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

REPLY BRIEF ON THE MERITS

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ARGUMENT

I. THE RELAXED FORCE STANDARD CONFORMS TO THE LEGISLATURE'S INTENT AND WOULD NOT VIOLATE DUE PROCESS NOTICE REQUIREMENTS

For purposes of kidnapping, mentally incapacitated adults and children occupy the same legal position; both are unable to consent to being moved by another acting with an unlawful purpose. Both are kidnapped on the application of less force than ordinarily required to kidnap, as the Court has held as to children and stated as to adults. The Court should now elevate the statements as to adults to a holding. Contrary to appellant's arguments, doing so would conform to the Legislature's intent and would not violate the notice requirements of the due process clause.

A. Mentally incapacitated adults can be kidnapped by the use of force sufficient to carry away

Because a mentally incapacitated adult cannot give valid consent to forcible movement undertaken for an illegal purpose, less force is required to kidnap that adult than an adult who can consent.

Kidnapping ordinarily requires "something more than the quantum of physical force necessary to effect movement of the victim from one location to another." (*In re Michele D.* (2002) 29 Cal.4th 600, 606; see OBM 19-32.) However, this Court has long recognized that this amount of force is not required to kidnap an unresisting infant or child because such victims ordinarily lack the capacity to resist in a meaningful way. (*Michele D.*, *supra*, 29 Cal.4th at pp. 606, 610; see also *People v. Oliver* (1961) 55 Cal.2d 761, 763 [child victim "went willingly" with defendant].) Rather,

"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" suffices. (*Michele D.*, at pp. 606, 610.)

The Court has acknowledged that the reasoning justifying relaxed force to kidnap a child applies to mentally incapacitated adult victims. Thus, in *Michele D.*, the Court considered a Maryland case that noted that only "a minimal amount of force" was required to kidnap an infant. (29 Cal.4th at p. 610, fn. 3.) The Maryland case rejected the defendant's argument that more force was required because "'[i]f we were to follow [the defendant's] reasoning to its logical end, children, incompetents, physically handicapped and the unconscious would not be protected by the statute if they did not resist in any manner or smiled as they were taken from their beds. It would ill serve the law to exclude as kidnappers those who prey on persons who cannot resist.'" (*Ibid.*) *Michele D.* "echo[ed] that sentiment." (*Ibid.*; see also *Oliver*, *supra*, 55 Cal.2d at p. 765 [for kidnapping, infants are similar to adults unable to give consent "by reason of extreme intoxication, delirium or unconsciousness"].) And when confronted with a case involving an intoxicated adult, the Sixth District recognized the reasoning of *Michele D.* and *Oliver* applied equally to mentally incapacitated adults. (*People v. Daniels* (2009) 176 Cal.App.4th 304, 332.) This Court should reaffirm that this standard applies when the victim is an adult incapable of consenting to movement.

Appellant counters that doing so would be "an expansion of the statute . . . contrary to the statute's plain language and the

intent of the Legislature" (ABM 39) and "the plain language of the statute requires the full quantum of force for kidnapping victims other than children" (ABM 46). Appellant, however, identifies no such plain language. Simple kidnapping—which defines "kidnaps" for the purposes of the phrase "kidnaps or carries away" in section 209 (*People v. Daniels* (1969) 71 Cal.2d 1119, 1131)—requires only that a person "forcibly, or by any other means of instilling fear," moves a victim. (§ 207, subd. (a).) The statute does not describe the quantum of force required, and thus does not support appellant's plain-language argument.

Appellant contends that the Legislature has reduced the force required to kidnap infants but "chose" not to change the force required to kidnap incapacitated adults. (ABM 45, 48.) He concludes, "No matter what the policy merits of the [People]'s position might be, the decision to expand the scope of conduct criminalized by statute is one only the Legislature can make." (ABM 49.) This claim fails on two grounds.

First, the Legislature's decision to codify the standard enunciated in *Michele D.* for child victims is not determinative of the quantum of force required to kidnap mentally incapacitated adults. *Michele D.*'s holding expressly addressed child victims. (29 Cal.4th at p. 612, fn. 5 ["our decision here affects only a narrow class of cases in which an unresisting infant or small child is taken away without any force or fear"].) The codification of that holding was therefore also limited to child victims. (Stats. 2003, ch. 23, §§ 1-2; see § 207, subd. (e) ["the amount of force required to kidnap an unresisting infant or child is 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"].) The Legislature's choice does not reflect its rejection of the standard for mentally incapacitated adults. (See *People v. King* (1993) 5 Cal.4th 59, 77 ["'[L]egislative inaction is a weak reed upon which to lean'"]; see also *Michele D.*, *supra*, at p. 606 ["The fact that the Legislature may not have considered every factual permutation of kidnapping, including the carrying off of an unresisting infant, does not mean the Legislature did not intend for the statute to reach that conduct"].)

Second, this Court construes statutes to avoid absurd results, such as letting a kidnapper avoid liability plainly intended by the Legislature. (*Michele D.*, *supra*, 29 Cal.4th at p. 613.) It would be absurd to insulate appellant from kidnapping 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. (OBM 27.) "An interpretation of Penal Code section 209, subdivision (b)(1) to avoid the absurd consequence of allowing a defendant to escape liability for carrying off an incapacitated person for the purpose of rape serves the legislative purpose underlying the statute, just as the California Supreme Court's construction of Penal Code section 207 did in *Michele* [*D.*]." (*Daniels*, *supra*, 176 Cal.App.4th at p. 332.) Thus, the relaxed force standard applies.

