

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KEIWAUN KESEM HARVEY,

Defendant and Appellant.

F061691

(Super. Ct. No. BF132538A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John S. Somers, Judge.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Leanne Le Mon and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Keiwaun Kesem Harvey (appellant) guilty of one count of maliciously depriving a lawful custodian of the right to custody of a child (Pen. Code, § 278.5)¹ and he was sentenced to two years in state prison.

On appeal appellant argues that the trial court prejudicially erred when it allowed evidence of the child's condition at the time she was returned because it was irrelevant and inflammatory, and when it failed to sua sponte instruct on mistake of fact. He also contends that the prosecutor committed prejudicial misconduct during closing argument. We disagree and affirm.

STATEMENT OF THE FACTS

In May 2010, Pamela C. lived with her four grandchildren, including her two-year-old granddaughter E., in Bakersfield. Appellant is E.'s father; Robert L. is the father of the other three children, but is not a party to this appeal.

In August 2009, Pamela C. initiated guardianship proceedings for all of her grandchildren, including E., because Pamela C.'s daughter, the mother of the children, was not caring for them. Pamela C. was concerned about appellant's ability to care for E. and to provide for her financially.

According to Pamela C., Robert L. opposed the guardianship proceedings for his three children, but appellant "didn't have a problem with [E.'s guardianship]" and said to Pamela C. "[T]hey're better off with you anyway." Appellant did not attend the guardianship proceedings, although both Pamela C. and appellant's girlfriend at the time, Ronnysha Benton, encouraged him to do so. The trial court took judicial notice that Pamela C. was appointed guardian of E. on September 29, 2009.

After the guardianship proceedings were initiated, appellant's relationship with Pamela C. remained friendly, but his visits with E. were sporadic. Appellant would call

¹ All further statutory references are to the Penal Code.

from time to time and, at his request, Pamela C. would drop E. off at either appellant's mother's house or at Benton's house. E. infrequently spent the night with appellant.

In April and early May 2010, E. was healthy, well-fed, and had no visible injuries. She was happy and "talkative" and knew her numbers and colors. She was toilet trained, but wore diapers at night.

On May 17, 2010, at 5:00 p.m., appellant called Pamela C. and asked if he could take E. for a visit. She agreed and appellant came and took the child, saying he was going to take her to the store. He did not take any of her clothing, diapers, toys or immunization records. Later that night, Pamela C. called appellant to say it was getting late. Appellant asked to take E. to his mother's house. Still later, Pamela C. called again and, after appellant requested, agreed that E. could spend the night with him at his mother's house. Pamela C. understood that she would pick E. up in the morning to take her to daycare on her way to work.

The next morning, Pamela C. called appellant, who said he would keep E. for the day and Pamela C. could pick her up after work. When Pamela C. called appellant after work, she agreed to appellant's request that he keep E. for another night.

The following day after work, Pamela C. called appellant, who told her to pick up E. the next day. Pamela C. questioned whether everything was alright, and appellant assured her that it was.

The next morning, Pamela C. called appellant, who said she (Pamela C.) was going to be "upset" because he was in Fresno with E.. Pamela C. discussed with appellant the fact that he was not supposed to take E. out of town and asked what he was doing there. Appellant said he was visiting his girlfriend's brother.

Pamela C. told appellant she needed to go to work, but that she would then come to Fresno to pick up E. and asked appellant how to get there. Appellant told her to take the Jensen exit off of Highway 99 and then call him. After work on May 21, Pamela C. picked up her other grandchildren from daycare and drove to Fresno. Once there, she

called appellant. Appellant said he would put someone on the phone to tell Pamela C. how to get to the house, but he hung up instead.

Pamela C. repeatedly and unsuccessfully attempted to call and text appellant, but eventually drove back to Bakersfield. Back in Bakersfield, Pamela C. called appellant's grandmother; went to appellant's girlfriend's mother's house; and attempted to call both appellant's and his girlfriend's phones, but both were disconnected. She then contacted the Bakersfield Police Department on May 23.

Pamela C. again went to Fresno on May 25 after she obtained an address for appellant's girlfriend's brother. En route, she called the Fresno Police Department, and an officer met her near the residence on Lily Avenue, in Fresno. Pamela C. had her custody order with her. Although an officer spoke to someone at that address, they found neither appellant nor E..

