened cash register, Sillas ordered the women to go into the bathroom. Castillo could not recall if Sillas was

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3 Carrillo identified People's exhibit No. 27 as the cell phone that was taken from her purse that day. People's exhibit No. 27 was a cell phone that was recovered by police in a search of a second codefendant.

pointing the gun at them when he did so, but, she testified "the case was that we were being threatened. And so he said, 'get in the bathroom.' So you have to obey. You have to obey it." Castillo felt that harm would come to her if she did not obey. Like Carrillo, as she walked to the bathroom Castillo noticed defendant handling the women's purses. Whereas Carrillo recalled that, when they came out of the bathroom about five minutes later the purses were on the floor but their contents had been taken, Castillo recalled that the purses themselves were gone. Running outside the salon, Castillo did not see defendant or Sillas, but announced to everyone there that they had been robbed. Two drunks standing outside the salon said, "Oh, they left. They left." A few days later, Castillo identified defendant from a photographic lineup shown to her by the police.

DISCUSSION

A. *Substantial Evidence Supports the Conviction for False Imprisonment By Violence*

Defendant contends his conviction for felony false imprisonment of Carillo, Castillo and Martinez during the robbery at the Mira Mar Salon is not supported by substantial evidence. As we understand his argument it is twofold: (a) the evidence did not establish a use of such force as would elevate the crime from a misdemeanor to a felony; and (b) even assuming there was force used, there was no evidence that defendant personally used any force to induce the women to go into the bathroom. Both arguments are without merit.

In accordance with the usual rules for addressing a challenge to the sufficiency of the evidence, we "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. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could

reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]" ' [Citation.]" (*Kraft, supra*, 23 Cal.4th at pp. 1053-1054.)

1. There Was Substantial Evidence of Menace

Penal Code section 236 defines misdemeanor false imprisonment as "the unlawful violation of the personal liberty of another." "The misdemeanor offense requires no force beyond that necessary to restrain the victim. All that is necessary is that ' "the individual be restrained of his liberty without any sufficient complaint or authority therefor, and it may be accomplished by words or acts . . . which such individual fears to disregard." [Citations.]' [Citation.] ' "Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty or is compelled to remain where he does not wish to remain, or to go where he does not wish to go, is false imprisonment." ' [Citation.]" (*People v. Babich* (1993) 14 Cal.App.4th 801, 806 (*Babich*).)

To elevate misdemeanor false imprisonment to a felony, there must be evidence that the crime was "effected by violence, menace, fraud, or deceit." (Pen. Code, § 237, subd. (a).) In this context, "menace" means a threat of harm express or implied by word or act. (*People v. Reed* (2000) 78 Cal.App.4th 274, 280; *People v. Bamba*

(1997) 58 Cal.App.4th 113, 1123-1124; *People v. Matian* (1995) 35 Cal.App.4th 480, 484 (*Matian*); see also CALJIC No. 9.60 (7th ed. 2003).)[4]

Thus, " '[f]orce is an element of both felony and misdemeanor false imprisonment. Misdemeanor false imprisonment becomes a felony only where the force used is greater than that reasonably necessary to effect the restraint.' " (*People v. Castro* (2006) 138 Cal.App.4th 137, 140.) In *Matian*, the court noted that the reported decisions upholding convictions for felony false imprisonment involving menace generally fell into the following two categories: (1) use of a deadly weapon[5] and (2) verbal threats of harm.[6]

Here, although Martinez, Carrillo and Castillo remembered some details of the robbery differently, they all agreed that there were two robbers, that one of them held a gun to Carrillo's neck and may have pointed it at the others as well, that one or both robbers ordered the women to go into the bathroom, and they complied. From this evidence, a trier of fact could reasonably infer that the robbers used the gun to compel the women to go into the bathroom and stay there. Thus, the evidence was sufficient

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4 The elements of violence, fraud or deceit were not implicated here.

5 See e.g. *People v. Fosselman* (1983) 33 Cal.3d 572 [defendant held a knife to victim's back]; *People v. Zilbauer* (1955) 44 Cal.2d 43 [defendant held victims at gunpoint]; *People v. Saffle* (1992) 4 Cal.App.4th 434, [defendant held a knife to victim's throat and instructed her not to scream and to take off her clothes]; *People v. Webber* (1991) 228 Cal.App.3d 1146 [defendant pointed a gun at victim's head].

