No. S272627

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

RODNEY TAUREAN LEWIS,
Defendant and Appellant.

Fourth Appellate District, Division Three, Case No. G060049
Santa Clara County Superior Court, Case No. B1366626
The Honorable Vincent J. Chiarello, Judge

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Whether the instructions as a whole correctly conveyed the quantum of force required for kidnapping for rape when an adult victim is incapable of consenting to the movement.

2. Whether any error in the force element of the kidnapping instruction was harmless beyond a reasonable doubt.

3. Whether substantial evidence supported the force element of kidnapping so that retrial is not barred under the double jeopardy clause.

INTRODUCTION

More than half a century ago, this Court recognized that the "rule[s] governing the forcible carrying of conscious persons capable of giving consent" cannot be "literally applied" to define the crime of kidnapping where the victim, "because of infancy or mental condition, is incapable of giving his [or her] consent." (*People v. Oliver* (1961) 55 Cal.2d 761, 766.) Consistent with those principles, this Court observed decades later that "infants and young children are in a different position vis-a-vis the force requirement for kidnapping than those who can apprehend the force being used against them and resist it," and expressly answered the question of what "quantum of force [is] necessary to establish the force element of kidnapping in the case of an infant or small child." (*In re Michele D.* (2002) 29 Cal.4th 600, 610.) In that context, this Court announced that "the amount of force required to kidnap an unresisting infant or child is simply the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with illegal intent." (*Ibid.*)

The Court should now hold that the same standard governs kidnapping offenses involving victims who are mentally incapacitated—meaning persons incapable of giving legal consent to movement due to intoxication or a mental condition—and affirm that the amount of force required to kidnap a mentally incapacitated person is the amount of physical force required to take and carry the victim away a substantial distance for an illegal purpose or with illegal intent. That standard (like the identical standard for young children identified in *Michele D.*) is consistent with the text of Penal Code section 207, evidence of legislative intent, and this Court's prior kidnapping precedents, including the reasoning in *Oliver* and *Michele D.*

The kidnapping instructions in this case adequately informed the jury of this relaxed standard of force. The jury was instructed that conviction required proof that appellant "used physical force or deception to take and carry away an unresisting person with a mental impairment." (Opn. 41.) Although the People agree that the term "or deception" should not have been included in that instruction, the jury was otherwise instructed that conviction required proof that the victim was mentally incapacitated, that appellant "moved" Doe a substantial distance (and thus that he used the amount of physical force required to take and carry the victim away a substantial distance), and that he did so with the intent to commit rape. The Court of Appeal's contrary judgment should be reversed.

STATEMENT OF THE CASE

A. The crime and trial

Appellant met the victim Suzanne Doe at a bar in Palo Alto. At the time, Doe felt "a little drunk" because she had shared a bottle of wine with her boyfriend over dinner and a "very strong" drink with him at the bar. (5RT 1220, 1222, 1225-1227, 1274.) Doe lost her phone somewhere at the bar, and appellant falsely told her that "a friend of his had found a phone." (5RT 1232.) At one point, appellant held his phone to his ear as if speaking to that friend, but he did not actually place or receive a call. (5RT 1234.) Believing appellant, Doe had some drinks with him while waiting for the supposed friend to return with her phone. (5RT 1235.) The bartender thought that Doe was intoxicated and refused to serve Doe additional alcohol. (5RT 1318.) However, appellant convinced the bartender to serve him additional alcohol (by falsely claiming that he knew the owner and threatening to have the bartender fired if she did not serve him) and provided the alcohol to Doe, who consumed it. (5RT 1319.) Doe's memory of the evening ended at that point. (5RT 1235.) Security video from the bar showed Doe walking out of the bar with appellant shortly thereafter, around 12:45 a.m. (9RT 2414.)

The following morning, Doe was discovered in a parking lot, unconscious and wrapped in a sheet. (4RT 953; 5RT 1300.) Underneath the sheet, Doe's dress had been pushed up to her belly button and her underwear was partly pulled down. (4RT 956, 993-994.) She had bruises on her arms, legs, and feet and abrasions on her back. (8RT 2214-2215.) She had been raped and involuntarily drugged with alprazolam (7RT 1898, 1903; 8RT

2223-2224), a medication she did not normally take (5RT 1265, 1291). When combined with alcohol, alprazolam can cause loss of consciousness or memory loss. (7RT 1861, 1903.) Doe was taken to a hospital, where her memory began again. (5RT 1238.) At 11:00 a.m., she had a blood-alcohol concentration (BAC) of 0.18. (9RT 2435.) An expert testified that around 1:45 a.m., Doe's BAC had been 0.35, which would be "Phase IV" intoxication, a level consistent with confusion and "passing out." (9RT 2431, 2443-2444.)

When contacted by the police, appellant claimed that he had offered Doe a ride home, and she had accepted. (6RT 1612.) Appellant said Doe had been "passing out" in the car. (6RT 1613.) He said Doe had "started freaking out" and that he had let her out in a driveway. (6RT 1613.) He denied having had sex with Doe, but recanted when the police said they had a warrant for his DNA, and admitted to having sex with her. (6RT 1617.)

Appellant's phone records disproved his story about driving Doe home. The records showed that he had driven to his own house from the bar—away from Doe's residence—and that he had called his girlfriend within minutes of leaving the bar. (9RT 2547-2548, 2552.) The sheet Doe had been found in belonged to appellant. (6RT 1618.)

The Santa Clara County District Attorney charged appellant with rape of a person prevented from resisting by an intoxicating substance (Pen. Code, § 261, subd. (a)(3)) and kidnapping to commit rape (Pen. Code, § 209, subd. (b)(1)). (2CT 356-357.)[1]

The trial court instructed the jury that to convict appellant of kidnapping to commit rape, the prosecution had to prove:

> 1. The defendant intended to commit rape of a woman while intoxicated;
>
> 2. Acting with that intent, the defendant used *physical force or deception* to take and carry away an unresisting person with a mental impairment;
>
> 3. Acting with that intent, the defendant moved the person with a mental impairment a substantial distance;
>
> 4. The person with a mental impairment was moved or made to move a distance beyond that merely incidental to the commission of a rape of a woman while intoxicated;
>
> 5. When that movement began, the defendant already intended to commit rape of a woman while intoxicated;
>
> 6. Suzanne Doe suffered from a mental impairment that made her incapable of giving legal consent to the movement;
>
> AND
>
> 7. The defendant knew or reasonably should have known that Suzanne Doe was a person with a mental impairment.

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

[¶] . . . [¶]

> A person with a mental impairment may include unconscious or intoxicated adults incapable of giving legal consent. A person is incapable of giving legal consent if he or she is unable to understand the act, its nature, and possible consequences.

(3CT 791, italics added.) The jury convicted appellant of both charged crimes. (3CT 759-760.)

Appellant moved for a new trial on the ground that the instruction on kidnapping to commit rape had permitted the jury to find him guilty of kidnapping even if it had found that he used "no force at all." (17RT 4806.) The prosecution responded that the instruction had also specified that conviction required proof that appellant "took and carried [Doe] away . . . a substantial distance" and "if a jury is instructed on (and properly finds) that the defendant moved the victim a substantial distance [it] must have properly found the required force for purposes of Penal Code section 209(b)." (3CT 878.) The trial court denied the motion. (17RT 4811.)

B. The Court of Appeal's decision

The Court of Appeal unanimously upheld the rape conviction but divided over the conviction for kidnapping. (Opn. 20-22; conc. & dis. opn. of Bedsworth, J., 15-18 (Conc. & Dis. Opn.)) The majority concluded that the instruction on kidnapping to commit rape was erroneous as it permitted the jury to convict appellant "based on deception alone" (Opn. 10); held that the error was prejudicial (Opn. 16-18); and determined that the evidence of force was so deficient that retrial was barred (Opn. 18-20).

Justice Bedsworth rejected each of these holdings. (Conc. & Dis. Opn. 6-15.)