On May 26, Police Officer Joshua Escobedo contacted various people connected to appellant. He told each person he interviewed that this was a case of possible parental concealment, mentioned that he believed Pamela C. was E.'s guardian, and asked each person to convey to appellant that Escobedo was looking for him. That evening, Escobedo received a call from appellant. Escobedo told appellant that it appeared Pamela C. was E.'s legal guardian, that appellant's actions were illegal, and that he needed to come to the police department to speak with him.

Appellant told Officer Escobedo that he was not going to come to the Bakersfield Police Department because he was in Sacramento and that he did not have to bring E. back. Appellant said he would instead go to the Sacramento Police Department and explain his side of the story. Appellant did not provide Escobedo with a phone number or address, although the officer requested both.

On May 27, 2010, a television story aired regarding the present case, with pictures of appellant and E. A day later, appellant called Detective Herman Caldas of the Bakersfield Police Department, who was assigned to the case, and told him he had

custody of E. By this point, Caldas had confirmed that Pamela C. had custody of E., informed appellant of such, and explained that appellant needed to return the child. Appellant did not provide Caldas with an address or telephone number, stating he was “here and there.”

On another occasion, Pamela C. again went to Fresno, this time with her mother, again informing the police when she did so. At the time, there was a warrant for appellant’s arrest, but the residence was unoccupied.

There was further television coverage of the story on June 25, 2010. Appellant again called Detective Caldas, who told appellant there was a warrant out for his arrest and that he needed to turn himself in and return the child.

On July 1, 2010, someone called Pamela C. to say that she had E. at a nail shop near Wal-Mart, in Bakersfield. Pamela C. drove to the location and saw E. standing near a female in front of the nail shop.

Pamela C. took E. to the daycare center where she had previously been cared for by Valerie Grissom, a friend of Pamela C.’s. Pamela C. and Grissom examined E. and found her forehead swollen, her ears pierced and draining, and she was wet, as if she had urinated on herself. She had bruises on her face, arms, chest, genitals, back and legs.

Pamela C. took E. to Dr. Emad Shafic, her regular pediatrician. Dr. Shafic had not previously seen traumatic injuries on E. He diagnosed bruises, bronchitis, and a urinary tract infection. He prescribed medications and made a Child Protective Services report. Two police officers took photographs of E.’s injuries. One of the officers thought that some of the injuries appeared to have been caused by a belt.

Grissom testified that when E. returned to daycare she was very thin, coughed, and had congestion in her chest. For about three weeks after E.’s return, she asked for food constantly. She did not know her colors, letters, or shapes, which she had known when she left, and she appeared distant and withdrawn.

Documents from the Fresno County Department of Social Services showed that appellant applied for aid on May 17, 2010, and signed documents under penalty of perjury on May 18, 2010. Notes in appellant's application file stated that E. had lived with appellant since Mother's Day and that appellant made no mention of having a girlfriend in the house. The listed addresses were in Fresno: the first on South Lily and then on North Diana.

Defense

An intake worker for the Fresno County Department of Social Services testified that appellant came in for an appointment on May 18, 2010, with his daughter and girlfriend. On the application, the intake worker noted that E. had lived with appellant since Mother's Day and that he lived on Lily. The intake worker sent appellant to Family Support and later, at appellant's request, to a homeless program for a rent deposit. In June, appellant came in and said he had found an apartment on Diana Avenue.

Appellant testified in his own behalf that he had been convicted of petty theft in 2005, criminal threats and spousal battery in 2007, and spousal battery in 2009. According to appellant, E. was born in July 2007, and appellant last saw E.'s mother about a year before trial. After E.'s mother moved away, appellant and Pamela C. shared responsibility for E.'s care. Although appellant never provided Pamela C. cash, he bought E. clothing, diapers, shoes, and Easter baskets. He obtained money for these items from relatives and "under the table" jobs.

In September 2009, appellant was living mostly in Visalia and E. was living with Pamela C. in Bakersfield. At some point, appellant became aware that Pamela C. was seeking guardianship of E.'s half siblings, but he was not aware that Pamela C. was seeking guardianship of E. Appellant did not recall being served with paperwork in September of 2009. According to appellant, no one ever handed him any paperwork, nor did his girlfriend at the time ever mention any guardianship proceedings.

