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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.

BERNARDINO MENDEZ,

Defendant and Appellant.

E060219

(Super.Ct.No. RIF1104610)

OPINION

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

Affirmed.

Ronda G. Norris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Bernardino Mendez appeals from his conviction for felony child endangerment. (Pen. Code, § 273a, subd. (a).)¹ We affirm.

STATEMENT OF FACTS

Although defendant's challenge is to the sufficiency of the evidence to support the conviction, no detailed recitation of the facts is necessary. The victim, defendant's wife Rosalia Mendez, was planning to leave him and take their children. Defendant had been physically abusive to Rosalia, and the two children who testified were also afraid of him. Defendant had told Rosalia that if she left him, he would kill her. The night before the murder, defendant wrote out a document, which he called a "letter of power of attorney," for his sister Rosa Mendez, authorizing her to use all his assets for the benefit of his children.

On the day of the murder, defendant's son Jose, then 15 years old, was awakened by screaming. He went towards the bathroom and saw defendant holding a knife lodged in his mother's back. Jose ran towards defendant, punching him in the stomach until the victim fell to the ground and defendant asked him " "Why are you doing this to your father?" " Defendant then went into the living room while Jose frantically called 911 and tried to revive his mother. Rosalia had been stabbed 12 times with a hunting knife.

Defendant testified in his own behalf. He claimed that as they argued over their relationship, the victim first grabbed the knife and that in some sort of struggle he "exploded."

¹ All subsequent statutory references are to the Penal Code.

Defendant was convicted of first degree murder for the death of Rosalia and the jury found true an allegation that he personally used a deadly weapon. (§ 12022, subd. (b)(1).) He does not challenge this conviction. Defendant was sentenced to a total term of 30 years six months to life.²

On this appeal defendant argues that the evidence was insufficient to support the felony child abuse conviction with respect to his son Jose. We disagree.

DISCUSSION

The standards under which we review a challenge to the sufficiency of the evidence are well known. We review the entire record in the light most favorable to the judgment, and determine whether there is evidence that is reasonable, credible, and of solid value that would permit a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. (*People v. Carter* (2005) 36 Cal.4th 1114, 1156.)

As pertinent to this case, section 273a, subdivision (a), applies where a defendant “*under circumstances or conditions likely to produce great bodily harm or death . . . willfully causes or permits [a] child to be placed in a situation where his or her person or health is endangered.*” (Italics added.) The required mens rea for such “indirect abuse” is simply criminal negligence. (*People v. Valdez* (2002) 27 Cal.4th 778, 789-790; *In re L.K.* (2011) 199 Cal.App.4th 1438, 1445.) Actual injury to the minor is not an element of the offense. (*People v. Wilson* (2006) 138 Cal.App.4th 1197,

² Defendant was also convicted of misdemeanor child abuse (§ 273a, subdivision (b)) with respect to his younger son Orlando, who came on the scene to find his mother slaughtered. A consecutive six-month term was imposed for this offense.

1205 (*Wilson*.) All that is required is that there be a substantial danger of great bodily harm—that is, that such harm be “likely” in light of all of the circumstances. It need not be certain or even probable. (*Id.* at p. 1204.)

In our view the following is a fair view of the evidence: defendant planned to kill his wife at his home, knowing that his three children, including the 15-year-old Jose, were present. He used a knife, almost ensuring that the victim would have time to struggle and scream. While he perpetrated a crime of almost unimaginable violence, his son awoke and rushed to his mother’s aid, pummeling defendant as the latter remained holding the knife in his victim’s back. Does this scenario represent a substantial risk of great bodily harm to Jose? In our view it clearly does. By his own testimony, defendant was enraged and the level of violence employed against the victim is strongly indicative of someone who—however much the killing might have been planned—is out of control. Defendant could well have struck out at Jose with his fist or his knife before realizing who the interfering person was. He could similarly have struck at Jose to defend himself against the latter’s desperate attack. The fact that his son’s presence appears to have extinguished defendant’s rage does not mean that this was a foregone or even probable result. Defendant’s act of attacking his wife in the home created a situation of extreme violence and danger into which it was highly likely that his teenaged son would be drawn.³

³ This conclusion makes it unnecessary for us to consider an argument presented by the People in a footnote—that the risk of great bodily harm or death to *Rosalia* triggered the applicability of the statute.

Defendant asserts that “the prosecution simply failed to put forth any credible evidence that Mendez’s action of stabbing his wife while alone with her in the bathroom of their home created a ‘substantial danger’—a ‘serious and wellfounded risk,’ ” citing *Wilson, supra*, 138 Cal.App.4th at page 1204. Our synopsis of the evidence immediately above expresses our disagreement. The risk to Jose was as substantial as that to the minor in *Wilson*. In that case, the defendant mother pushed her 10-year-old son through a bathroom window so that he could open the door of the house and facilitate a burglary. (*Id.* at p. 1200.) In affirming the mother’s conviction under section 273a, subdivision (a), the court noted that “entering a neighbor’s locked residence in order to help commit a burglary is indeed a highly dangerous undertaking that exposes the child to a number of serious physical dangers, e.g., someone in the home might react violently to the trespass”⁴ (*Id.* at p. 1205.) Surely the risks encountered by Jose in actually confronting his enraged parent were as great as those faced by the minor in *Wilson*.

Finally, defendant asserts that the prosecutor misled the jury by suggesting that the “great bodily harm or death” requirement could be met by *mental* suffering.⁵ No

⁴ The prosecutor had also argued that the minor might have been injured if he had landed on his head in the bathtub below the window while entering. It is not clear whether the appellate court also considered this a viable theory.

The mother was also convicted of a second count arising from an incident in which she choked the minor briefly, pushed him into the side of a refrigerator, and then swung a mop at him, striking the wall about four inches from his head. Again, the conviction was affirmed. (*Wilson, supra*, 138 Cal.App.4th at pp. 1204-1205.)

⁵ “I’ll advocate one way, that dealing psychologically with someone—with Orlando and Jose, it is physical harm that they’ve suffered. It is their mind. It is their brain. It doesn’t need to be a hand chopped off It is in their body for the rest of

[footnote continued on next page]

objection to the prosecutor’s argument was made at trial and any error may be deemed waived. (See generally *People v. Scott* (2012) 203 Cal.App.4th 1303, 1309.) In any event, we read the comments as not seriously misleading even if incorrect. The jury was instructed that “[g]reat bodily harm means significant or substantial physical injury.” There is no reason to suppose that it followed the prosecutor’s convoluted and unpersuasive suggestion.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.

[footnote continued from previous page]
their lives . . . [¶] . . . is this physical? Do we believe that what’s in their mind, the effect on their brain, is physical, and I say it is.”