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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM JONATHAN MAILOTO, Defendant and Appellant.	B232021 (Los Angeles County Super. Ct. No. TA104529)

APPEAL from a judgment of the Superior Court of Los Angeles County. Larry P. Fidler, Judge. Affirmed.

Heather J. Manolakas, 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, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

William Jonathan Mailoto appeals from the judgment entered upon his conviction by jury of two counts of felony child abuse (Pen. Code, § 273a, subd. (a)).[1] On count 1, the jury found to be true that appellant personally inflicted great bodily injury on a child under the age of five (§ 12022.7, subd. (b)). The court sentenced appellant to prison for 10 years and four months, imposing the midterm of four years on count 1, plus a consecutive midterm of five years for the great bodily injury enhancement and one-third of the midterm, or 16 months, on count 2.

Appellant contends: (1) that one count of child abuse should be vacated because count 1 which was alleged to have occurred on or about December 13, 2008 was subsumed by count 2 which was alleged to have occurred on or between November 12, 2008 and December 15, 2008; (2) the trial court erred in failing to stay his sentence on one count pursuant to section 654; and (3) the court erred by failing to instruct the jury sua sponte with the unanimity instruction on count 2.

We affirm.

FACTS

Prosecution Evidence

Events Prior to December 15, 2008

Baby E., the biological daughter of appellant and Daisy V., was born prematurely (at 36 weeks) in November 2008. Dr. Gerald Henry, the attending obstetrician, testified that it was a "normal, spontaneous vaginal delivery" and no forceps or vacuum was used. Baby E. weighed six pounds and measured 17 and one half inches in length, both appropriate for her age. Her Apgar scores, which tested her breathing, movement, heart rate, and color reflected an average, healthy baby. Baby E. was placed in the NICU (neonatal intensive care unit) which was common for a baby born at her gestational age.

Neonatologist Dr. Medardo Supnet took over care of Baby E. when she was four days old. He prepared the discharge summary dated November 12, 2008 which indicated

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

that Baby E. had no neurological issues and exhibited no symptoms of bleeding in the brain. Baby E.'s fontanel (soft spot on an infant's skull) was flat and soft, a normal finding. He testified that had there been bleeding inside her head, her fontanel would have been bulging. Baby E.'s skull sutures (where different bones meet) were checked regularly and were normal. Dr. Supnet conducted a physical examination of Baby E. and based on that and her progression in the NICU determined that she was neurologically normal. He did not order a retinal examination because it was not clinically indicated. Dr. Supnet was familiar with premature infants with bleeding in the brain and saw it more commonly in babies with a gestational age of less than 32 weeks. He further testified that an intraventricular hemorrhage (bleeding inside the brain) could not rebleed five to six weeks later and present as a subdural hematoma (bleeding outside the brain).

Pediatrician Dr. Chafik Dakak examined Baby E. at his office on November 17, 2008, for her first scheduled well-care visit. He testified that she was a normal healthy baby. He checked her fontanel and found it to be flat. There were no notations in the medical records to indicate that anybody complained about the baby being fussy, vomiting, acting lethargic, or having trouble breathing. Baby E.'s next scheduled well-care and vaccination appointment was set for January 12, 2009.

Appellant, Daisy, and her five children including Baby E. lived with Daisy's parents, M. and Sofia V. On Saturday, December 13, 2008, Daisy and Sofia went shopping. M. returned from work and stayed in the living room with all the children except Baby E. Appellant took care of Baby E. in the rear bedroom and M. only saw him when he came to the living room to prepare milk for her feedings. Appellant never told M. that day that he had any problems with Baby E. or that she choked on formula. The following day, Sunday, Daisy and Sofia went to a mass for an aunt and to a family gathering and appellant stayed home to take care of Baby E.

Hospitalization on December 15, 2008

Sofia testified that on Monday, December 15, 2008, Baby E. "looked different" and "did not appear normal." She did not grab and squeeze Sofia's fingers like she

usually did and her eyes were "cross-sided" and "going to the side." Sofia told Daisy to take Baby E. to the hospital immediately.

When Dr. Dakak examined Baby E. on December 15, 2008, she was lethargic and had abnormal twitching of the eyes with movement to the left side. He suspected neonatal sepsis and referred her to Long Beach Memorial Emergency Hospital to be admitted for evaluation.