B. There is no due process violation in applying this standard to appellant

The relaxed force standard's application to adults has roots reaching back 60 years. And in 2009—two years before appellant

took Jane Doe—the Sixth District's *Daniels* decision held the standard applied to mentally incapacitated adults. Notwithstanding that lineage, appellant claims applying the standard in his case would violate due process notice requirements under *Bouie v. City of Columbia* (1964) 378 U.S. 347. (ABM 50.) First, holding the standard applies is not a judicial enlargement of section 207, subdivision (a). Second, appellant had adequate notice of any expansion.

1. Legal principles

The state and federal due process clauses are violated when courts "impose unexpected criminal penalties by construing existing laws in a manner that the accused could not have foreseen at the time of the alleged criminal conduct." (*People v. Blakeley* (2000) 23 Cal.4th 82, 91.) Thus, "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." (*Bouie*, *supra*, 378 U.S. at p. 354.)

2. Confirming the relaxed force standard applies to incapacitated adults is interpretation, not enlargement

Due process is not violated by confirming that the relaxed force standard applies to mentally incapacitated adults because that holding would be a judicial interpretation, not enlargement, of section 207, subdivision (a). *Oliver* and *Michele D.* "did not create a new or different crime of kidnapping" but "simply applied an alternative standard in kidnapping cases involving children." (*People v. Westerfield* (2019) 6 Cal.5th 632, 715; see

also Stats. 2003, ch. 23, § 2 [codification of *Michele D.* standard for children "does not constitute a change in existing law"].) That standard was the result of the Court's applying normal principles of statutory construction, including the absurdity canon. (*Michele D.*, *supra*, 29 Cal.4th at p. 606.) Likewise, here, the statute should be construed to include the relaxed force standard for mentally incapacitated adults to avoid absurd consequences. Such construction simply interprets the statute to more clearly delineate its intended application. Because there is no judicial enlargement, there is no *Bouie* violation.

Appellant offers *People v. Martinez* (1999) 20 Cal.4th 225, overruled on another ground by *People v. Fontenot* (2019) 8 Cal.5th 57, 70, as an example of judicial enlargement. (ABM 50-51.) *Martinez* overruled a case that had held that the asportation element of kidnapping was "exclusively dependent on the distance" the victim had been moved and held that the jury should consider the totality of the circumstances. (20 Cal.4th at pp. 233 & 237, fn. 6.) *Martinez* rejected retroactive application because the Court had "not only expanded the factual basis" for determining whether a victim had been asported, but also "effectively overruled cases holding that specific distances failed to establish asportation." (*Id.* at p. 239.)

Martinez is inapposite. There, uniform case law made the "sole criterion" the distance moved, and this Court had "expressly declined" to alter that rule. (20 Cal.4th at p. 234.) Here, by contrast, no uniform authority rejected the relaxed force standard for incapacitated adults. Indeed, all authority pointed the other

way, including statements by this Court that the standard applied and one appellate holding that it did. (Cf. *Blakeley*, *supra*, 23 Cal.4th at p. 92 [this Court's holding that an unintentional killing in unreasonable self-defense was voluntary manslaughter was unforeseen judicial enlargement because three Court of Appeal decisions had held the crime was involuntary manslaughter and "no case held to the contrary"].)

Appellant suggests *Michele D.* enunciated the rule that "except with respect to children, '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.'" (ABM 51-52.) But *Michele D.* merely stated that "ordinarily" the usual force standard applies. (29 Cal.4th at p. 606.) It did not hold that the usual force standard was the exclusive standard for adults. And it (and *Oliver*) recognized the "force" required by the Legislature may vary depending on circumstances to effectuate the Legislature's intent. (*Id.* at pp. 606-613 [applying *Oliver*'s reasoning].)

3. Appellant had notice of any enlargement

Any judicial enlargement would not violate due process because appellant had notice. *Oliver* and *Michele D.* were decided many years before appellant took Jane Doe. Similarly, *Daniels* was decided before appellant's acts and became the first case to apply "*Michele* [*D.*]'s holding to an incapacitated adult." (176 Cal.App.4th pp. 331-332.) This Court's statements and the Sixth District's square holding provided ample notice.

Appellant counters that "the facts in [*Oliver* and *Daniels*, *supra*, 176 Cal.App.4th 671] were vastly different" than in this case (ABM 52) because the victims in those cases were described as "helplessly intoxicated" (*Oliver*, *supra*, 55 Cal.2d at pp. 765-766 ["If [a defendant] forcibly carr[ies] a helplessly intoxicated man lying in the middle of the highway" for "an evil and unlawful purpose" the defendant has kidnapped the man]) and "unable to move or talk" (*Daniels*, *supra*, 176 Cal.App.4th at p. 333 [victim "was lying face down, slipping in and out of consciousness, and unable to move or talk"].) Appellant asserts, "Doe was in no such state." (ABM 53.)[1]

Appellant's argument misses the point. A defendant cannot establish absence of notice that his conduct violated a statute simply by showing that no published case involved identical

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[1] Appellant makes a similar point (ABM 53) based on *People v. Hartland* (2020) 54 Cal.App.5th 71. But that case is irrelevant to his notice because it was decided after he took Doe in 2011. In *Hartland*, the victim physically resisted but may also have been unable to legally consent to movement. (*Hartland*, at pp. 73-74; see OBM 27-28, fn. 7.) *Hartland* rejected the argument that the court should have instructed that if the victim was incapacitated, the defendant had to have acted with an illegal purpose, reasoning, "The perpetrator does not get to decide that the victim's overt withholding of consent is of no consequence because of the victim's intoxication." (*Hartland*, at pp. 76, 79.) *Hartland*'s distinguishing *Oliver* because its "hypotheticals are incapacitated to a degree that goes far beyond lack of capacity to consent" (*id.* at p. 79) was dictum. *Hartland* had already distinguished *Oliver*'s hypothetical adult victims as not involving "victims who are resisting" (*ibid.*), which was determinative for not extending "the *Oliver*/*Michele D.* doctrine to the case of an intoxicated, resisting, adult victim." (*Id.* at p. 80.)

