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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KENNETH PAUL TYLER, Defendant and Appellant.	E078634 (Super.Ct.No. FWV1600425) OPINION

APPEAL from the Superior Court of San Bernardino County. Daniel W. Detienne, Judge. Affirmed.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, Paige B. Hazard, Daniel J. Hilton, and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

After a bench trial, the court found defendant and appellant Kenneth Paul Tyler guilty on multiple counts, including kidnapping and assault with a deadly weapon, arising from a series of acts of domestic violence against his wife (now his ex-wife). It imposed a total sentence of 20 years.

Tyler argues his kidnapping conviction must be reversed for lack of substantial evidence of asportation. In the alternative, he contends the trial court should have stayed punishment for kidnapping under Penal Code section 654.[1] Tyler also argues that the trial court abused its discretion in choosing an aggravated term for kidnapping.

We are not persuaded by any of these arguments and affirm the judgment.

I. FACTS

On the morning of January 16, 2016, Tyler and his wife got into an argument because she believed he had taken her phone. She testified that, as the argument escalated, it seemed Tyler was about to attack her physically ("he got loud and started rushing towards me, and like he wanted to attack me"). She tried to defuse the situation by backing off, and Tyler "went back upstairs" while she stayed downstairs in the kitchen. She then stepped into the backyard to "wait[] for things to cool down."

After a while, she slowly tried to go back into the house through a door from the back patio to the kitchen. But she heard Tyler "rushing" down the stairs and then saw him running toward her. She ran back out the kitchen door and tried to flee toward a side gate, warning Tyler not to touch her or she would scream. Tyler caught her by the hair

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

about 15 feet from the door (about halfway to the gate), causing her to fall. He then dragged her back into the house, despite her efforts to grab onto something to stop him from doing so. A security camera recorded Tyler catching his wife by the hair and dragging her back into their house, and the video was played at trial.

Once inside the house, Tyler picked up a closet rod—a cylindrical piece of wood, about two feet long, about the thickness of "the handle to a big shovel," intended to be mounted in a closet for hanging clothes—and started beating his wife with it. He struck her on the hands and arms as she tried to protect her face. She "dropped to the floor" in a "fetal position," and he kicked her in the ribs, stomach, and thighs, and continued to hit her with the rod. She estimated Tyler struck her with the rod about ten times and kicked her about six times.

While Tyler was beating her, she "was telling him to 'Stop. Please Stop. Don't hit me. Please stop.'" In response, he said was going to kill her. She believed him, but eventually Tyler stopped and went upstairs.

Tyler's wife "stayed downstairs for quite some time," but eventually "ended up going upstairs." When she did, the argument resumed, and again turned physical. In the bathroom, Tyler punched his wife in the face, causing her to fall into the bathtub, which was already filled with water. Tyler then continued hitting her while also holding her head underwater. She testified that he held her head underwater for about five seconds, pulled her up for a moment, and then pushed her down again, doing this three times before "it stopped again."

Tyler's wife changed out of her wet clothes and sat on the bed, "trying not to make any noise or to upset him again." This time, when she had an opportunity, she "took off," running to a neighbor's house to call police.

About six hours after the argument first turned physical, Tyler's wife called police. She walked with a limp for about a month after the beatings, her bruised ribs were "very painful" and took about two and a half months to heal, and she suffered a black eye and other cuts and bruises on her face.

In March 2016, Tyler was served with a criminal protective order and an order forbidding any contact with his wife. Nevertheless, on April 15, 2016, Tyler contacted her through a social media site by "liking" all of her pictures.

Tyler was charged with 10 counts and convicted of six: (1) assault with a deadly weapon (§ 245, subd. (a)(1), count 1); (2) corporal injury to a spouse (§ 273.5, subd. (a), count 2); (3) assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4), count 3); (4) criminal threats (§ 422, subd. (a), count 4); (5) kidnapping (§ 207, subd. (a), count 5), and (6) disobeying a domestic violence court order (§ 273.6, subd. (a), count 10).[2] The prosecution further alleged, and the trial court found true, that Tyler had committed counts 1 through 4 while released on bail (§ 12022.1), that he had used a deadly or dangerous weapon to commit count 2 (§ 12022, subd. (b)(1)), and that he had a

[2] The prosecution dismissed counts 7 and 9 before trial in the interests of justice, and the trial court found Tyler not guilty on counts 6 and 10. We therefore need not discuss those counts, their enhancements, or their alleged underlying facts.

prior serious felony conviction (§ 667, subd. (a)), which was also a strike conviction (§§ 667, subd. (b)-(i), 1170.12).[3]

The court sentenced Tyler to 20 years, consisting of the upper term of eight years for the kidnapping conviction, doubled to 16 years by the prior strike, plus two years each for the two assault convictions (one-third the midterm, doubled). The court either struck or stayed punishment on the remaining counts and enhancements. Tyler's sentence is less than the 23 years recommended in the probation report.