Between September 2009, when appellant broke up with Benton, and February of 2010, when appellant began dating and living with Ronnisha Norris, appellant saw E. three or four times a week. During this time period, E. stayed overnight with appellant “a few nights here and there.”

In March 2010, appellant moved to a two-bedroom apartment with Norris, Norris’s sister and her boyfriend. A week later six others moved in, but two moved out, making a total of eight people in the apartment. Appellant claimed that E. stayed with him in this apartment in April for two weeks and that Pamela C. did not object. Appellant testified that E. did not go to daycare during those two weeks.

After Mother’s Day, May 9, 2010, appellant had E. fulltime and he, Norris and E. moved to Fresno. According to appellant, Pamela C. either knew appellant was considering locating to Fresno or he had told her he was moving there. In Fresno, they first stayed with Norris’s brother until June 1, 2010, when they found an apartment on Diana. Appellant submitted his first application for aid on May 17, 2010, and interviewed with the intake worker the following day. Appellant acknowledged that he did not reveal on his application that he was living with Norris, who was receiving general assistance.

Appellant was aware that the police had come twice to the residence on Lily, but he never saw them nor spoke to them in person. Appellant called Officer Escobedo after a family member told appellant he had been on the news. According to appellant, Escobedo told him he was investigating a possible child abduction, but that the officer never told him that Pamela C. had guardianship of E., only that the officer told him Pamela C. “mentioned something about it.” Appellant told Escobedo that Pamela C. “gave [appellant his] daughter,” she knew he was moving to Fresno, he did not kidnap his daughter, and he was going to court to file the proper paperwork to keep his daughter in his custody. Appellant did not recall whether he told the officer that he would go to the Sacramento Police Department to explain his side of the story.

According to appellant, after he was informed that Pamela C. had papers saying she had guardianship, he filed papers for custody and faxed them to a detective and Escobedo. After this, appellant heard nothing more, so he assumed his paperwork had been received.

Appellant spoke to Detective Caldas in late June, two or three days before coming to Bakersfield to turn himself in. He did not recall speaking to the detective before this date. Caldas told appellant that a warrant had been issued for his arrest, that the papers he had faxed were irrelevant, and that appellant needed to return to Bakersfield to turn himself in and hand over E.

Appellant returned to Bakersfield two or three days later, made arrangements for a family friend to pick up E. and return her to Pamela C., went to arrange bail, and then turned himself in. According to appellant, he brought E. back to Bakersfield “[b]ecause I wasn’t guilty. What was the point of running if I felt I didn’t do anything wrong?”

Appellant explained that injuries to E.’s face occurred when she fell while they walked to a nearby store, but she did not have the bruises when he returned her. Appellant claimed not to have ever hit E. with a belt and never saw anyone else do so. E. had a cough for which he took her to a clinic two or three weeks before returning her, but he was unable to obtain medical treatment because he did not have her insurance information.

Appellant filed a petition to terminate guardianship on July 8, 2010. In the declaration, he stated that he lived in Fresno County and that E. had lived with him for the previous four months. He admitted at trial that the declaration was false.

Rebuttal

Grissom, E.’s child care provider, testified that E. was absent for one week in late April, but that she was present between April 7-23, and May 1-17, of 2010.

Benton, appellant’s ex-girlfriend, and Pamela C.’s mother both testified that appellant was served with guardianship papers. Benton testified that she read the papers

with appellant when he was served and that they had discussed the issue with Pamela C. Benton testified that she told appellant he should respond to the papers.

DISCUSSION

I. EVIDENCE OF E.'S CONDITION

Appellant argues that admission of evidence concerning E.'s physical condition when she was returned was irrelevant and prejudicial. We disagree.

Procedural Background

The prosecutor, in a written motion in limine, sought to introduce evidence that (1) appellant sought and obtained public assistance immediately after taking E. and (2) E., who was healthy, well-fed, and physically uninjured when taken, was “sick, under-fed, withdrawn, and covered front to back with bruises when she was returned.” The prosecutor proffered the evidence to (1) negate a section 278.7 legal necessity defense (acted as he did, with a good faith and reasonable belief, to prevent harm to E.) and (2) show that appellant’s actual motive in taking E. was to obtain welfare payments, and dispel any notion that he was motivated by his love or caring affection for E.

