Filed 2/13/19 P. v. Reese CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. AMANDA MARIE REESE, Defendant and Appellant.	F072832 (Super. Ct. No. BF148832A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua, Judge.

S. Lynne Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

INTRODUCTION

A jury convicted appellant Amanda Marie Reese of willful cruelty to a child, a felony. (Pen. Code, § 273a, subd. (a).)[1] She was sentenced to prison for four years.

The child in question was appellant's 15-month-old daughter, Sophia Lynn Taylor (the baby). It is undisputed that appellant's boyfriend, Jared Ramirez, killed the baby. Prior to appellant's trial, Ramirez pleaded no contest to committing second degree murder, and he was sentenced to prison for 15 years to life.[2] The trial court informed appellant's jury about Ramirez's plea and sentence.

The primary issue in appellant's trial was whether she was criminally negligent for causing or permitting the baby to suffer, be injured, or be endangered. The prosecutor argued to the jury that appellant's negligent act was leaving the baby with Ramirez on the fatal night knowing he had been abusing the baby.

On appeal, appellant contends that the trial court erred in permitting admission of 17 postmortem photos which depict the baby both at the hospital and during the external examination at her autopsy. She raises ineffective assistance of counsel regarding both the admission of these photos and how her trial attorney attempted to suppress her taped statements made to law enforcement. She also argues that the trial court abused its discretion in failing to investigate alleged juror bias. Finally, she asserts cumulative error. We reject these claims and affirm.

BACKGROUND

The baby's death was caused by severe head trauma. According to the testifying medical examiner, and readily visible on the 17 postmortem photos moved into evidence,

---

1 All future statutory references are to the Penal Code unless otherwise noted.

2 Ramirez is not a party to the present appeal.

the baby had extensive bruises and abrasions on her head, face, neck, upper back and buttocks.[3] She had a prominent abrasion at the back of her head.

I. The Prosecution's Case-In-Chief.

We provide a summary of the material trial facts which support the verdict, and which are relevant to the issues raised on appeal.

A. Appellant's relationship with Ramirez.

Ramirez was not the baby's father. Prior to the baby's death, appellant had been dating Ramirez for about 10 weeks. When the baby died, appellant and Ramirez were living together. They shared a three-bedroom residence with other adults and children. Appellant and Ramirez typically slept in the living room on a mattress while the baby slept near them in a playpen. The bedrooms were occupied by the other adults and children.

B. The night the baby died.

On January 11, 2013, the night the baby died, appellant left the residence at about 8:00 p.m. to attend a party. Ramirez stayed home. Before she left, appellant asked both Ramirez and another roommate, Tanya Wescott, who was appellant's long-time friend, to watch the baby. When appellant left the residence, the baby was playing and appeared fine. Appellant returned home at about 1:00 a.m. At that point, everyone in the residence, except for Ramirez, appeared asleep.

It is not known precisely when Ramirez fatally injured the baby. Before appellant returned home, Ramirez had woken Wescott around 10:00 or 10:30 p.m. Wescott had been asleep in her bedroom. Ramirez had complained that the baby had "puked" on him. Wescott changed the baby's pajamas and rocked the baby back to sleep. She told the jury that the baby had appeared fine at that point, but the baby had felt cold. She wrapped the

---

[3] The testifying medical examiner did not perform the autopsy. Instead, he testified as a substitute pathologist based on his review of the autopsy report and the postmortem photos, among other materials.

baby in a blanket and told Ramirez to keep the living room warm. Wescott went back to sleep.

When appellant returned home at about 1:00 a.m., she also believed that the baby was okay. Ramirez was holding the baby on the couch. The baby appeared asleep and appellant heard her snoring. After starting some laundry, appellant prepared for bed and she fell asleep. She estimated that she was asleep for about 10 minutes before Ramirez woke her stating that the baby had puked, and she was not breathing. The baby was cold and non-responsive. Wescott called 911.

Emergency personnel were dispatched at about 2:15 a.m. on January 12, 2013. The baby was transported by ambulance to a hospital, where she was pronounced dead a short time later. At trial, the medical examiner explained that, with a head injury, the baby could have vomited and lost consciousness. The baby would have struggled to breath, which could have sounded like a baby snoring.

C. Appellant's statements to law enforcement.

To establish appellant's criminal negligence, the prosecution relied on appellant's taped statements to law enforcement. On January 12, 2013, after learning that the baby was deceased, two homicide detectives from the sheriff's department, Michael Dorkin and Henry Bravo, interviewed appellant at a substation. This interview was video recorded with audio and it was played for the jury. The recording lasts a little over 80 minutes.[4] The jury learned that, shortly after this interview concluded, appellant was arrested while still at the substation.

This taped interview is the subject of one of appellant's claims on appeal. Given its importance in this matter, we provide an extensive summary of it. Our summary generally follows the interview in its chronological order.

---

[4] The trial court informed the jury that it had redacted a portion of the taped interview because it was not relevant. Based on this record, it is unknown what was redacted from the taped interview.

1. The advisement of *Miranda*[5] rights.

The interview occurred in what appears to be a small room containing a table and chairs. At the very beginning of the interview, Dorkin informed appellant that she was not under arrest and she was free to go if she wanted.[6] Bravo stated that the door to the room was unlocked and only closed for privacy. She agreed she was there freely and voluntarily. She also said, "I just want it to end so I can go home." After again stating that she was not under arrest, Dorkin read appellant her *Miranda* rights. Appellant agreed that she understood each of her rights. The interview commenced.

2. Appellant's personal history and her relationship with Ramirez.

At the start of the interview, appellant provided the detectives with some personal background information. She did not work but volunteered at an animal rescue. She worked at a pet store on weekends to "adopt dogs out." She spent most of her time at home with the baby. When volunteering, either appellant's mother, or Ramirez and other roommates, would watch the baby. She had been dating Ramirez for two and a half months, and they had no common children. She said Ramirez started watching the baby "since we started dating and hanging out." She said Ramirez had been helping with the baby "since day one." He had "stepped up" because the baby's father was not there.

Appellant began living with Ramirez on January 5, 2013. Prior to that time, she would visit Wescott's residence periodically. She and Ramirez slept in the living room and the baby slept in a portable playpen. Appellant denied that Ramirez was ever alone with the baby.

3. The fatal night.

At the start of the interview, and at various times throughout, appellant recounted what happened during the fatal night. Her statements to the detectives in this regard were

---

5 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

6 At no time during the taped interview is appellant restrained.

consistent with her later trial testimony. She explained that she went to a party with friends. She was the designated driver. She left a little after 8:00 p.m. and returned home around 1:00 a.m. Other than Ramirez, everyone else in the residence appeared asleep when she returned home. At that point, the baby seemed fine. Appellant learned that the baby had thrown up, and Wescott had changed her clothes. Appellant and Ramirez put the baby in her playpen on her back, and they started some laundry in the garage. They returned inside the house and the baby was okay. Appellant lay down and she fell asleep near the baby. She never heard the baby crying. Ramirez woke her when he brought the baby to her. He said the baby had thrown up and "was gurgling, not breathing." Appellant told Ramirez to wake Wescott, who called 911. The baby was cold, limp and not breathing. Appellant tried to wake her up. She lay the baby down on the bed and tried to administer CPR, but she did not know how to do it. Ramirez began to administer CPR and appellant went outside in a panic until emergency personnel arrived.

Appellant was certain that the baby had been alive when she came home and found Ramirez holding the baby in his arms. "She was snoring." It sounded like a regular snore. She eventually agreed, however, that it was possible the snoring had represented labored breathing.

4. Appellant initially denies knowing the cause of prior injuries.

Early in the interview, the detectives focused on prior injuries to the baby. Appellant told them that, when Wescott called 911, the baby had a "small little bruise" on her right cheek that had been there for a while. Appellant did not know how the baby got that bruise, but she had believed that the baby's sippy cup had caused it. She claimed that this bruise was the only bruise she saw on the baby before she went to the party.

Appellant explained that, around Christmas, the baby "had blisters on her mouth" and then the baby received the bruise on the side of her face. Appellant took the baby to a doctor, who prescribed medications. According to appellant, another boy who lived in the house had accidentally tripped the baby, who fell and hit the fireplace. That caused a

scrape and a scar on her head. In addition, on Christmas Eve, the baby was standing and "nodding out" when she fell and hit her face on a nightstand. Appellant denied knowing how the baby received the injuries on her chin or neck. Injuries on her neck kept "popping up."

