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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. GAYLON MICHAEL MAJORS, Defendant and Appellant.	D037968 (Super. Ct. No. SCD156302)

APPEAL from a judgment of the Superior Court of San Diego County, Howard H. Shore and David M. Gill, Judges. Reversed in part; affirmed in part and remanded with directions.

Gaylon Majors (Appellant) was convicted of kidnapping for rape (Pen. Code, § 209, subd. (b)(1)) (count 1), kidnapping (Pen. Code, § 207, subd. (a)) (count 2), assault with the intent to commit rape (Pen. Code, § 220) (count 3), and false imprisonment by violence (Pen. Code, §§ 236, 237, subd. (a)) (count 4). Following denial of his motion to suppress evidence, he pleaded guilty to rape of an unconscious person, oral copulation of

an unconscious person and three counts of object rape of an unconscious person (Pen. Code, §§ 261, subd. (a)(4); 288a, subd. (f); 289, subd. (d)) (counts 5 through 9). He was sentenced to a term of life in prison plus eight years. He appeals, arguing error in the denial of his Penal Code section 1538.5 motion, improper admission of propensity evidence, insufficient evidence of kidnapping and assault with the intent to commit rape, and sentencing error.

FACTS

A. *Prosecution Case*

On August 15, 2000, 18-year-old Alesandria M. was riding home on her bicycle after making purchases at the Zany Brainy store in Mira Mesa. Appellant, wearing sunglasses and standing next to a parked van, showed her a badge and an orange laminated card and asked her to stop. He told her he was a security guard and there was a report that someone on a bicycle was suspected of a theft at the Zany Brainy store. Alesandria showed Appellant her purchases and payment receipts. He told her she would have to return with him to the store to resolve the issue.

Alesandria got into the van and Appellant drove to the parking lot at the rear of the mall in which the Zany Brainy store was located. He parked the van, telling Alesandria he was stopping at the security office. After the van stopped, Alesandria started to get out but Appellant grabbed her by the hair and pulled her back into the van. He told her to get into the back of the van and he would not hurt her. He grabbed Alesandria's head and tried to force it between her legs. She broke away and tried to get out the rear door.

Appellant grabbed her and threw her against the back seat. He told her if she cooperated he would not hurt her.

Appellant straddled Alesandria and held her arms down. He implored her to do what he told her and she would not be hurt. Alesandria kicked Appellant. He got up, opened the door of the van and told her to get out. Alesandria ran to a nearby theatre and reported the incident to a police officer. She was not physically injured.

Appellant's fingerprint was found on Alesandria's Zany Brainy purchase receipt. Alesandria was shown a photographic line-up containing a picture of Appellant and she tentatively identified him as her assailant.

When arrested, Appellant was in possession of a briefcase containing a digital camera, a plastic penis, binoculars, an orange laminated card and sunglasses. During a search of Appellant's home officers found a locked toolbox containing torn women's underwear, a magnifying glass and copies of Asian Beauty and Barely Legal magazines. The officers also found in a locked toolbox a videotape showing Appellant having sexual intercourse with, orally copulating and inserting various objects in the vagina of his unconscious ex-wife.

B. *Defense Case*

Alesandria told the officer who interviewed her the day of the incident that she was not afraid when she entered Appellant's van but became frightened after he parked the van at the mall. She stated she willingly got into the van and rode to the shopping mall because she wanted to prove she was not a thief.

DISCUSSION

A. *Suppression Motion*

Appellant argues the trial court erred by denying his motion to suppress the videotapes seized at his home showing nonconsensual sexual conduct on his unconscious ex-wife. He argues seizure of the tapes was not authorized by the search warrant and was not lawful under any exception to the search warrant requirement.

"In reviewing the trial court's ruling on the suppression motion, we uphold any factual finding, express or implied, that is supported by substantial evidence, but we independently assess, as a matter of law, whether the challenged search or seizure conforms to constitutional standards of reasonableness. [Citation.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 327.)

1. Background

Police detective Jana Beard obtained a warrant allowing a search of Appellant's car and residence for "any law enforcement styled badges and insignias, a store receipt from Zany Brainy; handwritings, fingerprints, papers, documents and effects [that] tend to show possession, dominion and control over said premises[,] including keys, photographs, taped voice and/or video images, to seize and view computers and all computer files and computer disks, tapes or other computer information storage devices contained therein, pagers, anything bearing a person's name, social security number, driver['s] license number or other form of identification, including the interception of incoming calls during execution of the warrant . . . ."

During the search of Appellant's residence, Beard found a locked toolbox that contained a box within which were videotapes showing sexual acts by Appellant on his unconscious ex-wife. Appellant sought suppression of those videotapes, arguing the affidavit in support of the search warrant did not provide probable cause for their seizure and that the lack of probable cause was so patent no officer could reasonably believe the search warrant authorized seizure and viewing of the tapes. Appellant additionally argued there was no exception to the search warrant requirement allowing their seizure.

The prosecutor responded that the dominion and control clause of the search warrant allowed the seizure and viewing of videotapes because they might reveal evidence of dominion and control not simply of the residence, but also of the locked toolbox in which the tapes were found, which contained other items related to sexual behavior. However, at oral argument the prosecutor conceded that "[t]here is nothing in the affidavit [supporting the search warrant] that supports the authorization in the warrant to seize the videotapes" and sought to justify a concededly warrantless search on the basis the officer had probable cause to believe the videotapes contained evidence of criminal conduct. The prosecutor also argued seizure and viewing of the tapes was proper under the plain view exception to the search warrant requirement and, alternatively, the officer's good faith reliance on the search warrant.

