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

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICIA MARION CONKLIN,

Defendant and Appellant.

H040234

(Monterey County

Super. Ct. No. SS130600)

**I. INTRODUCTION**

After a jury trial, defendant Patricia Marion Conklin was convicted of three felony counts of elder abuse abuse likely to produce great bodily harm or death (Pen. Code, § 368, subd. (b)(1).)<sup>1</sup> The jury also found true the allegation that during the commission of count 1 the defendant personally inflicted great bodily injury on her mother, Margarita Zelada, a person 70 years of age or older. (§ 12022.7, subd. (c).) The trial court sentenced defendant to a total term of 8 years in the state prison, comprised of the lower term of two years on count 1, plus an enhancement of five years pursuant to section 12202.7, subdivision (c); one year on count 2 to be served consecutively to the sentence on count 1; and three years on count 3, to be served

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

concurrently with the sentence on count 1. The court suspended execution of the sentence and placed defendant on formal probation for four years.

On appeal, defendant contends that (1) trial counsel was ineffective in failing to object to the prosecutor's motion to redact the medical records admitted into evidence by excluding Zelada's statements to medical staff that her injury was the result of an accidental fall; (2) the conviction on either count 2 or 3 must be reversed and the charge dismissed because defendant's course of conduct in taking Zelada from the skilled nursing facility where she was recovering from surgery to repair her hip fracture and placing her in their home cannot be fragmented into two separate crimes; and (3) alternatively, the sentence on count 2 or count 3 must be stayed pursuant to section 654.

For the reasons stated below, we agree that under section 654 the sentence on count 3 must be stayed. We find no merit in defendant's other contentions and therefore we will affirm the judgment as modified.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### ***A. The Information***

The information filed in April 2013 charged defendant with three felony counts of elder abuse abuse likely to produce great bodily harm or death (§ 368, subd. (b)(1)):<sup>2</sup>

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<sup>2</sup> Section 368, subdivision (b)(1) provides: "Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed six thousand dollars (\$6,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or four years."

count 1 [pushing Zelada down on March 1, 2013]; count 2 [removing Zelada from the skilled nursing facility on March 9, 2013]; count 3 [placing Zelada in their home on March 9, 2013]. The information further alleged that during the commission of count 1 defendant personally inflicted great bodily injury on Zelada, a person 70 years of age or older. (§ 12022.7, subd. (c).) The case proceeded to a jury trial in July and August of 2013. A brief summary of the evidence presented at the jury trial follows.

## ***B. Jury Trial***

### **1. Conservatorship of Zelada's Estate**

Chris Campbell is an attorney who practices in the area of conservatorships. Campbell explained that a conservatorship “is established over an adult who lacks the capacity to either protect finances or his or her person.” She further explained that an attorney is often appointed to represent the person over whom the conservatorship is sought. To establish a conservatorship, a petition is filed in which it is alleged that an elderly person lacks capacity to handle money or to protect herself or himself physically. A conservatorship of the estate is sought to protect a person's finances, while a conservatorship of the person is sought for the person's physical protection.

In 2012, Campbell was appointed by the court to represent Zelada in trial court proceedings regarding the Monterey County public guardian's petition for a temporary and permanent conservatorship of Zelada's estate. Campbell met with Zelada and defendant, who is Zelada's adult daughter, a number of times and found their relationship to be extremely close. For that reason, Campbell wanted to develop a plan that would protect Zelada's finances while allowing Zelada and defendant to live together and the conservatorship proceedings to be dismissed.

However, in early March 2013, a temporary conservatorship of Zelada's estate was in place. Zelada's estate included \$3,000 in monthly rental income from her San Francisco property, \$4,000 to \$5,000 in monthly benefits, and an IRA account with a

balance of \$400,000 to \$500,000. Defendant had control of the rental income, which she collected in cash and was able to spend.

Jennifer Empasis is employed by the Monterey County Health Department as a deputy public guardian. She was the conservator of Zelada's estate during the period of temporary conservatorship.

## **2. March 1, 2013 Incident**

On March 1, 2013, police officer Ryan Anderson responded to a call for medical assistance for the victim of a fall at a residence in Pacific Grove shared by Zelada and defendant. Officer Anderson was the first to arrive on the scene at 12:47 p.m. When he entered the home, he saw Zelada lying on the kitchen floor in distress. Zelada was then 77 years old.