Pediatrician, Dr. Lena Schultz examined Baby E. later that day in the emergency department at Long Beach Memorial Hospital. Dr. Schultz noted that Baby E. had poor muscle tone and her arms and legs extended instead of flexing. Baby E. did not cry during the examination and the fontanel felt tense and full indicating some sort of pressure on her brain. Dr. Schultz ordered a head CT scan (computer tomography) to determine the cause of the increased pressure.

Baby E.'s Injuries

The radiologist who performed the CT scan informed Dr. Schultz that Baby E. had acute subdural and bilateral posterior parietal intraparenchymal hemorrhages meaning she was bleeding under the tissue that surrounds the brain and in the brain itself.

Emergency room pediatrician, Dr. Edward Vargas examined Baby E. at the request of Dr. Schultz. Dr. Vargas noted that the baby did not move much, her muscles were floppy, and her eyes twitched to the right. He also noted the fontanel was full, possibly indicating pressure on the brain. Blood tests ordered by Dr. Vargas ruled out infections and bleeding disorders such as hemophilia. Dr. Vargas read the CT report and saw that Baby E. had subdural bleeding. Dr. Vargas testified that bleeding under the dural tissue covering the brain comes from severe trauma of the type caused by car accidents, shaken babies, or football players getting hit very hard. Dr. Vargas asked appellant questions about Baby E.'s care during the previous 48 hours because the radiologist who performed the CT scan confirmed an acute bleed. Appellant informed Dr. Vargas that Baby E. had had a choking episode and he picked the baby up by her feet, held her upside down , and gently hit her bottom or buttocks area. This description did not explain the medical findings for Dr. Vargas because in his opinion Baby E. had to

have been shaken with a lot of force to cause the bleeding. Based on the indications of shaken baby syndrome that he had seen, Dr. Vargas opined that "this was just a clearcut case. You had the type of bleeding in the brain. It was in different parts of the brain and the history, the way the baby presented. All that for us pointed to most likely it was shaken baby."

Dr. Vargas informed hospital social worker Julie Crouch of the suspicious findings of the CT scan. Crouch spoke with both parents and after conferring again with Dr. Vargas notified the Los Angeles County Department of Children and Family Services and law enforcement.

On December 16, 2008, Dr. Josephine Nguyen, a radiologist at Long Beach Memorial Medical Center reviewed the results of an MRI (magnetic resonance imaging) test that was taken of Baby E.'s head. Dr. Nguyen observed several injuries to the brain. These included areas of hemorrhage bilaterally that were outside the brain and multiple abnormalities that were both on the left and right side of the brain. The MRI showed a subacute hemorrhage at the back right and left side of Baby E.'s brain which Dr. Nguyen opined was between one and seven days old. Dr. Nguyen observed hygromas which she described as chronic areas of hemorrhage or old subdural hematomas greater than two weeks old. She concluded that Baby E. had "bilateral subdural hematomas of differing ages without any fracture or broken bones in the skull."

The baby's corpus callosum which is a crescent shaped area of the brain composed of long tracks of fibrous tissue that connects signals between both sides of the brain was damaged, indicating that it did not have adequate oxygen or blood supply. Dr. Nguyen explained that this type of injury occurs when the brain moves rapidly from right to left or in a rotational manner. A stiff fibrous wall called the falx divides both sides of the brain. When the brain is moved from right to left or in a circular motion, the wall stays fixed while the softer brain tissue moves against the wall causing a shear injury.

Dr. Nguyen saw no evidence of buildup of pressure in Baby E.'s head that would explain her injuries, and stated that the injuries would look different if Baby E. had suffered a bleed at birth. Dr. Nguyen opined that some of Baby E.'s injuries could have

occurred three days prior to the scan but were in the window of one to seven days. Furthermore, the chronic injuries which were more than two weeks old were consistent with and could have been caused by the same mechanism as the newer injuries. The discovery of subdural hematomas combined with the lack of fractures and the findings of shear injury were indicative to Dr. Nguyen of shaken child syndrome.