The Court of Appeal's analysis of the kidnapping conviction began with the text of section 209, subdivision (b)(1) (Opn. 10-11), which provides, "Any person who kidnaps or carries away any individual to commit . . . rape . . . shall be punished by imprisonment in the state prison for life with the possibility of parole." The court noted, "Kidnap in section 209 means the same as kidnapping in section 207," which defines the offense as occurring when a person "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." (Opn. 11.) The court observed that because of this statutory definition, movement of the victim "by fraud alone does not constitute general kidnapping in California." (Opn. 11.)

Although the Court of Appeal identified "two lines of cases where courts have recognized a reduced quantum of force was permissible in a kidnapping case" (Opn. 11), it concluded neither applied. The first line—which involves minors—was "inapposite" because "Doe was 22 years old at the time of the offense—she was not a minor." (Opn. 12.) The court thought the second line of cases—which "involves incapacitated persons" (Opn. 12)—"arguably suggests the trial court's instruction was proper." (Opn. 13). In the Court of Appeal's view, that line of cases could be read to authorize a relaxed showing of force in certain cases involving incapacitated victims. But according to the Court of

Appeal, the kidnapping instruction here "did not relax the force requirement—the instruction completely eliminated it" (Opn. 14) because it "permitted the jury to conclude [appellant] carried away Doe by 'physical force *or* deception'" (Opn. 15).

The court also rejected the People's argument that the instructions were nevertheless correct as a whole. For example, the People argued that because the instruction required proof that appellant had "moved the person with a mental impairment a substantial distance," the instructions as whole conveyed the relaxed force standard recognized in cases in which the victim is a young child or mentally incapacitated. (Opn. 15.) The Court of Appeal disagreed, reasoning that the omission of an "introductory clause" in the pattern instruction—"Using that force or fear"—allowed the jury to convict on the basis of movement caused by deception rather than force. (Opn. 15.)

The Court of Appeal further held that the instructional error was not harmless beyond a reasonable doubt. (Opn. 16-17.) In the court's view, the other portions of the verdict did not demonstrate that the jury necessarily found appellant had used force, and the security video did not "unequivocally" establish that appellant "used force to make Doe leave the bar." (Opn. 17.) The court also rejected the possibility that the kidnapping might have begun at a later point because "the record is devoid of any evidence [appellant] forced Doe into his car or refused to let her out once she was in his car." (Opn. 18.)

Finally, the Court of Appeal barred retrial. Although the court acknowledged the instructional error was "a trial error not

implicating the Double Jeopardy Clause, which would permit the prosecutor to retry [appellant]," the court held there was also "an evidentiary void concerning the pivotal issue of force" and reasoned that appellant "could not" have been convicted had the jury been properly instructed. (Opn. 19.) Based on this perceived insufficiency of the evidence, the appellate court concluded that "retrial of the aggravated kidnapping charge is precluded." (Opn. 20.)

Justice Bedsworth dissented from the decision to reverse the kidnapping conviction and to bar retrial. In his view, the kidnapping instruction was proper: "While force or fear is generally required to satisfy the asportation requirement of kidnapping [citation], courts have tempered that requirement when, due to age or mental incapacity, the victim is unable to lawfully consent to being moved." (Conc. & Dis. Opn. 7.) He concluded that under this Court's decisions, "kidnapping an adult . . . incapable of giving consent can be based on either force *or* deception." (Conc. & Dis. Opn. 12.) He also believed that the asserted error was harmless because a properly instructed jury would have been required to find that "appellant, acting with unlawful intent, used enough force to take and carry [Doe] away a substantial distance while she was mentally incapacitated." (Conc. & Dis. Opn. 13-14.) Even though it was "certainly possible" that appellant had not used force to get Doe to leave the bar, the evidence showed that "appellant clearly and indisputably used enough force to move her a substantial distance" by driving Doe in his car. (Conc. & Dis. Opn. 14.) For the same reason,

Justice Bedsworth would have authorized retrial. (Conc. & Dis. Opn. 14-15.)

C. The People's petition for rehearing

The People petitioned for rehearing on the sufficiency of the evidence that appellant used force to kidnap Doe. Appellant had not challenged the sufficiency of the evidence of force in his opening brief (cf. AOB 24-31 [challenging sufficiency of evidence of intent and knowledge]) and had requested a new trial based upon the instructional error (AOB 20). After briefing had concluded, the Court of Appeal requested simultaneous letter briefs on the "proper remedy" for prejudicial instructional error. Appellant argued that retrial was prohibited because there was insufficient evidence of force (Appellant's LB 2), and the People argued that the proper remedy for instructional error was retrial (Respondent's LB 1-2).

In the petition for rehearing, the People argued that rehearing was required under Government Code section 68081 because the Court of Appeal had not provided an opportunity to brief the sufficiency of the evidence of force. The Court of Appeal denied the petition, with Justice Bedsworth dissenting.

ARGUMENT

Appellant was charged with kidnapping for rape, which requires asportation by force or fear. Because of the evidence of Doe's incapacity, the superior court instructed on kidnapping for rape by combining and modifying CALCRIM No. 1201 (kidnapping a child or person incapable of consent) and CALCRIM No. 1203 (kidnapping for robbery, rape, or other sex

offenses). The resulting instruction included an element that appellant "used physical force or deception to take and carry away" Doe. The Court of Appeal held that the instruction prejudicially eliminated the force requirement and that the evidence of force was so insubstantial that retrial was barred. To properly assess the correctness of the instructions, prejudice, and the sufficiency of the evidence, it is first necessary to articulate the quantum of force required to kidnap an incapacitated adult. With the proper standard in mind—that the required force is that necessary to asport—the flaws in each facet of the decision below become apparent.

I. THE ONLY FORCE REQUIRED TO KIDNAP A MENTALLY INCAPACITATED ADULT IS THE FORCE REQUIRED TO TAKE AND CARRY THAT PERSON A SUBSTANTIAL DISTANCE FOR AN ILLEGAL PURPOSE OR WITH AN ILLEGAL INTENT

"[O]rdinarily the force element [for kidnapping] requires something more than the quantum of physical force necessary to effect movement of the victim from one location to another." (*Michele D.*, *supra*, 29 Cal.4th at p. 606.) This Court has held that a different standard applies in the case of an unresisting infant or child who is incapable of giving legal consent to movement. In such cases, the "force" requirement is met by "the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with illegal intent." (*Id.* at p. 610.) Because mentally incapacitated adults are likewise incapable of giving legal consent to movement by another who acts with an illegal intent, the Court should hold that the quantum of force required to kidnap a mentally incapacitated adult is the quantum of force "necessary to effect

movement of the victim" a substantial distance for an illegal purpose or an illegal intent. (*Ibid*.)

A. An overview of kidnapping law

"The crime of kidnaping, sometimes called simple kidnaping, is the stealing, abduction, or detention of another person by force or fear." (1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against the Person, § 281 (Witkin & Epstein).)

Simple kidnapping is prohibited by section 207, subdivision (a), which provides, "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." This Court has construed section 207 to ordinarily require more than the quantum of physical force necessary to effect movement of the victim from one location to another. (*Michele D.*, *supra*, 29 Cal.4th at p. 606.) And it has repeatedly held that deception or fraud is not an alternative means to cause the movement of the victim to sustain a simple kidnapping offense.[2]

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[2] There are other types of simple kidnapping that either do not require that the victim's movement be accomplished by force or fear (e.g., § 207, subd. (b) ["Every person, who for the purpose of committing any act defined in Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping"]) or that include force as an alternative method of commission (e.g., § 207, subd. (d) ["Every person who, being out of this state, abducts or takes by force or fraud any

(continued…)

Aggravated kidnapping, as set forth in sections 209 and 209.5, is "kidnaping for robbery, for extortion or ransom, for specified sex offenses, or to facilitate a carjacking." (1 Witkin & Epstein, *supra*, Crimes Against the Person, § 292, citations omitted.) An aggravated kidnapping occurs if the defendant "kidnaps or carries away an individual to commit" an enumerated offense, including robbery and rape. (§ 209, subd. (b)(1).)[3] And this Court has held that section 209, subdivision (b) aggravated kidnapping incorporates the definition of simple kidnapping, including its force and asportation requirements. (*People v. Daniels* (1969) 71 Cal.2d 1119, 1131.)[4]

"Kidnapping is punishable by imprisonment in the state prison for three, five, or eight years" (§ 208, subd. (a)), unless the victim is a child under 14, in which case "the kidnapping is punishable by imprisonment in the state prison for 5, 8, or 11

(…continued)

person contrary to the law of the place where that act is committed, and brings, sends, or conveys that person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnapping"].)

