

Not Reported in Cal.Rptr.3d, 2009 WL 2049984 (Cal.App. 3 Dist.)

Not Officially Published

(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

Briefs and Other Related Documents

Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Third District, California.

The PEOPLE, Plaintiff and Respondent,

v.

Andre Zelinski LUCAS, Defendant and Appellant.

No. C057593.

(Super.Ct.No. P06CRF0323).

July 15, 2009.

Office of the State Attorney General, Sacramento, CA, for Plaintiff and Respondent.

Mark Farbman, Attorney at Law, San Rafael, CA, for Defendant and Appellant.

BUTZ, J.

*1 A jury convicted defendant Andre Zelinski Lucas of attempted forcible rape (Pen.Code, § 664/261, subd. (a)(2) [count I]),FN1 digital penetration by force (§

289, subd. (a)(1) [count II]) and kidnapping for rape (§ 209, subd. (b)(1) [count III]) with a special enhancement finding of aggravated kidnapping (§ 667.61, subd. (d)(1) & 2)). After the court found true allegations that defendant had sustained one prior strike (§ 667, subds.(b)-(i)) and one prior prison term (§ 667.5), it sentenced him to a term of 50 years to life (count II), a consecutive sentence of life with the possibility of parole (count III), plus 14 years consecutively in state prison (count I).

FN1. Undesignated statutory references are to the Penal Code.

Defendant appeals, claiming that the trial court erred in the exclusion of proffered expert testimony, admission of certain evidence, and instructions to the jury. He also assigns numerous alleged errors in sentencing.

We shall reverse the consecutive kidnapping conviction (count III) and kidnapping enhancement due to instructional error. In all other respects, we shall affirm the judgment.

FACTUAL BACKGROUND

The events of June 9 to 10, 2006

On the evening of June 9, 2006 (all further unspecified calendar dates denote that year), “Jane Doe” and her boyfriend, Ronnie Miser, went to the Hillside Bar in downtown Placerville, where they drank for several hours. Doe drank “quite a bit” of tequila and beer and, by the time she and Miser left the bar around 1:00 a.m., she was “drunk” and “stumbling.” The couple walked across the street to an art gallery. Doe was staggering and holding onto Miser for support. Doe collapsed to the ground and sat down, leaning against a window.

Just then, defendant appeared. Miser recognized him, since they had been in jail together. Miser asked defendant if he could watch Doe for a couple of minutes while Miser went across the street to try to find them a ride home. Defendant agreed.

When Miser returned, both defendant and Doe were gone. Miser frantically searched the vicinity, including a couple of bars nearby. He had just started to climb the steps of a parking garage adjacent to a pedestrian freeway overpass, when he

heard Doe screaming his name. The screams were coming from the other side of the freeway. Miser ran up the steps and across the pedestrian bridge. He spotted Doe lying on her back in a grassy area at the other end of the bridge. She was “dirty and ragged.” Her skirt was hiked up past her belly and her panties were pulled down about three inches, exposing her genital area. Placerville Police Officer Benjamin Scholtz described Doe as “very upset, emotional, crying and screaming.”

Doe's pretrial statements and testimony

Placerville Police Officer Brody Jordan was the first officer to respond to the scene. When he asked Doe what had happened, she replied that a Black man had pulled her dress open and grabbed her breasts. She was unsure if the man had sexual intercourse with her.

*2 Doe was transported by ambulance to Marshall Hospital, where she underwent a sexual assault examination by nurse Sheri McCall. Doe admitted to McCall that she “had a lot to drink.” When asked what had happened, Doe told her she had no memory of the incident. She “just remembered that she said somebody had tried to touch her and the next thing she remembered she was calling out for her boyfriend to help her and she was on the ground.” Doe said she did not know if she had been penetrated. She had no recollection of any physical force or threats, nor did she complain of any pain or discomfort.

The nurse's visual exam for sexual assault failed to disclose any redness, swelling or bruising. Swabs taken from Doe to determine the presence of sperm were negative. Swab samples taken from defendant and Doe failed to detect the transmission of DNA from one to the other.FN2

FN2. Swabs taken from defendant's penis did reveal the presence of female DNA, but Doe was excluded as the source.

At trial, Doe testified that her memory of the incident stopped at the point where she sat on a bench outside the Hillside and picked up again when she was flat on her back on the other side of the pedestrian bridge. At that point, she remembered struggling with defendant and trying to push him off her. Defendant got on top of her and she yelled “no.” She screamed for her boyfriend because defendant was “in

between my legs” and “raping me.” Defendant finally fled when someone approached the scene.

