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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.

LUCERO DIEGO,

Defendant and Appellant.

E053553

(Super.Ct.No. RIF146164)

OPINION

APPEAL from the Superior Court of Riverside County. Michele D. Levine,  
Judge. Affirmed with directions.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Daniel  
Rogers, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Lucero Diego appeals from the sentences she received after a jury convicted her of murder (Pen. Code, § 187, subd. (a))<sup>1</sup> and other charges that resulted from her actions in shaking and suffocating her two-month-old son, Romeo. Specifically, defendant argues: 1) this court should reverse her upper-term sentence for child abuse likely to produce great bodily injury (§ 273a, subd. (a)) because the trial court failed to state its reasons for imposing the aggravated term; and 2) this court should reverse her 25-years-to-life term for child abuse resulting in death (§ 273ab) as constituting cruel and unusual punishment because the conviction is based on second-degree murder rather than first-degree murder. As discussed below, we hold that defendant's first argument was waived and reject the second argument. We also order the abstract of judgment amended to reflect that the trial court ordered the determinate term to be served concurrent with, rather than consecutive to, the indeterminate term.

### **FACTS AND PROCEDURE**

About 8:00 am on the morning of September 19, 2008, emergency personnel went to a home after a 911 caller reported that a two-month-old baby, defendant's son Romeo, was not breathing. When paramedics arrived, Romeo was not breathing, his heart was not beating, and his lips were blue. By 9:45 that morning, the medical team at the hospital where Romero was taken had declared Romeo brain dead. The autopsy revealed numerous fractured ribs near the spinal cord that had been healing for two to four weeks, along with a subdural hemorrhage. Romeo also had two broken clavicle bones and other

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

injuries both old and new. Romeo's injuries were consistent with someone having held Romeo with their fingers near his spinal cord and thumbs on his chest or clavicles and shaking him violently.

Defendant admitted during a law enforcement interview that, on the morning of Romeo's death, she had become frustrated with his crying. She stated she shook Romeo violently by holding his chest, and then smothered him by placing him face down on a pillow. Defendant admitted that she intended to just "end it" because of her extreme frustration.

On March 15, 2010, the People filed an amended information charging defendant in count 1 with murder, in count 2 with child abuse resulting in death, and in count 3 with child abuse likely to produce great bodily injury. With regard to count 3, the information also alleged that defendant personally inflicted great bodily injury on a child under the age of 5 (§ 12022.7, subd. (d)).

On November 8, 2010, a jury found defendant guilty as charged, fixed the degree of murder in count 1 as second-degree, and found true the great bodily injury allegation as to count 3.

On March 11, 2011, the trial court imposed the mandatory sentence of 25 years to life on count 2. On count 3, the court imposed the upper term of six years, plus five years for the great bodily injury enhancement, and ran them concurrent with the term on count 2. The court imposed a term of 15 years to life for count 1, but stayed it pursuant to section 654. This appeal followed.

## DISCUSSION

### 1. *Defendant Waived any Objection to the Upper Term Sentence on Count 3*

Defendant argues her sentence for count 3—child abuse likely to produce great bodily injury—should be reversed because the trial court failed to state its reasons for imposing the aggravated term of six years. We agree with the People that defendant waived the right to appeal this issue. This is because she did not raise it in the trial court, despite being given both notice of the upper term via the probation report and the express opportunity by the trial court to state any objections before the sentence was imposed.

In *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the California Supreme Court held that a defendant may not, for the first time on appeal raise “claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices” if he or she did not first object in the trial court. (*Id.* at p. 353.) This includes cases such as this one where the defendant argues on appeal that the trial court “failed to state any reasons or give a sufficient number of valid reasons” for the sentence imposed. (*Id.* at p. 354.) This is because “counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention.” (*Id.* at p. 353.) The court went on to qualify this waiver rule by specifying that “there must be a meaningful opportunity to object to the kinds of claims otherwise deemed waived by today’s decision. This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the

sentence the court intends to impose and the reasons that support any discretionary choices. (*Id.* at p. 356.)

Here, defendant argues that, because the trial court did not make a tentative ruling before imposing the upper term for count 3, she was deprived of a “meaningful opportunity to object” under *Scott*. However, this ignores the Supreme Court’s later clarification of this exception to the *Scott* waiver rule in *People v. Gonzalez* (2003) 31 Cal.4th 745 (*Gonzalez*). The court in *Gonzalez* expressly stated that the trial court need not issue a tentative decision before the sentencing hearing in order to fulfill *Scott*’s “meaningful opportunity to object” requirement. Rather, “Under California law, information pertinent to sentencing is frequently contained in the presentence probation report, thus enabling the parties to anticipate the trial court’s sentencing choice and its reasons. [Citation.]” (*Id.* at p. 754.)

