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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

LYNDSAY COLULA,

Defendant and Appellant.

A138407

(Sonoma County  
Super. Ct. No. SCR620050)

Appellant Lyndsay Colula appeals after pleading no contest to a violation of Penal Code section 273a, subdivision (a),<sup>1</sup> and admitting an enhancement alleging the personal infliction of great bodily injury, in exchange for the dismissal of a second count. Appellant contends the trial court improperly relied on facts underlying the dismissed count when sentencing her, in violation of *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*). We agree, and remand for resentencing.

BACKGROUND

Injuries were discovered on the infant daughter (Minor) of appellant and Jesus Daniel Colula (Jesus).<sup>2</sup> The injuries included a one or two week old fracture in her tibia; healing fractures in multiple ribs; and injuries to her head, ear, and toes. Appellant and Jesus told law enforcement officers they did not know the cause of the injuries and provided a shifting series of accidents that they speculated might have been the cause.

<sup>1</sup> All undesignated section references are to the Penal Code.

<sup>2</sup> Facts about the underlying offense and investigation are taken from the probation report.

Law enforcement officers saw appellant and Jesus appearing to discuss how to coordinate their stories. Minor's physicians did not believe the accidents could have caused the injuries, and thought the injuries were very likely caused by abuse. Appellant stated they did not seek medical care for the infant because appellant smoked marijuana while breastfeeding and was afraid the baby would be taken away. Appellant and Jesus admitted attempting to "cast[]" Minor's leg themselves with bandages; Minor's physician opined the bandage "would have caused the infant extreme pain" and could have caused further damage.

In June 2012, a complaint was filed charging appellant and Jesus, in count one, with violating section 273a, subdivision (a), which provides: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years." Count two of the complaint charged appellant and Jesus with violating section 273d, subdivision (a), which prohibits "willfully inflict[ing] upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition." With respect to both counts, the complaint alleged an enhancement for personally inflicting great bodily injury on a child under the age of five (§ 12022.7, subd. (d)).

On August 2, the trial court stated for the record certain points discussed in an unreported conference. The court stated the People had made appellant and Jesus an offer of an open plea to count one and its enhancement, in exchange for the dismissal of count two. The trial court stated it was "very open towards a probation grant for both parties" for count one and the enhancement because of "the age of the people involved, the lack of any criminal record, [and] some ambiguity in what the injuries tell us about how the crime may have been committed."

At a subsequent hearing, both appellant and Jesus pled no contest to count one and admitted the enhancement.<sup>3</sup> The factual basis for the plea was stipulated to by counsel and not described in the written plea agreement or at the hearing. Count two was dismissed pursuant to the plea agreement. Appellant's plea agreement did not specify a sentence and did not include a waiver pursuant to *Harvey, supra*, 25 Cal.3d 754.

Appellant's sentencing was originally scheduled for September. During this hearing, appellant's counsel objected to the prosecutor's statements that Minor's parents inflicted horrific injuries on her. Appellant's counsel argued appellant "did not enter a plea as to Count II and Count II was not subject to *Harvey* waiver. I believe it's improper to be arguing that [appellant] intentionally inflicted any injury upon the child."<sup>4</sup> After hearing arguments, the trial court deferred sentencing and sent appellant for a diagnostic evaluation by the Department of Corrections and Rehabilitation pursuant to section 1203.03. The trial court explained its concern that it still did not know "the truth [about] what happened" to Minor and its hope that the diagnostic would shed light on the matter.

In November, while appellant's diagnostic was pending, Jesus was sentenced. During sentencing, Jesus's counsel argued "the prosecution paints a picture, allegations revolving around a count that was dismissed. The count that was pled to, the enhancement has to do with the standard of negligence, not a standard of intentional aggressive behavior." In announcing sentence, the trial court agreed that "the plea was based on a negligence theory, failure to give care," specifically, "the fact that he didn't provide timely medical care knowing that the child was in excruciating pain." The court noted, "we don't know which of the pair or both that committed these awful horrendous acts." The court found aggravating factors included "the seriousness of the injuries in the light of the failure to provide appropriate medical care in a timely way," "not providing medical treatment . . . to allow the breastfeeding wife to smoke marijuana," and Jesus's

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<sup>3</sup> The pleas were taken by a different judge, but the parties understood the case would return for sentencing to the judge who presided over the August 2 hearing.

<sup>4</sup> Appellant raised the same objection in her written statement in mitigation.

