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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHARLES SAMUEL BAINES, Defendant and Appellant.	B284396 (Los Angeles County Super. Ct. No. YA094254-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle M. Ahnn, Judge. Affirmed as modified.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Christopher

G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

In the underlying action, appellant Charles Samuel Baines was convicted of two counts of corporal injury to a child and other offenses. Appellant contends the judgment must be reversed due to instructional and sentencing error. We reject his challenges to the judgment, with the exception of his contention that the trial court miscalculated his custody credits. Accordingly, we modify the judgment to remedy that error, and affirm the judgment so modified.

RELEVANT PROCEDURAL HISTORY

On August 30, 2016, an information was filed, charging appellant with several offenses against two children. The information alleged in counts 1 and 2 that appellant inflicted corporal injury on a child (Pen. Code, § 273d, subd. (a)); in counts 3 and 4, that he engaged in cruelty to a child (Pen. Code, § 273a, subd. (b)); and in count 7, that he engaged in assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). The information also alleged in count 5 that appellant possessed a controlled substance (Health & Saf. Code, § 11377), and in count 6 that he possessed a smoking device (Health & Saf. Code, § 11364). Accompanying counts 1, 2, and 7 were allegations that

appellant had served two prior prison terms (Pen. Code, § 667.5 subd. (b)).[1] Appellant pleaded not guilty and denied the special allegations.

A jury found appellant guilty as charged. After appellant admitted the truth of the prior prison term allegations, the trial court imposed an aggregate sentence of ten years and four months.

FACTS

A. *Prosecution Evidence*

The key prosecution witnesses were appellant's sons, C. and N., who were born in 2003 and 2004. In May 2016, they lived with their grandmother, Judith Baines. On May 27, 2016, at approximately 6:00 p.m., Judith took them to appellant's trailer for an overnight visit.[2]

C. testified that although appellant is over six feet tall, he had injured his foot and limped around the trailer, using a swivel chair for assistance. During the visit, C. and his brother watched movies with appellant. According to C., appellant appeared to "talk[] to something in his head." Appellant referred to "a different world," "dimensions," and "some type of . . . electronics that . . . have . . . a life in them." When appellant said that he could kill C. and

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[1] All further statutory citations are to the Penal Code.

[2] Because appellant and his mother share a surname, we refer to her by her first name.

replace him with a C. from another dimension, C. became frightened.

At some point, appellant ordered the boys to "mark" themselves by cutting themselves. Fearful of appellant, C. found a knife in a kitchen drawer and used it to make a cut on his own stomach. Appellant then hit C. on the head three or four times with his fist, and choked him with force sufficient to rip C.'s shirt and scratch his face. C. tried to back away from appellant, who threw a pair of scissors at him. The scissors missed C.'s hip and hit a nearby wall. After throwing other objects at C. -- some pill bottles and a bottle of medicinal alcohol -- appellant grabbed a chain necklace with a spiked pendant and repeatedly struck C. with the necklace, leaving marks on his back, thigh and leg.

When appellant finished hitting C., he allowed him to go to the bathroom, and ordered N. to come to him. Appellant said, "I haven't hit you yet, huh," and struck N. with an object not visible to C. C. then heard N. scream and saw him run out of the trailer. C. also fled the trailer. As the boys ran away from the trailer, they saw a friend and used his phone to call Judith, who met them at a supermarket near appellant's trailer park.

N. testified that at some point while he and C. were in the trailer, appellant told him to cut himself, but he did not do so. N. further stated that after he and C. finished watching movies, they tidied up the trailer. Appellant was then making "really weird" statements, such as, "Did you just see . . . a ghost come out of me?" Frightened, N. went

into a bedroom and closed the door. He heard C. cry out, and became "super scared."

According to N., when C. entered the bathroom, appellant ordered N. to leave the bedroom. Appellant told N. that he was "letting C. take all the heat," and that "it was [his] turn." Appellant also said. "I haven't ganged up on you yet." Appellant slapped N.'s face with his hand, then hit N.'s back with a belt, resulting in a visible mark near his spine from the belt buckle. N. ran out of the trailer, where he was soon joined by C.

Judith testified that on May 28, 2016, at approximately 6:00 a.m., she received a phone call from C., who was crying and in distress. When she drove to the boys' location, she saw that they were upset and only partially dressed. They also displayed injuries not present when she left them at appellant's trailer. Judith found bleeding red marks on C.'s face, arms, chest, and back; on N.'s back, she discovered a red welt with spots of blood "where . . . it was opening up to be a laceration." At approximately 7:20 a.m., she phoned the police.

