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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

<p>THE PEOPLE,</p> <p style="padding-left: 40px;">Plaintiff and Respondent,</p> <p style="padding-left: 40px;">v.</p> <p>WILLIAM NEIDINGER,</p> <p style="padding-left: 40px;">Defendant and Appellant.</p>	<p>C042839</p> <p>(Super. Ct. No. 02-1556)</p>
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APPEAL from a judgment of the Superior Court of Yolo County, Michael W. Sweet, Judge. Reversed.

Victor S. Haltom for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Carlos A. Martinez and Ruth M. Saavedra, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant William Neidinger appeals after a jury convicted him of two counts of being a lawful custodian of his children who maliciously deprived another lawful custodian of the children, Olga Neidinger (Olga or mother), of her right to

custody. (Pen. Code, § 278.5, subd. (a) (§ 278.5(a)) (child abduction).)¹ Defendant argues the trial court erred by instructing the jury that he had the burden of proving, by a preponderance of the evidence, the defense that he had a good faith and reasonable belief that the children, if left with the mother, would suffer immediate bodily injury or emotional harm. (§ 278.7, subd. (a) (§ 278.7(a)) hereafter referred to as the good faith defense.) He argues that the facts supporting the defense negated an element of the crime--malice--and that he was thereby required to raise only a reasonable doubt as to the existence of those facts. We shall conclude, for the reasons stated below, that the court erred by failing to give an instruction that clarified the relationship between the good faith defense and malice. Since the error cannot be deemed harmless under the facts presented, the judgment must be reversed.

FACTS AND PROCEDURAL HISTORY

Defendant, an architectural consultant, met his Ukrainian-born wife, Olga, by corresponding with her through a singles club. She emigrated to the United States in February 1998 on a bride visa. Their marriage produced two children, a son, R., born in October 1998, and a daughter, A., born in November 1999. The family moved from Virginia to Reno, Nevada, in 2000 and from Reno to the Sacramento area in April or May 2001.

¹ Further undesignated section references are to the Penal Code.

The relationship between defendant and Olga was tumultuous; they had many arguments that escalated to physical altercations. Olga and defendant each claimed the other was the aggressor. Olga testified defendant was physically abusive; defendant testified that Olga became quite angry after the birth of A., and would take out her aggressions by hitting him or damaging his personal property.

One of the couple's significant altercations occurred in Reno in August 2000. Olga testified she was forced to call 911 because defendant was trying to break her arm. Defendant, on the other hand, testified the fight started for no apparent reason after he returned home from running some errands. Olga was angry and started yelling at him, and within moments she began punching, scratching and biting him, leaving over 50 visible marks on his body. Olga also hit him on the head with a telephone receiver, drawing blood and leaving a gash. As defendant tried to hold Olga down to stop the assault, she reached for the telephone and dialed 911, to which defendant offered no resistance. Four police officers arrived at their residence, interviewed the combatants, and arrested Olga. According to Olga, the police arrested her because defendant had "one scratch on his face," even though she believed defendant "did it by himself." Defendant testified that the children were "[a]bout two feet away" during the assault. Defendant bailed Olga out of jail the following day, and the charges were subsequently dismissed.

Another significant altercation occurred on August 3, 2001, after the family had relocated to Sacramento, which resulted in the filing of criminal charges against defendant. Olga testified that defendant received a letter from a doctor (addressed to defendant only) which caused her some concern, because defendant had been telling her she was "crazy" and "[h]e start calling to police and he tried to get -- put me in like a doctor place and I [had] been afraid of it because he tried to -- I don't know, like throw me on the street or something." Olga did not open the letter; she put it back in the mailbox so defendant could retrieve it after work. When defendant picked up the mail later that day and handed it to Olga, she noticed the letter from the doctor was missing. Olga asked defendant several times if that was all of the mail, and defendant replied that it was. Olga asked defendant about the unopened letter that defendant was holding. Defendant said it had arrived several days earlier and he had not had a chance to read it. Olga replied, "Give me please," and tried to take it from defendant, but he resisted, kicking her in the leg, breaking his wristwatch over her head, and tearing the letter to shreds.

