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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EMMANUEL LARS BREW,

Defendant and Appellant.

H033658

(Santa Clara County

Super. Ct. No. 206491)

STATEMENT OF THE CASE

An indictment charged defendant Emmanuel Lars Brew with murder (Pen. Code, § 187; count 1),¹ assault on a child under age eight resulting in death (§ 273ab; count 2), child endangerment with a great bodily injury enhancement (§ 273a, subd. (a), § 12022.7, subd. (a); count 3), and child abduction (§ 278.5; count 4).

Defendant represented himself at trial, and the jury convicted him on all counts. This court reversed the judgment of conviction, holding that the trial court's denial of public funding for defense investigators and medical experts constituted reversible error.

The case was remanded to the trial court, and defendant represented himself at a new jury trial. The jury convicted defendant as charged in the indictment, fixing the

¹ Subsequent unspecified statutory references are to the Penal Code.

degree of murder at second degree. The trial court sentenced defendant to a prison term of 25 years to life, consecutive to 9 years 8 months.

Defendant now appeals from the judgment of conviction. He makes the following arguments on appeal: 1) the trial court violated his right to compulsory process by failing to compel the attendance of a subpoenaed defense witness; 2) the trial court's instruction to the deadlocked jury produced a coerced verdict; 3) the trial court erred in failing to sua sponte instruct the jury pursuant to CALCRIM No. 1252; 4) the trial court imposed an upper term sentence on the child endangerment conviction in violation of *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*).

As set forth below, we conclude that there was no compulsory process violation, no instructional error, and no sentencing error. We therefore will affirm the judgment of conviction.²

STATEMENT OF THE FACTS³

The Death of Kahlil Detrinidad

On June 7, 1997, defendant called 911 and reported that an infant was not breathing. Paramedics arrived at defendant's San Jose home and found that Kahlil Detrinidad, the seven-weeks-old son of defendant's then-girlfriend, had no pulse and was not breathing. The paramedics transported Kahlil to the hospital. Doctors immediately noticed that Kahlil's pupils were fixed and dilated, a sign that he had suffered a severe

² Defendant filed a petition for writ of habeas corpus on January 3, 2012, another petition for writ of habeas corpus on October 22, 2012, and a supplemental petition for writ of habeas corpus on November 4, 2013. This court ordered those petitions to be considered with the appeal. By separate order of this date, we deny the petitions.

³ The facts of the case are largely irrelevant to our resolution of the issues on appeal. We therefore include only an abbreviated summary of the evidence presented at trial.

brain injury. On June 8, 1997, doctors concluded that Kahlil was brain dead. Kahlil was removed from life support on June 10, 1997, and he died that day.

While at the hospital, defendant told a nurse that he had been alone with Kahlil before Kahlil stopped breathing. Defendant stated that he shook Kahlil to revive Kahlil. The nurse testified that defendant “just kept saying, ‘I shook the baby. And I shook the baby.’ ”

Two autopsies were performed on Kahlil’s body. There was bleeding in the brain, a sign that Kahlil had suffered significant abusive head trauma. Both autopsy reports noted that signs of meningitis were also present. Healing rib fractures were discovered during the second autopsy. The autopsy reports ultimately listed traumatic brain injury as the cause of Kahlil’s death. The doctor who performed the first autopsy ruled Kahlil’s death to be a homicide.

At trial, experts opined that Kahlil’s death was caused by trauma to the brain. According to the experts, Kahlil’s brain injuries were caused by application of force to his body, such as violent shaking or violent impact against a soft surface. The brain injuries were not inflicted accidentally.

An expert explained that Kahlil’s rib fractures could only have been caused by “squeezing of the chest.” Given that the fractures appeared to have been inflicted a few weeks before Kahlil’s death, the expert opined that Kahlil had suffered an incident of abuse prior to the abusive incident that caused his death.

The Abuse of J.B.

Defendant’s son, J.B., was born less than a year after Kahlil’s death. On April 27, 1998, when J.B. was six weeks old, J.B.’s mother noticed that J.B.’s shoulder was swollen. She took J.B. to the hospital, and a doctor ordered x-rays. X-rays showed that J.B. had six bone fractures. He had fractures in his legs, arm, shoulder blade, and rib.