Also on December 16, 2008, Dr. Robert Clark, a pediatric ophthalmologist determined that Baby E. suffered from extensive hemorrhaging inside the retina in both eyes. He described the extent of the bleeding as "remarkable" because it extended all the way from the front of the eye to the back and was present in all layers of the retina and in all four quadrants of both eyes. Since 1994, Dr. Clark routinely examined approximately 500 premature babies each year for retinopathy related to hemorrhaging at birth and opined that there was "no possibility" that the hemorrhages present in Baby E.'s retinas were related to her birth. Dr. Clark had observed babies that were choking victims and could not see how "choking would create bleeding inside the eye just by itself." Dr. Clark opined that Baby E.'s only possible diagnosis based on the extent and location of the hemorrhages was nonaccidental shaken injury.

On January 8, 2009, Dr. Ramin Javahery, a pediatric neurosurgeon at Miller Children's Hospital in Long Beach Memorial Medical Center operated on Baby E. The surgery consisted of making a hole in the skull, mechanically draining out the excess fluid, irrigating out the blood clots, and placing a shunt in the skull to siphon away fluid and help close the cavity so that the brain could expand. Areas of Baby E.'s brain died away and she suffered damage to significant portions of her brain.

Dr. Javahery believed that while Baby E.'s subdural hematomas varied in age none were birth related because her injuries were inconsistent with the type sustained at birth. Birth injuries tended to be singular and located in one area while Baby E. suffered multiple injuries all over her brain. Dr. Javahery explained how shaking a baby results in a violent motion where the child is thrown in one direction and is then pulled back before stopping. The brain sits in a fluid sac and some portions are mobile and move but others are rigid and do not move. As the child is pulled back, the brain continues to go forward.

This results in a tearing away from each other producing a shearing injury. Baby E. had a shearing injury and it was Dr. Javahery's opinion that she was injured as a result of having been shaken.

Pediatrician and child abuse expert Dr. Carol Berkowitz testified as an expert witness.[2] Dr. Berkowitz reviewed all of Baby E.'s medical records and reports including the CT scan and MRI. Dr. Berkowitz opined that Baby E.'s injuries "were most consistent with an episode of violent shaking." She explained that Baby E. had (1) bleeding in the front portion and within the brain itself, (2) evidence of encephalopathy which she defined as altered mental status and derangement of the functioning of the brain, and (3) extensive retinal hemorrhaging. Dr. Berkowitz described these three findings as the "triad" that defines shaken baby syndrome.

Dr. Berkowitz's opinion was not affected by the fact that Baby E. was born premature and ruled out birth injury. She found it significant that Baby E.'s fontanel was flat in her birth records indicating no internal pressure, but full at five weeks which indicated bleeding and increased pressure. Dr. Berkowitz had not witnessed bleeding in the brain as a result of choking and also ruled that out as a cause of Baby E.'s injuries. Dr. Berkowitz concluded that Baby E.'s injuries were caused by inflicted trauma from shaking.

Appellant's Admissions

Interview with Detective Perez

Appellant was first interviewed by Los Angeles County Sheriff's Detective Maricruz Perez at Miller Children's Hospital, shortly after Baby E. was admitted on December 15, 2008.

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[2] At trial, there was considerable cross-examination in which each side questioned the qualifications of the other side's expert, e.g., which expert was more familiar with the relevant literature, who had published more, and whose particular field was most suited to the task of ascertaining the cause of Baby E.'s injuries. There is no dispute in this appeal over any expert's qualifications.

Appellant told Detective Perez that Daisy and her mother went shopping on Saturday, December 13, 2008, and he took care of Baby E. Around noontime, he prepared a bottle to feed her. When he gave her the bottle she started "gurgling" and he panicked because she was choking. Appellant tried to burp her by placing her on his shoulder and patting her on the back. When Baby E. did not burp, appellant "panicked." He placed Baby E. on the bed on her back. He then picked her up by the ankles so that she was upside down and checked to see if any liquid was coming out of her mouth. Baby E. was screaming and gurgling and after holding her upside down for about 10 seconds he patted her on the buttocks. After he laid her down on the bed she turned red and continued crying. When appellant picked her up a second time he noticed that she was "shivering." He placed his hands in her rib area and while lying on his back made a shaking motion. He shook her back and forth a few times and her head moved up and down. He described the shaking as "moderate" and ranked it as a "6" on a scale of one-to-ten. He felt her back pop while he was carrying her and panicked because his "mind was unsettled." After this incident on Saturday appellant said that Baby E. was "different." He told Detective Perez that when he finally put Baby E. to sleep on Saturday he was "worried."

