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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

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THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL CASAREZ ROMERO,

Defendant and Appellant.

C074103

(Super. Ct. No. 62110946)

A jury convicted defendant Angel Casarez Romero of attempted murder, assault with a deadly weapon, stalking, corporal injury to spouse, and three counts of felony child endangerment. The trial court imposed an aggregate prison term of 19 years eight months.

Defendant now contends (1) reversal on one of the felony child endangerment counts is required because there is no evidence that he had care or custody of the victim in that count; (2) there is insufficient evidence that he acted under circumstances or conditions likely to produce great bodily injury or death to the victims in the felony child endangerment counts; (3) the trial court erred in not instructing the jury on the lesser included offense of misdemeanor child endangerment; (4) the trial court should have stricken, and not merely stayed, punishment on the Penal Code section 12022.7, subdivision (a)<sup>1</sup> enhancement because it imposed punishment on the section 12022.7, subdivision (e) enhancement; and (5) the abstract of judgment must be corrected to show that the trial court stayed punishment on count two.

We conclude (1) no substantial evidence supports the finding in count three that defendant had care or custody of the victim; (2) there is substantial evidence to support the jury's finding that the totality of the circumstances created a substantial danger of great bodily harm or death to the victims in counts four and five; (3) defendant fails to demonstrate instructional error; (4) no punishment may be imposed pursuant to section 12022.7, subdivision (a) where the trial court imposed punishment under section 12022.7, subdivision (e) because the two section 12022.7 enhancements relate to the same victim in the commission of a single offense; and (5) the trial court failed to impose sentence on counts two and seven.

We will reverse the judgment as to count three, order the punishment under section 12022.7, subdivision (a) stricken, reverse the judgment as to counts two and seven, and remand for a new sentencing hearing so that the trial court can impose and then stay execution of an appropriate sentence on counts two and seven. We will otherwise affirm the judgment.

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

## BACKGROUND

Defendant abused I.S. during their 10-year relationship. He twice threatened I.S. with a knife. The couple separated in June 2011 but continued to share custody of their daughters, B.R. and D.R. B.R. was nine and D.R. was seven in December 2011.

After their separation, defendant followed I.S. and also called and texted her more than 20 times a day. He threatened to kill her if he ever saw her with another man. About a month before the incident leading to the charged offenses, defendant confronted a man leaving I.S.'s apartment. Defendant threatened to kill that man and another man.

When defendant told I.S. he had a way to get into her apartment, I.S. changed the locks on her front door, but she did not change the locks for two other exterior doors to her apartment. She arranged to serve defendant with divorce papers on December 10, 2011. A week later, defendant asked I.S. if she was pregnant, saying that he saw pregnancy tests in her apartment. I.S. had hidden a pregnancy test in her apartment and had not informed anyone about it.

A week later, I.S. was in the bedroom of her apartment with B.R., D.R., and eight-year-old K.C., the son of a friend. I.S. and D.R. slept on one bed, B.R. slept on another, and K.C. slept on the floor between the two beds. At one point I.S. woke up and saw a man wearing dark clothing watching her from the bedroom doorway. The height and body type of the man was similar to that of defendant and the man's eyes looked like defendant's eyes when defendant was angry. The man wore a cap and something covering his nose and mouth.

The man attacked I.S. I.S. detected the smell of defendant's body odor and the light scent of a "perfume" defendant wore.

I.S. waved her arms to push the attacker away. She tried to defend herself and grabbed her attacker. D.R.'s arm was on I.S.'s stomach at one point during the attack; I.S. pushed D.R.'s arm away so D.R. would not get hurt. I.S. screamed for help.

She thought the attacker was hitting her and did not realize he was stabbing her. She called police using her cell phone after the attacker fled.

K.C. awoke when someone stepped on his arm. He saw a person dressed in black but did not see the attacker's face and did not smell any cologne. It was dark in the bedroom, he was scared, and his arm hurt.