conduct. Due process requires only "fair warning that . . . contemplated conduct constitutes a crime" (*Bouie*, *supra*, 378 U.S. at p. 355), a standard that prevents "unexpected and indefensible" expansions of criminal liability from being given retroactive effect (*People v. Morante* (1999) 20 Cal.4th 403, 431). Any substantive gap between the language used in *Oliver* and *Daniels*, *supra*, 176 Cal.App.4th at page 333, on the one hand, and "mental incapacity that prevents legal consent," on the other, is not so vast that any enlargement is unexpected and indefensible.

Indeed, not only is there no unexpected and indefensible enlargement, there is no substantive gap between the two formulations. The overarching principle is that kidnapping is committed in light of the inability to give legal consent to a movement accomplished by reduced force and done for an unlawful purpose. That inability can arise because of youth (*Oliver*, *supra*, 55 Cal.2d at p. 768 ["who by reason of immaturity or mental condition is unable to give his legal consent]); near or complete unconsciousness, including as a consequence of extreme intoxication (*Oliver*, at p. 765; *Daniels*, *supra*, 176 Cal.App.4th at p. 333); or intoxication not to the point of unconsciousness but to the point of mental incapacity to consent.

The law has long punished an act when committed by force *or* when committed without force on someone who cannot legally consent to the act. Rape, for example, can be committed by force or under other circumstances in which the victim cannot legally consent for a variety of reasons. (§ 261, subd. (a) [addressing lack

of ability to consent to intercourse due to a mental disorder or developmental or physical disability, the influence of an intoxicating or anesthetic substance, or a controlled substance, or unconsciousness, including sleep].) Thus, "[a]n act of rape 'may be committed with a person who is unconscious but not intoxicated, and also with a person who is intoxicated but not unconscious[;] neither offense is included within the other.'" (*People v. White* (2017) 2 Cal.5th 349, 357; cf. *People v. Griffin* (1897) 117 Cal. 583, 585 ["If, by reason of any mental weakness, she is incapable of legally consenting, resistance is not expected any more than it is in the case of one who has been drugged to unconsciousness, or robbed of judgment by intoxicants"], overruled on another ground by *People v. Hernandez* (1964) 61 Cal.2d 529, 536.)

So too here. A person who is unconscious but not intoxicated can be kidnapped using reduced force. And a person who is intoxicated to the point of mental incapacity but not to the point of unconsciousness can be kidnapped using reduced force. The defendant in each circumstance—who must act for an illegal purpose (*Oliver*, *supra*, 55 Cal.2d at p. 768)—certainly views the unconscious victim and the intoxicated-to-mental-incapacity victim the same way. And the victim will feel no less carried away so that the defendant could rape her if she is "merely" intoxicated to the point of mental incapacity but not to unconsciousness. In such cases, the victim has been kidnapped by a kidnapper. (See *People v. Williams* (1992) 4 Cal.4th 354, 362.)

That Doe was not in "such state" (ABM 53)—even if true—did not deprive appellant of notice of the quantum of force required to kidnap a mentally incapacitated adult. If *factually* Doe was not in the state required to be proven for the relaxed force standard to apply, due process would protect appellant through its requirement that a verdict be supported by substantial evidence (*Jackson v. Virginia* (1979) 443 U.S. 307), not by labelling the *legal* standard (which she hypothetically factually did not satisfy) unexpected and indefensible.

Appellant raises sundry other concerns, none of which demonstrate an unexpected and indefensible enlargement. He argues that *Oliver*'s statement about the hypothetical adult kidnapping was dictum "without significance as fair warning." (ABM 52.) But a statement by this Court, even if properly characterized as dictum, "carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic." (*Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 297.) *Oliver*'s statement rested on the "compelling logic" of avoiding absurd results. Moreover, were there a *holding* by this Court about applying the standard to adults, there would be no need to even assess notice, the holding having settled the matter. Recognizing the correctness of dicta is common, and when it happens, the statement elevated from dicta to holding is not unexpected. Moreover, *Daniels*, *supra*, 176 Cal.App.4th 304 was not dicta.

Appellant contends two cases "have not purported to alter the force requirement where the victim was intoxicated." (ABM

54.) *People v. Alvarez* (2016) 246 Cal.App.4th 989 was decided years after appellant's crimes and is irrelevant to notice. There, the kidnapper was a police officer, and one victim had voluntarily entered his patrol car but had withdrawn her consent before he drove her to a remote location and obtained oral sex "under threat of authority and by duress." (*Id.* at pp. 992, 1004.) *Alvarez* concluded there was substantial evidence she had not consented to that movement and affirmed the kidnapping conviction. (*Id.* at p. 1004.) Appellant suggests that the relaxed force standard was not applied in *Alvarez* despite the victim having been "under the influence of heroin." (ABM 54-55; see *Alvarez*, at p. 1005.) But *Alvarez* mentioned the victim's purported heroin use only in addressing whether she was lawfully arrested, not to assess whether she was mentally incapacitated, nor did the court address the quantum of force required. *Alvarez* is inapposite.