The video and confession

Shortly after attending to the victim, Sergeant Dave Baker FN3 viewed a surveillance video taken by cameras mounted on each floor of the parking garage. The video was admitted into evidence, but Baker was also permitted to give his impressions of what it depicted. Baker testified that it showed two figures who appeared to be defendant and Doe entering the northeast corner of the garage. Defendant appears to be assisting Doe to keep her from falling; Doe pulls away from defendant and sits down against the wall of the garage; he crouches down in front of her, pulls her to her feet and they begin walking up to the next level; as they round the corner, “it appeared to [Baker that Doe] was attempting to push away from [defendant] and [he] pulled her back in close.”

FN3. At the time Baker investigated the events of June 10, 2006, he was a detective with the Placerville Police Department. When he testified at trial, he was a sergeant.

Sergeant Baker interrogated defendant between 8:00 and 9:00 a.m. that morning of June 10. Defendant initially denied having any contact with Doe other than helping to lift her to her feet. When Baker told defendant of the existence of a surveillance video, defendant admitted that he escorted Doe through the parking garage and to the other side of the overpass so she would not be arrested for being drunk in public, but again denied misconduct.

Sergeant Baker then decided to use a “ruse,” telling defendant there was additional video taken from the other side of the pedestrian overcrossing. Baker suggested that it was going to be “very embarrassing” for defendant, because the video showed quite the opposite of what he had just told him. Baker told defendant that all the evidence, including DNA evidence, was “going against you,” and that defendant needed to “get something going for yourself.” The officer suggested that perhaps Doe was drunk and the encounter was consensual.

*3 Defendant then changed his story, telling Baker that Doe, reeking of alcohol, had “tried to come onto” him. He said that Doe “grabbed [his]” and that he felt her up, but that was the extent of it. Baker scoffed at defendant, telling him that the video

“shows there was some penetration in the vagina.” Defendant then admitted putting two fingers in Doe's vagina, but denied having intercourse. After Baker again suggested the video contradicted defendant and told him he was “making it a bigger deal than it needs to be,” defendant admitted that he and Doe engaged in a single act of consensual intercourse, which he described as a “quickie.”

Defense

Taking the stand in his own defense, defendant testified that on the night in question, he had been awake and on methamphetamine for more than two days. He encountered Miser and Doe, who was crouched in a fetal position. Miser asked him to watch Doe while Miser went to buy drugs, and he agreed. When defendant told Doe he had some “crystal methamphetamine,” she became very interested in going with him to smoke it. At her request, defendant helped Doe walk. She was grabbing and pulling him, as he helped her along. Defendant helped her walk to the top of the parking structure. At one point, he showed her his bag of crystal methamphetamine. They arrived at a spot at the end of the bridge, where they intended to do the drugs. As he lowered her to the ground, Doe grabbed his penis and he grabbed her breast. Defendant told her they should not do this, because they were only there to get high, and they let go of each other. Doe fell and started screaming. Defendant ran away because he was in possession of drugs and on parole. He could hear voices in the vicinity yelling, “kill that nigger. Get a rope,” and “[h]e raped my girl.”

When he arrived at the police station for the interview with Sergeant Baker, defendant was tired, dehydrated, and very high on drugs. His admissions of digital penetration and sexual intercourse were lies. He made these false statements because Baker tricked him into believing that if he admitted to consensual sex, he would be released.

Verdict

The following chart summarizes the jury's verdict or court finding on each of the charges:

Count

Charge

Verdict or Finding

I

Forcible rape (§ 261(a)(2))

Guilty of attempted forcible rape (§ 664/261(a)(2))

II

Sexual penetration (§ 289(a)(1))

Guilty

III

Kidnapping for rape (§ 209(b)(1))

Guilty

Enhancement

Aggravated kidnapping (§ 667.61(d))

True

Enhancement

Prior strike (§ 667)

True

Enhancement

Prior prison term (§ 667.5)

Not true

Enhancement

Prior prison term (§ 667.5)

True

DISCUSSION

I. Exclusion of Expert Testimony

Prior to trial, the defense sought to introduce the expert testimony of Richard Leo, Ph.D., on the subject of false confessions and police interrogations. An Evidence Code section 402 hearing was held to determine the admissibility of his proffered expert testimony.

*4 Dr. Leo, an associate professor of law at the University of San Francisco, has taught sociology and law, criminology and psychology. He spent the last several years studying the phenomenon of false confessions and wrongful convictions. He has published books and articles, given speeches across the country, made presentations to law enforcement groups, and has testified more than 100 times in 22 states as an expert witness on police interrogation.

According to Dr. Leo, studies of false confessions date back to 1908, but the published literature on the subject has blossomed in the last 22 years. The most famous case involved a woman who was beaten and raped while jogging in New York City's Central Park. Five juveniles were apprehended and confessed to the crime under police interrogation. Subsequently, the real perpetrator came forward and DNA evidence exonerated all five juveniles.

