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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **MICHAEL JIOVANNI DALERIO,** **Defendant and Appellant.**	**A110408** **(Mendocino County Super. Ct. No. SCUKCRCR 05-63271)**

The crime of kidnapping requires the unlawful movement of the victim by force or fear. California courts have wrestled with the degree of force necessary to establish the kidnapping of an unresisting infant or young child, and our Supreme Court has concluded that the requisite force "is simply the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent." (*In re Michele D.* (2002) 29 Cal.4th 600, 610.) The Legislature then codified this holding in Penal Code section 207, subdivision (e) (hereafter section 207(e)). Defendant, Michael Jiovanni Dalerio, deceived a nine-year-old child into voluntarily accompanying him and then physically escorted the child a substantial distance before attempting to kill her. In the published portion of our opinion, we conclude that this conduct constitutes a kidnapping under section 207(e).

* Pursuant to California Rules of Court, rules 976(b) and 976.1, parts II. and III. of this opinion are not certified for publication.

FACTUAL BACKGROUND

The nine-year-old victim testified that on the morning of July 9, 2004, she saw defendant outside the home of her neighbors, minors Desiree and Dillon. When she asked defendant, whom she knew, if Desiree and Dillon were home, he told her they were in the park looking at a deer. When the victim walked to the park she saw defendant at the park gate, riding his bicycle. He rode his bicycle alongside her and the two talked as they continued into the park around the softball field and up onto a fire road. Defendant told her that Desiree and Dillon were with their mother looking at a deer he had sheltered. Once on the fire road, they passed a bridge and defendant told her to turn into the woods. When they reached the wooded area, he set his bicycle against a rock and led the way up a trail to a place he claimed her neighbors were located.

After walking a short distance, they stopped. For five to ten minutes while the victim followed him, defendant appeared to be looking for the her neighbors. Defendant then placed one hand on the back of the victim's neck and the other over her mouth and said, "Don't scream or I'll break your neck." The victim lay down on the ground and defendant started choking her. Before she lost consciousness, the victim urinated on herself. When she regained consciousness, she was holding a wet sock in her hand and was unable to locate one of her shoes. She put the sock back on her foot and walked down the trail toward her house.

Craig L. testified he saw the victim walking with her head down, leaves in her hair, a dirty shirt and one shoe missing. When Craig L. asked if she had fallen off her bicycle, she mumbled that her bike had broken the previous week. She then moved her hair back from her face and he noticed a gash over her eye. He asked her whether she was alone and whether she had been there all night. To these questions she answered in a monotone, "I don't know. I just woke up."[1]

Craig L. took the victim to the Brooktrails Fire Department. The fire chief noted she was extremely confused and had blood on her face and a considerable amount of

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[1] The victim testified that she did not tell Craig L. what happened because she did not feel safe.

bruising. He contacted the sheriff's department and two deputies responded and met with the victim. Although she continued to appear disoriented, she was able to tell them her name, date of birth and address.

The victim was eventually transported to Howard Hospital where she was examined. As a result of the attack, she suffered abrasions of her face, burst capillaries in her eye, swelling of her lip and around her eye, and abrasions with small burst blood vessels along the back of her neck consistent with strangulation.

On October 7, 2004, the victim and several law enforcement officials took 15 to 20 minutes to walk the path taken by the victim during the crime.

Defendant's Interview with Police

On the day of the incident, the victim reviewed a photographic lineup and identified defendant as her assailant. When Detectives Alvarado and Bailey interviewed defendant after his arrest, he told them he slapped and punched the victim a couple of times because she "was real mean" to his son and disrespected him by telling him to "fuck off and shit." When the victim started screaming, he took her "up into the woods . . . and then slamm[ed] her down," took one shoe and sock off her and put the sock in her mouth to quiet her. Although defendant claimed he did not remember what happened next, he ultimately said he "apparently . . . choked" the victim. Before leaving the area, he threw branches and leaves on top of her. He believed he may have killed the victim.

The jury convicted defendant of attempted murder with deliberation and premeditation (Pen. Code, §§ 664, 187, 189)[2] (count one) and kidnapping (§§ 207, subd. (a), 208, subd. (b)) (count two) and found true a special allegation that defendant inflicted great bodily injury during the commission of the kidnapping (§ 12022.7, subd. (a)).[3] On the attempted murder conviction, the court sentenced defendant to a prison term of life with the possibility of parole and imposed a consecutive term of 14 years for the

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[2] All undesignated section references are to the Penal Code.

[3] The jury also found that the victim was under the age of 14.

kidnapping.[4] On appeal, defendant argues (1) the court erred in denying his motion under section 1118.1 for judgment of acquittal on the kidnapping charge; (2) imposing separate punishments for the kidnapping and attempted murder convictions violates section 654; and (3) there was insufficient evidence to support a finding that the attempted murder was committed with premeditation and deliberation. We reject each contention and affirm.

DISCUSSION

I. *The Trial Court Properly Denied Defendant's Section 1118.1 Motion*

At the close of the prosecution's case, defendant moved under section 1118.1 for an entry of judgment of acquittal on the kidnapping and attempted murder charges. The court denied defendant's motion as to both offenses; defendant appeals the court's ruling as to the kidnapping charge only.

Section 1118.1 provides in relevant part: "In a case tried before a jury, the court on motion of the defendant . . . , at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."[5] In ruling on a motion for acquittal under this provision, the trial court must consider whether from the evidence presented, including all reasonable inferences to be drawn therefrom, there is any substantial evidence to support a finding of each element of the offense charged. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 89.)

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[4] The court also imposed a two-year concurrent term for defendant's violation of probation.

[5] Section 1118.1 reads in full as follows: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right."

We employ the same test on appeal: We review the whole record in the light most favorable to the judgment below to determine whether there is evidence which is reasonable, credible and of solid value, such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. This inquiry does not require the reviewing court to ask itself whether *it* believes the evidence established guilt beyond a reasonable doubt but whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260-261 [application of sufficiency of evidence test in reviewing trial court's ruling on a section 1118.1 motion].)

In our review, we apply the corpus delicti rule.

" ' " 'The corpus delicti of a crime consists of two elements[:] the fact of the injury or loss or harm, and the existence of a criminal agency as its cause.' " ' [Citation.] 'In any criminal prosecution, the corpus delicti must be established by the prosecution independently from the extrajudicial statements, confessions or admissions of the defendant.' [Citations.] Such independent proof may consist of circumstantial evidence [citations], and need not establish the crime beyond a reasonable doubt [citations].

"The purpose of the corpus delicti rule is to assure that 'the accused is not admitting to a crime that never occurred.' [Citation.] The amount of independent proof of a crime required for this purpose is quite small; we have described this quantum of evidence as 'slight' [citation] or 'minimal' [citation]. The People need make only a prima facie showing ' "permitting the reasonable inference that a crime was committed." ' [Citations.] The inference need not be 'the only, or even the most compelling, one . . . [but need only be] a *reasonable* one . . . .' [Citation.]" (*People v. Jones* (1998) 17 Cal.4th 279, 301-302.)

Defendant argues there was no proof, independent of his statement, that a kidnapping occurred because, according to the victim, she accompanied him into the wooded area of the park voluntarily. Therefore, he contends, the trial court should have

granted his section 1118.1 motion. We conclude the victim's testimony was sufficient to justify denial of the motion.

"Generally, to prove the crime of kidnapping, the prosecution must prove three elements: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance. (§ 207, subd. (a).)"[6] (*People v. Jones* (2003) 108 Cal.App.4th 455, 462, fn. omitted.)

In *In re Michele D.*, the defendant, who was 15 years old, accompanied a woman and her 12-month-old daughter, Cameron, to a market. The defendant and the mother alternated pushing the baby in her stroller. At some point the defendant and the mother headed to different areas of the store, with defendant pushing Cameron in the stroller. When the defendant did not return, the police were called and found the defendant and Cameron approximately a mile and a half away. The defendant was accused of kidnapping. (*In re Michele D.*, *supra*, 29 Cal.4th at pp. 603-604.) The Supreme Court recognized that the defendant's conduct did not satisfy the literal requirements of the kidnapping statute in that "force," as that term is conventionally understood, was not used to effect the illegal movement. Nevertheless, the court held, "[I]t is settled that the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend. . . . [Citation.] 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." (*Id.* at p. 606.) Recognizing that no prior California case had established the "quantum of force necessary to establish the force element of kidnapping in the case of an infant or small child," the court set that standard as follows: "[T]he amount of force required to kidnap an unresisting infant or child is simply the

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6 Section 207, subdivision (a) defines kidnapping in relevant part 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."

amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent." (*Id.* at p. 610.) This rule is now codified in section 207(e).

Defendant presents two arguments for distinguishing the facts of our case from the acts criminalized in section 207(e). First, he argues section 207(e) pertains only to "*infants and small children*," and not to the nine-year-old victim in this case. Second, he contends that *In re Michele D.* "retained an element of force," "a physical taking," which is absent here.

Parnell v. Superior Court (1981) 119 Cal.App.3d 392 (*Parnell*), cited with approval in *In re Michele D., supra*, 29 Cal.4th at page 609, is instructive on each contention. In *Parnell*, the defendant and an accomplice persuaded a seven-year-old boy to enter defendant's car on the pretext they would give him a ride home. Once inside the car, the boy sat between the two men. After the child stated that they had passed his home, the men told him they would call his parents and ask if he might spend the night. After arriving at a rented cabin 20 miles away, and staying there for several nights, defendant told the boy he had appeared in court and obtained custody of him. (*Id*. at p. 398.) Though no force or fear was utilized to accomplish this abduction, the kidnapping conviction was affirmed. The court stated the kidnapping of a minor could be accomplished "even if unaccompanied by force so long as it was done for an improper purpose, because a minor 'is too young to give his legal consent to being taken.' " (*Id.* at pp. 402-403, fn. 3, quoting *People v. Oliver* (1961) 55 Cal.2d 761, 764- 765.) "[The victim] was not informed of [the defendant's] intent to permanently take him from his home and, even if he knew, it is questionable whether he could have appreciated the significance of a permanent severance from his home and family. [His] near passive conduct should not be construed as consent; rather, it more logically evidences the inability of a minor to give a knowing consent." (*Parnell*, at p. 403, fn. 3.)

The same reasoning applies here. A nine-year old certainly qualifies as a "young child,"[7] and, due to defendant's deception, the victim was no more able to appreciate her peril than the *Parnell* victim. Moreover, once the victim encountered defendant at the park entrance, he directed her to a wooded area, physically escorting her to this remote location, where he tried to murder her. This is not a situation where an adult engages in a deception to persuade a child to meet him later in a secluded spot and commits a crime when the victim appears. Section 207, subdivision (b) proscribes the movement of a child under the age of 14 procured by deception alone, but only when that deception is for the purpose of committing any act defined in section 288.[8] Section 207(e) requires a talking and that component is satisfied where, as here, the defendant relies on deception to obtain a child's consent to walk with him and then, through verbal directions and his *constant physical presence*, takes the child a substantial distance for an illegal purpose.

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[7] Section 207(e) is expressly limited to situations where the victim of the alleged kidnapping is an "unresisting infant or child." The language comes directly from *In re Michele D.*, but one can plausibly argue that *In re Michele D.* only intended the rule to apply to infants and young children, because it articulated the rule in response to the need for a standard setting the level of force necessary to establish a kidnapping of an "infant or small child." (*In re Michele D., supra,* 29 Cal.4th at p. 610.) We need not resolve this argument or decide if section 207(e) applies to all minors; even if the statute should be more limited, a child whose age is expressed in a single digit is a young child for purposes of this provision.

[8] Section 207, subdivision (b) provides: "Every person, who for the purpose of committing any act defined in Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping."

In addition, section 207, subdivision (c) provides: "Every person who forcibly, or by any other means of instilling fear, takes or holds, detains, or arrests any person, with a design to take the person out of this state, without having established a claim, according to the laws of the United States, or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell that person into slavery or involuntary servitude, or otherwise to employ that person for his or her own use, or to the use of another, without the free will and consent of that persuaded person, is guilty of kidnapping."

People v. Oliver, supra, 55 Cal.2d 761, relied on in both *Parnell* and *In re Michele D.* supports this conclusion. In *Oliver,* the defendant was charged with kidnapping a two year-old infant and thereafter committing a lewd and lascivious act with the child. The only evidence of "force" was testimony that the defendant was observed walking down an alley, leading the victim by the hand. (*Oliver,* at pp. 763-764.) In fact, the Supreme Court stated that the victim went "willingly" with the defendant. (*Id.* at p. 764.) The court held that where a defendant is charged with kidnapping a child "too young to give . . . legal consent to being taken," it is both necessary and sufficient to show that the child was taken "for an illegal purpose or with an illegal intent." (*Id.* at pp. 764, 768.)

Defendant argues, unpersuasively, that *Oliver* and *Parnell* should be distinguished because each involved a physical taking: In *Oliver,* the accused held the child's hand and, in *Parnell,* a vehicle was utilized to transport the child. But, since the children in *Oliver, Parnell* and here did not resist, the use of the car in *Parnell* and the handholding in *Oliver* are simply immaterial.

Thus, under section 207(e), evidence that a defendant deceives a young child into walking with him a substantial distance away from public view, leaving her particularly vulnerable to his attack, is sufficient to satisfy the corpus rule in a kidnapping case. The evidence submitted by the prosecution in its case-in-chief justified denial of defendant's motion for judgment of acquittal without consideration of his statement.

II. *The Trial Court Properly Imposed Consecutive Sentences for the Kidnapping and Attempted Murder Convictions*[*]

Defendant argues the trial court erred in imposing a sentence for kidnapping because he could not be punished separately for both kidnapping and the offense that was the objective of the kidnapping, i.e., murder. We disagree.

Section 654 provides that an act punishable in different ways by different provisions of the Penal Code may be punished under either provision, but in no case may

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[*] See footnote, *ante,* page 1.

it be punished under more than one.[9] The statute proscribes multiple punishment when several crimes are part of an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) However, if the defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) Divisibility depends on the defendant's intent and objective (*Latimer*, at p. 1208), which are factual questions for the trial court (*People v. Coleman* (1989) 48 Cal.3d 112, 162). There must be substantial evidence to support a finding that the defendant formed a separate intent and objective for each offense for which he was sentenced. (*Ibid.*) The trial court's express or implicit factual determination for purposes of section 654 will not be overturned on appeal if it is supported by substantial evidence. (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

To support its decision to impose consecutive sentences on the attempted murder and kidnapping charges, the trial court relied on defendant's statement to police:

"Now, it seems to me at sentencing I can certainly look at [defendant's] own statement to the police to make a determination whether or not to impose consecutive or concurrent sentences. If I look to his statement, two things come to mind. One, there are two separate and distinct acts of violence. The one act, according to his statement, is when she apparently disrespected him, he slapped her, she starts to scream, he grabs her and pulls her into . . . an isolated area to shut her up. Then once they're in an isolated area, she continues to scream, so he not only takes steps to stop that, but at some point he obviously, forms an intent to kill, because he strangles her, which is a separate and distinct act of violence, until he believes she's dead. So, if I accept his statement or . . . his version of the events, it seems to me I have two separate and distinct acts of violence.

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9 Section 654, subdivision (a) provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

"I also think I have two separate objectives; that is to say, his first objective was to keep her quiet, according to his statement. Keep her quiet, because when he slapped her, she yelled. He grabbed her, took her into the woods to shut her up. Then, apparently, she didn't shut up. He stuffed a sock in her mouth and then proceeded to strangle her and form a separate and distinct intent to kill.

"So, I think, under that analysis, if I accept his version of the events, I have separate acts of violence. I have separate objectives. One objective is to keep her quiet. The other objective is not only to keep her quiet, but to kill her."

There is substantial evidence to support the trial court's finding that the kidnapping and attempted murder were separate offenses within the meaning of section 654. Defendant told the police that when the victim began screaming he took her into the woods, "slammed" her down and put a sock in her mouth to keep her quiet. If defendant's sole objective was to quiet the victim, it had been accomplished. Thus, the court could properly conclude that prior to strangling the victim, defendant had formed an additional intent, to kill her. Under these circumstances, punishment for both offenses does not violate section 654.

III. *There Was Sufficient Evidence to Support the Jury's Finding of Premeditated and Deliberate Attempted Murder*[*]

Defendant next contends there is insufficient evidence to support the jury's finding of premeditation and deliberation.[10] He rests his argument on *People v. Anderson* (1968) 70 Cal.2d 15, where the court identified three factors commonly present in cases of premeditated murder: "(1) facts about how and what [the] defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim

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[*] See footnote, *ante*, page 1.

[10] "We do not distinguish between attempted murder and completed first degree murder [in] determining whether there is sufficient evidence of premeditation and deliberation. [Citation.]" (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462-1463, fn. 8.)

from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)."**11** (*Id.* at pp. 26-27.)

In *People v. Stitely* (2005) 35 Cal.4th 514, 543, the California Supreme Court restated the evidentiary standards for premeditation and deliberation: "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. [Citations.] However, the requisite reflection need not span a specific or extended period of time. ' " 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' " ' [Citation.] [¶] Appellate courts typically rely on three kinds of evidence in resolving the question [of premeditation]: motive, planning activity, and manner of killing. [Citations.] These factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation. [Citation.]"

As we have already discussed, after using the victim's sock to quiet her screams, defendant strangled her. While ligature strangulation does not prove premeditation as a

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11 The Supreme Court has, however, cautioned against an "[u]nreflective reliance on *Anderson* for a definition of premeditation. The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way. [Citation.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 517.) "In other words, the *Anderson* guidelines are descriptive, not normative. 'The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive.' [Citation]." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081.)

matter of law (see *People v. Rowland* (1982) 134 Cal.App.3d 1, 9), the jury could reasonably infer choking the victim to the point of unconsciousness was "a deliberate manner of [attempted murder] sufficient to indicate a 'preconceived design' " (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020). Additionally, defendant's conduct after he strangled the victim is inconsistent with a rash, impulsive act. When he noticed the victim was not moving, defendant took the time to cover her body with branches and leaves, presumably so her body would not be found.

Viewing the evidence in the light most favorable to the People, the jury could have reasonably found sufficient evidence of deliberation and premeditation to support the verdict.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

GEMELLO, J.

Mendocino County Superior Court No. SCUKCRCR 05-63271, Ronald W. Brown, Judge.

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