5. Dorkin tells appellant to stop feeding him bullshit.

After hearing appellant's explanations, Dorkin told her that she was feeding him "a line of bullshit" and he cautioned that this was a "serious" time. He told her that she knew more than what she was saying. He said, "Don't give us a line of bullshit, that the baby just fell down. The injuries that she had came from somebody." Appellant denied knowing what had happened to the baby. She said that she was not around "half the time" when the baby became injured. She denied knowing who was doing this, claiming she did not know if anybody was hurting the baby.

Dorkin said there were "old injuries" on the baby's face. He said the baby "had been through a lot of pain." Appellant denied hitting the baby and she again denied knowing who was hurting the baby.

6. Bravo tells appellant a story about a couple from Taft.

Bravo told appellant about a couple in Taft whose child had died. "The mother got in a lot of trouble, and now she's in prison because she covered up for her boyfriend." Bravo told appellant that somebody killed her baby. "Now if you don't start telling us the truth, it's not gonna [*sic*] go very good for you." Appellant said, "I honestly don't know what happened. All I know is what they told me. I wasn't there."

Bravo asked appellant if she thought she knew Ramirez well enough to leave her baby with him. She did not answer. He said, "Somebody injured your child. And we've got to be the voice for your baby. I'm talking about you too. We're trying to help you out." Appellant again said she did not know, and she denied ever seeing Ramirez acting rough with the baby.

7. The detectives ask if Ramirez had lied.

Bravo asked appellant if Ramirez ever told her about an incident where a dog tripped him while he was holding the baby, and the baby fell against the brick fireplace. Appellant said she had not heard that. Instead, she was told that her baby was tripped by another boy who lived in the house. Bravo asked appellant if she thought Ramirez had lied. She said she was not sure.

Dorkin told appellant that Ramirez had spoken with their partners. According to Dorkin, Ramirez said he had dropped the baby while doing CPR, and this had occurred in appellant's presence. Dorkin asked if that had happened, which appellant denied. She did not know why Ramirez was lying, and she denied being in love with him.

8. Bravo asks if appellant is mentally retarded.

Bravo asked if appellant and Ramirez had argued before she went to the party. He noted that he would not be happy if his girlfriend went out with her friends and left him to care for her baby. Appellant responded that she left the baby with Wescott. Bravo countered that Ramirez was there when the baby was injured. It was either Wescott or Ramirez who injured the baby. Appellant noted that Wescott had been asleep when she returned home, and she agreed it was Ramirez who was alone with the baby. Bravo asked if appellant was "mentally retarded" or disabled. She answered that she had "mental issues." She explained that she was bipolar and suffered from depression. She takes Abilify and Klonopin. She took "three Klonopins" that day to keep her "nerves down" and "keep cool[.]" She had lost her Abilify and just got them back "so I haven't taken my Abilify in a few days."[7]

Bravo confirmed with appellant that neither a doctor nor psychologist had ever told her that she was "retarded" or developmentally disabled. He asked if she had

---

[7] On February 22, 2017, appellant filed a request for judicial notice regarding certain information about Abilify, Klonopin, and bipolar disorder. We address this request for judicial notice later in this opinion.

common sense. When she agreed, he asked her to use her common sense. He asked how somebody might react if the baby was fussy, crying and hungry at 1:00 in the morning. Appellant said, "I honestly don't know what happened. I don't know if he did anything or not."

9. Appellant begins to make statements that point to Ramirez.

After Bravo asked appellant to use her common sense, she agreed that the baby appeared normal when she had left for the party. When she returned, Ramirez was holding the baby, who appeared to be asleep. The baby was put into her playpen. She looked fine after they started the laundry. Appellant never saw any blood inside the baby's mouth as she lay in the playpen. Appellant then went to sleep. When asked how the baby's massive head injury may have occurred while appellant slept, appellant said that "maybe" Ramirez shook the baby, but she did not know. Appellant denied ever hearing the baby cry. She only heard snoring when she returned home.

10. The detectives ask appellant to help them.

Bravo asked appellant if she understood the detectives' position. He said they were "trying to be the voice" for the baby. They could not say that Wescott was involved because she was not there when the baby was laid down. It was either appellant or Ramirez who was responsible for the massive head injury.

Appellant denied seeing anything and she said it was Ramirez who had laid the baby down. Dorkin confirmed that everyone but Ramirez had appeared asleep when appellant got home. He told her this was her opportunity "to help us," and she should tell them if she knew something more. Bravo said once appellant left and the autopsy report came out, "you're done. We can't help you out anymore." Appellant said she was honest, she did not put the baby into her crib, and she only kissed the baby on her head. The baby was warm at that time. She gave the kiss when she first returned home while Ramirez was still holding the baby on the sofa. The baby appeared normal during that time.

Bravo noted that "something happened" during the time appellant fell asleep. He noted that the baby's injuries "have been going on for a long time—a long time. This assertion that, uh, you guys spank your baby on the hand, and other people will spank the baby on the hand—those injuries aren't on her hand. They're all over her body." Appellant denied beating her child. Dorkin said somebody deliberately murdered the baby.

11. The detectives ask about Ramirez's sexual practices.

According to Bravo, the emergency room doctor had believed that something was wrong with the baby's anus.[8] Bravo asked if appellant thought Ramirez might have been responsible for that. She denied that Ramirez might be sexually aroused in that way but admitted that he had asked her for anal sex twice. She said she could not explain why the baby had a lot of injuries on her.

12. Appellant suspects it was somebody in the residence who injured the baby.

After discussing the apparent injury to the baby's anus, Bravo asked appellant to use her "freakin' head" and explain how this happened. She said "it has to be [Ramirez], [because] I would never do something like that to my child, and I'm not covering [for] him." Bravo said they were trying to help her and be the justice for the baby. Dorkin said, "You know, you can help us be her voice too." Appellant agreed that she wanted justice for the baby. Bravo asked her who injured the baby. She said it had to be somebody at the house. She agreed that Ramirez never dropped the baby while doing CPR. She denied ever hitting the wall with the baby while walking around.

Dorkin confirmed that the lights were on when appellant returned home. Appellant reiterated that she did not see any injuries when she kissed the baby. She did see two prior bruises, one on her chin that would not go away and another one that "was

---

[8] One of the postmortem photos taken at the hospital (number 50), shows the baby's anus. In this photo, the anus appears distended.

kind of going away." Appellant noticed those because the baby had them for a couple weeks. Appellant denied knowing how the baby got those bruises. She told the detectives it was Ramirez who had suggested that the baby's sippy cup might have caused the bruises. With the detectives, however, she agreed that was not possible. She said that Ramirez was never "really alone" with the baby and someone else was always at the house. She said that the fatal night was the first time she had left the house for a party. If she ran an errand, she would leave the baby with Wescott, who was usually home. Appellant's mother would also watch the baby when appellant volunteered, which was an eight- to 10-hour day.

13. Appellant admits that her relationship with Ramirez was bad.

Appellant denied that she and Ramirez had an argument on the fatal night. She denied ever seeing Ramirez smoke methamphetamine. She did not know if he was "into" pornography. She admitted that he had been "hiding stuff" from her and deleting things from his computer. She had caught him talking to girls and messaging another female roommate. Ramirez had told the roommate that appellant was "annoying" and he wanted to kiss her (the roommate). Appellant said Ramirez had been distant from her recently, but they had not argued. She did not know why he had been distant. She agreed that she did not know Ramirez very well. She said it was her mistake for leaving her baby with him.

14. Appellant discloses that the baby was afraid of Ramirez.

When asked if she had seen any behavioral issues with the baby, appellant explained that the baby did not like Ramirez. The baby screamed when near him. Appellant admitted she had thought the situation was "weird," but she had not suspected anything "except for the fact that she didn't like him because she has a thing with certain people where she doesn't like people, and then she does like people. But I've never seen her act that way towards anybody but him." Appellant said she had held "suspicions"

that Ramirez was either hurting the baby or doing "something while I was gone, and that's why she didn't like him[.]"