Defendant testified he did not assault Olga. He testified he was concerned with Olga's emotional well-being due to her frequent mood swings, and that he had arranged an appointment with a psychiatrist located near their residence, but that Olga had refused to go. On the day of the altercation, he returned home early from work and retrieved the mail, which included a confidential letter that he did not want to discuss with Olga

due to "the tension between us." Olga, though, grabbed the letter from his briefcase and held it as though it belonged to her. Defendant grabbed the letter from Olga, who "hit me as hard as she possibly could." Olga ripped defendant's wristwatch off "and twisted the whole thing up like it was made out of foil." Olga scratched defendant, and the assault left bruises.

Olga testified that after the fight, she took the children and went to a friend's apartment, but returned home later that night and slept with the children in their room. The following morning, Olga called Women Escaping A Violent Environment (WEAVE). Less than a week later, Olga and the children moved into a WEAVE shelter. Olga and the children stayed in the WEAVE shelter for less than one month. They moved into a motel for two weeks, and then found an apartment in West Sacramento.

Prior to being taken to the shelter, an attorney working with WEAVE took Olga to a hospital, where a police officer questioned her about the August 3, 2001, incident. As a result, criminal charges were filed against defendant, but were dismissed in October 2001. The attorney helped Olga complete a request for a domestic violence restraining order, which Olga filed in Sacramento County Superior Court in August 2001. On September 5, 2001, the court issued an order restraining defendant from contacting Olga or the children.

The September 5 order also granted legal and physical custody to Olga with no visitation to defendant pending private mediation. A month later, following dismissal of the criminal charges against defendant, the court adopted a mediator's

recommendations and granted Olga and defendant joint legal and physical custody of the children with defendant having supervised visitation for two hours a week.

In December 2001, Olga filed a petition for legal separation, which was later consolidated with the domestic violence proceeding.

In January 2002, the court granted defendant unsupervised weekend visitation, which would include overnight visits on Fridays for the first two weeks and weekend visits thereafter.

Pursuant to stipulation, this order was modified on February 21, 2002. The order granted Olga and defendant joint legal custody with primary physical custody to Olga.² Defendant was granted visitation with the children on each Saturday and Sunday from 9:00 a.m. to 7:00 p.m.

² It is unclear whether the stipulation and order was intended to effect a change to the existing order for joint physical custody. "Though frequently employed, the term 'primary physical custody' has no legal meaning. [Citation.] It is not found in the Family Code. [Citation.] Under the Family Code, a parent may be awarded joint physical custody (Fam. Code, § 3004) or sole physical custody. (Fam. Code, § 3007; see Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2002) ¶ 7:361, pp. 7-129 to 7-130.)" (*In re Marriage of Richardson* (2002) 102 Cal.App.4th 941, 945, fn. 2; *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1081, fn. 1.)

In *People v. Mehaisin* (2002) 101 Cal.App.4th 958, this court held that a defendant who did not have a right of custody could not claim the good faith defense. (*Id.* at p. 963.) The People do not contend that defendant had no right to rely on the good faith defense because he did not have a right of custody of the children. We therefore express no opinion on this issue.

Following dismissal of the criminal charges in October 2001, defendant began to see the children more frequently. He became concerned with their well-being, as they had regressed into a state of near autism. They were lethargic, detached, and almost catatonic. Defendant noticed that A. was experiencing dramatic shifts in weight. Defendant also was concerned with the physical safety of R., whose temper tantrums Olga would encourage, even though they sometimes took place "right in the middle of a street where cars are driving." Defendant testified he made over 20 complaints (without a satisfactory response) to child protective service agencies in Sacramento and Yolo Counties about the children's well-being.

As part of the mediation process in family court, Olga underwent a psychological evaluation in January 2002. Defendant testified he received a copy of the report that same month, and that it recommended that Olga take medication for her mood swings and other disorders, but that Olga had refused. On cross-examination, defendant admitted the report concluded that Olga was a capable parent and there were no psychiatric problems requiring immediate intervention with respect to the children.

Defendant's decision to take the children from Olga's care was precipitated by an incident on March 5, 2002 (the March 5 incident). Defendant received a telephone call from Brian Dutra, who told defendant he was one of Olga's lovers. Dutra informed defendant that Olga had invited him to visit her for a "date," but that when he arrived at her residence, he found her in bed with Jeff Nelson, who had been defendant and Olga's

next-door neighbor in Reno. Olga told Nelson to make Dutra go away, but when Nelson began verbally and physically assaulting Dutra, Olga changed her mind and told Dutra to make Nelson go away. The incident ended with no physical injury, although there was a lot of "yelling." During the incident, the children stood at the bedroom door (which separated their bedroom from Olga's), and witnessed the confrontation.

