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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CARISSA RASHEA BAXTER, Defendant and Appellant.	B234996 (Los Angeles County Super. Ct. No. BA381387)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Richman, Judge. Affirmed as modified.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Carissa Rashea Baxter appeals from a judgment of conviction entered after a jury found her guilty of corporal injury of a child between the dates of June 1 and June 30, 2010 (Pen. Code,[1] § 273d, subd. (a); count 1) and corporal injury of a child between the dates of July 1 and July 31, 2010 (*ibid.*; count 2).[2] The trial court suspended imposition of sentence and placed defendant on probation for a period of five years, with the condition that she serve one year in county jail and pay a fee, including $5,000 in attorney's fees pursuant to section 987.8.

On appeal, defendant challenges the sufficiency of the evidence to support her convictions. She further contends the court erred in denying her motion to dismiss counts 1 and 2 pursuant to section 1118.1, and the trial court erred in admitting the statement of James Branch (Branch)[3] against her as an adoptive admission. Finally, defendant contends that the order to pay attorney's fees should be stricken because she did not receive notice or a hearing to determine her ability to pay the court ordered attorney's fees. We agree that the imposition of $5,000 in attorney's fees should be stricken.

FACTS

A. *Prosecution*

The minor victim, Elijah, was born in 2007. He is the child of defendant and Branch. During June through August 2010, Tiffany Baxter (Tiffany), defendant's sister, saw Branch discipline Elijah on a regular, weekly basis. Tiffany thought that Branch was

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1 Unless otherwise stated, all further statutory references are to the Penal Code.

2 Defendant also was charged in count 3 with corporal injury to a child between August 1 and August 31, 2010. The trial court dismissed this count pursuant to section 1118.1.

3 Branch was a codefendant below.

too rough in his aggressive grabbing of the child during that time period. Tiffany babysat Elijah once during the summer and noticed a cut on his face. Tiffany saw Branch and Elijah in the apartment swimming pool. Branch was attempting to teach Elijah how to swim by dropping him into deep water. The boy was screaming and choking. Tiffany saw Branch drop Elijah into the water three to five times. Tiffany felt it was inappropriate for a two-year-old to be treated the way Branch treated Elijah.

Sometime during the summer of 2010, Tiffany heard Branch tell Elijah, "Do you want me to get my belt?" Elijah said no and stopped doing what he had been doing.

Paul Abram (Abram) and Melissa Henry (Henry) were defendant's next-door neighbors for six or seven months. They heard Branch yelling at Elijah and heard "spanking" and "smacking" sounds in conjunction with Elijah crying. Abram heard a "smack" or spanking once or twice a day for a minute or so. Henry heard it two or three times a week for as long as three minutes. Neither Abram nor Henry actually saw Branch or defendant hit Elijah.

Jashawn Goodson (Goodson) was a friend of defendant's from high school in Virginia. Goodson had an interview in Los Angeles for an internship and asked defendant if she could stay with her. She stayed with defendant and Branch in the summer of 2010.

When Goodson came to stay with defendant, she noticed marks on Elijah's legs, right above the knees. She thought the marks were from Elijah hurting himself until she saw him getting spanked by Branch. The spanking would occur on a daily basis during the week and in the early morning hours when defendant was at work. She continued to see marks on Elijah until she moved out of the apartment in July.

Goodson saw Branch hit Elijah with a belt a number of times. She estimated there were five times that defendant was present when Branch spanked Elijah with a belt. On one occasion, Goodson heard Branch comment about the marks on Elijah's legs. It was on an evening in June, and defendant, Branch and Elijah were in the bedroom together. Branch said, "Ooh did daddy do this to you? I'm sorry. I must have gotten out of hand.

Daddy's sorry." Defendant was the one who normally bathed Elijah while Goodson was staying with them.

Goodson began to feel uncomfortable with the situation. In early July, she moved out. Goodson could still see marks on Elijah's legs around that time.