II. DISCUSSION

A. *Asportation*

1. *Applicable Law*

To convict a defendant of kidnapping, "[t]he prosecution must prove that the defendant unlawfully moved the victim by the use of physical force or fear, without the person's consent, and the movement was for a substantial distance (the asportation element)." (*People v. Williams* (2017) 7 Cal.App.5th 644, 670 (*Williams*).)

"For simple (rather than aggravated) kidnapping, the jury is to '"consider the totality of the circumstances,"' not simply distance, in deciding whether the movement was substantial." (*Williams*, *supra*, 7 Cal.App.5th at p. 670.) In *People v. Martinez* (1999) 20 Cal.4th 225 (*Martinez*), overruled on a different point by *People v. Fontenot*

[3] The prosecution also alleged an out on bail enhancement as to count 5, but the trial court found that enhancement not true. This apparent inconsistency in the verdict—counts 1 through 5 all were committed on the same day—is not explained in our record. Nevertheless, it had no effect on Tyler's sentence and has not been raised as an error on appeal.

(2019) 8 Cal.5th 57, 70, our Supreme Court described some of the circumstances that may be considered when determining whether a movement is substantial: "[I]n a case where the evidence permitted, the jury might properly consider not only the actual distance the victim is moved, but also 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*, at p. 237.)

When a case involves an "associated crime," as this case does, the trier of fact should also consider "whether the distance a victim was moved was incidental to the commission of that crime" in determining whether the distance was substantial. (*Martinez*, *supra*, 20 Cal.4th at p. 237.) "[A]n 'associated crime,' as that phrase was used [in *Martinez*,] is *any* criminal act the defendant intends to commit where, in the course of its commission, the defendant also moves a victim by force or fear against his or her will." (*People v. Bell* (2009) 179 Cal.App.4th 428, 438-439 (*Bell*).) Whether movement is incidental to an associated crime "is *not* a separate threshold determinant of guilt or innocence" for simple kidnapping, but rather one of the factors "to be considered *in determining the movement's substantiality*."[4] (*Id.* at p. 440.)

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[4] In contrast, aggravated kidnapping in violation of section 209 requires as an element "movement of the victim that is not merely incidental to the commission of the underlying crime and that increases the risk of harm to the victim over and above that necessarily present in the underlying crime itself." (*Martinez*, *supra*, 20 Cal.4th at p. 232; see § 209, subd. (b)(2).)

Martinez stated that "contextual factors, whether singly or in combination, will not suffice to establish asportation if the movement is only a very short distance." (*Martinez*, *supra*, 20 Cal.4th at p. 237.) Nevertheless, "[o]ur Supreme Court has 'repeatedly stated no minimum distance is required to satisfy the asportation requirement.'" (*People v. Robertson* (2012) 208 Cal.App.4th 965, 986.) The determination of whether a movement is substantial is a "multifaceted, qualitative evaluation," rather than a "simple quantitative assessment." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152 (*Dominguez*).) That evaluation is "necessarily connected to whether [the movement] substantially increased the risk to the victim." (*Ibid.*) "Where movement changes the victim's environment, it does not have to be great in distance to be substantial." (*People v. Shadden* (2001) 93 Cal.App.4th 164, 169 (*Shadden*).) Even a few steps can be enough, depending on the circumstances. (E.g., *People v. Arias* (2011) 193 Cal.App.4th 1428, 1435 (*Arias*) [sufficient evidence of asportation where victim was moved approximately 15 feet from outside of apartment to apartment's interior]; compare *Shadden*, *supra*, 93 Cal.App.4th at p. 169 [sufficient evidence of asportation where victim was moved about nine feet within a store "from an open area to a closed room"] with *People v. Perkins* (2016) 5 Cal.App.5th 454, 471 (*Perkins*) [insufficient evidence of asportation where victim was moved only a "short distance inside a private residence from one room to another"].)