At a hearing on the motion to suppress, detective Beard described her search of Appellant's vehicle and residence. The detective first stopped Appellant's vehicle, placed him under arrest and searched the vehicle pursuant to the search warrant. In a briefcase

in the vehicle the officer found sunglasses, a camera, plastic penis and a laminated orange card. In a nylon bag in the vehicle the officer found four computer discs.

In the living room of Appellant's residence the officer found a locked toolbox, which she opened. The toolbox contained a magnifying glass, three pornographic magazines entitled "Barely Legal Asian Beauties," a pair of lace panties and a Nextel telephone box. In the Nextel telephone box the officer found three VHS videotapes, three 8-millimeter videocassette tapes, a photograph of an Asian female and five computer disks. The officer surmised the videotapes and computer disks might contain images of sex crime victims.

The officer testified she seized the camera, binoculars, plastic penis and videotapes not pursuant to the warrant but because there was probable cause to believe they were evidence of other crimes. She seized the computer disks pursuant to the warrant but would have seized them in any event because she believed they might contain evidence of other sex crimes.

The trial court concluded the videotapes were not properly seized pursuant to the dominion and control clause of the search warrant. It reasoned that if the videotapes could be seized on the basis they might contain dominion and control evidence, then the warrant would essentially authorize an improper general exploratory search. The court also concluded the good faith exception based on the officer's reliance on a warrant was inapplicable because it was unreasonable for the officer to conclude the seizure of the videotapes was authorized by the search warrant.

The court concluded, however, that there was independent probable cause for seizure of the videotapes and concluded they were properly seized. It noted that Beard was an experienced sex crimes officer who knew of the particular relevance of videotapes and computer disks in sex crime investigations. It observed that the tapes were found with other items related to sex crimes and that it was reasonable to believe the tapes were, in the trial court's words, "not copies of the latest Disney movie." The court concluded there was probable cause to seize the tapes and to determine whether they were evidence. The court concluded the police need not obtain an additional search warrant to view the tapes. However, the court concluded this reasoning did not apply to the computer disks found in Appellant's vehicle and granted the suppression motion as to them.

2. Discussion

On appeal, the prosecution contends the seizure and viewing of the videotapes was proper because authorized by the dominion and control provisions of the search warrant and, in the alternative, the good faith and plain view exceptions to the search warrant requirement. Appellant contends the search was improper because it was not authorized by the search warrant or any exception to the search warrant requirement.

Although the search warrant here authorized the search of Appellant's residence to include videotapes for purposes of establishing Appellant's dominion and control of the residence, the investigating officer's affidavit submitted to obtain the search warrant contained no factual basis for including videotapes within the scope of the warrant. The affidavit included numerous items the officer averred should be the subject of seizure to

establish dominion and control, but videotapes were not included. "It is axiomatic that a warrant may not authorize a search broader than the facts supporting its issuance." (*Burrows v. Superior Court* (1974) 13 Cal.3d 238, 250; accord, *People v. Frank* (1985) 38 Cal.3d 711, 728.) Because the affidavit submitted here did not support the inclusion of videotapes as an item for which the warrant search could be conducted for the purpose of establishing Appellant's dominion and control of the residence or any other purpose, the warrant did not authorize a search for videotapes. It was on this basis that the prosecution at the suppression motion hearing conceded the search and viewing of the videotapes was not authorized by the search warrant. Furthermore, dominion and control was never an issue in conducting the search. Appellant had been arrested at the time his residence was searched and the investigating officer never expressed doubt the residence belonged to Appellant.

The dissent relies on *People v. Rogers* (1986) 187 Cal.App.3d 1001 to support its position that the scope of the search warrant in this case was not overbroad. However, in *Rogers* it was not contended that the breadth of the search warrant was unsupported by the affidavit submitted to obtain it. Furthermore, in *Rogers* there was an issue of dominion and control because the officers executing the warrant had no knowledge of the person who lived in the residence to be searched pursuant to the search warrant. We conclude the seizure and viewing of the videotapes was not authorized by the search warrant in this case for the purpose of establishing dominion and control or for any other

purpose; the seizure and viewing of the videotapes was beyond the scope of the affidavit submitted to obtain the search warrant.

The prosecution argues that even if the search warrant did not authorize the seizure and viewing of the videotapes, the officer's good faith reliance on an invalid search warrant exception to the valid search warrant requirement applies in this case.

If a defective search warrant is issued by a neutral and detached magistrate, evidence seized pursuant to the warrant is not subject to suppression if the officer executing the warrant acted in the reasonable good faith belief the warrant was valid. (*United States v. Leon* (1984) 468 U.S. 897, 900; *People v. Camarella* (1991) 54 Cal.3d 592, 596.) Good faith means objective reasonable reliance on the warrant. (*Camarella,* at p. 596.)

Here the officer executing the warrant was the affiant who signed the affidavit to obtain the search warrant. She therefore was personally aware there was no factual basis to establish probable cause for the seizure and viewing of videotapes. Furthermore, she testified at the suppression hearing that she did not rely on the search warrant in conducting that search. An executing officer who does not rely on the search warrant at all cannot be characterized as having in good faith reasonably relied on the validity of the warrant. We conclude that in this case the good faith reliance exception to the requirement of a valid search warrant is not present.

The dissent suggests that had Officer Beard not seized the videotapes on the theory she believed they were evidence of a crime, she would have seized them

reasonably relying in good faith on her belief the search warrant was a valid authorization to seize them. However, there is no evidence in the record to make the transition from "could have" to "would have."