The following day, defendant drove to Reno and spoke with Nelson at length about the incident. Nelson confirmed Dutra's story, but insisted that he had not had sexual relations with Olga.

The March 5 incident happened in conjunction with defendant's efforts to conclude all court proceedings in California and to initiate a new proceeding in Nevada, since "[n]obody was living in Sacramento whatsoever," and he had maintained his residency in Nevada during the period he had moved to Sacramento to complete a job.

On March 5, 2002, defendant requested and obtained dismissal of Olga's domestic violence complaint.³ On March 7, defendant filed an application in a Nevada court for an order for protection against domestic violence. In the accompanying declaration, defendant related that the children had been living with him in Nevada since February 23, 2002, and that there were

³ Even though defendant had no authority to request dismissal, the clerk mistakenly granted his request, although the error was corrected by an order filed less than four weeks later, on March 29, 2002.

no other actions pending regarding child custody in any other state.

Defendant testified that he decided to remove the children to his residence in Nevada for their own safety. Defendant did not call child protective services because they had been unresponsive in the past. He filed for a restraining order and a temporary custody order in Nevada because he had maintained residency there and had moved there.

Defendant picked up the children for his regular visitation on Saturday, March 9, 2002. Defendant testified he drove to the police station in West Sacramento to inform them of his plans to remove the children, but discovered that the station was closed. A woman in civilian clothes came to the door and told him "'We don't get into that'" and "'[w]e don't care.'"

Defendant communicated to Olga (through third parties) that he would not be returning the children because he had moved to Nevada, which would be a better place for them. Olga called the police.

While Olga was being interviewed by a police officer, defendant telephoned. Defendant stated that he had an order granting custody issued by a Nevada court on March 8, 2002, but he declined to fax a copy of the order to the officer.

Ricky Gore, the officer in charge of the investigation, left a message on defendant's cell phone the evening of March 9, to which defendant promptly replied with a lengthy message of his own. According to Gore, defendant stated he was fed up with the California court system; he had "gotten rid" of all actions

in California; he had tried (unsuccessfully) to serve Olga with court papers; and the children were safe.

Gore returned defendant's call the following morning, Sunday, March 10, 2002, and defendant reiterated the concerns he had stated in his earlier message to Gore. Gore testified that he "did not get any type of impression that [defendant] was removing the kids because they were in danger." Defendant seemed more upset about the March 5 incident from a moral standpoint than from a safety standpoint.

On Monday, March 11, Gore telephoned defendant, who reiterated his frustration with the California courts, and added that he was concerned about the children's welfare because of injuries and illnesses they had suffered due to Olga's inattentiveness, Olga's use of a belt to discipline the children, the domestic violence charge that had been filed against Olga in Nevada, and the March 5 incident. Even though defendant raised issues regarding the children's well-being, Gore did not question defendant further about them because he did not believe they were serious. Defendant stated he would not return the children to California, but he agreed to fax the Nevada order to Gore. Gore obtained an arrest warrant for defendant that same day and had it served by Nevada officers a few hours later while defendant was faxing the Nevada order to Gore.

Defendant was charged with two counts of maliciously depriving a lawful custodian of the right to custody of a child. (§ 278.5(a).) At trial, the People relied on the facts set

forth above.⁴ The defense was based on defendant's reasonable and good faith belief that removal of the children from Olga's care was necessary for their physical and emotional well-being.⁵

⁴ The court instructed the jury with CALJIC No. 9.71 as follows: "[D]efendant is accused of two counts [of] violating Penal Code section 278.5. Every person who takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody or a person -- deprives the lawful custodian of a right to custody is guilty of a violation of Penal Code[] section 278.5, a crime.

"In order to prove this crime, each of the following elements must be proved: Number one, that Olga Neidinger was a lawful custodian of a child; number two, that the defendant took, enticed away, kept, withheld, or concealed that child from the lawful custodian; and number three, [that] the person who took, enticed away, kept, withheld, or concealed the child thereby maliciously deprived a lawful custodian of a right to custody."

