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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.

DONJELL ORLONDO MORRISON,

Defendant and Appellant.

E052269

(Super.Ct.No. RIF153210)

OPINION

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton, and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Donjell Orlando Morrison was charged with first degree murder (Pen. Code, § 187, subd. (a), count 1)¹ and assault on a child under eight years old resulting in death (§ 273ab, count 2). A jury found defendant guilty of the lesser included offense of involuntary manslaughter on count 1 (§ 192, subd. (b)), and guilty on count 2. The trial court sentenced defendant to a term of 25 years to life in state prison on count 2. The court imposed a term of four years on count 1, but stayed it pursuant to section 654.

On appeal, defendant argues that the court erred in failing to instruct the jury on the lesser included offense of simple assault (§ 245) on count 2. We affirm.

FACTUAL BACKGROUND

Kayla Fouse was dating Willis Brown and had a child, Xavier Kesan Brown (the child), in August 2008. While Kayla was still dating Willis, she started dating defendant in 2009.

On September 25, 2009, Kayla left the child in defendant's care, while she went to work. Defendant had taken care of the child two or three times before. After the second time he watched the child, Kayla noticed that the child had some scratches on his back. The third time he watched the child, the child cut his top lip. According to defendant, the child rolled off the couch and hit his lip on the coffee table.

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

Kayla left for work at around 11:00 a.m. on September 25. Defendant sent her text messages throughout the day on routine matters pertaining to the child's care. Kayla left work at around 2:45 p.m. and called defendant on her way home to ask if the child was okay. Defendant said the child was sleeping and mentioned that he had hit his head on the coffee table earlier when he was pushing his toy. Defendant said he had a small bruise. Defendant gave her the impression that the bruise was not serious. Kayla arrived home at 3:30 p.m. Defendant was watching television.

Kayla picked up the child from his playpen, and the child's head fell back. He did not move. Kayla put him down and called the nurse help line. The nurse advised her to try different things to get a reaction out of him. Kayla tried them, but the child did not move at all. Kayla called 911, and the firefighters and paramedics arrived within five minutes. The paramedics were alerted to the severity of his condition when they discovered that his pupils were not responding to stimulation.

The paramedics transported the child to the trauma facility at the Riverside County Regional Medical Center. Dr. Zeke Foster performed tests on the child to determine his condition. The child's responses indicated that he had suffered brain damage. Dr. Foster observed a hematoma, or a bruise with a bump, on the child's forehead. He also noted a possible bruise to the right hip and the left gluteal area. A CT scan revealed that there was severe swelling in the brain. It also showed a midline shift, which meant that there was so much pressure built up

on one side of the child's brain, that part of his brain was pushed onto the other side of the brain.

Dr. Darryl Warner, a neurosurgeon, performed surgery on the child almost immediately after the CT scan. He performed a craniectomy in order to try and relieve the pressure that had built up in the child's head, and to restore the flow of blood and oxygen. Dr. Warner observed that the child's brain was very swollen, which was indicative of significant trauma. The swollen brain appeared to be consistent with a stroke. The injuries to the brain were very severe. The child was eventually placed on life support until Kayla gave consent to take him off. She decided to take him off of life support because the doctors said he was basically brain dead.

At trial, Dr. Warner testified that the child's injuries were caused by a significant trauma or force on the child, such as falling from the height of several feet. He could not imagine that the child would sustain such injuries from bumping his head on a coffee table, falling from his highchair, or participating in "rough play." Dr. Warner opined that the severity of the child's injuries was consistent with the child being thrown against a wall by an adult. He also opined that the degree of force necessary to cause the child's injuries was akin to someone being thrown into a windshield during a car accident.

Dr. Joanna Rice, a forensic pathologist, conducted an autopsy on the child. She testified that the degree of force necessary to cause the child's injuries could not have been produced by a simple fall or any typical household accident. She

said that ordinary household falls that children experience are rarely fatal. She also testified that a child could not cause this kind of injury to himself by pushing a toy truck and hitting his head on the edge or leg of a coffee table. She said she could not imagine this kind of injury being caused by a child standing on a high chair, falling, and hitting his head on a wood floor, or by a child being dropped on his head. Dr. Rice further said she could not imagine a 13-month-old child, who was barely mobile, sustaining this type of injury without the intervention of an adult or other person. Dr. Rice opined that the cause of death was some blunt force trauma to the child's head. A possible cause of this type of injury was an adult slamming the child's head against the wall.