Appellant fed Baby E. about five hours later but when he laid her on the bed she vomited. Appellant noticed that Baby E.'s eyes were twitching. One of her eyeballs was normal but the other was "like going out of control." Appellant changed Baby E. at around 9:00 p.m. when Daisy and her mother returned, but he did not feed her at that time.

At 3:00 a.m. on Sunday morning Baby E. was screaming and appellant noticed that she wasn't smiling. While Daisy was giving her a bottle appellant noticed that Baby E. did not move her head or arms and both her eyes were twitching. At approximately 8:00 a.m. when Baby E. awoke, her eyes were twitching. Baby E. ate very little and slept a lot on Sunday. When Daisy returned home on Sunday appellant told her they should take Baby E. to the hospital.

Appellant told Detective Perez that he took medication for anger problems and attended counseling at Compton Mental Health. He said that he was "improving" and does not have anger problems since having children.

Interview with Deputy Al Garcia

Appellant was interviewed by Los Angeles County Deputy Sheriff Al Garcia on December 16, 2008.

Appellant said that on Saturday Baby E. was having problems burping and he had to pound her on the back a little. He then picked her up by the ankles and patted her buttocks but that did not resolve the problem and she still appeared to be choking. He was panicking and scared and at the same time frustrated. He picked up Baby E. again and shook her so she would "snap[] out of it or something."

Appellant said he was frustrated and mad because Baby E. would not stop crying. He told Deputy Garcia that he had problems in the past controlling his anger but that he shook Baby E. out of frustration rather than anger. Later, he said that she had been crying for about 14 minutes and he shook her because he was angry that he could not calm her down and stop her from crying.

Appellant recalled another occasion when he tried to make Baby E. "snap out if it" because "she was doing that cross-eyed thing." He was not sure when it happened and believed that incident may have occurred the previous week.

Interview with Deputy James Garcia

On January 8, 2009, Los Angeles County Deputy Sheriff James Garcia interviewed appellant following his arrest.

Appellant told Deputy Garcia that he tried to prevent Baby E. from drowning from her formula. He first held her upside down to see if the liquid would run out but when she started gagging again he shook her.

Los Angeles County Sheriff's Detectives Christopher Waladis and Maricruz Perez joined the interview. Detective Perez told appellant that Daisy reported to them that shortly after Baby E. came home from the hospital after being born, appellant was frustrated and shook Baby E. In response, appellant said there was another occasion in

the middle of the night when he held the baby up in the air playing airplane with her but he denied shaking her.

During further questioning appellant said he probably forgot about the first incident and maybe Daisy was correct and he did shake Baby E. He said he thought she would stop crying if he shook her a little bit. When asked how he held the baby on the prior shaking occasion compared to December 13, he responded "I kind of have her the same way." Baby E. calmed down and he gave her a bottle and then burped her. His best recollection was that the first shaking incident occurred on the Monday preceding the December 13, 2008 shaking incident.

Defense Evidence

Dr. Charles Hinkin, a professor of psychiatry at the UCLA School of Medicine testified as an expert in neuropsychology. He reviewed appellant's educational records, social security disability records, and videotapes and transcripts of the police interviews.

Dr. Hinkin administered an IQ test to appellant and using the Wechsler Adult Intelligence Scale determined that appellant had an IQ of 75. He explained that a score of 70 or lower falls into the mentally retarded range. According to Dr. Hinkin, "Mr. Mailoto had real significant problems with learning new information and with remembering information." He agreed that appellant graduated high school with almost a C average and the fact that appellant had a driver's license implied that appellant had the ability to learn information and pass a test.

Dr. Hinkin discussed various interrogation techniques and opined that "individuals who are intellectually limited are more susceptible to influence in general," but he acknowledged that interrogation techniques more often than not elicit the truth.

