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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EILEEN M. MERCHANT et al., Defendants and Appellants.	E033887 (Super.Ct.No. RIF96279) OPINION

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed as to defendant Michael C. Gramaje. Affirmed as modified with directions as to defendant Eileen M. Merchant.

Ellen M. Matsumoto, under appointment by the Court of Appeal, for Defendant and Appellant Michael C. Gramaje.

John Dodd & Associates and John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant Eileen M. Merchant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia, Supervising Deputy Attorney General, Ivy B. Fitzpatrick and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

In this consolidated appeal, Michael C. Gramaje (hereafter defendant Gramaje) and Eileen M. Merchant (hereafter defendant Merchant) appeal from the jury's verdicts finding them each guilty of numerous charges, including child endangerment and torture (defendant Merchant only) arising from injuries that Terri Gramaje, defendant Gramaje's wife, inflicted on seven-month-old K. while the infant was living with the Gramajes. Defendants each raise various claims of error on appeal, the details of which we recount below in our discussion of those claims. We conclude, with exception of defendant Merchant's challenges to two enhancements under Penal Code section 12022.7,[1] that defendants' claims are meritless.

FACTS

The pertinent facts are that in January 2001 K.'s mother Lisa left then four-month-old K. and her 18-month-old sister S. with Terri Gramaje who had agreed to care for the children because Lisa was living in a mobile home that in Lisa's view was not safe for the children. Terri along with her husband (defendant Gramaje) and their two sons, 14-year-old M. and 12-year-old B., lived in a large barn-like structure owned by Terri's mother. Defendant Merchant and her 10-year-old son R. lived in a mobile home located

[1] All further statutory references are to the Penal Code unless indicated otherwise.

on the same property as the Gramaje's barn. Before K. was born Lisa and S. had lived in the mobile home with defendant Merchant and R. for about eight months but had to move because Terri's mother had kicked Lisa out.

During the time her daughters lived with the Gramajes, Lisa provided for the girls' basic needs, including food, clothes, diapers, and medication. Although Lisa intended for the children to stay with Terri Gramaje, K. and S. frequently also stayed with defendant Merchant in her mobile home. S., in fact, lived primarily with defendant Merchant while K. primarily stayed with the Gramajes. Lisa regularly visited her daughters, seeing them at least one to two times a week. Beginning in about mid-February, Terri frequently prevented Lisa from seeing K. when she came to visit, often putting her off by claiming that K. was asleep or ill. When Lisa was allowed to see the child during that time, K.'s body was covered by her clothes.

On March 3, 2001, Lisa went shopping with Terri, K., and S. but she did not see K.'s body that day. On about March 8, Lisa took S. to live with her but left K. with Terri because Lisa thought Terri would like a little "catch up time" with the infant. According to Lisa, Terri loved K. so Lisa wanted to give her a little time with K. before she took the baby back permanently. Lisa did not see K. again until March 11, 2001, when Terri and defendant Merchant drove K. to Lisa's house and Terri told Lisa to take the infant to a doctor because K.'s leg was infected. Terri removed a bandage from the baby's leg. According to Lisa, the leg looked like raw hamburger and the skin was open from the knee to the hip. When Lisa asked Terri what had happened to K.'s leg, Terri said only that K. had a bruise that had turned purple and then had ruptured. In fact, and as

defendant Merchant later told the police, K. had what appeared to be a bruise that Terri Gramaje believed was an infection that needed to be drained so Terri used a box cutter and made a two- to three-inch incision on the baby's leg. Defendant Merchant and Terri then put a topical antibiotic ointment on the wound and bandaged K.'s leg.

Terri Gramaje and defendant Merchant drove Lisa to a local hospital emergency room, where they dropped her off with K. and then drove away. In the emergency room, medical personnel immediately recognized that K. was gravely ill. They intubated the child and had her transported to Loma Linda University where doctors immediately performed surgery to remove dead tissue in order to save K.'s life. Surgeons removed dead tissue from K.'s left thigh and both sides of her buttocks, incised a lesion on her left foot, and also took skin from her back which they grafted to her thigh and buttocks.

Rebecca Piantina, a forensic pediatrician at Loma Linda University Children's Hospital, first evaluated K. on March 11, 2001, and continued to treat K. for the two months the child was hospitalized. According to Dr. Piantina, the lesion on K.'s left thigh was caused by necrotizing fasciatus, a rare and life-threatening infection that attacks the deep layers of the skin. The infection causes death of the deep skin tissue which then causes blood vessels to clot off as a result of which the surrounding tissue also dies. The first symptoms of the disease are extreme pain, flu-like symptoms, and swelling of the infected area. Because it rapidly progresses, necrotizing fasciatus must be treated quickly in order to avoid shock and ultimately death. Dr. Piantina testified that in K.'s case the infection was caused by a break in the skin, possibly caused by rodent or insect bites, which in turn caused E. coli (Escherichia coli) and other organisms to mix

and, in combination, to develop into necrotizing fasciatus. K.'s infection could have developed between a few weeks or a few days before March 11.