We review a determination that the victim's movement satisfied the asportation element for substantial evidence, i.e., whether a reasonable trier of fact could convict the defendant on the totality of the evidence. (*Dominguez*, *supra*, 39 Cal.4th at p. 1152;

People v. Rayford (1994) 9 Cal.4th 1, 23.) Under this deferential standard, if the evidence reasonably justifies the trier of fact's findings, the reviewing court's opinion that the evidence might also support a contrary finding does not warrant reversal. (*People v. Jones* (2013) 57 Cal.4th 899, 961.)

2. *Analysis*

Citing the factors listed in *Martinez*, Tyler argues that there is no evidence sufficient to support the conclusion he moved his wife a substantial distance, so his kidnapping conviction should be reversed. In his view, the movement was merely incidental to the assault that already began when he rushed at her, chasing her outside, which continued after he dragged her back inside. He asserts that the movement "did not increase the risk of harm above that which existed before she was moved," since the assault was simultaneous with the movement. He also contends that her movement "did not decrease the likelihood of detection," "increase[] the dangerousness of foreseeable attempts to escape," or give him "a greater opportunity to commit additional crimes."

Tyler's conclusions, however, are not compelled by the record. In substance, he asks us to reweigh the evidence and override the trial court's factual findings. We decline to do so, as the trial court's factual findings are reasonable and supported by substantial evidence.

Viewed in the light most favorable to the judgment, the trial court reasonably concluded that Tyler's movement of his wife was not merely incidental to the associated crime of assault. Although Tyler assaulted his wife by rushing at her, grabbing her by the

hair, and dragging her back inside, the charged assault *with a deadly weapon* occurred inside, after he moved her. In *Shadden*, *supra*, 93 Cal.App.4th at p. 169, the court found that the jury "could reasonably infer that the movement was not incidental to the attempted rape because [the defendant] only began the sexual attack after he moved [the victim]." Similar reasoning applies here, even though the most serious acts committed by Tyler were not sexual. Moreover, since Tyler was convicted only of simple kidnapping, not aggravated kidnapping, whether or not the movement was incidental to the associated offense is only one factor to be considered and weighed with other factors, rather than an element of the offense. (*Bell*, *supra*, 179 Cal.App.4th at p. 440.)

Tyler's application of the other *Martinez* factors also does not compel the result he wishes. He moved his wife inside from the relatively more public area of their backyard, allowing him to beat her in seclusion. Tyler emphasizes that no one responded to his wife's yelling during the brief period while he was moving her back into the house. But that does not mean that no one would have done so, had the commotion continued in a space more visible and audible to neighbors. Similarly, Tyler's wife did not make use of her first opportunity to escape, when Tyler stopped kicking her and hitting her with the closet rod and went upstairs. But that does not mean that moving her inside did not exacerbate the danger of her attempting an escape during the beating. Also, Tyler's wife testified that, based on her long observation of his behavior, Tyler is somewhat dissuaded from violence by the possibility of being observed ("I know he . . . doesn't want anybody to know anything"). That testimony provides some support for concluding that Tyler

perceived a greater opportunity to engage in more serious violence if he moved his wife inside, whether or not that was objectively true. For all these reasons, it was reasonable for the trial court to conclude, as it did, that the movement increased Tyler's wife's risk of harm.

Tyler cites several cases in support of his contention that "courts of this state have held distances greater than the fifteen feet involved here were insufficient to support a kidnapping verdict where those distances were incidental to another crime." Each of the cases he cites, however, are distinguishable from ours in that they involve movement within an interior space, not movement from outside to inside. In both *People v. Washington* (2005) 127 Cal.App.4th 290 and *People v. Hoard* (2002) 103 Cal.App.4th 599, the victims of the alleged kidnapping were moved from part of a business to another during a robbery. (See *People v. Washington*, *supra*, 127 Cal.App.4th at pp. 296, 299 [two bank employees moved to vault room, compelled to open the vault]; *People v. Hoard*, *supra*, 103 Cal.App.4th at pp. 602, 607 [jewelry store employees moved to back office of the store, giving defendant "free access to the jewelry" and allowing him "to conceal the robbery from any entering customers"].) In *Perkins*, a sexual assault victim was moved from one room to another within an apartment. (*Perkins*, *supra*, 5 Cal.App.5th at p. 471.) Additionally, other courts of this state have held distances equal to or even *shorter* than the fifteen feet involved here to be adequate to support a kidnapping verdict. (*Arias*, *supra*, 193 Cal.App.4th at p. 1435 [15 feet]; *Shadden*, *supra*, 93 Cal.App.4th at p. 169 [nine feet].) It is not just the distance the victim was moved, but

rather a qualitative evaluation of the totality of the circumstances that matters. (*Dominguez*, *supra*, 39 Cal.4th at p. 1152).