⁵ The court instructed the jury on this defense by giving CALJIC No. 9.71.5 as follows: "A good faith reasonable belief of harm is a defense to a claim[ed] violation of Penal Code section 278.5. The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the elements of this defense, namely: that the person who abducted the child had a right to custody of the child; that person also previously had been a victim of domestic violence; that person had a good faith and reasonable belief that the child, if left with the other person -- in this case Olga Neidinger -- would suffer immediate bodily injury or emotional harm; that person thereafter made a report to the office of the District Attorney of the county where the child resided before this action was filed within a reasonable time after the abduction; that report included the abductor's name, the then-current address and telephone number of the child and the abductor, and the reasons the child was abducted; and that person must have commenced a custody proceeding in a court of competent jurisdiction within a reasonable time after the abduction; and that person must have informed the District Attorney's office of any change of address or telephone number for himself and the child.

Defendant requested that the court instruct the jury that he need raise only a reasonable doubt as to the applicability of the defense, but the court declined to give defendant's proposed instruction.⁶

The jury found defendant guilty of both counts. The court suspended imposition of sentence and placed defendant on probation for four years on the condition he serve 240 days in jail and have no contact with Olga and the children.

DISCUSSION

Defendant contends that the trial court erred by instructing the jury that he had the burden of proving, by a preponderance of the evidence, the defense that he acted under a good faith reasonable belief that the children, if left with Olga, would suffer immediate bodily injury or emotional harm. (§ 278.7(a).)

"'Emotional harm' includes having a parent who has committed domestic violence against the person who is abducting the child.

"A reasonable time within which to make a report to the District Attorney is at least 10 days, and a reasonable time to commence a custody proceeding is at least 30 days. These time limitations do not preclude a person acting before 10 or 30 days respectively have passed after the abduction."

⁶ Defendant's proposed instruction would have deleted from CALJIC No. 9.71.5 the statement that "The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the elements of this defense," and substituted the following sentence: "It is the defendant's obligation to proffer some showing on the issue of a good faith reasonable belief of harm. Once such a showing is made, the prosecution then has the burden of proving beyond a reasonable doubt that defendant did not hold such a belief."

In order to resolve this issue, we must determine whether the good faith defense negates an element of the crime, or is collateral to the issue of guilt. If the former, defendant's burden was merely to raise a reasonable doubt with respect to it; if the latter, defendant was properly required to prove the defense by a preponderance of the evidence. The Supreme Court reiterated this distinction several years ago in *People v. Mower* (2002) 28 Cal.4th 457 (*Mower*), where the court wrote: ". . . Evidence Code section 501 provides that, when a statute allocates the burden of proof to a defendant on any fact relating to his or her guilt, the defendant is required merely to raise a reasonable doubt as to that fact. [¶] With respect to many defenses, as 'ha[s] been and [is] extremely common in the penal law' [citation], a defendant has been required merely to raise a reasonable doubt as to the underlying facts. [Fn. omitted.] Such defenses relate to the defendant's guilt or innocence *because they relate to an element of the crime in question.*" (*Mower, supra*, 28 Cal.4th at pp. 479-480.)⁷

⁷ In the accompanying footnote, the court set forth some of these defenses: "Included are the defense of alibi (*People v. Costello* (1943) 21 Cal.2d 760, 765-766 [predating Evid. Code, § 501]); the defense of unconsciousness (*People v. Babbitt* (1988) 45 Cal.3d 660, 689-696); the defense of duress (*People v. Graham* (1976) 57 Cal.App.3d 238, 240); any defense justifying, excusing, or mitigating the commission of homicide (*People v. Bushton* (1889) 80 Cal. 160, 164 [predating Evid. Code, § 501]); defense of another, against a charge of murder (*People v. Roe* (1922) 189 Cal. 548, 560-561 [predating Evid. Code, § 501]); self-defense, against a charge of assault (*People v. Adrian* (1982) 135 Cal.App.3d 335, 337-341); the defense of reasonable and good faith belief in the victim's consent, against a charge

Defendant was convicted of two counts of violating section 278.5(a), which provides: "Every person who takes, entices away, keeps, withholds, or conceals a child and *maliciously* deprives a lawful custodian of a right to custody, or a person of a right to visitation, shall be punished by imprisonment in a county jail not exceeding one year, a fine not exceeding one thousand dollars (\$1,000), or both that fine and imprisonment, or by imprisonment in the state prison for 16 months, or two or three years, a fine not exceeding ten thousand dollars (\$10,000), or both that fine and imprisonment." (Italics added.)