A doctor at the hospital informed defendant and J.B.'s mother that J.B. had fracturing, and that she had to report J.B.'s case to child protective services as possible child abuse. Upon learning this information, defendant "seemed calm," and he did not appear to be surprised or upset. J.B.'s mother "was tearful," and she appeared to be confused, disbelieving, and upset.

At trial, experts opined that J.B. had been the victim of abuse. One expert testified that "this is battered child syndrome." That expert explained that J.B.'s injuries were not inflicted accidentally, and that J.B.'s injuries were not caused by a disease.

The Abduction of T.F.

Defendant had another son, T.F., who visited him the weekend before J.B.'s hospitalization. A court order required defendant to return T.F. to T.F.'s mother,⁴ Amy Fowlie, at 6:00 p.m. on April 26, 1998. Before he was due to return T.F., defendant phoned Fowlie and said that he would return T.F. only if Fowlie had proof that her then-boyfriend was in a recovery program for substance abuse. When Fowlie arrived at defendant's house to retrieve T.F., defendant was not satisfied with the proof that Fowlie presented, and he refused to return T.F. There was no court order that required Fowlie to produce the sort of proof that defendant demanded.

Fowlie called the police, and she showed a police officer the court order that required defendant to return T.F. The officer told her that she had two options: leave T.F. with defendant or have T.F. placed in a shelter until the situation could be resolved in court. Because she did not want T.F. placed in an unfamiliar environment, she chose to leave T.F. with defendant.

Between April 27 and 30, 1998, Fowlie phoned defendant and contacted him at his home, but defendant did not return T.F. On May 1, 1998, a social worker informed

⁴ T.F. and J.B. have different mothers.

Fowlie that T.F. had been placed in protective custody due to defendant's situation with J.B. Later that month, a court awarded Fowlie full custody of T.F.

Defense Evidence

Defendant testified that he never abused Kahlil. He denied assaulting Kahlil, and he denied shaking Kahlil. He believed that the hospital "contaminated Kahlil . . . with bacterial meningitis." A defense expert testified that Kahlil did not suffer from bacterial meningitis. The expert opined that the primary cause of Kahlil's death was traumatic brain injury resulting from violent shaking or blunt force trauma.

Defendant testified that he never abused J.B. He denied assaulting J.B., and he denied shaking J.B. He testified that doctors who treated J.B at the hospital stated that J.B.'s injuries were caused by Caffey's Disease. A defense expert opined that J.B.'s injuries were inconsistent with Caffey's Disease.

Defendant testified that he refused to return T.F. to Fowlie because Fowlie's then-boyfriend was a drug addict. Defendant believed that he had to keep T.F. in his care in order to protect T.F.

DISCUSSION

I. Compulsory Process

Defendant contends that reversal is required because he was denied his Sixth Amendment right to compulsory process. Specifically, he argues that the trial court erred in failing to compel the attendance of Dr. Sharon Van Meter, a subpoenaed defense witness who had performed the second autopsy on Kahlil's body. He asserts that the court should have issued a bench warrant, a warrant of attachment, or a warrant of commitment in order to secure Dr. Van Meter's presence at trial. As explained below, defendant has not established a compulsory process violation.

A. Background

The prosecution began presenting evidence on January 16, 2007. On February 6, 2007, the trial court and defendant discussed the witnesses that defendant intended to present. Among other witnesses, defendant stated that he wished to call Dr. Van Meter as a witness.

On February 14, 2007, the court asked defendant which of his witnesses had been served with subpoenas. Defendant stated that his brother possessed a subpoena for Dr. Van Meter, and that she had not been served.

On February 26, 2007, the court told defendant, "I'm expecting you to start your case tomorrow morning." Defendant replied, "I'm ready to go, Your Honor. It's the actual people that have been served." Defendant explained, "There's a question of who's actually been served, what they've been served, and if they're prepared." Defendant was unable to confirm whether Dr. Van Meter had been served.