Officer Anderson approached Zelada, who said, "She pushed me, she pushed me." In his police report, Officer Anderson noted that Zelada had told him that the fall occurred while she was in the kitchen and defendant was yelling at her about wanting money to do work on the house. Zelada turned her back to defendant, who pushed Zelada to the floor with her hands. As a result of the fall, Zelada complained of pain in her left upper thigh area.

Officer Anderson also spoke with defendant while he was at the scene of Zelada's fall. Defendant was standing in the dining room on the side of the kitchen. As Officer Anderson approached defendant, he heard her say to Zelada, "Tell them I pushed you so they take me to jail. Is that what you want?" Officer Anderson noticed that defendant's hand was injured. Defendant stated that she was angry and had punched a pane of glass in a kitchen cabinet. She also told Officer Anderson that she had "bumped" her mother who frequently burned food while she was cooking. Due to her mother's "bad balance," her mother "then fell over."

Police Sergeant Roxanne Viray also responded to the call for medical assistance at the Pacific Grove residence on March 1, 2013, and saw Zelada lying on the kitchen floor.

When Sergeant Viray asked Zelada if she was okay, Zelada said, “My daughter pushed me.” Sergeant Viray heard defendant yell out, “Mommy, now I’m gonna go to jail.”

The ambulance paramedic, Myles Routh, who arrived at the Pacific Grove residence on March 1, 2013, found Zelada lying on the floor in pain. He stated in his report that Zelada told him that she had gotten into an argument with her daughter, who pushed Zelada in her back, causing her to fall to the ground. Zelada complained of left hip pain. Routh assisted in transporting Zelada to the hospital.

Later that afternoon, Officer Anderson returned to Zelada’s home. He spoke with defendant because there had been a report of suicide threats. Defendant told the medical personnel at the scene that she had ingested some pills. Defendant was then transported because the medical personnel said the amount she had ingested was unsafe.

Sergeant Viray also returned to the scene later that afternoon. At that time, defendant was in bed and ambulance and fire personnel were trying to persuade her to get out of bed so she could be transported. Defendant admitted she had taken pills and Sergeant Viray observed that defendant’s speech was very slow and she moved very slowly.

During the weekend of March 2, 2013, defendant left several messages for attorney Campbell. In one of the messages, defendant said that there had been a high flame from the stove and that Zelada had fallen when defendant pushed her away from the stove.

At the time of trial, Zelada testified that her daughter did not push her down. She recalled that she fell in the kitchen because her foot slid. According to Zelada, her left upper leg was a little sore as a result of the fall but she did not break anything. Zelada did not use a walker or cane when she appeared at trial.

### **3. Hospital Treatment**

After her fall on March 1, 2013, Zelada was taken by ambulance to Community Hospital of the Monterey Peninsula (Hospital). The emergency room nurse, Maryann

Bonsper, spoke with Zelada at about 1:20 p.m.. In her nursing assessment, Bonsper recorded that Zelada had told her that she “was in the kitchen when her daughter came in and asked for money to pay for bills at [Zelada’s] other house in San Francisco. [Zelada] . . . said, ‘No, I’d like to see for myself what the bills and materials cost.’ When [Zelada] said that . . . her daughter pushed her and she fell to the floor.”

Empasis, the deputy public guardian, obtained a temporary conservatorship of Zelada’s person and hand delivered letters of authorization to Hospital on March 4, 2014, which gave Hospital the legal authority to continue to treat Zelada. Orthopedic surgeon James Lin performed surgery to repair her Zelada’s hip fracture on March 2, 2013. He used an intramedullary-nail device, which goes inside the bone and acts as an internal splint. The normal course for someone of Zelada’s age who has had this surgery, provided there are no medical complications, is three days in the hospital followed by discharge to a skilled nursing facility and physical therapy. Zelada’s fracture was sufficiently stable to bear weight after surgery but Dr. Lin believed that she would probably need a walker for mobility. The length of the patient’s stay at a skilled nursing facility varies, depending on the patient’s situation. Dr. Lin would not expect Zelada’s fracture to heal in seven days. It is typical for a fracture of the type sustained by Zelada to heal in three months.