“deliberate fabrication of explanations” of the injuries. The trial court sentenced Jesus to the midterm of four years on count one, plus the aggravated term of six years on the great bodily injury enhancement.

Appellant’s diagnostic recommended a prison sentence. The evaluating psychologist found appellant was not a present threat to society; however, the associate warden concluded appellant was a threat.

At appellant’s sentencing hearing, the trial court stated that, while it was willing to give young people a chance to learn from their mistakes, “[t]his just wasn’t a mistake. This was a series of deliberate acts. Failure to provide treatment and care, and quite frankly the evidence is equal as to who actually inflicted all of these injuries.” The court found appellant presumptively ineligible for probation pursuant to section 1203, subdivision (e)(3) because “she intentionally inflicted great bodily injury to the victim based on the injuries sustained by the victim. The Court notes that the exact cause of injuries is unknown. But certainly the expert opinion is that this was traumatic, violent, intentional, and would have been devastating to the child [who] would have suffered gravely and painfully. The injuries are such that there were abuse, signs of abuse, including the rib injuries, also resulting from violent and aggressive forces.” The court noted that appellant could meet the criteria of an unusual case in which probation may be granted if otherwise appropriate as set forth in California Rules of Court rule 4.413(c)(2)(C),<sup>5</sup> which applies where the defendant is youthful and has no significant record of prior criminal offenses. Considering the rule 4.414 factors affecting whether appellant should receive a probation sentence, the unfavorable factors identified by the court included the victim was particularly vulnerable, the injuries were “severe,” and “we really don’t know what the long-term harms will be neurologically.” The court also found appellant “immature,” “violent,” and suffering from “anger management issues,” basing these findings in part on “the nature of these offenses, the repetitive injuries . . . .”

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<sup>5</sup> All undesignated rule citations are to the California Rules of Court.

The court identified circumstances in aggravation including that appellant “continue[d] with . . . marijuana use instead of treating, getting appropriate medical care for [Minor],” appellant’s “continuously lying throughout the proceedings of this case,” the severity of the injuries, and the vulnerability of the victim. The court concluded by noting the need for “deterrence involved in protecting children, protecting you from others, having now displayed extremely violent behavior towards one so vulnerable.” The court denied probation and sentenced appellant to the upper term of six years on count one, and the middle term of five years on the enhancement, for a total of 11 years’ imprisonment.

### DISCUSSION

Appellant argues the trial court improperly relied on facts underlying the dismissed count when sentencing her on count one, in violation of *Harvey, supra*, 25 Cal.3d 754. We agree.<sup>6</sup>

In *Harvey*, the California Supreme Court discussed a plea bargain in which the defendant pled guilty to two counts in exchange for dismissal of a third count. (*Harvey, supra*, 25 Cal.3d at p. 758.) The court held: “Implicit in such a plea bargain, we think, is the understanding (in the absence of any contrary agreement) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count.” (*Ibid.*) Under *Harvey*, absent a defendant’s waiver, “a court may not consider the facts underlying charges dismissed as part of a plea bargain to aggravate or enhance the defendant’s sentence.” (*People v. Lamb* (1999) 76 Cal.App.4th 664, 672.) However, a trial court may consider facts underlying a dismissed count when those facts are “*transactionally related*” to the admitted count because a plea bargain “ ‘does not, expressly or by implication, preclude the sentencing court from reviewing all the circumstances relating to [the defendant’s] *admitted* offenses to the legislatively mandated end that a term, lower, middle or upper, be imposed on [the

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<sup>6</sup> Because we are remanding for resentencing under *Harvey*, we need not decide appellant’s remaining challenges to her sentence.

defendant] commensurate with the gravity of his crime.’ ” (*Harvey, supra*, 25 Cal.3d at p. 758.)

As an initial matter, we must clarify what appellant pled no contest to. Appellant argues she pled to the offense of “act[ing] negligently in failing to keep her child out of harm’s way.” The People take the position on appeal that appellant pled to “deliberately fail[ing] to seek treatment for her infant daughter to avoid being discovered as a drug addict and potentially losing custody of her child.” This position is partly consistent with the position taken by appellant’s trial counsel, who stated at her sentencing hearing that “failing to seek the medical treatment for her daughter . . . is the bas[i]s of her conviction.” The parties dispute whether the conduct appellant pled to was negligent or willful, but agree that only the dismissed count alleged direct, willful infliction of the injuries.

