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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. WEILI KAO, Defendant and Appellant.	C050639 (Super. Ct. No. 04F04427)

A jury convicted defendant Weili Kao of three counts of corporal injury to a child (counts two through four) and one count of willful harm to a child (count five) as the result of defendant's physical assault upon her stepdaughter, T.L. (Pen. Code, §§ 273a, subd. (a), 273d, subd. (a); further section references are to the Penal Code.) The jury also found that defendant inflicted great bodily injury in the commission of counts two and three, and that she used a deadly or dangerous weapon in the commission of count four. (§§ 12022, subd. (b)(1), 12022.7, subds. (a) & (b).) It was unable to reach

a verdict on the charge that defendant tortured T.L. within the meaning of section 206.

Defendant was sentenced to an aggregate term of 16 years and 4 months in state prison. On appeal, she challenges the sufficiency of the evidence and raises various sentencing errors.

On October 23, 2006, we affirmed the judgment. On January 3, 2007, the California Supreme Court denied defendant's petition for review "without prejudice to any relief to which defendant might be entitled after the United States Supreme Court determines in *Cunningham v. California*, No. 05-6551, the effect of *Blakely v. Washington* (2004) 542 U.S. 296 and *United States v. Booker* (2005) 543 U.S. 220, on California law."

After the United States Supreme Court issued its decision in *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (hereafter *Cunningham*), we granted defendant's motion to recall the remittitur and file a supplemental brief addressing *Cunningham* issues only.

We now agree only with defendant's contention that imposition of the upper term on her conviction for corporal injury to a child violated the Sixth Amendment to the United States Constitution because it was based on a fact not tried to the jury and proved beyond a reasonable doubt. However, because the error was harmless beyond a reasonable doubt, we shall affirm the judgment.

FACTS

Defendant, who was born and raised in Taiwan, married Thomas L. in 2001 and became a stepmother to his young daughter, T.L. Thomas's previous wife died of cancer when T.L. was around

two years old. Thomas and defendant had a daughter together, and defendant stayed home to care for the two girls.

On May 11, 2004, defendant beat and strangled six-year-old T.L. into a persistent vegetative state when defendant became enraged by T.L.'s dishonesty and disobedience.

According to defense witnesses, which included several family members and church associates, defendant's violent outburst was uncharacteristic because she loved T.L. and was a very caring person. Various psychotherapists testified the episode likely was the result of defendant's own abusive upbringing; her rigid culturally-influenced attitudes about her role as a wife and mother and a child's duty to unquestioningly obey parental authority; and defendant's mental problems, including depression and possibly post-traumatic stress syndrome. According to them, these and other factors culminated in her explosion into an atypical rage on the night in question.

Whether or not defendant's behavior was out of character is irrelevant to the tragic consequences suffered by T.L. Defendant's statement to Detective Charles Husted revealed that she completely overreacted to behavior that is typical of a six-year-old child. The statement recounted the following events:

Around 9:00 p.m., defendant observed T.L. grab or push her younger sister, who was 16 months old. When defendant questioned T.L. about what had happened, T.L. lied and stated she had been playing with a stuffed animal. Defendant confronted T.L. about the lie, spanked her repeatedly on the buttocks and hands, slapped her across the face four or five times, and pulled on her ears.

After T.L. apologized for lying, they hugged and defendant then sent the child to stand in the bathroom for a time-out.

When Thomas telephoned defendant around 10:00 p.m., she did not mention punishing T.L. After the phone call, defendant went to check on T.L., who had been in the bathroom about an hour. T.L. was sitting down rather than standing up as defendant had instructed her. Because defendant did not want to wake the baby, who was sleeping in a room near the bathroom, defendant hauled T.L. by the neck to the master bedroom walk-in closet. Defendant scolded T.L. and when she did not receive a satisfactory response, defendant spanked the child five or six times on the buttocks with a plastic hanger, breaking the hanger in the process.