Defendant's investigator spoke with the court on February 27, 2007. The court asked him whether Dr. Van Meter had been served with a subpoena. The investigator replied, "Dr. Van Meter was served yesterday. I spoke to her on the telephone. She's retired. She does consulting. She's currently under subpoena in Alameda County on three trials, one being a death penalty. She told me under the best of circumstances she could be prepared for [defendant's] case the last week of March, first week of April" The court stated that such a timeframe was "not acceptable." The court noted that it would contact Dr. Van Meter and inquire whether she could "squeeze us in" and "give us half a day somewhere."⁵

On March 1, 2007, the court and defendant discussed problems that defendant was encountering with his witnesses. The court stated that a Dr. Lawrence, a doctor who had

⁵ The court never stated whether it did in fact contact Dr. Van Meter.

been subpoenaed by defendant, was refusing to testify. The court noted that defendant was “having some difficulty” with a Dr. Shuleshko, and that it appeared that Dr. Shuleshko would be unavailable as a defense witness. The court also stated, “Dr. Van Meter is not available—she was contacted again by [defendant’s investigator]—until the end of April and that’s not something that is acceptable to the court.” The court thereafter asked defendant, “[W]hat is your wish?” Defendant responded, “I mean, they’re all problems, your honor, that can’t actually be fixed by a magic wand.” Defendant stated his reluctance to force any doctor to testify because “that may turn into Dr. Koukkari-type situation which doesn’t need to be.” He explained that Dr. Koukkari was a reluctant witness that he had previously called to testify,⁶ that Dr. Koukkari’s testimony had not been beneficial to him, and that he did not want to repeat the Dr. Koukkari incident in the current trial. Defendant noted that the court here “could do a body attachment,” but he noted that such a measure “would be the foolish thing.” He further stated, “Forcing someone to look at documents now and throw them up . . . and testify on my behalf would be a really foolish thing I believe.” Defendant informed the court that, other than the custodians of records he intended to call, he himself would be the only other defense witness.

B. Defendant Has Not Established a Compulsory Process Violation

The Sixth Amendment to the United States Constitution grants a criminal defendant the right “to have compulsory process for obtaining witnesses in his favor.” The right to compulsory process includes “the right to the government’s assistance in compelling the attendance of favorable witnesses at trial.” (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.) “A defendant’s constitutional right to compulsory

⁶ Although not stated by defendant, it appears that Dr. Koukkari was a defense witness at defendant’s first trial in this matter.

process is violated when the government interferes with the exercise of his right to present witnesses on his own behalf.” (*In re Martin* (1987) 44 Cal.3d 1, 30.)

A compulsory process claim is cognizable on appeal only if the defendant “raise[s] a claim of a compulsory process violation in the trial court.” (*People v. Fuiava* (2012) 53 Cal.4th 622, 691 (*Fuiava*); see also *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 991 (*Lewis and Oliver*)). This is so because a “ ‘party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.’ ” (*Lewis and Oliver, supra*, 39 Cal.4th at p. 991.)

Defendant’s claim is not cognizable on appeal because he failed to assert a compulsory process violation in the trial court. (*Fuiava, supra*, 53 Cal.4th at p. 691; *Lewis and Oliver, supra*, 39 Cal.4th at p. 991.) Far from asserting such a violation, he actually informed the court that he did not want the court to compel Dr. Van Meter’s attendance at trial. When the court asked defendant how he wished to proceed in light of Dr. Van Meter’s asserted unavailability, defendant expressed his reluctance to force any doctor to testify. He noted that the court had the power to “do a body attachment,” but he specifically noted that employing such a measure would be “foolish.” He also rejected any other judicial means of compelling Dr. Van Meter’s attendance at trial, stating, “Forcing someone to . . . testify on my behalf would be a really foolish thing I believe.” Given that defendant informed the court that he did not wish to compel Dr. Van Meter’s attendance at trial, he cannot now complain that the court erred in failing to compel her attendance. (See *Lewis and Oliver, supra*, 39 Cal.4th at p. 991 [an appellant cannot argue that the trial court erred in failing to conduct an analysis it was not asked to conduct].) Indeed, the measures defendant now contends the court should have employed to secure Dr. Van Meter’s attendance—a bench warrant, a warrant of attachment, or a warrant of commitment—were rejected by defendant at trial. Thus, for the foregoing reasons,

defendant is precluded from alleging a compulsory process violation. We accordingly must conclude that there was no compulsory process violation.

II. Instruction to the Deadlocked Jury

Defendant contends that reversal is required because the trial court's instruction to the deadlocked jury, which employed the language approved in *People v. Moore* (2002) 96 Cal.App.4th 1105 (*Moore*), produced a coerced verdict. Specifically, defendant asserts that the instruction coerced a holdout juror to surrender his or her beliefs in favor of securing a verdict. As explained below, we conclude that the instruction was not coercive.