#### **4. Events at Windsor Monterey Care Center**

Zelada was transferred from Hospital to Windsor Monterey Care Center (Windsor Care), a skilled nursing facility, on March 6, 2013. Empasis, the deputy public guardian, had approved a higher level of care based upon the doctor’s orders. Empasis assumed that Zelada’s admission paperwork, including the conservator’s letters of authorization, would follow Zelada to Windsor Care.

On March 8, 2013, Campbell had a meeting with defendant at the house that defendant shared with Zelada. Campbell emphasized that her goal was “to create a situation in which [Zelada] could safely return home.” Her plan involved a 24-hour

caregiver for Zelada and the house to be cleaned up by defendant, so that the public guardian would be convinced that Zelada could return home.

At about 6:00 p.m. on March 9, 2013, defendant came to Windsor Care with a friend and told the receptionist that she wanted to talk to the nurse, see the x-rays, and see her mother. As the receptionist went to find the charge nurse, she saw defendant running down the hallway to the nurses' station. At that time, Zelada was in front of the nurses' station talking on the phone. Defendant grabbed the phone and began yelling. After defendant got off the phone, the receptionist tried to introduce her to the charge nurse, Zheholg "Emily" Shen. According to the receptionist, when charge nurse Shen tried to tell defendant that she could not take her mother from Windsor Care without a doctor's order, defendant said, "You can't stop us here. If you would stop here [*sic*], I'm going to do something or I'm going to kill someone here."

Charge nurse Shen had seen a note at the nurses' station indicating that defendant could not take her mother home. The note was a warning to employees that the public guardian's office had directed that defendant could not take her mother out of the building. Shen telephoned the deputy public guardian to ask that defendant be told why Zelada had to stay at Windsor Care. While defendant was on the phone with the on-call deputy public guardian, Carl Powers, she became very agitated. Powers tried to talk to defendant about Zelada's conservatorship and explain that it was unsafe to take her mother from Windsor Care because she had a broken hip. Defendant was "ranting" and did not listen to Powers.

Shen recalled that defendant was very aggressive and was telling the nurses that she had to take her mother home. Since Shen was a nurse unable to make the decision about Zelada's discharge from Windsor Care, she called 911 at about 7:00 p.m. to ask the police for help. The police did not come to Windsor Care right away. In the meantime, defendant grabbed her mother, put her in a wheelchair, and pushed her to the nurses'

station. Defendant said, “[N]obody can stop me.” Shen called 911 again. Police officers eventually came and had a conversation with Windsor Care’s administrator, Alex Monte.

Windsor Care staff had called Monte when defendant tried to remove Zelada. The nursing staff were trying to explain to defendant that Zelada could not be removed because the doctor had been contacted and had refused to write an order for her discharge, and also because defendant did not have the right to remove Zelada. According to Empasis, as Zelada’s conservator she was the only person who could consent to Zelada’s removal from Windsor Care. However, the letters of authorization granting Empasis temporary conservatorship powers had not been included in the discharge papers given to Windsor Care when Zelada was transferred there from the Hospital.

Monte knew that Zelada was the subject of a temporary conservatorship, but Windsor Care did not have copies of the conservatorship documents. At some point, Monte had a conversation with defendant. Defendant told him that “she smelled gas and that she saw her mom by the stove and it scared her. So she pushed her out of the way because she thought that something could ignite because . . . it really smelled really strong like gas.” Monte believed that Windsor Care could not stop defendant from removing Zelada.

When defendant brought Zelada to the front lobby, the receptionist heard defendant yelling and “telling everyone . . . that why we kept her mom here because we want all her money and she’s the daughter and . . . she’s getting all the money, not we do [sic].” Police Officer Wayland Kopp responded to Windsor Care at 7:43 p.m., where he saw a group of people in the front lobby that included defendant and Zelada, who was in a wheelchair.

Officer Kopp spoke to defendant and determined that there was a dispute as to whether defendant could take her mother home. He also had a telephone conversation with Monte, who told him that there were no medical reasons and no conservatorship or

restraining orders that would prevent defendant from taking Zelada home. Monte also told Officer Kopp that there had been an incident in Pacific Grove in which defendant allegedly pushed her mother down and caused her to be hospitalized. Officer Kopp then contacted the Pacific Grove Police Department, which did not provide any information. The local police department also did not have any record of a conservatorship in place. Officer Kopp concluded that there was no record of anything that would prevent defendant from taking Zelada home. Although Empasis faxed the letters of authorization to Windsor Care during the evening of March 9, 2013, Zelada had already been removed by defendant.