The prosecution also argues that the plain view exception to the requirement of a valid search warrant is applicable in this case and justifies the seizure and viewing of the videotapes. An investigating officer may seize items without regard to a search warrant "provided the officers are lawfully located in the place from which they view items and the incriminating character of the items as contraband or evidence of a crime is immediately apparent." (*People v. Kraft* (2000) 23 Cal.4th 978, 1041.) It is undisputed that the investigating officer was lawfully within Appellant's residence at the time she observed the locked toolbox that contained the Nextel box that contained the videotape. However, the plain view exception to search warrant requirements depends on the establishment of nexus between the item in plain sight and criminal behavior, which has been characterized as whether there is probable cause to believe the items in plain sight will aid in a conviction of a criminal offense. (*People v. Hill* (1974) 12 Cal.3d 731, 762, overruled on other grounds in *People v. DeVaughn* (1977) 18 Cal.3d 889, 896, fn. 5; *People v. Carpenter* (1997) 15 Cal.4th 312, 364.)

Here, the videotapes were not immediately apparent until the locked toolbox and then the Nextel box were opened, and the contents of the videotapes were unknown and not apparent until the images on the tapes were viewed. Assuming the two boxes were properly opened, the issue becomes whether there was probable cause the videotapes,

then in plain view, could reasonably be believed to aid in the conviction of a criminal offense. There was no connection between the crime under investigation and the videotapes, a fact the investigating officer admitted. Rather, the officer surmised the videotapes may have relevance to unrelated crimes of which she professed awareness. However, the videotapes were not contraband and in outward appearance provided no hint of evidence of criminal activity. The investigating officer surmised that because other objects of a sexual nature were in the boxes, the videotapes might also portray activity of a sexual nature. We are unable to equate the officer's surmise with probable cause that the videotapes were evidence to aid in a criminal conviction because possession of the other items was not in itself criminal and did not provide evidence of any particular crime. We conclude neither the readily apparent nor the probable cause elements of the plain view exception to the search warrant requirement were present in this case.

The seizure and viewing of the videotapes was not authorized by the search warrant or the reasonable good faith belief or plain view exceptions to the search warrant requirement. The prosecution makes no contention that any other exception is applicable. We therefore conclude the Appellant's suppression motion was incorrectly denied and Appellant is entitled to withdraw his guilty plea to counts 5 through 9.

B. *Propensity Evidence*

The trial court, over objection, admitted for the purpose of showing Appellant's propensity to commit sex offenses (Evid. Code, § 1108)[1] in connection with the charges Appellant kidnapped Alesandria to commit rape (Pen. Code, § 209, subd. (b)(1)) and assaulted her with the intent to commit rape (Pen. Code, § 220), a stipulation that while his ex-wife was unconscious Appellant had sexual intercourse with her, orally copulated her and inserted objects in her vagina. Appellant argues the trial court erred because section 1108 does not apply to the charged offenses and the evidence was more prejudicial than probative.

1. Evidence Code Section 1108

In a sex offense case, section 1108 allows the admission of evidence of the defendant's other sex offenses for the purpose of showing a propensity to commit such crimes. In pertinent part the section states: "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352. [¶] . . . [¶]

"(d) As used in this section, the following definitions shall apply:

"(1) 'Sexual offense' means a crime under the law of a state or of the United States that involved any of the following:

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1 All further statutory references are to the Evidence Code unless otherwise specified.

"(A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314 or 647.6 of the Penal Code.

"(B) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person.

"(C) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body.

"(D) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

"(E) An attempt or conspiracy to engage in conduct described in this paragraph."

2. Background

Before trial, the prosecutor noted his intention to offer propensity evidence with regard to the kidnapping to commit rape and assault with the intent to commit rape charges. This evidence was of Appellant's sexual assaults on his unconscious ex-wife. Appellant objected that those charged offenses were not sexual offenses as that term is defined by section 1108, subdivision (d)(1), and, in any event, admission of the evidence was more prejudicial than probative and thus should have been excluded pursuant to section 352.

The trial court admitted the evidence. It concluded that assault with the intent to commit rape and kidnapping for the purposes of rape, although not listed offenses in section 1108, subdivision (d)(1)(A), were both essentially attempted rapes within the

meaning of section 1108, subdivision (d)(1)(E), and were thus sexual offenses as defined by the section.

The trial court, however, excluded playing the videotape of Appellant's sexual assault on his ex-wife because it concluded playing the tape was more prejudicial than probative. However, it allowed a stipulation that 18 months before his assault on Alesandria, Appellant had sexual intercourse with his unconscious ex-wife, orally copulated her and inserted various objects in her vagina.

3. Discussion

The trial court properly admitted the stipulation concerning Appellant's prior sexual offenses.

a. Sexual Offenses

Appellant argues assault with the intent to commit rape and kidnapping for the purpose of rape are not offenses expressly defined in section 1108 as sexual offenses and it was error, therefore, for the trial court to admit propensity evidence concerning them. Appellant urges it was the intent of the Legislature that the term "sexual offense" as used in section 1108 be given a narrow construction and be limited to the specific offenses listed in subdivision (d)(1)(A) and to conspiracies and attempts involving only those enumerated offenses (§ 1108, subd. (d)(1)(E)).