Dr. Piantina also testified that she evaluated K. the day after she was admitted into Loma Linda Children's Hospital. That examination, which included laboratory tests, X-rays and CT scans, revealed that K. had subdural hematomas (chronic bleeding) on two sides of her brain, as well as retinal hemorrhages in both eyes, all of which were caused by violently shaking the infant. K. also had crusted lesions around her nose, and lesions around her mouth that were most likely caused by insect bites that became infected due to unsanitary living conditions; "very significant" cockroach bites all over her body, including her genital area; rodent bites on her shoulder; scarring and tearing in her mouth, under and on her tongue, and at the back of her throat that was consistent with having had a spoon shoved down her throat; three- to six-week-old fractures of both pelvic bones, the type of fractures that are very unusual in a seven-month-old child and that happen in motor vehicle accidents but could also possibly be caused by an adult kicking the child; a three-week-old fracture of the left tibia that was caused by "a lot of force" such as a kick from an adult; advanced decubitus ulcers (bed sores) that appeared to be weeks old and would have resulted from being in one position for a prolonged period, and were consistent with K. being strapped in a car seat or lying on her back in a bassinet for a long period of time; and "a very, very horrible bad tear" on her rectum that went up towards her vaginal area and back from the anal area, caused by trauma to the rectum either from penetration or blunt force, such as having been kicked or hit. The rectal tear damaged

K.'s sphincter muscle and deformed the rectal folds and required that she wear a colostomy bag for six months in order for the damage to heal.

In consent searches of both the Gramaje's house and defendant Merchant's mobile home, conducted later in the day on March 11, 2001, sheriff's deputies discovered deplorable living conditions. In Merchant's trailer, among other things, there was a strong odor of urine and dog feces with dog and cat feces, both fresh and old, on the carpets, and cockroaches in every room. The Gramaje's barn also smelled of urine and dog feces, the carpets were wet, and dog feces, fresh and old, were throughout the house. Bugs, spiders and cockroaches were also all over the house. Under a bassinet, presumably K.'s, located in Terri and defendant Gramaje's bedroom, there was a puddle of urine and dog feces as well as a dead mouse. The house was filthy and rodents could be heard scratching behind furniture and walls.

When sheriff's deputies initially contacted defendant Gramaje at his home on March 11 and explained that there was something wrong with K., defendant Gramaje stated that they had been watching the child for a few months and that "he had treated the baby as his own, taken it in." When later interviewed, defendant Gramaje stated, in pertinent part, that he did not know much about the situation with K. because he spent long hours away from home, commuting to and working at his job as a cook at the Marriott in Irvine. Defendant Gramaje stated that K. had been living at his house since October 2000 and that his wife Terri watched K. most of the time but that defendant Merchant also cared for the child. Although he claimed not to know how K. came to be living in his house, defendant Gramaje did acknowledge that he told his wife that he did

not want the responsibility of looking after someone else's child, but because it was something Terri wanted to do, defendant Gramaje accepted it.

Defendant Gramaje also stated that he had noticed sores around K.'s mouth and nose and that Terri said the former were caused by an allergic reaction to apple products and the latter were the result of a cold. Defendant Gramaje had not noticed other sores or injuries on K. but if he had, he would have made sure she received medical attention. When told about K.'s injuries, defendant Gramaje stated that he was confused, that he had never seen the injuries, and did not know how they had occurred. He admitted, however, that the Gramajes' house was filthy and not the proper place for a seven-month-old infant to live.

When interviewed, defendant Merchant initially stated, among other things, that she first noticed the so-called bruise on K.'s leg on March 10 and that on the morning of March 11, the bruise began opening up, "like the skin had peeled apart." After she and Terri looked at the bruise, Terri said they needed to take the baby to Lisa so she could take K. to the doctor. Defendant Merchant later admitted that she had seen the bruise or black mark on K.'s leg earlier in the week, and that she had seen bedsores on K.'s buttocks for two to three weeks. She then explained how on March 10 Terri brought K. to defendant Merchant's trailer and used a box cutter to open K.'s leg.

Defendant Merchant also said that she had no idea how K. had come to have a broken left tibia and broken hip bones. She admitted that K. had a lot of cold sores and purported bite marks from her sister S. and recently had been "breaking out" with black and blue marks all over her body. Defendant Merchant said that she never saw Terri

Gramaje drop or hit K. but that she had seen her spank the child. According to defendant Merchant, who acknowledged having been hit by her, "Terri's got a hard hand when she hits." In a second interview two days later, defendant Merchant disclosed that K. had twice gone into convulsions. The first time, which occurred about a month before the interview, Terri called defendant Merchant at work and said that K. had been convulsing and had stopped breathing but started to breathe again after Terri performed CPR. Defendant Merchant returned home and she and Terri poured cold water on the baby to shock her and "bring some life back into her." A week later, K. convulsed again and this time Terri poured water on her to revive her. Although they considered taking her to the hospital, Terri decided not to because K. had sores on her buttocks and Terri "didn't know where they were from and she didn't want any trouble, any problems . . . ."

Defendant Merchant's son, R., testified at trial, among other things, that because K. did not like to eat with a spoon, Terri Gramaje, would "shove the spoon in her mouth" and make K. cry. When Terri got mad she would throw K. down on the couch or in her bassinet and K. would cry loudly. R. also saw Terri hit K. hard more than 10 times, kick K.'s walker while the infant was in it, and shake K. two to three times. R. also saw two of K.'s seizures. During the first one, R. saw Terri shake K. and then heard her tell her sons, B. and M., to throw water on the baby. During the second seizure, Terri called defendant Merchant at work and by the time she arrived, K. was awake. According to R., when defendant Merchant told Terri to take K. to the doctor, Terri said she did not "want the police to be involved." R. also testified that he had noticed that K. had sores around her nose and mouth and had dime-sized bruises on her buttocks. R. was in the trailer

when Terri cut open K.'s leg with the box cutter and he saw his mother hold K.'s legs still while Terri made the incision.