[3] Section 209 was amended since appellant's conviction. (Stats. 2021, ch. 626, § 16.) Because the amendments are not relevant to the issues presented, the People quote the current version.

[4] The role of the term "carries away" in the phrase "kidnaps or carries away" is not clear. (See *People v. Wein* (1958) 50 Cal.2d 383, 420-422 (dis. opn. of Carter, J.) [finding the term ambiguous].) It may be the exact equivalent of "kidnaps" or it may cover conduct other than that required for kidnapping. The People do not rely on the phrase "carries away" here.

years" (§ 208, subd. (b).) Aggravated kidnapping is punishable by either life or life without the possibility of parole. (§§ 209, subds. (a) & (b), 209.5, subd. (a).)

B. This Court has relaxed the force required to kidnap an unresisting child victim incapable of giving legal consent

This Court has long recognized that the amount of force ordinarily required for simple kidnapping is not the amount of force required to kidnap an unresisting infant or child.

More than 60 years ago, the Court in *Oliver*, *supra*, considered whether a defendant leading a two-year-old, who "went willingly with defendant," a short distance by the hand constituted kidnapping within the meaning of section 207. (55 Cal.2d at p. 763.) The defendant challenged his conviction because the jury was not required to find that he moved the baby for an improper purpose or with an illegal intent. The defendant argued that the omission of such a motive requirement allowed a kidnapping conviction for movement of a minor "for a good or innocuous purpose, and in which it would be unthinkable that the adult should be held guilty of kidnaping." (*Id.* at p. 765.)[5]

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[5] Thus, for example, if a man finds "a child on the sidewalk and take[s] his hand and walk[s] along with him out of friendliness or a fondness for children or any other innocent or innocuous reason with no malign or evil purpose, nobody could reasonably believe that it was the intention of the Legislature that for any of these acts [he] could be convicted of the crime of kidnaping." (*Oliver*, *supra*, 55 Cal.2d at p. 765.) "On the other hand," *Oliver* reasoned, if an adult finds and transports a child "in exactly the same manner with an evil and unlawful intent,

(continued…)

This Court agreed. Although simple kidnapping of a "person capable of giving consent" did not require evidence that a "forcible mov[ement]" was done with any improper "purpose or motive," this Court held that section 207, "as applied to a person forcibly taking and carrying away another, who by reason of immaturity or mental condition is unable to give his legal consent thereto, should . . . be construed" to require proof that "the taking and carrying away is done for an illegal purpose or with an illegal intent." (*Id.* at p. 768.) The Court acknowledged that a "literal[] interpretation" of the text did not support the illegal purpose or illegal intent requirement, but also held that a strictly textual construction would "lead to obvious injustice and a perversion of legislative purpose." (*Id.* at 766.) The illegal purpose or illegal intent requirement, the Court reasoned, would "preserve[] and further[]" the "legislative purpose" of section 207. (*Ibid.*)

The *Oliver* Court emphasized that the victim was "too young to give his legal consent to being taken by the defendant." (55 Cal.2d at p. 764.) While the Court's analysis focused on minors, the Court observed that its analysis would apply equally in a case in "which an adult person, who by reason of extreme intoxication, delirium or unconsciousness from injury or illness is unable to give his consent, is forcibly carried by another." (*Id.* at p. 765; see

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everybody would equally agree that [the adult's] conviction of kidnaping would fall within the legislative purpose." (*Ibid.*)

also *id.* at p. 766 [forcible movement of a person "who by reason of immaturity *or mental condition* is unable to give his legal consent" is kidnapping when "done for an illegal purpose or with an illegal intent" (italics added)].) In such cases, just as ones involving a minor, the Court suggested that a jury "should determine whether such forcible carrying" was for "an evil and unlawful purpose." (*Id.* at p. 765.)

The Court in *Oliver* did not expressly define the quantum of force necessary to establish the force element of kidnapping in the case of an infant or small child. But this Court in *Michele D.* observed that the decision in *Oliver* had described the child victim as going "'willingly' with defendant," suggesting that "force was not used against" the young victim in that case. (*Michele D.*, *supra*, 29 Cal.4th at p. 609.) And the Court ultimately announced in *Michele D.* what had been implied in *Oliver*: Although "ordinarily the force element in section 207 requires something more than the quantum of physical force necessary to effect movement of the victim from one location to another," "the amount of force required to kidnap an unresisting infant or child is simply the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent." (*Id.* at pp. 606, 610.)

As did the Court in *Oliver*, the Court in *Michele D.* emphasized in its analysis the importance of the capacity of a victim to legally consent to movement. The Court observed that "the consent and force elements of kidnapping are clearly intertwined" and reasoned that where a victim is too young to

give or withhold consent, there will often be "no evidence the victim's will was overcome by force." (*Michele D.*, *supra*, 29 Cal.4th at p. 609.) Thus "infants and young children are in a different position vis-a-vis the force requirement for kidnapping than those who can apprehend the force being used against them and resist it." (*Id.* at p. 610.)

And also like the Court in *Oliver*, the Court in *Michele D.* acknowledged that its construction of the kidnapping statute was not necessarily compelled by the literal text. But the Court explained that its duty (as in *Oliver*) was to "construe the statute in a manner that avoids the absurd consequence of allowing a defendant who carries off an infant or small child under circumstances similar to those in the present case to escape liability." (*Michele D.*, *supra*, 29 Cal.4th at p. 613; see *id.* at pp. 607-608 ["in this case a literal construction of the statute might result in the absurd consequence of finding that a kidnapping did not occur where it is clear a kidnapping was intended"].) The Court concluded it was "'inconceivable that the Legislature intended the physical taking of an infant in the manner described in these facts not to be the crime of kidnapping.'" (*Id.* at p. 608.)[6]

C. This Court should reaffirm that the relaxed force standard applies when the victim is a mentally incapacitated adult victim

This Court should now explicitly acknowledge that the relaxed force standard from *Michele D.* applies not only when the

[6] The Legislature codified this holding in section 207, subdivision (e). (Stats. 2003, ch. 23, § 1.)

victim is a child but also when the victim is mentally incapacitated. That is, that the amount of force required to kidnap a mentally incapacitated person is the amount of physical force required to take and carry the victim away a substantial distance for an illegal purpose or with illegal intent.

A mentally incapacitated victim is one who is incapable of giving legal consent to movement because intoxication or a mental condition renders her unable to understand the movement, its nature, and its possible consequences. (See *People v. Giardino* (2000) 82 Cal.App.4th 454, 466; 3CT 791 ["incapacitated" defined in jury instruction].) Like infants, such adults "are in a different position vis-a-vis the force requirement for kidnapping than those who can apprehend the force being used against them and resist it." (*Michele D.*, *supra*, 29 Cal.4th at p. 610; *Oliver*, *supra*, 55 Cal.2d at p. 765 [infants are similar to adults unable to give consent "by reason of extreme intoxication, delirium or unconsciousness"].) An adult who is rendered incapacitated or even unconscious by alcohol, drugs, or a mental condition is incapable of understanding, consenting to, and resisting movement by another person, just as an infant or young child.