Dr. Leo described the Reid technique of police interrogation, on which he has written a book. The first step is to convince the suspect that there is overwhelming evidence against him, that resistance is futile and that his denials will not be believed. In this context, Dr. Leo noted that it is perfectly legal for the police to lie to a suspect and pretend there is evidence that does not exist. The second step is to offer inducements or reasons why it would be in the suspect's best interest to make an admission or confession. Suspects soon begin to feel hopeless, trapped, overwhelmed and railroaded, believing there is no way out. Thus, the technique may be successful in inducing a suspect to confess to a crime he did not commit.

The doctor testified that law enforcement agencies are familiar with the Reid technique and train their officers to use it. There is a common misconception among the general public that a person would never confess to a crime that he did not commit unless he were subject to physical abuse or coercion. Yet the phenomenon of generating false confessions by use of the Reid technique is quite real and has been well documented.

Dr. Leo reviewed materials pertaining to defendant's case, including the DVD of his confession and police reports. He opined that Sergeant Baker used elements of the Reid technique in inducing defendant's confession: accusations of guilt, followed by denials, followed by confrontation with false evidence and inducements to admit guilt by suggesting that the victim's intoxication and consent minimized his culpability. Confrontation with false evidence, accusations, and promises of minimized culpability are primary risk factors in inducing false confessions. Significantly, in this case there was no physical evidence connecting defendant to the accusations and DNA evidence failed to corroborate the rape charge.

Based on this testimony, defense counsel moved to admit Dr. Leo's expert opinion that police techniques such as those used here are prone to lead to false confessions. Counsel cited the absence of physical evidence that sexual contact occurred, that DNA evidence would show no transfer of cells between defendant and the victim and the fact that Doe's pretrial statements contained no definitive allegation that defendant "actually did anything" to her.

*5 The trial court refused to allow Dr. Leo to testify, concluding that nothing that the doctor had to say would assist the jury and that there was "not a shred of evidence before us at this point to render a basis for any opinion by Dr. Leo that the confession was false...."

A trial court has broad discretion in determining whether to admit expert testimony and its ruling will be reversed on appeal only where the record reveals an abuse of discretion. (People v. Ramos (2004) 121 Cal.App.4th 1194, 1205 (Ramos); People v. Robbie (2001) 92 Cal.App.4th 1075, 1083-1084.)

Defendant's admissions during the interview with Sergeant Baker formed a centerpiece of the prosecution's case. Defendant's incremental admissions of sexual contact were, argued the prosecutor, "little snapshots of truth." The prosecutor was compelled to rely heavily on these statements, since other aspects of the case against defendant were fairly weak: The victim's trial testimony was inconsistent with her statements to others on the night of the incident; there was no physical evidence that force was used; and laboratory results failed to show any transfer of DNA between defendant and Doe.

As Dr. Leo pointed out, the notion that an individual would falsely confess to a crime without the application of force or traditional forms of duress is contrary to general public perception. Yet scientific studies have shown that use of the Reid technique, which was employed by Sergeant Baker in this instance, may well produce unreliable confessions.

"The requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates." (People v. Olguin (1994) 31 Cal.App.4th 1355, 1371.) We agree with defendant that, in general, the phenomenon of false confessions and

the factors tending to produce such confessions is a subject that is beyond the experience of the average person. Yet, as the United States Supreme Court has observed, "a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility." (Crane v. Kentucky (1986) 476 U.S. 683, 689, [90 L.Ed.2d 636, 644].) Similar to the subjects of battered women's syndrome (People v. Humphrey (1996) 13 Cal.4th 1073, 1087-1089) and eyewitness identification (People v. McDonald (1984) 37 Cal.3d 351, 367-369, overruled in part on different grounds in People v. Mendoza (2000) 23 Cal.4th 896, 914-915), in which expert testimony is recognized as helpful to disabuse the jury of certain assumptions about human behavior, expert testimony regarding false confessions can serve to refute the commonly held notion that people do not confess to crimes they did not commit. (See People v. Page (1991) 2 Cal.App.4th 161, 181-183.)

*6 Of course, it would have been up to the jurors to decide how much weight to give Dr. Leo's testimony. Nevertheless, the court's refusal to allow Dr. Leo to testify altogether deprived them of valuable expert opinion on a subject with which most laypersons are unfamiliar. This was an abuse of discretion. (See United States v. Hall (7th Cir.1996) 93 F.3d 1337, 1345.)