The good faith defense as embodied in section 278.7(a) provides: "Section 278.5 does not apply to a person with a right to custody of a child who, with a good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm, takes, entices away, keeps, withholds, or conceals that child."⁸

of kidnapping (*People v. Mayberry* (1975) 15 Cal.3d 143, 157); the defense of reasonable and good faith belief in the victim's consent, against a charge of rape (*ibid.*); the defense of intent to marry, against a charge of taking a woman for the purpose of prostitution (*People v. Marshall* (1881) 59 Cal. 386, 388-389 [predating Evid. Code, § 501]); the defense of lawful arrest, against a charge of false imprisonment (*People v. Agnew* (1940) 16 Cal.2d [655,] 664-667 [predating Evid. Code, § 501]); and the defense of exemption under state securities laws, against a charge of violating such laws (*People v. Simon* (1995) 9 Cal.4th 493, 501; *People v. Figueroa* (1986) 41 Cal.3d 714, 722)." (Mower, *supra*, 28 Cal.4th at p. 479, fn. 7.)

⁸ The remaining subdivisions of section 278.7 are not at issue. These subdivisions provide:

"(b) Section 278.5 does not apply to a person with a right to custody of a child who has been a victim of domestic violence who, with a good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm, takes, entices away, keeps, withholds, or conceals that child. 'Emotional harm' includes having a parent who has committed domestic violence against the parent who is taking, enticing away, keeping, withholding, or concealing the child.

"(c) The person who takes, entices away, keeps, withholds, or conceals a child shall do all of the following:

"(1) Within a reasonable time from the taking, enticing away, keeping, withholding, or concealing, make a report to the office of the district attorney of the county where the child resided before the action. The report shall include the name of the person, the current address and telephone number of the child and the person, and the reasons the child was taken, enticed away, kept, withheld, or concealed.

"(2) Within a reasonable time from the taking, enticing away, keeping, withholding, or concealing, commence a custody proceeding in a court of competent jurisdiction consistent with the federal Parental Kidnapping Prevention Act (Section 1738A, Title 28, United States Code) or the Uniform Child Custody Jurisdiction Act (Part 3 (commencing with Section 3400) of Division 8 of the Family Code).

"(3) Inform the district attorney's office of any change of address or telephone number of the person and the child.

"(d) For the purposes of this article, a reasonable time within which to make a report to the district attorney's office is at least 10 days and a reasonable time to commence a custody proceeding is at least 30 days. This section shall not preclude a person from making a report to the district attorney's office or commencing a custody proceeding earlier than those specified times.

"(e) The address and telephone number of the person and the child provided pursuant to this section shall remain confidential unless released pursuant to state law or by a court order that contains appropriate safeguards to ensure the safety of the person and the child."

At first glance, the good faith defense seems collateral to defendant's guilt, if only because it is set forth in a statute separate from that defining the crime. Further reflection, though, reveals a much closer question, since the good faith defense appears necessarily related to the element of malice required to establish the crime.

The interplay of these two provisions was addressed, in a related context, in *People v. McGirr* (1988) 198 Cal.App.3d 629, 633-634 (*McGirr*), which considered former section 277, a provision that governed child abduction in the absence of a court order determining the rights to custody and visitation. At the time of the offenses in *McGirr*, former section 277 required that the defendant not only "maliciously" take, detain, conceal, or entice away the child within or without the state, but that the defendant do so "without good cause." (*Id.* at p. 633.)

The issue in *McGirr* was whether the statute was unconstitutionally vague because it failed to provide any definition of what constituted "good cause" for the abduction.⁹ The court rejected this contention, reasoning that "'Good cause'

⁹ Prior to the decision in *McGirr* (but after the acts giving rise to the offense), the Legislature amended former section 277 to define "good cause" as "a good faith belief that the taking, detaining, concealing, or enticing away of the child is necessary to protect the child from immediate bodily injury or emotional harm." (*McGirr, supra*, 198 Cal.App.3d at p. 634.) This definition of good cause is substantially similar to the language defining the good faith defense in section 278.7.