Officer Robert Masson, a homicide investigator with the Riverside County Sheriff's Department, along with another officer, interviewed defendant on the day of the incident. A videotape of the interview was played at trial. Defendant said he arrived at Kayla's house in the morning and that Kayla and the child were the only ones there. Kayla left the house about 10 minutes later. The child started crying and whining a lot. When Officer Masson asked defendant what happened to the child, defendant said that the child was holding the handle on his red push car, and started pushing it along. The child then fell and hit his head on the leg of the coffee table. He started crying, so defendant picked him up, put him in his playpen, and gave him a bottle of milk. The child fell asleep. Defendant said that was the only time the child hit his head that day.

As he kept talking during the interview, defendant admitted that he grabbed the child when the child was crying and said, “[W]hat’s wrong with you, boy?” Defendant also admitted that he was playing with the child by tossing him in the air. Defendant then “grabbed him . . . firmly” and dropped him. The child hit his head on the floor and was fussy after that. Defendant played with him, and the child started crying. Officer Masson asked defendant if he was playing rough with the child, and defendant said, “I guess so, yeah.” Defendant admitted he dropped the child one time, but maintained that the child hit his head on the table.

The other officer at the interview informed defendant that the child sustained a serious injury that was inconsistent with him bumping his head on a coffee table. The officer urged defendant to tell the truth. Defendant said he was scared of what was going to happen to him. Defendant then said that he was pushing the child on the truck. He pushed him hard, and the child fell off and hit the table. Defendant added that there was another time when the child hit the back of his head on the hardwood floor. Defendant also said he was playing with the child and rolling around with him, until he “realized [he] hurt him.”

The officers then told defendant that they talked to the doctors and found out that the child had a cracked skull, so they did not think he had told them the whole truth. Officer Masson said the doctor believed the child was going to die, and he kept urging defendant to tell the truth. Defendant said, “All right. I had him in his high chair. He was standing up, and then . . . that’s where he really hit his head hard.”

ANALYSIS

The Trial Court Did Not Have a Sua Sponte Duty to Instruct on Simple Assault as a Lesser Included Offense

Defendant was charged with a violation of section 273ab, assault on a child with force likely to produce great bodily injury resulting in death. He contends that the trial court committed prejudicial error when it failed to instruct the jury sua sponte on the lesser included offense of simple assault. (§ 240.) We disagree.

A. Relevant Background

During a discussion on jury instructions, defense counsel stated that he was aware that there was case law to the effect that assault by force likely to produce great bodily injury (§ 245, subd. (a)(1)) was a lesser included offense of assault on a child resulting in death (§ 273ab, count 2). However, he was not requesting that that instruction be given. The court stated that if defendant was guilty of assault, it would be an assault that resulted in death, and the court could not conceive of a scenario where defendant could be guilty of the lesser but not the greater offense. Defense counsel agreed and reiterated that he was not requesting the instruction on the lesser included offense. The court acknowledged that it had a sua sponte duty to instruct on lesser included offenses, but it did not believe it was necessary here, since the evidence did not support the finding of an assault that was separate and apart from death. The prosecutor agreed. Defense counsel then stated, “My position is and it is going to remain [that] there isn’t any evidence that any assault occurred.” He then asserted again that he was not asking for the assault

instruction. The court concluded that it would not give a lesser included offense instruction on count 2.

During closing arguments, defense counsel argued, with regard to count 1, that defendant failed to seek medical assistance, so he was guilty of voluntary manslaughter. With regard to count 2, defense counsel argued defendant was not guilty since “[t]here [was] no evidence that any blow was struck or assault committed in this case.”

The court then raised its concern about not giving a lesser included offense instruction on count 2. The court stated that it was not sure if the roughhousing that defendant talked about during his police interview would constitute an assault. The court acknowledged that the finding that it was an assault was inconsistent with the defense’s theory that there was only a failure to act in obtaining care, but no assault.

The prosecutor argued that roughhousing did not constitute assault. It was simply roughhousing.

Defense counsel again asserted that he was not requesting an assault instruction, and stated that it “[w]ould be silly” to argue that defendant was guilty of an assault that was separate and apart from death. The court agreed and concluded that it would not give the instruction because to dissect the assault from the death was “almost an unbelievable request of the jury to be able to make.”

