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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

LEANN JONES,

Defendant and Appellant.

C070576

(Super. Ct. No. P11CRF0105)

This case is not about what defendant Leann Jones did, but rather, what she did not do. Defendant appeals her convictions of child abuse likely to produce great bodily harm or death and personally inflicting great bodily injury on someone under the age of five years. She contends there is not sufficient evidence to support the jury's determination that she willfully placed her baby in a situation where the baby's health was endangered or that she personally inflicted great bodily injury on the baby, and that the court erred in ordering her to pay \$4,000 to the public defender for her representation. Finding sufficient evidence to uphold her convictions, we affirm the judgment, but we reverse the attorney fee order because the trial court failed to hold a hearing on defendant's ability to pay, even though defendant's attorney told the court she had no such ability.

FACTUAL AND PROCEDURAL BACKGROUND

On January 13, 2011, defendant and Demetrius Jones took their three-and-one-half-month-old child to Barton Memorial Hospital, where defendant worked. The infant was unresponsive. Defendant told South Lake Tahoe Police Officer John Spaeth that Demetrius had been holding the infant in his arms when he tripped over a baby gate and fell on the infant. Defendant claimed that immediately after the incident, they came to the hospital. During her conversation with the officer, defendant was not emotional or upset. Defendant did not mention the infant had ingested water, been hit in the head with a toy, or been injured a day or two earlier. While Officer Spaeth was interviewing defendant, South Lake Tahoe Police Officer Angela Kallstrom interviewed Demetrius, who gave a similar account of the incident.

Dr. Lance Orr was working on the night of the incident in the Barton Hospital emergency room. He questioned the story about how the injuries occurred because the baby's bruising appeared to be older than defendant and Demetrius claimed. Additionally, lab results showed the baby may have been dehydrated or not had enough to eat. Dr. Orr thought the injuries were consistent with "nonaccidental trauma" or shaken baby syndrome.

The day after the baby was taken to the hospital, Leah Brown, a social worker from El Dorado County Child Protective Services, investigated the family. When asked when the injury occurred, Demetrius told Brown it had happened in the morning. However, defendant immediately interrupted and said that it had happened in the evening, just before they had gone to the hospital.

A couple months after the incident, South Lake Tahoe Police Detective Pierre Herring interviewed defendant. Defendant again claimed Demetrius had tripped over a baby gate and fallen on their child. When confronted with the doctor's statements that her story was not consistent with the baby's injuries, defendant remained silent or reaffirmed her story, claiming "they haven't proven that yet." Defendant explained to

Detective Herring that Demetrius took care of the infant during the day while she was at work, and that if he had hurt the baby, he would have told her. Defendant also confirmed that the baby had been healthy and happy before the accident, and did not mention that the baby had not moved, cried, or eaten for two days.

Following his no contest plea in this case, Demetrius provided new information. Since 2008, he had been suffering from paranoia and had told defendant about his problem. Defendant was aware that Demetrius was taking medication that made him sleepy and unable to care for the children. Demetrius thought the infant was possessed by demons because she would talk to him. Demetrius had also told defendant that the government was “mind jacking” him.

Defendant had instructed Demetrius to watch their children while she was at work. Defendant threatened Demetrius that if he left he would never see his kids again. Demetrius told defendant that his sickness was getting worse and he did not think he was safe around the children. Even though he wanted to leave for the children’s safety, defendant told Demetrius to stay or he would not see his children anymore.

Demetrius gave a startling account of what actually happened to the infant that likely caused her injuries. Two days before Demetrius and defendant took the baby to the hospital, Demetrius “freaked out” when he noticed the infant was under water in the bathtub. He picked her up and she appeared unconscious, so he shook her and threw her on the bed. She flew across the bed and hit the wall. Demetrius tried to perform CPR, and the baby awoke and started breathing again. Demetrius then placed the infant in her car seat near the heater to warm her. When defendant came home several hours later, Demetrius told her that the infant had swallowed some water, would not eat, and did not look good. Demetrius told defendant that the infant had been submerged under water, and defendant agreed that the infant did not look good.

Defendant did not suggest that they take the infant to the hospital. Instead, she spent her evening eating dinner and watching movies while the infant was in her crib.