Appellant also offered the testimony of Dr. Ronald Gabriel, a pediatric neurologist and pediatric neuroimager who was an expert in determining whether a child's injuries were accidental or nonaccidental. Dr. Gabriel testified that he reviewed all Baby E.'s birth and medical records and the CT scans and MRI's taken after she was admitted to the hospital. Dr. Gabriel saw no evidence of a shear injury on the CT scans or on the MRI

and opined that Baby E.'s injuries were the result of a difficult labor and delivery because Baby E. had an abnormally large head. He said "there were a number of things that were wrong with [Baby E.]" from the beginning which required hospitalization before she was discharged. In reviewing the birth records, he found it significant that Baby E. was irritable, she had to have a noninvasive artificial ventilation, and she had a weak cry. He opined that Baby E. had a birth injury and that a subsequent rebleed can occur after a few days, weeks or even months, if the baby was jostled, cried strongly, coughed or threw up.

Dr. Gabriel also testified that he reviewed Baby E.'s retinal hemorrhages and attributed their cause to a combination of a vaginal delivery, the presence of blood in the brain, and the buildup of pressure in Baby E.'s brain.

Dr. Khaled Tawansy, a pediatric ophthalmologist, reviewed Baby E.'s medical records and specifically Dr. Clark's notes and diagrams. He opined that the hemorrhages that Dr. Clark described are not specific to shaken baby syndrome and can be the result of the birthing process.

Dr. Marvin D. Nelson, a neuroradiologist at Children's Hospital in Los Angeles reviewed Baby E.'s CT scans and MRI's, and concluded that she did not have a shear injury because he saw no evidence of a tear in the brain tissue.

DISCUSSION

I. Appellant Was Properly Charged with Two Separate Violations of the Statute

Appellant contends that only one conviction for felony child abuse can be sustained because the information alleged two different theories on which the same crime was allegedly committed.

Appellant bases his argument on the wording of the information. Count 1 of the amended information states: "On or about December 15, 2008, in the County of Los Angeles, the crime of CHILD ABUSE, in violation of PENAL CODE

SECTION 273a(a), a Felony, was committed by [appellant], ..."[3] Count 2 states: "On or between November 12, 2008 and December 15, 2008, in the County of Los Angeles, the crime of CHILD ABUSE, in violation of PENAL CODE SECTION 273a(a), a Felony, was committed by [appellant], ..." Appellant contends that conduct constituting count 1 is included in count 2 because December 13, 2008 is included within the time frame of count 2.

But the evidence offered throughout the trial as well as the prosecution argument pertaining to that evidence made it abundantly clear that the abusive acts at issue were two separate instances of shaking, one on December 13, 2008, and a *prior* shaking incident that occurred after Baby E. was discharged on November 12, 2008 following her birth and by definition sometime preceding December 13, 2008.

The testimony of the prosecution doctors was that Baby E. was shaken on two separate occasions and the older injuries were at least two weeks old. In reviewing the MRI, radiologist Dr. Nguyen identified subdural hematomas that were of "differing ages" and her best estimate was that some were between one and seven days old, while others were "probably greater than two weeks" old. Similarly, Dr. Javahery testified that Baby E.'s subdural hematomas were of "variable ages." Furthermore, appellant admitted shaking Baby E. on December 13, 2008 and on an unspecified date prior to the December 13 incident.

In closing arguments the prosecutor explained that count 1 referred to "the allegation of the abuse that occurred on Saturday, the 13th. That's the Saturday where we had the most descriptive detail, and that is events that landed [Baby E.] in the hospital with the acute *fresh* injuries." With respect to count 2, the prosecutor explained: "The second count of child abuse is that occurring sometime between [Baby E.'s] homecoming after her birth and when she ended up at Miller Children's Hospital. It's been alleged in a wide window of time that it occurred sometime between that."

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[3] Count 1 of the original information alleged the incident occurred "[o]n or about December 15, 2008."

Appellant's reliance on *People v. Coyle* (2009) 178 Cal.App.4th 209 (*Coyle*), is misplaced. In *Coyle*, defendant killed Samuel Trujillo and was convicted of (1) murder with a true finding of the special circumstance that the murder was committed during the commission or attempted commission of a burglary, (2) murder with a true finding of the special circumstance that the murder was committed during the commission or attempted commission of a robbery, and (3) second-degree murder. (*Id*. at p. 211.) The court accepted respondent's concession that defendant was improperly convicted of three separate counts of murder, because the three counts "simply alleged alternative theories of the offense." (*Id*. at p. 217.) The only dispute was over whether the appropriate remedy for the error was to consolidate the judgment to reflect one count of murder with two special circumstances. (*Ibid*.)