On cross-examination, Judith stated that C. had been in fights at school, and that the boys sometimes fought each other. She also stated that the boys had undergone therapy after they misused their asthma sprays on one occasion, which resulted in swelling to their skin.

Torrance Police Officer Stuart Scott testified that he responded to a call regarding child abuse at appellant's trailer. Upon interviewing the boys, he saw injuries on their

bodies. Inside appellant's trailer, he found a pair of scissors, a belt with a buckle, and a necklace with a metal attachment, as well as four baggies containing methamphetamine and three narcotics pipes.

B. *Defense Evidence*

Appellant testified that in January 2015, he pleaded guilty to felony child abduction. According to appellant, that charge resulted when he took the boys to Mexico in order to protect them from his mother, who had been choking them.

Appellant further testified that on May 27, 2016, when the boys arrived for their visit, he was suffering from a serious foot injury. He attributed the injury to the boys, stating that three weeks earlier, a power drill they left on the floor penetrated his foot. According to appellant, during the visit, he asked them to do some chores. N. rammed a vacuum into appellant's injured foot, causing him considerable pain. Although appellant yelled at the boys, his anger soon passed, and they watched a movie together. Appellant took some medicine to help him to sleep, and he told the boys to go to sleep. Hours later, appellant awoke when police officers appeared at his door.

Appellant denied engaging in misconduct during the visit, asserting that he did not hit the boys, make threatening remarks, or use methamphetamine. He also denied knowing how the boys became injured. According to appellant, although the boys "roughhouse[d]," he always intervened when he saw them fighting in his trailer.

On cross-examination, appellant acknowledged that after the incident, he told his mother, "I am allowed to spank the kids. [¶] . . . And the police come and get me for trying to whoop the kids. I don't understand what's going on."

DISCUSSION

Appellant contends the trial court erred in (1) failing to instruct the jury on certain lesser included offenses, (2) failing to state its reasons for imposing the upper term on count 1, and (3) calculating his custody credits. For the reasons discussed below, we reject his contentions, with the exception of the challenge to his custody credits.

A. *Instructions Regarding Lesser Included Offenses*

Appellant contends the trial court engaged in prejudicial error by failing to instruct the jury regarding simple battery and simple assault as lesser included offenses of corporal injury to a child, as alleged in counts 1 and 2. As explained below, we disagree.

Although appellant requested no instructions on lesser included offenses, the trial court is obligated to instruct sua sponte on lesser included offenses that the evidence tends to prove. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 (*Breverman*).) Under this rule, courts identify lesser included offenses by means of the so-called "accusatory pleading" test, which "looks to whether 'the charging allegations of the accusatory pleading include language

describing the [charged] offense in such a way that if committed as specified [the candidate] lesser included offense is necessarily committed.'" (*People v. Montoya* (2004) 33 Cal.4th 1031, 1100-1101, quoting *People v. Lopez* (1998) 19 Cal.4th 282, 288-289.) The trial court must instruct on any lesser included offense for which there is substantial evidence to support a conviction (*Breverman*, *supra*, at p. 162), but not if the pertinent evidence is "minimal and insubstantial" (*People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680). "In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight." (*People v. Moye* (2009) 47 Cal.4th 537, 556.)

Counts 1 and 2 charged appellant with the offense specified in section 273d, subdivision (a), which provides: "Any person who willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition is guilty of a felony . . . ." In view of the allegations in the information, simple assault and simple battery constituted lesser included offenses. (*People v. Moussabeck* (2007) 157 Cal.App.4th 975, 980-981 & fn. 2.) Generally, simple assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another" (§ 240), and simple battery is a "willful and unlawful use of force or violence upon the person of another" (§ 242).

The key factor distinguishing simple assault and simple battery from corporal injury to a child is "injury

resulting in a traumatic condition." (See *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952.) For purposes of the latter offense, the term "traumatic condition" means "'a condition of the body, such as a wound or external or internal injury, whether of a minor or a serious nature, caused by physical force.'" (*People v. Cockburn* (2003) 109 Cal.App.4th 1151, 1160, quoting CALJIC No. 9.36; see *People v. Stewart* (1961) 188 Cal.App.2d 88, 91 [a traumatic condition is "a wound or other abnormal bodily condition resulting from the application of some external force"].)

