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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

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NICHOLAS E. CROUCH,

Petitioner,

v.

THE SUPERIOR COURT OF SISKIYOU COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

C079318

(Super. Ct. No.  
YKCRF150264)

Petitioner, defendant Nicholas E. Crouch, has been charged with multiple crimes following an episode of alleged domestic violence and kidnapping. After he unsuccessfully moved to dismiss several charges in the information pursuant to Penal Code section 995, he filed this petition for writ of prohibition and/or mandamus.<sup>1</sup> Petitioner claims there is insufficient evidence supporting a finding of probable cause

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

with respect to (1) one of the two counts of kidnapping charged in the case (§ 207, subd. (a)—count 2), (2) child abuse or endangerment (§ 273a, subd. (a)—count 4), (3) attempting to prevent or dissuade a witness from reporting a crime (§ 136.1, subd. (b)(1)—count 7), and (4) interfering with a wireless communication device (§ 591.5—count 8).

The People concede that only one kidnapping count is supported by the evidence, and we shall accept that concession. The People otherwise claim sufficient evidence supports the finding of probable cause as to the remaining charges. We agree. Accordingly, we shall issue a writ of prohibition directing the superior court to grant petitioner’s motion in part and to dismiss the second kidnapping charge.

## **BACKGROUND**

### **A. Evidence**

The sole evidence presented at the preliminary hearing was the testimony of Deputy Joseph Hopper. Hopper relied upon witness statements, primarily those of petitioner’s girlfriend, who is referred to as “H.A.” in the record. She lived with petitioner at the time of the underlying incident.

She reported that about 1:00 o’clock on the morning in question, she tried to leave the home that she shared with petitioner. He would not let her go; he pushed her and shut the door on her a few times. When she was finally able to get outside, petitioner grabbed her and dragged her to the garage, threw her down, and told her to go back into the house. When she continued to lie on the ground, petitioner picked her up and dropped her repeatedly. He poured water on her. She was pregnant at the time, and he threatened to kick her in the stomach if she did not go inside. Petitioner also took her purse, keys, cell phone, and wallet.

Petitioner’s threat to kick H.A. in the stomach prompted her to go back into the house, where she and petitioner argued before she fell asleep at approximately 3:00 a.m. She awoke at approximately 6:00 a.m. to get her children or child ready for school.

Petitioner drove both H.A. and at least one of her two children to the school, and then he drove H.A. to court for a scheduled mediation at 9:00 a.m.<sup>2</sup> When they arrived at the courthouse for the mediation, H.A. took her purse and opened the car door. But petitioner “smacked the purse into her stomach” and sped away so she could not get out of the vehicle. He drove her to the mountains and told her they would spend the day there. At approximately noon, they returned and had lunch at a Burger King.

After they returned home, petitioner took a shower. While he was showering, H.A. found her wallet, which had a hidden key in it, got her cell phone, and left with her four-year-old son. She drove away, but petitioner pursued in another car. He caught up with her and cut her off, slamming on the brakes in front of her and almost causing her to hit his car. She stopped her car. Petitioner approached and banged on the window of H.A.’s car. She backed up and drove around his car. Again, petitioner pursued, turning across two lanes of traffic in front of her as she tried to get away. A witness corroborated that petitioner drove very fast, passing and turning in front of other cars, and slamming on his brakes. That witness indicated he followed petitioner for several miles until petitioner was eventually pulled over by the California Highway Patrol.

Deputy Hopper spoke with H.A. shortly thereafter. When asked if H.A.’s statement was that petitioner “was in control of her activities from approximately 1:00 a.m.” until the car chase, Deputy Hopper answered in the affirmative. Hopper was asked if this included the meal at Burger King, and he responded that he believed H.A. indicated they ate in the car.

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<sup>2</sup> It is unclear whether petitioner and H.A. accompanied one or both children to school that day. Although Deputy Hopper initially indicated H.A. referred to getting “her kids” ready for school, the deputy later stated, “She just said she was getting her child ready for school and was going to take her daughter to school.” He was later asked to clarify how many “born” children H.A. had, and the deputy indicated he thought she said she had two.

