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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE, Plaintiff and Respondent, v. FLORENCIO MANING, Defendant and Appellant. | A103918 (Contra Costa County Super. Ct. No. 050300319) |
| In re FLORENCIO MANING, on Habeas Corpus. | A107357 |

Appellant Florencio Maning was convicted, following a jury trial, of one count of conspiracy to commit contempt of court, two counts of child abduction, and two counts of child custody deprivation. All counts were related to appellant's participation in the abduction and concealment of his codefendant's two daughters from their father, who had legal custody. In addition, following a bifurcated court trial, the trial court found true the allegation that appellant had previously been convicted of child molestation. On appeal, appellant contends the trial court (1) committed instructional error regarding the relationship between evidence of abuse of the two girls by their father and the element of malice in the two substantive offenses; (2) erroneously excluded evidence that the girls had said their father abused them; (3) erroneously excluded evidence of abuse by the girls' father dating more than one year before the abduction; (4) erroneously sustained the prosecutor's hearsay objections to testimony by appellant and his codefendant that he had

attempted to discourage the abduction and concealment of the girls; and (5) erroneously imposed a consecutive sentence on the conspiracy count, where the conspiracy and substantive offenses had the same objective and intent. Appellant also has filed a petition for writ of habeas corpus, which we have consolidated with the direct appeal, alleging his counsel was ineffective for failing to (1) object to the prosecutor's misrepresentations and the improper instructions; (2) request instructions to clarify the relevance of the abuse evidence to the malice requirement; and (3) object to the consecutive sentence on the conspiracy count. We shall stay imposition of the sentence on the conspiracy count, pursuant to Penal Code section 654.¹ We shall otherwise affirm the judgment and shall deny the petition for writ of habeas corpus.

PROCEDURAL BACKGROUND

Appellant and codefendants Kelli Nunez and Rich Peterson were charged by indictment with one count of conspiring to commit contempt of court (§ 182, subd. (a)(1)); two counts of child abduction (§ 278); and two counts of child custody deprivation (§ 278.5, subd. (a)). Nunez was also charged with one count of soliciting to commit murder (§ 653f, subd. (b)). The indictment also alleged that appellant had a prior strike conviction for child molestation. (§§ 288, subd. (a), 667, subds. (b)-(i); 1170.12).

Following a jury trial of appellant and Nunez,² appellant was found guilty as charged. Nunez was found not guilty of the solicitation count, but otherwise was found guilty as charged. Following a court trial, the trial court found true the prior conviction allegation against appellant.

On August 29, 2003, the trial court sentenced appellant to a total term of nine years four months in state prison. On that same date, appellant filed a notice of appeal.

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

² Proceedings against Peterson were suspended due to doubts about his competency.

FACTUAL BACKGROUND

The charges in this case all related to the abduction and concealment of codefendant Nunez's two daughters from their father, who had legal custody of them. Appellant, who was the leader of an organization, California Family Advocacy Council (CFAC), which was dedicated to advocating for parents who believed they had been wrongly denied custody of their children, and codefendant Rich Peterson, leader of a similar group, Klout for Kids, were charged with assisting Nunez in planning and participating in the abduction and concealment of the two girls.

Prosecution Case

Daniel Nunez, the father of the two girls who were abducted, testified that he and Nunez married in 1995 and had two daughters together, "Jane Doe I" and "Jane Doe II," who were seven and five years old, respectively, at the time of trial. Nunez's daughter from a previous marriage, L., also lived with them during the marriage. Daniel Nunez began divorce proceedings in 1998; the most contentious issue was child custody. Initially, the parents shared custody of the two girls equally.

In 2001, Nunez alleged that Daniel Nunez had abused Jane Doe II, after Nunez allegedly found a small bruise on Jane Doe II's arm, welts on her buttock, and a bruise on her eye. Daniel Nunez denied inflicting those injuries and stated that he and his girlfriend, Sharon Neff, did not believe in corporal punishment as a form of discipline. Nunez's allegations came to the attention of the trial court, and were investigated.

In late March 2002, while Judge Craddick, the judge in charge of the case, was out of town, Nunez obtained a temporary restraining order (TRO), which barred Daniel Nunez from seeing the girls because of alleged abuse. Codefendant Rich Peterson served the TRO on Daniel Nunez. At an April 26, 2002 hearing on his request to lift the TRO, Judge Craddick gave Daniel Nunez full custody of the children.

On April 26, 2002, the two girls' daycare provider, May Yen, called Daniel Nunez to tell him that Nunez was leaving the school with the girls. Daniel Nunez drove to the preschool, calling 911 on the way there. He did not speak to or see his daughters again until November 3, 2002. During the six months they were missing, he was devastated

and frantic about finding them. He enlisted the help of all organizations he could find that help locate missing children, engaged a number of private investigators to help in the search, and stayed in regular contact with law enforcement. He also contacted the media, and Dan Noyes of television station KGO in San Francisco prepared a news story on the abduction, which aired on November 2, 2002. On November 3, 2002, Dan Noyes and the district attorney called Daniel Nunez and told him that his daughters were at the news station. At the time of their abduction, Jane Doe I was six years old and Jane Doe II was four years old.