Within clearly defined limits the definition of sexual offenses provided by section 1108 is broad and flexible. The section describes as a sexual offense a crime under the laws of "a state or of the United States," that involves any conduct proscribed by a list of

California Penal Code sections dealing with a wide range of sex and sex related offenses. It goes beyond the listed offenses and states that sexual offenses include crimes involving nonconsensual genital and anal contact, crimes that involve deriving sexual pleasure or gratification from the infliction of death or injury or pain, and the attempt or conspiracy to engage in the defined offenses and conduct. (Evid. Code, § 1108, subd. (d)(1)(A)-(E).)

The term "sexual offense" in section 1108 is not defined by mechanical limitations but rather by the policy basis for the admission of propensity evidence. The Legislature made sex offense propensity evidence admissible because of its particular importance and usefulness in sex crime cases. Because the willingness to commit sex offenses is uncommon and because sex crimes are often committed in secret with no witnesses except the perpetrator and the victim, prior sex offense evidence is relevant to the credibility of a defendant's denial of participation or intent and generally to his or her disposition to commit such offenses. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911-912; *People v. Fitch* (1997) 55 Cal.App.4th 172, 181-182.)

Section 1108, subdivision (d)(1)(E) makes the attempt or conspiracy to engage in conduct described in subdivision (d)(1) a sexual offense. This inclusion of attempts and conspiracies comports with the policy basis of section 1108 because those crimes involve the same issues of credibility, an intent that arises in the completed sexual offenses. We conclude assault with the intent to commit rape and kidnapping for the purpose of rape are attempts to commit rape, and therefore are sexual offenses within the meaning of section 1108.

An attempt occurs when there is a specific intent to commit a crime and a direct but ineffectual act done towards its commission. (Pen. Code, § 21a.) " 'An attempt connotes the intent to accomplish its object, both in law [citation] and in ordinary language.' [Citation.]" (*People v. Smith* (1997) 57 Cal.App.4th 1470, 1481, fn. omitted.) The act required must be more than mere preparation, it must show that the perpetrator is putting his or her plan into action. That act need not, however, be the last proximate or ultimate step toward commission of the crime. (*People v. Kipp* (1998) 18 Cal.4th 349, 376.)

In *People v. Rupp* (1953) 41 Cal.2d 371, 382, the court stated that an assault with an intent to commit a crime is necessarily an attempt to commit the underlying crime. It concluded that an assault with the intent to commit rape is merely an aggravated form of attempted rape. (*People v. Holt* (1997) 15 Cal.4th 619, 674.) Assault with intent to commit rape, therefore, is a sexual offense within the meaning of section 1108.

We reach the same conclusion with regard to kidnapping for the purpose of rape. Kidnapping for the purpose of rape requires that the defendant commit the kidnapping with the specific intent to rape. This requirement is derived from the statutory definition of the offense as "kidnap[ping] or carr[ying] away . . . to commit . . . rape." (Pen. Code, § 209, subd. (b)(1).) " 'A person could not kidnap and carry away his victim to commit [rape] if the intent to [rape] was not formed until after the [kidnapping] had occurred.' [Citation.]" (*People v. Jones* (1997) 58 Cal.App.4th 693, 717.) A kidnapping for the purpose of rape is not a mere act of preparation. It demonstrates that the perpetrator is

putting his plan into action and is necessarily an attempt to commit rape. Kidnapping for the purpose of rape is, therefore, a sexual offense within the meaning of section 1108.

b. Evidence Code Section 352 Objection

Appellant argues the court erred in finding that the evidence of his past sexual offenses was more probative than prejudicial.

"Under Evidence Code section 352, the trial court has discretion to exclude evidence ' . . . if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' The trial court's exercise of discretion in admitting evidence under Evidence Code section 352 will not be disturbed unless the court acted in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 406.)

With regard to the admission of propensity evidence, pursuant to section 1108 "trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or

excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*People v. Falsetta, supra,* 21 Cal.App.4th at pp. 916-917.)

Appellant also argues that if the videotapes of his sexual assault on his former wife were obtained as a result of an illegal search, his stipulation that the sexual acts shown on the videotapes occurred should not have been admitted into evidence. Although Appellant's argument may be correct, we conclude that the admission of the stipulation was nevertheless not prejudicial to his defense. It is not reasonably likely that exclusion of the propensity evidence would have resulted in a different result at trial with regard to counts 1 through 4. (*People v. Watson* (1956) 46 Cal.2d 818.) Even were we to apply the *Chapman* standard of prejudice (*Chapman v. California* (1967) 386 U.S. 18, 24), we would conclude that, beyond a reasonable doubt, exclusion of the evidence would not have resulted in a more favorable verdict for Appellant.

C. *Sufficiency of Evidence*

Appellant argues there was insufficient evidence to convict him of kidnapping, kidnapping with the intent to commit rape or assault with the intent to commit rape.

In determining whether the evidence is sufficient to support the verdict, we review the entire record, viewing the evidence most favorably to the judgment and presuming in support of the verdict the existence of every fact the jury could reasonably deduce from the evidence. The issue is whether the record so viewed discloses evidence that is reasonable, credible and of sufficient solid value to permit a rational trier of fact to find

the elements of the crime beyond a reasonable doubt. (*People v. Brown* (1995) 35 Cal.App.4th 1585, 1598.)

1. Intent to Commit Rape

While conceding there was sufficient evidence he intended some sex act with Alesandria, Appellant argues there was insufficient evidence he intended to rape her. Appellant employed a stratagem to get Alesandria to an isolated location. When there, he assaulted her, attempted to force her into the back seat of his vehicle and at one point straddled her. The assault ended when Alesandria kicked Appellant and he told her to get out of the van. A jury could reasonably conclude that at least one of Appellant's intents in gaining control of Alesandria was to rape her after the van parked in the shopping mall. We conclude there is sufficient evidence to support the jury finding that Appellant intended to rape Alesandria.