Appellant explained that the baby knew a few words in sign language. She denied that the baby ever signed anything about Ramirez, but the baby got scared every time he came around. "And now I'm seeing it." She denied seeing anything abnormal around the baby's vagina or anus, but a rash had developed, which she was treating.

Dorkin asked about the relationship between Ramirez and the baby's father. Appellant said they were on bad terms. Not long before, the father had threatened Ramirez and appellant in a telephone message. Bravo asked appellant to "think back to any other situations that cause you alarm now . . . ." She said, "Now, I think back and I think I should have done something a long time ago, and my baby would still be here."

15. Appellant discusses the prior bruises and a visit to a doctor.

Appellant said she first noticed bruises about a week and a half before the fatal night. Those were bruises on the baby's chin. She had asked the other adults in the house about the bruises, but they had denied knowing what caused them. With the detectives, appellant denied seeing any previous scratches or scrapes on the baby's body.

Bravo asked if appellant had been concerned over the last week. She answered, "I was worried. I wanted to know what was going on, and I knew that [the baby] had a weird feeling about [Ramirez] a long time ago, [because] she didn't—for a while she hasn't really liked him. She always screamed for quite some time."

Dorkin asked if the baby had any resemblance to the baby's father, and whether Ramirez was showing resentment and taking it out on the baby. She said it was a possibility. She did not know if Ramirez would hurt the baby, "but looking back on everything and now what you guys say has happened to her, makes me think twice." She confirmed that she last took the baby to the doctor on December 31, 2012. The doctor examined the baby's tongue, which was the reason for the visit. The doctor had noticed bruising on the baby's head. The baby's body was not examined, and she was not

undressed. Appellant agreed that some injuries around the baby's neck were present during the doctor's visit on December 31. The doctor told appellant that a sippy cup did not cause the bruise to the chin. The doctor called child protective services (CPS), which sent a worker to appellant's residence. According to appellant, the CPS worker examined the baby and said she looked fine.

Other than the bruising around the baby's neck, the injury on her head, and the infection in the baby's mouth, appellant denied seeing other injuries. An injury on the baby's temple had disappeared a few days before the fatal night. The detectives asked appellant how to explain the injuries to the baby that occurred after the visit to the doctor. Appellant said she only saw "the little rash" and "the bruise on her chin." She denied seeing any other bruises.

16. Appellant admits that Ramirez was too rough with the baby.

Bravo said that appellant had not explained how the baby had bruises after the doctor's visit. Bravo described them as "old bruises." Appellant admitted that Ramirez was "sometimes" a little too rough with the baby. He would grab the baby and make the baby sit on his lap until she stopped crying. He would tell her that "she needs to stop." Bravo asked why appellant had not stated this earlier. He questioned if she was trying to protect him. Appellant denied knowing what Ramirez had done when she was not present. She clarified that Ramirez would hold the baby down on his lap and hold down her arms until she stopped crying. This would last until the baby stopped crying. She last saw Ramirez do this "a couple nights ago."

Appellant told the detectives that she yelled at Ramirez to stop when this happened. He sat the baby down and walked away. This happened when the baby got into some "DVDs or something." The baby was screaming when Ramirez held her down. Appellant did not think that Ramirez was holding the baby too tight, and the baby often screamed when he held her. Appellant agreed it was possible some of the baby's

bruises occurred when Ramirez held the baby down. When pressed, she said that Ramirez did this "almost every day."

17. Appellant had planned to move out.

Bravo asked why appellant let this happen every day. She said she told Ramirez to stop and he was too rough with the baby. She said Ramirez "doesn't listen and continues to do it. I've been trying to get out. Ask my mom. I've been trying to get out. I was going—last night was, um, this morning I was supposed to pack all my stuff up and go home." Appellant admitted that not everything had been good. She did not like how Ramirez treated the baby. She said he was "rough" and "mean" with the baby.

Bravo said they were there to help appellant. He said the detectives had kids, too. He asked why she was planning on leaving. Appellant said she was tired of being with Ramirez. He was "mean" and he did not "care." He treated both her and the baby "like crap." She denied that Ramirez hit her, but Ramirez would "smack" the baby's thigh "all the time and I yell at him for that." He smacked the baby before Christmas and it caused a bruise. That had caused "another red flag" for appellant. She told the detectives she had stayed in the residence only to help Wescott.

18. Appellant admits that Ramirez seemed upset on the fatal night.

Bravo asked appellant, "What do you think happened last night?" Appellant said that Ramirez "had to have done something" because the baby had been fine. Ramirez had not seemed upset when appellant left. When she returned, he appeared "a little irritated." She believed because the baby had "puked on him." Ramirez told appellant that the baby had puked, which appellant also saw on his shirt. They washed Ramirez's shirt that night. When pressed, appellant then said that Ramirez had been mad. He used a "mean, rude voice" when he announced that the baby had puked on him.

19. Appellant saw Ramirez hitting the baby.

Appellant admitted that, on a "couple times" she had witnessed Ramirez hitting the baby so hard that she thought he was injuring the baby. When asked why she had not

left him, appellant said she was "stupid and now I lost my child because of him." She agreed that she could have stopped this a long time ago. She had not thought it was this bad. When asked if she could have done more to protect the baby, appellant said, "I shoulda [*sic*] left a long time ago and she'd still be here."

Dorkin explained they would keep appellant's phone to search it pursuant to a warrant. Bravo asked her to wait in the lobby. The taped interview concluded with appellant stating, "That bastard murdered my daughter."

D. The disputed evidence regarding the number of prior injuries.

The trial evidence was in conflict regarding the extent of the prior injuries appearing on the baby versus the injuries that occurred on the fatal night. The medical examiner testified that it was impossible to determine whether the injuries to the baby's face occurred when the fatal head injuries were inflicted. According to the medical examiner, the baby's injuries appeared "fresh" and occurred "within one to two days." However, the medical examiner also noted that the facial injuries "may have occurred earlier." There was no way to determine when the facial injuries may have occurred. Injuries to the baby's mouth appeared fresh and had occurred within one to two days prior to death. However, the medical examiner believed that the pattern of injuries suggested "one basic event."

In contrast to the medical examiner's testimony, the jury heard appellant's taped statements to the detectives in which she discussed prior injuries appearing on the baby prior to the fatal night. In addition, Wescott testified that, in the 10 days before that fatal night, she saw a scratch on the baby's forehead and a bruise on the baby's chin on the left side. Wescott first saw the bruise on the chin when, about four days before the baby died, Ramirez "pointed it out" and asked if Wescott knew how it had happened. According to Wescott, the scratch had occurred on December 23, 2012, when Wescott's young son had tripped Ramirez, who was standing near the fireplace. Ramirez had thrown himself

forward to avoid landing on another child who was nearby, and the baby's head struck the corner of the fireplace.

Wescott stated that, when she called 911, she had looked at the baby's face. Wescott denied seeing any bruises on the baby's face at that time, other than the previous scratch on the forehead and the prior injury to the chin.

A responding sheriff's deputy, Blake Edwards, testified about providing CPR to the baby before the baby was transported to the hospital. Edwards told the jury that, when he performed CPR on the baby at the residence, the baby's "gums were very dry" and she had dried blood "in her gum area." He saw a "very large bruise" on the left side of the baby's neck.

E. Additional evidence regarding Ramirez's behavior with the baby.

Wescott told the jury that she never saw or believed that Ramirez had hurt or abused the baby. She never saw Ramirez swat the baby's butt or pat the baby's hand to discipline her. Instead, both Ramirez and appellant would put the baby in the playpen for a timeout if discipline was needed. Wescott never heard from anyone that Ramirez had been abusing the baby.

At trial, Wescott agreed that, when appellant left the residence to attend the party, appellant left the baby in both Ramirez's and Wescott's custody. However, Wescott testified that, based on prior custom and practice in the residence, she had understood that Ramirez was "primarily responsible" for the baby's care that night. According to Wescott, Ramirez would watch the baby "[m]ost of the time" if appellant was not home. Wescott would assist, which mainly involved changing the baby's diaper or watching the baby if Ramirez went outside to smoke a cigarette.