That night, the baby did not move or make noise, which was not normal for her. The next morning, the baby was not moving or crying, even though she had missed several feedings. Demetrius changed the baby's diaper and she appeared limp and lifeless. In order to hide the baby from public view, defendant suggested that their six-year-old son stay home from school so Demetrius would not have to take the baby out of the house. That day, defendant came home several times to check on the baby. Each time, the baby was not moving, crying, or eating.

At some point later that day, defendant suggested that they concoct a story to tell if they took the baby to the hospital. They made up the story about Demetrius tripping over the baby gate and falling. That night, they watched movies while the baby remained limp and lifeless. When they changed the baby's diaper, there was barely anything in it.

The next morning, defendant checked on the baby and noted that she did not look good. They decided that they would take the baby to the hospital after defendant came home from work, so they could go over their concocted story again. That night, they staged the trip-and-fall event with the six-year-old son watching so that he could corroborate their story. Finally, at about 9:45 p.m., defendant and Demetrius took the baby to the hospital.

Dr. Kathleen Dully, an expert on accidental and nonaccidental pediatric injuries, was of the opinion that the trip and fall story did not explain the infant's injuries. Dr. Dully thought the injuries probably happened two and one-half days before the baby was brought to the hospital and concluded the most likely cause of the injuries was nonaccidental trauma. Contributing to her opinion was the fact that the baby was dehydrated, starved, and underweight when she got to the hospital. Further, an abdominal CT scan showed the contents of the baby's colon to be inconsistent with defendant's description of the baby's bowel movements.

Dr. Dully further concluded that the baby was paralyzed, with no pain stimulus and no visual contact with her environment. It was Dr. Dully's opinion that the baby had

suffered brain damage as a result of a single trauma, most likely vigorous shaking and slamming, plus lack of appropriate medical treatment thereafter. Dr. Dully explained “But going without calories to support blood sugar, going without fluid intake to support blood pressure while the brain inside the skull is swelling and starting to prevent blood flow from being able to even get up to the brain because the swelling will choke off those vessels, is going to result in progressive damage to the brain from lack of energy, meaning blood sugar and oxygen to work with so it can try to repair itself. [¶] I can’t say to what degree that is responsible for the global brain damage we see. Some of it is injury and some of it is probably lack of care, but I can’t tell you if it’s 20 percent responsibility or 4 percent responsibility or 90 percent responsibility, but it did not help to leave this baby without appropriate good medical care for so long.” When asked if it was fair to conclude that the baby’s ultimate brain damage was worse today as a result of the two and one-half days without food or medical intervention, Dr. Dully responded “I think that’s likely, yes.” Dr. Dully predicts the baby will most likely be blind, paralyzed, and unable to ever think and reason normally. There was no evidence that the baby had been under water, and Dr. Dully did not believe Demetrius’s story about the drowning .

Defendant’s version of the facts is substantially different. She claims that until the day they went to the hospital, she had not noticed anything wrong with the baby, as she had mainly given her attention to the other children who had the flu. When she saw Demetrius holding the baby in the days leading up to the trip to the hospital, the baby looked normal. However, on the day they took the baby to the hospital, defendant thought the baby looked pale and weak, and her neck was limp. Defendant claims Demetrius is the one who told her to lie and say the baby was injured in a fall. Defendant only went along with the story because she was “confused,” “[s]cared,” and “[c]ontrolled.” Defendant claims she thought the baby’s injuries were caused by being hit in the head with a toy, and that Demetrius never told her about the baby ingesting water or being thrown against the wall.

The trial court sentenced defendant to an aggregate term of nine years in prison.

DISCUSSION

I

The Jury's Verdicts Are Supported By Sufficient Evidence

Defendant contends there is insufficient evidence to support her convictions for child abuse likely to produce great bodily harm or death and personally inflicting great bodily injury on someone who was under the age of five years. She is wrong.

For claims of insufficient evidence, “ ‘The standard of review is well settled: On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . .

“ ‘An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.’ [Citation.] ‘Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].’ ” (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1572-1573.)