The record supports the parties’ understanding as to the distinction between the counts. Section 273d, subdivision (a), charged in the dismissed count two, prohibits “willfully inflict[ing] upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition.” This statute targets the willful infliction of punishment or injury on a child and therefore the dismissed count could not have been based on the failure to protect or seek medical treatment. In contrast, “[v]iolation of section 273a, subdivision (a)” —charged in count one, which appellant pled to— “ “can occur in a wide variety of situations: the definition broadly includes both active and passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect.” ’ ” (*People v. Valdez* (2002) 27 Cal.4th 778, 784.) Section 273a, subdivision (a), can apply “where indirect infliction of harm on a child has occurred, such as failing to seek medical treatment, child endangerment, or willfully permitting situations that imperil children.” (*In re L.K.* (2011) 199 Cal.App.4th 1438, 1445.) Accordingly, the failure to protect or to seek medical treatment could have been the basis for count one.

At the August 2 hearing, while discussing the appropriate sentence for count one, the trial court noted there was “some ambiguity in what the injuries tell us about how the crime may have been committed,” indicating the basis for count one was not intentional

child abuse. At appellant’s sentencing hearing appellant’s counsel stated, without objection or contradiction from the prosecutor, that the failure to seek medical treatment was the basis of appellant’s plea. Similarly, at Jesus’s sentencing hearing, the trial court stated, again with no prosecution objection, “what [Jesus] did admit to . . . was the fact that he didn’t provide timely medical care knowing that the child was in excruciating pain.” Moreover, the trial court noted at Jesus’s and appellant’s sentencing hearings it was unclear who directly inflicted the injuries. Accordingly, we conclude the factual basis of appellant’s no contest plea to count one was the failure to seek medical treatment,<sup>7</sup> and the factual basis of the dismissed count two was the direct, intentional infliction of Minor’s injuries.

The question, therefore, is whether facts underlying the dismissed count are transactionally related to appellant’s admitted conduct. *Harvey* referred to *People v. Guevara* (1979) 88 Cal.App.3d 86 (*Guevara*) as an example of a case involving transactionally related facts. (*Harvey, supra*, 25 Cal.3d at p. 758.) In *Guevara*, the defendant kidnapped at gunpoint a mother and son at the same time. (*Guevara*, at p. 89.) He pled guilty to kidnapping the son; in exchange, a count alleging he kidnapped the mother and firearm enhancement allegations were dismissed. (*Id.* at pp. 88, 93.) On appeal, the defendant argued the trial court impermissibly relied on the fact that the crime involved a firearm and multiple victims as aggravating factors in his sentence. (*Id.* at pp. 92–93.) The Court of Appeal affirmed, noting first that sentencing courts were statutorily authorized to consider “circumstances” in aggravation or mitigation of the crime, and such circumstances “include ‘attendant facts,’ ‘the surroundings at the commission of an act.’ ” (*Id.* at pp. 92, 93.) The *Guevara* court concluded, “ ‘circumstances’ here would include those facts, matters occurring, acts committed or omitted in the commission of the kidnapping of [the child].” (*Id.* at p. 93) The use of a firearm and kidnapping of the mother constituted such circumstances: “The shotgun was

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<sup>7</sup> As we note below, we need not decide whether appellant pled to negligent or willful conduct.

in the possession of, used by Guevara in compelling [the child] and his mother to enter the car at the commencement of the kidnapping. To say the possession and use of the shotgun was not one of the circumstances of the kidnap of [the child] is to place blinders on a sentencing judge the Legislature did not expressly or impliedly intend. . . . [¶] . . . [The mother] was abducted along with [the child]. No amount of sophistry will make this fact anything but a ‘circumstance’—an aggravating ‘circumstance’ of the kidnapping of [the child].” (*Ibid.*) Because “[t]he plea bargain does not, expressly or by implication, preclude the sentencing court from reviewing all the circumstances relating to Guevara’s *admitted* offenses to the legislatively mandated end that a term, lower, middle or upper, be imposed on Guevara commensurate with the gravity of his crime,” the fact that a firearm and multiple victims were involved in the child’s kidnapping was properly considered by the trial court. (*Id.* at p. 94.)