2. Kidnapping

Appellant argues the evidence was insufficient to convict him of kidnapping and kidnapping for the purpose of rape because there was insufficient evidence he transported Alesandria by force or fear.

Penal Code section 207, subdivision (a) provides: "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." In 1990 Penal Code section 207 was amended by adding the phrase "or by any other means of instilling fear." One

court has concluded that since that amendment to Penal Code section 207 there are two alternative circumstances under which the offense of kidnapping may be committed: Asportation by the use or threat of force, or by any means of instilling fear. (*People v. Moya* (1992) 4 Cal.App.4th 912, 916-917.) However, it is doubtful that the 1990 amendment to Panel Code section 207 created a totally new form of kidnapping. Courts had held before that amendment that " '[t]he force used against the victim "need not be physical. The movement is forcible where it is accomplished through the giving of orders [that] the victim feels compelled to obey because he or she fears harm or injury from the accused and such apprehension is not unreasonable under the circumstances." ' [Citations.]" (*People v. Alcala* (1984) 36 Cal.3d 604, 622, superseded by statute on other grounds, as stated in *People v. Falsetta, supra,* 21 Cal.4th at p. 911; see also *People v. Hill* (2000) 23 Cal.4th 853, 856; *People v. Moya, supra*, 4 Cal.App.4th at p. 916.) Therefore, the concept of kidnapping by instilling fear had been recognized before 1990, at least to the extent the fear instilled by the accused was fear of harm or injury from the accused.

In this case there is no evidence Appellant used force or the threat of force to transport Alesandria from the point of initial contact to the shopping mall parking lot where Appellant parked the van. Furthermore, there is no evidence that during that asportation she feared harm or injury from Appellant. Appellant stopped Alesandria on the street and identified himself as a security guard investigating a suspected theft. He showed her a badge to support his authority. After looking at her identification and

receipts for items purchased, Appellant told Alesandria she would "have to go back with him . . . to clear things up." Alesandria testified Appellant did nothing to make her fear for her safety and she was not afraid of harm or injury from him when she entered his van or during the drive to the shopping mall. Alesandria testified she first became frightened when Appellant parked the van in the shopping mall parking lot. However, there was no further asportation after the van was parked, and force or threat of force after the asportation has ended does not establish the offense of kidnapping. (See *People v. Camden* (1976) 16 Cal.3d 808, 814.)

Because the record does not support the finding of kidnapping based on force or threat of force (including fear of injury or harm from appellant), the issue is whether the record contains substantial evidence that Appellant "by any means of instilling fear" transported Alesandria to the parking lot. We first conclude that under the instilling fear theory of kidnapping, the victim must in fact experience fear imposed by the defendant. If the victim does not experience fear, there is no kidnapping offense (absent force or the threat of force) even though the defendant sought to create fear in the victim. Although Penal Code section 207 does not define fear or suggest the required subject of the fear, the cases suggest the fear must be sufficient to overcome the will of the victim. (*People v. Hill, supra,* 23 Cal.4th at p. 856; *People v. Duran* (2001) 88 Cal.App.4th 1371, 1378; *People v. Moya, supra,* 4 Cal.App.4th at p. 916.)

Although Alesandria testified that she was afraid not to return to the shopping mall with Appellant because she did not want to go to jail for shoplifting, a fair reading of the

record convinces us that her concern about the fraudulent guise used by Appellant was not a fear that overcame her free will. On the contrary, Alesandria testified she entered Appellant's van because she wanted to return to Zany Brainy to prove she had not shoplifted any merchandise and Appellant had done nothing to cause her concern for her safety. She had no doubt that she could prove her innocence: she had worked at Zany Brainy, knew the manager and other employees, and had a receipt for the merchandise in her possession. Her motivation in entering Appellant's van and returning to Zany Brainy appears from the entirety of her testimony not to have been fear but rather an exercise of free will to prove her innocence. This case appears to be a classic case of asportation by fraud, not by force or fear. We find nothing in the 1990 amendment to Section 207 to change the longstanding rule that asportation by fraud alone does not constitute kidnapping. (*People v. Green* (1980) 27 Cal.3d 1, 64, rejected on other grounds by *People v. Hall, supra,* 41 Cal.3d at p. 834, fn. 3; *People v. Rhoden* (1972) 6 Cal.3d 519, 526, 527.)

The dissent emphasizes its interpretation of the record in this case and embellishes Alesandria's testimony with its own spin. However, in our view, the dissent equates its interpretation of the record with substantial evidence that the jury was free to accept. Rather than disregarding the substantial evidence appellate review standard, as we are charged with doing, we have independently reviewed the record and do not find substantial evidence of fear that even the dissent's definition of kidnapping requires.

For legal authority the dissent relies primarily on *Parnell v. Superior Court* (1981) 119 Cal.App.3d 392 and *People v. Broyles* (1957) 151 Cal.App.2d 428. In the former case the victim was a seven-year-old child. The California courts have treated the asportation of children differently from the asportation of adults: the child's free will may be overcome regardless of the presence of fear if the defendant's intent in the asportation is unlawful. (See *People v. Hill, supra,* 23 Cal.4th at pp. 856-858; *People v. Oliver* (1961) 55 Cal.2d 761, 768.) In the latter case there was evidence of force used during the asportation: "some force was used while she was being transported over a space of several miles" (*Broyles,* at p. 431.) Neither case has application to the instant case.