Still angry, defendant continued to press T.L. about her lying and asked, "What if I told you I won't push you again, but I did? I lied to you. I'm lying to you. How do you feel?" Defendant pushed T.L., who fell to the floor and hit her head. Defendant heard a big bump and T.L. said it hurt. Defendant made the girl stand up and then pushed her to the floor again. T.L. blinked her eyes and then closed them. T.L. did not wake up despite defendant's repeated attempts to arouse her. Defendant assumed T.L. had fallen asleep from exhaustion or was pretending to be asleep so that she did not have to deal with defendant. Defendant carried T.L. to bed and covered her with a blanket. Although defendant claimed that she did not realize T.L. was unconscious, her claim is belied by the fact she put a diaper on the six-year-old child to ensure that she did not wet the bed.

Defendant checked on T.L. twice during the night. When she was still unresponsive at 6:00 a.m. the next morning, defendant called a friend in New Jersey, who suggested that defendant call someone who lived closer. Defendant telephoned a woman, who attended the same church in Oakland. The woman told defendant to take T.L. to the hospital immediately.

Upon her arrival at the emergency room, T.L. was lethargic and limp, her eyes were closed, and her breathing was shallow. Defendant admitted hitting T.L. and asked a nurse not to call social services. Detective Husted responded to a child abuse call and interviewed defendant later that day, during which she made the statements we have summarized above.

Dr. Angela Rosas, a pediatrician specializing in child abuse cases, examined T.L., who was comatose, completely unresponsive even to painful stimuli, and on a ventilator. Her pupils were fixed and dilated, indicating serious injury to the deep parts of her brain. T.L. had multiple bruises and injuries all over her body, including small bruises called petechiae on her face, neck, chest and shoulders, bleeding from her mouth, bruises on both ears, abrasions to her lips, and multiple linear bruises on her lower back and buttocks. The linear bruises were consistent with being beaten forcefully with a hanger.

Dr. Rosas also observed petechiae and bruises around T.L.'s neck and chin, consistent with grab marks and strangulation. Her suspicions regarding strangulation were confirmed when she reviewed the scans of T.L.'s brain, which disclosed a "classic" asphyxiation injury. The scans showed swelling and severe oxygen

deficit, which Rosas opined was caused by the compression and obstruction of T.L.'s windpipe for around four to six minutes, or by a partial obstruction for a longer period of time. All of the child's brain tissue was destroyed, except for the portion that controlled her breathing. She was in a persistent vegetative state. If T.L. had received medical care significantly earlier, she would have had a better outcome.

According to Dr. Rosas, T.L. also had a moderate subdural hematoma on the left side of her head. This is a collection of blood between the brain and the surrounding casing, and is usually caused by an impact injury. The injury was consistent with T.L. hitting her head on the closet floor. In Rosas's opinion, the hematoma did not contribute to T.L.'s persistent vegetative state, but it had contributed to her need to be hospitalized.

Dr. Rosas concluded that the strangulation occurred after defendant beat T.L. with the hanger and pushed her to the ground. This was so because if T.L. had been asphyxiated first, she would not have been able to stand up for the beating or to be shoved to the ground. According to Rosas, T.L. will never be able to see, talk, hear, walk, or eat again.

When Detective Husted told defendant that it looked as if someone had choked T.L., defendant admitted she had pulled T.L. up from the floor with both hands around her neck, but she denied that she had squeezed her neck.

The jury convicted defendant of three counts of corporal injury to a child based on defendant beating T.L. with a hanger (count four), causing a subdural hematoma when she pushed T.L. to

the floor (count three), and asphyxiating T.L. until she almost died (count two). The jury also convicted defendant of willful harm to a child based on defendant's failure to obtain medical care for T.L. in a timely manner (count five).

DISCUSSION

I

Defendant contends that section 654 prohibits the imposition of separate punishment on counts three and four, which involved the corporal injury counts in which defendant beat T.L. with a hanger and pushed her to the floor, causing a subdural hematoma. This is so, according to defendant, because the acts occurred during a continuous course of conduct pursuant to a single intent and objective of punishing T.L. for lying.