To prove defendant was guilty of child abuse likely to produce great bodily harm or death, the prosecutor had to prove beyond a reasonable doubt that: (1) defendant willfully inflicted unjustifiable physical pain or mental suffering on a child, or the defendant willfully caused or permitted a child to suffer unjustifiable physical pain or mental suffering, or the defendant, while having care or custody of a child, willfully caused or permitted the child's person or health to be injured, or the defendant, while having care or custody of a child, willfully caused or permitted the child to be placed in a situation where the child's person or health was endangered, and (2) the defendant inflicted pain or suffering on the child or caused or permitted the child to suffer or be

injured or be endangered under circumstances or conditions likely to produce great bodily harm, and (3) the defendant was criminally negligent when she caused or permitted the child to suffer or be injured or be endangered, and the defendant did not act while reasonably disciplining the child. (CALCRIM No. 821.)

The phrase “likely to produce great bodily harm” means the probability of great bodily harm or death is high. Great bodily harm means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. Criminal negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when: one, she acts in a reckless way that is a gross departure from the way an ordinarily careful person would act in the same situation. Two, the person’s acts amount to disregard for human life or indifference to the consequences of her acts. And, three, a reasonable person would have known that acting in that way would naturally and probably result in harm to others. (CALCRIM No. 821.)

Here, there was sufficient evidence for the jury to conclude that, as a result of her criminal negligence, defendant permitted her child to suffer great bodily harm. Demetrius told defendant that he was paranoid and having serious mental health problems and that he was taking medication that made him sleepy and unable to care for the children. Demetrius also told defendant that he thought their child was possessed by demons and that the government was “mind jacking” him. In spite of the fact that Demetrius told defendant his sickness was getting worse and he did not think he was safe around the children, defendant made Demetrius watch their children while she was at work.

Further, even if defendant was not criminally negligent for leaving her infant with Demetrius prior to the accident, she certainly was criminally negligent for not immediately taking her baby to the hospital once she became aware of the extent of the injuries. The jury heard expert testimony that the infant’s injuries occurred probably two and one-half days before the infant was taken to the hospital. During that span, there was

substantial testimony that defendant was aware her baby was not eating, moving, crying, making noises, or going to the bathroom, and that the baby was limp and lifeless. In fact, there was testimony that defendant even suggested that their six-year-old child stay home from school to hide the baby from public view. In sum, defendant knew something was terribly wrong, yet did nothing.

When she finally took the infant to the hospital, defendant did not mention the infant had ingested water or been injured a day or two earlier in spite of the fact that Demetrius told defendant that the infant had been submerged under water. At the hospital, defendant confirmed that the baby had been healthy and happy, and did not mention that the baby had not moved, cried, or eaten for two days.

Had defendant not acted so grossly negligently, things might have turned out differently. It was Dr. Dully's opinion that a contributing factor to the extensiveness of the infant's injuries was the lack of appropriate medical treatment following the incident.

Ultimately, the baby was paralyzed, with no pain stimulus and no visual contact with her environment. This means, simply, that the baby will most likely be blind, paralyzed, and unable to ever think and reason normally because of brain damage.

There is sufficient evidence to uphold defendant's conviction for child abuse likely to produce great bodily harm.

To prove defendant was guilty of personally inflicting great bodily injury on someone who was under the age of five years, the prosecutor had to prove beyond a reasonable doubt that: (1) defendant personally inflicted great bodily injury on the child during the commission or attempted commission of that crime, and (2) at that time, the child was under the age of five years, and (3) the child was not an accomplice to that crime.

Defendant claims she did not personally inflict the injury upon her baby, and therefore there is not sufficient evidence to uphold the jury's finding of the enhancement. She is wrong again.

In *People v. Cross* (2008) 45 Cal.4th 58, the California Supreme Court interpreted the meaning of the term “personally inflicts” in Penal Code section 12022.7, subdivision (a), an enhancement with language identical to that contained in section 12022.7, subdivision (d).¹ (*Cross*, at p. 67.) Our high court stated, “Commonly understood, the phrase ‘personally inflicts’ means that someone ‘in person’ (Webster’s 7th New Collegiate Dict. (1970) p. 630), that is, directly and not through an intermediary, ‘cause[s] something (damaging or painful) to be endured’ ” (*Id.* at p. 68.)