6 See e.g. *People v. Raley* (1992) 2 Cal.4th 870, 907 [defendant threatened the victims, all children, that he would hit them with a leather belt that had a big metal buckle kept nearby]; *People v. Arvanites* (1971) 17 Cal.App.3d 1052 [the defendants barricaded themselves inside victim's office, physically restrained the victim from leaving and told him he would have nothing to smile about]; *People v. Magana* (1991) 230 Cal.App.3d 1117 [defendant forcibly held the rape victim's hand as they walked through a park and threatened to kill her when she asked to be let go]; *People v. Moore* (1961) 196 Cal.App.2d 91, 99 [defendant threatened to arrest victim and take her children away].

to establish that the robbers used menace to restrain the women and, as such, to elevate the offense from a misdemeanor to a felony.

2. Defendant Was Liable As An Aider And Abettor

It is irrelevant that Sillas and not defendant was identified as the person holding the gun. This is because the prosecution's theory of defendant's liability was as an aider and abettor and the jury was instructed accordingly.

" 'A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.' [Citations.] [¶] 'Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment.' [Citation.] [¶] . . . [¶] . . . [I]n general, neither presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission. [Citations.] However, '[a]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.' [Citation.]" (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

Here, from the evidence that defendant entered the salon with Sillas, while Sillas held the victims at gunpoint defendant went to the cash register and handled their purses, as well as the evidence that either defendant or Sillas or both ordered the women into the bathroom while Sillas was still armed, a trier of fact could reasonably conclude that defendant had knowledge of Sillas' unlawful purpose and intentionally aided, promoted, and encouraged that purpose. Under these circumstances, there was substantial evidence of defendant's liability for felony false imprisonment as an aider and abettor.

B. *The Evidence Did Not Support Sua Sponte Instructions on Misdemeanor False Imprisonment*

Defendant contends his conviction for felony false imprisonment must be reversed because the trial court had a sua sponte duty to instruct on the lesser necessarily included offense of misdemeanor false imprisonment. He argues that this is so because the evidence that defendant used more force than that necessary to effect the restraint "was nonexistent." We disagree.

Misdemeanor false imprisonment is a lesser, necessarily included offense within felony false imprisonment. "A trial court is required to instruct sua sponte on a lesser included offense ' " 'when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense . . . ' [Citations.]" [Citation.]' [Citation], that is, when the evidence would justify a jury in acquitting on the greater offense, but convicting on the lesser." (*Babich*, *supra*, 14 Cal.App.4th at p. 807.) In the context of false imprisonment, the issue becomes whether the evidence would have justified a jury finding that the defendant unlawfully restrained the victim, but did so without violence or menace. (*Ibid*.)

For example, in *Babich*, the victim testified that the defendant held a knife to her throat but other witnesses and the defendant all testified that the defendant did not use a knife, but merely held the victim with his arms. Under these circumstances, the court in *Babich* found the trial court had a sua sponte duty to instruct on the lesser included offense of misdemeanor false imprisonment because there was evidence from which the jury could conclude that the prosecution had proven unlawful restraint through physical force, but not the use of excessive force or menace to accomplish the restraint.

Here, there was no such evidence. On the contrary, the evidence was undisputed that one of the robbers was armed during the entire incident, including when either he or his companion ordered the women into the bathroom. The only reasonable inference from this evidence is that the robbers used menace – the presence

of a firearm – to compel the victims to go where they did not want to go. Under an aiding and abetting theory of liability, and absent any evidence that defendant was unaware that Sillas was armed, that defendant was not the one holding the gun does not make him guilty of any lesser offense.

C. *Blakely Error*

Defendant contends the upper term and consecutive sentencing imposed in this case violated his Sixth and Fourteenth Amendment rights under *Blakely* because the jury did not find the facts used to justify the upper term. But in *People v. Black* (2005) 35 Cal.4th 1238, our Supreme Court held that *Blakely* did not apply to California's sentencing scheme. Accordingly, this contention must fail.

DISPOSITION

The judgment is affirmed.

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RUBIN, J.

We concur:

COOPER, P. J.

BOLAND, J.