The trial court's stated reason for exclusion, i.e., that there was "not a shred of evidence" that the confession was false, was unsound. As counsel indicated in his offer of proof, that evidence included the negative DNA results, the victim's pretrial statements that she had no recollection of the incident, and the lack of physical evidence to support the charges. Counsel's offer of proof laid a sufficient foundation for the admission of the testimony.

We disagree with the Attorney General's argument that the trial court's ruling should be upheld under Ramos. There, the appellate court upheld the exclusion of Dr. Leo's testimony because there was insufficient evidence before the trial court at the time it made its ruling that the officer who interviewed the defendant used the techniques that were likely to produce false confessions. Since the defense failed to demonstrate the need for expert testimony on false confessions, the court did not abuse its discretion in excluding it. (Ramos, supra, 121 Cal.App.4th at p. 1207.) Here there was no question that Sergeant Baker used techniques which Dr. Leo identified as likely to induce false confessions-accusations, confrontation with fabricated evidence, and encouraging the accused to make inculpatory statements.

Prejudice

Without supporting authority, defendant contends the error in excluding Dr. Leo's testimony must be measured under the "harmless beyond a reasonable doubt" standard for federal constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711] (*Chapman*). We disagree. The "[a]pplication of the ordinary rules of evidence ... does not impermissibly infringe on a defendant's right to present a defense." (*People v. Cunningham* (2001) 25 Cal.4th 926, 998.) Thus, the proper test is whether it is reasonably probable the jury would have returned a more favorable verdict had the expert testimony been admitted. (*People v. Cegers* (1992) 7 Cal.App.4th 988, 1001, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) We conclude the answer to this question is no.

The main thrust of Dr. Leo's testimony was that the interrogation tactics used by Sergeant Baker might have induced defendant to falsely confess to crimes that he did not commit. However, unlike the typical false confession situation, defendant's defense was not that the prosecution had the wrong man. At trial, defendant testified that both he and Doe had, in fact, fondled each other in a sexual manner, but that they stopped short of sexual intercourse by mutual agreement. Thus, as defendant acknowledged on the stand, his description of the events during the police interview was largely consistent with his trial testimony, except for the admissions of digital and penile penetration.

*7 The record shows that even without Dr. Leo's testimony, the jury displayed a healthy skepticism about accepting defendant's interview statements at face value. Notwithstanding his admission of full sexual intercourse during the interview, the jury convicted defendant of only the lesser crime of attempted rape and digital penetration, reflecting a factual determination that defendant took preparatory steps toward raping Doe in her blacked-out state, but was interrupted before he could complete the act. This verdict is supported by independent evidence: The victim was in a drunken stupor and incapable of intelligent consent to any type of sexual activity; minutes after defendant's departure, she was discovered screaming, with her dress hiked up and underpants pulled down, exposing her genitalia; yet tissue swabs showed no transmission of DNA between defendant and Doe. Thus, the record reveals that even without Dr. Leo, the jury considered defendant's admissions to Sergeant Baker as a tapestry woven out of both fact and fiction, and was able to view the value of his admissions through the dispassionate prism of the physical and circumstantial evidence in the case.

Because the jury's verdict was well grounded in convincing, objective evidence and did not demonstrate a blind acceptance of the prosecution's interpretation of defendant's "confession," we cannot say a more favorable verdict was more likely had Dr. Leo been permitted to testify.

II. Voluntariness of Defendant's Confession

Defendant claims the trial court erred in admitting his confession into evidence because it was involuntary. However, trial counsel made no attempt to exclude the confession. Failure to object to evidence specifically and in a timely manner waives the issue of admissibility on appeal. (Evid.Code, § 353; People v. Garceau (1993) 6 Cal.4th 140, 179.) Defendant's argument that the issue was "preemptively raised" in the trial court is unaccompanied by citation to authority and thus deserving of no further response. (People v. Stanley (1995) 10 Cal.4th 764, 793 .)

Nor are we persuaded by defendant's corollary claim that counsel was constitutionally ineffective in failing to attempt to exclude the interview. Even " "debatable trial tactics" " do not amount to a deprivation of the effective assistance of counsel. (People v. Weaver (2001) 26 Cal.4th 876, 928.) Not only were defendant's statements mostly consistent with his defense at trial, admission of the interview arguably placed Sergeant Baker in an unflattering light, since he admittedly told several lies during the course of the interrogation in order to induce defendant into making damaging admissions. Counsel may well have deemed it to his client's advantage to allow the jury to hear the interview in its entirety. We refuse to second-guess such a tactical choice.

In any event, there was no sound basis for concluding that the confession was involuntary. Sergeant Baker did not promise leniency, nor did he threaten defendant. He merely pointed out, quite accurately, that if defendant and Doe had engaged in consensual sex, no crime was committed. Hence, we cannot fault counsel for failing to make a meritless motion. (See People v. Foster (1993) 14 Cal.App.4th 939, 954-955.)

