Filed 1/25/13 P. v. Barlow CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>PRISHA BARLOW,<br><br>Defendant and Appellant. | B238943<br><br>(Los Angeles County<br>Super. Ct. No. LA067572) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas Rubinson, Judge. Affirmed.

Johanna R. Shargel, 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, James William Bilderback II and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant Prisha Barlow appeals from the judgment entered following her conviction by jury of child endangerment. (§ 273a, subd. (a).)[1] She contends that the evidence is insufficient to support the jury's verdict. We disagree and affirm the judgment.

## STATEMENT OF FACTS

1. *Factual Overview*

Defendant works as a prostitute to support her daughter and the child's father, Jahamal Mayfield. While on the street with her three-month-old daughter, she struck a bargain with Jairon Arreaga to orally copulate him at her apartment. Arreaga drove defendant and her daughter to the apartment. Once there, defendant left her sleeping daughter in the bedroom and returned to the living room where Arreaga awaited her. What subsequently transpired was vigorously disputed at trial.

Arreaga testified that after he gave defendant $30, defendant withdrew a gun hidden under an ottoman, pointed it at him, and demanded the remainder of his money. He gave her $20. He started to leave the apartment but defendant continued to point the gun at him. Arreaga grabbed her hand. During the ensuing struggle, the gun discharged. Neither individual was hit. Arreaga left the apartment and reported the matter to the police.

Defendant, in contrast, testified that after she began to orally copulate Arreaga, he insisted upon sexual intercourse. She refused. Arreaga forcibly removed her dress and pinned her down on the couch. Fearing Arreaga would rape

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[1] All statutory references are to the Penal Code.

her, defendant pulled a gun out from under the couch and told Arreaga to leave. Arreaga tried to take the gun away and during the struggle, the gun discharged.

The People charged defendant with robbery (§ 211) and child endangerment (§ 273, subd. (a)). The jury deadlocked on the robbery charge (11 to 1 for not guilty) but convicted on the child endangerment charge.

2. *The Prosecution's Case*

Arreaga testified as follows. At approximately 6:00 p.m. on January 25, 2011, he saw defendant on the sidewalk with a baby stroller. He had never before met defendant. Arreaga gave two explanations as to why he stopped and spoke with her. One was that defendant, wearing "a nice sexy red dress," had waved and said "hi" to him. The other was that because he saw that defendant was trying to calm her crying baby, he stopped to ask her if she needed any help. She replied "yes" and asked him to pull over. In any event, Arreaga drove into a parking lot and the two spoke. Defendant said that she needed money to buy food for her baby. Eventually, she agreed to orally copulate Arreaga for $30. She asked him for a ride to her home which was "right across the street." Arreaga placed the baby stroller in his car and defendant sat in the front passenger seat with her three-month-old baby on her lap. They drove to defendant's apartment. The drive took "[n]ot even a minute."

Once inside her apartment, defendant put her infant in the bedroom. She returned to the living room and asked Arreaga for the money. He gave her $30 whereupon defendant picked up a gun from under an ottoman, pointed the weapon at Arreaga and demanded the rest of his money. Arreaga gave her an additional $20 as she pointed the gun at his chest. As Arreaga started to walk backwards towards the front door, he grabbed defendant's hand and pointed the gun upwards. Defendant bit the inside of Arreaga's left forearm, causing it to bleed; at about the

same time, the gun fired. No one was injured by the discharge of the firearm. Arreaga left the apartment and ran to his car.

Later that day, Arreaga went to a nearby police station and spoke with Los Angeles Police Office Cesar Corrales. Officer Corrales testified that Arreaga told him that he had been robbed at gunpoint. The officer took two photographs of the bite mark on Arreaga's arm.[2]

Arreaga gave the officer defendant's address. Officer Corrales and his partner went to investigate. Officer Corrales knocked on the apartment door but no one answered. Because Arreaga had told Officer Corrales that a baby was in the apartment, the officer's partner kicked down the door out of concern for the infant's safety. No adult was present inside of the apartment. The baby was asleep on the bed in the bedroom. Marijuana and two live rounds of ammunition were found on the floor at the foot of the bed. In the living room, Officer Corrales found a black pouch under an ottoman. The pouch contained an unloaded revolver, ammunition, a spent casing and marijuana. A child's toy lay next to the pouch. A bullet hole was in the ceiling in the living room.