We conclude the evidence is insufficient to establish either the force or fear element of kidnapping and therefore reverse Appellant's convictions of kidnapping and kidnapping for rape.

D. *Sentencing*

Appellant makes several arguments related to his sentencing.

Appellant argues the trial court abused its discretion in sentencing him to the indeterminate life term for his conviction of kidnapping for the purpose of rape (count 1). Appellant describes the court's error as a failure to consider the entire sentencing scheme applicable to the case. Appellant also argues his convictions for kidnapping (count 2) and false imprisonment (count 4) must be reversed because each is a lesser included offense of kidnapping for the purpose of rape, and he was incorrectly sentenced to full mid-terms on counts 3 and 6 through 9. However, because we reverse Appellant's

convictions of kidnapping (count 2) and kidnapping for purposes of rape (count 1), and direct the trial court to permit Appellant to withdraw his guilty plea to counts 5 through 9, it is unnecessary to discuss these issues.

DISPOSITION

Appellant's convictions of kidnapping (count 2) and kidnapping for rape (count 1) are reversed for insufficiency of the evidence. The trial court's order denying Appellant's section 1538.5 motion is reversed and the trial court is directed to permit Appellant to withdraw his guilty plea to counts 5 through 9 if within 30 days after this decision becomes final as to this court he files a motion to withdraw his guilty plea. In the event no motion for withdrawal of the guilty plea is timely filed, Appellant's convictions of counts 5 through 9 are affirmed. In all other respects, the judgment is affirmed and the matter is remanded to the trial court for resentencing.

McDONALD, J.

I CONCUR:

McINTYRE, J.

I respectfully dissent from both the majority's holdings that the evidence was insufficient to support Gaylon Michael Majors's kidnapping convictions and that the trial court erred in denying appellant's suppression motion.

I

Kidnapping

A. *Facts*

The majority finds the following facts insufficient to support appellant's kidnapping convictions. Appellant drove his van up to 18-year-old Alesandria and stopped her on the street as she rode her bicycle home from a mall. He identified himself as a security guard investigating a suspected theft. He showed her a badge to support his authority. After looking at her identification and receipts for items purchased, appellant told Alesandria she would "have to go back with him . . . to clear things up." He took the bicycle she was riding and tried to put it in his van. When he was unable to do so, he took her backpack and told her to leave her bicycle at a school across the street. She did so, looked again at appellant's badge and got into his van.

Alesandria testified she was afraid not to get into the van. In fact, she stated she did not ride away from appellant because she was "really scared" she would be put in jail if she did so. When asked why she got in the van, Alesandria stated: " I don't even know. I felt something, like I shouldn't have gone in there." Once in the van, appellant used his cell phone, making it sound as if he was talking to a partner, "saying that the suspect was apprehended." Alesandria asked if she could use the phone to call her

parents. Appellant said she could do so when they got to the mall. At the mall, appellant began to drive around and told Alesandria they needed to check with the manager at Zany Brainy "to look at their cameras." Having worked at Zany Brainy, Alesandria knew there were no cameras in the store. This too caused her apprehension.

B. *The Elements of Force and Fear*

The majority concludes the evidence is insufficient since, in its view, it fails to satisfy the element of Penal Code[1] section 207, subdivision (a), that the asportation of the victim be forcible or by any other means of instilling fear. My colleagues believe the evidence supports no more than asportation by fraud or deceit. I disagree.

The force or fear element of section 207, subdivision (a), is premised upon compulsion, a concept which is wider and more flexible than the majority is willing to accept. In some cases the element of asportation by force or instilling fear raises no difficulties. The victim may be grabbed and pushed into a car. The perpetrator may tell the victim to move "or else." Human thought and behavior, however, are infinitely variable. Situations arise when the issue of force and fear become more complex. (See, e.g., *People v. Hill* (2000) 23 Cal.4th 853, 856-858 [kidnapping of infants].) The crime of kidnapping as defined in section 207, subdivision (a), accounts for this variability and complexity. It permits a finding of force or fear where the victim is compelled to accompany the defendant. It is the presence of *compulsion* which separates this case

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1 All further statutory references are to the Penal Code unless otherwise specified.

from the "classic case of asportation by fraud" (maj. opn., p. 21) which the majority concludes it is.

This realistic definition of force is in no sense novel. "A forcible taking occurs whenever the victim is taken or accompanies the defendant under some form of compulsion. The form of the compulsion used by the defendant can be actual physical force or express threat; however, neither of these is actually required if the taking is accomplished through the giving of commands that the victim feels must be obeyed in order to avoid harm or injury. In the alternative, the use of any other means of instilling fear is sufficient." (Vol. 6, *Cal. Criminal Defense Practice*, § 142.14[1][b], fns. omitted.)

In *People v. Moya* (1992) 4 Cal.App.4th 912, 915, the court concluded the definition of kidnapping encompasses any asportation accomplished by fear. The court noted the then recent amendment to the definition of kidnapping in section 207. It noted that prior to 1990, section 207 required a forcible taking. In 1990 the Legislature added to the section the language "or by any other means of instilling fear." (*Ibid*.) The appellant in *Moya* argued this amendment required that the use of force must actually instill fear.