III. Instructional Errors on Kidnapping

*8 There was conflicting evidence as to whether Doe's movement on the night in question was voluntary or procured by force or fear. Sergeant Baker testified that he believed, based on the surveillance video, that Doe was trying to get away from defendant as they walked through the garage. Baker testified that the video showed "some minor grappling" and that she appeared to push him away, while he grabbed her arm. The video was introduced into evidence and viewed by the jury. During the police interview, defendant said that when Doe told him she was drunk or on dope, he advised her to get off the street so she would not be arrested by the police. At trial, he told a different story-that Doe willingly walked with him across the bridge in search of a place where they could take drugs together.

In closing argument, the prosecutor argued that the video was persuasive evidence that Doe was struggling to get away from defendant but was transported to another location against her will, thereby satisfying the “force or fear” element of the kidnapping charge and enhancement.

The judge instructed the jury that, to find defendant guilty of both the kidnapping charge and enhancement, the jury had to find that he “took, held, or detained” the victim “by the use of force or by instilling reasonable fear,” and that she was moved a substantial distance. The jury also had to find that her movement substantially increased the risk of harm to Doe, that Doe did not consent to the movement, and that defendant did not reasonably believe in such consent.

During deliberations, the jury sent the judge the following note: “Is either, ... (1) offering a safe location from the police because she is drunk considered coercion [sic] if under false pretense [or] [¶] (2) offering an opportunity to do drugs under false pretenses considered coercion [sic] [?] [¶] Is coercion [sic] considered force?” The trial court responded by rereading CALCRIM No. 1203 (kidnapping for rape) in its entirety.

Later that day, the jury sent another written inquiry: “Is using false pretenses constitute [sic] reasonable fear or force?” In response, the trial judge gave the following instruction: “False pretenses do not equal force. It is a question of fact for the jury to determine if false pretenses would instill reasonable fear in the alleged victim. False pretenses which do not instill a reasonable fear in the alleged victim would not meet the required element. An act is accomplished by fear if the other person is actually and reasonably afraid or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it .” (Italics added.)

Defendant contends that the court's instructions misled the jury as to the “fear” element of kidnapping. On this record, we must agree.

“Kidnapping” is defined in section 207, subdivision (a) as follows: “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.” (Italics added.) The kidnapping enhancement, section 209, contains parallel language.

*9 The jury's questions indicate that it was unpersuaded by the prosecutor's argument that defendant used force to accomplish the rape by pulling or dragging the unwilling Doe to another location.FN4 Instead, it appears the jurors had tentatively concluded that Doe willingly accompanied defendant by virtue of (1) his statement that she would end up in jail if found by the police in a drunken state (as he stated during Sergeant Baker's interview), or (2) his offer to smoke methamphetamine together at a safe location (as he testified at trial). Both of the inquiries indicate that the jury believed defendant had used false pretenses to induce Doe's voluntary movement. Understandably, the jury was struggling with the concept of whether such fraudulent representations could satisfy the "force or fear" element required for kidnapping.

FN4. The jury's conclusion was not surprising. Despite Sergeant Baker's opinion testimony and the prosecutor's argument, the choppy surveillance video, which we have viewed, is inconclusive. It shows the couple entering the parking garage and Doe sitting down against a wall, while defendant crouches down in front of her. He then pulls her to her feet and holds both her hands as they walk to the other side. It is susceptible to either an interpretation that Doe is struggling to get away from him or using him for support.

Voluntary movement by the victim accomplished solely through fraudulent representations, unaccompanied by an express or implied threat of force or harm to the victim, does not satisfy the "force or fear" element of kidnapping. As the California Supreme Court has stated, "In contrast to the use of force or fear to compel asportation, 'asportation by fraud alone does not constitute general kidnapping in California.' (*People v. Davis* (1995) 10 Cal.4th 463, 517, fn. 13; *People v. Green* (1980) 27 Cal.3d 1, 64, 63 ['defendant tricked [victim] into believing she was simply being taken on a quick trip to her sister's house and back'], ... and *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) This long-standing rule is premised on the language of section 207, which for general kidnapping, at issue here, requires asportation by force or fear, but for other forms of kidnapping proscribes movement procured only by 'fraud,' 'entice[ment],' or 'false promises.' (§ 207, subds.(a)-(d).)" (*People v. Majors* (2004) 33 Cal.4th 321, 327 (*Majors*); see also *People v. Stephenson* (1974) 10 Cal.3d 652, 657-660 [kidnapping convictions reversed where victims were deceived into thinking they were getting into a taxi].)