### **5. Zelada's Return Home**

In her capacity as Zelada's conservator, Empasis requested that police officers perform a welfare check on Zelada on the evening of March 9, 2013, after defendant had removed her from Windsor Care and taken her home. Empasis also asked the police officers to bring Zelada to the Hospital. Police Officer Daniel Deis arrived at Zelada's home in Pacific Grove with Police Officer Meghan Bliss and a reserve officer on March 9, 2013 at about 10:00 p.m. Defendant answered the door and let them in.

When Officer Deis spoke with defendant, she told him that at least two toilets in the house were not working. He did not clarify whether there were any working toilets in the house. Defendant also told him that the stove was not working properly and occasionally a flame would come out of it. During their conversation, defendant also said that she had removed Zelada from Windsor Care because Zelada did not want to be there.

Officer Bliss planned to regain custody of Zelada and have her transported to the hospital by ambulance. Defendant was very upset and did not want the police officers to take Zelada. Officer Bliss found Zelada in a bed with clutter and clothing on it. She also observed that there was no clear path from the bed to the bathroom because there were shoes, electrical cords, and other items on the floor. According to Officer Bliss, "[t]here

were plenty of things to trip over.” When Officer Bliss asked Zelada how she was doing, Zelada said that she could stand and walk, but standing and walking caused pain.

Four days later, on March 13, 2013, Zelada was evaluated by Thomas Reidy, a forensic psychologist hired by the public guardian. At the time of the evaluation, Zelada was in bed at Windsor Care. Dr. Reidy found that Zelada “was a very nice lady, but [she] was not fully oriented and seemed to have symptoms consistent with dementia.” She also had difficulty with memory. Dr. Reidy concluded that Zelada did not have the capacity to manage her finances or to take care of herself.

On March 26, 2013, Empasis and Powers photographed Zelada’s house. The photographs showed safety concerns, including a bathroom without a clear pathway or safety railings and multiple rugs on the floor. The safety hazards in the bedroom included two rugs and three electrical cords that posed a tripping hazard, as well as an unsecured television on a chest of drawers. Also, the exit closest to Zelada’s bedroom in case of an emergency was a door with a “significant drop” and multiple locks that would be difficult for Zelada to reach, and which therefore posed a fire hazard.

On April 2, 2013, Empasis went to Zelada’s house to perform an evaluation and retrieve her personal belongings. Empasis observed that the mattress in Zelada’s bedroom was soiled with urine and bloody matter and there were soiled undergarments on the floor next to the bed. The bedroom closet had a light bulb that could not be turned off and that appeared to be a fire hazard. Empasis could see that the home was not safe for Zelada.

Jim Kramer had an agreement with defendant to rent a room in Zelada’s house. Sometime between March 5, 2013, and March 9, 2013, Kramer met with defendant at the house and offered to help put electrical cords away and hook up the lights so that not all the electrical cords were necessary. He also unclogged a toilet. Kramer did not have any problems navigating his way through the house.

Tara Robinson met defendant for the first time during the first week of March 2013. Robinson described herself as a “retired and disabled” licensed vocational nurse, who helps people as a “charitable act.” Robinson recalled that on March 15, 2013, she was cooking a meal at Zelada’s house when the left rear burner made a funny noise. On March 21, 2013, as Robinson was again cooking a meal at Zelada’s house, the left rear burner burst into flames that reached to the ceiling. Robinson put out the flame with a rag. Robinson has been to Zelada’s house 12 times and has not found the house to be unkempt or untidy or have any tripping hazards. She did not have any safety concerns about the house.

Empasis stated that Zelada is currently living in a board and care home where she receives 24-hour care.

### ***C. Jury Verdict and Sentencing***

On August 12, 2013, the jury rendered its verdict finding defendant guilty on all three counts of elder abuse likely to produce great bodily harm or death (§ 368, subd. (b)(1)): count 1 [pushing Zelada down on March 1, 2013]; count 2 [removing Zelada from Windsor Care on March 9, 2013]; count 3 [placing Zelada at home on March 9, 2013]. The jury also found true the allegation that during the commission of count 1 the defendant personally inflicted great bodily injury on Zelada, a person 70 years of age or older. (§ 12022.7, subd. (c).)