A. Background

The jury began deliberating in the afternoon on Tuesday, March 6, 2007. In the afternoon on Friday, March 9, 2007, the foreperson sent the following note to the trial court: "We want to provide you an update on the status of our deliberations. We are stalemated on some of the charges. We continue to work diligently to get to resolution but need to let you know that one juror is fully entrenched in their position and is very unwilling to change their viewpoint despite all available evidence. The one having difficulty has not presented in other opinions, a reasonable argument. If we don't make headway this afternoon, we need to come back to you on Monday for advice on how to proceed."

Outside the presence of the jury, the court discussed the note with defendant and the prosecutor. The prosecutor suggested that the court give the same instruction that was approved in *Moore*. The court agreed that a *Moore* instruction was appropriate. Defendant did not object.

The court called the jury into the courtroom. The court stated to the foreperson: "You've indicated that you wanted to provide the court an update on the status of the deliberations. And I really appreciate that. That was very thoughtful of the group. And

you said that, ‘We are stalemated on some of the charges and we continue to work diligently to get resolution but need to get—to let you know that one juror’s fully entrenched in their position, is fully very unwilling to change their viewpoint despite all available evidence—one of the difficulties—or reasonable argument. [¶] If we don’t make headway this afternoon, we need to come back Monday for advice on how to proceed.’ [¶] And that’s what I intend to do. But is that accurate?’ The foreperson responded, “Yes.”

The court thereafter gave the instruction approved in *Moore*. The court instructed the jury as follows:

“What I’m going to do right now, ladies and gentlemen, I have further instructions and directions to give you as to the counts charged in the indictment.

“It has been my experience and many judges on more than one occasion that a jury will initially report it was unable to reach a verdict will ultimately arrive at verdicts on one or more of the counts before it.

“To assist you in your further deliberations, I’m going to further instruct you as follows:

“Your goal as jurors is to reach a fair and impartial verdict, if you’re able to do so, based solely on the evidence presented without regard to consequences of your verdict, regardless of how long it takes to do so. It is your duty as jurors to carefully consider, weigh, and evaluate all of the evidence presented at the trial[,] to discuss your views regarding the evidence, and to listen to and to consider the views of your fellow jurors. And evidence, I just want everybody to remember, is the sworn testimony of witnesses, the exhibits that have been admitted into evidence and anything else I have told you to consider as evidence.

“In the course in your further deliberations you should not hesitate to re-examine your own views or oppress your fellow jurors to re-examine them. You should not

hesitate to change your view you once held if you are convinced it is wrong or suggest other jurors to change their views if you are convinced they are wrong. Fair and effective jury deliberations require a frank and forthright exchange of views.

“As I previously instructed you, each of you must decide the case for yourself. You should do so only after a full and complete consideration of all the evidence with your fellow jurors.

“It is your duty as jurors to deliberate, with the goal of arriving at a verdict on the charge if you can do so without violence to your individual judgment.

“Both the People and the defendant are entitled to the individual judgment of each juror. As I previously instructed, you have the absolute discretion to conduct your deliberations in any way you deem appropriate.

“May I suggest that since you have not been able to arrive at a verdict using the methods that you’ve chosen, that you consider to change the methods you have been following at least temporarily and try new methods.

“For example[,] you may wish to consider having different jurors lead the discussions for a period of time or you may wish to experiment with reversed role playing by having those on one side of an issue present and argue the other side’s position and vice versa. This might enable you to better understand the other’s position.

“By suggesting you should consider changes in your methods of deliberation, I want to stress I am not dictating or instructing you as how to conduct your deliberations. I merely find you may find it productive to ensure the jury has a full and fair opportunity to express his or her views and consider and understand the views of the other jurors.”

Immediately after reading the *Moore* instruction, the court dismissed the jury for the weekend. Defendant never objected to the *Moore* instruction given by the court.

The jury deliberated all day on Monday, March 12, 2007. At 9:30 a.m. on Tuesday, March 13, 2007, the jury reached its verdict.