In *Majors* the defendant, posing as a security guard, accused the victim of shoplifting and ordered her into his van. He then transported her to a remote area, where he

attempted to rape her. The victim testified she was afraid she would be arrested if she did not go with him. (Majors, supra, 33 Cal.4th at pp. 324-325.) Although the defendant clearly used false pretenses, the court upheld the conviction because the defendant also induced fear of forcible asportation by the implied threat of arrest. Said the court: “[I]n those cases in which the movement was found to be by fraud alone, and not force or fear, the circumstances suggest the victim exercised free will in accompanying the perpetrator. By contrast, the threat of arrest carries with it the threat that one’s compliance, if not otherwise forthcoming, will be physically forced. Thus, the use of force is implicit when arrest is threatened.” (Id. at p. 331.) The court also rejected the Attorney General’s argument that the crime of kidnapping would be accomplished if the victim’s movement was compelled by fear of any type. Rather, after analyzing the legislative history of the statute (§ 207), the court concluded that the movement may be considered forcible only “ ‘where it is accomplished through the giving of orders which the victim feels compelled to obey because he or she fears harm or injury from the accused.’ ” (Id. at p. 327, italics added.)

*10 Returning to this case, the appropriate response to the jury’s question was that false pretense alone is insufficient to satisfy the force or fear element of kidnapping, unless it is also accompanied by the threat of force or injury from defendant. By telling the jury merely that it was a question of fact for them to decide if false pretenses satisfied the fear element the court permitted, if not invited, the jury to conclude erroneously the “force or fear” element was satisfied if defendant used deception alone to effectuate voluntary movement by the victim. Moreover, by instructing the jury that kidnapping could be accomplished through exploitation of an unreasonable fear, but failing to add that the fear had to be fear of harm or injury from defendant, the jury was given a clear path to convict defendant of kidnapping merely because Doe feared harm from a third party, e.g., arrest by the police, a result inconsistent with Majors.

An instructional error that misdescribes or omits an element of a criminal offense violates the right to a jury trial guaranteed by the federal Constitution and must be measured against the harmless error test of Chapman, supra, 386 U.S. at page 24 [17 L.Ed.2d at p. 710]), wherein we must reverse unless we find beyond a reasonable doubt that the error did not contribute to the verdict (People v. Flood (1998) 18 Cal.4th 470, 502-503; People v. Hall (1998) 67 Cal.App.4th 128, 136-137).

The error cannot be judged harmless under this standard. The jury’s questions strongly suggested it had discounted the prosecutor’s theory of forcible asportation and had tentatively concluded that defendant had managed to convince Doe to come with him by either (1) offering her the opportunity to take drugs at a safe location,

or (2) advising her that she would be taken to jail by the police if she remained where she was in a drunken state. Under neither scenario would defendant have been guilty of kidnapping under applicable law.

By failing to give the jury a proper Majors instruction and telling them, effectively, that it was up to them to decide whether defendant's false representations could satisfy the fear element of kidnapping, the court encouraged the jury to conclude that asportation could be accomplished by fear if defendant had merely tricked Doe into accompanying him through false pretenses. Hence, there is a reasonable possibility that the erroneous instructions contributed to the guilty verdict on the kidnapping count (count III) and the true finding on the special enhancement of aggravated kidnapping.

Because both the kidnapping conviction and aggravated kidnapping enhancement must be reversed, we need not reach defendant's claim of sentencing error associated with them.

IV. Substantial Evidence Re: Kidnapping Conviction and Enhancement

Defendant challenges the sufficiency of the evidence to support his conviction of kidnapping, as well as the special finding of aggravated kidnapping. He contends the record is bereft of evidence that force or fear was used to accomplish the victim's movement.

*11 “To determine sufficiency of the evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole.” (*People v. Carpenter* (1997) 15 Cal.4th 312, 387, quoting *People v. Johnson* (1993) 6 Cal.4th 1, 38; see *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560, 572-574].) If the evidence reasonably justifies the finding of the trier of fact, that this same evidence could also be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

There was credible evidence from which the jury could have concluded that defendant accomplished the victim's movement by force. First, the surveillance

video of the couple's passage through the parking garage, while not conclusive, is at least susceptible to the interpretation placed on it by Sergeant Baker, i.e., that Doe was struggling to pull away from defendant.

Moreover, by all witnesses' accounts, Doe was in a drunken stupor at the time of her encounter with defendant. Defendant himself admitted in his interview with Sergeant Baker that she was "so drunk she [could] hardly walk," and that he "damn near" had to carry her across the bridge to where their sexual encounter took place. The jury could have concluded that Doe's inebriated state rendered her effectively incapable of voluntary consent and that defendant exploited the opportunity presented by her vulnerable condition to physically transport her across the pedestrian bridge for the purpose of accomplishing nonconsensual intercourse.

