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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.

NORA TANG,

Defendant and Appellant.

E054572

(Super.Ct.No. RIF152165)

OPINION

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

Gail Ganaja, 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, James D. Dutton and Donald W.
Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant guilty of (1) willfully causing or permitting a child to suffer under conditions likely to produce great bodily harm or death, inflicting unjustifiable pain or mental suffering upon a child, or willfully causing or permitting a child to be placed in a situation where her person or health is endangered (Pen. Code, § 273a, subd. (a));¹ and (2) willfully inflicting upon a child cruel or inhuman corporal punishment or an injury resulting in a traumatic condition (§ 273d, subd. (a)). As to both counts, the jury found true the allegations defendant inflicted great bodily injury on a child under the age of five years old. (§§ 12022.7, subd. (d), 1192.7, subd. (c)(8).) The trial court suspended a prison sentence of four years, and granted defendant probation with the condition she be committed to the Riverside County Sheriff's Department for 360 days. The trial court struck the punishments for the great bodily injury enhancements. (§ 1385.) Defendant contends the trial court erred by incorrectly instructing the jury on the great bodily injury enhancements. (CALCRIM No. 3162.) We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Defendant gave birth to the victim, who is female, in December 2007. The victim was born healthy and was developing normally. On October 26, 2008, when the victim was less than one year old, City of Riverside Police Detective Stephen Pounds was summoned to Loma Linda University Hospital for a possible case of child abuse involving the victim. At the hospital, Detective Pounds spoke to defendant. Defendant

¹ All subsequent statutory references will be to the Penal Code unless indicated.

told the detective that doctors at Parkview Hospital, where the victim was initially taken, had determined the victim's brain was bleeding.

When speaking to Detective Pounds, defendant said she shook the bed the victim was lying on because she was trying to change the victim's diaper, and the victim was fidgeting and moving around. Defendant also admitted taking "ahold of the [victim] by the hips and upper thighs while the [victim] was laying [on her back] on the bed, and shaking the [victim] up and down." Defendant said she shook the victim to make her calm down for the diaper change, and that she felt frustrated by the victim fidgeting and moving around. The shaking incident occurred during the daytime on Thursday, October 23. Defendant admitted the shaking may have been severe enough to harm the victim.

Defendant said that "around noon" on October 25, she noticed the victim crying, throwing her head back, her eyes rolling "up and to the right," her right arm becoming rigid, and her fist shaking. The victim never fully awoke on October 25, and intermittently continued to suffer the foregoing symptoms throughout the day. The victim had never suffered such problems in the past. Although defendant felt she should take the victim to the hospital on October 25, she chose not to because she did not know where the hospital was located and there was no one else available to watch her roommate's children.

The victim fell asleep around noon on October 25, and by 2:00 a.m. on October 26 she had not awoken. Defendant took the victim to the hospital around 2:00 a.m. on Sunday, October 26, when the victim began screaming louder than usual while still

asleep. Defendant told a forensic pediatrician at Loma Linda University Hospital that she became frustrated with the victim during a diaper change and shook the victim by the hips.

The victim suffered bleeding on her brain, eyes, and spinal area, as well as a “pretty extensive brain injury.” Due to the brain injury the victim suffers from spastic cerebral palsy, which will cause “[s]peech delays, visual, [and] perhaps learning problems.” It is also possible the victim will have trouble walking.

During trial, the court took a recess to discuss the jury instructions. Thus, the conversation is not included in the record. On the record, the trial court said, “We’ve gone over instructions, and aside from any objections—which I don’t recall any at the moment—but the objections—the instructions are to be read without objection, unless there’s some further objection.” Defense counsel asked a question about the verdict forms, which the trial court answered, and then the jury was brought into the courtroom.

The trial court instructed the jury with CALCRIM No. 3162 as follows: “If you find the defendant guilty of the crime charged in Count 1, child abuse likely to cause great bodily harm, in violation of . . . section 273a(a) and or in Count 2, inflicting on a child injury that caused a traumatic condition in violation of . . . section 273d(a), then you must decide whether, for each crime, the People have proved the additional allegation that the defendant personally inflicted great bodily injury on someone under the age of five years. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.