B. The Instruction Was Not Coercive

“Errors in jury instructions are questions of law, which the appellate court reviews de novo.” (*People v. Zamani* (2010) 183 Cal.App.4th 854, 875.) We therefore review defendant’s claim de novo.

“The trial court’s authority to give supplemental jury instructions to a deadlocked jury in a criminal case derives from Penal Code section 1140.” (*People v. Whaley* (2007) 152 Cal.App.4th 968, 979 (*Whaley*)). That section states: “Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.” (§ 1140.)

“The trial court is therefore required to determine in its ‘sound discretion’ whether there is a reasonable probability of agreement by the jury.” (*Whaley, supra*, 152 Cal.App.4th at p. 980.) “The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury’s independent judgment ‘in favor of considerations of compromise and expediency.’ ” (*People v. Miller* (1990) 50 Cal.3d 954, 994.) The court “may direct further deliberations upon its reasonable conclusion that such direction would be perceived ‘as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.’ ” (*People v. Proctor* (1992) 4 Cal.4th 499, 539.)

Here, the court read an instruction that was approved in *Moore*. The court did not merely paraphrase the *Moore* instruction; rather, the court quoted the *Moore* instruction virtually verbatim. *Moore* specifically held that the instruction was not coercive. (*Moore, supra*, 96 Cal.App.4th at pp. 1120-1121.) *Moore* explained that nothing in the

instruction coerced the jurors into abdicating their independent judgment in favor of compromise and expediency, and nothing in the instruction pressured the jury to reach a verdict. (*Ibid.*)

In *People v. Whaley, supra*, 152 Cal.App.4th 968, this court approved the use of the *Moore* instruction, reasoning in part that “there was nothing in the [*Moore*] instruction that was designed to coerce a verdict or unduly increased ‘ “the inevitable pressure to agree felt by minority jurors.’ [Citation].’ ” (*Id.* at p. 983.) *Whaley* emphasized that the *Moore* instruction did not “encourage the minority jurors to acquiesce in the verdict without exercising their independent judgment.” (*Id.* at p. 983.) *Whaley* thus impels us to conclude that the *Moore* instruction here was not coercive.

Defendant does not provide any compelling reason for us to depart from our decision in *Whaley*. He fails to point to any flaws in the reasoning in *Whaley* or *Moore*. Nor does he point to any coercive language in the *Moore* instruction. Rather, he merely asserts that the instruction here should have included a “reminder to jurors not to surrender conscientiously held beliefs in order to achieve a verdict.”

Defendant takes the “conscientiously held beliefs” language from a federal case, *Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976 (*Jiminez*). *Jiminez* noted that when a court instructs a deadlocked jury, “it ‘is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party.’ ” (*Id.* at p. 981, fn. 5.) *Jiminez* does not compel us to conclude that the instruction here was coercive. As a state court, “we are not bound by decisions of the lower federal courts.” (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) Moreover, even if we were bound by the decision in *Jiminez*, the instruction here did remind the jurors not to surrender their beliefs simply to secure a verdict. The instruction advised the jurors that “each of you must decide the case for yourself” and to arrive at a verdict only “if you can do so without violence to your individual judgment.” We believe

that this language was equivalent to informing the jury not to surrender conscientiously held beliefs in order to secure a verdict.

Accordingly, for the foregoing reasons, we conclude that the *Moore* instruction given in this case was not coercive. We therefore conclude that the instruction did not produce a coerced verdict.

Defendant additionally asserts that the *Moore* instruction here was coercive when viewed in the context in which it was given. He points to several circumstances that he believes rendered the instruction coercive: “the jury had deliberated over parts of four days; a jury note from the foreman advised the court of a ‘stalemate’ due to a holdout juror who was ‘entrenched’ and not deliberating; the trial court reread the jury foreman’s note verbatim in the presence of the entire jury.”

Defendant correctly notes that a reviewing court should consider an instruction to a deadlocked jury “ ‘in its context and under all the circumstances.’ ” (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 237.) We are not persuaded, however, that the circumstances here rendered the *Moore* instruction coercive. It is not uncommon for a court to read a jury’s note aloud. Nor is it uncommon for a jury to send a note stating that there is a stalemate due to a holdout juror. Given the complex medical testimony presented, we do not find it unusual that the jury deliberated for several days. Defendant provides no authority that suggests that the aforementioned circumstances will convert a non-coercive *Moore* instruction into an instruction capable of producing a coerced verdict. Moreover, defendant ignores the circumstance that he failed to object to the *Moore* instruction. Where the defendant fails to object to the instruction, “such an omission indicates that the potential for coercion argued now was not apparent to one on the spot.” (*Id.* at p. 240; see also *Whaley, supra*, 152 Cal.App.4th at p. 983.) We therefore conclude that the *Moore* instruction here was not coercive when considered in the circumstances in which it was given.