Nurse Practitioner Nune Abraamyan examined Elijah on October 2, 2010. She asked Elijah what had happened to him. Elijah responded, "Daddy hit me with a belt." She also noticed multiple pattern marks, loops and linear in form, all over Elijah's body. The marks were left when Elijah was struck with an object. The loops were left by the looped end of a belt. The multiple linear marks were straight marks left by a belt. Elijah also had scars, scratches and scalp abrasions.

Dr. Astrid Heger is a board certified pediatrician and had been the director of the child abuse program at Los Angeles County USC Medical Center for 25 years. She had reviewed the photographs of Elijah's injuries and determined that Elijah "had been severely ongoingly beaten with an object" that had left marks over a long period of time.

The injuries were of different ages. Some were well healed, some still had abrasions, some older wounds had scarring. The older loop marks ranged in age from two to four weeks, to a couple of months, up to a year. The scarring was at least a year old. Reviewing all of the injuries together, Dr. Heger opined that this was "textbook" "child abuse."

B. *Defense*

Marzell Cole was friendly with defendant and Branch. During the months of June and July 2010, Cole and her then one-and-a-half year old son spent a few weekends in defendant's home. She saw no physical discipline administered to Elijah. She never saw Goodson when she stayed at defendant's home during June and July.

DISCUSSION

A. *Sufficiency of the Evidence*

Defendant contends the evidence is insufficient to support her conviction for corporal injury to a child in counts 1 and 2 because there was insufficient evidence linking the beatings of her son to the months of June and July of 2010, and because there was insufficient evidence she intended to aid Branch in the commission of the offenses. We are not convinced.

When the sufficiency of the evidence is challenged, we review the entire record in the light most favorable to the judgment to determine if it contains substantial evidence—i.e., evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Solomon* (2010) 49 Cal.4th 792, 811.) This standard of review is applied regardless of whether the People rely primarily on direct or circumstantial evidence. (*Ibid*.) We presume in support of the judgment the existence of any fact the jury reasonably could have deduced from the evidence. (*People v. Vines* (2011) 51 Cal.4th 830, 869.) Thus, we must accept logical inferences that the jury could have drawn even if we would have reached a contrary conclusion. (*Solomon*, *supra*, at pp. 811-812.)

While the evidence is overwhelming that Elijah was continuously beaten over a long period of time, defendant attempts to distance herself from the beatings and the abuse committed by Branch while the two were living together. Dr. Heger called it a "textbook" example of a "battered child." Goodson testified that the beatings occurred continuously every week she stayed with defendant.

1. Aiding and Abetting

A person who aid and abets the commission of a crime is a principal to that crime. (§ 31; CALCRIM No. 400.) In order to support a conviction as an aider and abettor, the evidence must show that the defendant encouraged, aided or abetted the commission of a crime with the intent to commit, facilitate or encourage the commission of the crime.

(*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123; *People v. Beeman* (1984) 35 Cal.3d 547, 560.) Defendant contends that there was no evidence she had the intent to aid and abet Branch in his abuse of Elijah.

Parents have a duty to exercise reasonable care in the supervision and protection of their minor children. (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 746.) "'By failing to act, the parent may be deemed to have implicitly sanctioned the criminal behavior and, therefore, may be held accountable for the abusive conduct.'" (*People v. Rolon* (2008) 160 Cal.App.4th 1206, 1217, quoting *People v. Pollock* (2002) 780 N.E.2d 669, 684.) Defendant's inaction when faced with clear evidence of prolonged abuse raises a reasonable inference that she sanctioned Branch's criminal behavior. Thus, there is substantial evidence to support her convictions.

2. Unanimity Instruction

At the beginning and at the conclusion of the trial, the court informed the jury that defendant and Branch had been charged with corporal injury to a child in count 1 during the month of June 2010, and in count 2 during the month of July 2010. The court gave the unanimity instruction pursuant to CALCRIM No. 3500 on its own motion.[4] Neither defendant nor the People objected to this instruction.