May Yen testified that, on April 26, 2002, Nunez and her 13-year-old daughter, L., came to the girls' school and each went into a different classroom. Yen told her assistant to stop them and then called Daniel Nunez, as he had asked her to do if Nunez came to the school. Nunez came into Yen's office and Yen said she could not take the girls. Nunez showed her some papers, saying they gave her the right to take her daughters. Nunez and L. took the girls to a car in the driveway; a stocky man was in the driver's seat. When they had the girls inside, Nunez said "go, go," and the driver sped away. Yen never saw any sign that the two girls had been abused.

Nancy Levine, a teacher at the preschool, testified that she too never saw any signs that the girls had been abused or neglected. Some weeks before the abduction, Nunez told Levine about her problems with custody. When Levine hugged Nunez and said she was sorry, Nunez said, "he's going to pay for it."

Mark Ernst, lead investigator in the case for the District Attorney's Office, testified that, a few days after he learned that Jane Doe I and Jane Doe II had been abducted from their school, he received a voice mail message from Nunez, in which she said that she had not "stolen" her children, but had legally taken them because she had "filed a UCCi filing" with the Secretary of State claiming her children as property. Nunez also told Ernst to stop "wasting" his time because she had acted legally in taking the children. After Nunez was arrested, she refused to reveal the children's location.

Valerie Blackmore, Nunez's former neighbor, testified that she became friendly with Nunez, and their children played together. Blackmore saw bruises on the girls, but

never learned where they came from. Nunez talked to Blackmore about custody issues, and complained that the judge favored Daniel Nunez. After Nunez got involved with a child advocacy group, she became more aggressive. She described a group that would help a parent get their kids and take them “underground.” At one point, Nunez told Blackmore that she had found someone to kill her ex-husband in exchange for her truck.

On April 26, 2002, Nunez told Blackmore that she and her friend, Rich Peterson, were going to get her kids that day because she had had enough and just wanted her kids. On cross-examination, Blackmore acknowledged she had told police both that Nunez had said she was taking the kids because they were being abused and nobody was listening to her, and that she had seen bruises on Jane Doe II after a visit with Daniel Nunez. Blackmore also testified that Nunez had said Peterson had obtained a “UCC-1” document for her that gave her the right to take custody of her children.

Judy DeLarosa, Nunez’s mother, testified that, after Nunez abducted the girls, she called DeLarosa and told her that she had taken the girls on vacation. Peterson later called DeLarosa and said that Nunez and the girls were flying into San Francisco that night. At the airport, Delarosa saw Nunez and L., but did not see Jane Doe I or Jane Doe II. Nunez said the two girls were “ ‘being well taken care of.’ ” DeLarosa did not ever recall seeing any marks or bruises on Jane Doe I or Jane Doe II.

Lana Jo Hescoock testified that she met appellant through her involvement with a group called Klout for Kids, which was comprised of parents who believed the courts had wrongly denied them custody of their children. Appellant spoke at the group meetings and explained the law to the parents, as well as how to proceed in their cases. On one occasion, appellant asked Hescoock to do a favor for Rich Peterson, explaining that “[t]hese girls had been abused by their father. We’re trying to get them away from their father. And we’re trying to hide them from their father, so they couldn’t get back into the system and abuse them [*sic*].” Appellant told her there might be some money involved, though he never gave her any money.

The next day, Peterson called and asked Hescoock to pick up the two girls at the San Francisco airport at around midnight, which she did. The next day Peterson gave her

\$100. The girls stayed with Hescock for one night and then she took them to Susan Newman's house, as Peterson instructed her to do. Hescock saw the girls twice after that, once at a birthday party and once when appellant and Kathie Bettencourt asked her to baby-sit them.

Susan Newman was a parent involved with appellant's advocacy group in San Jose. Appellant also helped Newman with her custody case. In April 2002, Rich Peterson asked Newman to take care of Jane Doe I and Jane Doe II because their mother was in jail for drunk driving. The girls stayed with her for three weeks, and then Newman took them to Peterson at appellant's office, as instructed by Peterson.

Gloria Kathleen Bettencourt (Kathie) was a member of appellant's advocacy group. She met him in approximately June 2000, when her parental rights were being terminated. Appellant offered to take her case for \$2,000. Appellant started living with Bettencourt part-time at about the end of 2000. Appellant told her a couple of times that he had been "helping and hiding kids for 20 years." He said there was only one attorney "that had got more kids home than he had." On one occasion, Bettencourt overheard a conversation between appellant and two other people, in which they were discussing the San Francisco airport and picking someone up. She later asked appellant about the conversation, and appellant got very defensive and "brushed it off."