“To prove this allegation, the People must prove that: [¶] 1. The defendant personally inflicted great bodily injury on [the victim] during the commission of the crime, and this includes a failure to act where action is required; and [¶] 2. That at the time [the victim] was under the age of five years.

“Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. The People have a burden of proving each element beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.”

As to both counts, the jury found true the allegations defendant inflicted great bodily injury on the victim. (§§ 12022.7, subd. (d), 1192.7, subd. (c)(8).) However, during sentencing, the trial court struck the punishment for both great bodily injury enhancements “in the interest of justice, per . . . Section 1385.”²

² The original sentencing hearing minute order, dated September 16, 2011, reflects the trial court (1) stayed the sentences for the great bodily injury enhancements (§ 654), and (2) struck both great bodily injury enhancements. A minute order dated May 10, 2012, reflects the trial court found the September 16 minute order did not “correctly/clearly reflect the Court order” and therefore the court ordered the September 16 minute order corrected nunc pro tunc to reflect the court’s “factual basis for striking [the great bodily injury] enhancements.” The reporter’s transcript from defendant’s sentencing hearing reflects the trial court struck “the *punishment* related to the [great bodily injury] allegations in Count[s] 1 and 2 in the interest of justice, per . . . Section 1385.” (Italics added.) The People assert the trial court struck only the punishments, not the enhancements in their entirety. Defendant’s “Statement of the Case” reflects the trial court “struck both enhancements.” “Conflicts between the reporter’s and clerk’s transcripts are generally presumed to be clerical in nature and are resolved in favor of the reporter’s transcript unless the particular circumstances dictate otherwise. [Citations.]” (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 249.) We reconcile this conflict in favor of the reporter’s transcript and conclude the trial court struck only the punishments associated with the great bodily injury enhancements. (See *People v.*

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DISCUSSION

Defendant contends the trial court erred by instructing the jury that it could find defendant personally inflicted great bodily harm by failing to act. The People contend (1) defendant forfeited the instruction issue by not raising it below; (2) the trial court properly instructed the jury; and (3) if the trial court erred, then the error was harmless. We agree the trial court did not err, but if it did then the error was harmless.

In regard to forfeiture, we will assume defendant has not forfeited the instructional issue on appeal because (1) it is unclear if an objection was raised during the off-the-record discussion, and the trial court directed the lawyers not to object during the reading of the instructions, and (2) the alleged error concerns a description of how the enhancement may be committed. A defendant has a right to correct instructions on the elements of an offense, and an appellate court may review an alleged instructional error on appeal even if the defendant failed to raise an objection at the trial court. (*People v. Prieto* (2003) 30 Cal.4th 226, 268; § 1259.) Thus, we will address the merits of defendant's contention.

We now turn to the alleged instructional error. “Errors in jury instructions are questions of law, which we review de novo.’ [Citation.]” (*People v. Fenderson* (2010) 188 Cal.App.4th 625, 642.) In *People v. Warwick* (2010) 182 Cal.App.4th 788, 793, the

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Jones (2007) 157 Cal.App.4th 1373, 1378-1379 [“It is well established that, as a general matter, a court has discretion under section 1385, subdivision (c), to dismiss or strike an enhancement, or to “strike the additional punishment for that enhancement in the furtherance of justice.” [Citation.]” Fn. omitted.)

appellate court considered whether “the meaning of ‘personally inflicts’ requires a ‘personal and direct application of force,” or whether it can include injuries that result from “‘a passive failure to act.’” The appellate court concluded section 12022.7, subdivision (d), could be violated by failing “to act where action is required.” (*Warwick*, at p. 795.)

