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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MALLORY LYNN JUSTICE,

Defendant and Appellant.

E052148

(Super.Ct.No. RIF152771)

OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge.

Affirmed.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Peter Quon, Jr., Susan Miller, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury convicted defendant Mallory Lynn Justice of one count of felony child abuse in violation of Penal Code section 273d, subdivision (a). The court suspended imposition of sentence and placed her on formal probation for five years, including the condition that she live at a residence approved by her probation officer and not move without approval.

On appeal, defendant advances two arguments: first, that it was an abuse of discretion to allow evidence of a prior incident; and, second, that the probation condition concerning defendant's residence was unconstitutional. We reject these contentions and affirm the judgment.

II

FACTUAL BACKGROUND

A. The Social Worker's Testimony

Kristen Stennett, a social worker, testified that she received an emergency referral from a hospital on July 22, 2009, concerning Christopher, 13 months. The child had reportedly sustained bruising on the right side of his face and ear. Stennett went to an apartment occupied by Christopher's mother, Christine, and defendant, her roommate. Stennett observed the child had dark purple bruises on his face and ears.

Stennett interviewed defendant who told Stennett she had been watching Christopher while his mother was working. The child had been trying to balance or stand on a tractor toy. When defendant left Christopher alone while she used the bathroom,

defendant heard the child cry out, followed by a thud. She found him on the floor by the television stand with the toy on top of his head. He was on his stomach with his weight toward the left side and the back of his head touching the television stand with his left ear to the ground. He was turning blue. The toy box was knocked over on the ground. Defendant picked him up and he was red. Defendant called Christine and they took him to the hospital. Defendant believed the bruises were caused by the fall. Stennett arranged for Christopher to be medically evaluated for child abuse and neglect (CAN). Based on the doctor's CAN report, she decided to detain the child.¹

B. The Mother's Testimony

Christine had known defendant since they were in the sixth grade. Defendant shared the apartment with Christine and was Christopher's caretaker beginning April 1, 2009. Christopher had an ongoing history of febrile seizures beginning when he was a baby. By July 2009, when Christopher had started walking, the seizures had increased in frequency and duration. During the seizures, Christopher would turn color, stiffen and shake his head, and lose consciousness.

Christopher had no injuries before his mother left for work on the morning of Wednesday, July 22, 2009, at 9:30 a.m. A short while later, defendant called Christine at work to say Christopher had experienced a seizure and had fallen. Christine left work between 11:16 a.m. and 11:30 a.m. to go to the emergency room. Christopher's eyes and ears were black and purple and bruised. Defendant told Christine she had been in the

¹ The CAN report was not part of the record at trial or on appeal.

bathroom when she heard a loud cry and Christopher was on the ground, purple, with his toy tractor on top of him.

Christine stated one of the bruises in the photographs was along the hairline and was from an earlier incident in which Christopher had fallen off a couch on to a carpet while in defendant's care and visiting defendant's mother's house.

C. Expert Testimony

Susan Horowitz (Horowitz), the forensic physician, testified that Christopher's extensive bruises could not have been caused by the fall on July 22, 2009, as described by defendant. The bruises were nonaccidental.

Over defense objections, Horowitz testified that an infant would generally not incur a bruise from falling off a couch on to a carpeted floor.

III

PRIOR INCIDENT

Defendant strenuously argues that the trial court abused its discretion by allowing Christine to testify about Christopher falling off a couch while in defendant's care, by allowing Horowitz to testify about the likely effect of such a fall, and by instructing the jury, based on CALCRIM No. 375, it could consider the prior incident as relevant to show a common scheme or plan. Defense counsel did not object initially to Christine's testimony but did object subsequently to the expert testimony and the jury instruction. In the absence of a pertinent defense objection to mother's testimony, defendant has waived this issue on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 434.) We reject defendant's other points of error for the following reasons.

The prior incident consumed very little time at trial. Defendant had admitted to Christine that she was watching Christopher on the day he purportedly tumbled off the couch. Horowitz gave the opinion that Christopher could not have sustained bruises from falling off the couch on to a carpeted floor. Horowitz's opinion was based on the facts recounted by mother and was not objectionable as lacking foundation. (*People v. Vang* (2011) 52 Cal.4th 1038, 1045, citing *People v. Gardeley* (1996) 14 Cal.4th 605, 618.)

Furthermore, the jury instruction, based on CALCRIM No. 375, correctly stated the law regarding the prior incident. Unless the People prove the prior incident by a preponderance of the evidence, the jury must disregard the prior incident. The prior incident is used for the limited purpose of showing a common plan or scheme and not to establish that defendant had a bad character or a predisposition to commit crime. The prosecutor explained the jury could only consider the prior incident in comparison to the charged incident but the jury had to decide the elements of the present offense beyond a reasonable doubt. The prior offense was not evidence of defendant's present guilt. Even if defendant had not forfeited her objection to Christine's initial testimony, defendant's admission, combined with the expert opinion, means there was still sufficient evidence for the jury to conclude it was more probable than not that defendant had committed the previous offense against Christopher. (*People v. McClellan* (1969) 71 Cal.2d 793, 805.)

Finally, the circumstantial and expert evidence establishing the present crime was strong. Defendant admitted she was caring for Christopher when he was injured. He displayed no injuries, except the hairline bruise from the earlier fall, before Christine left for work. Although Christopher was still affected by seizures, there was no evidence of

seizures causing extensive bruising on other occasions. Finally, the medical expert testified the extensive bruising could not have been caused by falling and the bruises were not accidental.

Therefore, it is not reasonably probable the jury would not have convicted defendant if evidence of the prior incident had been excluded. (*People v. Welch* (1999) 20 Cal.4th 701, 750.)

IV

PROBATION CONDITION

Defendant's probation included the condition that she live in a residence approved by the probation officer and not move without prior consent. Defendant challenges the constitutionality of the residence-approval condition as not being reasonably related to a compelling state interest in reformation and rehabilitation. (*People v. Bauer* (1989) 211 Cal.App.3d 937, 942, 944.) Respondent counters that the condition is narrowly tailored to further the state's legitimate interest in preventing defendant from having ready access to young children. (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355-1356; *People v. Delvalle* (1994) 26 Cal.App.4th 869, 879.)

In *Bauer*, the court rejected a residence-approval condition which seemed designed to prevent the defendant from living with his parents because they were over-protective. The appellate court rejected the state's power to impinge on the right to travel and the freedom of association and "to forbid [defendant] from living with or near his parents—that is, the power to banish him." (*People v. Bauer, supra*, 211 Cal.App.3d at p. 944.)

The present case differs significantly from *Bauer*. Here, defendant was convicted of causing traumatic injury to a child. Defendant apparently earns her livelihood by babysitting, including her sister and brother's children. Under these circumstances, the state's interest in protecting children and prohibiting defendant's access is properly served by the residence-approval condition. It is presumed the probation officer will not withhold approval for irrational or capricious reasons. (*People v. Olguin* (2008) 45 Cal.4th 375, 383.)

V

DISPOSITION

No prejudicial error arose from the admission of evidence of a prior incident. The probation condition requiring approval of defendant's residence was not unconstitutional under the circumstances.

We affirm the judgment.

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CODRINGTON

J.

We concur:

RAMIREZ

P.J.

KING

J.