We conclude that, considering the totality of the circumstances, a reasonable trier of fact could find that Tyler moved his wife a substantial distance. (*Williams*, *supra*, 7 Cal.App.5th at p. 670.) We therefore may not disturb the trial court's finding regarding the asportation element of kidnapping.

B. *Section 654*

Taylor argues the trial court should have stayed his punishment for kidnapping under section 654.[5] In his view, "the kidnapping and assault with a deadly weapon were one indivisible action taken to advance the objective of assaulting [his wife] with a deadly weapon." We disagree.

Section 654 prohibits multiple punishments for multiple offenses committed by a single act or during an indivisible course of conduct. (*People v. Pinon* (2016) 6 Cal.App.5th 956, 967.) A course of conduct is generally indivisible if the defendant harbored a single criminal objective the entire time. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) "However, if the defendant harbored 'multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the

[5] Of course, the trial court would have the choice of which punishment to stay and which to impose if section 654 barred multiple punishment. (§ 654, subd. (a) ["An act or omission that is punishable in different ways by different provisions of law may be punished under either of such provisions . . ."].) But Taylor would prefer that the punishment for kidnapping be stayed.

violations share common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) "The temporal proximity of two offenses is insufficient by itself to establish that they were incidental to a single objective." (*People v. Vasquez* (2020) 44 Cal.App.5th 732, 737.) "Objectives may be separate when 'the objectives were either (1) consecutive even if similar or (2) different even if simultaneous.'" (*Ibid.*)

Also, even where a course of conduct is "directed to one objective," multiple punishments are justified if the acts comprising the course of conduct are "divisible in time." (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11.) In this context, acts are divisible in time if the defendant had sufficient time between them to "reflect upon what he had already done . . . and what he was about to do." (*People v. Lopez* (2011) 198 Cal.App.4th 698, 718 (*Lopez*).)

"'The question of whether the acts of which defendant has been convicted constitute an indivisible course of conduct is primarily a factual determination, made by the trial court on the basis of its findings concerning the defendant's intent and objective in committing the acts." (*People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657.) The trial court's "findings on this question must be upheld on appeal if there is any substantial evidence to support them." (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) "'We must "view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence."'" (*Id.* at pp. 1312-1313.)

So viewed, the evidence supports the trial court's conclusion that section 654 does not prohibit imposition of punishment for both the kidnapping and the assault with a deadly weapon. Nothing in evidence compels the conclusion that Tyler already formed a plan to beat his wife with the closet rod, and he was just acting on that plan, when he chased her down and dragged her back into the house. Thus, Tyler's analogy to several cases where the defendant's series of violent acts, including false imprisonment, were merely the means of accomplishing a sexual assault, is unpersuasive. (See *People v. Walker* (1983) 146 Cal.App.3d 34, 36-37 (*Walker*); *People v. Martinez* (1980) 109 Cal.App.3d 851, 858 (*Martinez*).) "Each case must be determined on its own circumstances." (*People v. Hutchins*, supra, 90 Cal.App.4th at p. 1312.) The circumstances here support the conclusion that Tyler's intent and objective may not have been so singular as that of the defendants in *Walker* and *Martinez*.

Rather, it is equally plausible, if not more so, that Tyler's intent in kidnapping his wife was, at least in part, simply to keep her from leaving and to keep her from telling neighbors or police that he was keeping her phone from her.[6] Tyler's objective for the assault with the deadly weapon, on the other hand, was to inflict pain—say, as punishment for her attempt to leave, or for fighting his attempt to keep her from leaving, or for bothering him about the phone, or some other reason or combination of reasons.

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[6] The record does not establish whether Tyler in fact took his wife's phone, but she testified that their argument began because she believed he had done so and confronted him about it.

From this perspective, Tyler acted with multiple criminal objectives, so multiple punishment is appropriate.