Appellant and Peterson told the group about a mother who was in jail for drunk driving, and the father was trying to manipulate this to get custody. At group meetings, pictures were shown "of some very bruised little girls." The two girls later briefly stayed with Bettencourt over two weekends, at Peterson's request. Appellant was there on one of the occasions. Bettencourt also took the girls to Candida Estrada's home once, at appellant's request.

Joe Caetano was involved in appellant's advocacy group. Caetano saw Jane Doe I and Jane Doe II once at Bettencourt's house. He also took the girls from their babysitter to Bettencourt's house on one occasion. Another time, Caetano took appellant and the girls to San Francisco, at appellant's request. Caetano then dropped appellant off at his office. Appellant was babysitting the girls, but asked Caetano to take them home and

watch them until Candida (their caretaker) got off work, because he did not want them at his office.

Candida Estrada was a member of appellant's advocacy group; appellant also helped her work on her legal case. In the summer of 2002, appellant asked Estrada if Jane Doe I and Jane Doe II could stay with her. She agreed, and Joe Caetano and a woman named Sherene brought the two girls to her house, where they stayed for about eight days. Appellant later told her who the girls were and showed her some photographs. Estrada asked him to find somewhere else for the girls to go. "Kathie" came and picked the girls up shortly thereafter.

Donald Schropp, another member of appellant's advocacy group, met Jane Doe I and Jane Doe II on a car trip to San Francisco with appellant, Joe Caetano, and the two girls. Schropp told appellant that his landlady, Florence Sullivan, had offered to let the two girls stay at her home; appellant said he would look into it. One or two weeks later, Kathie Bettencourt brought the girls to Sullivan's house. The girls stayed at Sullivan's home from September 18, 2002 to November 4, 2002. Schropp saw appellant at the home once for Jane Doe I's birthday party.

Florence Sullivan testified that appellant's girlfriend, Kathie Bettencourt, brought Jane Doe I and Jane Doe II to her home on September 18, 2002. Peterson paid Sullivan about \$250 for the six weeks the girls stayed with her. She had no contact with appellant during the time the two children stayed with her. Kathie Bettencourt and another woman came and got the girls when they left her home on November 2, 2002.

Michael Frame, the private investigator for Daniel Nunez's lawyer, testified that, on October 24, 2002, he met with appellant, in an attempt to find out where the two girls were being kept. Appellant, who had made several statements on television implying that he was involved in their concealment, told Frame it had been a "mistake" to take the girls. Appellant denied being involved in taking them, but said that he wanted to assist in the return of the children and that he was "60 percent sure" he knew where they were located.

Appellant also said he would not disclose the whereabouts of the girls unless Nunez was released from jail, the girls were placed in foster care, and the abuse allegations were independently investigated. Appellant said he would talk to Rich Peterson and then contact Frame. After Frame did not hear back from appellant, he called appellant first on October 25, 2002 and again on October 31, 2002. On both occasions, appellant said he had not been able to reach Peterson and that he believed Peterson was out of town.

Steve Talley and his wife became involved in appellant's advocacy group because his wife was in a custody battle with the father of her children. Talley noticed that appellant was controlling and dominating with members of the group. Talley also knew appellant's girlfriend, Kathie Bettencourt; appellant yelled at her, browbeat her, and "talked to her like she wasn't a human." Appellant talked to Talley more than once about Nunez's children being kept in a safe place away from their abusive father.

After a meeting at which appellant mistreated Bettencourt, Talley "started taking a hard look at the situation," and shortly thereafter began talking to Bettencourt about a plan to "grab the children." In order to get appellant to turn the children over to him and his wife, Talley told appellant that he was going to rent a home in Gilroy where he could hide the girls.

Talley met KGO reporter Dan Noyes at appellant's office, where Noyes came to learn about the group for an investigative report he was preparing. On November 3, 2002, after Noyes's television newscast aired, Talley went to pick up appellant at Bettencourt's house. Appellant had his suitcase packed and "was ready to go on the road. He was panicking." While Talley drove appellant to a motel, appellant said Jane Doe I and Jane Doe II were going out of the country, to South America. At the motel, appellant said that he was going to go "underground," and that, as long as he had a computer, he could continue to work. Appellant also said he couldn't "afford to leave any witnesses

around,” and told someone he was talking to on his cell phone to “ ‘make it happen.’ ”³ When Talley left appellant at the motel, the plan was for him to come back the next morning with a rental car to take appellant into hiding.

After leaving the motel, Talley met Kathie Bettencourt and his wife, who had Jane Doe I and Jane Doe II with them. Talley made arrangements to meet Dan Noyes, and, the next morning, he took the girls to the KGO station in San Francisco and turned them over to Noyes.

At about 7:30 a.m. on November 4, 2002, Morgan Hill Police Officer Steve Pennington went to appellant’s motel in his patrol car, where he saw appellant exit the building, look in his direction, and then go back inside. Officer Pennington then made contact with appellant inside the motel room, and appellant told the officer his name was Jacob Brianes. Appellant consented to a search of the room, and Officer Pennington found a citation issued to Florencio Maning. Appellant then confirmed that that was in fact his name.