has in fact acquired reasonable certainty by established usage, interpretation and a settled commonsense meaning. Moreover, the term 'good cause' as used in both the preamended and postamended section is further narrowed or circumscribed by the requirement that the taking, detaining, concealment or enticing of the child be done maliciously, i.e., with malice. Malice is defined in section 7, subdivision (4): 'The words "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.' And as Professor Witkin states, 'But such hatred or intent to injure is rarely required; the element of malice in most criminal statutes is satisfied by the intentional doing of the act without justification or excuse or mitigating circumstances ("an intent to do a wrongful act").' [Citation.] *Thus, if one acts maliciously in the taking, concealing, etc. of the child, as established by the record, it seems logical he or she did not have good cause, i.e., acted without good cause.*" (McGirr, supra, 198 Cal.App.3d at pp. 636-637, italics added.)¹⁰

¹⁰ The current good faith defense defines malice similarly. In defining malice, the CALJIC committee wrote: "'Maliciously' means with intent to vex, annoy, or injure another person, or to do a wrongful act." (CALJIC No. 9.72.)

Although *McGirr* makes clear that the element of malice and the good faith defense are related, they are distinguishable, and it is possible, both in theory and in practice, to harbor both mental states. In other words, a defendant may act maliciously while at the same time entertaining a good faith reasonable belief that his actions are necessary to prevent

Four years after the *McGirr* decision, former section 277 received further appellate analysis in *People v. Dewberry* (1992) 8 Cal.App.4th 1017 (*Dewberry*), where the defendant raised the defense of necessity because he believed the abductee's physical safety was in peril. The trial court instructed the jury that the absence of good cause was an element of the offense, and it also instructed the jury that necessity was an affirmative defense which the defendant had the burden of proving by a preponderance of the evidence.¹¹

Dewberry held the instruction regarding the defense of necessity was erroneous. The court noted that former section 277 converted what would normally be an affirmative

immediate physical or emotional harm to the abductee. The present case offers such an example. The evidence disclosed that defendant was dissatisfied with the California court system (and inferably Olga's reliance on it) and that he communicated to her (through third parties) that she would not be seeing the children again when he picked them up to take them to Nevada. This evidence creates a permissible inference of malice. On the other hand, there was evidence that defendant entertained a reasonable and good faith belief that the children would suffer immediate physical or emotional harm if he left them with Olga, by reason of her unstable personality and the potential for a violent confrontation involving third parties. This evidence creates a permissible inference that the taking and withholding was not done in conjunction with a malicious intent.

¹¹ In defining good cause, the trial court in *Dewberry* instructed the jury in accordance with former section 278, which defined good cause as "a good faith and reasonable belief that the taking, detaining, concealing, or enticing away of the child is necessary to protect the child from immediate bodily injury or emotional harm." (*Dewberry, supra*, 8 Cal.App.4th at p. 1020.) This definition of "good cause" is almost identical to the language now contained in section 278.7(a).

defense--the claim of belief in the necessity to protect the child from harm--into an element of the offense, "by a device which is very unusual in the Penal Code, the specification of lack of 'good cause' for the proscribed conduct within the statutory description of the crime." (*Dewberry, supra*, 8 Cal.App.4th at p. 1021.) The court concluded that "the absence of good cause is an element of the offense prescribed by [former] section 277. Accordingly, in attempting to show good cause for taking [the child] to Texas, [the defendant] need only have raised a reasonable doubt on this point. [Citation.] ¶ The court therefore erred in instructing the jury that [the defendant] had to prove the affirmative defense of necessity by a preponderance of the evidence. The instruction was correct on its face, but it was inappropriate in this context because of the statutory conversion of the necessity issue into an element of the offense. The result was error because the instruction increased [the defendant's] burden from raising a reasonable doubt as to good cause to proof of good cause by a preponderance of the evidence. [Citation.]" (*Dewberry, supra*, 8 Cal.App.4th at p. 1021.)

After *Dewberry*, the Legislature revised the provisions regarding child abduction. Prior to the amendment, former section 277 governed child abduction by a person with a right to custody but without a court order, while former section 278.5 governed child abduction by a person having a right to custody pursuant to court order. (Stats. 1992, ch. 163, § 106, p. 784 [former § 277]; Stats. 1989, ch. 1428, § 4, p. 6320 [former

§ 278.5].) The amendment combined these two provisions into one, while making changes to the elements required to establish a violation.¹² (Stats. 1996, ch. 988, §§ 8-9.) Prior to the amendment of former section 278.5, the People were only required to prove that the person with a right to custody pursuant to a court order acted "with the intent to deprive the other person of that right to custody" (See fn. 12, *ante*.) The statute did not include a malice element, nor did it require the People to prove that the defendant acted without good cause. (Former § 278.5, Stats. 1989, ch. 1428, § 4.)