Defendant Gramaje's sons, B. and M., also testified at trial. In his testimony B., the younger of the two boys, stated, among other things, that he had seen some of K.'s injuries, including the scabs all over her mouth. He remembered when the bruise on K.'s leg opened up and that his dad told his mother to take K. to a doctor. B. also testified that his dad did not want K. and S. living with them because he felt the house was not fit for girls to live in. B. acknowledged that he told an investigator that his dad was afraid something would happen to K. and S. and that his mother would be involved. B. also acknowledged but denied the truth of other statements he had made to investigators, including a statement that Terri and defendant Gramaje screamed at K. and called her a "fucking bitch," that Terri spanked K. and slammed her in her bassinet, that his mother hit him hard, and that defendant Merchant had been present when Terri hit K.

M. testified in pertinent part that his mother threw K. down hard on the waterbed, yelled and cussed at K. and forcefully put the child in her bassinet. M. recalled that K. had a seizure and that B. and his mother threw water on her and Terri shook her hard to revive her. M. testified that he later told his father about the seizure and his father was upset that his mother had not taken K. to the hospital.[2]

Additional facts pertinent to the issues raised on appeal will be recounted below.

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[2] Lisa eventually pleaded guilty to two counts of felony child endangerment for leaving K. and S. with the Gramajes. Terri Gramaje also pled guilty to torture and other charges, and is serving a term of 25 years to life in prison.

DISCUSSION

We first address the issues raised by defendant Gramaje and begin with his claim that section 273a, subdivision (a) is unconstitutionally vague.[3]

1.

SECTION 273a, SUBDIVISION (a)

The child endangerment statute, section 273a, subdivision (a), states in pertinent part that, "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered" is guilty of a crime punishable as either a misdemeanor or felony. (§ 273a, subd. (a).)

Defendant Gramaje raises various challenges to his conviction for violating that statute. First, he contends that the statute is vague and therefore unconstitutional because it applies to "[a]ny person who . . . willfully permits" a child to suffer and does not limit criminal liability to those who are under a duty to act. To support his claim, defendant Gramaje cites *People v. Heitzman* (1994) 9 Cal.4th 189, in which the Supreme Court

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[3] Defendants each purport to join in the issues raised by the other. However, the issues are fact specific, and the facts vary as to each defendant. Therefore, an issue raised and addressed by one defendant does not suffice to address the issue from the perspective of the other defendant. Because all issues raised in this appeal are fact specific either as to error or prejudice, defendants' asserted joinder requests are irrelevant.

declared that the identical language in the elder abuse statute, section 368, subdivision (a), did not "meet the constitutional requirement of certainty" as applied to a person, such as the defendant in that case, who was not the abuser, did not live with, and was not the caretaker of the elder parent who was being abused. (*Heitzman*, at p. 209.)

Defendant Gramaje was not prosecuted under the "[a]ny person who . . . willfully permits" provision of section 273a, subdivision (a); he was prosecuted under the "care or custody" provision, specifically the provision applicable to any person "having the care or custody of any child." Consequently, although we are inclined to agree, for the reasons stated in *People v. Heitzman*, that the "[a]ny person who . . . willfully permits" provision in section 273a, subdivision (a) is constitutionally uncertain we will not resolve that issue.

The issue pertinent under the "care or custody" provision, and the next issue that defendant Gramaje raises, is whether sufficient evidence was presented at trial to show that he had "care or custody" of K. Defendant Gramaje contends the evidence was insufficient. We disagree.

"In reviewing a challenge to the sufficiency of evidence, the reviewing court must determine from the entire record whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt. In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt."

(*People v. Mincey* (1992) 2 Cal.4th 408, 432.) Substantial evidence is "evidence which is reasonable, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

We begin our assessment of the sufficiency of the evidence with our observation in *People v. Cochran* (1998) 62 Cal.App.4th 826 (*Cochran*), that there is "no special meaning to the terms 'care and [*sic*] custody' beyond the plain meaning of the terms themselves. The terms 'care or custody' do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver." (*Id*. at p. 832.)

Defendant Gramaje contends the evidence is insufficient to show he had care or custody of K. because it does not show that he actually took care of the child and instead shows that he merely tolerated the infant's presence in his home. In other words, defendant Gramaje is of the view that in order to prove K. was in his care or custody, the evidence had to show that he fed, bathed or otherwise attended to the immediate physical needs of the infant. In our view, evidence that defendant Gramaje tolerated the infant's presence in his home is sufficient to show that defendant Gramaje provided care for K. The evidence is undisputed that K. lived in defendant Gramaje's home, with his knowledge, from January 2001 to March 2001, and according to his statement to the police, defendant Gramaje took K. in and "treated her as his own." By providing K. with a roof over her head, defendant Gramaje provided care to K. Thus, the evidence is sufficient to show that K. was in defendant Gramaje's care for purposes of section 273a, subdivision (a).