During trial, the parties stipulated to several matters, including that, on April 4, 2003, appellant wrote a letter to Kathie Bettencourt’s uncle in which he falsely stated that the prosecutor had offered him a plea bargain in this case. In addition, Judge Judith Craddick, who was the superior court judge assigned to the Nunez divorce action, utilized several experts in child abuse allegations and counseling to serve as special master and custody evaluators in this case. Based on the special master’s recommendation, Judge Craddick found that there was no evidence that Daniel Nunez was at risk for being physically abusive.

Defense Case

Appellant testified that he was a paralegal, specializing in juvenile dependency and family law matters. In March 2002, appellant met with Nunez regarding her family

³ Bettencourt testified that, after the newscast (which linked appellant’s group, CFAC, to the concealment of Jane Doe I and Jane Doe II), appellant said the girls would be taken out of the country and he would possibly be going out of the country as well.

law case. He reviewed her court file and interviewed her children, who described many incidents of abuse by their father.

Appellant had no contact with Nunez after she left with her children.⁴ During the six months Nunez's two children were in hiding, appellant did not know their whereabouts; nor did he make any arrangements regarding their care. However, he did see the children about five times during that period. Appellant saw them twice at Kathie Bettencourt's house, where he stayed sometimes, and once when Bettencourt drove him to Susan Newman's house and surprised him with the two girls' being there. He also saw the girls in Joe Caetano's pickup truck when Caetano picked him up for a trip to San Francisco.

Appellant denied asking Lana Hescocock to pick up the girls at the airport, or telling Steve Talley or anyone else that he was going to run or leave the country. Appellant also denied conspiring to commit contempt of court or in any way participating in the taking and concealing of Jane Doe I and Jane Doe II. Although he was opposed to concealing the girls from their father, he had his reasons for doing nothing to stop it.

DISCUSSION

I. Claim of Instructional Error and Ineffective Assistance of Counsel Regarding the Relationship Between Evidence of Abuse and Element of Malice

Both in his opening brief and his habeas petition, appellant contends that instructional error and ineffective assistance of counsel related to the application of malice (the mental state required for conviction of child abduction (§ 278) and child custody deprivation (§ 278.5)) to the allegations against him constituted prejudicial error.

⁴ Nunez also testified at trial, acknowledging that she knew she did not have legal custody of the girls on the day she abducted them. She did not take them with the intent to keep them away from Daniel Nunez, but wanted him to have supervised visits until he and his girlfriend completed parenting and anger management classes. Inspector Mark Ernst testified on rebuttal that he visited Nunez in custody on September 18, 2002, and Nunez said that she would not reveal her children's whereabouts unless she was given custody of them.

Section 278 provides for the punishment of “[e]very person, not having a right to custody, who maliciously takes, entices away, keeps, withholds, or conceals any child with the intent to detain or conceal that child from a lawful custodian”

Section 278.5 provides for the punishment of “[e]very 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”

Section 7, subdivision (4), provides that “[t]he 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.”⁵

Finally, section 278.7 provides a defense to charges under section 278.5, in specific, limited circumstances.⁶

⁵ CALJIC No. 9.72, which was given to the jury, similarly instructs that, “[a]s used in the crime of child abduction: [¶] [¶] ‘Maliciously’ means with intent to vex, annoy, or injure another person, or to do a wrongful act.”

⁶ Section 278.7 provides: “(a) 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.

“(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

According to appellant, the prosecutor’s misrepresentations during closing argument, the trial court’s instructional errors, and defense counsel’s failure to object and request clarifying instructions led the jury to believe that evidence that Daniel Nunez abused Jane Doe I and Jane Doe II was not relevant to the question whether appellant acted with malice when he participated in the abduction and concealment of the two girls. He asserts that this error, combined with defense counsel’s failure to object to and request a clarifying instruction regarding the prosecutor’s statement that violation of a court order is equivalent to a “wrongful act” (§ 7, subd. (4)), requires reversal of the judgment.

A. Instructional Error Claim

Appellant contends the trial court had the duty to instruct the jury *sua sponte* regarding how to apply evidence of Daniel Nunez’s abuse of the girls to the element of malice in sections 278 and 278.5, particularly in light of the prosecutor’s alleged misrepresentation of the law on this point. In particular, appellant asserts that the court should have either (1) refused to instruct with CALJIC No. 9.71.5, regarding the statutory necessity defense under section 278.7, or (2) given an instruction to explain the relationship between the affirmative defense of section 278.7 and the element of malice in sections 278 and 278.5.