The court in *Moya* responded: "[We do not] interpret the statute as now requiring an additional element before a conviction of kidnapping can be sustained. Prior to the amendment, kidnapping could only be sustained upon a finding that the person was taken . . . by the use or threat of force. [Citation.] If a person's free will was not overborne by the use of force or the threat of force, there was no kidnapping. [Citation.] [¶] As we

read the amended version of section 207, kidnapping can now be accomplished not only by the application of force or threats of force but also by other methods which instill fear. Rather than modifying and defining (and thereby limiting) the word 'forcibly'. . . , the phrase 'by any other means of instilling fear' expands the types of methods by which a person can overcome the free will of his or her victim. Thus, rather than being an additional element for the crime of kidnapping, the new language provides an alternative basis for finding a defendant guilty of kidnapping." (*People v. Moya, supra,* 4 Cal.App.4th at pp. 916-917.)

Even prior to the 1990 amendment to section 207, subdivision (a), the facts of this case would support a kidnapping by force. In *Parnell v. Superior Court* (1981) 119 Cal.App.3d 392, the seven-year-old victim was offered, and accepted, a ride home by two men posing as church volunteers. The child was asked to spend the night with his abductors and they stated they would call his parents and ask. The court, in rejecting the defendants' argument that there was no force involved in the taking, responded: "The testimony at the preliminary hearing indicates that, after Steven was fraudulently enticed into petitioner's car, both men failed to respond to the boy's statement that the car had passed his road. Petitioner and Murphy told Steven that they would call his parents to ask if the boy might spend the night with them. Steven countered: '[W]e could go down to my house and ask.' The two men, however, again responded that they would call, and instead removed Steven to Cathey's Valley about twenty miles from his home. One cannot imagine a more threatening situation: A seven-year-old youngster in a moving

automobile under the control of two adult strangers who twice countermanded the child's request to contact his parents. The substitution of wills, petitioner's and Murphy's, for Steven's, together with the physical and psychological confinement of the moving automobile is ample force to satisfy the 'forcible taking' element of section 207. (*Id*. at p. 402.)

Closer to the facts of our case here is the pre-1990 case of *People v. Broyles* (1957) 151 Cal.App.2d 428, 431. There, the defendants, posing as deputy sheriffs, ordered a woman into their car under the guise she and a male companion were engaged in illegal conduct while parked on a back road. The victim got into their car believing they were police officers. They drove her several miles. They stopped the car and she was raped. In responding to the defendants' argument on appeal that there had been no kidnapping, the court set forth the evidence which includes the observation that the defendants "forced [the victim] into their car by giving orders which she felt compelled to obey." (*Ibid.*)

I find *Parnell* and *Broyles* supportive authority for the proposition that for purposes of section 207, subdivision (a), force exists where one is compelled to accompany another under color of authority or because that person confines the victim in a moving vehicle. Both of these elements are present here.

As *Moya* makes clear, the 1990 amendment expanded, rather than contracted, the situations which comprise the crime of kidnapping. I see no reason to conclude a kidnapping would have occurred here before 1990 but not after.

The majority dramatically narrows the crime of kidnapping. With the sincerest respect for my colleagues, I fear that even in its unpublished form, their opinion sends predators such as appellant a disturbing new message: flash a badge, coerce your victim to drive away with you, and face no criminal liability. Nothing in the language or history of the law of kidnapping supports such a message.

C. *Appellate Review*

My concern with the majority's discussion of kidnapping does not end with its interpretation of the force or fear elements. The majority, using selective parts of Alesandria's testimony, concludes that she did not experience fear until the van stopped at the mall, and it was not fear, "but rather an exercise of free will to prove her innocence" (maj. opn., p. 21) which initially made her get into the van with appellant. This was the precise defense offered by appellant at trial.

The problem with my colleagues' interpretation of the evidence is that 12 members of a jury in this case disagree with them. This being the case, with all due respect, I must conclude my colleagues, while stating the sufficiency of the evidence test on appeal, have in practice abandoned that well-settled rule of appellate review.

The legal question before us is one which bears repeating. It is whether after a review of the entire record, viewing the evidence in the light most favorable to the judgment and presuming in its support all facts the jury could reasonably deduce, a rational trier of fact could find that appellant forcibly or by instilling fear asportated Alesandria. (*People v. Brown* (1995) 35 Cal.App.4th 1585, 1598.)

We are not at liberty to disregard an interpretation of the facts that supports the jury's verdict. Based on the evidence presented in this case, the jury was entitled to believe Alesandria's testimony. It was entitled to believe and we must assume did believe appellant caused her to fear that if she did not follow his instructions, including accompanying him in his van, he would forcibly arrest her. It was entitled to believe and we must assume did believe her fear occurred before she entered the van and during her ride back to the mall. It was entitled to believe and we must assume did believe Alesandria felt both fear and a desire to vindicate herself when she first entered the van. It was entitled to conclude and did conclude that during the trip back to the mall, Alesandria's fear grew as her request to call her parents was denied and she began to realize appellant was not telling the truth. These conclusions overwhelmingly support the verdict.

D. *Publication*

As the foregoing indicates, I could not more strongly disagree with the majority's narrow definition of force or fear and its conclusion that the evidence is insufficient. Nonetheless, if kidnapping does not include the coercive acts disclosed in this record, I believe my colleagues should express this court's position authoritatively so that prosecutors, defense counsel and trial courts can act accordingly, and so that the Legislature and public can, if they see fit, respond to what is a very significant interpretation of the elements defining kidnapping.

II

Suppression Motion

The majority concludes on a number of bases that the trial court erred in failing to suppress the videotapes of appellant sexually assaulting his ex-wife. I conclude the trial court properly denied the motion.

1. Dominion and Control

In possession of evidence strongly suggesting appellant was Alesandria's assailant, police detective Jana Beard secured a warrant allowing a search of appellant's car and residence for "any law enforcement styled badges and insignias, a store receipt from Zany Brainy, handwritings, fingerprints, papers, documents and effects which tend to show possession, dominion and control over said premises including keys, photographs, taped voice *and/or video images*, to seize and view computers and all computer files and computer disks, tapes or other computer information storage devices contained therein, pagers, anything bearing a persons' name, social security number, drivers' license number or other form of identification including the interception of incoming calls during execution of the warrant." (Italics added.)

Generally, and with obvious justification, warrants routinely and properly authorize the search for items showing who has dominion and control of the place to be searched. To avoid, however, unlimited general exploratory searches, the warrant must reasonably confine the search to items demonstrating dominion and control. (*People v. Alcala* (1992) 4 Cal.4th 742, 799-800; *People v. Nicolaus* (1991) 54 Cal.3d 551, 574-

575; *People v. Rogers* (1986) 187 Cal.App.3d 1001, 1006-1009; *People v. Holmen* (1985) 173 Cal.App.3d 1045, 1047-1049.)

In *Rogers* the dominion and control clause of the warrant authorized a search for "'articles of personal property tending to establish the identity of the person or persons in control of the premises . . . , consisting of and including, but not limited to, utility company receipts, rent receipts, cancelled mail, envelopes and keys.'" (*People v. Rogers, supra*, 187 Cal.App.3d at pp. 1003-1004.) The court in *Rogers* concluded the clause was not overbroad, noting that the search authorized by the clause was limited to items "tending to establish the identi[t]y of the persons in control of the premises." (*Id*. at p. 1007.)

Dominion and control searches are reasonably and unavoidably broad. (See *People v. Alcala, supra,* 4 Cal.4th at pp. 799-800.) In that regard *Rogers* makes these useful observations: "The affidavit in support of the warrant alleged -- and common experience tells us -- that houses and vehicles ordinarily contain evidence establishing the identities of those occupying or using them. However, we think it is obvious that the officers could not be expected to divine in advance of their entry the precise nature of such evidence -- whether mail, bills, checks, invoices, other documents, or keys. Nor could the officers be expected to know the precise location where such evidence would be located. To require such prescience from the officers would be patently unreasonable. Nor do we perceive a reasonable way to require police officers to describe the nature or location of identity evidence with greater particularity.

"While a search for the matters described in the warrant may invade the privacy of the occupants of the premises, so does any search. The extent of invasion of privacy is not unreasonable in the circumstances. We cannot believe the Fourth Amendment prohibits officers with ample probable cause to believe those in a residence have committed a felony from searching the residence to discover ordinary indicia of the identities of the perpetrators. We hold that the search warrant in this case was not overbroad under the Fourth Amendment and the evidence challenged by defendant was properly admitted. [Citations.]" (*People v. Rogers, supra*, 187 Cal.App.3d at p. 1009.)

The dominion and control clause in this case is in practical effect indistinguishable from that in *Rogers*. Here, the crucial issue is the reasonableness of including videotapes in that clause. *Rogers* was decided in 1986 before videotape cameras became ubiquitous. I would conclude that it is reasonable to believe that a videotape found at a location may reveal information concerning those associated with the location and alone or in combination with other evidence disclose who has dominion and control of the place searched. The warrant properly authorized the search for and the seizure of videotapes.

2. Good Faith Exception

Even if the warrant was overbroad or lacking in probable cause, no basis exists for suppression of the evidence seized pursuant to it. When a defective search warrant is issued by a neutral and detached magistrate, evidence seized pursuant to it is not subject to exclusion if the officer who executed the warrant acted in the reasonable good faith

belief that the warrant was valid. (*United States v. Leon* (1984) 486 U.S. 897, 900; *People v. Camarella* (1991) 54 Cal.3d 592, 596.)

Good faith means "objective reasonable reliance" on a warrant. The question is whether a well-trained officer would know the warrant was invalid. (*People v. Camarella, supra,* 54 Cal.3d at p. 596.) When the defect is insufficient probable cause, the issue is whether the warrant is so lacking in probable cause that it would be unreasonable for a well-trained officer to rely on it. (*Ibid*.) When the defect is overbreadth, the issue is whether the description is so general the warrant could not be regarded as valid. (*Bay v. Superior Court* (1992) 7 Cal.App.4th 1022, 1030.)

It was not unreasonable for a well-trained officer to believe that a warrant could properly authorize the search for items showing dominion and control of the place to be searched. The warrant *specifically* authorized a search for videotapes. It was not unreasonable to conclude such an item could demonstrate evidence of dominion and control. There was nothing in the authorization of search for videotapes as evidence of dominion and control that would reasonably have caused the officer to doubt its validity.

The majority argues a good faith reliance argument is meaningless here since the officer who seized and viewed the videotapes did so based not on the dominion and control language of the warrant but because she believed the tapes were evidence of a crime. While the officer might have seized the videotapes because she believed them to be evidence of a crime, that did not mean that she would have not seized them based on the dominion and control language of the warrant, *a warrant she prepared.* The officer,

thus, had two bases for seizing the evidence, that she acted on the one that seemed most immediate does not mean the prosecution was foreclosed from also relying on the second authorized basis for seizing the tapes. (See generally *People v. Lively* (1992) 10 Cal.App.4th 1364, 1367; *People v. Adams* (1985) 175 Cal.App.3d 855, 859-864.)

Given the majority's divergence from *Rogers*, I believe the majority is also remiss in failing to publish that portion of its opinion.

I would affirm the judgment.

BENKE, Acting P. J.