Although there is no evidence to show that defendant Gramaje caused K.'s injuries or that he permitted anyone else to injure the infant, section 273a, subdivision (a) also

imposes liability for willfully permitting a child "to be placed in a situation where his or her person or health is endangered." (§ 273a, subd. (a).) The evidence presented at trial, as recounted above, shows at the very least that the Gramajes' home was filthy and infested with rodents and insects. Infected insect bites were the most likely cause of the necrotizing fasciatus on K.'s leg. Evidence regarding the deplorable conditions of the home is sufficient to show that defendant Gramaje willfully permitted K. to be placed in a situation where her health was endangered. That evidence combined with the evidence that defendant Gramaje tolerated K.'s presence in his home and thereby undertook to provide care for the child, is sufficient to support his conviction for violating section 273a, subdivision (a) as alleged in count 2. Accordingly, we reject his contrary claim.

2.

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant Gramaje next contends that his trial attorney should have requested a pinpoint instruction on the definition of "care or custody" after the jury sent a note during their deliberations asking the court to "explain the legal definition" of those terms and the next day submitted another note in which they asked if they could have a law dictionary and also whether defendant Gramaje is "bound by the verbal contract made between Lisa S. and Terri G. regarding the care of those kids ([S.] & [K.])." The trial court responded to the jury's first note as follows: "Refer to Instruction number 9.37 [which defines the section 273a, subdivision (a) violation]. The term is care or custody. There is no special legal definition of those words that would apply here. Use the common, everyday meanings of those words in your deliberations." In response to the second note, the trial

court told the jurors they could not have a legal dictionary and referred them to CALJIC instruction Nos. 9.37 and 3.01 for an "answer to the first part of [their] question."

According to defendant Gramaje, the jury's notes indicate that the jurors were "seriously grappling with the issue of whether [he] had care or custody of the children" and therefore trial counsel should have requested a pinpoint instruction which would have advised the jury that "care or custody" means "a willingness to assume duties correspondent to the role of a caregiver." We disagree.

An ineffective assistance of counsel claim has two components: deficient performance, namely, that counsel's representation "fell below an objective standard of reasonableness . . . under prevailing professional norms," and prejudice, namely, that it is reasonably probable, but for counsel's error, that the outcome of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 688; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.)

Defendant Gramaje has not demonstrated that trial counsel's representation was deficient. As discussed above, the terms "care or custody" as used in section 273a, subdivision (a) do not have any special meaning "beyond the plain meaning of the terms themselves." (*Cochran*, *supra*, 62 Cal.App.4th at p. 832.) The defendant in *Cochran* claimed that although he had taken the infant victim and her mother into his home he did not have care or custody of the infant (who was not his child) and therefore he did not come within the purview of section 273ab at issue in that case. In rejecting the defendant's claim we not only concluded that the terms care or custody have no special meaning but we also noted that, "The terms 'care or custody' do not imply a familial

relationship but only a willingness to assume duties correspondent to the role of a caregiver." (*Cochran*, at p. 832.)

Contrary to defendant Gramaje's view, the above-quoted language is not a definition of either term in question but rather a clarification that neither concept is dependent on a familial connection. Therefore, we reject defendant Gramaje's assertion that trial counsel should have requested a pinpoint instruction that advised the jury that care or custody means "a willingness to assume duties correspondent to the role of a caregiver." Because no such instruction was warranted we conclude that trial counsel's representation was not deficient. In short, we reject defendant Gramaje's ineffective assistance of counsel claim.

3.

RESPONSE TO JURY INQUIRY

As noted above, in response to the jury's question whether defendant Gramaje was bound by his wife's "verbal contract" with Lisa to take care of K. and S., the trial court answered by referring the jury to CALJIC Nos. 9.37 and 3.01, the latter of which defines aiding and abetting. Defendant Gramaje's attorney objected to referring the jury to the aiding and abetting instruction on the ground that the case against defendant Gramaje had been predicated on a theory of criminal negligence and that aiding and abetting was inconsistent with that theory.

Defendant Gramaje reasserts that objection in this appeal. Specifically, he contends there was no evidence that he aided and abetted in the commission of any criminal act committed by his wife, Terri. Therefore, the trial court should not have

referred the jury to CALJIC No. 3.01 and, by doing so, the trial court led the jury to believe that defendant Gramaje did aid and abet in the crimes that resulted in K.'s severe injuries. Again, we disagree.

The jury's question asked whether defendant Gramaje was responsible for the acts of his wife, that is, was he under an obligation to provide care for K. and S. based on Terri's agreement with Lisa to care for the children. In response to that question, the trial court correctly referred the jury to CALJIC No. 3.01, the only theory under which defendant Gramaje could be held criminally responsible for acts committed by someone other than himself. By referring the jury to the aiding and abetting instruction, the trial court directed the jurors to the legal principles from which they would be able to answer their question. Contrary to defendant Gramaje's view, the trial court did not implicitly or expressly suggest that defendant Gramaje was liable as an aider and abettor. After considering the definition of aiding and abetting and reviewing the evidence, the jury would have found that defendant Gramaje was not an aider and abettor. Defendant Gramaje's assertion otherwise is speculation. For these reasons, we reject this claim of error.

4.