This Court's reasoning in *Michele D.* compels that conclusion. The Court in *Michele D.* noted that the plain text of section 207 did not include a relaxed force standard for child victims incapable of consent but held that "a literal construction of the statute might result in the absurd consequence of finding that a kidnapping did not occur where it is clear a kidnapping was

intended." (29 Cal.4th at p. 608.) Similarly here, it would be an "absurd consequence" to insulate appellant from liability simply because Doe's incapacity meant that appellant did not have to apply the same level of force required to kidnap an adult capable of apprehending and resisting movement. Indeed, each of the considerations that supported a relaxed force requirement in *Michele D.* applies equally for mentally incapacitated victims: The principles of "statutory construction set forth in *Oliver* apply with equal force in this case" (*Michele D.*, *supra*, 29 Cal.4th at p. 607); *Oliver* has "substantive significance on the very question before us" because *Oliver* recognized that minors are like "an adult person, who by reason of extreme intoxication, delirium or unconsciousness from injury or illness is unable to give his consent" (*id.* at p. 608; *Oliver*, *supra*, 55 Cal.2d at p. 765); and the illegal purpose or illegal intent requirement "provide[s] a limiting principle so that individuals with . . . innocuous purposes cannot be charged under the kidnapping statute" (*Michele D.*, *supra*, 29 Cal.4th at p. 612).

On the basis of such analysis, the Sixth District Court of Appeal has concluded that the *Michele D.* standard applies to mentally incapacitated victims. (*People v. Daniels* (2009) 176 Cal.App.4th 304, 332.)[7] The Court of Appeal below did not identify any contrary authority. (See Opn. 13-14.)

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[7] In *People v. Hartland* (2020) 54 Cal.App.5th 71, the Court of Appeal declined to require proof of illegal purpose or illegal intent for simple kidnapping under *Oliver* and *Michele D.* where the victim physically resisted but may also have been unable to

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The relaxed force standard is also consistent with decisions from other jurisdictions addressing the quantum of force required to kidnap an unconscious adult. Although different jurisdictions have different statutory frameworks for kidnapping, several "have determined that use of force required for a kidnapping conviction is significantly decreased when the victim is unconscious at the time that he is taken by his kidnapper." (*State v. Urioste* (N.M. 2011) 267 P.3d 820, 826, and cases cited therein.)[8]

(…continued)

legally consent to movement because "[t]he perpetrator does not get to decide that the victim's overt withholding of consent is of no consequence because of the victim's intoxication." (*Id.* at pp. 78-80; see also *People v. Westerfield* (2019) 6 Cal.5th 632, 716 [if the jury found the child victim had resisted but "was overcome through defendant's use of force to move her, then the alternative definition of force under *Oliver* is also irrelevant"].)

[8] The Model Penal Code and some other States define kidnapping to include movement by deception. (See, e.g., Model Pen. Code, § 212.1 ["A removal or confinement is unlawful within the meaning of this Section if it is accomplished by force, threat or deception, or, in the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare"]; *State v. Serrato* (N.M. 2020) 493 P.3d 383, 388 [movement "by force, intimidation or deception"]; *State v. Olsman* (Kan. 2020) 473 P.3d 937, 944 [taking or confining "by force, threat or deception"]; *Jones v. State* (Ind. 2020) 159 N.E.3d 55, 64 [movement "by fraud, enticement, force, or threat of force"]; see also 18 U.S.C. § 1201 ["seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person"].)

The Court of Appeal's decision does not provide a persuasive reason to reach a different result. As a threshold matter, the People agree with the Court of Appeal that it was improper for the trial court to instruct the jury it could find that appellant asported Doe by force "or deception." (3CT 791.) The People do not endorse deception as an alternative means of meeting the force or fear element of kidnapping in section 207, subdivision (a) and 209, subdivision (b). As this Court has observed, "Asportation by fraud alone does not constitute *general* kidnapping in California.'" (*People v. Majors* (2004) 33 Cal.4th 321, 327, italics added.)[9] This is because the statutory language defining kidnapping requires that a person be moved "forcibly, or by any other means of instilling fear." (§ 207, subd. (a); see *Majors*, *supra*, 33 Cal.4th at p. 327; *People v. Nieto* (2021) 62 Cal.App.5th 188, 194-197 & fn. 8.)[10]

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[9] *Major*'s use of the adjective "general" bears note because although kidnapping as defined in section 207, subdivision (a) requires force "or other means of instilling fear," not all kidnappings are rooted in asportation by force or fear. (E.g., § 207, subds. (b) ["hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like"], (c) [same], (d) [abducts or takes by force or fraud].)

[10] This view is open to some debate. (See *People v. Towns* (Ill. 2020) 174 N.E.3d 1036, 1043 [Illinois case law holds that fraud can constitute "force" for kidnapping if it "subjects the will of the person abducted, and places such person as fully under the control of the other, as if actual force were employed"]; *State v. Murphy* (N.C. 1971) 184 S.E.2d 845, 847 [statutory definition of kidnapping incorporated common law requirement of taking "by force" but "in the last century this and other courts have progressively recognized that one's will may be coerced as

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The Court of Appeal did not articulate what quantum of force suffices for kidnapping a mentally incapacitated adult, but its reasoning suggests that it disagreed that a relaxed-force standard would apply. The court noted "two lines of cases where courts have recognized a reduced quantum of force was permissible in a kidnapping case." (Opn. 13.) It dismissed the first line of cases—which included *Oliver* and *Michele D.*—on the ground that "cases involving minors are inapposite" to the instant case, in which Doe was 22 years old. (Opn. 13-14.) Although this case does not involve a minor victim, this Court did observe in *Oliver* that incapacitated adults are identically situated to children for the purposes of the kidnapping law, insofar as both classes of victims are unable to consent to movement. (55 Cal.2d at pp. 765-766.) Thus, as this Court reasoned in *Michele D.*, relaxing the force requirement with respect to both classes of victims in the same way would fall "within the legislative purpose" of the statute. (See *Michele D.*, *supra*, 29 Cal.4th at p. 609 [describing "the holding in *Oliver*" as "where the victim by reason of youth *or mental incapacity* can neither give nor withhold consent, kidnapping is established by proof that the victim was taken for an improper purpose or improper intent" (italics added)].)

(…continued)

effectually by fraud as by force"]; see also Conc. & Dis. Opn. 12 ["I believe *Oliver* and its progeny support the conclusion that kidnapping an adult . . . incapable of giving consent can be based on either force or deception"].)

The Court of Appeal concluded that a "second line of cases" "involv[ing] incapacitated persons" was likewise immaterial to the analysis in this case. (Opn. 12.) The Court of Appeal discussed *Daniels*, *supra*, 176 Cal.App.4th 304 without agreeing or disagreeing that the relaxed *Michele D.* standard of force should also be applied when the victim is an incapacitated adult. (Opn. 12-14.) Rather, the Court of Appeal distinguished *Daniels* on the ground that the instruction in this case "did not relax the force requirement—the instruction completely eliminated it." (Opn. 14; but see Arg. II, *post* [the jury instructions as a whole correctly conveyed the proper quantum of force required].)

Finally, the Court of Appeal asserted that "[a]n appellate court may not rewrite the clear language of [a] statute to broaden the statute's application." (Opn. 16, internal quotation marks omitted.) But that assertion contravenes this Court's analyses in *Oliver* and *Michele D.*, which both construed the statute to avoid an "absurd consequence" and in a way that was consistent with legislative intent and statutory purpose. Applying the *Michele D.* standard of force to incapacitated adults does not "broaden" the kidnapping statute beyond its intended scope; the standard is consistent with it. And such a construction aligns with the fundamental rationale this Court explicitly adopted for cases involving child victims and is consistent with the Court's observation that the same standard applies for mentally incapacitated adults.

In conclusion, this Court should explicitly acknowledge that the *Michele D.* relaxed force standard for child victims is also to

be applied for mentally incapacitated adult victims. The law protects from harm by others the healthy and the infirm, the infant and the elderly, the sober and the inebriated. An intoxicated and drugged woman incapable of giving consent who is led from a bar and taken to a private location to be raped would feel no less kidnapped than a woman dragged kicking and screaming down an alley to be raped. And just as a toddler carried away with a nefarious intent would be viewed as kidnapped, a helplessly intoxicated man who is carried away to be robbed would view himself as kidnapped. (*Oliver*, *supra*, 55 Cal.2d at pp. 765, 766 ["everybody would . . . agree" such conduct fell within statute].) It is "'inconceivable'" that the Legislature intended such conduct to fall outside the scope of the kidnapping law. (*Michele D.*, *supra*, 29 Cal.4th at p. 608.) Thus, this Court should hold that when the victim is a mentally incapacitated adult, the kidnapping statute requires only that quantum of force sufficient to asport the victim with an improper purpose or illegal intent.