Relying on *Cross*, the court in *People v. Warwick* (2010) 182 Cal.App.4th 788, interpreting Penal Code section 12022.7, subdivision (d), stated that personally inflicts means that defendant “ ‘ “causes something (damaging or painful) to be endured.” ’ ” (*Warwick*, at p. 795.) The court concluded that “this definition does not preclude the failure to act where action is required.” (*Ibid.*)

Here, defendant failed to act in spite of the fact that her infant child was not eating, moving, crying, making noises, or going to the bathroom. As mentioned above, defendant suggested that their six-year-old child stay home from school to hide the baby from public view. According to Dr. Dully, had defendant acted sooner, her baby’s injuries likely could have been mitigated.

Therefore, there is sufficient evidence in the record for the jury to find that defendant knew her baby required immediate medical attention and that she failed to act for more than two days, thus resulting in great bodily harm. The jury’s finding for the enhancement must be upheld.

¹ Penal Code section 12022.7, subdivision (d) contains the great bodily harm enhancement for which defendant was alleged to have committed, convicted, and now appeals.

II

Imposition Of Attorney Fees

Defendant claims the trial court erred by ordering her to pay attorney fees in the amount of \$4,000. (See Pen. Code, § 987.8.) The People agree.

At sentencing, the following occurred:

“[THE COURT:] The Court will find that the defendant is able to pay for legal services pursuant to [section] 987.8 of the Penal Code. [¶] The Court would be inclined, Ms. London, to impose \$4,000 for legal services. Any comment?”

“MS. LONDON [Defense Counsel]: I don’t know how you calculated that other than, obviously, the time we spent in the courtroom. I don’t have an opinion. *I’m sure she doesn’t have the ability to pay that.* I’m certainly not going to say I’m not worth it. (Italics added.)”

“MR. GOMES [Prosecutor]: Shouldn’t the cost of Dr. Dully being flown up here for sentencing be included in that?”

“THE COURT: That’s part of what I’ve calculated in. It may not cover all of the costs. It certainly doesn’t cover the cost of the actual cost of legal services which are probably more in the \$20,000 range.”

“MS. LONDON: I don’t have an opinion on that.”

“THE COURT: I’m going to impose 4,000. I think that’s reasonable for the defendant to be able to pay over the course of her imprisonment.”

Penal Code section 987.8 provides that in a criminal proceeding in which the defendant was provided legal assistance, either through the public defender or private counsel appointed by the court, the trial court shall order the defendant to reimburse the county for all or part of the cost of representation “[i]f the court determines that the defendant has the present ability to pay.” (Pen. Code, § 987.8, subd. (e).) The court may make a determination of the defendant’s ability to pay “after notice and a hearing.” (*Id.*, subd. (b).) At such a hearing, the defendant has the right (among others) to be heard in

person, present witnesses and documentary evidence, and have the evidence against her disclosed to her. (*Id.*, subd. (e).) Ability to pay includes the defendant's reasonably discernible future financial position, but "[i]n no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense." (*Id.*, subd. (g)(2)(B).) Also, the record must contain competent evidence of the actual cost of the services provided to the defendant by the county and of the defendant's ability to pay. (E.g., *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217-1218.)

The trial court's order here that defendant pay \$4,000 for the legal representation she received complied with virtually no part of Penal Code section 987.8. Defendant does not appear to have been given notice that the court was going to determine her ability to pay at the sentencing hearing, and she certainly was not afforded all of the rights to which she was entitled during such a hearing. Further, there appears to have been no evidence of the actual cost of the services defendant received. Also, there appears to have been no evidence of defendant's financial position at the time of the sentencing hearing to justify a \$4,000 reimbursement order, and the court's conclusion that it would be reasonable for her to pay that amount over the course of her imprisonment for an aggregate term of nine years went far beyond the six-month period that the governing statute permits the court to consider.

Given the trial court's utter failure to comply with the terms of Penal Code section 987.8, and the People's concession that the matter should be remanded for a proper hearing on defendant's ability to pay, we will reverse the fee order and remand for further proceedings.

DISPOSITION

The judgment is affirmed, but the order requiring defendant to reimburse the county \$4,000 for the cost of her legal representation is reversed, and the case is remanded to the trial court to conduct further proceedings in compliance with Penal Code section 987.8.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

HOCH, J.