An instructive discussion of the requisite traumatic condition is found in *People v. Thomas* (1976) 65 Cal.App.3d 854 (*Thomas*). There, the defendant hit his stepdaughter with his hand and choked her, resulting in a swollen eye, a cut and swollen lip, and a scratched neck. (*Id.* at p. 856.) Affirming the defendant's conviction for corporal injury to a child, the appellate court concluded that the injuries constituted a traumatic condition sufficient for the offense. (*Id.* at p. 857.)

Generally, a court need not instruct on a lesser included offense when the defendant completely denies the charged offense, and no evidence reasonably supports the inference that the defendant committed only the lesser included offense. (*People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1019-1020.) As explained below, that is the case here.

At trial, the evidence that the boys suffered injuries during their visit with appellant was undisputed. The evidence showed that C. had bleeding red marks on his face,

arms, chest, and back, and that N. had a red welt with blood spots on his back. Under *Thomas*, those injuries were sufficiently grave to constitute a traumatic condition. Accordingly, the dispositive issue is whether there was evidence that appellant engaged in assault or battery, but did not inflict the injuries.

The jury heard only two versions of appellant's conduct during the visit, neither of which reflected any such evidence. The prosecution's account of the visit relied primarily on the statements of C. and N., who attributed their injuries to appellant's physical attacks on them. Their testimony, if credited by the jury, necessarily established corporal injury to a child, as charged in counts 1 and 2. Although appellant's account contradicted the boys' testimony, he denied the existence of *any* assault or battery, and suggested that they injured themselves while he slept. For that reason, appellant's account supported no instruction on simple assault or simple battery. Accordingly, the trial court was not obliged to instruct the jury regarding simple assault and simple battery.

Moreover, even had the trial court been required to instruct the jury regarding those offenses, we would find no prejudice from the error. When substantial evidence supports an instruction on a lesser included offense, the failure to so instruct is assessed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*Breverman, supra,* 19 Cal.4th at pp. 148-149.) In this context, review for prejudice "focuses not on what a reasonable jury *could* do,

but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Breverman*, *supra*, at p. 177.)

Under that standard, any failure to instruct regarding lesser included offenses was harmless, as the evidence establishing appellant's guilt under counts 1 and 2 was compelling. In contrast, appellant's evidence was subject to impeachment, in view of his admitted remark to Judith that he had "tr[ied] to whoop the kids." Accordingly, there is no reasonable likelihood that the instructions would have resulted in an outcome more favorable to appellant. In sum, appellant has shown no instructional error.[3]

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[3] In a related contention, appellant maintains that defense counsel rendered ineffective assistance by failing to request the instructions. "Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an
(*Fn. is continued on the next page.*)

B. *Upper Term on Count 1*

Appellant contends the trial court improperly failed to state its reasons for imposing the six-year upper term on count 1 (corporal injury to C.), which the court selected as the base term for appellant's sentence. Generally, the court is required to set forth the facts and reasons supporting its decision to select the upper term. (*People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1511 (*Velasquez*).) As explained below, appellant has failed to show reversible error.

1. *Underlying Proceedings*

After the jury returned its verdicts, the prosecution submitted a sentencing memorandum requesting that the court deny probation, select count 1 as the principal count, and impose the upper term on that conviction. The prosecution argued that probation should be denied because appellant had two prior felony convictions and attempted to

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insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

Appellant has demonstrated neither component. As there was no meritorious basis for the instructions, defense counsel did not contravene professional norms by declining to request them. (*People v. Price* (1991) 1 Cal.4th 324, 387.) Furthermore, there is no reasonable likelihood that the absent instructions affected the outcome of the trial.

use a deadly weapon during the incident. The prosecution further argued that three aggravating circumstances supported the imposition of the upper term on count 1, namely, that the crime involved great violence (Cal. Rules of Court, rules 4.421(a)(1), (a)(8)), that appellant was armed (*id.*, rule 4.421(a)(2)), and that the victim was particularly vulnerable (*id.*, rule 4.421(a)(3)).

Appellant's sentencing memorandum asked the court to grant probation, impose the middle term on his convictions regarding counts 1, 2, 5, 6, and 7, and "merge" counts 3 and 4 with counts 1 and 2. Appellant argued that four mitigating factors supported the imposition of the middle terms: that he had exercised care to avoid harm to persons and damage to property, that he suffered from a mental or physical condition, that he had no significant criminal record, and that his prior performance on probation was satisfactory (Cal. Rules of Court, rule 4.423(a)(6), (b)(1), (b)(2), (b)(6)).