II. The Relevant Defense Evidence.

Appellant testified in her own defense. She explained how and when she first met Ramirez, and when they began dating. She said she had known Wescott for many years and considered her a sister. Appellant began living with Ramirez at the Wescott

residence on January 5, 2013.[9] She told the jury that, if she had to leave the residence, she never left the baby alone with Ramirez. Instead, another adult was always in the residence with Ramirez and the baby. Appellant also sometimes left the baby with appellant's mother.

Regarding the fatal night, appellant's trial testimony in this regard was consistent with her taped statements to the detectives. She did, however, tell the jury that she had assumed that Wescott would be awake "most of the night" while she attended the party. She had asked Ramirez to watch the baby that night because she knew Wescott would be busy watching Wescott's three young children, and the young son of another roommate.

Appellant admitted to the jury that she did not know or love Ramirez, and it was a mistake to leave her baby with him. She said a lot of "red flags" had existed about Ramirez's behavior towards the baby, but she never thought it was a pattern or that he would hurt the baby. It was only after the baby died that she looked back and saw the red flags.

A. Appellant's knowledge of prior injuries on the baby.

Appellant testified that, prior to the fatal night, the baby only had one bruise on her chin. According to appellant, the postmortem photos showed many more injuries on the baby's face than were there previously.

Around Thanksgiving, appellant saw a small bruise on the right side of the baby's chin. This bruise went away. A similar bruise appeared again. At one point, appellant had thought that the baby's sippy cup was causing this bruise. The baby also had a recurring bruise on her neck. Appellant had asked the other adults in the house about the source of the bruising, but nobody knew what was causing them.

---

[9] In contrast to appellant's trial testimony, Wescott told the jury that appellant moved into this residence in November 2012.

In mid-December, appellant noticed a mark in the baby's hairline. Wescott informed appellant that Wescott's young son accidentally ran into the baby, causing her to hit her head on the fireplace. Appellant learned during her taped interview with the detectives that Ramirez was involved in this accident.

On Christmas Eve, appellant returned from a store and saw that the baby had a bruise on her eye. Ramirez said that the baby fell and hit her head on a nightstand.

Appellant told the jury that she had been worried about the baby's bruising, but she did not know what was causing it. Nobody ever told her that the baby was being abused, and she never saw anything that made her think someone was abusing the baby. She thought one of the other children had been too rough with the baby when playing. According to appellant, Ramirez usually disciplined the baby by smacking her hand or putting her in the playpen for a timeout.

B. The visit to the doctor.

According to appellant's trial testimony, she took the baby to the doctor on December 27, 2012. The doctor informed her that the bruise on the baby's chin was not caused by a sippy cup. On January 1, 2013, a CPS worker came to the residence, evaluated the situation, and did not take any action. The CPS worker told appellant that the baby looked normal. Appellant never told either the doctor or the CPS worker that Ramirez had struck the baby. At that time, she had not connected Ramirez to the baby's bruises. She told the jury that, before the baby died, nobody indicated that Ramirez was "trouble."

C. Appellant's inconsistent testimony compared to her taped interview.

At trial, appellant testified that, although the baby did not like Ramirez and she screamed when he came near, she had acted that way with other people. She claimed that her contrary statement to the detectives was not true. Although Ramirez had treated her badly, she denied that Ramirez had treated the baby "like crap."

At trial, appellant discussed two incidents involving Ramirez and the baby.

Ramirez once tried to spank the baby on her buttocks with an open hand, but he missed her diaper and hit her thigh. This left a bruise, although he did not hit her that hard. Appellant told the jury that she had yelled at Ramirez for doing that, she never saw him do it again, and she never heard from anyone else that he did it again. Appellant denied that Ramirez did this "all the time" as she had said during her interview. It was not true, as she had said during her interview, that Ramirez often hit the baby hard.

Another time, Ramirez held the baby on his lap and held down her hands for about five minutes. Appellant yelled at him and struck him so he would stop. At trial, appellant only recalled this happening once. She said it had not been accurate when she told the detectives this had occurred almost daily.

Appellant explained to the jury that it had not occurred to her that Ramirez was committing child abuse when he slapped the baby on the thigh or held her down. As a result, she did not tell the detectives about these events right away. She emphasized to the jury that she never corroborated Ramirez's claims that the baby had been dropped during CPR.

Appellant admitted that Ramirez had used a strict tone of voice when he spoke with the baby. He would throw pillows at the children, including the baby, that appellant thought was a little rough, but the children would laugh. She told the jury that she had lied when she told the detectives she had never seen Ramirez acting rough with the baby. At trial, she had no explanation why she had lied in this regard. Although he was a "little more rough" when disciplining the baby, appellant said she did not think Ramirez would hurt the baby. She stated that, since the baby's death, she had felt guilty that she did not pay more attention to Ramirez's roughness.

D. Appellant's taped interview with the homicide detectives.

Appellant told the jury that, before her taped interview with Dorkin and Bravo, she did not know the baby's cause of death. She was aware that the deputy coroner was investigating the cause of death. Her interview with the detectives occurred between 8:00

a.m. and 10:00 a.m. on the morning of the baby's death. She voluntarily rode to the substation with her mother and aunt.

When the taped interview started with the detectives, she did not suspect that Ramirez had killed the baby. She denied hiding anything from the detectives regarding the circumstances of the baby's death. She denied ever trying to protect Ramirez.

Appellant said she had been truthful with the detectives when she denied knowing who had caused the baby's injuries. It was during the interview that she realized the detectives were trying to get information on Ramirez.

Appellant admitted to the jury that she had lied to the detectives. On direct examination she was asked why she had told the detectives that she saw Ramirez abuse the baby. She answered: "I don't know. The only thing I can think of is because they had said that what had happened, and I placed it with, well, he killed my daughter. So I figured that—I don't know. I can only think of the fact that he did it." She said it was during the interview that she first heard a suggestion that Ramirez had killed the baby. That made her angry. On cross-examination, when confronted with her inconsistent statements, she repeatedly said, "I don't know," when asked why she had lied to the detectives.

E. Appellant's additional interview with the detectives.

In addition to the taped interview with Dorkin and Bravo, appellant discussed a second interview which she had with these detectives on January 15, 2013.[10] She told the jury that she was arrested after she gave her taped interview on January 12, 2013. She was taken to jail, but she was released the next day. She returned to her parents' home to live.

---

[10] The prosecution did not introduce evidence regarding this second interview with the detectives.

On January 15, 2013, Dorkin and Bravo visited her at her parents' home. Appellant said she spoke with them willingly. She agreed that, during this second interview, she told the detectives that she did not see Ramirez continuously spank the baby, and she did not think it was abuse. She saw it "just [as] rough discipline." During this interview, she told the detectives that she saw Ramirez spank the baby about six times. She told the detectives that it was not correct that Ramirez had spanked the baby daily or almost daily. Instead, this happened "a couple of times," and she had yelled at him for it.

On recross-examination, appellant agreed that, during her second interview with the detectives, she had said that Ramirez smacked the baby's thigh three times in a row one day. She had yelled at Ramirez for doing it. She also agreed that she told the detectives during this second interview that Ramirez did "the holding thing" a "couple of times." She agreed that her trial testimony was different from these prior statements. She agreed that she had lied to the detectives during her second interview about the number of times these events had happened.

DISCUSSION

We address appellant's claims on appeal in the order that they generally occurred in the proceedings below.

I. Appellant Does Not Establish Ineffective Assistance Of Counsel Regarding Her Taped Statements To The Detectives.

Appellant contends that her trial counsel rendered ineffective assistance regarding the admission of her taped statements with the detectives. She points to two specific concerns. First, when seeking suppression of her taped statements to the detectives, she notes that her counsel failed to argue that these statements were involuntary. Second, appellant asserts her counsel should have presented evidence to the jury regarding "psychological coercion" and its effects. Appellant claims such evidence would have helped the jury understand the discrepancies between her taped statements with the

detectives and her trial testimony. She argues that this alleged ineffective assistance was prejudicial, requiring reversal.

A. Background.

Prior to trial, appellant's defense counsel filed certain motions in limine. One motion requested exclusion of any statements that appellant made which were either involuntary or taken in violation of *Miranda*. In the alternative, appellant requested a hearing pursuant to Evidence Code section 402. The trial court granted the request to conduct an evidentiary hearing.