Appellant filed a motion in limine seeking to exclude medical records and photographs of E. on the grounds that it was irrelevant and unduly prejudicial under Evidence Code section 352.

The trial court heard both motions together. Initially, defense counsel stated that he did not intend to pursue a necessity defense.² In response, the prosecutor argued that the physical condition evidence was still needed to counter defendant’s allegations that he was a good and caring father. Defense counsel stated that he did not intend to present evidence that appellant was a good father or not, only that appellant “did not know a temporary guardianship had been obtained [so] that he did not have a right to have possession of the child.” According to defense counsel, evidence of E.’s condition was

² Defense counsel also stated that he did not object to the introduction of public assistance evidence.

“basically” prejudicial character evidence used “to smear [appellant] to inflame the passions of the jury” As defense counsel argued, the issue of E.’s physical condition was “not relevant to the issue of malice as it applies as it’s used in [section] 278.5.” In other words, whether appellant did anything which led to E.’s condition while she was in his custody is irrelevant to section 278.5. The prosecutor disagreed, stating that the Penal Code’s definition of malice (§ 7, par. 4) is, “among other things, an intent to do a wrongful act,” and appellant’s action of taking E. in order to collect welfare benefits was malicious. Neither party argued at the hearing that the medical evidence was relevant or not relevant to the issue of motive.

The trial court granted the People’s request to introduce evidence regarding public assistance and E.’s medical condition and ruled as follows:

“[A]s to evidence regarding the child’s condition, again it does appear to the Court to be relevant to demonstrate that motive and support the contention that the act was done with malice, that is an intent to do a wrongful act, to injure, vex or annoy. That could relate to the child or someone else. That’s a disputed issue in this case, of course. [¶] [Appellant’s] contention is that he had no intention to do a wrongful act and was unaware of the [guardianship] order. He can present that defense, but I think the People are entitled to present evidence that circumstantially rebuts that and show it was done with malice and, if done, was in fact done for another reason.”

The court essentially concluded that evidence of E.’s physical condition was relevant to the issue of motive for taking E. and for the issue of malice.

In addressing the issue of prejudice, the trial court stated that, while the evidence “does have some prejudicial effect under Evidence Code Section 352,” as “some people at least will tend to have a prejudiced attitude toward ... someone[] seeking public assistance” and “certainly to the evidence relating to the child’s condition,” it was nevertheless “not particularly inflammatory and not exceptionally prejudicial, and the Court does believe that the probative value of it outweighs the prejudicial effect.” Finally, the trial court concluded by stating: “Given that malice ... is the issue, or

primary issue, which is going to be disputed in this case, I will permit that evidence to be admitted.”

Applicable Law and Analysis

Relevant evidence is evidence, “including evidence relevant to the credibility of a witness or a hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) While trial courts maintain broad discretion to determine evidentiary issues, it cannot admit irrelevant evidence. “Irrelevant evidence must be excluded; a trial court has no discretion to admit it.” (*People v. Thompson* (1981) 127 Cal.App.3d 13, 18.)

Section 278.5 provides in subdivision (a) that it is a crime when a person “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” Section 7, paragraph 4, states that the words “‘malice’ and ‘maliciously’ import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act” “Malice” is an element of a section 278.5 violation. (*People v. Neidinger* (2006) 40 Cal.4th 67, 78.) The parties on appeal spend a great deal of effort discussing whether the medical condition of E. is relevant to the issue of “malice” as defined in section 278.5 and section 7, paragraph 4, relying on various interpretations of earlier statutes and cases. We find the answer to that question far from clear.

However, we need not resolve that relevancy issue since we conclude the evidence of E.’s physical condition upon her return was relevant to the motive issue. As the jury was instructed, having a motive may be a factor tending to show guilt. (CALCRIM No. 370.) “‘The test of relevance is whether the evidence tends “‘logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive.’”” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1117.) Although not an element to be proved by the People, motive is always a relevant fact in a criminal prosecution. (*People v. Sykes* (1955) 44 Cal.2d 166, 170.) The trial court correctly ruled that evidence of E.’s

physical condition upon her return was relevant to prove her abduction was motivated by appellant's quest for welfare payments and not by any love or affection for his daughter.