Unlike *Coyle* where only one act occurred, two separate instances of child abuse were alleged here. Contrary to appellant's contention, neither the information nor the prosecutor's argument alleged alternative theories to explain Baby E.'s injuries. Appellant incorrectly asserts that "[o]ne count alleged that appellant engaged in a course of conduct between November 12 and December 15, 2008, the other count alleged that appellant committed a single act of child abuse within that same time period." Although the pleading alleged child abuse occurring between two specified dates it did not allege a continuous course of conduct constituting child abuse. Instead, it alleged and the evidence showed child abuse occurring on two separate occasions, one incident occurring on a specified date, and a second incident occurring on an unspecified date.

II. The Sentence Imposed Did Not Violate Section 654

Appellant contends that section 654 prohibits his two separate sentences for child abuse because count 1 which allegedly occurred on or about December 13, 2008 is included in count 2 which alleged a course of conduct theory comprised of acts allegedly occurring between November 12, 2008 and December 15, 2008. We disagree.

Section 654 provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the

longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

The protection of section 654 has been extended to cases where a single act or omission has occurred, or where there are several offenses committed during a course of conduct deemed to be indivisible in time. (*People v. Le* (2006) 136 Cal.App.4th 925, 931–932.) "It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The defendant may be found to have harbored a single intent if the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, resulting in the defendant being punished only once. (*Ibid.*) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*Ibid.*) Whether the facts reveal a single objective is a factual matter; the meaning of section 654 is a legal matter. (*People v. Guzman* (1996) 45 Cal.App.4th 1023, 1028.) "A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence. [Citation.]" (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

If the offenses were independent of and not merely incidental to each other, the defendant may be punished separately even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1084–1085.)

We find that the two instances of child abuse were divisible crimes. The record shows that when Baby E. was examined at the hospital on December 15, 2008 there was evidence of injuries which were recently inflicted and injuries that were older in time.

Evidence of the older injuries was provided by Dr. Nguyen who testified that the MRI showed chronic areas of hemorrhage that were more than two weeks old. Dr. Javahery concurred with this opinion and stated that some subdural hematomas were

older than others. Dr. Berkowitz also opined that if the radiologist saw blood of different ages in Baby E.'s head then that would cause her concern regarding a prior injury. Finally, appellant admitted shaking Baby E. on a separate occasion prior to the incident on December 13, 2008, which resulted in the newer injuries.

The child abuse statute may be violated by single acts and can be so charged rather than as a continuous course of conduct. (*People v. Ewing* (1977) 72 Cal.App.3d 714, 717.) The People chose to allege two separate acts and substantial evidence supported the conclusion that the acts and injuries occurred at different times.

We conclude that the trial court did not violate section 654 by sentencing appellant on both count 1 and count 2.

III. Trial Court Had No Duty to Give Instruction on Unanimity

Appellant contends that the court erred in failing to instruct the jury sua sponte with the unanimity instruction on count 2 to ensure that all the jurors agreed on the specific act that constituted the offense because there were a number of acts alleged by the prosecution from which the jury could have found that appellant was guilty of child abuse.

"When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) Moreover, "[i]n a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given." (*People v. Jones* (1990) 51 Cal.3d 294, 321.)

"The unanimity requirement is constitutionally rooted in the principle that a criminal defendant is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged." (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1499–1500; see Cal. Const., art. I, § 16.) Even when the defendant does not

request a unanimity instruction, "such an instruction must be given sua sponte where the evidence adduced at trial shows more than one act was committed which could constitute the charged offense, and the prosecutor has not relied on any single such act." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275.)

This was not a case in which the prosecutor asked the jurors to select from among several discrete acts by appellant in order to convict him on count 2. The record shows that the prosecutor made the required election and clearly informed the jury in closing argument that there were two separate and distinct acts involving appellant shaking Baby E. The prosecutor argued "[Baby E.] was the victim of two shaking injuries. She had the chronic subdural that were more than two weeks old. And she had all of the fresh injury, the shearing injury, the intraparenchymal injury, the bleeding in the tissues, and the fresh subdural." This election obviated the necessity of a unanimity instruction. (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292.)

Appellant argues that the election was ineffective because the prosecutor emphasized the following incidents as the basis for liability for count 2: (1) swinging the baby upside down; (2) tossing her on the bed; (3) slapping her on the cheek; (4) an alleged two-week old injury to which appellant purportedly admitted; (5) an incident that occurred on the Monday preceding the December 13, 2008 incident; and (6) anything that occurred on December 13, 2008, but did not elect which act applied with "sufficient clarity."