The evidence fully supports a jury finding that defendant "took, held, or detained" Doe "by the use of force," and thus was guilty of kidnapping with intent to rape (CALCRIM No. 1203).FN5

FN5. Defendant also seeks reversal of the aggravated kidnapping enhancement on the ground there was no evidence of a "prior qualifying conviction," one of the circumstances that triggers the enhancement. (See § 667.61, subd. (d)(1).) The argument fails because the enhancement was also triggered by the guilty verdict of forcible sexual penetration (§§ 289, subd. (a)(1), 667.61, subd. (c)(5)), coupled with the jury's finding that the kidnapping substantially increased the risk of harm to the victim (§ 667.61, subd. (d)(2)).

V. Evidence of Defendant's Criminal History

During direct examination, defendant testified that he lied to Sergeant Baker because he was led to believe that if he admitted that he and Doe had engaged in consensual sex, the officer would set him free.

Prior to conducting cross-examination, the prosecutor asked permission to briefly delve into defendant's extensive criminal history, in order to show moral turpitude and to impeach the claim that "he was so criminally unsophisticated that if he told this detective whatever he wanted to hear, he would get to go home that day." The prosecutor also noted that defendant had opened up the subject area by referring to his drug use and the fact that he was on parole. The trial court permitted this line of

questioning over defense counsel's objection on grounds of relevance and undue prejudice under Evidence Code section 352.

*12 During cross-examination, this exchange took place:

"Q: [Defendant], this incident on June 10th, 2006, it wasn't your first run-in with the law, was it?

"A: Correct.

"Q: In fact, is it fair to say that you had quite a few run-ins with the law?

"A: Correct.

"Q: Been on probation multiple times?

"A: Correct.

"Q: Been sent to prison several times?

"A: Correct.

"Q: Sent to county jail multiple times?

"A: Correct.

"Q: Crimes ranging from hit-and-run with injury?

"A: Correct.

"Q: That goes all the way back to 1986?

"A: Correct.

"Q: Crimes including transportation of drugs?

"A: Correct.

"Q: Goes back to 1994?

"A: Correct.

"Q: Crime involving an attempted sexual assault in 1995?

"A: Correct.

"Q: Theft?

"A: Correct.

"Q: 1999[?]

"A: Right.

"Q: Lot of different run-ins?

"A. Correct.

"Q: So fair to say you weren't new to police officers on the day in question, June 10th?

"A: Correct. I never been interrogated in my life.

"Q: That was the first time?

"A: First time."

Defendant contends the trial court abused its discretion in allowing this line of cross-examination. He contends the other crimes evidence was bad character evidence inadmissible under Evidence Code section 1101, and that its prejudicial effect exceeded its probative value.

The claim of inadmissible character evidence has been forfeited due to the failure to make a timely objection on that ground in the trial court. (Evid.Code, § 353, subd. (a); People v. Kipp (2001) 26 Cal.4th 1100, 1124.)

We do not agree that the trial court abused its discretion under Evidence Code section 352. "We will not overturn or disturb a trial court's exercise of its discretion under section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd." (People v. Jennings (2000) 81 Cal.App.4th 1301, 1314.) As defendant concedes, his conviction for attempted sexual assault had earlier been ruled admissible under Evidence Code section 1108. His conviction for transportation of drugs, a crime of moral turpitude, also constituted proper impeachment evidence. (People v. Vera (1999) 69 Cal.App.4th 1100, 1103.)

Even before the prosecutor's cross-examination, the jury had learned from defendant himself that he had extensive contact with law enforcement. Defendant

said he knew Miser from having met him in jail. He testified that he had been a drug user for 21 years and was into his third day of a methamphetamine binge when he met Doe. He admitted he was on parole at the time and would have been sent back to prison if he had been caught. Finally, he volunteered that when he heard others accusing him of rape he had been “in a situation like that before,” and that he had almost gotten killed by the police on three different occasions.

Since the jury was well aware of defendant's criminal background, the prejudicial impact of the prosecutor's cursory description of his past offenses was minimal. On the other hand, the value of the impeachment evidence was strong, since defendant's credibility was an important consideration in determining his guilt or innocence of the charged crimes. The court did not abuse its discretion in allowing the prosecutor to bring out defendant's extensive history of police contact for purposes of impeaching his claim of naïveté with respect to his interview with Sergeant Baker.

*13 Finally, because defendant himself made constant references to his numerous run-ins with the law on direct examination, the court's admission of the subject evidence, even if error, was harmless. (*People v. Whitson* (1998) 17 Cal.4th 229, 251; *People v. Watson*, supra, 46 Cal.2d at p. 836.)