People v. Bird (1961) 195 Cal.App.2d 606, in which the defendant kidnapped two men who had been drinking and claimed the trial court should have instructed the jury to determine whether he had acted with an illegal purpose under *Oliver* (*id.* at pp. 608, 611), is also inapposite. (See ABM 55.) *Bird* held: "The evidence does not indicate that either of the victims was so intoxicated as to be incapable of giving consent." (*Bird*, at p. 611.) Thus, the *Bird* victims were not incapacitated under the instructions here. (See 3CT 791.) If anything, *Bird* supports the People's position that the relaxed force standard applies to an adult only if the adult is incapacitated, including via

intoxication. Intoxication that does not preclude legal consent does not suffice. (Cf. *People v. Giardino* (2000) 82 Cal.App.4th 454, 466-467 [rape by intoxication victim must be more than "intoxicated to some degree"; rather, "the level of intoxication and the resulting mental impairment must have been so great that the victim could no longer exercise reasonable judgment"]; see 3CT 791 [jury instructed that a person with "a mental impairment" means a person "incapable of giving legal consent," defined as "unable to understand the act, its nature, and possible consequences"].)

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

It is not reasonably likely the jury understood the instructions as permitting an aggravated kidnapping conviction without finding that appellant had used force to take and carry Doe away a substantial distance. The kidnapping instruction required proof appellant had "moved" Doe a substantial distance, which he could only have done by applying force. (OBM 33-35.) Were there error, it would be harmless because a properly instructed jury would, beyond a reasonable doubt, have concluded from appellant's intent to rape Doe that he had drugged her and that the drug combined with the alcohol she had drunk (some through appellant's efforts) rendered her unable to consent to his driving her to the place he raped her.

A. Appellant's factual challenge is improper and fails

Appellant contends that if his challenges to the availability of the relaxed force standard fail, "no reduced-force instruction

would be appropriate on the facts here" because there was no substantial evidence "even close to the level of incapacitation that justified the instruction in *Daniels*." (ABM 56.)

The claim is not properly before this Court. The only question about the propriety of the instructions—"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" (PR 6)—does not fairly include whether the evidence supported giving an instruction based on mental incapacity to give legal consent. (Cal. Rules of Court, rule 8.516(b)(1).)

Moreover, the relaxed force standard does not require incapacity at (or "even close" to (ABM 56)) the level identified in *Daniels*, *supra*, 176 Cal.App.4th 304. Mental incapacity—not being nearly unconscious—is required; appellant thus asks the wrong evidentiary question.[2]

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[2] The Court of Appeal made a similar error, believing that preservation of the force requirement necessitated that Doe, like the victim in *Daniels*, *supra*, 176 Cal.App.4th 304, be "unable to stand on her own." (Opn. 14; see Opn. 23 [although the "evidence establishes Doe's intoxication level rendered her incapable of consenting to intercourse," she was "quite capable of navigating her own way in leaving the bar"].) The Court of Appeal misunderstood not only the law of kidnapping but also the law of unconsciousness, a mental state that "need not reach the physical dimensions commonly associated with the term" (such as "incapability of locomotion or manual action") and that "can exist . . . where the subject physically acts in fact but is not, at the time, conscious of acting." (*People v. Newton* (1970) 8 Cal.App.3d 359, 376.)

The right question is "whether a reasonable trier of fact could have found beyond a reasonable doubt that" Doe was incapacitated as required for the relaxed force theory, i.e., whether there was "evidence that would allow a reasonable jury to make a determination in accordance with the theory presented under the proper standard of proof." (*People v. Cole* (2004) 33 Cal.4th 1158, 1206.)

The jury could have so found. Indeed, the jury did find the required incapacity by intoxication in connection with the rape. (See Opn. 21-22.) Doe's mental incapacity before or during the drive away from the bar was inferable from her alcohol consumption, appellant's plan to intoxicate her for rape by giving her more alcohol and alprazolam, the intoxicating effect of that combination, and appellant's brazen calls to his girlfriend with Doe still in the car. (OBM 37-38.).

B. Appellant has not established a reasonable likelihood the jury misunderstood the relaxed force requirement

Appellant contends "nothing in the instructions required jurors to find force" (ABM 26), and the Court of Appeal opined "the instruction completely eliminated" the force requirement. They are mistaken. Although the court did not instruct ideally, it also did not instruct *erroneously* on the relaxed force standard.

Error exists if "in the context of the instructions as a whole and the trial record," there is a "reasonable likelihood that the jury understood the instruction in the way asserted by the defendant." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) Appellant has not established such a likelihood. The instructions

informed the jury that guilt required proof appellant had "moved" Doe a substantial distance; that was something he could only have done by applying force to her person, whether by driving her in his car or dragging her body. (OBM 34; see 3CT 791.)

Appellant contends that "changing someone's position does not necessarily require force of any quantum." (ABM 24-25.) He argues, "A general moves troops by issuing an order, for example." (ABM 25.) Appellant identifies nothing in the trial record creating a reasonable likelihood that the jury would have understood "move" as used in his military example.[3] Nor does appellant identify anything creating a reasonable likelihood that the jury would have interpreted "move" to include appellant's having "moved" Doe emotionally or by changing her posture (ABM 24), or any other way beyond the commonsense one of changing something's location from one place to another.[4] The instruction foreclosed those fanciful interpretations by requiring proof appellant "moved the person with a mental impairment *a substantial distance*." (3CT 791, italics added.)