## **B. Magistrate's Ruling and Subsequent Proceedings**

Petitioner was initially charged in the criminal complaint with a single count of kidnapping. At the preliminary hearing, the prosecutor asked the magistrate to bind petitioner over on two counts of kidnapping, “both for the conduct [of] spiriting H.A. [away] in the vehicle as well as dragging her back into the residence after she had left.” The magistrate agreed, concluding there was evidence to support two separate counts, “[o]ne having to do with dragging her in and about the garage and the house and the other having to do with the driving away in the car.”

As to the remaining counts at issue, the magistrate found probable cause to bind petitioner over on the charges. With respect to the charge of child abuse or endangerment, the magistrate observed “that the defendant placed that child in a situation that his personal health was in danger.” The magistrate observed that petitioner drove “recklessly in front of the car, stopping abruptly, and almost driving the car off the road.” As for dissuading a witness, the magistrate observed, “there is really only one obvious motive for the defendant to have taken the phone and that was to prevent her from making contact for her own safety, having threatened her.” The magistrate also commented that there was “adequate evidence” that petitioner “removed a wireless communication device with the intent to prevent the use of this with some assistance . . . .”

Petitioner challenged the determination of probable cause with respect to the aforementioned counts by a section 995 motion. As to the two counts of kidnapping, the trial court noted it reached the same conclusion as the magistrate, emphasizing “the separation of those acts by time, by location, and by actions.” As to the charge of child abuse or endangerment, the court found sufficient evidence for probable cause based on “the specific acts involving the driving conduct and the other acts as set forth in the transcript . . . .” As to dissuading a witness, the court referred to “the detention, the threats, the taking of the keys, [and] the taking of the phone.” Finally, as to interfering

with a wireless communication device, the court observed that it did not “know what other intent could be gleaned from the detention, the taking of the keys, the taking of the wireless communication device.”

**C. Petition for Writ of Prohibition and/or Mandamus**

On May 27, 2015, petitioner filed a timely petition for writ of prohibition and/or mandate in this court. On June 5, 2015, this court issued a stay of further proceedings in the trial court and requested opposition from the Attorney General. After the opposition was filed and the time for petitioner to reply had lapsed, this court advised the parties that it was considering issuing a peremptory writ and permitted further opposition. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171 (*Palma*.) The Attorney General did not file further opposition.

**DISCUSSION**

Petitioner’s section 995 motion alleged that he was committed without reasonable and probable cause and that the information must therefore be set aside as to the counts at issue. (§ 995, subd. (a)(2)(B); see also §§ 871, 872.) “Reasonable and probable cause (Pen. Code, §§ 995 and 999a) and the synonymous term sufficient cause (Pen. Code, §§ 871 and 872) mean ‘ “such a state of facts as would lead a [person] of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused [citation].” ’ [Citation.]

“To withstand scrutiny when attacked on the ground of evidentiary sufficiency, it must appear some showing of the existence of each element of the charged crime was made at the preliminary examination. The showing may be made by means of circumstantial evidence supportive of reasonable inferences. [Citation.] The level of proof need not be sufficient to support a conviction. [Citation.] Indeed, every reasonable inference that may be drawn from the evidence must be drawn in favor of the information.” (*Ortega v. Superior Court* (1982) 135 Cal.App.3d 244, 256.) Further,

“[w]e are not at liberty to select from available inferences,” provided they are, of course, reasonable inferences as explained above. (*Id.* at p. 257.)

The trial court does not make credibility determinations when considering a section 995 motion; the magistrate who presided at the preliminary hearing is the finder of fact. (*People v. Laiwa* (1983) 34 Cal.3d 711, 718, superseded by statute on another ground as stated in *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223.) Accordingly, we directly review the ruling of the magistrate holding a defendant to answer. (*People v. Superior Court (Bell)* (2002) 99 Cal.App.4th 1334, 1339.) We shall address each of the disputed charges in turn.