II. THE JURY INSTRUCTIONS ADEQUATELY CONVEYED THE PROPER FORCE REQUIREMENT AND ANY ERROR WAS HARMLESS

Although the jury instructions included the term "deception," the instructions as a whole properly required the jury to find each of the elements of a kidnapping for rape offense involving a mentally incapacitated victim. Reading the instructions as a whole, it is not reasonably likely (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 433 (*Bryant*)) that the jury

understood the instructions to authorize a guilty verdict based on "deception" alone. If, as discussed in Arg. I, *ante*, the necessary quantum of force is the relaxed-force standard recognized in *Michele D.*, then the balance of the jury instruction reasonably conveyed that standard. Moreover, even if the jury instructions as a whole were erroneous, the error was harmless beyond a reasonable doubt because appellant used a sufficient quantum of force to move Doe a substantial distance with the illegal intent to commit rape.

A. The instructions adequately conveyed the force requirement

In holding that the superior court committed instructional error, the Court of Appeal focused squarely on the disjunctive phrasing of "force or deception." (Opn. 15-16.) That analysis, however, was incomplete. "It is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." (*Estelle*, *supra*, 502 U.S. at p. 72; *Bryant*, *supra*, 60 Cal.4th at p. 433 ["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" (internal quotation and edit marks omitted)].) And although the court briefly considered the significance of other parts of the instruction, it did so based in part on what it thought was missing from the instruction, as opposed to what the instruction said, and without even defining the quantum of force required to kidnap a mentally incapacitated adult. (Opn. 15-16.) When those matters are properly considered, it is not reasonably

likely the jury understood the instructions as permitting conviction based on deception alone. Stated differently, it is not reasonably likely that the jury understood the instructions as permitting conviction without a finding that appellant used the relaxed quantum of force necessary to asport Doe.

As acknowledged above, the People do not endorse phrasing the force instruction in terms of force "or deception." (*Ante*, at p. 27.) But including the phrase "or deception" does not undermine the instructions as a whole. The instructions correctly informed the jury of the *Michele D.* standard by allowing a conviction for kidnaping for rape only if the jury found that Doe had been mentally incapacitated when appellant moved her a substantial distance with an improper intent or for an illegal purpose. (3CT 791.)

As to the force requirement, the jury was instructed that to convict appellant they had to find that he "*moved* the person with a mental impairment a substantial distance." (3CT 791, italics added.) This part of the instruction adequately conveyed the lesser quantum of force needed to kidnap a mentally incapacitated adult. The transitive verb "moved," by its ordinary meaning of "to change from one place or position to another,"[11] informed the jury that to convict of kidnapping by "force or deception," the jury had to find that appellant changed Doe's location from one place to another, a feat the jury would have

[11] <https://www.dictionary.com/browse/move> (as of May 25, 2022).

understood could only be accomplished by appellant's application of the force necessary to carry Doe away a substantial distance.

The Court of Appeal believed that the instruction requiring the jury to find that appellant had "moved [Doe] a substantial distance" did not adequately explain that force was required because the instruction omitted the prefatory phrase "[u]sing that force or fear," as included in CALCRIM No. 1203. (Opn. 15-16.) But the correctness of an instruction is not measured by any deviation from a pattern instruction or from what a reviewing court might consider a "better" instruction. Rather, "[t]he only question . . . is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" (*Estelle*, *supra*, 502 U.S. at p. 72.) And as explained, the instructions as a whole informed the jury that aggravated kidnapping required proof that appellant "moved [Doe]." (3CT 791.) Moving Doe required, as a matter of basic physics, the application of force to Doe's person sufficient to change her location. The absence of the phrase "using force" does not undermine that conclusion.

The Court of Appeal apparently believed that it was reasonably likely the jury understood the instruction to permit a guilty verdict if appellant used *deception* to move Doe. But the use of deception does not enable one person to "move" another; rather, the use of deception without force would—again, as a matter of Newtonian physics—merely cause the second person to move herself. The instruction on the third element expressly conditioned guilt on a finding that appellant "moved" Doe—which

could only happen through the application of force. Thus, the instructions as a whole made clear that appellant was not guilty unless he used force to move Doe.

B. Any instructional error was harmless beyond a reasonable doubt

Even if the instructions erroneously omitted the relaxed-force element, the error was harmless. In cases of instructional error, the proper prejudice inquiry is whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." (*Neder v. United States* (1999) 527 U.S. 1, 18.) Here, the answer is yes, it is clear beyond a reasonable doubt that a jury not instructed on deception and properly instructed on the relaxed-force standard would have found appellant guilty.

Initially, appellant cannot dispute that the jury found that he had the intent to commit rape at the time he moved Doe and that Doe suffered from a mental impairment that made her incapable of giving legal consent. (3CT 791.) Those findings were not implicated by instructional error as to "force or deception." Thus, the only question is whether it is clear beyond a reasonable doubt that the jury would have found that appellant used the force required to move Doe a substantial distance while she was mentally incapacitated.

The evidence established beyond a reasonable doubt that appellant used force sufficient to move Doe a substantial distance. The jury's rape verdict reflected its finding that at the time of her rape, Doe was so intoxicated that she was incapable of giving legal consent. (3CT 788.) Given that finding and the fact that

Doe's intoxication would also constitute incapacitation for the purpose of the kidnapping statute (see 3CT 791 ["A person with a mental impairment may include unconscious or intoxicated adults incapable of giving legal consent"]), the question becomes whether Doe's incapacity began before, during, or after appellant moved her. The evidence conclusively establishes that Doe was incapable of providing legal consent at the time appellant moved her.

There was overwhelming evidence that Doe was mentally incapacitated—if not entirely unconscious—during the drive away from the bar. Doe was intoxicated and had no memory of the drive. (5RT 1235.) Appellant told the police that Doe was "pretty drunk" as they left the bar and that "she was passing out" as they got in appellant's car. (6RT 1612-1613; see also 10RT 2832 [appellant testified Doe looked drunk], 2843 [Doe was nodding head in car].) Doe's BAC when she was treated at the hospital later that day was still 0.18 (9RT 2435), indicating it had been much, much higher while in appellant's car. (9RT 2441-2442). And the drug alprazolam, which has a synergistic effect with alcohol, was also discovered in her urine. (7RT 1889, 1916.) Finally, the following morning, Doe was still unconscious when found in the bushes by a stranger, and she could not be woken. (5RT 1300.)

That Doe was mentally incapacitated at the time appellant drove her away from the bar is also shown by the evidence that appellant had executed a *plan* to intoxicate Doe with alcohol and alprazolam in order to kidnap and rape her. Appellant falsely

told Doe that "a friend of his" had found her lost phone. (5RT 1232.) As part of his ruse, appellant held his phone to his ear as if speaking to that friend, but he did not actually place or receive a call. (5RT 1234.) Having gained Doe's trust, appellant plied her with more alcohol despite her being so visibly intoxicated that the bartender refused to serve her until appellant threatened the bartender's job. (5RT 1318-1320.) Doe had also been dosed with alprazolam, which she did not take herself. (5RT 1265, 1291.)

The evidence also established that appellant had succeeded in incapacitating Doe before or during the drive to his house. Appellant's phone records showed him calling his girlfriend twice on the drive from the bar and towards his home. (9RT 2547-2552.) The first call was only 13 minutes after appellant and Doe had exited the bar. (9RT 2414, 2547.) However, appellant acknowledged that intercourse with Doe was cheating on his girlfriend and that he had not told his girlfriend about Doe because he was ashamed and thought that his girlfriend and her family would exclude him if they knew he had been unfaithful. (10RT 2806, 2809, 2820.) The only reasonable explanation for appellant's making those calls at that point was if he believed he was safe from having his infidelity discovered, and that his belief in his safety was based upon his knowledge that Doe was unconscious and not going to make a sound. (See 12RT 3355 [prosecutor's closing argument].)