Tyler parses the trial court's comments during sentencing in support of the proposition that "[e]ven the trial court recognized that the kidnapping, assault with a deadly weapon and corporal injury to spouse . . . all involved the same course of conduct." This line of reasoning is unproductive. The court explained to Tyler that section 654 required staying punishment for Tyler's corporal injury to a spouse conviction (count 2), since the kidnapping and assault convictions were each part of the broad scope of acts underlying that offense.[7] The court also explained, however, that it viewed the kidnapping and the assault with the deadly weapon as separate from one another, and *not* part of the same indivisible course of conduct.[8] Moreover, our question

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[7] In response to a comment by Tyler that he was "confused" by arguments by counsel about the applicability of section 654, the trial court explained that the prosecutor was conceding, and the court agreed, that "the 273.5, the punishment on that should be stayed because the basis of that is the kidnapping, what happened during the kidnapping, what happened during the 245(A)(1), what happened during the 245(A)(4). So that section, 654, precludes you from being punished for that 273.5 because—well, I should say if I punish you for the other ones, then I can't for the 245 and 207. I also can't punish you for the 273.5 because it's all the same conduct underlying those charges. That's kind of a way to explain it. Or the other way, like I said, it's just one course of conduct."

[8] The trial court stated it did not find "the 245(a)(1), the incident in the kitchen with the rod or a stick" was "654 to the 207," explaining: "I believe that the 207 was complete when [the victim] was taken by force and without consent and moved a substantial distance. When they got into the house the crime was complete, if not before that. Now, if Mr. Tyler was hitting her with a stick while dragging her into the house, I guess you can argue it was 654. But here she was trying to escape, dragged back into the house. He didn't have to hit her with the stick to make it a kidnapping, he could have just held her there and it still would have been a kidnapping. [¶] I don't think it is 654, the 245(a)(1), 207, like probation thinks it is."

here is whether the trial court's *ruling* was supported by substantial evidence, not whether the court's expressed reasoning was sound in every detail. Tyler's argument based on a snippet of the reporter's transcript does not attempt to answer that question.

Alternatively, but also leading to the conclusion that section 654 does not apply, the evidence is reasonably interpreted to show that the acts comprising Tyler's course of conduct were divisible in time, even if assumed to be directed to one objective. The kidnapping was complete before Tyler picked up the weapon with which he committed the assault with a deadly weapon. The act of dragging his wife inside and the act of picking up the closet rod and beating her with it are reasonably viewed as separate volitional acts, between which was a moment during which Tyler could have "reflect[ed] upon what he had already done . . . and what he was about to do." (*Lopez*, *supra*, 198 Cal.App.4th 698, 718.) On this point, *People v. Trotter* (1992) 7 Cal.App.4th 363 (*Trotter*) is instructive. In *Trotter*, the defendant fired three shots at a police officer, with the second shot about a minute after the first, and the third shot seconds later. (*Id.* at pp. 365-366.) The court found "[a]ll three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible." (*Id. at p. 368.*) Here, too, after the kidnapping, Tyler had at least the time it takes to pick up a closet rod when he could have reflected on his actions. From this perspective, too, section 654 does not bar multiple punishment for the kidnapping and the assault with a deadly weapon.

C. *Aggravated Sentence*

Tyler argues the trial court erred in several respects in choosing to impose an aggravated sentence for his kidnapping conviction. We find no prejudicial error.

1. *Additional background*

In choosing the upper term for the kidnapping, the trial court acknowledged certain mitigating factors applied: "I do think I can consider the fact that Mr. Tyler showed remorse and apologized for his behavior, and the fact that he did have letters referencing good character." It found, however, that none of the mitigating factors listed in section 1170, subdivision (b)(6) applied, and that a low term would not be "in the interest of justice."[9]

The court also said it considered Tyler's criminal history, as well as "other aggravating factors that were proven in this case that the court can consider." The court further commented as follows: "I am going to strike the 12022(b)(1) enhancement, and because I'm striking that I'm going to use that as an aggravating factor, the use of a weapon during the 245(a)(1), the rod that was used to beat [the victim]. And I'm not imposing punishment . . . under Penal Code section 422, so I think I can consider the threat to kill. And I'm not imposing punishment under the 273.5, so I think I can consider the fact that he had a relationship with [the victim], she was his spouse, and that

[9] Section 1170, subdivision (b)(6) establishes a presumption in favor of the lower term where specified circumstances were "contributing factor[s] in the commission of the offense." That presumption can be overcome if the trial court finds that aggravating circumstances so "outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice." (*Ibid.*)

is an aggravating factor, his conduct against someone like that. [¶] I'm also going to be striking the 667(a)(1) prior, so I can consider that in terms of [an] aggravating factor as well. [¶] So for all those reasons, and some of the other ones mentioned by [the prosecutor], I am going to impose the aggravated term of eight years."