At the Evidence Code section 402 hearing, the trial court heard testimony regarding the various contacts that appellant had with law enforcement. She spoke with law enforcement personnel at the hospital. Later that same day, she underwent her taped interview with Dorkin and Bravo. Following this interview, appellant was arrested. She was booked into jail. She was released because the district attorney did not file charges against her. The final interview occurred with the same detectives on January 15, 2013. This interview occurred at a residence where appellant was staying.

Following the presentation of testimony, appellant's trial counsel focused on the final interview. Appellant's attorney argued that this final interview had been coercive. The trial court ruled that appellant had not been in custody when she made statements at the hospital. Regarding the taped interview with the detectives, the court determined that appellant had not been formally under arrest or in custody. Although *Miranda* had not been required, appellant had been properly advised of her *Miranda* rights. Regarding the final interview on January 15, 2013, the court ruled that appellant had not been in custody, and *Miranda* was not applicable. The court concluded that the prosecution could introduce appellant's statements from her various encounters with law enforcement.

B. Standard of review.

Under the federal and state Constitutions, a criminal defendant is entitled to the effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To prevail on a claim of ineffective assistance of counsel, a defendant must establish two criteria: (1) that counsel's performance fell below an objective standard of reasonable competence and (2) that she was thereby prejudiced. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) The defendant has the burden of showing both deficient performance and resulting prejudice. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.)

Regarding a pretrial motion, an attorney has a duty to research the law, investigate the facts, and file a meritorious motion in circumstances where a diligent and conscientious advocate would do so. (*People v. Gonzalez* (1998) 64 Cal.App.4th 432, 437.) To establish prejudice, however, a defendant must show that such a motion would have been successful. (*Id.* at p. 438.)

C. Analysis.

Based on the totality of the circumstances, appellant asserts that her will was overborne during her taped interview and those statements were the product of psychological coercion. According to appellant, had her trial counsel argued that her taped statements were coerced, there is a "strong likelihood" that the trial court would have granted the motion. We disagree. Appellant does not establish ineffective assistance of counsel.

1. We deny appellant's request for judicial notice.

In conjunction with this claim, appellant filed a request for judicial notice pursuant to rule 8.252 of the California Rules of Court, and Evidence Code sections 452 and 459. We were asked to take judicial notice of the following:

(1) The United States Food and Drug Administration's (FDA's) "Medication Guide" regarding Abilify, available at http://www.fda.gov/downloads/Drugs/DrugSafety/ucm085804.pdf;

(2) The FDA's information regarding Klonopin, available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/017533s045,020813s005lbl.pdf; and

(3) The United States National Institutes of Health's information regarding bipolar disorder, available at https://ghr.nlm.nih.gov/condition/bipolar-disorder.

On February 28, 2017, this court deferred appellant's request pending consideration of the appeal on its merits. Respondent was granted leave to file any objection. On March 9, 2017, respondent filed an opposition to appellant's request.

We agree with respondent that, although we can take judicial notice of official acts and public records, "we cannot take judicial notice of the truth of the matters stated therein. [Citations.]" (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 541–542.) As such, we deny appellant's request for judicial notice.

2. Appellant did not undergo a custodial interrogation.

As an initial matter, we agree with the trial court that appellant was not in custody when she underwent her taped interview with the detectives at the substation. A custodial interrogation occurs when law enforcement officers initiate questioning " 'after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citation.]" (*Oregon v. Mathiason* (1977) 429 U.S. 492, 494.) To determine if a person is in custody for purposes of *Miranda*, the first step is to determine if a reasonable person would have felt free to end the interrogation and leave. (*Howes v. Fields* (2012) 565 U.S. 499, 509.) Questioning at a police station, by itself, does not mean that a suspect is in custody. (See *Oregon v. Mathiason, supra,* 429 U.S. at p. 494.)

Appellant voluntarily appeared for the taped interview. She was told that she was not under arrest and she was free to go if she wanted. Appellant was never restrained during the interview. Although the door to the interview room was shut, Bravo stated that the door to the room was unlocked and only closed for privacy. Appellant agreed she was there freely and voluntarily, but also said, "I just want it to end so I can go home."

A reasonable person in appellant's position would have felt free to end the interrogation and leave. (*Howes v. Fields, supra,* 565 U.S. at p. 509.) Because a custodial interrogation did not occur, we reject appellant's claim that her trial counsel rendered ineffective assistance in failing to do more to seek suppression of her taped statements. In any event, even when we assume that a custodial interrogation occurred, appellant's statements were voluntary and were not coerced.

3. Appellant's statements were voluntary and not coerced.

"Both the state and federal Constitutions bar the prosecution from introducing a defendant's involuntary confession into evidence at trial. [Citations.]" (*People v. Linton* (2013) 56 Cal.4th 1146, 1176.) Based on a preponderance of the evidence, the prosecution bears the burden of establishing that a defendant's confession was voluntary. (*Ibid.*) When the interview is tape recorded, an appellate court reviews independently whether a confession was voluntary. (*Id.* at p. 1177.) The ultimate question is whether the defendant's will was overborne. (*Id.* at p. 1176.)

To determine whether a confession was voluntary, we must look at all the circumstances. (*People v. Linton, supra,* 56 Cal.4th at p. 1176.) The issue is whether police brought influences upon the accused so that his or her will to resist was overcome. (*People v. Thompson* (1990) 50 Cal.3d 134, 166.) We must examine both the defendant's characteristics and the details of the interrogation. (*Ibid.*)

Both the United States Supreme Court and our high court have listed relevant factors to examine. Those factors include (1) the defendant's age or maturity; (2) the defendant's level of education; (3) the defendant's level of intelligence; (4) the lack of any advice given to the defendant regarding her constitutional rights; (5) the length of the detention; (6) whether the questioning was repeated and prolonged; (7) whether physical punishment occurred, such as the deprivation of food or sleep; (8) whether any threats were used; (9) whether any direct or implied promises were made; and (10) whether police used deceptive tactics. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226;

People v. Linton, *supra*, 56 Cal.4th at p. 1176; *People v. Dykes* (2009) 46 Cal.4th 731, 752.) No single factor, however, is dispositive. (*People v. Williams* (2010) 49 Cal.4th 405, 436.)

When we examine both appellant's personal characteristics and the details of this interrogation, the evidence establishes that appellant's statements were voluntary and not coerced.

a. Appellant's personal characteristics.

Appellant argues that she lacked the emotional capacity to resist the detectives' alleged coercive behavior. She maintains that her personal characteristics, such as her mental issues and use of medications, suggest her vulnerability to coercion. She claims that her statements were not the product of a rational intellect and free will. We disagree.

Appellant was about 22 years old when this interview occurred, and she had some prior experience with law enforcement. In 2006, when she was approximately 15 years old, she committed second degree burglary (§ 460, subd. (b)). She was declared a ward of the juvenile court and placed on probation. Later that same year, she committed battery (§ 243.2, subd. (a)). She was committed to juvenile hall for five days and ordered to pay restitution. Probation was continued through 2008.

Although relatively young and unmarried, appellant had graduated from high school and she was attending a local college. She had been a mother, and she was not living with her parents at the time. Although she was unemployed, she occasionally volunteered at an animal center, which involved an eight- or 10-hour day. Throughout the interview, appellant appeared mature and able to manage her own affairs. At no time during the interview does she appear intimidated when speaking with the detectives. She never expressed fatigue. Although she was visibly upset at times, she kept her composure and she never appeared overwhelmed. She never asked the detectives for a break, and she never stated that she was unable or unwilling to answer questions. She provided answers that were responsive. At no time did she express confusion.

We disagree with appellant that her emotional state, her fatigue, and/or her medications suggest that her statements were not the product of a rational intellect and free will. Nothing indicates she did not understand the nature and circumstances of the interrogation. Nothing shows she was irrational. Nothing demonstrates she was unable to provide answers derived from her own free will. In any event, the Fifth Amendment only prohibits official coercion and is not concerned with moral and psychological pressures coming from other sources. (*People v. Linton, supra*, 56 Cal.4th at p. 1179.) There is no indication that the detectives may have "exploited any personal characteristics" of appellant to obtain her statements. (*Ibid.*)

b. The details of this interrogation.