Defendant suggests that because a unanimity instruction was given, the People elected to prove a single act in each month and were responsible for proving defendant committed "one act" so that the jury could unanimously agree that one act occurred. The People submit that the unanimity instruction was given in error and they never approved or requested it, so they were not required to prove "one act" in each of the two months.

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[4] CALCRIM No. 3500 provides, in relevant part: "The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he or she committed."

The verdict form asked the jury to find defendant "Guilty" or "Not Guilty" of violating section 273d, subdivision (a), "as charged in Count[s 1 and 2] of the Information." The information charged a course of conduct. The forms specifically referred to the information, and the People argue that they did not require the jury to find a specific act on a particular day. If the People's argument is correct, the jury only needed to find that defendant had knowledge of the continuous course of beatings being inflicted on her son by Branch. The course of conduct could easily have been inferred from Elijah's physical condition over an extended period of time, defendant's opportunities to view the evidence of the beatings and her physical presence during numerous beatings.

Defendant relies on *People v. Thompson* (1984) 160 Cal.App.3d 220 for the proposition that defendant could not receive two separate convictions for a single continuous course of conduct in the instant case. In *Thompson*, the defendant was found guilty of violation of section 273.5, corporal injury to a spouse resulting in a traumatic condition. The information alleged the offense occurred during the period January 1 to January 21, 1981. (*Id*. at p. 222.) The defendant contended that because "the prosecutor was not required to elect which act he was relying on to prove the crime charged, [the defendant] was denied his right to be informed of the particular act he was accused of committing," and the trial court erred in its failure to instruct the jury that they must agree unanimously on which act they based their guilty verdict. (*Id*. at p. 223.) The court held neither the instruction nor an election was required under the continuous course of conduct exception. (*Id*. at p. 224.) While it is true that the instant case involved two counts and *Thompson* involved a single count, *Thompson* also states that "[d]ue process requires only that [the] defendants be given adequate notice of the charges against them so that they may have a reasonable opportunity to prepare their defense and not be taken by surprise at trial. [Citation.]" (*Id*. at p. 226.)

In the instant case, while the trial court did give the unanimity instruction, the information charged defendant with two violations of section 273d. "[T]he information alleged a course of conduct in statutory terms which had occurred between two

designated dates. The issue before the jury was whether [defendant] was guilty of the course of conduct, not whether [s]he had committed a particular act on a particular day. The instruction requiring jury unanimity as to particular acts was inappropriate." (*People v. Ewing* (1977) 72 Cal.App.3d 714, 717.) However, defendant had adequate notice of the charges and a reasonable opportunity to prepare her defense, so the problems present in the *Thompson* case are not present here.

Even if defendant is correct that the jury instruction given required the jury to unanimously agree on the existence of a particular injury as a result of defendant's inaction, the evidence is sufficient to support the verdict. There was evidence of beatings during both June and July, and there was evidence of injuries of varying ages. Thus, the evidence was sufficient to support unanimous findings of corporal injury in both June and July.

B. *Defendant's Section 1118.1 Motion*

Defendant contends that the trial court erred in not dismissing counts 1 and 2 pursuant to section 1118.1.[5] Her contention is based on her claim of insufficient evidence to support her convictions. We disagree for the same reasons stated above, finding there was sufficient evidence to support the conviction.

In *People v. Dement* (2011) 53 Cal.4th 1, at page 46, the court stated as follows: "'"The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to section 1118.1 is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, that is, 'whether from

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[5] Section 1118.1 provides, in relevant part: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.'". . .'"

At the conclusion of the People's case-in-chief, defendant made her section 1118.1 motion. While the court agreed that there was no evidence of a violation of section 273d, subdivision (a), as to count 3 for the period of time in August 2010, the trial court properly denied the section 1118.1 motion as to counts 1 and 2, as there was sufficient evidence to support a conviction on those counts.