PROSECUTORIAL MISCONDUCT

Defendants contend that the prosecutor committed misconduct when during closing argument, he put a photograph of then-two-year-old K. on the monitor and addressed the jury as if he were K. After the prosecutor completed his argument, defendants both objected. They asked the court to admonish the jurors to disregard the

argument, and also moved for mistrial. The trial court denied defendants' motions for mistrial and also declined to admonish the jury. The court reasoned that the jury already had been admonished not to consider sympathy in their deliberations and that although the prosecutor's argument "was clearly designed to appeal to at least some sense of emotion," what the prosecutor said found "at least some support in the evidence" and the prosecutor "was very careful in that he did not depart from what the testimony brought out."

Both defendants contend that the prosecutor engaged in misconduct and that the trial court, therefore, erred in denying their respective mistrial motions. We agree that this aspect of the prosecutor's closing argument was improper. Contrary to the trial court's view, the prosecutor did not limit his argument to facts adduced from the evidence. He also undertook to express K.'s emotions and to attribute thoughts to the child. The pertinent details[4] are that after the prosecutor projected K.'s image on the monitor he stated, "That's my last slide. That's the best witness in this case. You don't get to hear from her. But based upon the evidence as we know it, as you heard it, this is what she would tell you:

"Hi. My name is K. I'm gonna be three this summer. I have a great new mom and dad and a great new home. But it wasn't always like that. I used to live in a barn, in a trailer, and I *hated* it there. I *hated* the smell. I *hated* the mold. I *hated* the spiders. I

[4] We will only recount the improper aspects of the prosecutor's closing argument. Much of what the prosecutor related while purporting to speak as K. was limited to factual details adduced from the evidence.

hated the cockroaches. I *hated* everything that scurried along the floor at night. The cockroaches were really bad. . . . They bit my private parts. They bit my bottom. They bit my legs, my body, arms, head, and mouth. *And I would try to get rid of them*, but it wasn't as good as my big stepbrother had it; they would just bite his hands." The prosecutor, speaking in K.'s voice, also said, "*Eileen, Eileen was worse*. Her house stunk, too. The roaches and spiders and webs *scared me* there too . . . ." The prosecutor also argued, "The last night I spent there on March 10th was the *scariest*. Eileen and Terri only cared about saving their own skin. They sure didn't care about my skin. Eileen Merchant knew that my leg was getting blacker and blacker and swollen, and it smelled really bad. She took me into her room and put me on her own bed. *And then I saw the box cutter and Terri coming with the box cutter. And I tried to get away. I tried to kick away. Even though it hurt because of my broken pelvis, I thought it was gonna hurt more with that box cutter. And I was right. But I couldn't kick away because she held my leg down* so it could be ripped apart, amongst all the roaches and the spiders and the webs and the smell." The prosecutor concluded his closing in K.'s voice by stating, "Doing a lot better now. The bag attached to my body came out a little bit after my first birthday party. I can walk. Even though I limp, *I am happy about that* [presumably referring to the ability to walk, not the limp]. *I have lots of scars the other kids don't have. I don't know if they'll go away. But I am alive*." (Italics added.)

We are inclined to agree with defendants that it was improper for the prosecutor to deliver part of his closing in K.'s voice and attribute to her thoughts and emotions that were purely speculation and highly emotional. "By doing so, the [p]rosecutor

inappropriately obscured the fact that his role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim. Furthermore, the prosecutor seriously risked manipulating and misstating the evidence . . . . Finally, by testifying as [K.], the prosecutor also risked improperly inflaming the passions of the jury through his first-person appeal to its sympathies for the victim . . . ." (*Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 712-713.)[5] However, we will not address the issue further because defendants were not prejudiced by the prosecutor's conduct.

In order to constitute a violation of a defendant's due process right to a fair trial under the federal Constitution, the prosecutor's misconduct must render the trial "'fundamentally unfair.'" (*Drayden v. White*, *supra*, 232 F.3d at p. 713.) "Misconduct by a prosecutor that does not render a criminal trial fundamentally unfair is error under state law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. [Citation.] Misconduct that infringes upon a defendant's constitutional rights, mandates reversal of the conviction unless the reviewing court determines beyond a reasonable doubt that it did not affect the jury's verdict. [Citations.] A violation of state law only is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred

[5] In *Drayden v. White*, the prosecutor sat in the witness chair and delivered a soliloquy as if he were the murder victim. Before beginning his remarks, the prosecutor exhorted the jury to hold him to his representation that everything he was going to tell them the victim "would have said has been said by somebody for him in this courtroom. All of this is in the evidence." (*Drayden v. White*, *supra*, 232 F.3d at p. 711.)

had the district attorney refrained from the untoward [argument]. [Citation.]" (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.)

The prosecutor's misconduct in this case did not render defendants' trial fundamentally unfair. First, the objectionable portion comprised only the last few minutes of the prosecutor's closing argument, and even though it was relayed to the jury from K.'s perspective, most of what the prosecutor said was based on facts derived from the evidence. Second, the trial court instructed the jury not only that statements of the attorneys are not evidence but also that the jury should not base its verdicts on sympathy. In addition, given the subject matter of the trial, which includes the fact that the victim was a baby, and the nature and extent of K.'s injuries, we must presume that the atmosphere during trial was fairly emotional and that the prosecutor's argument only minimally increased the level of emotion. In short, we cannot say that the prosecutor's closing argument rendered defendants' trial fundamentally unfair. Accordingly, defendants' rights under the due process clause of the United States Constitution were not violated.

For these same reasons, we cannot say that the prosecutor's conduct violated state law. However, if a violation occurred, it was harmless. Simply stated, it is not reasonably probable the jury would have reached a result more favorable to either defendant on any of the charged crimes if the purported misconduct had not occurred.