2. *Standard of review*

"The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.'" (*People v. Sandoval* (2023) 41 Cal.5th 825, 847, superseded by statute on another point as stated in *People v. Lewis* (2023) 88 Cal.App.5th 1125, 1132.) It is defendant's burden to show the trial court's decision was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.)

3. *Analysis*

a. *Section 1170.76*

The prosecutor invoked section 1170.76 in arguing the court could consider Tyler's marital relationship to his wife as a factor in aggravation.[10] This was mistaken.

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[10] The prosecutor said, "I believe [section 1170.76] is another thing that the court can look at. I believe that it specifically states that "the fact that a defendant, who commits a violation of [section] 245, is or has been in a marital or blood relationship with the victim, that's also a circumstance in aggravation," which grants the imposing of the upper term under subdivision (b) of section 1170." Later, the prosecutor repeated the same point: "I believe it was [section] 1170.76 that says if the defendant is married to the victim, that that is a circumstance in aggravation. The fact that [the victim] was the defendant's spouse at the time of the incident was pled in count 2. It specifically says, 'corporal injury resulting in a traumatic condition upon [the victim], who was the spouse

[footnote continued on next page]

Section 1170.76 cannot apply unless "the offense contemporaneously occurred in the presence of, or was witnessed by" a minor.[11] Thus, section 1170.76 does not apply to Tyler's current offenses.

While imposing sentence, the trial court said it was considering his marital relationship with the victim as an aggravating factor. On this basis, Tyler assumes the court "shared the prosecutor's belief that [section] 1170.76 applied as an aggravating factor."

The People argue, and we agree, that Tyler forfeited this argument by failing to raise it in the trial court. (See *People v. Boyce* (2014) 59 Cal.4th 672, 730-731.) We nevertheless address the issue to "forestall a petition for writ of habeas corpus based on a claim of ineffectual counsel." (*People v. Williams* (2000) 78 Cal.App.4th 1118, 1126.)

Notably, the trial court did *not* cite section 1170.76 as the source of its authority to consider Tyler's marital relationship with his wife as an aggravating factor. In the absence of evidence to the contrary, we presume the trial court knows the law and applies it correctly. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 398.) There is

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of the defendant.' He was on notice that that aggravating factor was pled, and it was proven when your honor found him guilty of the 273.5."

[11] In full, section 1170.76 provides: "The fact that a defendant who commits or attempts to commit a violation of Section 243.4, 245, or 273.5 is or has been a member of the household of a minor or of the victim of the offense, or the defendant is a marital or blood relative of the minor or the victim, or the defendant or the victim is the natural parent, adoptive parent, stepparent, or foster parent of the minor, and the offense contemporaneously occurred in the presence of, or was witnessed by, the minor shall be considered a circumstance in aggravation of the crime in imposing a term under subdivision (b) of Section 1170."

no evidence in support of Tyler's assumption that the trial court adopted the prosecutor's misstatement of the law.

Further, the trial court was permitted to consider Tyler's relationship with his wife as an aggravating factor, albeit not under section 1170.76. "Circumstances in aggravation" include that the "defendant took advantage of a position of trust or confidence to commit the offense." (Cal. Rules of Court[12], rule 4.421(a)(11); see *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1031 [rule 4.421(a)(11) applies to aggravated assault under circumstances involving domestic violence].) They also include any other factors that "reasonably relate to the defendant or the circumstances under which the crime was committed." (Rule 4.421(c).) Thus, we find no abuse of discretion in the trial court's consideration of Tyler's relationship with his wife as an aggravating factor.

b. *Criminal history*

Although Tyler acknowledges his criminal history is not pristine, he argues it "did not warrant an aggravated term sentence." We find the trial court did not abuse its discretion in treating his criminal history as an aggravating factor.

The trial court's decision to consider Tyler's criminal history as an aggravating factor was neither irrational nor arbitrary. Its characterization of Tyler's criminal history as "extensive" is amply supported by the record. Dating back to when Tyler was a teenager (he was born in 1966), his criminal record includes numerous convictions, including multiple felony convictions and lesser offenses. The most serious of Tyler's

[12] Undesignated rules references are to the California Rules of Court.

felony convictions was also a strike, shooting at an occupied motor vehicle in violation of section 246, an offense he committed in 1990. He received multiple prison sentences, the longest of which was a term of 8 years. When released from prison, he repeatedly violated his parole.