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[3] The military analogy hurts appellant more than it helps given the implied threat of force behind a military order. (See, e.g., 10 U.S.C. §§ 890 [willfully disobeying order], 894 [mutiny], 899 [misbehavior in presence of enemy].) If appellant issued that type of movement order to Doe, he implicitly threatened punishment for noncompliance, a threat satisfying the "force or fear" element of kidnapping. (*People v. Majors* (2004) 33 Cal.4th 321, 331.)

[4] See <https://www.dictionary.com/browse/move> (as of Oct. 10, 2022).

Citing CALCRIM No. 1203, appellant asserts that "the model instructions require the jury to conclude the defendant used force" but "the trial court here excised the model's force requirement." (ABM 26.) But the court had no obligation to use the CALCRIM instruction. (*People v. Thomas* (2007) 150 Cal.App.4th 461, 466; cf. Cal. Rules of Court, rule 2.1050(e) [using CALCRIM "strongly encouraged" and "recommended"]; see *People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7 ["jury instructions, whether published or not, are not themselves the law"].) The court fulfilled its duty to instruct on the relevant law. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The instructions adequately conveyed the force requirement. (OBM 32-36.) Identifying a difference between a given instruction and a pattern instruction does not give rise to a reasonable likelihood the jury understood the given instruction in an erroneous way. Error depends on what was said, not on how many ways lawyers can devise to say the same thing differently or on how many dictionary definitions they posit could apply. (*Boyde v. California* (1990) 494 U.S. 370, 380-381 ["Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might"].)

Appellant asserts that the instruction "explicitly told the jury movement can be accomplished by 'tricking the mentally impaired person into accompanying [the defendant] a substantial distance for an illegal purpose.'" (ABM 26.) Not so. The third element of the instruction required the jury to determine whether appellant, with the intent to commit rape, "moved [Doe] a

substantial distance." (3CT 791.) The third element did not mention deception. Moreover, even if the jury believed that Doe had initially gotten into appellant's car due to his trickery, there is no reasonable likelihood the jury would have understood the instructions as permitting conviction without a finding that he had moved Doe by applying force to her person after she was mentally incapacitated. Thus, the presence of deception does not mean that the jury would have failed to understand that force was also required under the given instruction. (*Majors*, *supra*, 33 Cal.4th at p. 328 ["asportation may be accomplished by means that are both fraudulent and involve force or fear"]; cf. *Middleton v. McNeil* (2004) 541 U.S. 433, 438 ["Given three correct instructions and one contrary one, the state court did not unreasonably apply federal law when it found that there was no reasonable likelihood the jury was misled"].)

C. Any alternative-theory error is harmless beyond a reasonable doubt because the jury would have found reduced force absent any error

Alternative-theory error leaves the People in no worse a position for harmless error purposes than single-theory error, such as the omission of an element. (*Hedgpeth v. Pulido* (2008) 555 U.S. 57; *People v. Aledamat* (2019) 8 Cal.5th 1, 11-12.) Thus, the ordinary federal test from *Chapman v. California* (1967) 386 U.S. 18 applies. (*Aledamat*, at p. 13.) That test asks, "Is it 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; see also *id*. at 17 ["the jury verdict would have been the same absent the error"].) Under this test, "a court,

in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is 'no,' holding the error harmless does not 'reflec[t] a denigration of the constitutional rights involved.'" (*Id*. at p. 19.) The Court of Appeal erred by asking a different question—whether the jury actually convicted under the nonerroneous theory. And it erred by not recognizing on consideration of the evidence that absent the error, the jury would have convicted appellant of kidnapping.[5]

1. Harmless error analysis for alternative-theory error does not require proof that the jury actually relied on the correct theory

Rather than apply *Neder*'s straightforward rule, the Court of Appeal addressed whether it was "convinced beyond a reasonable doubt the jury did not base its verdict on the legally incorrect theory." (Opn. 18.) Appellant likewise insists harmless error analysis turns on what "this jury did." (ABM 27, bold omitted.) That approach is incorrect.

These views are very like those advanced by *Neder*, who argued for a "restrictive approach" that would have limited harmless error to "three 'rare situations,'" including "where other

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[5] A similar issue is pending before this Court in *People v. Lopez*, review granted January 15, 2020, S258912 ("To what extent or in what manner, if any, may a reviewing court consider the evidence in favor of a legally valid theory in assessing whether it is clear beyond a reasonable doubt that the jury based its verdict on the valid theory, when the record contains indications that the jury considered the invalid theory?").

facts necessarily found by the jury are the 'functional equivalent'" of the omitted element. (*Neder*, *supra*, 527 U.S. at p. 13.) But the United States Supreme Court rejected those arguments. It did not limit the inquiry to what the jury *actually* did and instead identified the inquiry as being into what the jury *would have done* absent the error (*id*. at p. 18), an inquiry that "will often require that a reviewing court conduct a thorough examination of the record" (*id*. at p. 19).

Appellant relies heavily on *Sullivan v. Louisiana* (1993) 508 U.S. 275 for the proposition that *Chapman* focuses on "'whether the guilty verdict actually rendered in this trial was surely unattributable to the error,'" (ABM 27), which he understands to mean what the jury actually did. Appellant's efforts to resurrect this understanding of *Sullivan* "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried" (*Lamb's Chapel v. Center Moriches Union Free School Dist.* (1993) 508 U.S. 384, 398 (conc. opn. of Scalia, J.)) must be rejected.