III. Sua Sponte Duty to Instruct Pursuant to CALCRIM No. 1252

Defendant contends that his child abduction conviction must be reversed because the trial court failed to sua sponte instruct pursuant to CALCRIM No. 1252, which articulates a defense to child abduction. We conclude that there was not substantial evidence to support the instruction, and that the trial court therefore did not err in failing to sua sponte instruct pursuant to CALCRIM No. 1252.

A. Background

During a discussion regarding jury instructions for the child abduction charge, defendant requested that the jury be instructed pursuant to CALCRIM No. 3403, which explains the defense of necessity. The trial court thereafter instructed the jury with CALCRIM No. 3403 as a defense to the child abduction charge. Defendant never expressed interest in CALCRIM No. 1252, and the trial court did not instruct the jury pursuant to CALCRIM No. 1252.

B. The Trial Court Did Not Have a Sua Sponte Duty to Instruct Pursuant to CALCRIM No. 1252

Defendant was charged with child abduction in violation of section 278.5. That section punishes “[e]very person who takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody, or a person of a right to visitation.” (§ 278.5, subd. (a).)

Section 278.7 codifies a defense to section 278.5, stating in part: “Section 278.5 does not apply to a person with a right to custody of a child who, with a good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm, takes, entices away, keeps, withholds, or conceals that child.” (§ 278.7, subd. (a).) Section 278.7 further states: “The person who takes, entices away, keeps, withholds, or conceals a child shall do all of the following: [¶] (1) Within a reasonable time from the taking, enticing away, keeping, withholding, or concealing,

make a report to the office of the district attorney of the county where the child resided before the action. The report shall include the name of the person, the current address and telephone number of the child and the person, and the reasons the child was taken, enticed away, kept, withheld, or concealed. [¶] (2) Within a reasonable time from the taking, enticing away, keeping, withholding, or concealing, commence a custody proceeding in a court of competent jurisdiction consistent with the federal Parental Kidnapping Prevention Act . . . or the Uniform Child Custody Jurisdiction Act [¶] (3) Inform the district attorney’s office of any change of address or telephone number of the person and the child.” (§ 278.7, subd. (c).)

CALCRIM No. 1252 articulates the defense described in section 278.7.

CALCRIM No. 1252 provides, in relevant part: “The defendant did not maliciously deprive a (lawful custodian of a right to custody/ [or] person of a right to visitation) if the defendant: [¶] 1. Had a right to custody of the child when (he/she) abducted the child; [¶] 2. Had a good faith and reasonable belief when abducting the child that the child would suffer immediate bodily injury or emotional harm if left with the other person; [¶] 3. Made a report to the district attorney’s office in the county where the child lived within a reasonable time after the abduction; [¶] 4. Began a custody proceeding in an appropriate court within a reasonable time after the abduction; [¶] AND [¶] 5. Informed the district attorney’s office of any change of address or telephone number for (himself/herself) and the child.”

“The trial court has no duty to instruct on a defense that is not supported by substantial evidence.” (*People v. Bohana* (2000) 84 Cal.App.4th 360, 370.) Thus, “there is no sua sponte duty to instruct on a defense if the evidence of that defense is minimal or insubstantial.” (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424.) When a defendant claims that the trial court erred in failing to sua sponte instruct on a defense, we apply the de novo standard of review. (*Ibid.*)

Here, the trial court did not have a sua sponte duty to instruct pursuant to CALCRIM No. 1252. The defense described in CALCRIM No. 1252 required defendant to report the abduction of T.F. to the district attorney's office and to begin a custody proceeding in an appropriate court after the abduction. (§ 278.7, subd. (c).) There was no evidence, however, that defendant complied with either of those requirements. Indeed, defendant does not even attempt to argue that such evidence was presented. Given that there was no evidence to support two of the elements of the defense, the trial court did not err in failing to sua sponte instruct pursuant to CALCRIM No. 1252. (See *People v. Mehaisin* (2002) 101 Cal.App.4th 958, 965 [“the trial court properly held that defendant was not entitled to a section 278.7 defense because he did not report the taking to the Sacramento District Attorney and did not commence a custody proceeding in a court of competent jurisdiction”].)