At the sentencing hearing, the trial court stated that it had received the sentencing memoranda. Before pronouncing sentence, the court heard statements from appellant and his mother and argument from counsel, during which defense counsel requested a "midterm" sentence. The court then ruled that appellant was ineligible for probation, stating that he had two prior felony convictions and was on probation at the time of the incident. The court also stated: "Even if [appellant] were eligible for probation, the court would not grant because in this matter

. . . he first abused C.[,] . . . and then abused N. by hitting him with a belt . . . ."

The trial court imposed an aggregate term of ten years and four months, comprising a six-year upper term on count 1, a 16-month term on count 2, a one-year term on count 7, and two one-year enhancements for the prior prison terms. The court also imposed concurrent six-month terms on counts 5 and 6, and stayed sentencing regarding counts 3 and 4 (§ 654). In so ruling, the court did not state its basis for imposing the upper term on count 1. On three occasions, when the court asked whether defense counsel wished to address the sentence described above, counsel replied, "No."

2. *Analysis*

We conclude that appellant has forfeited his contention by failing to raise it before the trial court. Generally, the absence of a timely objection works a forfeiture when the trial court erred in its discretionary sentencing choices, include instances in which it "failed to . . . give a sufficient number of valid reasons." (*People v. Scott* (1994) 9 Cal.4th 331, 353.) The rationale for this rule is "to encourage prompt detection and correction of error, and to reduce the number of unnecessary appellate claims." (*Id.* at p. 351.) Appellant's failure to request the reasons for the imposition of the upper term thus constitutes a forfeiture. (*Velasquez*, *supra*, 152 Cal.App.4th at p. 1511.)

Appellant contends no forfeiture occurred because he was not afforded an opportunity to object to the court's

failure to state its reasons. We disagree. Although the forfeiture rule applies only when there is a "meaningful opportunity" to object when sentence is imposed, that requirement does not oblige the trial court to announce a tentative sentence. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751-752.) As our Supreme Court has explained: "The court need not expressly describe its proposed sentence as 'tentative' so long as it demonstrates a willingness to consider . . . objections." (*Id.* at p. 752.) The court demonstrated such willingness here, as it invited defense counsel on three occasions to address the sentence it had pronounced on count 1. Accordingly, appellant was afforded a meaningful opportunity to object. (*People v. Sperling* (2017) 12 Cal.App.5th 1094, 1101-1102 [for purposes of forfeiture rule, defense counsel had meaningful opportunity to object, as counsel remained silent when trial court invited comment on sentence].)

Furthermore, had appellant preserved his contention, we would find no prejudicial error. When the trial court fails to state its reasons for a discretionary sentence choice, "remand for resentencing is not automatic," as the error is examined for prejudice under *Watson*. (*People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1684.) Generally, "[o]nly a single aggravating factor is required to impose the upper term . . . ." (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Here, the prosecution's sentencing memorandum identified multiple aggravating circumstances supporting the imposition of the upper term on count 1 -- including the

vulnerability of the victim, the violence of the offense, and appellant's use of a weapon -- and the trial court's remarks conveyed its attention to appellant's abuse of C. As the record suffices to establish the aggravating circumstances, there is no reasonable likelihood that the court would impose a lesser term on count 1 were we to remand for resentencing. In sum, appellant has not shown that the trial court's failure to state its reasons for imposing the upper term on count 1 constitutes reversible error.[4]

C. *Custody Credits*

Appellant contends the trial court miscalculated his presentence custody credits. The trial court awarded him custody credits totaling 844 days, based on 422 days of actual custody and 422 days of conduct credit. Appellant argues that he is entitled to credit for an additional two days, namely, one day of actual custody and one day of conduct credit. Respondent agrees. We conclude that the judgment must be corrected to set forth custody credits totaling 846 days.

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[4] Appellant also contends defense counsel rendered ineffective assistance by failing to object to the trial court's error. However, because the error was harmless, that contention fails. (*Rodrigues*, *supra*, 8 Cal.4th at p. 1126.)

DISPOSITION

The judgment is modified to reflect that appellant is entitled to custody credits totaling 846 days. The trial court is directed to correct the sentencing minute order to reflect the modification stated above, to prepare an amended abstract of judgment reflecting that modification, and to forward the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.