To be sure, it could have been worse. As Tyler emphasizes, his strike offense was committed decades before his current offenses, and our record does not speak to whether he "was the shooter or an aider and abettor to the crime." With the exception of that long-ago strike offense and his current offenses, his convictions are for non-violent crimes, such as possession of drugs for sale and unlawful taking or driving of a motor vehicle.[13] One of Tyler's felony convictions, for transporting marijuana in violation of former Health and Safety Code section 11360, subdivision (a), would not be a felony under current law. It simply does not follow, however, that it was irrational or arbitrary for the trial court to give such a substantial criminal history some weight as an aggravating factor. Tyler has not demonstrated any fault in the trial court's exercise of its discretion in this regard.

c. *Risk to society*

Tyler argues he "did not pose a risk or danger to society," and that the trial court erred by imposing an aggravated sentence in part on that basis. We are not persuaded.

[13] Tyler's wife testified that January 2016 was hardly the first time he had been violent towards her. But Tyler does not have any previous convictions for domestic violence.

First, the record is ambiguous as to whether the trial court's decision to impose an aggravated sentence in fact was based in any significant part on Tyler posing a danger to society. The probation report recommended a finding that Tyler "has engaged in violent conduct that indicates a serious danger to society." (See rule 4.421(b)(1).) The prosecutor also argued he is a "risk to public safety," noting that in Tyler's adult life, the longest period he has been "crime-free" and not incarcerated or on probation is about five years. In imposing sentence, the court expressly identified Tyler's criminal history as one of several aggravating factors, and indicated that it also considered "some of the other" factors mentioned by the prosecutor.[14] Nevertheless, it did not expressly state that it considered any danger Tyler poses to society as an aggravating factor.

In any case, assuming the trial court did find Tyler has engaged in violent conduct that indicates a serious danger to society, that finding was entirely reasonable. Among other things, Tyler's recent offenses against his wife are reasonably viewed as an indication that the violence of his prior strike offense was not a youthful aberration, but a continued aspect of his behavior.

In arguing for a different conclusion, Tyler makes much of the prosecution's pretrial settlement offers. Tyler was released on bail from May 23, 2016, to June 28, 2021, when bail was revoked after he failed to appear for a pretrial hearing. In 2018, the prosecution offered to resolve Tyler's various charges (including those that were then

[14] The court summarized: "So for all those reasons, and some of the other ones mentioned by [the prosecutor], I am going to impose the aggravated term of eight years" for the kidnapping conviction.

pending, but later dropped or of which he was acquitted at trial) with a "period of work release." In 2020, the offer on the table was a total sentence of 10 years or, in the alternative, a five year sentence plus payment of $30,000 in restitution. Tyler interprets these offers as a sign the prosecution was not "concerned about [Tyler's] risk or danger to society." He states that "going from an offer to settle the case for work release to five or ten years, to advocating an aggravated term of twenty years because appellant posed a risk to society seems unwarranted."

We are not persuaded that the prosecution's pretrial plea offers are best interpreted as Tyler proposes. More likely, they reflect the prosecution's evolving view of the strength of the evidence. In 2018, Tyler's wife was refusing to cooperate with the prosecutor. By 2020, Tyler's wife was cooperating, but there are always risks and costs inherent in taking a case to trial.

For present purposes, however, the prosecution's actual motives for making the plea offers it made are irrelevant. Tyler cites no authority and articulates no reason why the prosecution might not have been entitled to reconsider at any point its evaluation of the danger to society posed by Tyler. Critically, as well, Tyler does not cite any authority or articulate any reason why the *trial court* might not be entitled to make its *own* evaluation of that danger, after seeing the evidence at trial.

Again, we find no abuse of the trial court's discretion.

d. *Use of a deadly weapon*

During sentencing, the trial court said it would dismiss the section 12022, subdivision (b)(1) enhancement for use of a deadly or dangerous weapon "because I'm striking that I'm going to use that as an aggravating factor, the use of a weapon during the 245(a)(1), the rod that was used to beat [the victim]." Tyler reads this comment as indicating the court misunderstood which count the section 12022, subdivision (b)(1) enhancement applied to, noting that it "was alleged as to the domestic violence charge (Count 2) and not alleged as to the Penal Code section 245(a)(1)." He reasons from that premise that the court's "mistaken belief that it had struck the use of a deadly weapon enhancement applicable to the assault with a deadly weapon was clearly not a proper reason to impose an aggravated term sentence." We disagree with Tyler's interpretation of the court's comment, but agree that the court's reasoning was erroneous.