5.

SUFFICIENCY OF THE EVIDENCE

Defendant Merchant contends the evidence is insufficient to support the jury's verdict finding her guilty of torture in violation of section 206 as alleged in count 1 because neither she nor Terri Gramaje harbored the requisite intent to cause cruel or extreme pain. We disagree.

As set out above, in our discussion of defendant Gramaje's challenge to the sufficiency of the evidence, our task on appeal is to determine based on a review of the entire record, "whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt." (*People v. Mincey*, *supra*, 2 Cal.4th at p. 432.) In order to make this determination, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*Ibid*.)

Torture, as defined in section 206, requires, among other things, that great bodily injury be inflicted "with the intent to cause cruel or extreme pain and suffering." (§ 206.) In challenging the jury's verdict finding her guilty of torture, defendant Merchant contends the evidence shows that she participated in only one act -- she assisted Terri Gramaje in cutting open K.'s leg in order to drain the infection. Defendant Merchant argues that she and Terri Gramaje did not intend to cause cruel or extreme pain and suffering when they inflicted that injury on K. but, instead, intended only to drain the

infection. Because neither she nor Terri harbored the required intent, defendant Merchant contends that act does not support a conviction for the crime of torture. Defendant Merchant asserts that all other injuries were inflicted by Terri Gramaje alone and defendant Merchant was prosecuted for those injuries on an aiding and abetting theory. As to those injuries, defendant Merchant argues that Terri Gramaje inflicted them while acting in fits of rage or out of explosive anger rather than with the intent to cause cruel or extreme pain. Because Terri Gramaje, the actual perpetrator, did not harbor the required intent, defendant Merchant argues that she cannot be guilty of torture.

Although we are inclined to agree with defendant Merchant's initial assertion, we will not address it because we do not agree with her assertion that Terri did not harbor the requisite intent in inflicting the other injuries. Defendant Merchant bases this claim in part on *People v. Steger* (1976) 16 Cal.3d 539, in which the defendant fatally beat her three-year-old stepdaughter and was convicted of first degree murder by torture. The Supreme Court modified the defendant's conviction by reducing the degree of murder from first to second degree based on the court's view that the evidence was insufficient to show the defendant harbored the requisite intent. The court held, "Viewed in the light most favorable to the People, the evidence shows that defendant severely beat her stepchild. But there is not one shred of evidence to support a finding that she did so with cold-blooded intent to inflict extreme and prolonged pain. Rather, the evidence introduced by the People paints defendant as a tormented woman, continually frustrated by her inability to control her stepchild's behavior. The beatings were a misguided, irrational and totally unjustifiable attempt at discipline; but they were not in a criminal

sense willful, deliberate, or premeditated." (*Id*. at p. 548.) In the Supreme Court's view, the fact that the beatings occurred and the victim's wounds were inflicted over an extended period of time, likewise, did not necessarily support an inference that the defendant intended to inflict pain -- "In some cases this fact might lend support to a torture murder conviction. For example, if a defendant had trussed up his victim, proof that pain was inflicted continuously for a lengthy period could well lead to a conclusion that the victim was tortured. But in the present case the fact that [the victim] was injured on numerous occasions only supports the theory that several distinct 'explosions of violence' took place, as an attempt to discipline a child by corporal punishment generally involves beating her whenever she is deemed to misbehave." (*People v. Steger*, *supra*, 16 Cal.3d at pp. 548-549, fn. omitted.)

Defendant Merchant's reliance on *People v. Steger*, and the cases cited therein, is misplaced. First, Terri Gramaje testified at trial that she had pleaded guilty to various charges including the torture of K. By her guilty plea, Terri Gramaje admitted that she inflicted great bodily injury on K. with the intent to cause the infant cruel or extreme pain. Thus, unlike *People v. Steger*, in which the defendant's intent arguably was equivocal, the perpetrator's intent in this case is clear and established by her admission of guilt. Next, we note that the Supreme Court has in more recent cases clarified that the nature and severity of the victim's wounds are probative of the defendant's intent to inflict pain and that a misguided attempt at discipline can also involve an intent to inflict extreme pain and suffering. (See, e.g., *People v. Mincey*, *supra*, 2 Cal.4th at pp. 432, 434.) Therefore, even absent Terri Gramaje's guilty plea, a jury could reasonably infer

from the fact that K.'s injuries were extensive and had been inflicted over a period of time that Terri Gramaje intended to cause K. extreme pain and suffering. Not only did the evidence show that over the course of at least a month, Terri used her foot or some blunt object on K. causing the infant's rectum to tear, but that she also must have stomped on the infant, which crushed K.'s pelvis, and may also have caused her left tibia to break. Terri also repeatedly jammed a spoon down K.'s throat when she fed the infant causing tears in K.'s mouth and tongue and scarring in her throat. Terri must also have immobilized K. by strapping her into a car seat or leaving her for extended periods of time in her bassinet which caused K. to develop severe and advanced pressure sores on her buttocks.