We next determine whether the evidence was admissible under Evidence Code section 352, which provides that the court, in its discretion "may 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 issues, or misleading the jury."

"The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" [Citation.]' [Citation.]" (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.)

Evidence is not inadmissible under Evidence Code section 352 unless the probative value is "substantially" outweighed by the probability of a "substantial danger" of undue prejudice or other statutory counterweights. Our Supreme Court has emphasized the word "substantial" in Evidence Code section 352. (*People v. Tran* (2011) 51 Cal.4th 1040, 1047 ["But Evidence Code section 352 requires the exclusion of evidence only when its probative value is *substantially* outweighed by its prejudicial effect"]; cf. *People v. Geier* (2007) 41 Cal.4th 555, 585.)

Trial courts enjoy "broad discretion" in deciding whether the probability of a substantial danger of prejudice substantially outweighs probative value. (*People v. Michaels* (2002) 28 Cal.4th 486, 532; *People v. Memro* (1995) 11 Cal.4th 786, 866.) A trial court's exercise of discretion under Evidence Code section 352 will not be reversed

unless it “exceeds the bounds of reason, all of the circumstances considered.” (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

Here we find that the trial court did not abuse its discretion in concluding that the probative value of E.’s condition was not “substantially outweighed” by a “substantial danger” of undue prejudice. While evidence of E.’s condition would undoubtedly be disturbing to most people, we cannot say that it was substantially more prejudicial than probative, for its value in establishing appellant’s motive to take, detain and conceal E. was significant. The court balanced the evidentiary worth against the potential to cause prejudice and determined that the former substantially outweighed the latter. Its decision was reasonable. (*People v. Memro, supra*, 11 Cal.4th at p. 866.)

But even if we assume, for purposes of argument, that the trial court erred in admitting the physical condition evidence, over an Evidence Code section 352 objection, the court’s determination will not be overturned unless it proves prejudicial.

“No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (*People v. Watson* (1956) 46 Cal.2d 818, 834, italics omitted (*Watson*).)

The court in *Watson* determined that a “miscarriage of justice” should be declared only when the court, “‘after an examination of the entire cause, including the evidence’ is of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*Id.* at p. 836.)

Assuming the jury adopted the negative inference from the evidence, we nevertheless conclude appellant would not have obtained a different verdict absent the error. The evidence against appellant was strong. Pamela C., Pamela C.’s mother, and Benton, appellant’s girlfriend at the time, all testified that appellant was properly served with notice of guardianship. Officer Escobedo told appellant that what he was doing was

wrong and that appellant needed to come to the Bakersfield Police Department to “speak with us.” Detective Caldas twice told appellant that Pamela C. had custody of the child and that appellant needed to return her.

Appellant took E. from Pamela C. without any of her clothing, diapers, toys or immunization records. When appellant took E., he said he was taking her to the store and would return her that same day, but he continued to postpone the return date, and eventually took her to Fresno, which appellant knew would “upset” Pamela C. When Pamela C. spoke with appellant, she told him he was not supposed to have taken E. out of town. When she said she was coming to Fresno to pick E. up, appellant said he would let Pamela C. know how to find him, but he hung up the telephone instead and further calls to him were unsuccessful. Appellant did not return to the police department, as Officer Escobedo had requested, despite the officer’s statement that he needed to do so. Appellant did not provide Pamela C., Escobedo or Detective Caldas with an address or contact number. Instead, appellant applied for aid for himself and E., and did not mention on his application that he was living with Norris at the time.

In sum, the evidence clearly shows that appellant knew he did not have rightful custody of E., and it is not reasonably probable the jury would have reached a different verdict, even absent evidence of E.’s condition. As such, any error in admitting this evidence was harmless under *Watson, supra*, 46 Cal.2d at page 836.

II. MISTAKE OF FACT INSTRUCTION

Appellant’s defense at trial was mistake of fact---that he did not know there was a valid guardianship order in favor of Pamela C., so he could not have formed the malicious intent to violate section 278.5. Appellant contends that the trial court prejudicially erred in failing to sua sponte instruct the jury on mistake of fact, which is an affirmative defense. (*In re Jennings* (2004) 34 Cal.4th 254, 280.) We reject his contention.