"Section 654 provides that even though an act violates more than one statute and thus constitutes more than one crime, a defendant may not be punished multiple times for that single act. [Citations.] The 'act' which invokes section 654 may be a continuous '"course of conduct" . . . comprising an indivisible transaction . . . .' [Citation.] 'The divisibility of a course of conduct depends upon the intent and objective of the defendant. . . . [I]f the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'

[Citations.]" (*People v. Akins* (1997) 56 Cal.App.4th 331, 338-339.)

People v. Harrison (1989) 48 Cal.3d 321 (hereafter *Harrison*) held that in connection with sex offenses, each sexual assault may be viewed as a separately punishable criminal act even if the defendant claims that all the offenses were committed to obtain sexual gratification. The Supreme Court observed "that such a 'broad and amorphous' view of the single 'intent' or 'objective' needed to trigger [section 654] would impermissibly 'reward the defendant who has the greater criminal ambition with a lesser punishment.' [Citation.] Rather, in keeping with the statute's purpose, the proper view [is] to recognize that a 'defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act.'" (*Harrison, supra,* 48 Cal.3d at pp. 335-336.)

The *Harrison* rule has been extended to sequential crimes of violence. (*People v. Trotter* (1992) 7 Cal.App.4th 363, 366-368; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1255-1257; *People v. Nubla* (1999) 74 Cal.App.4th 719, 730-731.) "[W]hen a defendant maintains one criminal objective he may be convicted and punished for each successive crime of violence against the same victim." (*People v. Kwok, supra,* 63 Cal.App.4th at p. 1256.) This rule is particularly applicable if the defendant had an opportunity to reflect between offenses, and each successive offense creates a new risk of harm. (*People v. Trotter, supra,* 7 Cal.App.4th at pp. 367-368.)

Defendant challenges the extension of *Harrison* to cases that do not involve sexual offenses. A similar contention was rejected in *People v. Surdi* (1995) 35 Cal.App.4th 685, which observed that *People v. Trotter, supra,* 7 Cal.App.4th 363 was cited with approval by the Supreme Court in *People v. Latimer* (1993) 5 Cal.4th 1203, which did not question the validity of decisions finding consecutive, and thus separate, intents, or finding different, if simultaneous, intents. (*People v. Latimer, supra,* 5 Cal.4th at pp. 1211-1212, 1216; *People v. Surdi, supra,* 35 Cal.App.4th at p. 689, fn. 7.)

Accordingly, defendant's contention is not persuasive. "[T]his was not a case where only one volitional act gave rise to multiple offenses." (*People v. Trotter, supra,* 7 Cal.App.4th at p. 368.) Nor was it a case where the commission of one crime facilitated the commission of another. (See, e.g., *Neal v. State of California* (1960) 55 Cal.2d 11, 19-20 [attempt to murder the victim by committing arson].) Rather, this was a case where defendant committed successive acts of violence against T.L. between which she had time to pause and reflect about what she was doing. First, defendant beat the small girl with a hanger until the hanger broke. Then defendant scolded her for lying before shoving her to the ground, causing the subdural hematoma. Defendant said that she "talk[ed]" to T.L. after spanking her with the hanger and before she shoved her -- which means that defendant had ample time to reconsider before committing another act of violence. Furthermore, the evidence supports a determination that she harbored multiple intents, i.e., defendant (1) beat T.L. with the hanger for her disobedience and defiance in not standing up

during the hour-long time-out as defendant had instructed, and then (2) shoved T.L. as punishment for lying.

"Whether the acts of which a defendant has been convicted constitute an indivisible course of conduct is a question of fact for the trial court, and the trial court's findings will not be disturbed on appeal if they are supported by substantial evidence." (*Kwok, supra,* 63 Cal.App.4th at pp. 1252-1253.) Here, the trial court's findings are supported by substantial evidence.