First, as the People note, Tyler did not raise any objection to the court's comment, thereby forfeiting any claim of error on appeal. (See *People v. Gonzalez* (2003) 31 Cal.4th 745, 751 ["A party in a criminal case may not, on appeal, raise 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' if the party did not object to the sentence at trial"], quoting *People v. Scott* (1994) 9 Cal.4th 331, 353 .) Again, however, we exercise our discretion to consider the issue on the merits now, rather than on habeas. (See *People v. Williams*, *supra*, 78 Cal.App.4th at p. 1126.)

We do not read the court's comment as an indication that it was confused about whether the section 12022, subdivision (b)(1) enhancement related to count 1 or count 2. Rather, it appears the court was attempting to apply the rule stated in section 1170, subdivision (b)(5), that the court "may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law," language it quoted during the sentencing hearing. The court apparently believed that striking punishment for the enhancement made it appropriate to consider the circumstance that Tyler "was armed with or used a weapon at the time of the commission of the crime" as an aggravating factor. (Rule 4.421(a)(2).)

There are at least two problems with such reasoning. First, Tyler was not armed during the commission of the *kidnapping*, which is the crime for which the court chose to impose an aggravated term. The kidnapping was complete once Tyler dragged his wife back into the house, and it was only then that he picked up a weapon. It is well established that, "in selecting the base term for a substantive offense, . . . the trial court can use facts under [Rule 4.21(a)] only if they relate to that offense." (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1779.) Thus, the court may not use "facts from other counts to aggravate a defendant's sentence for a different count." (*People v. Searle* (1989) 213 Cal.App.3d 1091, 1098.)

Second, even with the section 12022, subdivision (b)(1) enhancement stricken, the sentence that the trial court imposed still makes dual use of the same fact—Tyler beating his wife with a closet rod—both as an aggravating factor for the kidnapping count and as

an element of assault with a deadly weapon, an offense for which the court imposed a prison term. That violates the rule that a "fact that is an element of the crime on which punishment is being imposed may not be used to impose a particular term." (Rule 4.420(h); see *People v. Scott*, *supra*, 9 Cal.4th at p. 350 [court may not "use a fact constituting an element of the offense either to aggravate or to enhance a sentence"].)

Nevertheless, remand is unnecessary "'if "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error."'" (*People v. Osband* (1996) 13 Cal.4th 622, 728.) The error is harmless and resentencing is not required where "the court could have selected disparate facts from among those it recited to justify the imposition of [. . .] the upper term, and . . . we [can] discern no reasonable probability that it would not have done so." (*Id.* at p. 729.)

Here, numerous aggravating factors apply that Tyler has not challenged on any basis, or that we have found were appropriately considered. Between Tyler's strike offense, his current offenses, and his wife's testimony of uncharged violent actions, there is ample basis to conclude he "has engaged in violent conduct that indicates a serious danger to society." (Rule 4.421(b)(1).) His "prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous" and arguably of "increasing seriousness." (Rule 4.421(b)(2).) He had served several prior prison terms (Rule 4.421(b)(3)), and his prior performance on probation or parole was "unsatisfactory." (Rule 4.421(b)(5).) He was out on bail when he committed the current offenses. (Rule 4.421(c); see *People v. Combs* (1986) 184 Cal.App.3d 508, 511 [bail status valid

aggravating factor, though not specifically listed in rules of court].) The trial court properly considered both Tyler's relationship with his wife, and his threat to kill her, as aggravating factors. (Rule 4.421(a)(11), (b)(1), (c).) The court exercised its discretion to strike an enhancement for a prior serious felony (§ 667, subd. (a)(1)), so that prior conviction was properly considered instead as an aggravating factor. (Rule 4.420(g).)

Any one of these many aggravating factors, including some that Tyler has not disputed, would have been legally sufficient to make Tyler eligible for an upper term. (*People v. Black* (2007) 41 Cal.4th 799, 813.) We do not find it plausible, let alone reasonably likely, that Tyler would receive a more favorable sentence if we were to remand for resentencing. We therefore find no prejudicial error, and any arguable error was harmless.[15]

[15] At the request of Tyler's appellate counsel, in lieu of oral argument, we allowed the parties to file written arguments in response to our tentative opinion. As we would at the end of an oral argument, we now thank the parties for their thoughtful comments. Tyler's written argument focuses on whether his movement of his wife was merely incidental to the crime of assault with a deadly weapon, and whether the movement was too minor to satisfy the asportation element of kidnapping. We remain persuaded that our tentative conclusions, which are the same as those of this final opinion, are correct.

III. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAPHAEL
J.

We concur:

McKINSTER
Acting P. J.

FIELDS
J.