C. *Adoptive Admission*

Defendant contends that the trial court erred in allowing the jury to determine if Branch's apology to Elijah for beating him, and his admission he had gotten out of hand, were adoptive admission of defendant. We disagree.

Initially, the trial court ruled that Branch's statement could be used against him only, not against defendant, and it would so instruct the jury. After Goodson testified that defendant was present when Branch made the statement, the trial court changed its ruling, stating, "Then I'm not going to issue the cautionary instruction, I'll just allow it to come out. Because potentially it can be an adopted admission. And now she becomes aware of it, and the whole theory of this case is failure to prevent the further abuse." Defendant later objected to an instruction on adoptive admissions, but the trial court overruled the objection.

The trial court instructed the jury on adoptive admissions pursuant to CALCRIM No. 357 as follows: "If you conclude that someone made a statement outside of court that accused a defendant of the crime or tended to connect a defendant with the commission of the crime and the defendant did not deny it, you must decide whether each of the following is true: [¶] 1. The statement was made to the defendant or made in his or her presence; [¶] 2. The defendant heard and understood the statement; [¶] 3. The defendant would, under all the circumstances, naturally have denied the statement if he or she thought it was not true; [¶] AND [¶] 4. The defendant could have denied it but did not. [¶] If you decide that all of these requirements have been met, you may conclude

that the defendant admitted the statement was true. [¶] If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose."

"Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) "In determining whether a statement is admissible as an adoptive admission, a trial court must first decide whether there is evidence sufficient to sustain a finding that: (a) the defendant heard and understood the statement under circumstances that normally would call for a response; and (b) by words or conduct, the defendant adopted the statement as true. [Citations.]" (*People v. Davis* (2005) 36 Cal.4th 510, 535.)

Defendant contends there was nothing for her to deny, citing *People v. Carter* (2003) 30 Cal.4th 1166. In *Carter*, the court noted "that nothing in [a third person's] remarks referred to [the] defendant or accused him of anything. There being, in essence, nothing for [the] defendant to deny, a condition of the hearsay exception for adoptive admissions did not exist, and the trial court therefore erred in concluding [the third person's] remarks were admissible as adoptive admissions." (*Id*. at pp. 1196-1197.)

Here, it would not have been unreasonable for defendant to respond to Branch's statement if she believed it to be untrue. The trial court properly allowed the jury to determine if ignoring Branch's confession to child abuse was an admission by defendant that she was aware of Branch's conduct (*People v. Davis*, *supra*, 36 Cal.4th at p. 535), i.e., if, from the evidence presented in the trial, the four requirements for an adoptive admission were met. If the requirements for an adoptive admission were not present, we may presume the jury followed the instruction given and did not consider the statement as evidence against defendant. (*People v. Holt* (1997) 15 Cal.4th 619, 662; *People v. Delgado* (1993) 5 Cal.4th 312, 331.)

Defendant also claims that admission of Branch's statement violated the *Aranda/Bruton* rule. In *People v. Aranda* (1965) 63 Cal.2d 518, the California Supreme

Court held that when the prosecution intends to offer the extrajudicial statement of one defendant which incriminates a codefendant, the trial court must either grant separate trials, exclude the statement, or excise all references to the nondeclarant defendant. (*Id.* at pp. 530-531.) Under *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476], "'[A] defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating [statement] of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant.'" (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1045, quoting from *Richardson v. Marsh* (1987) 481 U.S. 200, 207 [107 S.Ct. 1702, 95 L.Ed.2d 176].) A defendant's Sixth Amendment right of confrontation is violated by the admission of a nontestifying codefendant's statement only if the codefendant's statement facially and powerfully incriminates the defendant. (*Richardson*, *supra*, at pp. 207-208; *People v. Fletcher* (1996) 13 Cal.4th 451, 455-456.)

Branch's statement did not facially and powerfully incriminate defendant, so its admission did not violate *Aranda/Bruton*. Additionally, "the admission of an out-of-court statement as the predicate for an adoptive admission does not violate" *Aranda/Bruton*. (*People v. Jennings* (2010) 50 Cal.4th 616, 662.) Thus, defendant's claim of *Aranda/Bruton* violation is without merit.