1. Trial Court Background

Before trial, the prosecutor asked that evidence that Daniel Nunez abused the two girls be excluded as irrelevant. Initially, the court agreed, expressing doubt about

“(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.”

whether such evidence was relevant because there was no showing that Nunez had complied with the requirements of section 278.7, which provides a defense based on a good faith belief in imminent harm to the children. Nunez's counsel responded that even if the evidence at trial failed to establish that Nunez had complied with section 278.7's reporting requirements, evidence of abuse would still be relevant to the malice element of section 278 and 278.5. In particular, counsel argued, such evidence could negate the prosecutor's theory that Nunez took the children "basically to vex and annoy, to get back at the ex-husband." After the court did some additional research, it concluded that the abuse evidence would be relevant to whether Nunez acted with malice, i.e., with intent to "vex, annoy, or injure" (§ 7, subd. (4)) her ex-husband when she abducted and concealed the children.⁷

In closing argument, the prosecutor told the jury that evidence of abuse was not a defense to the crimes charged, characterizing the abuse claims as the "abuse excuse." He focused particularly on Nunez, stating that the only available legal defense, if a parent thinks his or her child is being abused, requires that the parent inform the district attorney's office and file good cause reports shortly after taking the child. The prosecutor then argued that it was "no coincidence that she snatched them after she lost custody. It had everything to do with losing custody and nothing to do with the abuse." The prosecutor further stated that the question was whether Nunez "was acting with any malice at all," or in the "belief that she was doing the right thing."

2. *Invited Error*

As a preliminary matter, respondent asserts that appellant has waived any claims of instructional error, under the doctrine of invited error, because he specifically requested the instructions he claims should not have been given or should have been amplified.

⁷ The focus during these discussions was on the relevance of the abuse evidence to Nunez's defense. In fact, appellant's counsel said, at one point, "I'm not sure that's my issue, your Honor."

Our Supreme Court has explained that “invited error will be found ‘only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction’ [Citation.]” (*People v. Cooper* (1991) 53 Cal.3d 771, 830.)

Here, appellant argues that the invited error doctrine does not apply because the record does not show that counsel had a clear tactical purpose for his requests. We agree. While appellant’s counsel joined Nunez’s counsel in requesting CALJIC No. 9.71.5, regarding the statutory necessity defense (§ 278.7), and also requested CALJIC No. 9.72, which defines the term “maliciously,” without asking for any modification or amplification, there is no indication of a particular tactical reason for any of these requests. Because the record does not show “ ‘that counsel acted for tactical reasons and not out of ignorance or mistake’ ” (*People v. Cooper, supra*, 53 Cal.3d at p. 830, quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 330), the doctrine of invited error is inapplicable here.

3. *Legal Analysis*

Turning to the merits of appellant’s contention, we find no instructional error for the simple reason that the evidence of abuse in this case was *not* relevant to whether appellant acted with malice when he participated in the abduction and concealment of Jane Doe I and Jane Doe II.

Several cases discussing the relationship between malice and crimes committed with “noble” motives are relevant to appellant’s argument. First, in *People v. Weber* (1984) 162 Cal.App.3d Supp. 1, 3, the defendants were convicted of, *inter alia*, obstruction of a street and/or sidewalk during an antinuclear protest. On appeal, the Appellate Department of the Superior Court rejected the defendants’ claim that the trial court had a *sua sponte* duty to instruct the jury that a good faith belief in their actions would negate malice, stating: “It is naive to infer that the jury was not aware of the defendants’ purpose in blocking traffic. The verdict form contained a finding of willfully and maliciously obstructing free movement. One does an act ‘willfully’ when he intends to do such act; and *one does an act ‘maliciously’ when he intends to do such act and knows that it is a wrongful act, i.e., one banned by law.* In this case, the defendants’

intention to obstruct the street and sidewalk was done with the knowledge that such obstruction was a wrongful act. However laudable the defendants' motives may be, it was not required of the trial judge to *sua sponte* instruct on a matter which was not a negation of the elements of the offense. [Citation.]" (*Id.* at p. 7.)

Similarly, in *People v. Man* (1974) 39 Cal.App.3d Supp. 1, 4-5, the Appellate Department of the Superior Court distinguished an unlawful act done with "good intentions," as had occurred in that case, from an unlawful act done with a truly mistaken belief or ignorance of the law, explaining that only the latter would negate malice since " 'mistake of fact . . . disproves *any* criminal intent.' " The court concluded that the standard instructions on malice accurately presented the issues to the jury. (*Ibid.*)

In *People v. Bohmer* (1975) 46 Cal.App.3d 185 (*Bohmer*), the defendant was convicted of maliciously placing an obstruction on a railroad track. The appellate court rejected his contention that the trial court improperly refused to instruct the jury in a way that would allow it to determine if the defendant's actions were intended only as a symbolic protest. (*Id.* at p. 190.) The court stated that the defendant had "confused the motive behind the doing of the act with the intent with which it was done. The reasonableness of protest against war in general, or the war in Vietnam in particular, is irrelevant. The price to be paid by those whose protest for the sake of a cause professed by them to be noble involves the criminal destruction of or interference with the property of others, is to accept the penalties fixed by the law." (*Ibid.*)

In finding no misinstruction of the jury, the *Bohmer* court explained that the malice required to be guilty of the crime in question was "that which would negate an accidental and unintended obstruction, such as might result if a vehicle being driven across the tracks should stall or overturn, and, before it could be moved off, should cause a train to slow down or stop." (46 Cal.App.3d at p. 191; cf. 1 Witkin, Cal. Crim. Law 3d (2000) Defenses, § 249, p. 616 ["Unless the case comes within one of the recognized excuses, such as mistake of fact or law . . . , it is no defense that the criminal act was done with a moral purpose, or was dictated by religious convictions or social custom."].)