Neder similarly relied on *Sullivan* in arguing "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," not upon even "overwhelming record evidence of guilt the jury did not *actually* consider" because the jury was unaware of the relevant element. (*Neder*, *supra*, 527 U.S. at p. 17.) *Neder* rejected that argument, observing that "in the context of an omitted element, . . . the jury's instructions preclude any consideration of evidence relevant to the omitted

element, and thus there could be no harmless-error analysis." (*Id.* at pp. 17-18; see also *People v. Gonzalez* (2012) 54 Cal.4th 643, 666 ["the *Neder* court concluded a demonstration of harmless error does not require proof that a particular jury '*actually* rested its verdict on the proper ground'"].)

Holding an instructional error harmless only if the jury actually convicted on a valid theory would mean that alternative-theory error predicated on the omission of an element would *never* be harmless absent certainty the jury relied on the valid theory, a result foreclosed by *Hedgpeth*, *Neder* (527 U.S. at p. 17 [argument based on *Sullivan* was "at bottom . . . simply another form of the argument that a failure to instruct on any element of the crime is not subject to harmless-error analysis"]), and *Aledamat* (8 Cal.5th at p. 9 ["no higher standard of review applies to alternative-theory error than applies to other misdescriptions of the elements" of a crime]).

Appellant attempts to distinguish *Neder* on the ground that "the instructional error there concerned omission of an element rather than presentation of an invalid legal theory." (ABM 29.) That argument too is foreclosed. (E.g., *Hedgpeth*, *supra*, 555 U.S. at p. 61 ["drawing a distinction between alternative-theory error" and single-theory error "would be patently illogical, given that such a distinction reduces to the strange claim that, because the jury . . . received both a good charge and a bad charge on the issue, the error was somehow more pernicious than . . . where the *only* charge on the critical issue was a mistaken one" (internal quotation marks omitted)]; *Aledamat*, *supra*, 8 Cal.5th at p. 9.)

Appellant's assertion that in *Neder* "the omitted element was effectively conceded, making the harmless error analysis an easy one" (ABM 29) confuses the difficulty of satisfying a burden of persuasion with the identification of the burden. Indeed, *Neder* rejected the defendant's attempt to import a case-by-case approach to the determination of whether an error is structural or amenable to harmless error analysis. (527 U.S. at p. 14 ["Under our cases, a constitutional error is either structural or it is not"].)

Finally, appellant repeatedly and mistakenly relies on the quotation of *Sullivan* in *Greer v. United States* (2021) 141 S.Ct. 2090, going so far as asserting that "just last year the United States Supreme Court reaffirmed that 'constitutional error is harmless only if there is no reasonable doubt about whether it affected the jury's actual verdict in the actual trial.' (*Greer*, *supra,* 141 S.Ct. at 2102 [citing *Sullivan*, *supra*, 508 U.S. at p. 279].)" (ABM 28.) But page 2102 is part of Justice Sotomayor's single-justice concurring and dissenting opinion. The eight-justice majority never cited *Sullivan*, focusing instead on whether the defendants were "entitled to plain-error relief for their unpreserved . . . claims." (*Greer*, at p. 2096.) Plain-error review asks whether the error "affected 'substantial rights,' which generally means that there must be 'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" (*Ibid*.) That by definition is not *Chapman* review.

Of course, proof beyond a reasonable doubt that the jury actually did rely on the valid theory or otherwise found the

element missing from the erroneous alternative theory will establish that the error was not prejudicial. (*Aledamat*, *supra*, 8 Cal.5th at pp. 8, 13.) But the converse—that the inability to establish harmlessness under those approaches is the end of the analysis and the error is prejudicial—is, under *Neder* and *Aledamat*, not true. Rather, the inquiry extends to what the jury would have done absent the error.

2. Beyond a reasonable doubt the jury would have found reduced force absent the error

Even if the instructions did not adequately convey that the jury had to find that appellant applied force to Doe sufficient to meet the relaxed force standard, the error was harmless beyond a reasonable doubt because it is clear the jury would have convicted appellant under the proper instruction. There was overwhelming evidence that appellant met the relaxed force standard by driving Doe, while she was mentally incapacitated, to a location she did not consent to. (OBM 36-39.)

Appellant contends that the error was not harmless because the prosecution "'relied heavily on the invalid theory'" of deception. (ABM 35.) The prosecutor did briefly argue that deception could substitute entirely for force. (12RT 3356 [kidnapping can be performed "through deception" or "through any amount of force"].)[6] But notwithstanding this argument,

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[6] Appellant is incorrect to the extent he argues that any *mention* of a deception (or ruse, or lie (AOB 35)) in argument establishes error. Appellant's executing a plan to incapacitate Doe so that he could remove her from the bar and rape her in a more secure location is strong circumstantial evidence that Doe

(continued…)

there was overwhelming evidence of force under the relaxed force standard (e.g., his driving Doe). (OBM 36-44.) Thus, a properly instructed jury would, beyond a reasonable doubt, have found the force element satisfied.

Appellant asserts that the People are "attempting to shift the timeline and to establish that Doe was incapacitated . . . immediately upon leaving the bar." (ABM 62.) He contends that "cell tower data indicates that [he] drove north toward his house immediately upon leaving" the bar and that "Doe was not incapacitated in the bar or as she left it, and there is no evidence that she could have become incapacitated in the few moments between leaving and when [he] started driving north." (ABM 62.) Appellant, however, once again confuses incapacity to consent with unconsciousness by relying on Doe's purported lack of unconsciousness upon leaving the bar as proof of capacity. (But see *Newton*, *supra*, 8 Cal.App.3d at p. 376.) In so doing, appellant ignores overwhelming contrary evidence of mental incapacity due to intoxication notwithstanding Doe's ability to walk out of the bar under appellant's guidance. Doe had been drinking since earlier in the evening, had multiple additional drinks with appellant shortly before leaving the bar (see 5RT

(…continued)

had been incapacitated, kidnapped, and raped. (Cf. *People v. Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2 ["Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged"].) Thus, a jury instructed on the relaxed force standard could properly consider the evidence of deception as evidence of guilt.