Turning to the details of this interrogation, appellant asserts that Bravo threatened her with prison when he talked about the couple in Taft. She also claims that the detectives made deceptive statements about the extent of prior injuries on the baby. She notes that, at the time of the taped interview, the autopsy had not yet been performed. She further notes that, at trial, the medical examiner testified that the baby's injuries appeared to have been sustained within one to two days, and all occurred at the same time. Finally, she argues that the detectives promised her leniency by asking her to help them. She maintains that the combination of these alleged threats and promises made her admissions involuntary and inadmissible. We find these arguments unpersuasive.

i. Whether any threats or promises were made.

A confession may be deemed involuntary if police use direct or implied promises to extract it. (*People v. Linton, supra*, 56 Cal.4th at p. 1176.) If a defendant is made to understand that he might reasonably expect benefits from lenient treatment either from the police, the prosecution or the court in consideration of making a statement, even a truthful one, such motivation renders any subsequent statement involuntary and inadmissible. (*People v. Hill* (1967) 66 Cal.2d 536, 549.) Police officers, however, are permitted to point out benefits to a suspect which naturally flow from a truthful and

honest course of conduct. (*People v. Hill, supra,* 66 Cal.2d at pp. 549–550.) Absent improper threats or promises, law enforcement officers are permitted to urge a suspect to tell the truth. (*People v. Williams, supra,* 49 Cal.4th at p. 444.)

Here, prior to Bravo telling appellant about the couple from Taft, appellant had repeatedly denied knowing who may have injured the baby. Bravo finished the Taft story by stating somebody killed the baby and "if you don't start telling us the truth, it's not gonna [*sic*] go very good for you." Neither detective ever told appellant that she faced charges or prison time. Instead, the focus of the interview was to determine who injured the baby and when those injuries occurred. When read in context, Bravo's Taft story implored appellant to tell the truth, which was permissible. (*People v. Williams, supra,* 49 Cal.4th at p. 444.)

Moreover, although the detectives repeatedly stated that they wanted to "help" appellant, those vague comments cannot be construed as a promise of leniency. (See, e.g., *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 61 [the meaning behind an officer saying he would "help" the suspect is unclear, but it does not constitute a promise of leniency].) At no time did the detectives tell appellant that she might reasonably expect benefits from either the police, the prosecution and/or the court in consideration of making a statement, even a truthful one. Instead, early in the interview, the detectives said that somebody caused the baby's injuries. The detectives said they were a voice for the baby.

We reject appellant's contentions that a reasonable person in her position would have believed that the detectives promised her leniency or threatened her with prison.

ii. Whether the detectives used deceptive tactics.

We reject appellant's assertion that the detectives made deceptive statements regarding the extent of prior injuries on the baby. To the contrary, the trial evidence made clear that the baby suffered injuries prior to the fatal night. Moreover, even if the detectives used deception during this interview, a position we do not take, police may use

deceptive tactics, including lies. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1240.) If deception occurs, it is a factor to be considered in determining the voluntariness of a confession. (*Id.* at p. 1241.) If deception is used, however, it must be a proximate cause for the defendant's confession. (*Id*. at p. 1240.) In addition, the deception must be of a type reasonably likely to procure an untrue statement. (*People v. Farnam* (2002) 28 Cal.4th 107, 182.)

Here, we disagree with the suggestion that a comment about older injuries on the baby, even if untrue, was likely to induce admissions. (*People v. Farnam*, *supra*, 28 Cal.4th at p. 182 [fabricated evidence of fingerprints on a wallet alone not of type reasonably likely to procure an untrue confession]; *People v. Thompson*, *supra*, 50 Cal.3d at pp. 166–167 [officers repeatedly lied, insisting they had forensic evidence linking the suspect to a homicide]; *In re Walker* (1974) 10 Cal.3d 764, 777 [confession found voluntary where a wounded defendant was told, perhaps deceptively, that he might die before reaching the hospital and that he should talk to close the record].)

Further, even if the detectives were deceitful, we disagree that appellant's admissions were causally related to any alleged deceptions. To the contrary, appellant first expressed concern that Ramirez may have injured the baby after realizing that the baby's traumatic head injury had not been visible when appellant went to sleep. It was during the 10 minutes that appellant had her eyes closed that "maybe" Ramirez "shook her" but she was uncertain. She next said it had to be Ramirez who caused the baby's injuries because "I would never do something like that to my child, and I'm not covering [for] him." She later discussed that Ramirez had been very distant recently, he had been hiding information from her, she caught him messaging their female roommate, and she admitted that the baby reacted negatively around him. She then admitted she had held suspicions that Ramirez "was either hurting her or something while I was gone, and that's why she didn't like him[.]"

When asked if the baby ever communicated in sign language about Ramirez, appellant answered, "No." She explained that the baby only knew a few things in sign language, "but it was just like every time he came around, she got scared. And now I'm seeing it."

After discussing the threats that the baby's father had made to Ramirez and appellant, Bravo asked if there were "any other situations that cause you alarm now, looking back at the whole situation?" Appellant said, "Now, I think back and I think I should have done something a long time ago, and my baby would still be here." When asked when she first saw bruises, appellant said it was "about a week and a half ago." She was asked whether she had concerns over the last week. She said, "I was worried. I wanted to know what was going on, and I knew that [the baby] had a weird feeling about [Ramirez] a long time ago, [because] she didn't—for a while she hasn't really liked him. She always screamed for quite some time." When asked if Ramirez might be motivated to hurt the baby to "get even" with the baby's father, appellant said she did not know. "I don't think he would hurt her, but looking back on everything and now what you guys say has happened to her, makes me think twice."

Based on this record, appellant's incriminating statements were not causally connected with any alleged deceitful statements from the detectives. Instead, appellant's admissions occurred after she recounted the chronology of events and realized that Ramirez had both the opportunity and motive to hurt the baby.

4. Conclusion.

We have reviewed both the taped interview and its transcript. At approximately 80 minutes, appellant did not endure an exceptionally long interview and the detectives behaved courteously with her. Although Bravo asked her if she was "retarded" at one point, he did so after appellant continued to deny knowing how the baby was injured. The detectives treated appellant with respect even when pressing her for details about who injured the baby and when those injuries occurred.

Appellant was apprised of her constitutional rights as expressed in *Miranda*. She acknowledged understanding those rights. At no time did she invoke her right to silence, ask for an attorney, or ask to stop the questioning. A reasonable person in appellant's situation would have understood that she could terminate the interview.

Appellant did not ask for food, water or medication. She never expressed any discomfort or pain. Nothing from this record suggests that either the length of this interview or the nature of the questions rendered appellant's statements involuntary. (See, e.g., *People v. Hill* (1992) 3 Cal.4th 959, 981 [no coercion where a suspect underwent eight hours of actual interrogation (in five separate sessions) over a 12-hour period], overruled in part on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Based on this record, the detectives did not bring improper influences upon appellant that overcame her will to resist. (See *People v. Thompson, supra*, 50 Cal.3d at p. 166.) The prosecution has established that appellant's incriminating statements were voluntary. (See *People v. Linton, supra,* 56 Cal.4th at p. 1176.) The totality of the circumstances demonstrates that appellant's pretrial statements were admissible. As such, appellant fails to show that a motion to suppress her statements was meritorious based on alleged coercion. She also fails to establish that such a motion would have been successful. (See *People v. Gonzalez, supra*, 64 Cal.App.4th at pp. 437–438.) Thus, because this evidence was admissible, any motion to have it suppressed would have been futile. Accordingly, appellant does not establish ineffective assistance of counsel and this claim fails.[11] (*Strickland v. Washington, supra,* 466 U.S. at p. 687; *People v. Lucas, supra,* 12 Cal.4th at p. 436.)

---

11 Likewise, we reject appellant's claim that her trial counsel was ineffective in failing to present evidence to the jury regarding psychological coercion and involuntary admissions to explain why appellant "lied" during her interview with the detectives. To the contrary, appellant did not undergo a custodial interrogation. In any event, the

II. Appellant Has Forfeited Her Claim That The Trial Court Abused Its Discretion In Permitting Admission Of the 17 Postmortem Photos And She Does Not Establish Ineffective Assistance Of Counsel In This Regard.

Appellant argues that the trial court abused its discretion when it permitted admission of the 17 postmortem photos into evidence.[12] She contends that her conviction should be reversed.