B.R. woke up when she heard K.C. and D.R. screaming. B.R. heard K.C. ask if he could go on I.S.'s bed because he was scared, and heard I.S. say yes. B.R. asked if I.S. could go to B.R.'s bed. I.S. and D.R. both said I.S. was not feeling well. B.R. turned on the light in the bedroom and saw D.R. and K.C. on D.R.'s bed, I.S. on the floor with blood on her hands, and blood on the bed. K.C. and D.R. had blood on their clothes. B.R., D.R., and K.C. were scared and cried. B.R. did not know who hurt I.S. She did not see anyone other than I.S., D.R., and K.C. in the bedroom.

B.R. called 911 at about 12:55 a.m. She called defendant two or three times using I.S.'s cell phone. Cell phone records indicate that when the cell phone defendant used received a call from I.S.'s cell phone at 12:57 a.m., the phone defendant used was less than one mile from I.S.'s apartment.

I.S.'s neighbors heard a thumping sound from I.S.'s apartment, followed by loud screaming by a woman, and then children screaming and pleading for help. A neighbor called 911 around 1:00 a.m. and her husband went to I.S.'s apartment to see what had happened. He found I.S.'s front door ajar and K.C., B.R., and D.R. crying. There was blood around the bedroom. I.S. was unconscious.

I.S. suffered eight stab wounds, three to her chest, four to her arm, and one on the side of her abdomen. Her wounds were consistent with knife wounds. The wounds to her chest and abdomen were potentially life threatening. Emergency surgical procedures were performed to save her life.

I.S. identified defendant as her attacker based on what she saw and smelled during the attack and because defendant believed she was pregnant and had threatened her.

Defendant presented alibi evidence. His uncle testified that defendant was at a party in Rocklin starting at 8:00 or 8:30 p.m. on December 17, 2011. Another witness testified that defendant was still at the party after 1:00 a.m.

The jury convicted defendant of attempted murder (§§ 187, subd. (a), 664 -- count one), assault with a deadly weapon (§ 245, subd. (a)(1) -- count two), three counts of felony child endangerment (§ 273a, subd. (a) -- counts three, four and five), stalking (§ 646.9, subd. (a) -- count six) and corporal injury to spouse (§ 273.5, subd. (a) -- count seven). The jury found true the allegations in count one that defendant personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)), personally inflicted great bodily injury (§ 12022.7, subd. (a)), and personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)) in the commission of attempted murder. The trial court declared a mistrial as to the count one allegation of premeditation and deliberation.

The trial court sentenced defendant to an aggregate of 19 years eight months in prison. It imposed nine years on count one, plus a consecutive five years for the section 12022.7, subdivision (e) enhancement and a consecutive one year for the section 12022, subdivision (b)(1) enhancement. The trial court stayed punishment on the section 12022.7, subdivision (a) enhancement. The trial court did not impose a sentence on counts two and seven. It merely said those counts were stayed pursuant to section 654. The trial court imposed 16 months for each child endangerment count and eight months for the stalking count.

## DISCUSSION

### I

Defendant contends his count five child endangerment conviction should be reversed because there is no evidence he had care or custody of K.C., the visiting son of a friend, at the time of the offense. Defendant's opening appellate brief erroneously refers to count five as the count concerning K.C. Count three, not five, of the information

charged defendant with felony child endangerment in relation to K.C. We will treat defendant's contention as pertaining to count three, and as to that count, we agree with his contention.

In determining whether sufficient evidence supports a conviction, “ ‘we do not determine the facts ourselves. Rather, we “examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- evidence that is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.]’ ” (*People v. Nelson* (2011) 51 Cal.4th 198, 210.) We do not reweigh evidence or reevaluate a witness’s credibility. (*Ibid.*) Reversal on the ground of insufficiency of the evidence is not warranted unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the verdict. (*People v. Hughes* (2002) 27 Cal.4th 287, 370.) The effect of this standard of review is that a defendant challenging the sufficiency of the evidence to support his conviction bears a heavy burden on appeal. (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1287.)

Defendant was charged with three counts of felony child endangerment. Section 273a, subdivision (a), the felony child endangerment statute, proscribes four categories of punishable conduct. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1215 (*Sargent*)). The statute provides that a person shall be punished if, under circumstances or conditions likely to produce great bodily harm or death, they (1) willfully cause or permit a child to suffer, (2) inflict unjustifiable physical pain or mental suffering, (3) have

the care or custody of a child and willfully cause or permit the child to be injured, or (4) willfully cause or permit that child to be placed in a situation where he or she is endangered. (§ 273a, subd. (a).)