Likewise, in the present case, while appellant may have been motivated to participate in the abduction and concealment of Jane Doe I and Jane Doe II by his belief that the girls had been abused, such a belief does nothing to negate the element of malice. Appellant never claimed that he did not realize the girls were being taken and kept from their father, who had legal custody. On the contrary, the evidence at trial made clear that appellant was well aware of this fact. Indeed, appellant acknowledged in his testimony that, by the third week in April of 2002, he had a court document showing that Nunez did not have custody of the two girls. He also claimed he was opposed to concealing the girls from their father. In addition, evidence that he was planning to flee and falsely identified himself to police further demonstrates appellant's awareness that he had committed a wrongful act. Evidence of abuse was thus irrelevant to whether appellant acted maliciously, pursuant to section 278 and 278.5.⁸ (See *Bohmer, supra*, 46 Cal.App.3d at pp. 190-191.)

Appellant argues that the prosecutor misstated the law when he equated violation of a court order with the "wrongful act," described in section 7, subdivision (4), which defines malice. (See also CALJIC No. 9.72.) Appellant also argues that the court in *People v. Weber, supra*, wrongly described a wrongful act as "one banned by law." (162 Cal.App.3d Supp. at p. 7.) According to appellant, "there can never be a well-intentioned malicious act." Appellant's claim, however, goes against the case law in this area, as well as common sense. As long as the defendant commits a wrongful act (e.g., violation of a court order), *knowing* that it is wrongful (e.g., illegal), the malice element is satisfied. That the defendant did so with good intentions does not change this result, since only when the act is done accidentally or pursuant to a mistake of law or fact will malice be

⁸ The trial court found the abuse evidence relevant to codefendant Nunez's case with respect to whether Nunez acted with an intent to "vex, annoy, or injure" her ex-husband, a distinct question under section 7, subdivision (4), from whether appellant intended to commit a "wrongful act" pursuant to that section. We hazard no opinion regarding the relevance of the abuse evidence to Nunez's intent to vex or annoy Daniel Nunez.

negated. (See *Bohmer, supra*, 46 Cal.App.3d at pp. 190-191; see also *People v. Weber, supra*, 162 Cal.App.3d Supp. at p. 7; *People v. Man, supra*, 39 Cal.App.3d Supp. at p. 5.)

In conclusion, the standard malice instructions given in this case were sufficient, and appellant's claim of instructional error cannot succeed.

*B. Ineffective Assistance of Counsel Claim Related to the
Element of Malice in Appellant's Habeas Petition*

In his petition for writ of habeas corpus, which we have consolidated with the appeal, appellant further contends he received ineffective assistance of counsel because of defense counsel's failure to (1) request a jury instruction that would have informed the jury that evidence of abuse was not only relevant as a defense under section 278.7; (2) object to the prosecutor's misstatements of law during closing argument regarding the applicability of evidence of abuse to the charges against both defendants; (3) object to the giving of CALJIC No. 9.71.5 (regarding the statutory necessity defense under section 278.7) to avoid misleading the jury, since there was no evidence that the reporting requirement of section 278.7 had been satisfied, and, if the objection had not been sustained, the failure to request an instruction to explain the relationship between the affirmative defense in section 278.7 and the element of malice in sections 278 and 278.5; (4) object to the prosecutor's argument that violation of a court order is a "wrongful act," for purposes of satisfying the malice requirement of sections 278 and 278.5; and (5) request a clarifying instruction regarding what constitutes malice.

We conclude that appellant's ineffective assistance of counsel argument concerning the element of malice is without merit. Just as there was no misinstruction in the trial court (see part I.A. *ante*), there was no ineffective assistance of counsel, given that evidence of abuse by Daniel Nunez was irrelevant to whether appellant acted with malice.

*II. Exclusion of Evidence Regarding Abuse of
Jane Doe I and Jane Doe II by Their Father*

Appellant contends the trial court erroneously excluded corroborating testimony by three of the people who cared for Jane Doe I and Jane Doe II during their concealment

that the two girls had told them that their father had abused them. He also contends the trial court erroneously limited evidence of abuse at trial to incidents that had occurred within one year before the abduction of the girls.⁹

However, in light of our finding that evidence of abuse was irrelevant to whether appellant acted with malice—i.e., whether he knowingly committed a wrongful act—there was no error, and certainly no prejudice, in the exclusion of such evidence.