While Officer Corrales was conducting his investigation, Mayfield arrived at the apartment.[3] He told the officer that the baby was his daughter and that he lived in the apartment. He had unloaded the gun and placed it under the ottoman. Lastly, he told the police that defendant typically kept the gun under the ottoman.

Late that evening, defendant came to the police station to ask about her baby. Officer Corrales told her that she was charged with child endangerment,

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[2] The photographs were introduced into evidence.

[3] Mayfield did not testify at trial. Instead, Officer Corrales testified about Mayfield's statements as well as information he had learned about Mayfield during his investigation.

robbery, and discharge of a firearm. After being advised of and waiving her *Miranda* rights, defendant provided the following written statement: "I did not fire a gun in my life. I never endangered my three-month-old child. I love her."

3. *The Defense Case*

Defendant testified on her behalf as follows. She has worked as a prostitute for five years. That work supports her infant daughter and Mayfield, the child's father. Approximately a month and a half prior to the events underlying this case, Arreaga paid defendant $50 to perform oral sex in his car.

On January 25, 2011, she was walking with her daughter when Arreaga pulled up in his car and asked: "[Y]ou remember me?" She replied that she did. He asked: "Are you working like right now?" Initially, defendant replied no but soon agreed to perform oral sex for $50. She told Arreaga that they would go back to her apartment, "on the corner right here." Arreaga put her stroller in his car and she entered the vehicle with her baby. They drove to her apartment, "[l]ike a half a block" away.

At her apartment, defendant placed her sleeping daughter in the bedroom and closed the door. When she returned, Arreaga was seated in the living room (approximately 20 to 22 feet from the bedroom). Defendant saw that he had placed cash on an end table. She sat down on the couch next to Arreaga. After the two drank some vodka, defendant began to orally copulate Arreaga. At one point, Arreaga stated that he desired sexual intercourse because "[i]t will be faster." Defendant replied "no" whereupon Arreaga forcibly removed her dress and began to fondle her. Defendant repeatedly told him to stop. Arreaga pinned her down on the couch. Defendant became scared because Arreaga was bigger and stronger, six or seven inches taller and 40 pounds heavier than she. Fearful that Arreaga would rape her, defendant bit his forearm "hard" but Arreaga would not let go of her.

Defendant remembered that Mayfield sometimes kept his gun under the couch. She reached underneath the couch, grabbed the gun, and told Arreaga "Get out of my house. Just leave me alone." Defendant did not know that the gun was loaded and did not point it at Arreaga. Arreaga "came and attacked [her] and tried to take the gun away from [her] hand." As the two struggled over the gun, it discharged. Defendant ran into the bedroom and Arreaga left through the front door.

Defendant testified that approximately 10 minutes later, Mayfield returned to the apartment. She told him what had happened. Mayfield, angry that she had invited a "john" to the apartment and had pulled his gun on the man, told her to leave.[4] She left.

Defendant denied that she either attempted to rob Arreaga or had endangered her daughter through her conduct. However, in regard to the latter charge, she testified that she was aware that riding in Arreaga's car with her infant on her lap instead of in a car seat created the risk that the child could have been severely injured or killed if there had been a car accident but that, nonetheless, she had done so in order to earn $50 from Arreaga. Further, she conceded that "working as a prostitute is pretty dangerous"; that she accepted rape as a danger of being a prostitute; and that "there is a reason [she did not] bring people to [her] apartment."

3. *The Jury Instructions*

The pattern CALCRIM instructions explaining robbery and child endangerment were submitted to the jury. In addition, the jury was told: "The People have presented evidence of more than one act to prove that the defendant committed [the] offense [of child endangerment]. You must not find the defendant

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[4] Mayfield did not testify; instead, defendant testified about his statements. (See fn. 3, *ante*.)

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 she committed." (CALCRIM No. 3500.)

4. *The Closing Arguments*

The bulk of each party's closing argument centered on the robbery charge and whether Arreaga or defendant was telling the truth about why defendant used the gun: did she try to rob Arreaga or was she defending herself against Arreaga's attempt to rape her?

In regard to the child endangerment charge, the prosecutor said only: "[I]n the course of committing that robbery [of Arreaga], [defendant] did endanger her child. When she decided to take a john up to the apartment and introduced a gun into this equation, at that point in time, ladies and gentlemen, any reasonable person would know that you were putting your child's life in danger[,] that is child endangerment."