Count three alleges that defendant, under circumstances or conditions likely to cause great bodily harm or death, (1) willfully caused or permitted K.C. to suffer or inflicted upon K.C. unjustifiable physical pain or mental suffering or (2) having care or custody of K.C., willfully caused or permitted K.C. to be placed in a situation where his person or health was endangered. The People proceeded under the latter allegation only and the jury was instructed only on that theory. Under that theory, the People had to prove that defendant had care or custody of the victim.

The words “care or custody” in section 273a are commonly understood terms that have no particularized meaning. (*People v. Perez* (2008) 164 Cal.App.4th 1462, 1475.) The words “imply . . . only a willingness to assume duties correspondent to the role of a caregiver.” (*People v. Cochran* (1998) 62 Cal.App.4th 826, 832.) Section 273a “covers not only parents, guardians, and babysitters, but also individuals who do not necessarily have as substantial a relationship to a child as a parent, guardian, and/or babysitter, but who nevertheless have been entrusted with the care of a child, even for a relatively short period of time.” (*Perez, supra*, 164 Cal.App.4th at p. 1469; see *People v. Malfavon* (2002) 102 Cal.App.4th 727, 736-737 [defendant had responsibility for watching the victim when she was injured].) Thus, “the relevant question in a situation involving an individual who does not otherwise have a duty imposed by law or formalized agreement to care for a child (as in the case of parents or babysitters), is whether the individual in question can be found to have undertaken the attendant responsibilities [of a caregiver] at all.” (*Perez, supra*, 164 Cal.App.4th at p. 1476.)

K.C. testified that I.S. was a family friend, although he called her “aunt.” There was evidence that K.C. visited I.S.’s home. But defendant did not live with I.S. And there is no evidence K.C. was ever left in defendant’s care. There is no evidence in the

record from which the jury could find that defendant ever undertook any duties which correspond to the role of a caregiver with regard to K.C. For this reason, we conclude that no substantial evidence supports the finding in count three that defendant had care or custody of K.C., and we reverse the judgment as to that count.

## II

Defendant next claims there is insufficient evidence that he acted under circumstances or conditions likely to produce great bodily injury or death to the victims in the felony child endangerment counts (counts three, four, and five). We need only discuss defendant's claims with regard to counts four and five because we have determined that reversal is required on count three.

Section 273a, subdivision (a) "is 'intended to protect a child from an abusive situation in which the probability of serious injury is great.' " (*Sargent, supra*, 19 Cal.4th at p. 1216.) If an act is done " 'under circumstances or conditions likely to produce great bodily harm or death,' " the crime is a felony. (*Id.* at p. 1223.) Otherwise it is a misdemeanor. (*Ibid.*) " 'Great bodily harm refers to significant or substantial injury and does not refer to trivial or insignificant injury.' [Citation.]" (*People v. Cortes* (1999) 71 Cal.App.4th 62, 80.) But there is no requirement that the child actually suffer great bodily harm. (*Sargent, supra*, 19 Cal.4th at p. 1216.)

Whether an act is done " 'under circumstances or conditions likely to produce great bodily harm or death,' " i.e., under conditions in which the probability of serious injury is great, is a question for the trier of fact. (*Sargent, supra*, 19 Cal.4th at pp. 1221, 1223; *People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204 [" 'likely' as used in section 273a means a substantial danger, i.e., a serious and well-founded risk"].) The circumstances and conditions a reasonable jury could consider in determining whether the totality of the circumstances created a substantial danger of great bodily harm or death include "(1) the characteristics of the victim and the defendant, (2) the characteristics of the location where the abuse took place, (3) the potential response or

resistance by the victim to the abuse, (4) any injuries actually inflicted, (5) any pain sustained by the victim, and (6) the nature of and amount of force used by the defendant.” (*People v. Clark* (2011) 201 Cal.App.4th 235, 245, fn. omitted.)

There is sufficient evidence of a great probability of serious bodily harm to D.R. because D.R. was in the same bed as I.S. while defendant repeatedly stabbed I.S. It was dark in the bedroom. I.S. waved her arms to fend defendant off. She grabbed defendant. Her wounds were not limited to a single area. She suffered stab wounds to her arm, chest, and abdomen, suggesting that defendant stabbed her indiscriminately and/or that she was moving during the attack. D.R.’s arm was on I.S.’s stomach at one point during the attack, and I.S. pushed D.R.’s arm away so that D.R. would not get hurt. The jury could rationally conclude that the probability of great bodily harm to D.R. was high under the circumstances here.

B.R. was not in the same bed as I.S. However, the jury could have reasonably found that defendant caused B.R. to be endangered under circumstances or conditions likely to produce great bodily harm. B.R. was nine years old at the time of the stabbing. She woke up to screaming and sought reassurance from I.S., asking I.S. to come to her bed. After she saw I.S. was hurt, B.R. went to I.S. and tried to help her. There is a great probability of serious bodily injury to B.R. if she had approached I.S. in the dark when I.S. screamed for help and while I.S. was fending defendant off. The prosecution showed the jury photographs and a video of the bedroom with the two beds. There was testimony about where I.S., B.R., D.R., and K.C. slept in the bedroom. The jury was in the best position to observe the witnesses and the characteristics of the bedroom where I.S. was attacked, including the proximity of the children to I.S., to determine whether the circumstances of the attack in the dark bedroom, in the presence of the three children, were likely to cause great bodily harm to the children. The jury could have rationally concluded from the characteristics of the children, the location, the nature of the attack

and the response by the victims, that the totality of the circumstances created a substantial danger of great bodily harm or death to B.R. and D.R.

Defendant asserts that witnessing the attack and being traumatized by it is insufficient to satisfy the “likely to produce great bodily injury or death” element. But the trial court did not instruct the jury that mental suffering was adequate to satisfy the “likely to produce great bodily injury or death” element. The trial court told the jury that in order to convict defendant of felony child endangerment, the jury must find that defendant caused or permitted the child to be endangered under circumstances or conditions likely to produce great bodily harm or death. The trial court said “likely to produce great bodily harm or death” means that “the probability of great bodily harm or death is high.” And “great bodily harm” means significant or substantial physical injury and injury that is greater than minor or moderate harm. The trial court told the jury to follow the law as it had explained and to follow its instructions on the law if an attorney’s comments on the law conflicted with those instructions. The prosecutor argued that defendant placed all of the children in danger because he stabbed I.S. while the children were in close proximity to I.S. The prosecutor did not argue that being traumatized by the attack satisfied the “under circumstances likely to produce great bodily injury or death” requirement.

Defendant’s claim of insufficient evidence lacks merit regarding B.R. (count four) and D.R. (count five).

### III

Defendant also argues the trial court erred in not instructing the jury on the lesser included offense of misdemeanor child endangerment.

A trial court has a duty to sua sponte instruct the jury on a lesser included offense when evidence that the defendant is guilty only of the lesser offense is “ ‘substantial enough to merit consideration’ ” by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) “ ‘Substantial evidence’ in this context is ‘evidence from which a jury

composed of reasonable [persons] could . . . conclude[ ]” ’ that the lesser offense, but not the greater, was committed.” (*Ibid.*) The trial court need not instruct on theories that have no such evidentiary support. (*Ibid.*)

Defendant claims a misdemeanor child endangerment instruction was warranted because it was questionable whether his actions were committed “under circumstances or conditions likely to produce great bodily harm or death” to K.C., B.R., and D.R., and there was substantial evidence to support instruction on misdemeanor child endangerment. But he fails to point to the evidence in the record from which the jury could reasonably find that defendant did not act “under circumstances or conditions likely to produce great bodily harm or death” to the children. To the contrary, as we have explained, there was substantial evidence that defendant subjected B.R. and D.R. to a high probability of great bodily harm when he repeatedly stabbed I.S. in the dark bedroom while D.R. lay next to I.S. and B.R. was in the next bed, and it was reasonably foreseeable that B.R. and/or D.R. would move toward their mother when she screamed for help during the attack. Defendant fails to demonstrate that the trial court had a sua sponte duty to instruct the jury on misdemeanor child endangerment. (*People v. Crosby* (1956) 139 Cal.App.2d 101, 108 [appellant must affirmatively prove error]; *People v. Goodall* (1951) 104 Cal.App.2d 242, 249.)

#### IV

Defendant further claims the trial court should have stricken, and not merely stayed, punishment on the section 12022.7, subdivision (a) enhancement because the trial court imposed punishment on the section 12022.7, subdivision (e) enhancement. The Attorney General agrees.

The People charged defendant with attempted murder in count one, and alleged in that count that defendant personally inflicted great bodily injury on I.S. (§ 12022.7, subd. (a)) and personally inflicted great bodily injury on I.S. under circumstances involving domestic violence (§ 12022.7, subd. (e)). Section 12022.7, subdivision (a)

provides, “Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.” Section 12022.7, subdivision (e) provides, “Any person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years.”

The jury convicted defendant of attempted murder and found the section 12022.7 allegations to be true. The trial court imposed a sentence of five years for the section 12022.7, subdivision (e) enhancement and stayed punishment on the section 12022.7, subdivision (a) enhancement pursuant to section 654.

“When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense.” (Stats. 2011, ch. 361, § 8.7, [§ 1170.1, subd. (g)].)<sup>2</sup> Pursuant to section 1170.1, subdivision (g), no punishment may be imposed under section 12022.7, subdivision (a) -- the lesser of the section 12022.7 enhancements -- because the enhancements relate to the same victim in the commission of a single offense. (*People v. Mercado* (2013) 216 Cal.App.4th 67, 94.) Accordingly, we will strike the punishment under section 12022.7, subdivision (a).

## V

Defendant argues the abstract of judgment must be corrected to reflect that the trial court stayed punishment on count two.

“[W]hen a court determines that a conviction falls within the meaning of section 654, it is necessary to impose sentence but to stay the execution of the duplicative

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<sup>2</sup> Section 1170.1 was amended with minor changes and extended effective January 1, 2014. (Stats. 2013, ch. 508, § 7.)

sentence . . . . The sentencing court should stay execution of sentence pending completion of service of sentence upon the greater offense, with the stay to become permanent upon completion of that sentence.” (*People v. Duff* (2010) 50 Cal.4th 787, 796, italics omitted (*Duff*)). Staying imposition of sentence is not an option. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1468 (*Alford*)). “ ‘Upon conviction it is the duty of the court to pass sentence on the defendant and impose the punishment prescribed. [Citations.] Pursuant to this duty the court must either sentence the defendant or grant probation in a lawful manner; it has no other discretion.’ ” (*Ibid.*) Failure to sentence the defendant results in an unauthorized sentence. (*Id.* at p. 1473.)

Here, the trial court found defendant was statutorily ineligible for probation. But it did not impose sentence on counts two and seven, it merely said those counts were stayed pursuant to section 654. The trial court must impose a sentence on counts two and seven and stay execution of sentence pursuant to section 654. (*Duff, supra*, 50 Cal.4th at p. 796; *Alford, supra*, 180 Cal.App.4th at pp. 1468-1473.)

We could impose a sentence on counts two and seven rather than remanding for a new sentencing hearing if we could determine the sentence the trial court would have undoubtedly imposed on those counts. (*Alford, supra*, 180 Cal.App.4th at p. 1473) Here, however, we will remand. It is true that the trial court exercised its discretion to impose the upper term on the attempted murder count, and that it did not orally impose any sentence on counts two and seven. But the abstract of judgment indicates a midterm for counts two and seven. Under the circumstances, we will exercise caution and remand for a new sentencing hearing so the trial court can impose sentence on counts two and seven and stay execution of sentence pursuant to section 654.

#### DISPOSITION

Defendant’s count three conviction for felony child endangerment is reversed. Punishment under section 12022.7, subdivision (a) is stricken. The judgment as to counts two and seven is reversed and the matter is remanded so the trial court can impose