III. *Trial Court's Refusal to Permit Appellant to Testify Regarding
His Efforts to Discourage the Abduction and Concealment of
Jane Doe I and Jane Doe II*

Appellant contends the trial court erroneously prevented appellant and codefendant Nunez from testifying regarding appellant's efforts to discourage the abduction and concealment of Jane Doe I and Jane Doe II. In particular, he asserts the trial court improperly sustained the prosecutor's hearsay objections to defense counsel's question to Nunez regarding whether she had ever discussed with appellant "whether or not you should take your children and run," as well as counsel's questions to appellant regarding whether he gave Nunez any advice about her running with the children and whether he ever warned Kathie Bettencourt "about having the children."¹⁰

We find that appellant has not preserved this claim for appeal. He has not directed us to any offer of proof in the record regarding what Nunez would have said in response to defense counsel's question, and what additional testimony, if any, he would have given in response to counsel's two questions. We are therefore unable to determine whether the

⁹ Respondent argues, as a preliminary matter, that appellant waived these claims by failing to join in the request by Nunez's counsel to admit this evidence and by failing to object to the trial court's rulings denying Nunez's requests to admit the evidence. We disagree. Given that Nunez's counsel had already made the request, which the trial court denied, additional objection by appellant to the trial court's rulings was not necessary. (Cf. Code Civ. Proc. § 647.)

¹⁰ While Nunez did not answer the question before the prosecutor objected, appellant responded to the first question regarding advice to Nunez by saying, "Oh, yes," and to the second question regarding warning Bettencourt by saying, "Many times," before the prosecutor objected and the trial court sustained the objections.

testimony in question would have been admissible, either because it was not hearsay or because it fell within an exception to the hearsay rule.¹¹ (See Evid. Code (§ 354, subd. (a) [claim regarding erroneous exclusion of evidence will be preserved for appeal only if “[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means”].)

Moreover, even assuming that both appellant’s and Nunez’s responses to the questions either (1) would not have been hearsay and also would have been relevant (see, e.g., *People v. Frye* (1985) 166 Cal.App.3d 941, 950 [“Evidence of a declarant’s statement is not hearsay if it relates facts other than declarant’s state of mind and is offered to circumstantially prove the declarant’s state of mind.”]), or (2) would have been hearsay, but within the state of mind exception to the hearsay rule, and relevant (see Evid. Code § 1250, subd. (a)(2) [evidence of a statement of declarant’s then existing state of mind satisfies exception to hearsay rule when it is offered “to prove or explain acts or conduct of the declarant”]), we nevertheless find that any error in excluding this testimony was harmless. (*People v. Watson* (1956) 46 Cal.2d 818.)

First, appellant explicitly testified that he was not involved in, was opposed to, and did nothing to encourage the abduction or concealment of the girls. Second, and especially in light of appellant’s testimony denying any involvement in the conspiracy or the substantive offenses, the purported evidence was not crucial to his case. That he may have initially advised Nunez against taking the girls or warned Bettencourt of the possible consequences of helping to conceal them does not necessarily negate his involvement in the offenses of which he was accused. Thus, appellant’s claim that the court essentially “denied appellant the opportunity to deny that he was involved in the

¹¹ With respect to defense counsel’s two questions to appellant, appellant answered the questions before the prosecutor’s objections were sustained. Appellant has not alleged that these answers were later stricken or that the jury was told to disregard them. Therefore, appellant cannot claim any erroneous exclusion with respect to these two questions. Moreover, even if the answers were later stricken, the uninformative character of the responses, as to the nature of the advice and warnings appellant gave, demonstrate the lack of prejudice to appellant due to their exclusion.

conspiracy and the opportunity to have the other coconspirator deny his involvement” is without merit.¹²

Finally, the evidence against appellant was extremely strong, with numerous witnesses testifying to his direct, day-to-day involvement in hiding the girls. There was also evidence that he was making plans to flee and that he gave false information to police officers regarding his identity in an effort to avoid arrest.

Consequently, even assuming the court erred, it is not reasonably probable the result of the trial would have been different absent that error. (See *People v. Watson*, *supra*, 46 Cal.2d 818.)

IV. *Consecutive Sentence on the Conspiracy Charge*

A. *Claim in Supplemental Opening Brief*

In a supplemental opening brief, appellant contends the trial court erred when it imposed a sentence on the conspiracy count for contempt of court consecutive to the child abduction and child concealment counts because the conspiracy had the same objective and intent as those two counts. (See § 654.)¹³

“Because of the prohibition against multiple punishment in section 654, a defendant may not be sentenced ‘for conspiracy to commit several crimes and for each of those crimes where the conspiracy had no objective apart from those crimes. If, however, a conspiracy had an objective apart from an offense for which the defendant is punished, he may properly be sentenced for the conspiracy as well as for that offense.’ [Citations.] Thus, punishment for both conspiracy and the underlying substantive offense has been held impermissible when the conspiracy contemplated only the act performed in the

¹² We do not agree with appellant that the expected testimony was so vital to his defense that its exclusion violated due process and requires utilization of the *Chapman* standard for assessing prejudice. (See *Chapman v. California* (1967) 386 U.S. 18.)