1341-1342, 1344-1345), and was so intoxicated the bartender refused to serve her (5RT 1318), a refusal appellant circumvented by threat (5RT 1319-1320). An expert testified that the rapid consumption of alcohol can cause the symptoms of alcohol intoxication to manifest faster. (9RT 2446.) Doe had no memory of the evening beyond her last drink. (5RT 1235.) And Doe had alprazolam, a sedative, in her urine the following morning. (7RT 1889.) There was therefore overwhelming evidence that Doe became incapacitated at the bar, or shortly thereafter, before appellant had finished driving her.

Appellant contends that Doe must have consumed more alcohol after leaving the bar but that there was no evidence that the additional alcohol could have rendered her incapacitated "within moments of leaving the bar." (ABM 64.) But the issue is not when Doe's intoxication peaked; rather, it is simply whether beyond a reasonable doubt she was mentally incapacitated when appellant moved her with the intent to rape her. As discussed, the evidence and associated inferences amply demonstrated beyond a reasonable doubt that she was incapacitated while appellant was driving her to his home or the site of her rape. This includes the uncontested evidence that Doe had been dosed the alprazolam, which has a synergistic effect with alcohol and can cause loss of consciousness. (7RT 1903.) Indeed, the evidence proved appellant conceived and acted on a plan to incapacitate, transport, and rape Doe, a plan which the jury necessarily found in convicting appellant of kidnaping *with the intent to commit rape* (a specific intent finding not in question in

this appeal). Appellant's attempt to factually challenge the jury's finding that Doe was mentally incapacitated by identifying an absence of evidence that she had consumed *more* alcohol after leaving the bar is a red herring.

Appellant contends that because he met Doe "less than 15 minutes" before they left the bar together and "the effects of alprazolam are felt 'somewhere between a half hour and [a] hour and a half' after ingestion" (ABM 64, fn. 16; 7RT 1895) that he was not the source of the drug, a conclusion he believes is supported because the "entirety" of their interaction was recorded (ABM 64). But the video had several gaps due to periodic changes in the bar's lighting (4RT 1074, 1077), including one just before Doe consumed a drink that was on the bar (7RT 1848; People's Tr. Exh. 13). More to the point, that she was involuntarily drugged with alprazolam was confirmed by medical tests showing it was in her urine and by her testimony that she did not take the drug herself. That left the jury with two possibilities: Appellant slipped her the drug as part of his plan to rape her, or some stranger who was not drinking with Doe randomly slipped the drug in her drink and then simply left, giving rise to a fortuitous happenstance for appellant to unwittingly take advantage of. That second possibility, however, is so illogical as to be nonsensical and does not give rise to a reasonable doubt. Rather, the evidence and logical inferences necessarily proved that appellant drugged Doe at a moment not visible on the video.

The fact that Doe and appellant left the bar within minutes does not call into question the evidence of Doe's incapacity. The effects of alprazolam come "quicker and earlier" if combined with alcohol (7RT 1895-1897, 1916-1917; see also 12RT 3415 [prosecutor arguing this point]), and it has a "more than additive" effect with alcohol if taken by a person unfamiliar with its effects (7RT 1893, 1917-1918), like Doe (5RT 1265 [she had never heard of the drug and had not taken it before]).[7]

In sum, there is overwhelming evidence that appellant applied force to Doe's person by driving her to his home or the site of her rape, without her consent and after she became mentally incapacitated. Accordingly, had the jury been expressly instructed on the relaxed force standard, it would, beyond a reasonable doubt, have found that standard satisfied and convicted appellant of aggravated kidnapping. Any error in the kidnapping instruction was therefore harmless.

III. RETRIAL IS NOT BARRED BY THE DOUBLE JEOPARDY CLAUSE

If appellant's kidnapping conviction must be reversed, retrial is not barred by the double jeopardy clause. The Court of Appeal erred in holding otherwise because there was substantial evidence of force under both the traditional and the relaxed force standards and because the trial court's inclusion of the "or

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[7] Appellant also told the police that Doe spent about 45 minutes in his car, more than sufficient time for her to experience the onset of the combined effects of alprazolam and alcohol. (6RT 1618; 9RT 2487.)

deception" language was supported by case law at the time of appellant's trial. (OBM 44-56.) Appellant disagrees as to both points, but his arguments are unconvincing.

A. There is substantial evidence of force

Viewing the record in the light most favorable to the People, there was substantial evidence of force under the traditional standard (and a fortiori the relaxed force standard). As discussed above, there was ample evidence that appellant executed a plan to incapacitate Doe with alcohol and alprazolam and that Doe became incapacitated at some point during the drive towards appellant's house, where she had not previously consented to go. (OBM 47-49.)