At the sentencing hearing held on September 27, 2013, the trial court imposed a total term of eight years in the state prison, comprised of the lower term of two years on count 1, plus an enhancement of five years pursuant to section 12202.7, subdivision (c); one year on count 2 (one-third the middle term) to be served consecutively to the sentence on count 1; and three years on count 3 (the middle term), to be served concurrently with the sentence on count 1. The court suspended execution of the sentence and placed defendant on formal probation for four years.

### III. DISCUSSION

#### A. *Ineffective Assistance of Counsel*

Defendant contends that trial counsel was ineffective in failing to object to the prosecutor's motion to redact the medical records admitted into evidence by excluding Zelada's statements to medical staff that her injury was the result of an accidental fall.

##### 1. Standard of Review

"To prevail on a claim of ineffective assistance of counsel, a defendant 'must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.'" [Citation.] A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citation.] . . . Moreover, prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 389 (*Maury*)).

Further, " '[r]eviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " [Citations.] " (*People v. Jones* (2003) 29 Cal.4th 1229, 1254 (*Jones*)). " 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' [Citation.]" (*Ibid.*) "The decision whether to object to the admission of evidence is 'inherently tactical,' and a failure to object will rarely reflect deficient performance by counsel. [Citation.]" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1335.)

"[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not

determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *In re Cox* (2003) 30 Cal.4th 974, 1020.)

## **2. The Parties' Contentions**

Defendant argues that trial counsel should have objected to the exclusion of Dr. Lin's statements in the medical records that "there is a question of whether or not there was elder abuse;" "[t]he patient, to me, stated that her fall was due to mechanical reasons after trying to pick something up on a wet floor;" and "[Zelada] states there was maybe some flooring that was waxed or cleaned recently, resulting in a slip and fall when she tried to pick something up."

Defendant also argues that trial court should have objected to the exclusion of a statement by Zelada that was recorded in the medical records by another doctor: "The patient herself states she simply lost her footing and fell on her left side versus a carpet. There is a concern that her daughter pushed her during this argument over family financial affairs. The patient denies, though, there was an assault."

The excluded statements were, according to defendant, admissible as prior consistent statements and as spontaneous statements, and to also impeach Zelada's extrajudicial statements. Defendant explains that "[b]ecause the prosecution relied on Zelada's incriminating statements to medical personnel, her exculpatory statements made in the same time period were just as admissible." Further, defendant contends that the exclusion was prejudicial because Zelada's statements that her fall was accidental would have reduced the credibility of the only evidence showing that defendant had committed a crime: Zelada's extrajudicial statements that defendant pushed her.

The People respond that trial counsel could have made a tactical choice not to object to the exclusion of Zelada's statements that her fall was accidental, since those statements "could have indicated to the jury that [defendant] had an undue influence over her motives and forced or pressured her to recant even as she was receiving medical treatment for her injuries." Additionally, the People argue that exclusion of the statements, which "were buried in the medical reports but not testified to by witnesses at trial," was not prejudicial since the statements were cumulative to Zelada's testimony at trial that defendant did not push her.

### **3. Analysis**

The California Supreme Court has "explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' [citation].'" (*Jones, supra*, 29 Cal.4th at p. 1254.) We follow that rule in the present case. Trial counsel could have made a reasonable tactical decision not to object to the exclusion of Zelada's statements to doctors that she had accidentally slipped and fallen, since those statements were inconsistent with defendant's out-of-court statements regarding the circumstances of the fall that were admitted into evidence.

For example, on the day of Zelada's fall, March 1, 2013, defendant told Officer Anderson that she had "bumped" her mother, who frequently burned food while she was cooking, and that was why Zelada fell. The day after the fall, March 2, 2013, defendant left a message for Campbell stating that there had been a high flame from the stove and that Zelada had fallen when defendant pushed her away from the stove. During closing argument, trial counsel stated that there was no debate as to whether Zelada fell because she was pushed. Instead, trial counsel argued the affirmative defense of necessity,<sup>3</sup> as

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<sup>3</sup> "To assert a defense of necessity, the defendant must show, by a preponderance of the evidence, that he or she 'violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than (continued)"

well as an explanation pointing to not guilty, on the grounds that the evidence showed that defendant had pushed Zelada away from the flaming stove. Admission of Zelada's statements to doctors that she had slipped and fallen on a wet floor or carpet would have undermined, rather than supported, the defense theory of the case.