That Terri might have acted out of anger or frustration, as defendant Merchant claims, does not preclude a finding that she also intended to cause K. cruel or extreme pain. From the number and severity of the injuries Terri inflicted, a jury reasonably could infer that she intended to cause K. cruel or extreme pain, even if she had been motivated by frustration and anger to inflict the injuries. In short, we conclude a jury could reasonably infer from the evidence recounted above that Terri Gramaje intended to cause K. cruel or extreme pain and therefore that she possessed the mental state necessary to support a torture conviction. From that we must in turn conclude that the evidence is sufficient to support defendant Merchant's conviction for torture as an aider and abettor to Terri Gramaje's acts of child abuse and torture.

6.

EXCLUSION OF EVIDENCE

Defendant Merchant next contends that the trial court erred by excluding evidence that Terri Gramaje had threatened defendant Merchant while the two were in jail, awaiting trial. According to her offer of proof, within a few weeks of trial, Terri Gramaje told defendant Merchant that "'when you go up to state, I'm gonna see that you get hurt. If someone doesn't do it for me, I will do it myself.'" Defendant Merchant intended to call as witnesses two sheriff's deputies who were on duty in the jail at the time the threat was made and who prepared a report of the incident. Defendant Merchant argued that the evidence regarding Gramaje's recent threat corroborated her defense "of domination, physical force, threats and duress in this case from Terri Gramaje . . . ." The trial court ruled that the jailhouse threat was irrelevant and excluded it from evidence.

We agree with the trial court that the evidence was irrelevant. Relevant evidence as defendant Merchant correctly points out is "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The trial court has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 132.) We review a trial court's exercise of discretion in admitting or excluding evidence for abuse of that discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.)

Defendant Merchant argued in the trial court as she does on appeal that Terri Gramaje's jailhouse threat was relevant because it corroborated Merchant's defense of

duress, specifically, that she had been dominated by Gramaje at the time the crimes took place. We disagree. Evidence that two years after their arrest and after the crimes occurred Terri Gramaje threatened sometime in the future to hurt defendant Merchant has no tendency in reason to prove that defendant Merchant was dominated by Gramaje and acted under duress created by that domination two years earlier when the crimes occurred. Stated simply, the trial court did not abuse its discretion by excluding the proffered evidence.

But even if we were to conclude otherwise, any error in excluding the jailhouse threat from evidence necessarily was harmless. The erroneous exclusion of evidence requires reversal of a conviction only if that error was prejudicial in that it resulted in a miscarriage of justice. (Evid. Code, § 354.) In this context, a miscarriage of justice occurs when this court is able to say, absent the erroneously excluded evidence, that it is reasonably probable the jury would have reached a result more favorable to defendant. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Other evidence was presented at trial to support defendant Merchant's duress claim, namely, the testimony of Merchant's son, R., that he saw Terri Gramaje hit his mother; Merchant's statement to the police that Terri had hit Merchant and that Terri's got "a hard hand"; and the testimony of Mandy Smyth, the roommate of K.'s mother, Lisa, who stated that Merchant seemed like a slave or puppet to Terri Gramaje. The noted testimony involved events that occurred and observations that were made at the time that K. was in the care of defendant Merchant and the Gramajes. Despite that evidence, the jury rejected defendant Merchant's duress defense and found her guilty of

torture, child abuse, and assault, as charged. It is not reasonably probable the jury would have reached a more favorable result in this case if the evidence regarding the jailhouse threat had been admitted at trial. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

7.

GREAT BODILY INJURY ENHANCEMENT

Defendant Merchant moved in the trial court to dismiss the section 12022.7 great bodily injury enhancements the jury found true in connection with her felony child endangerment conviction (count 2) and her assault conviction (count 3) on the ground that she had not personally inflicted any injury on K. The trial court, after first acknowledging that the enhancement applies only to the person who actually inflicted the great bodily injury, nevertheless denied defendant Merchant's motion. The trial court reasoned that the group beating principle set out in *People v. Corona* (1989) 213 Cal.App.3d 589 (*Corona*) applied in this case because although Terri Gramaje actually cut open K.'s leg with the box cutter, defendant Merchant held the infant's leg and thereby participated in inflicting that injury. We agree with defendant Merchant that the trial court erred.

Section 12022.7 creates a five-year sentence enhancement on any person who intentionally and personally inflicts "great bodily injury" in the commission or attempted commission of a felony.

By its use of the word "personally," the Legislature "clearly and concisely expressed" its intent: "that the individual accused of inflicting great bodily injury must be the person who directly acted to cause the injury. The choice of the word 'personally'

necessarily excludes those who may have aided or abetted the actor directly inflicting the injury." (*People v. Cole* (1982) 31 Cal.3d 568, 572 (*Cole*).) In other words, section 12022.7 does not apply to principals who proximately cause great bodily injury. Proximately causing the injury would support criminal liability on the underlying crime, depending on the crime charged, but it does not support imposition of the section 12022.7 enhancement. (*People v. Rodriguez* (1999) 69 Cal.App.4th 341, 351.) In short, the section 12022.7 great bodily injury enhancement is "intended to impose an additional penalty for causing great bodily injury only on those principals who perform the act that directly inflicts the injury, and . . . one who merely aids, abets, or directs another to inflict the physical injury is not subject to the enhanced penalty . . . ." (*Cole*, at p. 571.)