After the amendment, though, the People were required to prove that a defendant with a right to custody (whether by court order or operation of law) "maliciously deprive[d]" a lawful custodian of the right to custody or visitation. (§ 278.5(a), as amended by Stats. 1996, ch. 988, § 9.) In other words, during the consolidation of former sections 277 and 278.5, the malice element of former section 277 was (1) *retained* in the case of child abduction by a person having a right to custody but without a court order, and (2) *added* in the case of a person

¹² Prior to the 1996 amendment, section 278.5 provided: "Every person who has a right to physical custody or of visitation with a child pursuant to an order, judgment, or decree of any court which grants another person, guardian, or public agency right to physical custody of or visitation with that child, and who within or without the state detains, conceals, takes, or entices away that child with the intent to deprive the other person of that right to custody or visitation shall be punished by a specified punishment]." (Former § 278.5, as amended (Stats. 1989, ch. 1428, § 4, p. 6320).)

having a right to custody pursuant to court order. The absence of the good cause element was *deleted* with respect to a person with a right to custody without a court order. With respect to a person having a right to custody pursuant to court order, the deletion of the absence of good cause element of former section 277 made no change in the law. (Stats. 1996, ch. 988, § 9.) As part of the statutory revision, the good faith defense in section 278.7 was added. (*Ibid.*)

CALJIC No. 9.71.5 specifies that the defendant has the burden of proving the good faith defense by a preponderance of the evidence. In their Comment to CALJIC No. 9.71.5, the authors noted that section 278.7 is silent on the issue of burden of proof, and that the preponderance of the evidence burden was selected because the defense appears substantially similar to the defense of necessity, which has been held to be collateral to the issue of guilt (and thereby properly subject to a defendant's proof by a preponderance of the evidence).¹³

¹³ The Comment to CALJIC No. 9.71.5 (Jul. 2004 ed.) states in part: "The legislation is silent as to the issue of burden of proof. However, the code section and the defense appears to be similar to the affirmative defense of necessity. The defendant has the burden of proving the defense of necessity by a preponderance of the evidence. Please refer to the comments to CALJIC 4.43 and 4.44 for authorities. By analogy, the committee has assigned the burden of proof in this instruction to the defendant."

Dewberry supports this conclusion, as do other cases involving the necessity defense.¹⁴

Although it is ordinarily prudent for a trial court to instruct in accordance with CALJIC, the court nonetheless remains obligated to give a correct instruction. "A trial court must instruct the jury on the allocation and weight of the burden of proof [citations], and, of course, must do so correctly. It must give such an instruction even in the absence of a request [citation], inasmuch as the allocation and weight of the burden of proof are issues that 'are closely and openly connected with the facts before the court, and . . . are necessary for the jury's understanding of the case' [citation]." (*Mower, supra*, 28 Cal.4th at pp. 483-484.) "Included within this duty is the ' . . . obligation to instruct on defenses, . . . and on the relationship of these defenses to the elements of the charged offense . . .' where ' . . . it appears that the

¹⁴ "'Necessity is an affirmative public policy defense, in effect a plea in avoidance and justification, which comes into focus only after all elements of the offense have been established.' [Citation.]" (*People v. Youngblood* (2001) 91 Cal.App.4th 66, 73.) Thus, "[t]he necessity defense does not negate any element of the crime but represents a public policy decision not to punish such an individual despite the proof of all the elements of the crime. [Citation.] '[B]y definition, the [necessity] defense is founded upon public policy and provides a justification distinct from the elements required to prove [the crime].' [Citation.] Unlike duress, the necessity defense involves a threat in the 'immediate future' rather than an imminent threat to one's life; the conditions of a necessity defense are not in derogation of the crime's intent element. [Citation.]" (*People v. Beach* (1987) 194 Cal.App.3d 955, 973.)

defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense’ [Citation.]” (*People v. Stewart* (1976) 16 Cal.3d 133, 140 (*Stewart*).)