Here, as the People point out, the probation report expressly weighed the circumstances in aggravation and mitigation and recommended an upper-term sentence for count 3. In addition, the trial court stated that it had read and considered the probation report before it sentenced appellate. Further, the trial court invited comments from the parties before it proceeded with sentencing. Defense counsel, after clarifying that the court was “inviting remarks,” first stated that “there’s not a great deal that an attorney can say that could change these kinds of things in this forum.” Defense counsel then described defendant’s remorse and sorrow at the death of her infant son and concluded with “And I guess with that, I’ll just have a seat. Thank you.” Thus, despite having been given access to the probation report that recommended the upper term

sentence, and then being asked by the trial court to make any comments he felt were necessary, defense counsel failed to object at all to the upper term sentence for count 3. For this reason, under both *Scott* and *Gonzalez*, defendant waived the right to appeal this issue.

## 2. *Defendant's Sentence of 25 Years to Life Is Not Cruel and Unusual*

Defendant argues that the sentence of 25 years to life imposed for her conviction for child abuse resulting in death is cruel and unusual because it is based on a finding of second-degree murder rather than first degree murder, and based on the facts of the case. We emphatically disagree.

As provided by section 273ab, the trial court sentenced defendant to a prison term of 25 years to life. Defendant contends the particular circumstances of this case make the sentence cruel and unusual punishment as applied to her. (*People v. Dillon* (1983) 34 Cal.3d 441.)

In a similar case involving a youthful defendant, the court rejected a cruel and unusual claim: “Section 273ab describes a very serious offense. Not only does the crime require the killing of an extremely vulnerable child, it requires an assaultive act of great violence by one charged with the child’s care. [¶] Central to appellant’s claim his punishment is cruel or unusual is that it is the same as the punishment for first degree murder when, he contends, his offense was less serious and more like assault by means of force likely to cause great bodily injury (§ 245, subd. (a)) or involuntary manslaughter (§ 192, subd. (b)). While it is true section 273ab does not require an intent to kill or any other form of malice aforethought, neither does first degree felony murder [citation] and neither does

the three strikes law. [Citation.] [¶] The Legislature could reasonably conclude given the particular vulnerability of the victim, the relationship of the victim to the defendant, the violent and purposeful nature of the act involved and the fact a death results, the crime described in section 273ab is a very serious one and a term of 25 years to life was appropriate.” (*People v. Lewis* (2004) 120 Cal.App.4th 837, 855-856 (*Lewis*); *People v. Norman* (2003) 109 Cal. App.4th 221, 230-231.)

As applied to the *Lewis* defendant, the court said: “Appellant is a relatively young man without a criminal record. Still, the amount of force required to cause four-month-old Jace’s fatal head injuries and the amount of anger and loss of control that led to the assault all lead us to conclude while the punishment imposed is harsh, it is not disproportionate to appellant’s culpability.” (*Lewis, supra*, 120 Cal.App.4th at p. 856.) The same analysis operates here where defendant inflicted violent fatal injuries on her infant son because his crying frustrated her. We reject the claim of cruel and unusual punishment.

### 3. *The Abstract of Judgment Should be Amended*

As the People point out, at the sentencing hearing the trial court clearly indicated its intent that the determinate term be served concurrently with the indeterminate term, noting first that “the Court will order that [this] is served concurrently or that [c]ount 2 is served concurrently with that time imposed in [c]ount 3, which means that it will be served at the same time[,]” and later that the “time period [on the enhancement] will run concurrently again with that imposed in [c]ount 2.” Based on these statements, it appears the trial court misspoke when it later indicated, while setting the aggregate sentence that

“the 11 years [is] to run consecutively to the time imposed in [c]ount 2.” However, it was this final misstatement that was set forth in the minutes and the abstract of judgment.

“Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. [Citations.]” (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) Accordingly, we order the abstract of judgment amended to reflect the concurrent determinate term imposed during the trial court’s oral pronouncement of sentence.

**DISPOSITION**

The trial court is directed to correct the abstract of judgment to reflect the concurrent determinate term imposed during the trial court’s oral pronouncement of sentence. The trial court is further directed to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

RICHLI  
J.

KING  
J.