The issue we must address is whether defendant Merchant personally inflicted any of the injuries K. suffered. In imposing the enhancements at defendant Merchant's sentencing hearing, the trial court stated, with the exception of the injury caused by the box cutter, that "it's abundantly clear" Terri Gramaje inflicted all of K.'s other injuries. The box cutter injury is the basis for the enhancement the trial court imposed on count 3, the torture charge, and the other injuries are the basis for the enhancement the trial court imposed on count 2, the felony child endangerment charge. Although the evidence shows that defendant Merchant aided and abetted Terri Gramaje in committing child endangerment, there is no evidence whatsoever to show that she personally inflicted any of the injuries that were the basis for that conviction, as the trial court expressly acknowledged. Therefore the evidence does not support imposition of the section

12022.7 enhancement on count 2, defendant Merchant's conviction for child endangerment and we will strike that great bodily injury enhancement.

The great bodily injury enhancement imposed in connection with count 3 is based on defendant Merchant's act of holding K.'s leg while Terri Gramaje cut it with a box cutter. The Attorney General contends that by holding K.'s leg, defendant Merchant personally inflicted that great bodily injury. To support that view, the Attorney General cites *People v. Dominick* (1986) 182 Cal.App.3d 1174 (*Dominick*), in which several men kidnapped and sexually assaulted a young woman after which the defendant held the victim and pulled back her head while his cohort struck at her with a pole. The blow hit the victim in the face and caused her to fall down "a mountainside" and break her shoulder. Citing the victim's shoulder injury and the defendant's participation in the act that caused her to fall, the *Dominick* court held there was substantial evidence to support the trial court's finding that the defendant's "acts constituted more than aiding and abetting and that he was directly responsible for the broken shoulder the victim suffered." (*Dominick*, at p. 1211.)

Except for the fact that the defendant in *Dominick* had physical contact with the victim, the circumstances of the case are indistinguishable from *Cole*, in which the defendant blocked the door in order to prevent a robbery victim's escape so that a coparticipant could comply with the defendant's exhortation to shoot the victim. If *Dominick* is correctly decided, then the determinative fact is that the defendant's act of aiding and abetting in inflicting the injury involved actual physical contact with the victim. Under that analysis, if rather than barring the door, the defendant in *Cole* had

physically restrained the victim to prevent her escape, the defendant would have personally inflicted the injury that resulted when the coparticipant shot the victim and thus would have been subject to the section 12022.7 enhancement. Whether the defendant's act involved physical contact with the victim should not be the determinative fact. If, as *Cole* states, aiding and abetting in the injury causing act is not sufficient to support imposition of the enhancement, then the form that aiding and abetting takes should be irrelevant. Consequently, we cannot ascribe to a conclusion that depends on whether there was physical contact with the victim.

Dominick is also explicable under the so-called group beating principle, articulated in *Corona*, *supra*, 213 Cal.App.3d 589, and is the rationale the trial court relied on in this case to impose the section 12022.7 enhancements on defendant Merchant. In *Corona*, Division One of this Court held that the section 12022.7 enhancement applies when injuries result from a group beating in which several people participate and it is not possible to attribute a specific injury to a particular assailant. (*Corona*, at p. 594.) In *Dominick*, which the *Corona* court cited to support its conclusion, the great bodily injury consisted of the victim's broken shoulder. That injury was caused by her fall down the hill and that fall in turn was the result of acts committed by both defendants. Thus the injury was not directly attributable to either defendant.

The group beating principle is not pertinent here because the evidence clearly shows that Terri Gramaje cut K.'s leg and thus inflicted the great bodily injury that is the basis for defendant Merchant's conviction on count 3. Defendant Merchant's act of holding the child's leg, while sufficient to impose liability for aiding and abetting in the

underlying crime, is not sufficient to show that she personally inflicted the pertinent injury. Because she did not personally cut K.'s leg, or personally inflict any other injury on the child, we must reverse the section 12022.7 enhancement imposed on count 3.

8.

UPPER-TERM SENTENCE ON COUNT 2

In supplemental briefs, defendants Gramaje and Merchant contend that the trial court deprived them of their Sixth Amendment right to a jury by imposing upper-term sentences, in defendant Gramaje's case on count 2, his felony child endangerment conviction, and defendant Merchant's case, on counts 2, 3 and 5, her convictions for felony child endangerment, assault on a child under eight years of age, and mayhem, respectively. Specifically, defendants contend that in imposing the upper-term sentence, the trial court relied on facts found by the trial court rather than by the jury.

Defendants' claims are based on *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531], in which the Supreme Court applied *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*)[6] to an "exceptional sentence," which is one that exceeds the statutory maximum sentence but is warranted by facts found by the trial court, authorized under Washington State law. Whether *Blakely* applies to trial court findings in support of an upper-term sentence is an issue currently pending before our state Supreme Court in

[6] In *Apprendi*, the Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490.)

People v. Towne, review granted July 14, 2004, S125677 and *People v. Black*, review granted July 28, 2004, S125182.

This court recently held in *People v. Joy* (2004) 124 Cal.App.4th 1115 that California's determinate sentencing scheme does not run afoul of *Blakely*. For the reasons stated in *People v. Joy*, we must reject defendant's claim in this appeal.

DISPOSITION

The judgment as to defendant Gramaje is affirmed. The judgment as to defendant Merchant is modified by striking the five-year great bodily injury enhancements imposed on counts 2 and 3. As modified, the judgment is affirmed as to defendant Merchant. The trial court is directed to prepare an amended abstract of judgment reflecting defendant Merchant's modified sentence and to forward that amended abstract to the appropriate agencies.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Richli
J.