The evidence also showed that appellant applied force to Doe after she became incapacitated. By driving her to the site of her

rape, he was applying force to her body. Doe also had abrasions to the top of her feet and bruising on her left arm, shin, and knee. (4RT 993-994; 8RT 2214-2215.) Those injuries were consistent with appellant physically carrying or dragging Doe's body outside of his car. The collective application of this force shows, beyond a reasonable doubt, that appellant applied force under the *Michele D.* standard.

Given the overwhelming evidence of Doe's mental incapacity, appellant's act of driving Doe not to her home or his friend's location—the only locations the evidence possibly suggested she could have agreed to as destinations before she lost consciousness—but instead to a separate location where he raped her was nonconsensual forcible movement constituting kidnapping.

Appellant's testimony that Doe was conscious during the drive (10RT 2833-2847) does not raise reasonable doubt on this point. The question is whether Doe was mentally incapacitated, not unconscious. To whatever extent appellant's testimony suggested that Doe was capable of consent at the time appellant kidnapped her, the jury's verdicts reflect its decision to credit Doe and disbelieve appellant. Given Doe's stated desire to spend the night with her date and no one else (5RT 1221-1225, 1257-1258, 1267), the rape verdict, and the findings unaffected by the assumed instructional error, beyond a reasonable doubt, Doe was not capable of consenting to going with appellant to his house, the park, or any other place. Even if there were doubt as to her ability to consent to enter his car to go to her home or to her

phone that his friend supposedly had, no evidence supports an inference that the phone was at appellant's house, in the park, or at any location where she was raped. (See 6RT 1574 [an investigator recovered Doe's phone from the bar later that day, where it had been "turned in" to the owner]; 10RT 2817-2818 [appellant testified that he had not told Doe a friend of his had her phone or that he would take Doe to get it].) To the contrary, the evidence showed that the only reason Doe went to appellant's home and the park was that she was intoxicated to the point of being incapable of providing legal consent or he had restrained her.

Appellant's exculpatory testimony about Doe's being conscious was also undercut by his lies to the police. When first contacted by authorities, appellant denied having had sex with Doe. (6RT 1616-1617.) However, as the prosecutor argued, that appellant attempted this lie shows that "he knows that the only person in the world who would contradict that statement has no idea it happened." (12RT 3351.) Moreover, immediately after being served a warrant for his DNA, appellant admitted having had sex with Doe, but he said they had stopped somewhere in Palo Alto. (6RT 1617-1618.) However, appellant's phone records showed that he had not stopped in Palo Alto, but rather driven north toward his home. (9RT 2547-2548, 2552.) Appellant's lies demonstrated his consciousness of a guilt and that he knew he had done something wrong long before stopping and raping Doe; otherwise, he would not have had to lie to the police about bringing Doe to his home.

The Court of Appeal's conclusion that the error was prejudicial was mistaken. Relying on *People v. Aledamat* (2019) 8 Cal.5th 1, the Court of Appeal asserted that it could not "conclude beyond a reasonable doubt the jury's verdict on count 2 was not tainted by the legally incorrect jury instruction" (Opn. 17) and that it was "not convinced beyond a reasonable doubt the jury did not base its verdict on the legally incorrect theory, deception" (Opn. 18). But that is the wrong standard for assessing prejudice. The question is not whether the erroneous instruction "tainted" the verdict or whether the jury in fact based its verdict on an incorrect theory. The Court of Appeal erred by treating alternative-theory error worse than single-theory error, such as in the case of an omitted element. In the event of an omitted element, the jury never bases its verdict on the omitted element, yet the error is subject to review to determine whether "a rational jury would have found the defendant guilty absent the error?" (*Neder*, *supra*, 527 U.S. at p. 18.) The Court of Appeal's treatment of the issue is akin to the defendant's argument in *Neder* "that a finding of harmless error may be made only upon a determination that the jury rested its verdict on evidence that its instructions allowed it to consider." (*Id*. at p. 17.) Harmless error analysis, however, does not ask what the jury actually did but what a jury would have done absent the error. (*Id*. at pp. 17-18.) As this Court held, alternative-theory error is subject to "the more general *Chapman* [*v. California* (1967) 386 U.S. 18] harmless error test," which looks to "the entire cause' to determine whether the error was harmless beyond a reasonable

doubt. (*Aledamat*, *supra*, 8 Cal.5th at p. 13.) Under that standard, the error here was harmless, as discussed above.

The Court of Appeal, citing *People v. Stephenson* (1974) 10 Cal.3d 652, 658-660, also stated that "where the defendant entices the victim by fraud or trickery, and not force, to get into his car, our Supreme Court has determined the statutory definition of kidnapping was not met." (Opn. 17-18.) That misses the point. This Court elaborated in *People v. Camden* (1976) 16 Cal.3d 808 that although a victim who initially consents to accompany a defendant through fraud is not kidnapped, if that victim subsequently withdraws consent when the fraud is exposed, any further forcible asportation does constitute kidnapping. (*Id.* at p. 814 ["[W]here the victim has at first willingly accompanied the accused, the latter may nevertheless be guilty of kidnapping if he subsequently restrains his victim's liberty by force and compels the victim to accompany him further"].) Moreover, because Doe fell unconscious, she lacked the capacity to legally consent to any deviation from the planned trip. (See *People v. Dancy* (2002) 102 Cal.App.4th 21, 37 [explaining that unconsciousness "necessarily deprives [the victim] of the opportunity to indicate her lack of consent"].) Irrespective of whether he initially enticed her into his car by fraud, appellant's subsequent act of taking her to a new location while she was incapable of consent satisfied the relaxed force standard. It is of no moment that the force was accomplished

using an automobile to carry her, as opposed to bodily carrying her with his arms.[12]

Here, as discussed, the evidence showed beyond a reasonable doubt even if Doe became unconscious at some point after she was in the car with appellant, his deviation from any agreed upon trip and his driving Doe to the site of her rape was nonconsensual, and the force used to transport her unconscious body to that location constitute kidnapping.

Lastly, the Court of Appeal reasoned that "the record is devoid of any evidence [appellant] forced Doe into his car or refused to let her out once she was in his car." (Opn. 18.) This again overlooks the correct standard of force and the evidence. And that evidence and the proper standard demonstrate beyond a reasonable doubt the execution of a planned rape of an unconscious woman that depended on drugging the woman into unconsciousness and surreptitiously moving her to place where she could be raped: Appellant used a ruse to engage Doe at the bar, induced her to consume more alcohol, dosed her with alprazolam, then took her home, where he knew he could rape her in privacy and without resistance due to her being

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[12] Thus, if a woman who has had too much to drink calls a ridesharing service to take her home and she passes out in the back of the car during the drive, if the defendant takes advantage of her unconsciousness to deviate from the originally agreed upon route with the intent to rape her, drives her to a secluded location, and rapes her, his act of forcibly transporting her to that location when she is incapable of consenting to that transportation due to unconsciousness would constitute kidnapping.

incapacitated. This was precisely what the prosecutor told the jury had happened. (12RT 3326.) To the extent that the Court of Appeal faulted the prosecution for failing to present *direct* evidence of Doe's incapacity in the car, there was no such requirement. As described, the prosecution presented strong circumstantial evidence that Doe was incapable of giving legal consent by the time she left the bar and that she became unconscious at some point during the drive. That the evidence of Doe's incapacity in the car was primarily circumstantial rather than direct—due to Doe's loss of memory because appellant drugged her and appellant's failure to testify honestly—is not material. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 162 ["Direct evidence is neither inherently stronger nor inherently weaker than circumstantial evidence"]; *People v. Pierce* (1979) 24 Cal.3d 199, 210 ["Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt"]; see Arg. III.A.2., *post* [describing the substantial evidence of force].)

Thus, absent the assumed error in the instructions, the jury would, beyond a reasonable doubt, have convicted appellant of kidnapping for rape, rendering the error harmless.