The *Warwick* court analyzed a variety of cases and concluded none of them precluded a failure to act from falling within the definition of personally inflicting great bodily harm. For example, in *People v. Cross* (2008) 45 Cal.4th 58, our Supreme Court concluded the great bodily injury enhancement was supported by a pregnancy resulting from “unlawful but nonforcible sexual conduct.” (*Id.* at p. 64.) The Supreme Court wrote, “[B]ased solely on evidence of the pregnancy, the jury could reasonably have found that 13-year-old K. suffered a significant or substantial physical injury.” (*Id.* at p. 66.) The *Warwick* court interpreted *Cross* as supporting the view that a defendant need not inflict force upon the victim in order for the great bodily injury enhancement to be found true. (*People v. Warwick, supra*, 182 Cal.App.4th at p. 794.)

We agree with the *Warwick* court’s analysis of the case law, and conclude a failure to act where action is required can form the basis for a violation of section 12022.7, subdivision (d). Thus, we conclude the trial court did not err in its instruction to the jury.

Defendant asserts the *Warwick* court’s comments on a “failure to act” are merely dicta, and thus the trial court erred by including the “failure to act” information in the jury instruction because that portion of the *Warwick* opinion is not law. Assuming, for

the sake of judicial efficiency, that defendant is correct, we find the error to be harmless. In determining whether the assumed error was harmless, we must examine the record to discover whether we can conclude beyond a reasonable doubt that the element at issue is supported by overwhelming evidence. (*People v. Mil* (2012) 53 Cal.4th 400, 417.)

When speaking to Detective Pounds, defendant said she took “ahold of the [victim] by the hips and upper thighs while the [victim] was laying [on her back] on the bed, and sh[ook] the [victim] up and down.” Defendant said she shook the victim to make her calm down for a diaper change, and that she felt frustrated by the victim fidgeting and moving around. Defendant admitted the shaking may have been severe enough to harm the victim. The victim told a forensic pediatrician at Loma Linda University Hospital that she became frustrated with the victim during a diaper change and shook the victim by the hips.

The forensic pediatrician concluded the victim’s injuries were intentionally inflicted due to the severity of the injuries and the fact that “there is no other explanation for them,” such as spontaneous bleeding or a car accident. The forensic pediatrician was asked whether the delay in treatment caused the victim’s injuries to be more severe. The pediatrician responded, “[I]t’s a difficult question to answer, because [the victim] did not get timely medical treatment. So we don’t really know what exactly we could have prevented”; however, the doctor felt the lack of immediate medical attention “likely contributed to a worse outcome.”

The defense presented the testimony of Dr. John Goldenring, who stated the victim suffered from shaken baby syndrome. Dr. Goldenring concluded defendant’s

account of shaking the victim could not have caused the victim's injuries because defendant did not lift the victim off the bed when shaking her. Dr. Goldenring believed the victim's head would have needed to be lifted off the changing area during the shaking to cause the "rotation force" type injuries sustained by the victim. During closing argument, defendant's trial counsel asserted defendant "didn't harm her baby." Defense counsel argued two other people may have shaken the victim.

Any error in the instruction was harmless because defendant affirmatively acted to cause the victim's severe injuries. The evidence reflects defendant twice admitted shaking the victim and that the shaking alone could have caused serious injuries. Further, defendant's witness concluded the victim suffered from shaken baby syndrome and defendant admitted her act of shaking the victim could have been enough to cause severe injuries. Thus, the injuries inflicted by defendant were not merely the result of a "failure to act," rather, they were the result of defendant shaking the victim. We conclude beyond a reasonable doubt the evidence of defendant's affirmative act of shaking the victim is overwhelming such that a contrary finding could not be found. In sum, the assumed instructional error on the part of the trial court is harmless.

Defendant contends the error is not harmless because the evidence did not "unquestioningly establish that [defendant] was the only person who could have personally inflicted the injuries, or that injuries *had* to [have] been inflicted on October 25, 2008." We find defendant's argument to be unpersuasive because we are focused on an enhancement. The jury found defendant guilty of child abuse likely to produce great bodily harm (§ 273a, subd. (a)), and inflicting physical punishment on a child

(§ 273d, subd. (a)). Thus, to the extent another person may have also been involved in abusing the victim, the evidence cited *ante*, overwhelming supports the conclusion defendant's acts caused the victim great bodily harm.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

KING
J.