D. *Attorney's Fees*

Defendant contends that the record does not disclose that she received notice or a hearing to determine her ability to pay the $5,000 the court ordered in attorney's fees. Defendant also contends that the record does not reveal an ability to make such a payment. We agree.

1. Defendant Has Not Forfeited Her Claim

The People do not contend that the trial court complied with the procedural safeguards of section 987.8. They urge us to conclude, however, that defendant's failure

to interpose an objection below constitutes a waiver or forfeiture of her right to contest the attorney's fees order. We do not agree.

Implied in the trial court's imposition of attorney's fees is a finding that defendant had the ability to pay such fees. (§ 987.8, subds. (b) & (e).) Defendant's assertion that the record reflects an inability on her part to pay the attorney's fees is a challenge to the sufficiency of the evidence supporting the court's implied finding. No objection is required below to preserve such a challenge on appeal. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537; accord, *People v. Rodriquez* (1998) 17 Cal.4th 253, 262.)

2. Applicable Law

An assessment of attorney's fees against a criminal defendant involves the taking of property, triggering constitutional concerns. Due process, therefore, requires that the defendant be afforded notice and a hearing before such a taking occurs. (*People v. Amor* (1974) 12 Cal.3d 20, 29-30; *People v. Phillips* (1994) 25 Cal.App.4th 62, 72.)

Section 987.8 sets forth the statutory procedure for ascertaining a criminal defendant's ability to repay the county for the cost of services rendered by court-appointed counsel. Subdivision (b) of section 987.8 provides that "[i]n any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided."

The notice to be given the defendant must contain "(1) A statement of the cost of the legal assistance provided to the defendant as determined by the court. [¶] (2) The defendant's procedural rights under this section. [¶] (3) The time limit within which the

defendant's response is required. [¶] (4) A warning that if the defendant fails to appear before the designated officer, the officer will recommend that the court order the defendant to pay the full cost of the legal assistance provided to him or her." (§ 987.8, subd. (d).)

At the hearing, "the defendant shall be entitled to, but shall not be limited to, all of the following rights: [¶] (1) The right to be heard in person. [¶] (2) The right to present witnesses and other documentary evidence. [¶] (3) The right to confront and cross-examine adverse witnesses. [¶] (4) The right to have the evidence against him or her disclosed to him or her. [¶] (5) The right to a written statement of the findings of the court." (§ 987.8, subd. (e).)

In the event "the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability. Failure of a defendant who is not in custody to appear after due notice is a sufficient basis for an order directing the defendant to pay the full cost of the legal assistance determined by the court. The order to pay all or a part of the costs may be enforced in the manner provided for enforcement of money judgments generally but may not be enforced by contempt." (§ 987.8, subd. (e).)

Here, the trial court failed to comply with the procedural safeguards of section 987.8. In addition to the failure of the trial court to give defendant notice of a hearing to determine her ability to pay attorney's fees, the record before the trial court did not establish defendant's "overall capability" to pay the fees, based on her present and future "financial position." (§ 987.8, subds. (e), (g)(2).)

The testimony of the witnesses showed that, prior to her arrest, defendant was employed, while much of the time Branch was not. There also was reference to an international music project with Branch that Goodson and Tiffany were also involved with at one point, but no evidence as to any income from that project. Defendant and Branch lived in an apartment. According to the probation officer's report, defendant did

not have insurance to cover restitution. Her driver's license was suspended until she paid a fine for misdemeanor driving without a license and failure to appear.

Even if notice was given to defendant, there is nothing in the record to support the imposition of $5,000 attorney's fees. Defendant contends that no remand is necessary since her inability to pay is clear from the record. We agree.

DISPOSITION

The judgment is modified to strike the imposition of $5,000 in attorney's fees. In all other respects, the judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.