II

Defendant challenges the great bodily injury enhancement on count three, in which T.L. suffered a subdural hematoma.

Section 12022.7, subdivision (f) defines great bodily injury as "a significant or substantial physical injury." This "standard contains no specific requirement that the victim suffer 'permanent,' 'prolonged' or 'protracted' disfigurement, impairment, or loss of bodily function." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 (hereafter *Escobar*).) However, the victim's injury must exceed the injury inherent in the substantive offense. (*Id.* at pp. 746-747, 749-750.) Thus, a section 12022.7 enhancement may not be imposed where great bodily injury is an element of the offense. (*People v. Parrish* (1985) 170 Cal.App.3d 336, 344.)

Section 273d states in pertinent part: "(a) Any person who willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition is guilty of a felony . . . ." A traumatic condition is a wound or other abnormal bodily condition, either minor or serious,

resulting from the application of physical force. (*People v. Thomas* (1976) 65 Cal.App.3d 854, 857; CALJIC No. 9.36.) Because a traumatic condition may be minor or serious, it follows that (1) great bodily injury is not an element of the substantive offense, and (2) a section 12022.7 enhancement may be imposed upon a section 273d, subdivision (a) conviction. (Cf. *People v. Chaffer* (2003) 111 Cal.App.4th 1037, 1042 [construing "traumatic condition" for purposes of section 273.5].)

Defendant argues, however, there is insufficient evidence the moderate subdural hematoma T.L. suffered was the equivalent of a great bodily injury rather than simply a traumatic condition. According to defendant, "[s]aying a single bruise is 'moderate' in size does not raise it to the level of a serious or substantial injury."

Defendant minimizes the nature of the injury by ignoring the location of the "bruise." A moderate subdural hematoma is not the equivalent of a medium-sized bruise on the shin. It involves "bleeding about the brain." According to Dr. Rosas, T.L. required surgery to relieve the pressure on her brain that was caused by the swelling from the strangulation *and from the subdural hematoma* caused by the impact injury. Although the hematoma did not cause T.L.'s vegetative state, it "contributed to her illness and the reason why she was in the hospital." It was a contributing factor to T.L.'s coma, which was the condition T.L. experienced before she progressed to a persistent vegetative state. If T.L. had suffered only the hematoma, she would have recovered but would

have required medical attention to "make sure that the blood resolve[d]."

This evidence amply supports the finding that T.L. suffered great bodily injury. For example, *Escobar* upheld a finding of great bodily injury based upon a rape victim's bloody knees, vaginal soreness, abrasions, and painful neck. (*Escobar, supra,* 3 Cal.4th at pp. 744, 749-750.) Here, unlike the victim in *Escobar*, T.L. is unable to speak. Thus, she cannot relate the degree of pain she suffered from the subdural hematoma. However, T.L.'s injury to her head, which involved internal bleeding and required surgery and medical monitoring, was at least as severe as the injuries suffered in *Escobar*. The section 12022.7 finding is supported by substantial evidence. (*Id.* at p. 750 [a great bodily injury finding must be upheld if it is supported by substantial evidence, even if the circumstances might reasonably be reconciled with a contrary finding].)

III

According to defendant, the trial court erred in imposing consecutive sentences based on the aggravating factor that the manner in which the crime was carried out indicated planning. (Cal. Rules of Court, Rule 4.421(a)(8).) She claims the only evidence of planning is that because she did not want to awaken the baby, who was sleeping in a room nearby, she took T.L. into the closet before punishing her. Defendant acknowledges that her attorney failed to object on this ground at the sentencing hearing. She asserts, however, that if this oversight results

in the waiver of her claim, then she received ineffective assistance of counsel.

As we will explain, because such an objection ultimately would have proved futile, defense counsel was not incompetent for failing to object to the trial court's consideration of the challenged aggravating factor. (*People v. Mendoza* (2000) 24 Cal.4th 130, 171; *People v. Constancio* (1974) 42 Cal.App.3d 533, 546 ["It is not incumbent upon trial counsel to advance meritless arguments or to undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel"].)