**A. Kidnapping (Count 2)**

As petitioner and real party in interest both correctly observe, kidnapping is a continuous offense during the entire period of the detention. (See, e.g., *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1334-1335; *People v. Cortez* (1992) 6 Cal.App.4th 1202, 1209.) Our Supreme Court has confirmed that the crime of kidnapping continues until the kidnapper “releases or otherwise disposes of the victim and has reached a place of temporary safety.” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1159.)

Petitioner contends, based on this authority and the evidence presented, that the entire sequence of events supports only one count of kidnapping. Petitioner observes that there is no indication he released H.A. during the time period at issue and that he in fact remained in H.A.’s presence and control overnight and during the following day, when he drove her to the school, the courthouse, and the mountains. The People concede the issue, agreeing the motion to dismiss should have been granted as to the second count of kidnapping. We accept the People’s concession.

**B. Child Abuse or Endangerment (Count 4)**

There are alternative methods of proving child abuse, some of which require physical or mental suffering to the child, evidence of which is absent here. The current case involves whether there is sufficient evidence that petitioner, “having the care or

custody” of a child, “willfully” permitted the child to be placed in a situation in which the child’s person or health was endangered. (See § 273a, subd. (a).) Addressing this theory of child endangerment, petitioner complains there is an absence of evidence establishing that (1) he had undertaken a relationship of care or custody over the child, and (2) he acted “willfully” in placing the child in danger in that the evidence did not establish petitioner knew H.A. had taken the child with her when she left in the car. We address each of these issues in turn.

### **1. Care or Custody**

“The terms ‘care or custody’ do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver.” (*People v. Cochran* (1998) 62 Cal.App.4th 826, 832.) An affirmative expression of intent to undertake such duties is unnecessary. (*People v. Perez* (2008) 164 Cal.App.4th 1462, 1476.) Consequently, evidence of care or custody may be established by a defendant’s conduct and the circumstances of his or her interaction with the child, including, for example, incidents in which the defendant is left alone with the child. (See *ibid.*; *People v. Culuko* (2000) 78 Cal.App.4th 307, 335.)

We agree with the People that there is at least sufficient evidence under the deferential “probable cause” standard to support an inference of a relationship of care or custody. The child was at the residence where the first incidents occurred, the same residence where both petitioner and H.A. were apparently living. A fair reading of the record supports an inference that H.A.’s children stayed with petitioner and H.A. at least part of the time. It appears that at least one or both children had been at the house when H.A. attempted to leave on the night before she fled by car. As the People observe, there is no indication H.A. attempted to take any of her children with her at that time, suggesting they would otherwise have remained with petitioner if he had not prevented her from leaving. Moreover, H.A. indicated that when she awoke in the morning she was getting at least one or both of the two children ready for school, and that petitioner drove

them to the school. Although the victim of the child abuse count might not have been the child driven to school by petitioner, the act of driving at least one of the children to school provides evidence indicating a caregiving relationship toward H.A.'s children.

## **2. Willfully**

Turning to the issue of whether petitioner acted "willfully" in placing H.A.'s young son in danger, we likewise conclude the evidence is sufficient for purposes of probable cause. It appears from the limited record that petitioner had an opportunity to know who was present at the home, at least before he took a shower. Even assuming that he left quickly after ascertaining H.A. had fled, he might have had time to realize that she had left with the child. But even if he did not notice the child's absence, there is evidence he later approached and struck the window of H.A.'s car after forcing her to stop. At this point, it is certainly reasonable to infer petitioner had an opportunity to observe that the child was in the car. The evidence indicated he continued to chase H.A.'s car even after this incident, which likewise placed the child in a situation of danger even if petitioner was not ultimately successful in again forcing H.A. to stop her car.

## **C. Dissuading a Witness (Count 7)**

The crime of dissuading a witness pursuant to section 136.1, subdivision (b)(1) requires a showing that " '(1) the defendant has attempted to prevent or dissuade a person (2) who is a victim or witness to a crime (3) from making [a] report . . . to any peace officer or other designated officials.' [Citation.] The prosecution must also establish that 'the defendant's acts or statements [were] intended to affect or influence a potential witness's or victim's testimony or acts.' [Citation.] In other words, 'section 136.1 is a specific intent crime.' [Citation.]" (*People v. Navarro* (2013) 212 Cal.App.4th 1336, 1347.)