A. Background.

1. The motions in limine and the trial court's pretrial rulings.

a. The defense's relevant motions in limine.

Prior to trial, the defense filed certain motions in limine. One motion was a request for the trial court to exclude all autopsy photos. Defense counsel generally alleged that they were all irrelevant and highly prejudicial.

On Monday, October 5, 2015, the trial court heard argument regarding the parties' various motions in limine. During the hearing, the prosecutor represented that he had provided the defense with all previously discovered photos.[13] The prosecutor said he was not certain which photos were needed at trial and he normally made that decision as the witnesses testified. Regarding the autopsy photos, the prosecutor wanted to introduce "at least a few of them" to identify the baby and show some of the external injuries. The prosecutor admitted that the cause of death was not at issue in this trial. However, he was going to ask the pathologist to opine about the impact of the baby's injuries.

---

interview was not coercive, and her statements were voluntary. Accordingly, appellant also fails to establish ineffective assistance in this regard.

[12] In her briefing, appellant repeatedly refers to these 17 images as "autopsy" photographs. However, she also recognizes in her briefing that the photos depict the baby both at the hospital and during her autopsy. Of the 17 postmortem photos, four photos clearly show the baby at the hospital with medical equipment still on her face and body (numbers 34, 43, 47, 66).

[13] The record is silent regarding the number of postmortem photos appearing in this packet.

In response, defense counsel noted that one photo, marked as number 87, was particularly troubling. Defense counsel, however, did not state why this picture should be excluded and the record is silent regarding the nature of this image.

The court commented that the prosecution had "to prove that danger or death was likely." Without identifying any photo, the court concluded that some of the autopsy photos would be relevant to prove appellant's criminal liability. The court noted that, while not all photos were applicable, some could be shown to the jury. As such, the court denied the defense motion to exclude all postmortem photos. The court ordered the parties to meet and confer to decide which photos were agreeable. If an agreement could not be reached, the court stated it would revisit the issue and make that determination.

In another motion in limine, the defense asked for an order that no further objection would be required to preserve any issue for appeal originally raised in a motion in limine. The trial court denied that request. The court stated it required "a timely objection to be made during the presentation of evidence so as to memorialize that time and place for purposes of appeal." Defense counsel asked for clarification. The court indicated that, if an objection was required in front of the jury, counsel should say something like, "Your Honor, the defense renews its objection based on the in limine motion rulings."

b. The prosecution's relevant motion in limine.

At the same hearing on October 5, 2015, the trial court also addressed various motions in limine filed by the prosecution. The first such motion requested admission of autopsy photos.[14] The trial court granted this motion, noting it had previously ruled on this issue. The court again reminded counsel "of the obligation to meet and confer

---

[14] The prosecutor's written motion had an apparent scrivener's error. It argued that autopsy photos were relevant because appellant had been charged with second degree murder. Based on its ruling, it is clear the trial court understood that appellant was not charged with murder.

regarding such photographs. If there are any disagreements, then certainly the Court will resolve those."

2. The postmortem photos used at trial.

Prior to the commencement of trial, defense counsel did not alert the trial court that the parties had been unable to reach an agreement regarding the postmortem photos. During the trial, the prosecutor showed 17 postmortem photos to various witnesses. These included both photos of the baby at the hospital, along with photos of her external autopsy examination. At trial, a majority of these postmortem photos (14 in total) were shown to the medical examiner. The other three photos, along with some of those shown to the medical examiner, were also shown to other witnesses. These 17 photos primarily show the baby and her injuries. These photos show extensive bruising and abrasions to the baby's face and head, her neck, her upper back, and her buttocks. However, one photo (number 65) does not show the baby but shows the coroner's body bag and identification tag for the baby.

As appellant concedes in her opening brief, at no time during the trial did defense counsel object to the prosecutor's use of the 17 postmortem photos.

3. The admission of the postmortem photos into evidence.

At the end of the prosecution's rebuttal evidence, the parties discussed the admission of the remaining exhibits, including the postmortem photos. When asked if the defense had any objection to the prosecution's marked exhibits, defense counsel made the following relevant reply: "Your Honor, subject to my objections and in limine motions regarding the photographs."

The court noted that it had a CD with "numbered photographs that were properly authenticated by witnesses." The court asked the parties if they could review the photographs to confirm which photos had been authenticated or whether the court needed to review that with them. The parties agreed they would resolve that issue together. The prosecutor agreed he would provide a redacted CD of the images the following day. The

court noted that, based on the representations, and recognizing the defense's objections previously made, the People's exhibits, including the unredacted CD containing the photos, "will be received."

The following day, the prosecutor represented that he had provided the court's clerk with a CD that contained only the photos that were used at trial, along with a "thumbnail printout" of those images. This new CD was marked as People's exhibit 1-B and the printout as 1-C. The trial court asked defense counsel if she had any comment about the surviving photos. She answered, "No, Your Honor. Thank you." The court admitted the redacted photos into evidence, saying they would be available for the jury during deliberations. The prior unredacted CD (People's exhibit 1) and the prior unredacted thumbnail printout (People's exhibit 1-A) would not be available to the jury.

B. Analysis.

The parties dispute numerous issues regarding the admission of the 17 postmortem photos. They disagree whether appellant forfeited this issue when she failed to object when these photos were shown to trial witnesses. If forfeiture occurred, they disagree whether appellant's trial counsel rendered ineffective assistance. They also disagree whether the trial court abused its discretion in admitting these photos. Finally, they disagree whether any presumed error was harmless.

We need not resolve each dispute. Instead, we agree with respondent that appellant has forfeited this claim. We also agree with respondent that appellant does not establish ineffective assistance of counsel.

1. Appellant has forfeited this claim.

In general, a timely objection or motion is required before a verdict, finding or judgment will be reversed due to the erroneous admission of evidence. (Evid. Code, § 353, subd. (a).) The "specific ground of the objection or motion" must appear in the record. (*Ibid.*) Our Supreme Court has held that a failure to object in the trial court

results in a forfeiture of those issues which are then raised on appeal. (*People v. Redd* (2010) 48 Cal.4th 691, 730; *People v. Dykes, supra,* 46 Cal.4th at p. 756.)

Under certain circumstances, a motion in limine can preserve an issue for appeal by acting as a "motion to exclude" under Evidence Code section 353. (*People v. Morris* (1991) 53 Cal.3d 152, 188, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) To preserve an issue for appeal, a motion in limine must (1) make a specific legal ground for the exclusion of evidence; (2) be directed to particular evidence; and (3) be made before or during trial when the judge can determine the evidence question in the appropriate context. (*Id.* at p. 190.)

In this matter, appellant's motion in limine was not sufficient to preserve this issue for appeal. In denying the motion, the trial court twice directed the parties to meet and confer regarding the postmortem photos. The court said it would resolve any issues if the parties could not agree. The parties agreed to meet. Defense counsel never alerted the court that they were unable to agree on the photos. We note that the prosecutor did not use the photo (number 87) to which defense counsel specifically raised an objection.

Further, the trial court directed the defense to raise objections during the presentation of evidence to preserve issues for appeal. At no time during the trial did the defense raise any objection to the prosecution's use of these photos.

Finally, after the presentation of evidence, the parties met to discuss redacting the images. The parties agreed to meet regarding which photos had been authenticated. Prior to moving the unredacted photos into evidence, the court asked defense counsel if she had any comments. Defense counsel said no.

Based on this record, appellant has forfeited her claim that the trial court abused its discretion in admitting the postmortem photos. At no time did the defense ask the court to resolve a specific dispute regarding any photos. At no time did the defense object when the prosecutor showed the 17 postmortem photos to various witnesses. Appellant cannot argue that the court erred in failing to conduct an analysis it was not

asked to conduct. (*People v. Tully* (2012) 54 Cal.4th 952, 980.) Because the defense failed to raise a timely objection, we will not reverse the verdict based on the alleged erroneous admission of evidence. (Evid. Code, § 353, subd. (a).) Accordingly, appellant's failure to object in the trial court results in a forfeiture of this issue on appeal. (*People v. Redd, supra,* 48 Cal.4th at p. 730; *People v. Dykes, supra,* 46 Cal.4th at p. 756.)