Even assuming that trial counsel was ineffective in failing to object to the exclusion of Zelada's statements to doctors that her fall was accidental or to the exclusion of Dr. Lin's note that there was a question of elder abuse, in light of the evidence that defendant pushed Zelada we see no reasonable probability that but for the error, the outcome of the trial would have been different. (See *Maury, supra*, 30 Cal.4th at p. 389.) Accordingly, the exclusion of Zelada's statements to doctors was not prejudicial.

**B. Convictions on Counts 2 and 3**

Defendant contends that the conviction on either count 2 [removing Zelada from Windsor Care on March 9, 2013] or count 3 [placing Zelada in their home on March 9, 2013] must be reversed and the charge dismissed because defendant's course of conduct in taking Zelada from Windsor Care and returning her to their home cannot be fragmented into two separate crimes. According to defendant, removing Zelada from Windsor Care only posed a risk because Zelada was returned to a home without the requested safety features and trained assistants, and therefore the acts on which count 2 and count 3 are based "were intertwined" and had the same objective.

The People disagree, arguing that defendant committed two criminal acts: (1) removing Zelada from a skilled nursing facility against doctor's orders; and (2) placing Zelada in further danger by bringing her to an unsafe environment.

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the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which [he or] she did not substantially contribute to the emergency. [Citations.]' [Citations.]" (*People v. Buena Vista Mines, Inc.* (1998) 60 Cal.App.4th 1198, 1202.)

## **1. Multiple Convictions Arising From the Same Course of Conduct**

With regard to multiple convictions arising from the same act or course of conduct, the California Supreme Court has stated: “[S]ection 954 provides: ‘An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged . . . .’ We have repeatedly held that the same act can support multiple charges and multiple convictions. ‘Unless one offense is necessarily included in the other [citation], multiple convictions can be based upon a single criminal act or an indivisible course of criminal conduct (§ 954).’ [Citation.] Section 954 thus concerns the propriety of multiple convictions, not multiple punishments, which are governed by section 654.” (*People v. Gonzalez* (2014) 60 Cal.4th 533, 536-537 (*Gonzalez*).

Where the issue is whether multiple convictions are proper under section 954, the standard of review is de novo. (*People v. Villegas* (2012) 205 Cal.App.4th 642, 646.)

## **2. Analysis**

Having reviewed the trial record in its entirety, we determine that the convictions on count 2 and count 3 are proper under section 954. The act charged and proven in count 2 (removing Zelada from Windsor Care on March 9, 2013, seven days after hip fracture surgery against medical advice) was an act likely to cause great bodily harm or injury within the the meaning of section 368, subdivision (b)(1). The act charged and proven in count 3 (placing Zelada in an unsafe home environment on March 9, 2013) was a separate act likely to cause additional great bodily harm or injury within the meaning of section 368, subdivision (b)(1). Defendant has not argued that either count 2 or count 3 constitutes a lesser included offense. Therefore, even if these acts are considered to be an

indivisible course of conduct on March 9, 2013, the multiple convictions are nevertheless proper under section 954. (See *Gonzalez, supra*, 60 Cal.4th at pp. 536-537.)

We understand defendant to argue that she could be convicted of only one count of violating section 368, subdivision (b)(1) based on her acts on March 9, 2013, because her acts with respect to Zelada on that day constituted a continuing offense for which there may only be one conviction. This argument is unpersuasive.

“The concept of a continuing offense is well established. For present purposes, it may be formulated in the following terms: ‘Ordinarily, a continuing offense is marked by a continuing duty in the defendant to do an act which he [or she] fails to do. The offense continues as long as the duty persists, and there is a failure to perform that duty.’ [Citations.] Thus, when the law imposes an affirmative obligation to act, the violation is *complete* at the first instance the elements are met. It is nevertheless not *completed* as long as the obligation remains unfulfilled. ‘The crime achieves no finality until such time.’ [Citations.] [¶] Determining if a particular violation of law constitutes a continuing offense is primarily a question of statutory interpretation. [Citations.] The answer, however, does not depend solely on the express language of the statute. Equally important is whether ‘the nature of the crime involved is such that [the Legislature] must assuredly have intended that it be treated as a continuing one.’ [Citations.]” (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 525-526, fn. omitted (*Wright*).