Appellant asserts the absence of evidence that he "used force" and that "Doe was incapacitated" during the drive. (ABM 67.) He simply offers contrary inferences, but assuming they exist, they do not mean there is not substantial evidence of force. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 12.) Appellant asserts that his administering alprazolam to Doe would not satisfy the traditional force requirement because "the [People] would have to prove not just that [he] gave Doe alprazolam but also that he gave her enough to render her unconscious and that her state was not due to her own ingestion of alcohol." (ABM 59-60; see OBM 48-49.) This assertion is unsupported by any authority and defies common sense. The only authority appellant cites is *People v. Kelley* (1980) 220 Cal.App.3d 1358, which noted that "where the victim's lack of resistance or unconsciousness is not due to the defendant surreptitiously drugging the victim, but due to the

victim's own actions, the legal authorities and courts of this and other states have found the force element lacking" for robbery. (*Id.* at p. 1368.) But *Kelley* did not purport to establish a rule that any voluntary intoxication by the victim negates the existence of force if a defendant *also* surreptitiously drugged the victim (or as here, drugged the victim knowing the victim had been drinking). (Cf. *ibid.* [force found in previous cases "depended on the surreptitious use of the drugs to overcome the victim's resistance"].). Appellant's rule perversely encourages criminals to target and drug victims who have voluntarily consumed any amount of an intoxicant and is incompatible with ordinary principles of liability. (E.g., *In re M.S.* (1995) 10 Cal.4th 698, 719-720 ["substantial factor" causation].)

B. The law at the time of trial supported the trial court's decision to instruct on deception

Retrial is not barred by the double jeopardy clause even if there was insufficient evidence of force because the prosecution should not be penalized for seeking to apply law that, at the time of trial, reasonably suggested that deception could substitute for force. (OBM 50-51, citing *Westerfield*, *supra*, 6 Cal.5th at p. 714 [assuming victim "had been moved by a ruse and *not through force or fear*, the evidence was sufficient to support defendant's conviction for kidnapping" (italics added)], *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"] & *Michele D.*, *supra*, 29 Cal.4th at p. 609 [*Oliver* was "reasonably extended . . . to encompass situations in which, because of the victim's youth, there is no evidence the victim's

will was overcome by force"].) This authority establishes that, at the time of appellant's trial, it was at least unclear whether deception could substitute for force when the victim is unable to consent due to youth or mental incapacity. The prosecution's reliance on the trial court's ruling on this cloudy issue should not operate to prohibit retrial after that ruling was reversed on appeal.

Appellant counters, "The law at the time of trial was clear" that kidnapping requires force. (ABM 68.) But authorities simply holding that deception could not substitute for force for simple kidnapping did not clearly establish that principle for all victims of kidnapping to commit a sexual offense, particularly in light of repeated language in the case law about deception substituting for force. As discussed, *Dalerio* affirmed a kidnapping conviction even though "no force or fear" was used. (144 Cal.App.4th at p. 782.) *Michele D.* indicated general agreement with *Dalerio* (29 Cal.4th at p. 609) and also stated that the relaxed force standard applied to unresisting child victims when they are "taken away *without any force or fear*" (*id.* at p. 612, fn. 5, italics added). (See also *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"]; conc. & dis. opn. of Bedsworth, J., 6-12 [case law supports kidnapping of a mentally incapacitated victim "based on either force *or* deception"].) Indeed, as noted by the trial court, CALCRIM No. 1201 at the time addressed kidnappings of "a child/[or] a person with a mental impairment who was not

capable of giving legal consent to the movement" and included as one element that "[t]he defendant used (physical force/deception) to take and carry away an unresisting (child/[or] person with a mental impairment)." (12RT 4247-4248; see *Hartland*, *supra*, 54 Cal.App.5th at p. 78 [discussing former CALCRIM No. 1201].) Although not binding law, this instruction was consistent with the prosecutor's argument and the trial court's decision. Because their position was reasonable—albeit mistaken—retrial should not be barred.

Appellant asserts that "the [People] cannot claim the prosecutor relied on the erroneous instruction in deciding what evidence to introduce, because the court did not decide to give it until after both parties had rested." (ABM 70.) The suggestion that the prosecutor only relied upon deception after the close of evidence is false. (See 15RT 4248 [trial court referring to "our discussions off the record" about instructions]; 3CT 842 [defense motion for new trial noting that the instructional issue "was argued pretrial"]; PFR 13 & Appen. [in appellant's previous trial that resulted in a hung jury, jury instructed with same "force or deception" language].)

Appellant, relying on *In re D.N.* (2018) 19 Cal.App.5th 898, argues that the prosecution's failure to present evidence of force was attributable to its "own tactical decision" and that retrial for another opportunity to present such evidence is therefore barred. (ABM 71-72.) *D.N.* held that the prosecution had known that it had to prove the value of a stolen car despite the existence of "conflicting published opinions" on the issue and that the

prosecution's failure to present evidence of the car's value was a "gamble" that barred retrial under the double jeopardy clause. (19 Cal.App.5th at p. 903.) As appellant acknowledges, *D.N.* has been criticized for faulting the People and trial court for making a decision based upon conflicting authority. (ABM 73, fn. 19; *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 858.) The same criticisms apply here, where the instruction was based upon language from several published decisions. If the prosecutor elected to focus on the theory of deception and therefore did not present all available evidence of force, retrial is proper under *People v. Garcia* (1984) 36 Cal.3d 539. (OBM 50-52.) In all events, as discussed, the prosecution ultimately *did* present evidence of force, including overwhelming evidence that appellant had applied the relaxed *Michele D.* quantum of force to Doe. He also argued that appellant had applied sufficient force to Doe. (See, e.g., 12RT 3356 [asserting that kidnapping can be accomplished via deception or "through any amount of force"], 3357 [arguing appellant applied force inside bar].) Thus, appellant's reliance on *D.N.* is unavailing. Retrial is not barred by the double jeopardy clause.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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October 10, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached **Reply Brief on the Merits** uses a 13 point Century Schoolbook font and contains 8,339 words.

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October 10, 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 October 10, 2022, at San Francisco, California.

J. Espinosa
Declarant

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

SF2022400366

STATE OF CALIFORNIA
Supreme Court of California

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