IV. Upper Term Sentence for Child Endangerment

Defendant contends that the trial court imposed an upper term sentence on the child endangerment conviction in violation of *Cunningham, supra*, 549 U.S. 270, and he accordingly requests that we reduce the sentence to the middle term. Because defendant was not sentenced pursuant to the statute declared unconstitutional in *Cunningham*, we conclude that there was no *Cunningham* violation.⁷

A. Background

Defendant was sentenced on November 24, 2008. For the child endangerment conviction, the trial court imposed an upper term sentence of six years, plus an additional three years for the concomitant great bodily injury enhancement.

⁷ The People assert that defendant forfeited his claim by failing to object to his sentence in the trial court. Defendant concedes that he did not object to his sentence, but he urges us to deem the claim not forfeited. Because we can easily resolve defendant's claim on the merits, we will not address the issue of forfeiture.

B. There was no Cunningham Violation

Prior to March 30, 2007, section 1170, subdivision (b) of California's determinate sentencing law (DSL) stated, in relevant part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (Stats. 2004, ch. 747, § 1.) In *Cunningham*, the United States Supreme Court held that this former version of section 1170, subdivision (b) violated the Sixth Amendment right to a jury trial because it "assign[ed] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham, supra*, 549 U.S. at p. 274.) *Cunningham* explained: "As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Id.* at pp. 274-275.) Thus, under the former version of section 1170, subdivision (b) as interpreted by *Cunningham*, the middle term was the statutory maximum, and the trial judge was improperly permitted to impose a sentence greater than the statutory maximum based on facts not found by the jury. (See *People v. Jones* (2009) 178 Cal.App.4th 853, 866 (*Jones*).

In response to *Cunningham*, the California Legislature amended the DSL by urgency legislation effective March 30, 2007. (Stats. 2007, ch. 3, § 2; *People v. Sandoval* (2007) 41 Cal.4th 825, 836, fn. 2 (*Sandoval*)). The amended version of section 1170, subdivision (b) states, in relevant part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." The amendments to the DSL thus eliminated the middle term as the statutory maximum, made the upper term the statutory maximum, and granted the trial judge discretion to select among the lower, middle, and

upper terms. (*Jones, supra*, 178 Cal.App.4th at pp. 866-867.) Accordingly, the amended version of section 1170, subdivision (b) does not violate *Cunningham's* prohibition against judicial fact-finding to elevate a sentence above the statutory maximum. (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992 (*Wilson*) [sentencing pursuant to the amended version of section 1170, subdivision (b) does not violate a defendant's constitutional rights under *Cunningham*].)

Here, defendant assumes that he was sentenced pursuant to the version of section 1170, subdivision (b) that was declared unconstitutional in *Cunningham*. He ignores the circumstance that he was sentenced over a year and a half after the amendments to the DSL became effective. Given that defendant was sentenced long after the amendments to the DSL became effective, it is apparent that he was sentenced pursuant to the amended version of section 1170, subdivision (b). (*Jones, supra*, 178 Cal.App.4th at p. 867.) Thus, because defendant was not sentenced pursuant to the sentencing scheme found unconstitutional in *Cunningham*, his reliance on *Cunningham* is misplaced. We therefore must conclude that there was no *Cunningham* violation.⁸ (See *ibid.* [finding no *Cunningham* violation where the defendant was sentenced after the amendments to the DSL became effective]; *Wilson, supra*, 164 Cal.App.4th at p. 992 [same].)

⁸ Defendant does not assert that it was improper for the trial court to sentence him pursuant to the amended version of the DSL. We nonetheless note that it was proper for the court to sentence defendant pursuant to that version of the DSL. The California Supreme Court has held that it is constitutionally appropriate to apply the amended version of the DSL in all sentencing proceedings conducted after the effective date of the amendments, regardless of whether the offense was committed prior to the effective date of the amendments. (*Sandoval, supra*, 41 Cal.4th at pp. 845-857.)

DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.