VI. Truth of the Strike Prior

Defendant contends there was insufficient evidence that his out-of-state conviction for violating Nevada's lewd conduct statute qualified as a serious felony (strike) under California's three strikes law.

To prove the strike, the People introduced a certified copy of a 1995 judgment in the District Court of Carson City, Nevada, showing defendant's conviction of “Attempted Lewdness With a Child Under the Age of Fourteen (14) Years, a felony” in violation of Nevada Revised Statutes sections 193.330 FN6 and 201.230. The court found this to be sufficient proof.

FN6. Nevada Revised Statutes section 193.330 is the portion of the Nevada criminal law that deals with attempts.

“Penal Code section 667, subdivision (a)(1) provides for a sentence enhancement for each prior conviction for ‘any offense committed in another jurisdiction which includes all of the elements of any serious felony’ under California law. Under the Three Strikes law, a prior conviction from another jurisdiction constitutes a strike if it is ‘for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.’ (Pen.Code, §§ 667, subd. (d)(2), 1170.12, subd. (b)(2).) Thus, the prior foreign conviction ‘must involve conduct that would qualify as a serious [or violent] felony in California.’ (People v. Avery (2002) 27 Cal.4th 49, 53.) ‘To make this determination, the court may consider the entire record of the prior conviction as well as the elements of the crime.’ (Ibid.) If the record insufficiently reveals the facts of the prior offense, the court must presume the prior conviction was for the least offense punishable under the foreign law.” (People v. Jenkins (2006) 140 Cal.App.4th 805, 810.)

Defendant asserts the record of conviction alone was insufficient because, in California a crime of lewd and lascivious conduct with a child (§ 288) requires a touching of the child (People v. Martinez (1995) 11 Cal.4th 434, 444), whereas in Nevada, one can be guilty of lewdness with a child without physically touching the victim. Defendant relies on Townsend v. State (Nev.1987) 103 Nev. 113 [734 P.2d 705], wherein Nevada's Supreme Court held that the defendant could be convicted of violating Nevada Revised Statutes section 201.230 merely by the defendant's act of masturbating in front of a child and encouraging the child to do the same. (Id. at pp. 120-121 [734 P.2d at p. 710].)

A comparison of the lewd conduct statutes of the two states shows that the core elements of each offense are the same: At the time of defendant's 1995 conviction, Nevada Revised Statutes section 201.230, subdivision (1) provided that: “Any person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child [is guilty of a felony].” (Houtz v. State (Nev.1995) 111 Nev. 457, 458, fn. 2 [893 P.2d 355, 356].) California Penal Code section 288, subdivision (a) provides that “Any person who willfully and lewdly commits any lewd or lascivious act, ..., upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony.”

*14 Defendant's argument fails because, unlike the defendant in Townsend, he was convicted only of attempted lewd conduct.FN7 Regardless of whether the completed

crime requires physical contact with the child, there is no doubt that one can attempt lewd conduct with a child without actually touching the child. (See, e.g., *People v. Memro* (1985) 38 Cal.3d 658, 699, overruled in part on different grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) Defendant makes no argument, nor cites any authority, indicating that a conviction of attempted lewd conduct in Nevada would not include all of the same elements as attempted lewd conduct in California. Thus, the trial court properly found that defendant's conviction of Nevada Revised Statutes section 201.230 qualified as a strike in California.

FN7. Since the offense of lewd or lascivious act on a child under 14 is a serious felony, any attempt to commit that crime is also a serious felony. (§ 1192.7, subd. (c)(6), (39); *People v. De Porceri* (2003) 106 Cal.App.4th 60, 67.)

DISPOSITION

Defendant's conviction in count III of kidnapping for rape and the true finding of a special enhancement of aggravated kidnapping for rape are vacated. The matter is remanded to the trial court to permit the People to decide whether to retry him on these counts. If the People fail to bring defendant to a new trial within 60 days of the remittitur or within any extended time limit resulting from defendant's time waiver (§ 1382), or if the People file a written election not to retry him, the trial court shall modify the verdict by striking the kidnapping conviction and aggravated kidnapping enhancement, and shall resentence defendant accordingly. If the vacated counts are retried, the trial court shall resentence defendant at the conclusion of that trial. In all other respects, the judgment is affirmed.

I concur: HULL, J.

NICHOLSON, Acting P.J.

I concur with the opinion except as to part I of the Discussion as to which I concur in the result.

Cal.App. 3 Dist.,2009.

People v. Lucas

Not Reported in Cal.Rptr.3d, 2009 WL 2049984 (Cal.App. 3 Dist.)

Not Officially Published

(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

Briefs and Other Related Documents ([Back to top](#))

- [C057593 \(Docket\)](#) (Nov. 16, 2007)

END OF DOCUMENT