Defense counsel argued that defendant's conduct did not rise "to a level of child endangerment" because while "it wasn't a wise choice for her to take [Arreaga] home[,] . . . she was not endangering her baby. She did not intend to take [Arreaga] home and pull a gun on him. It just turned out to be like that." When Arreaga tried to rape her, "she reaches for a gun. She doesn't intend to use it. She wants to scare him off and she is not endangering her baby at that time. What she's doing is trying to protect herself from being raped. She's not committing a felony child endangerment. Her actions are reasonable. Anyone would probably have done that in that situation." Defense counsel also summarily dismissed the theory that defendant committed child endangerment when she held her "baby on her lap when driving [with Arreaga], not in a car seat, for half of a block."

5. *The Jury's Verdicts and Subsequent Proceedings*

The jury convicted defendant of child endangerment but deadlocked on the robbery charge.

At the sentencing hearing, the trial court granted the People's motion to dismiss the robbery charge. (§ 1385.)

## DISCUSSION

Insofar as is relevant to this case, a defendant violates section 273a, subdivision (a) if "under circumstances or conditions likely to produce great bodily harm or death [and] having the care or custody of any child [she] willfully causes or permits that child to be placed in a situation where his or her person or health is endangered." Decisional law consistently has interpreted the statute to contain a criminal negligence standard. (*People v. Valdez* (2002) 27 Cal.4th 778, 790.) Criminal negligence means that the defendant's conduct amounts to "'a reckless, gross or culpable departure from the ordinary standard of due care [that is] incompatible with a proper regard for human life.'" (*People v. Odom* (1991) 226 Cal.App.3d 1028, 1032.) A defendant's conduct is "likely" to produce great bodily injury or death if it creates "a substantial danger" or a "serious and well-founded risk" of either result occurring. (*People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204.)

Whether the evidence supports the jury's conviction of defendant on the child endangerment charge is subject, of course, to the deferential substantial evidence standard of review that recognizes that it is the exclusive province of the jury to determine the facts and decide credibility. (*People v. Boyer* (2006) 38 Cal.4th 412, 480.)

In this case, the evidence, viewed in the light most favorable to the judgment, establishes that defendant supported herself by working as a prostitute.

She recognized the dangers posed by this endeavor, including the possibility of rape and the risks inherent in bringing a "john" to her apartment. Nonetheless, she brought Arreaga (a man she did not know) to her apartment to engage in sexual conduct for money. She did so while her three-month-old daughter (far too young to protect herself from any harm) was present in the next room. A confrontation with Arreaga ensued. Defendant withdrew a loaded gun from under the ottoman (the location where she regularly kept the gun) and pointed it at Arreaga. A struggle ensued and the gun discharged. Based upon these facts, a rational jury could find that defendant permitted her daughter to be placed "'in a situation in which serious physical danger or health hazard to [her was] reasonably foreseeable.'"[5] (*People v. Hansen* (1997) 59 Cal.App.4th 473, 479.) That her

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[5] The trial court, as indicated by the comments it made at the sentencing hearing, reached a similar conclusion. First, it rejected defense counsel's request to reduce the conviction to a misdemeanor, stating:

"This was a very serious matter in which a firearm was used. While it was in dispute as to the circumstances under which it was used and the jury appeared to struggle somewhat as to what the circumstances of this were, nevertheless, *this firearm was taken out by the defendant knowing that her child was in the next room, and the gun was fired. And this is by a person who was in the midst of committing an act of prostitution, with her child in the next room,* while she was on probation for prostitution." (Italics added.)

Second, the trial court explained its reasons for selecting the midterm sentence as follows:

"Like I said, this crime involved great violence. It involved a victim, her own child, who was particularly vulnerable, and this victim was placed in that vulnerable position by this defendant, by her own admission and her own testimony. . . .

"And the defendant in her testimony – and I agree [that Arreaga's] credibility had some issues as well, as the jury found, but so did this defendant. But what really bothered me about her testimony is how blasé she was about this whole lifestyle that she's living; you know, the prostitution and the weapons and the drugs and, you know, this is just the way life is for her. *And the most worrisome part of all of it is you know who came last in her mind? Her child. The safety of the child came last. Her making 50 bucks in the middle of the day to perform oral sex on some guy came first. Clearing the apartment of guns and drugs wasn't so important.*

"*And she gets into it with Mr. Arreaga in this case and that gun goes off, and it's only by the grace of God that that bullet didn't fly in the direction of that child's room*

daughter was not actually harmed does not matter. (*Cline v. Superior Court* (1982) 135 Cal.App.3d 943, 948.) Section 273a "is intended to protect a child from an abusive situation in which the probability of serious injury is great." (*People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835.)