Mistake of fact is a defense where the mistake negates any criminal intent required for a crime. (§ 26, class three.) CALCRIM No. 3406, the standard jury instruction on this mistake of fact defense, was not given to the jury and does not appear in the list of jury instructions requested by either party. Nor does it appear the instruction was discussed during the jury instruction conference. The unmodified instruction provides:

“The defendant is not guilty of _____ <insert crime[s]> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact. [¶] If the defendant’s conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ <insert crime[s]>. [¶] If you find that the defendant believed that _____ <insert alleged mistaken facts> [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for _____ <insert crime[s]>, you must find (him/her) not guilty of (that crimes/those crimes).” (CALCRIM No. 3406.)³

Maliciously depriving a lawful custodian of her right to custody is a specific intent crime in violation of section 278.5. (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 5, p. 206.) Therefore, an actual mistake of fact need not be objectively reasonable for the defense to apply. (*Russell, supra*, 144 Cal.App.4th at p. 1426.)

The court “must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial.” (*People v. Ervin* (2000) 22 Cal.4th 48, 90.) However, the obligation to instruct on a defense such as mistake of fact arises “only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense the defense is not inconsistent with the

³ The bench notes instruct: “If the defendant is charged with a general intent crime, the trial court must instruct with the bracketed language requiring that defendant’s belief be both actual and reasonable. [¶] If the mental state element at issue is specific criminal intent or knowledge, do not use the bracketed language requiring the belief to be reasonable.” (Judicial Council of Cal., Crim. Jury Instns. (2012) Bench Notes to CALCRIM No. 3406, p. 995; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1426 (*Russell*).)

defendant's theory of the case.'" (*People v. Barton* (1995) 12 Cal.4th 186, 195.) With specific intent crimes, the instruction is only appropriate where the evidence supports a reasonable inference that the claimed mistake was made in good faith, even if unreasonable. (*Russell, supra*, 144 Cal.App.4th at p. 1427.)

In *Russell*, the Court of Appeal found the trial court prejudicially erred by not instructing on mistake of fact based on "relatively strong" evidence that the defendant believed a motorcycle that he took was in fact abandoned, and that he held the belief in good faith. (*Russell, supra*, 144 Cal.App.4th at p. 1433.) This evidence included the poor condition of the motorcycle, the fact that the defendant found it parked near some trash bins by a repair shop, and the defendant's testimony, corroborated by other witnesses, that he asked an employee of the shop if the motorcycle had been left for repair and was told that it was not. Before the owner reported the motorcycle stolen, the defendant also had been stopped for a traffic violation, and he told the citing officer he found the motorcycle and intended to register it in his name. The citing officer ran the vehicle identification number to confirm that the vehicle had not been reported stolen and, at the defendant's request, gave defendant the name of the registered owner. Before he was arrested, the defendant made an attempt to find the registered owner in the hope that he would sign the vehicle over. (*Id.* at pp. 1422-1423, 1433.) In light of the relative strength of the evidence that the defendant believed in good faith the motorcycle had been abandoned, the court concluded it was reasonably probable the result would have been different had the court instructed on mistake of fact. (*Id.* at p. 1433.)

Appellant's defense was based on his alleged mistaken belief that he could legally take custody of E. The issue here is whether there was sufficient evidence that appellant held a good faith belief, whether reasonable or unreasonable, that he had a right to custody of E., which would require the trial court to instruct on the mistake of fact defense. We conclude there was not. There is no sua sponte duty to instruct on a defense

if the evidence of that defense is minimal or insubstantial. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145; *Russell, supra*, 144 Cal.App.4th 1415, 1424.)

Appellant's defense at trial was that the witnesses against him lied because they had something to gain (Pamela C. and Grissom) and that the officers involved in the case had done sloppy police work. Defense counsel also argued that appellant "was not aware that guardianship had been granted with regard to [E.]" and that he moved to Fresno because "he thought he had every right to because it was his daughter, blood relation." Defense counsel argued that, although appellant became aware that there might be an issue when Officer Escobedo contacted him, he thought the matter was cleared up when he faxed a document seeking custody of the child to the officer. And when appellant realized there was a warrant out for him, appellant turn himself in "[w]ithin days." Defense counsel argued that appellant's actions were "not the actions of someone who was acting with maliciousness."