The People cite *People v. Klaess* (1982) 129 Cal.App.3d 820 (*Klaess*), in which the defendant pled guilty to being an accessory after the fact to murder in exchange for the dismissal of two counts of murder. (*Klaess*, at pp. 822–823.) The sentencing court relied upon the aggravating factors “that the crime to which [the] defendant was an accessory was known to her to have involved great bodily harm and [the] defendant was aware the underlying crimes involved multiple victims, one of whom was particularly vulnerable.” (*Id.* at pp. 823–824.) The Court of Appeal found these facts “transactionally related” to the defendant’s admitted crime because the facts “were inseparably and integrally a part of [the] defendant’s admitted offense.” (*Id.* at p. 823.) The court explained: “The crime of accessory after the fact is an offense separate and distinct from the underlying felony. . . . [¶] . . . It is the intentional act with knowledge of a principal’s crime for which an accessory is punished. *All other things being equal*, an accessory after the fact to a felony involving fraudulent checks undoubtedly would not bear the same degree of culpability as an accessory after the fact to a multiple murder. The level of depravity of the principal is not irrelevant to the level of depravity of one who is willing to and who does knowingly render the principal aid after the fact. Defendant’s culpability for her admitted offenses can only be fully gauged by examining

what she knew about the crime to which she was an accessory. [Citation.] Defendant’s knowledge when acting as an accessory was a circumstance integrally a part of her admitted offense. Consideration of that knowledge by the sentencing judge did not violate the proscription of *People v. Harvey, supra*, 25 Cal.3d 754.” (*Id.* at pp. 823–824.)

*Klaess* is instructive. As in *Klaess*, appellant’s knowledge at the time she committed the admitted act of failing to seek medical care is transactionally related to her crime. Thus, the trial court could properly rely on a finding that, when appellant failed to seek medical care, she was aware of the severity of Minor’s injuries, because this would make her failure to seek medical care more culpable. Similarly, if the trial court found appellant knew the injuries were inflicted intentionally, rendering them more likely to reoccur, this would also impact her culpability for failing to seek care. Moreover, assuming appellant is correct that she pled only to negligent, not intentional, conduct, the trial court could properly consider any intentionality in her failure to seek medical care as that intent is integrally a part of the admitted crime.

However, the trial court could not rely on any finding that appellant herself directly inflicted the injuries, as this fact is not transactionally related to appellant’s subsequent failure to seek medical care. The infliction of the injuries is a separate and distinct act, not an act “committed or omitted in the commission of the” failure to seek medical care (*Guevara, supra*, 88 Cal.App.3d at p. 93), or “a circumstance integrally a part of her admitted offense” (*Klaess, supra*, 129 Cal.App.3d at p. 824). The trial court also could not consider the bare fact that the injuries were severe or were intentionally inflicted, absent a finding that appellant was aware of these facts when she failed to seek care.

We turn, finally, to what the trial court actually considered at sentencing. The trial court did not expressly find appellant directly inflicted the injuries, and noted at the beginning of its sentencing discussion that “the evidence is equal as to who actually inflicted all of these injuries.” However, appellant points to three comments by the trial court. First, the trial court stated appellant “intentionally inflicted great bodily injury to

the victim based on the injuries sustained by the victim.”<sup>8</sup> Second, the trial court stated appellant is “violent” and has “anger management issues,” and based these findings in part on “the nature of these offenses [and] the repetitive injuries.” Finally, the trial court identified a need for “[t]he specific deterrence involved in protecting children, protecting you from others, having now displayed extremely violent behavior towards one so vulnerable.”

We conclude these statements demonstrate the trial court made an implied finding that appellant directly inflicted Minor’s injuries and relied on this finding in sentencing appellant. Because consideration of this fact violated *Harvey*, we remand for resentencing.<sup>9</sup>

#### DISPOSITION

The judgment is reversed and remanded for resentencing.<sup>10</sup>

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<sup>8</sup> At oral argument, the People argued this statement reflected the admitted great bodily injury enhancement. However, the trial court found “intentional[]” infliction of great bodily injury. The enhancement “does not require a showing of *intent* to inflict [great bodily injury],” but rather a “general intent in committing the underlying . . . felon[y]” and the personal infliction of great bodily injury in the commission of that felony. (*People v. Poroj* (2010) 190 Cal.App.4th 165, 172, italics added.)

<sup>9</sup> The People contend any error is harmless; however, this argument is solely based on the People’s contention that “the sentence was not based on a finding that appellant intentionally inflicted the harm,” which we have rejected.

<sup>10</sup> In a separate petition for writ of habeas corpus, case No. A143137, appellant has raised claims challenging her no contest plea and the competency of her trial counsel. By separate order filed this date, we are issuing an order to show cause why certain relief requested in the petition should not be granted, returnable to the superior court. The superior court shall determine the order in which proceedings below shall occur.

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SIMONS, J.

We concur.

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JONES, P.J.

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BRUINIERS, J.