To avoid the force of this conclusion, defendant argues that her use of the gun in her confrontation with Arreaga cannot be considered criminally negligent because the jury deadlocked on the robbery charge. She argues that the "only sensible interpretation of the evidence—the one the jury seems to have adopted—is that she took the gun out in self-defense [and] protecting oneself against imminent rape is *not* a 'gross departure from the conduct of an ordinarily prudent person.'" The argument is not persuasive for two reasons.

First, it ignores the fact that even were one to credit her testimony that she used the gun in self-defense (a conclusion we do not reach), she created the situation in which the need to use the gun arose. She brought Arreaga back to her apartment to engage in criminal conduct (prostitution), fully aware of the risks inherent in that situation and the fact that her three-month-old daughter was in the next room.

Second, "'[s]ufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt. [Citations.] *This review should be independent of the jury's determination that evidence on another count was*

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*and end up in the cranium of that child or we'd be sitting here with a whole different set of circumstances.*

"The callousness and the selfishness that this defendant exhibited not only in the way that she testified, but by her own admission of the underlying facts of what happened here, it was all about her and nothing about the child. The child was more of an annoyance than something to be loved, cherished and protected like every child deserves. The child should come first, not last." (Italics added.)

*insufficient.* The Government must convince the jury with its proof, and must also satisfy the courts that given this proof the jury could rationally have reached a verdict of guilt beyond a reasonable doubt.'" (*People v. Palmer* (2001) 24 Cal.4th 856, 863-864, italics added, quoting from *United States v. Powell* (1984) 469 U.S. 57, 67.)

This approach is consistent with the principle that "an inherently inconsistent verdict is allowed to stand; if an acquittal of one count is factually irreconcilable with a conviction on another, . . . effect is given to both. [Citations.]" (*People v. Santamaria* (1994) 8 Cal.4th 903, 911.) By a parity of reasoning, the same result follows when, as here, the jury is unable to reach a verdict on one count (robbery) but convicts on another (child endangerment). "When a jury renders inconsistent verdicts, 'it is unclear whose ox has been gored.' [Citation.] The jury may have been convinced of guilt but arrived at an inconsistent acquittal [or deadlock] 'through mistake, compromise, or lenity. . . .' [Citation.] *Because the defendant is given the benefit of the acquittal [or dismissal following a jury deadlock], 'it is neither irrational nor illogical to require her to accept the burden of conviction on the count[] on which the jury convicted.*' [Citation.]" (*Ibid.*, italics added.)

Defendant's remaining arguments "amount[] to no more than an invitation to this court to reweigh the evidence and substitute its judgment for that of the jury. That is not the function of an appellate court." (*People v. Guzman* (1996) 45 Cal.App.4th 1023, 1027.) Further, there is no need to discuss whether the evidence would also be sufficient to support the conviction on any of the other theories advanced in the trial court or the appellate briefs.[6] Even were we to find that the

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[6] The prosecutor's opening statement only briefly alluded to one potential factual theory for the child endangerment charge. When describing Officer Corrales' investigation, the prosecutor stated that when he went to the apartment he found "a three-

evidence was insufficient to support a conviction based upon any one of those theories (findings we do not make), reversal would not be required because substantial evidence supports the jury's verdict on the theory set forth above (the theory urged by the prosecutor in closing argument) and the jury was instructed that all jurors had to agree that defendant committed the same act. No more is required. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126-1129, relying upon *Griffin v. United States* (1991) 502 U.S. 46; see, in general, 6 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Appeal, § 170, pp. 453-455.)

**DISPOSITION**

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J. MANELLA, J.

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month old, all alone. . . . [¶] What [he] didn't find at that location was any adult taking care of this three-month old in the bedroom."

During closing argument, the prosecutor, in the context of arguing that defendant's testimony was not credible, stated: "She [defendant] says that she takes him [Arreaga] to the apartment. You know, she would never risk her baby's safety and, really? I mean you heard her testify. She [is] willing to risk her baby's safety for 50 bucks. She's willing to put the kid on her lap for $50."