Here, it is undisputed that appellant took E. and moved with her to Fresno. Even crediting appellant's self-serving statement that he was not served with notice of the guardianship proceedings, despite contrary testimony from Pamela C., Pamela C.'s mother, and Benton, appellant did not make a sufficient showing that he was, in good faith, unaware of Pamela C.'s guardianship. Appellant himself testified that he knew officers had come by his residence twice; he spoke to Officer Escobedo over the phone after hearing from a family member that he had been in the news; and he spoke with Detective Caldas, who said that the papers he had previously faxed were irrelevant and that he needed to turn himself in. But even after the telephone call with Caldas, appellant still did not provide a phone number or address for himself and did not return to Bakersfield until several days later. According to appellant's own testimony, he was under notice of Pamela C.'s guardianship, at the very latest, when Caldas told appellant that the papers he had faxed were ineffectual, but he still kept E. from Pamela C. for several more days.

Other evidence at trial of appellant's conduct does not comport with his claim of good faith. The manner in which appellant took E., first promising to return her, then postponing her return for days, and eventually concealing her from Pamela C. and the law belies his protestation of good faith. If appellant had truly believed that he had rightful custody of E., he would not have acted as he did: mislead and hide from Pamela C. and the law, even moving to another city. By acting as he did, he only succeeded in demonstrating his consciousness of guilt. As the court in *Stewart* stated: "Whether a claim is advanced in good faith does not depend solely upon whether the claimant believes he was acting lawfully; the circumstances must be indicative of good faith." [Citations.]” (*People v. Stewart* (1976) 16 Cal.3d 133, 140.) While “the circumstances in a particular case might indicate that although defendant may have ‘believed’ he acted lawfully, he was aware of contrary facts which rendered such a belief wholly unreasonable, hence in bad faith.” (*Ibid.*) Under these circumstances and from our review of the record, we cannot say that there was substantial or sufficient evidence of good faith to trigger a sua sponte obligation to give a mistake of fact instruction. (*Russell, supra*, 144 Cal.App.4th at p. 1427.)

Even if we assume for the sake of argument that the trial court erred in failing to sua sponte instruct the jury with a mistake of fact instruction, any such error was harmless. Contrary to appellant's assertion, error in failing to instruct on this defense is subject to the harmless error test of *Watson, supra*, 46 Cal.2d at page 836. Under this standard, a conviction of a charged offense may be reversed only if, after an examination of the entire case, including the evidence, it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*Russell, supra*, 144 Cal.App.4th at p. 1432.)

Three people testified that appellant was properly served with guardianship papers. Officer Escobedo testified that he told appellant his actions were illegal. Detective Caldas told appellant that Pamela C. had been awarded custody and that

appellant needed to return E. But appellant did not return E. until approximately one month after he first spoke with Caldas. It is undisputed that appellant took E. and that he moved with her to Fresno. His actions, initially lying about his purpose for taking E. and the length of time he would have her, and later not telling Pamela C. and law enforcement officers where he was, were entirely inconsistent with the actions of someone who truly believed he had legal custody of a child.

It is not reasonably probable the jury would have accepted appellant's claim of mistaken belief had the mistake of fact instruction been given. Any error in failing to give such an instruction was not prejudicial.

III. PROSECUTORIAL MISCONDUCT

Appellant contends that the prosecutor committed prejudicial misconduct during closing argument by misstating the law. Specifically, he alleges that the prosecutor misstated the law when he argued that a violation of section 278.5 could be established by the fact that E. was mistreated and allowed to live in a bad environment. He also argues misconduct when the prosecutor "confusingly" referred to murder in describing malice and to malice as a "mathematical function." We find no prejudicial error.

Procedural Background

During closing, the prosecutor argued that the crime for which appellant was charged consisted of three elements. He argued the first two, that appellant took E. and that E. was under the age of 18, were undisputed. As to the third element he argued:

"[T]he third element is the complicated one. It says when the defendant acted, he acted maliciously. And maliciously is defined as intentionally doing a wrongful act or acting with the unlawful intent to disturb, defraud, annoy or injure someone else."