III. RETRIAL IS NOT BARRED BY THE DOUBLE JEOPARDY CLAUSE

The Court of Appeal did not follow the usual practice of reversing when a court determines there was prejudicial instructional error. (See *Aledamat*, *supra*, 8 Cal.5th at p. 13 ["The reviewing court must reverse the conviction" if alternative-theory instructional error not harmless].) Instead, the Court of

Appeal held that retrial is barred by the double jeopardy clause because there was insufficient evidence of force under the due process clause. (Opn. 18-20; see *People v. Shirley* (1982) 31 Cal.3d 18, 71.) However, there was substantial evidence of force (both under the force standard articulated above and under ordinary principles of forcible asportation). Further, even if there were not sufficient evidence of force, the instructional error in this case would not warrant a bar on retrial in light of the state of the law at the time of trial.

A. The record contains substantial evidence of force

The Court of Appeal should not have barred retrial on the theory that there was insufficient evidence of force. There was ample evidence of force, under both the relaxed-force standard articulated above and the normal rule on force.[13]

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[13] As explained in the rehearing petition below, the People did not get a full and fair opportunity to brief the issue of double jeopardy barring retrial. Appellant raised the issue for the first time in response to a request by the court for simultaneous supplemental briefing on "the proper remedy" if the "court concludes the trial court erred by instructing the jury on deception and that error was prejudicial." (Ct.App. Oct. 12, 2021 Order.) Evidentiary insufficiency is a distinct species of error from instructional error. (See *Burks v. United States* (1978) 437 U.S. 1, 15 ["reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct"].) Neither the wording of the court's request nor the cases cited

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The double jeopardy clause bars retrial "when a court, using the 'substantial evidence' test, determines as a matter of law that the prosecution failed to prove its case." (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1038, fn. 6.) In conducting that inquiry, the reviewing court must "review the record 'in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*Westerfield*, *supra*, 6 Cal.5th at p. 713.) "We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the

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(…continued)

therein focused on a claim of *evidentiary* insufficiency so as to trigger a response to a claim of insufficiency. The court also immediately ordered the cause submitted after receiving the simultaneous briefing, preventing the People from responding to the novel claim, and the court denied rehearing on this point. Those actions were improper. Before a court renders a decision on appeal "based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing." (Gov. Code, § 68081; accord, *People v. Alice* (2007) 41 Cal.4th 668, 677 [explaining that the right to file briefs "gives the parties the opportunity to brief any issues that are fairly included within the issues actual raised"].) Indeed, this opening brief is our first opportunity to fully and fairly address the sufficiency of the evidence to guard against a double jeopardy bar.

circumstances might also reasonably be reconciled with a contrary finding." (*Ibid.*)

Here, there was substantial evidence from which the jury could rationally have found that appellant drove an unconscious Doe to his home, as discussed in Arg. II.B., *ante*—which is enough to satisfy the relaxed force standard.

Briefly, appellant knew Doe was unconscious because he had *planned* on Doe's becoming unconscious. With the intent to rape her, he had used a ruse to gain her confidence, plied her with alcohol, and even threatened a bartender who tried to cut Doe off. (5RT 1319.) There was also substantial evidence from which the jury could have concluded that appellant drugged Doe with alprazolam, because there was evidence that it was "very easy to obtain" (7RT 1815-1816), caused blackouts and memory loss when mixed with alcohol (7RT 1861, 1903; see also 7RT 1862 [alcohol covers the taste]), and Doe did not take it herself (5RT 1265, 1291). From this evidence, a rational jury could infer that appellant had supplied Doe with the alcohol and alprazolam to render her unconscious so that he could move her and rape her without consent or resistance. The jury could also rationally have found that appellant drove Doe to his home based upon his cellphone data, which showed him driving northbound (away from Doe's home) from the bar to his home (9RT 2547, 2551-2552) and her having been found wrapped in one of his bedsheets (4RT 951).

The jury could also rationally have found that Doe had become unconscious (or at least mentally incapacitated because

she could not give legal consent) prior to reaching appellant's house. Doe had a high BAC, had alprazolam in her urine, and had no memory of the events of the evening after the bar. Further, appellant made two calls to his girlfriend during the drive home, supporting the inference that he knew that Doe was unconscious and thus would not make a sound to interrupt his conversation or reveal his infidelity to his girlfriend. (9RT 2547-2552.) Appellant applied force to the unconscious Doe by continuing to drive her, without her consent, a substantial distance to the site of her rape.

There was also substantial evidence from which the jury could rationally have concluded that appellant had moved Doe's body beyond driving it. Doe had bruises and abrasions on her arms, legs, and back. (4RT 993-994; 8RT 2214-2215.) The jury could rationally have concluded that those injuries were caused by appellant's physically removing an unconscious Doe from his car and carrying or dragging her into his home, where he raped her safe in the knowledge that he could do so without interruption or risk of discovery. Alternatively, the jury could rationally have concluded that the injuries were caused when appellant removed Doe's unconscious body from the car at the park, where he raped her. In either case, there is substantial evidence of force, and thus the double jeopardy clause does not bar retrial.

Finally, even if proof of the standard quantum of force were required, there was substantial evidence supporting the alternative theory that appellant used force by administering Doe

the drug alprazolam, which, combined with the alcohol he plied her with, rendered her unconscious.[14] As the Court of Appeal in *People v. Dreas* (1984) 153 Cal.App.3d 623 observed in the context of robbery, "the administering of drugs to overcome the victim's resistance does constitute force within the purview of section 211." (*Id.* at p. 628.)

> "'Force' is the power or energy by which resistance is overcome. . . . When, to take the personal effects of another, a blow is struck with a bludgeon, thereby paralyzing the victim's power of resistance, the taking will constitute robbery. The same effect might be produced on the victim by the physical act of administering a deadly potion. In either case resistance is involuntarily overcome. Great physical strength might be required to accomplish the result in the first instance, while a mere turning of the hand might effect the consequence in the second; force, however, is present in both. The agency through which the force operates is immaterial. The result in either case is the overcoming of resistance without the voluntary co-operation of the subject whose resistance is repressed; this is the test."

(*Ibid.*)

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[14] Although this theory was not advanced by the district attorney, the substantial evidence inquiry looks to the evidence before the fact finder, not the prosecutor's theory. (*People v. Perez* (1992) 2 Cal.4th 1117, 1126 ["It is elementary, however, that the prosecutor's argument is not evidence and the theories suggested are not the exclusive theories that may be considered by the jury"].) Likewise, this theory was not advanced in the Court of Appeal. But as explained, the Court of Appeal did not provide a fair opportunity to brief the issue of substantial evidence. And, in any event, the sufficiency of the evidence if assessed based on the facts before the fact finder, not on the arguments before an intermediate appellate court.

The same reasoning applies here: Appellant drugged Doe with alprazolam, which constituted the force necessary for kidnapping. Accordingly, there is substantial evidence of force, and thus the double jeopardy clause does not bar retrial.

B. A retrial on standard force is permissible if the Court rejects the relaxed-force standard

Given the Court's existing precedents supporting a relaxed-force standard for mentally incapacitated victims, the Court of Appeal should not have barred retrial on the standard force requirement. When a question of law has not been definitively settled and a Court of Appeal decides that question adversely to a party, the court should reverse. Reversal for a reason other than insufficiency of the evidence permits retrial. (*People v. Eroshevich* (2014) 60 Cal.4th 583, 591, 593-594.) The court should not apply the announced rule to the facts and test for insufficiency.

In *People v. Garcia* (1984) 36 Cal.3d 539, the Court reversed a special circumstance finding because the trial court omitted an instruction on an intent to kill. (*Id.* at pp. 544-545.) *Garcia* held that "the evidence presented may be insufficient to support a finding of intent to kill, but [we] think it unrealistic to assume that the prosecution, with a perfect case for proof of felony murder, necessarily presented all available evidence relating to intent." (*Id.* at pp. 557-558.) *Garcia* thus permitted retrial. (*Id.* at p. 558 & fn. 13.)