B. *Standard of Review*

“A trial court must instruct on a lesser included offense if substantial evidence exists indicating that the defendant is guilty only of the lesser offense. [Citation.]” (*People v. Manriquez* (2005) 37 Cal.4th 547, 584 (*Manriquez*)). “An offense is necessarily included in a greater offense when, for present purposes, under the statutory definition of the offenses the greater offense cannot be committed without necessarily committing the lesser. [Citations.]” (*People v. Basuta* (2001) 94 Cal.App.4th 370, 392.) “[A] lesser included instruction need not be given when there is no evidence that the offense is less than that charged. [Citation.]” (*Ibid.*)

On appeal, “we employ a de novo standard of review and independently determine whether an instruction on the lesser included offense . . . should have been given.” (*Manriquez, supra*, 37 Cal.4th at p. 584.)

C. *The Evidence Did Not Support the Lesser Included Offense Instruction*²

Defendant was charged in count 2 with violating section 273ab, subdivision (a), which provides that, “[a]ny person, having the care or custody of a child who is under eight years of age, who assaults the child by means of force

² We note the People’s initial argument that defendant is barred from challenging the court’s failure to give the assault instruction under the doctrine of invited error. We decline to address this issue, except to note that it is not clear from the record that defense counsel made an express objection to the instruction, or that the trial court made an error “at his behest.” (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1234.) Rather, the record shows that defense counsel stated that he was not requesting the instruction and agreed with the court’s decision not to give it.

that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished" Section 240 provides that an assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." We accept, for purposes of this appeal, defendant's assertion that simple assault (§ 240) is a lesser included offense of an assault on a child under eight years old resulting in death (§ 273ab).³ (See *People v. Golde* (2008) 163 Cal.App.4th 101, 115.) "Nevertheless, a trial court errs in failing to instruct on a lesser included offense only if the lesser offense is supported by substantial evidence in the record. [Citation.]" (*Ibid.*)

Defendant argues that the court should have given the lesser included offense instruction because there was evidence that he committed "simple assaults that were not likely to cause great bodily injury." During his police interview, he admitted that he pushed the child forcefully while the child was on his toy truck, and the child fell off the truck. Defendant also said he tossed the child and rolled around with him. He contends that the jury could have concluded that these acts constituted simple assaults.

Although the jury did hear evidence that defendant played with the child in a perhaps rough manner, it is ludicrous to suggest, on this record, that defendant committed only simple assault. First, we observe that despite defendant's admissions to the police, defense counsel asserted during closing arguments that

³ We note that in the discussions over jury instructions, the issue was whether the court should have instructed the jury on the lesser included offense of assault with force likely to produce great bodily injury. (§ 245, subd. (a)(1).)

there was no evidence *any* assault occurred. “Generally, when a defendant completely denies complicity in the charged crime, there is no error in failing to instruct on a lesser included offense. [Citation.]” (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 709.) Thus, there was no error in failing to instruct on the lesser included offense since the defense position was that “[t]here [was] no evidence that any blow was struck or assault committed in this case.”

Furthermore, the record contained substantial evidence from which a jury could conclude that defendant was guilty of assault resulting in death, not just simple assault. Defendant was the only person who was present at the time the child was injured. Kayla arrived at home to find the child unresponsive. The child had a hematoma, severe swelling in his brain, and part of the child’s brain had been pushed onto the other side of the brain. The doctors who worked on the child concurred that the degree of force necessary to cause the child’s injuries could not have been produced by a simple fall or any typical household accident. Rather, the child’s injuries were caused by significant trauma or force. Thus, defendant’s varying statements to the police about how the child fell and hit his head were not consistent with the child’s serious injuries.

Moreover, one doctor opined that a child could not cause this type of injury without the intervention of another person. The evidence showed that the severity of the child’s injuries was consistent with him being thrown against a wall by an adult. Considering that defendant was the only person who could have inflicted the child’s injuries, and the injuries resulted in death, the jury could not have

found defendant guilty of the lesser offense and not the greater. Even defense counsel acknowledged to the court that it “[w]ould be silly” to argue that defendant was guilty of an assault that was “separate and apart from death.”

Thus, in view of the evidence, we conclude that the trial court did not err in failing to instruct on simple assault as a lesser included offense. We further note that the trial court instructed the jury that, to find defendant guilty of assault causing the death of a child (§ 273ab), it had to find that he used force that was likely to produce great bodily injury, that he had the present ability to apply force likely to produce great bodily injury, and that his act caused the child’s death. In light of these instructions, and considering the factual determinations made by the jury in reaching a guilty verdict on count 2, we conclude the jury would have returned the same verdict, even if the simple assault instruction had been given. Therefore, even if the court erred in failing to instruct the jury on simple assault, any error would have been harmless. (See *Manriquez, supra*, 37 Cal.4th at p. 586.)

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.