From this judicial and legislative background, we draw the following conclusions: in order to prove a violation of section 278.5(a), the People are required to prove that a defendant with a right of custody (pursuant to a court order or otherwise) maliciously deprived a lawful custodian of the right to custody or visitation. The deletion of the phrase “without good cause” manifests an intent to eliminate this as an element of the offense of child abduction by a person having a right to custody. The addition of section 278.7 manifests an intent to establish an affirmative defense of good faith for the abduction. (*People v. George* (1994) 30 Cal.App.4th 262, 275 [“where a statute first defines an offense in unconditional terms and then specifies an exception to its operation, the exception is an affirmative defense to be raised and proved by the defendant”].) The defense that the abductor had a reasonable and good faith belief that the abduction was necessary to protect the abductee from immediate bodily injury or emotional harm is akin to the defense of necessity. (*Dewberry, supra*, 8 Cal.App.4th 1017, 1020-1021.) The defendant may properly be required to prove, by a preponderance of the evidence, the defense of necessity and, by parity of reasoning, the good faith defense of section 278.7(a). (*Id.* at p. 1020.)

Where a defense also negates an element of the crime, the defendant need raise only a reasonable doubt as to the defense. (*Mower, supra*, 28 Cal.4th at pp. 479-480.) A good faith and reasonable belief that the child will suffer immediate bodily injury or emotional harm tends to negate the element of the offense that the defendant acted maliciously. (*McGirr, supra*, 198 Cal.App.3d at pp. 636-637.) The trial court was required to give an instruction which clarified the relationship between the good faith defense and the element of malice, so that it was clear to the jury that, to the extent the evidence regarding the good faith defense also showed that defendant acted without malice, he need raise only a reasonable doubt as to that element of the offense. (*Mower, supra*, 28 Cal.4th at pp. 483-484; *Stewart, supra*, 16 Cal.3d at p. 140.)

The People do not respond directly to defendant's argument that the facts he relied on to support his good faith defense also tended to negate the malice element of section 278.5(a). Instead, the People state that "[c]ertainly, if any of the evidence used to prove the affirmative defense of necessity was also relevant to raise a doubt that an element of the offense had been proved, the defense was free to present it and argue its relevance for that purpose." The statement is correct, but incomplete. It fails to address the trial court's responsibility to instruct on the law necessary for the jury's understanding of the case; here, regarding the allocation of burdens of proof to interrelated facts presented. CALJIC No. 9.71.5 does not explain the relationship between malice and

the good faith defense, and the proper burdens of proof with respect thereto.

Turning to the issue of prejudice, we conclude that the conviction must be reversed. We need not resolve whether error of this nature affects the very structure of the trial and is thus reversible per se. (See *Arizona v. Fulminate* (1991) 499 U.S. 279, 291 [113 L.Ed.2d 302]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [124 L.Ed.2d 182].) This is because applying the more forgiving standard of review under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705], we cannot conclude that the court's omission of a clarifying instruction was harmless beyond a reasonable doubt. (*Dewberry, supra*, 8 Cal.App.4th at pp. 1021-1022, applying the *Chapman* standard to an analogous instructional error.)

Defendant presented evidence that his decision to take the children was motivated in part by his fear that they were living in an environment where they would suffer immediate bodily injury or emotional harm. There was evidence which, if believed by the jury, could raise a reasonable doubt as to defendant's intent to act maliciously. Most significant was the altercation involving Dutra and Nelson in Olga's bedroom, where she allegedly directed the two men alternatively to attack each other, while the children were in the adjacent room. The risk of physical injury to bystanders in such circumstances was high. The evidence of Olga's repeated and violent confrontations with defendant gave rise to the inference that these episodes would be repeated with other men in her life. There also was evidence

that she was inattentive to basic safety issues regarding the children, including evidence that she allowed her son to have temper tantrums in the middle of the street, and that the children were acting extremely withdrawn in the months before the abduction. Olga also refused to take any medication to control her mood swings, even though it had been recommended by the psychiatrist who examined her in the family law proceeding. Her refusal to take the medication increased the risk that her behavior would continue or worsen, from which a jury could reasonably infer that the children were at risk emotionally and physically. In light of the substantial evidence tending to negate malice, and the likelihood that the jury misapprehended defendant's burden of proof with respect to the element of malice, we cannot deem the court's omission of a clarifying instruction harmless beyond a reasonable doubt. (CERTIFIED FOR PUBLICATION.)

DISPOSITION

The judgment is reversed.

DAVIS, Acting P.J.

We concur:

RAYE, J.

BUTZ, J.