¹³ Section 654, subdivision (a), provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

substantive offense [citations], or when the substantive offenses are the means by which the conspiracy is carried out [citation]. Punishment for both conspiracy and substantive offenses has been upheld when the conspiracy has broader or different objectives from the specific substantive offenses. [Citations.]” (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 615-616, fn. omitted (*Ramirez*); accord *People v. Vargas* (2001) 91 Cal.App.4th 506, 570-571 (*Vargas*)). The trial court’s finding on this question must be upheld if supported by the evidence in the record. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.)

In the present case, the trial court imposed a consecutive eight-month sentence on the count of conspiring to commit contempt of court (§ 182, subd. (a)(1)) (for violating the court’s custody order), finding that the conspiracy was “independent of” the substantive offenses of child abduction and child concealment (§§ 278, 278.5).¹⁴

We agree with appellant that the trial court should have stayed the sentence on the conspiracy count pursuant to section 654. The conspiracy count was based on appellant’s conspiring with codefendants Nunez and Rich Peterson to keep Jane Doe I and Jane Doe II hidden from their father, in violation of the trial court’s custody order. Because the conspiracy alleged and the two substantive crimes involved the same intent and objective, i.e., to remove and conceal the girls from their father, separate punishment is not permitted. (See *Ramirez, supra*, 189 Cal.App.3d at pp. 615-616; *Vargas, supra*, 91 Cal.App.4th at pp. 570-571.)

In *Ramirez, supra*, the defendants were sentenced for conspiracy to commit murder and for the substantive offenses of robbery, sex offenses, and attempted murder. The trial court stayed only the attempted murder sentence, under section 654. (189 Cal.App.3d at p. 616.) A panel of this Division held, *inter alia*, that, “[s]ince the evidence

¹⁴ Appellant did not object to the sentence on the conspiracy count in the trial court. The issue may nonetheless be raised on appeal since a “court acts in ‘excess of its jurisdiction’ and imposes an ‘unauthorized’ sentence when it erroneously stays or fails to stay execution of a sentence under section 654. [Citation.]” (*People v. Scott* (1994) 9 Cal.4th 331, 354 & fn. 17.)

necessarily shows an agreement to commit sex offenses as well as murder . . . , punishment for both the sex offenses and the conspiracy violated the prohibition of section 654 . . . despite the fact that only conspiracy to commit murder was charged.” (*Id.* at p. 617.)

In *Vargas, supra*, the defendant was sentenced consecutively both for the offense of murder and the conspiracy to commit murder. (91 Cal.App.4th at p. 570.) These consecutive sentences did not violate section 654 because there was strong evidence that the defendant’s gang “conspired to kill not only [the victim], but other persons as well, in addition to the gang’s overriding conspiracy” to “establish power through the use of crime, force, and fear, and to use that power to further strengthen and perpetuate itself by killing its enemies, raising money for the gang, and instilling obedience and discipline among its members by killing members who break its rules.” (*Id.* at pp. 553, 571.)

Here, the sole agreement between appellant, Nunez, and Peterson, either alleged or supported by the evidence, was a conspiracy to abduct and conceal Jane Doe I and Jane Doe II from their father, in violation of the court’s custody order. Unlike in *Vargas*, there was no evidence of a larger conspiracy with additional objectives beyond those contained in the two substantive crimes of which appellant was convicted. Contrary to respondent’s assertion, the fact that there was some evidence that appellant had an ongoing interest in “fighting the system” does not support an implied finding of a broader conspiracy to defy judicial authority in custody matters; it merely shows another possible motive on appellant’s part beyond that of protecting the girls from alleged abuse by their father. The conspiracy charged and the relevant evidence all related to a single objective: to hide the girls from their father.

Consequently, appellant cannot be punished for both the conspiracy to abduct and conceal the girls and the identical substantive crimes. (See *Ramirez, supra*, 189 Cal.App.3d at pp. 615-616.)

B. *Ineffective Assistance of Counsel Claim*

In his habeas petition, appellant contends defense counsel was ineffective for failing to object to the trial court’s imposition of a consecutive sentence on the conspiracy

count, in violation of section 654. In light of our conclusion in part IV.A. *ante*, of this opinion, appellant's ineffective assistance of counsel contention is moot.¹⁵

DISPOSITION

The judgment is modified to stay imposition of the sentence on count one (conspiracy to commit contempt of court), pursuant to section 654, and, as modified, is affirmed and remanded to the trial court with directions to issue a corrected abstract of judgment. The petition for writ of habeas corpus is denied.

Kline, P.J.

We concur:

Haerle, J.

Ruvolo, J.

¹⁵ Given our conclusion in part IV.A., *ante*, of this opinion, we also find moot appellant's contention, in an additional supplemental opening brief, that the trial court's order that the conspiracy count be served consecutively violates appellant's Sixth Amendment right to a jury trial because the findings supporting consecutive sentencing were made by the judge based on facts not reflected in the jury's verdict.