It does not matter whether defendant took T.L. to the closet, so as not to awaken the baby as defendant contends, or whether she took her there so that the neighbors could not hear T.L.'s screams, as the People contend. Both scenarios support the trial court's finding of premeditation and planning. Defendant did not simply erupt in an uncontrollable fit of rage and lash out at her six-year-old stepdaughter after defendant found T.L. sitting in the bathroom during the girl's lengthy time-out. Rather, defendant marched T.L. from the bathroom into the master bedroom closet with the intent of privately administering physical punishment therein, without being inconvenienced by awakening her sleeping child as the result of T.L.'s foreseeably voluble resistance. The court's determination that this conduct demonstrated planning was not arbitrary or irrational. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.)

IV

Lastly, defendant correctly contends the trial court's imposition of the upper term on her conviction for corporal injury to a child (count two) violated the Sixth Amendment to the United States Constitution as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter *Apprendi*), *Blakely v. Washington, supra,* 542 U.S. 296 [159 L.Ed.2d 403] (hereafter *Blakely*), and *Cunningham, supra,* 549 U.S. ___ [166 L.Ed.2d 856].

Apprendi held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant; thus, when a court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra,* 542 U.S. at pp. 303-305 [159 L.Ed.2d at pp. 413-414].)

Accordingly, in *Cunningham*, *supra*, 549 U.S. at p. ___ [166 L.Ed.2d at p. 864], the United States Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Ibid.*, overruling *People v. Black* (2005)

35 Cal.4th 1238 on this point, vacated in *Black v. California* (2007) __ U.S. __ [167 L.Ed.2d 36].)

Here, the trial court imposed the upper term in reliance on the fact that defendant, who had no prior criminal history, occupied a position of trust with respect to the victim. (Cal. Rules of Court, rule 4.421(a)(11).) This judicial fact finding violated defendant's constitutional right to a jury trial. (*Cunningham, supra,* 549 U.S. at p. ___ [166 L.Ed.2d at p. 864] [court could not rely on the particular vulnerability of the victim where such fact was not submitted to, and found by, the jury].)

However, "*Apprendi* error--that is, error in failing to submit a punishment-increasing factual issue to the jury--is subject to harmless error analysis under the beyond-a-reasonable-doubt test of *Chapman v. California* [1967] 386 U.S. [18,] 23 [17 L.Ed.2d 705, 710]. [Citation.] Indeed, even when jury instructions completely omit an element of a crime, and therefore deprive the jury of the opportunity to make a finding on that element, a conviction may be upheld under *Chapman* where there is no 'record . . . evidence that could rationally lead to a contrary finding' with respect to that element. [Citations.]" (*People v. Davis* (2005) 36 Cal.4th 510, 564; see also *U.S. v. Zepeda-Martinez* (9th Cir. 2006) 470 F.3d 909, 913 [*Apprendi* error is harmless where the record contains overwhelming and uncontraverted evidence supporting the sentencing factor].)

Here, there is overwhelming and uncontroverted evidence that defendant, the stepmother and primary caregiver of the six-year-old

victim, occupied and took advantage of a position of trust to commit the crimes. T.L. was in defendant's sole care when defendant changed the little girl's life forever, and had depended on defendant to keep her safe. Defendant's husband, Thomas, who was opposed to corporal punishment, also depended on defendant and entrusted her with T.L.'s safety in his absence. Unfortunately, defendant abused their trust by dragging T.L. into a closet, severely beating her with a hanger, pushing her to the floor where she hit her head, and failing to obtain timely medical attention for T.L. when she became comatose. Absent defendant's position of trust, T.L. would not have submitted to defendant's punishments and Thomas would not have left his child in defendant's care. The error in failing to submit the sentencing factor to the jury is harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

BLEASE, J.

MORRISON, J.