The appellate court in *People v. Rae* (2002) 102 Cal.App.4th 116 (*Rae*) determined that section 368, subdivision (b)(1) “*may be violated by a continuous course of conduct . . . .* [Citation.]” (*Rae, supra*, at p. 123, italics added.) The *Rae* court explained that “[o]n the facts of this case, defendant’s failure to provide Johnson with appropriate nutrition, to help her to move when she was unable to move herself, to clean her when she was incontinent, and to cooperate with health care workers and caregivers attempting to assist him in providing necessary care, as well as his failure to provide adequate care by refusing to use the hospital bed and refusing to adhere to the

instructions of the health care workers who came to the home, constituted a continuing course of conduct.” (*Id.* at p. 124.)

The present case is distinguishable, since defendant committed two acts: (1) removing Zelada from Windsor Care seven days after surgery; and (2) placing her in an unsafe home environment. Each act was likely to cause great bodily harm or injury within the meaning of section 368, subdivision (b)(1), and therefore each act constituted a completed violation, not a continuous offense. (See *Wright, supra*, 15 Cal.4th at pp. 525-526.)

Moreover, the California Supreme Court in *People v. Heitzman* (1994) 9 Cal.4th 189, 197 instructed that “[section 368] may be applied to a wide range of abusive situations, including within its scope active, assaultive conduct, as well as passive forms of abuse, such as extreme neglect. [Citation.]” Defendant has provided no authority for the proposition that a violation of section 368, subdivision (b)(1) must be treated as a continuing offense for which only one conviction is proper.

We therefore find no merit in defendant’s contention that the conviction on either count 2 or count 3 is improper and must be dismissed.

### ***C. Section 654***

The trial court imposed the lower term of two years on count 1, plus an enhancement of five years pursuant to section 12202.7, subdivision (c); one year on count 2 to be served consecutively to the sentence on count 1; and three years on count 3 to be served concurrently with the sentence on count 1. Defendant argues that the punishment on either count 2 or count 3 must be stayed pursuant to section 654’s ban on multiple punishments when the defendant acts with only one objective, as here where defendant’s only objective was to take Zelada home.

At the outset, we note that defendant did not object to the sentence on count 2 or the sentence on count 3 at the time of sentencing. However, a defendant's claim of sentencing error under section 654<sup>4</sup> generally "is not waived by failing to object below." (*People v. Hester* (2000) 22 Cal.4th 290, 295.) We will therefore address the merits of defendant's claim.

"Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct." (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) It is the defendant's intent and objective that determines whether the course of conduct is indivisible. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) Thus, "if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) " 'When section 954 permits multiple convictions, but section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited. [Citations.]' [Citation.]" (*People v. Sloan* (2007) 42 Cal.4th 110, 116.)

The applicable standard of review is well established. "Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence.

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<sup>4</sup> Section 654, subdivision (a) provides in pertinent part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

[Citation.]” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) We also defer to express or implicit determinations that are based upon substantial evidence. (Cf. *People v. Osband* (1996) 13 Cal.4th 622, 730-731.)

In the present case, the People concede that the three-year sentence on count 3 should be stayed pursuant to section 654, and we find the concession to be appropriate. The trial court found that “the taking from the Windsor [Care] and bringing to the home was pretty close in time and space and was essentially one course of conduct.” We determine there is substantial evidence to support the finding that defendant had one objective on March 9, 2013 when she removed Zelada from Windsor Care and placed her in an unsafe home environment: to return Zelada to their home. Accordingly, the imposition of the three-year sentence on count 3 must be stayed, rather than be served concurrently. “ ‘Where multiple punishment has been improperly imposed, “. . . the proper procedure is for the reviewing court to modify the sentence to stay imposition of the lesser term. [Citation.]” [Citation.]’ [Citation.]” (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 131.)

#### **IV. DISPOSITION**

The judgment is modified by staying the three-year sentence imposed on count 3. As so modified the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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GROVER, J.