As in *Garcia*, retrial should not be barred here. Assuming the Court of Appeal correctly concluded that the trial court erroneously eliminated the need to prove force, that error was

based on a good faith interpretation of existing case law that was only invalidated on appeal. (See 15RT 4240-4247 [trial court stating the reasons it decided to give the instruction]; see also *Westerfield*, *supra*, 6 Cal.5th at p. 714 ["even assuming [the victim] had been moved by a ruse and not through force or fear, the evidence was sufficient to support defendant's conviction for kidnapping"]; *People v. Dalerio* (2006) 144 Cal.App.4th 775, 782 [affirming kidnapping conviction "[t]hough no force or fear was utilized to accomplish this abduction"]; see also *Michele D.*, *supra*, 29 Cal.4th at p. 609 ["our holding in *Oliver*—that, where the victim by reason of youth or mental incapacity can neither give nor withhold consent, kidnapping is established by proof that the victim was taken for an improper purpose or improper intent—was reasonably extended in *Parnell* and *Rios* to encompass situations in which, because of the victim's youth, there is no evidence the victim's will was overcome by force"].) In such circumstances, retrial should not have been barred. (See *People v. Hola* (2022) 77 Cal.App.5th 362 [292 Cal.Rptr.3d 476, 485] [when postconviction change in law invalidates legal theory relied upon by prosecution, neither due process nor double jeopardy bars retrial on valid legal theory]; *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 857 [given "the conflicting authority on the issue" at the time of trial, retrial permitted despite absence of evidence on element].) Given the trial court's instructions, the prosecutor may not have presented or emphasized all of the evidence of force at his disposal. Accordingly, even if the existing

trial evidence on force "may be" (*Garcia*, *supra*, 36 Cal.3d at p. 557) insufficient, retrial should be permitted.

C. The Court of Appeal misapplied the law, overlooked evidence, and improperly considered a prior mistrial

The Court of Appeal's conclusion that the evidence was insufficient under the ordinary force standard is erroneous for several reasons. First, the Court of Appeal failed to follow the well-established methodology of appellate review for claims of insufficient evidence. Second, the Court of Appeal relied on a distinguishable case. Third, the Court of Appeal improperly relied on an earlier mistrial as justifying the application of the double jeopardy clause here.

The Court of Appeal failed to follow the established appellate methodology for a claim of insufficient evidence. Specifically, in finding insufficient evidence of force, the court did "not refer to any standard of review" and "failed to view [the] evidence in the light most favorable to the judgment." (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 11-12.) To the contrary, the court simply asserted there was "an evidentiary void concerning the pivotal issue of force" as "neither [the bar's] video surveillance nor any other evidence establishes [appellant] used force to take and carry away Doe." (Opn. 19.) However, viewing the evidence in the light most favorable to the judgment, and presuming in support of the judgment "the existence of every fact the trier of fact reasonably could infer from the evidence" (*Westerfield*, *supra*, 6 Cal.5th at p. 713), there was strong evidence that appellant applied the quantum of force sufficient to

support his kidnapping conviction under the ordinary force standard.

The Court of Appeal's error is highlighted by a comparison to *Westerfield*. In that case, the seven-year-old murder victim was removed from her bedroom one night. (6 Cal.5th at p. 713.) Despite the absence of evidence of precisely when or how this was done, this Court "agree[d] with the People that the jury could have reasonably inferred that defendant abducted [the victim] by either using force to quietly subdue her or by threatening her with harm if she made any noise. Although it is possible that defendant persuaded or tricked Danielle into secretly leaving with him, even assuming such a possibility reasonably exists, it simply presents a contrary view of the evidence." (*Ibid.*) Likewise here, even if it were possible that Doe remained conscious and voluntarily accompanied appellant to the scene of her rape, that is merely one view of the evidence. The Court of Appeal erred in holding that it was the only view.

Similarly, *Westerfield* held force was "overwhelmingly" shown by the evidence that the victim had been in the defendant's motor home because that evidence, viewed in the light most favorable to the judgment, "suggests [the victim] was alive at some point when defendant drove the motor home to various locations," which "continued the kidnapping." (6 Cal.5th at p. 715.) By contrast here, the Court of Appeal discounted or ignored the extensive circumstantial evidence that Doe had become unconscious prior to her rape and that appellant had forcibly moved (or continued moving) her thereafter.

Second, the Court of Appeal erred in relying on *People v. Glenos* (1992) 7 Cal.App.4th 1201 in concluding that the double jeopardy clause bars retrial. (Opn. 19.) In *Glenos*, the defendant was convicted of making a space available for the manufacture of methamphetamine. (7 Cal.App.4th at p. 1205.) However, the trial court failed to instruct the jury on one of the elements of that offense, and the defendant argued there was insufficient evidence of that element. (*Id.* at pp. 1210-1211.) *Glenos* agreed there was insufficient evidence of the missing element and barred retrial under the double jeopardy clause. (*Id.* at p. 1212.)

Glenos is inapposite. Here, the trial court did not fail to instruct on an element of the offense; rather, the trial court's instruction erroneously—in the Court of Appeal's view—included an alternative and invalid theory (i.e., "or deception"). That instruction was based on language taken directly from existing case law. For example, in *Dalerio*, *supra*, 144 Cal.App.4th 775, the defendant told the nine-year-old victim that he had seen her friends nearby. She walked next to the defendant to a wooded area, where he attempted to murder her. (*Id.* at pp. 777-778.) On appeal, the defendant argued that "there was no proof, independent of his statement, that a kidnapping occurred because, according to the victim, she accompanied him into the wooded area of the park voluntarily." (*Id.* at p. 781.) *Dalerio* considered *Parnell*, in which a seven-year-old boy was persuaded to enter the defendant's car on a pretext. (*Id.* at p. 782.) *Dalerio* noted, "Though no force or fear was utilized to accomplish this abduction, the kidnapping conviction was affirmed." (*Id.* at p.

782.) Thus, *Dalerio* held that "where, as here, the defendant relies on deception to obtain a child's consent to walk with him and then, through verbal directions and his *constant physical presence*, takes the child a substantial distance for an illegal purpose." (*Id.* at p. 783.)

Although *Dalerio* considered the kidnapping statute in the context of a corpus delicti claim (144 Cal.App.4th at pp. 780-781), it is not the only case using language suggesting that deception can substitute for force (see, e.g., *Michele D.*, *supra*, 29 Cal.4th at p. 609 ["our holding in *Oliver*—that, where the victim by reason of youth or mental incapacity can neither give nor withhold consent, kidnapping is established by proof that the victim was taken for an improper purpose or improper intent—was reasonably extended in *Parnell* and *Rios* to encompass situations in which, because of the victim's youth, there is no evidence the victim's will was overcome by force"]; *Westerfield*, *supra*, 6 Cal.5th at p. 714 [sufficient evidence of kidnapping "even assuming [the victim] had been moved by a ruse and not through force or fear," and "even if [the victim] was persuaded into leaving her home, . . . she was still kidnapped"]). The "force or deception" language tracked the language used in such cases. (See 15RT 4240-4247 [trial court stating the reasons it decided to give the instruction].) Thus, this situation is far more similar to *Garcia*, in which the prosecutor reasonably focused on proof of an alternative theory (later disallowed). Retrial should not be barred in such circumstances.

Finally, the Court of Appeal speculated that "the prosecutor recognized the evidentiary deficiency on the force element and requested the trial court instruct the jury that deception could supplant force. The prosecution does not get a *third* chance to marshal evidence of force to retry [appellant] for kidnapping to commit rape." (Opn. 20.) However, the fact that appellant's first jury trial resulted in a mistrial is irrelevant. The Constitution sets the limit at "one" trial but that one must be "a full and fair opportunity to convict those who have violated its laws." (*Ohio v. Johnson* (1984) 467 U.S. 493, 502.) The Constitution does not prohibit another trial after a mistrial because the jury has hung. (*Yeager v. United States* (2009) 557 U.S. 110, 118.)

Double jeopardy, therefore, does not preclude retrial.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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May 25, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 12,678 words.

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May 25, 2022

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DECLARATION OF ELECTRONIC SERVICE

Case Name: ***People v. R. Lewis*** No.: **S272627**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on May 25, 2022, at San Francisco, California.

J. Espinosa
Declarant

/s/ ***J. Espinosa***
Signature

SF2022400366

STATE OF CALIFORNIA
Supreme Court of California

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