The prosecutor then argued that "malice is the intention to do a wrongful act," and that the living conditions E. was subjected to in Fresno, E.'s injuries, and appellant's motive for welfare payments "I think ... all amounts to malice."

On rebuttal, the prosecutor stated,

“You’ve heard the judge instruct you that some terms that are used in this case are legally defined terms. Okay. And malice is exactly that. We all as a result of our own lives have – I felt I did explain what we think the word ‘malice’ means. Malice doesn’t mean that here. Malice is defined in this instruction. It’s a legal term. When I was in law school and we were studying murder which requires malice aforethought[] [t]he professor said think of malice as being a black box, kind of like a mathematical function, and this is what amounts to malice.”

The prosecutor went on to define malice as “Intentionally doing a wrongful act. In other words, you know it’s wrong, and you do it anyway. That’s what [appellant] does. He knows it’s wrong, but he does it anyway. It also means the unlawful attempt to disturb, defraud, annoy, or injure someone else. And it may also be those things in this case.”

Later the prosecutor argued,

“Don’t be sidetracked. Don’t be confused by the use of the term ‘malice,’ you know, I think of malice as being someone who is evil and malicious and does things within the scope of that definition. [¶] But malice can mean just what it means in that definition. The intention to do something that you know is wrong. And clearly the defendant in this case knew what he was doing was wrong. He’s not an unintelligent person. I’m sure he didn’t graduate from the 12th grade, but he’s not an unintelligent person, and he knew what he was doing that was wrong in this case.”

No objection was made to the prosecutor’s comments.

Applicable Law and Analysis

“The standards governing review of misconduct claims are settled. “A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such “unfairness as to make the resulting conviction a denial of due process.” [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.” [Citation.] “In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.” [Citation.] When a claim of misconduct is based on the prosecutor’s comments before the jury, “the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” [Citation.]” (*People v. Gonzales*

(2011) 51 Cal.4th 894, 920, quoting *People v. Friend* (2009) 47 Cal.4th 1, 29.)

In assessing prejudice, we “do not lightly infer” the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on a different point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

We agree with the People’s contention that appellant has forfeited his claim, although appellant contends he is excused from the necessity of making either a timely objection and/or request for admonition as it would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Chatman* (2006) 38 Cal.4th 344, 380.) According to appellant, the trial court “had already ruled in a pretrial hearing that the incorrect statement of the law advanced by the prosecutor was correct. In particular, the court interpreted malice as ‘an intent to do a wrongful act, to injure, vex or annoy. That could relate to the child or someone else.’”

In any event, while it is improper to misstate the law (*People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1266), we do not find that the prosecutor did so here in defining malice. As discussed, *ante*, malice within the meaning of the child abduction statute includes the intent to injure someone or the intent to perform a wrongful act. The only arguably incorrect statement of law made by the prosecutor was when he argued that appellant knew what he was doing was wrong, stating “In other words, you know it’s wrong, and you do it anyway.” According to CALCRIM No. 251, as given, “to find a person guilty of the crime in this case that person must not only intentionally commit the prohibited act but must do so with a specific intent and mental state.” The standard articulated by the prosecutor could not have harmed appellant.

Appellant also complains that the prosecutor “confusingly” referred to malice in the context of first degree murder which requires malice aforethought and then mentioned his law school professor who described malice as “a black box, kind of like a mathematical function.” But taken in context, the prosecutor was simply attempting to

explain that “malice” had a somewhat different meaning in the legal context of the present case than it might in other situations. CALCRIM No. 1251, as given, specifically instructed that “Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.”

Additionally, the court instructed the jury with CALCRIM No. 200: “You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.” Absent any contrary indication, we presume the jury followed these instructions. (*People v. Gray* (2005) 37 Cal.4th 168, 217.) These correct instructions tend to negate any possibility that the jury misunderstood the law. (See *People v. Dykes* (2009) 46 Cal.4th 731, 773.)

DISPOSITION

The judgment is affirmed.

Franson, J.

WE CONCUR:

Gomes, Acting P.J.

Detjen, J.