Preliminarily, petitioner emphasizes there is no indication H.A. was attempting to report what was happening to the authorities. But the People correctly observe an actual attempt to report a crime is not itself an element of the crime, which is true. The element

at issue is petitioner's specific intent. Circumstances bearing on whether the victim attempted to report a crime by calling for help are, of course, relevant to determining that intent. But they are not essential. As the People observe, a defendant may act to dissuade a victim or witness from reporting a crime in anticipation that the victim or witness will attempt to report it.

Turning to the crux of the matter, petitioner complains there was no evidence from which to infer the requisite intent, as the only relevant evidence consists of a description of petitioner's act of taking the phone. Petitioner claims it is pure speculation as to what his intent was under the circumstances and that an equally valid "guess" was that he took her purse, with her personal effects contained therein, to prevent her from leaving. In this respect, Deputy Hopper was asked at the preliminary hearing if H.A. spoke to him about petitioner "doing anything" with her cell phone while she was in the garage. He answered, "Yeah, she said that [petitioner] took her phone and wallet and keys -- her purse and keys, wouldn't let her have them back." It is not clear from this response where H.A.'s phone was in relationship to her other personal effects and what made H.A. aware that petitioner had taken the phone and other items.

The People claim there is a reasonable inference petitioner took the phone to prevent H.A. from informing the police that petitioner would not let her leave the house. The People suggest H.A. did not have the opportunity to call since petitioner prevented her and observe, "The act of taking the cell phone was contemporaneous with the physical violence petitioner inflicted on the victim." The People argue that characterizing the act of taking the items as one of dominance over H.A. is not mutually exclusive with the intent required for dissuading a witness. The People explain that one method "of making the victim feel helpless and controlling them is by taking their cellphones so they cannot call the police."

In considering this issue, it is important to consider that specific intent is often established by inferences based on a defendant's acts. Prior case law has emphasized

with respect to “the specific intent prong that ‘[i]ntent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense.’ [Citation.] ‘Evidence of a defendant’s state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.’ [Citation.]” (*People v. Rios* (2013) 222 Cal.App.4th 542, 567-568.)

Although there are multiple inferences that may reasonably arise from the taking of H.A.’s cell phone, one such inference is that petitioner took it with the intent to prevent her from reporting petitioner’s acts and summoning help. We are not at liberty to draw from competing inferences in reviewing the evidence presented at the preliminary hearing. For present purposes, we do not and need not hold that this evidence is sufficient as a matter of law to conclude beyond a reasonable doubt that petitioner had the requisite specific intent. Undoubtedly, the issue will be more fully explored at trial.

**D. Interfering With a Wireless Communication Device (Count 8)**

The last count petitioner challenges, interference with a wireless communication device, is a misdemeanor. It applies to a “person who unlawfully and maliciously removes, injures, destroys, damages, or obstructs the use of any wireless communication device with the intent to prevent the use of the device to summon assistance or notify law enforcement or any public safety agency of a crime . . . .” (§ 591.5.) Petitioner raises similar points to those regarding count 7, challenging the evidence concerning the requisite intent. For the same reasons that we find sufficient evidence establishing probable cause for dissuading a witness, we likewise conclude there is probable cause to support this charge.

**DISPOSITION**

Having complied with the procedural requirements for issuance of a peremptory writ in the first instance, we are authorized to issue the peremptory writ forthwith and without oral argument. (See *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1243-1244; *Palma, supra*, 36 Cal.3d 171.)

Let a peremptory writ of prohibition issue directing respondent Superior Court of Siskiyou County to vacate its order denying petitioner Nicholas E. Crouch's section 995 motion and to enter a new and different order that grants the motion with respect to count 2 of the information and dismisses that count. Upon finality of this decision or upon stipulation of the parties, the stay previously issued by this court is dissolved.

\_\_\_\_\_ RAYE \_\_\_\_\_, P. J.

We concur:

\_\_\_\_\_ HULL \_\_\_\_\_, J.

\_\_\_\_\_ HOCH \_\_\_\_\_, J.