The two incidents of shaking were clearly distinguishable based on the evidence presented. Count 1, the second injury, occurred on or about December 13, 2008, and the prosecution presented medical records and testimony from Baby E.'s treating doctors and experts and appellant's admission. Appellant admitted swinging the baby upside down, tossing her on the bed and slapping her on the cheek all of which accompanied the shaking incident which occurred when appellant claimed that Baby E. was choking on formula on the afternoon of December 13, 2008. On the other hand, the prosecutor explained that count 2 was the older injury and was based on the medical evidence presented and appellant's admission to a prior shaking incident that occurred on an

unspecified date, which by definition had to have taken place prior to December 13, 2008. Appellant could not clearly recollect the specific date the first shaking incident occurred but the circumstances he described evidenced a different shaking incident. Appellant fed Baby E., burped her and put her to sleep after the first shaking which he said occurred in the middle of the night. In contrast, the second shaking occurred in the middle of the afternoon when appellant claimed that Baby E. was choking on formula after he had fed her. The prosecution never alleged a continuous course of conduct with respect to count 2, and the record does not support the conclusion that the prosecutor conveyed the impression to the jury that acts other than a shaking formed the basis for count 2.

The jury was instructed with CALCRIM No. 3515 as follows: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." The jury was also instructed with CALCRIM No. 207 which stated: "It is alleged as to Count 1 that the crime occurred on or about December 13, 2008. It is alleged as to Count 2 that the crime occurred on or between November 12, 2008 and December 15, 2008. The People are not required to prove that the crime took place exactly on that day but only that it happened reasonably close to that day." It is, of course, presumed the jury understood and followed the court's instructions in the absence of any showing to the contrary. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) It is noted with regard to the specificity of the acts alleged that the court stated "I was reading a use note because the prosecution was very specific about which act constituted which crime. I don't think we need a unanimity instruction in this case." The defense neither requested a unanimity instruction nor objected to the court's decision not to give one.

Appellant contends that the jury was confused over the dates applicable to count 2 because after the jury returned a guilty verdict on both counts the verdict form was changed to reflect the dates contained on the information. Appellant contends that this allowed the jury to consider any act prior to December 15, 2008, which could have included the December 13, 2008 shaking incident as the basis for count 2.

As the jury was polled on count 2, the following exchange took place:

"JUROR NO. 6: Yes. I was under the impression that count 1 was something like was committed on or—December 13. Count 2 was something that happened before she was five years [*sic*] old.

"THE COURT: Well, both of these were—

"JUROR NO. 6: Yes. And that's between November 12th and December 13th; is that correct?

"THE COURT: Wendy, what does the verdict say?

"THE CLERK: The verdict says who on or between November 12th, 2008, and December 13th, 2008.

"JUROR NO. 6: Right.

"JUROR NO. 3: Yeah, we didn't consider that date."

The jury returned to the jury room and trial court and counsel discussed amending the verdict form because it did not match the information. Defense counsel did not think a change was necessary because she thought "the whole theory is one was on the 13th and one was before the 13th." The verdict form was amended and sent to the jury room. The jury returned a guilty verdict on count 2.

Appellant's contention that the jury was confused is meritless. The jury had reached a guilty verdict on count 2 when the verdict form stated "between November 12th, 2008, and December 13th, 2008." Juror No. 6's comment shows that the jury correctly understood the prosecutor's election and the jury instructions. He deliberated under the impression that count 1 was committed on December 13, and count 2 "happened" "between November 12th and December 13th." Juror No. 3's comment that the jury "didn't consider" the December 13th date for count 2 also reflected an understanding of the proceedings and a finding of two separate instances of shaking.

The jurors were informed of their duty to render a unanimous decision on count 2 as to a particular unlawful act, a shaking that occurred prior to the shaking incident on December 13, 2008, because the prosecutor communicated an election to the jury with "as much clarity and directness as would a judge in giving instruction." (*People v.*

Melhado, supra, 60 Cal.App.4th at p. 1539.) We are satisfied that a unanimity instruction was not required and the court had no sua sponte duty to so instruct.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST