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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KATRINA ACKLES,

Defendant and Appellant.

D060772

(Super. Ct. No. SCD230712)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Einhorn, Judge. Affirmed.

A jury convicted Katrina Ackles of two counts of child abuse (Pen. Code¹, § 273a, subd. (a)), and found true an allegation that she personally inflicted great bodily injury on a child under the age of five (§§ 1192.7, subd. (c)(8) & 12022.7, subd. (d)). Ackles was sentenced to a determinate term of three years, four months in prison.

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

Ackles appeals contending the prosecutor committed prejudicial misconduct during cross-examination and in closing argument. Our review of the record leads us to the conclusion there was no misconduct by the prosecutor, even though the prosecutor made mistakes. We are satisfied there was no prejudice to Ackles's case.

STATEMENT OF FACTS

Ackles does not challenge either the admissibility or the sufficiency of the evidence to support the convictions in this case. Accordingly, only a summary of the facts is warranted in this opinion in order to provide context for the discussion which follows. We will adopt the statement of facts set forth in appellant's opening brief as an adequate summary.

A. Prosecution Case

On August 26, 2010, appellant took her 23-month-old son, D., to appellant's grandmother's house. The grandmother noticed an injury on D.'s hand and called Child Protective Services (CPS). The next day, on August 27, 2010, appellant took D. to Rady Children's Hospital for treatment. While at Rady Children's Hospital, appellant spoke with Officer Zane Peterson. Appellant told Peterson that the previous Monday she had been ironing some clothes but that she left the room where the iron was, and a few minutes later D. came running to her saying "ouchie, ouchie." Appellant said she unplugged the iron and ran D.'s hand under cold water for about 10 minutes, and bandaged the wound. The next day it had blisters. Appellant told Peterson that she had taken D. to Euclid Medical Center for treatment, where a physician checked the wound,

cleaned it and bandaged it. Appellant later admitted to Detective Burow that she only took D. to the doctor after CPS came out to her house.

Seema Shah, pediatric emergency physician at Rady Children's Hospital, treated D. on August 27, 2010. Shah described the wound as a burn to the hand, overlying between the thumb and first finger, with indistinct burns to the middle finger, ring finger, and wrist. Shah stated the burn was clearly a pattern from a clothing iron.

Jennifer Davis, a pediatric hospitalist at Rady Children's Hospital, spoke with Detective Burow, reviewed D.'s medical records, and viewed photographs of D.'s wounds. In Davis's opinion, the burn pattern on D.'s hand was inconsistent with a hot iron falling on the hand because there were no "swipe burns" from D. pulling his hand away. Here, the circular sparing on the iron steam holes were visible in the wound. Davis also said that there were medical risks for failing to seek treatment for burns, and because D. required three visits to the burn center, the burn was severe enough to require treatment and therapy.

B. Defense Case

On a Sunday during August 2010, appellant was drying a pair of pants with a clothes iron as her son D. was playing around the house. Appellant picked up the pants, wrapped the cord around the iron, and when the phone started ringing, set the iron on a deep freezer and went to answer the phone. She did not worry about D. playing with the iron. Soon after, D. came running to appellant in the bedroom saying, "mommy, ouch," with some tears. Appellant saw that D. had been burned, and she ran cold water on the burn for 10-15 minutes, and then wrapped a cold towel around his hand. She bought

Neosporin and treated the wound. Appellant took D. to the hospital only after a CPS worker came out. She was concerned that she had not taken D. for treatment because "[t]hey probably would have thought that I had did it." Appellant denied intentionally burning D., and denied that she would ever do such a thing to her child.

Steven Gabaeff, a board certified emergency physician, reviewed the police reports, medical records, and viewed the photographs pertaining to this case. In Gabaeff's opinion, D.'s hand was probably flat, the iron came down on the hand sideways, and D. immediately pulled his hand back. Gabaeff's opinion was that because of the temperature of the iron, intentional injury was unlikely because it would have been very difficult to just make contact with the iron for the one-tenth of a second or two-tenths of a second that would be involved to make this burn. To a reasonable medical certainty, Gabaeff's opinion was this was an accident.

Five witnesses testified to appellant's reputation as a nonviolent person.

C. Prosecution Rebuttal Case

Bruce Potenza, physician director of the burn unit where D. was treated, stated the burn pattern showed that an object was placed on D.'s hand for a period of time to allow the tattoo mark to occur, and then taken directly off. Potenza disagreed with Gabaeff's opinion that D. pulled his hand from under the object, because if that had happened, it would have left a diffuse burn and not the distinct tattoo mark. In Potenza's opinion, it was more likely that this was an intentional injury rather than an unintentional injury.

DISCUSSION

Ackles contends the prosecutor committed two acts of prejudicial misconduct.

The first alleged act took place during cross-examination when the prosecutor asked Ackles about her prior conviction for selling cocaine base. Ackles acknowledged she had suffered that conviction and then the prosecutor asked her: "That was while you had your three kids in the house?" The court sustained defense counsel's objection to the question and there were no further questions on the subject. The defense motion for mistrial was denied.

The second alleged act of misconduct took place during the prosecutor's final argument. The prosecutor referred to testimony of Ackles's daughter, L. The prosecutor said: "[W]e heard from [L.]. Do you remember when she sat on the stand a few days ago and had to talk about how her mom beat her, punched her in the head repeatedly, whipped her with a belt." Defense counsel immediately objected that the comment misstated the evidence, however the court overruled the objection. The respondent correctly concedes the prosecutor's statement was incorrect. L. actually denied all but a single push to her head, however, the prosecution had entered evidence through a social worker who testified that L. said her mother had hit her in the head with her fist.

Ackles contends both actions by the prosecutor constituted prejudicial misconduct.

A. Legal Principles

The parties are essentially in agreement as to the definitions of prosecutorial misconduct. "A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1202; *People v. Parson* (2008) 44 Cal.4th 332, 359; *Darden v. Wainwright* (1986) 477 U.S.

168, 181.)

Under California law prosecutorial misconduct occurs when a prosecutor uses deceptive or reprehensible methods, even if those actions do not result in a fundamentally unfair trial. (*People v. Parson, supra*, 44 Cal.4th at p. 359; *People v. Earp* (1999) 20 Cal.4th 826, 858.)

B. Cross-Examination

As we have noted, the prosecutor asked Ackles whether her conviction for selling cocaine base arose out of a time when she had three small children in her house. In sustaining the objection the court found the prosecutor had exceeded the scope of questioning regarding prior convictions as had been outlined in the in limine motions. In the earlier rulings the court directed the prosecution not to inquire about the facts of the underlying offense.

The prosecutor explained that she was not inquiring about the facts of the offense, but was responding to defense evidence that indicated Ackles was a near perfect mother who would do nothing to endanger her children. Satisfied with the prosecutor's explanation, the court still believed the question inappropriate, but not prejudicial and denied the defense motion for mistrial.

We agree the question asked was not artful and had the potential of being interpreted as inquiring into the facts of the prior conviction. That said, there does not appear to be any evidence of deceitful or reprehensible conduct by the prosecutor. Inquiring into matters that would bear on the character traits Ackles had put in issue does not indicate misconduct. In any event, the court timely sustained the objection and there

were no other inquiries about the prior conviction. The jurors were instructed that they should not speculate about questions to which objections might be sustained. There is nothing about this very brief comment during cross-examination to remotely demonstrate prejudice, or improper conduct by the prosecutor.

C. Closing Argument

It is undisputed the prosecutor incorrectly stated that L. had testified about beatings by her mother. L. in fact denied most of it. The prosecutor did, however, follow up her comments about L. with a discussion of her statements to a social worker that included statements by L., which were inconsistent with her trial testimony. Thus there was evidence of statements attributed to L. about physical abuse by her mother in the past.

It is the case that a prosecutor can commit misconduct when he or she misstates or mischaracterizes the evidence in argument to the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 823; *People v. Harrison* (2005) 35 Cal.4th 208, 249.) The question remains, however, whether on this record we should conclude the prosecutor committed misconduct, or simply made a mistake. We are satisfied this record leads to the latter conclusion.

First, the comment did not refer to something that was not in evidence. Certainly there was a dispute in the case about what exactly L. said about past abuse. It is also important to recall that L. was not the victim in this case and that a good deal of time had been taken in exploring Ackles's character traits as introduced by the defense. Thus the misstatement does not inject some new or false issue into the case.

Further, taken in context with the follow-up comment about the social worker's testimony, it seems clear that the prosecutor was attempting to rebut the defense argument with reference to facts surrounding L., which the prosecutor did incorrectly. In short we find nothing in this brief comment from which we can reasonably infer deceitful or reprehensible conduct.

Finally, even if there is some possible inference of misconduct, we are satisfied that any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) There was abundant expert testimony demonstrating the burns on D.'s hand were intentionally inflicted. Ackles's explanations were implausible, and her expert was thoroughly impeached and lacked the credentials to cast any doubt on the mountain of expert evidence that these burns were the result of deliberate child abuse. The prosecutor's erroneous comments in closing argument are unquestionably harmless on this record.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.