2. Appellant does not establish ineffective assistance of counsel.

Anticipating forfeiture, appellant asserts that her trial counsel was ineffective in failing to preserve this issue for appeal. We reject this argument because appellant does not show prejudice. Our Supreme Court makes it clear that, if a defendant fails to show prejudice, a reviewing court may reject a claim of ineffective assistance without determining the sufficiency of counsel's performance. (*People v. Mendoza* (2000) 24 Cal.4th 130, 164.) In fact, the high court recommends this approach. (*In re Fields* (1990) 51 Cal.3d 1063, 1079.) To establish prejudice, the defendant must demonstrate a " 'reasonable probability' " that, absent defense counsel's alleged errors, the result would have been different. (*People v. Ledesma, supra,* 43 Cal.3d at pp. 217–218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*People v. Majors* (1998) 18 Cal.4th 385, 403.)

A felony conviction under section 273a requires a showing, in part, that the defendant, "under circumstances or conditions likely to produce great bodily harm or death," willfully caused or permitted any child to be placed in a situation where his or her person or health was endangered. (§ 273a, subd. (a).) The mens rea for this crime is criminal negligence, or "a gross departure from the conduct of an ordinarily prudent person." (*People v. Valdez* (2002) 27 Cal.4th 778, 790.) An objective standard is used to determine whether a defendant had knowledge of the risk. (*Id.* at p. 783.) If a reasonable person in the defendant's position would have been aware of the risk, then the defendant

is presumed to have held such an awareness. (*Ibid.*) The defendant's subjective intent is not part of this inquiry. (*Id.* at p. 785.)

Appellant's statements to the detectives established her criminal negligence. She acknowledged knowing of the baby's prior injuries. She stated that, prior to the fatal night, she knew that Ramirez posed a risk of harm to the baby and she "should have done something a long time ago[.]" She explained that the baby had been afraid of Ramirez. She had held suspicions that Ramirez was hurting the baby "or something while I was gone, and that's why she didn't like him[.]" She had been worried because the baby had a "weird feeling" about Ramirez for a long time. She commented that Ramirez was rough with the baby, he was mean, and appellant wanted to leave him. She said that Ramirez treated both her and the baby "like crap." She agreed that she could have stopped this a long time ago.

During her taped interview with the detectives, appellant claimed that she never left the baby alone with Ramirez. At trial, Wescott agreed that, when appellant left the residence to attend the party, appellant left the baby in both Ramirez's and Wescott's custody. However, Wescott also testified that, based on the prior custom and practice in the residence, she had understood that Ramirez was "primarily responsible" for the baby's care that night. According to Wescott, Ramirez would watch the baby "[m]ost of the time" if appellant was not home. Wescott would assist, which mainly involved changing the baby's diaper or watching the baby if Ramirez went outside to smoke a cigarette.

To overcome her prior statements to the detectives, appellant told the jury that she had lied to them. On direct examination she was asked why she had told the detectives that she saw Ramirez abuse the baby. She answered: "I don't know. The only thing I can think of is because they had said that what had happened, and I placed it with, well, he killed my daughter. So I figured that—I don't know. I can only think of the fact that he did it." She said it was during the interview that she first heard a suggestion that

Ramirez had killed the baby. That made her angry. On cross-examination, when confronted with her inconsistent statements, she repeatedly said, "I don't know," when asked why she had supposedly lied during her taped interview.

We disagree with appellant's assertion that, other than her statements to the detectives, no other evidence established her guilt. At trial, both Wescott and appellant established that the baby had recurring bruises prior to the fatal night. Appellant told the jury that she had been worried about the baby's bruising, but she did not know what was causing it. She admitted to the jury that she did not know or love Ramirez, and it was a mistake to leave her baby with him. She said a lot of "red flags" had existed about Ramirez's behavior towards the baby, but she never thought it was a pattern or that he would hurt the baby. It was only after the baby died that she looked back and saw the red flags.

Based on this record, appellant's criminal negligence was overwhelmingly established. The evidence readily demonstrated her gross departure from the conduct of an ordinarily prudent person. (*People v. Valdez, supra*, 27 Cal.4th at p. 790.) Appellant does not show a " 'reasonable probability' " that, absent defense counsel's alleged errors, the result would have been different. (*People v. Ledesma, supra,* 43 Cal.3d at pp. 217–218.) Confidence in the outcome of this trial is not undermined. (*People v. Majors, supra,* 18 Cal.4th at p. 403.) Accordingly, appellant does not establish that her trial counsel was ineffective regarding the admission of the postmortem photos, and this claim fails.

III. The Trial Court Did Not Abuse Its Discretion Regarding Alleged Juror Bias.

Appellant contends that the trial court prejudicially abused its discretion by failing to conduct an inquiry regarding alleged juror bias.

A. Background.

During the trial, defense counsel raised concerns to the court about Juror No. 8. According to defense counsel, two incidents occurred with this juror, which were

troubling. First, during a break in trial proceedings, defense counsel saw this juror sitting in a hallway. Defense counsel contacted appellant in the hallway. Appellant was crying. Defense counsel observed the juror look in appellant's direction and, according to defense counsel, the juror rolled her eyes at appellant.

The second incident occurred during defense counsel's direct examination of appellant. After posing a question to appellant, defense counsel heard this juror sigh. Defense counsel observed this juror roll her eyes in the direction of Juror No. 7. It appeared to defense counsel that Juror No. 7 was taking notes at the time, but Juror No. 7 stopped writing. To defense counsel, this appeared to be some type of communication between the two jurors.

Defense counsel asked the court to question Juror No. 8 about her actions. According to defense counsel, the defense had just started its case, the jury had not heard anything from the defense, and defense counsel was very concerned about the juror's eye rolling and possible communication with Juror No. 7.

The trial court denied the defense request. The court stated it was "confident" the jurors knew they had to keep an open mind throughout the entire proceedings and to avoid reaching a conclusion until the case was presented to them. The court noted it could not order the jurors to "behave a certain way or that their demeanor remain a certain way since everyone is different." The court expressed concern that requiring juror investigation under these circumstances would open a Pandora's box with "virtually no limit." The court determined that the defense had made an insufficient showing regarding the need to question Juror No. 8. Nothing indicated either direct or indirect communication between the jurors, or that they had discussed the evidence. The court stated it was willing to revisit this issue if something occurred in the future.

After closing arguments, the trial court revisited this issue. It noted it had never observed any communication or attempted communication between Juror No. 8 and other jurors.

B. Standard of review.

A trial court's decision whether to investigate a juror's potential bias or misconduct is reviewed for abuse of discretion. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1348.) Under this standard, we will not disturb the trial court's decision on appeal unless "the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.)

C. Analysis.

Appellant argues that Juror No. 8's eye rolling and sighing demonstrated bias. According to appellant, the trial court was obligated to investigate. We disagree.

A trial court is not required to investigate any and all new information obtained about a juror during a trial. Instead, a hearing is required only if the court receives information which, if proven true, would constitute " 'good cause' " to doubt a juror's ability to perform his or her duties and which would justify the juror's removal from the case. (*People v. Bradford, supra,* 15 Cal.4th at p. 1348.)

In *People v. Cowan* (2010) 50 Cal.4th 401 (*Cowan*), the Supreme Court found no abuse of discretion when the trial court declined to inquire further into alleged jury bias or misconduct. It was alleged that a juror had made contact with the defendant's family members, who also were trial witnesses. (*Id.* at p. 507.) According to the high court, however, the information given to the lower court was "ambiguous" and merely suggested that the juror "may or may not have been talking" to the defendant's relatives. (*Ibid.*) Although the juror should not have been sitting near the defendant's relatives, the trial court could have reasonably concluded that no grounds existed to believe the juror had conversed with them. Moreover, there was no suggestion, other than speculation, that anything the juror said or heard had anything to do with the trial. As such, the trial court could have reasonably concluded no grounds existed to believe excusal of the juror was warranted. (*Id.* at pp. 507–508.)

Here, appellant did not provide information to the trial court which, if true, cast doubt on the juror's ability to perform her duties. (*People v. Bradford, supra,* 15 Cal.4th at p. 1348.) Moreover, similar to *Cowan*, the defense attorney's concerns regarding Juror No. 8 were vague and speculative. Nothing established or reasonably suggested that this juror may have harbored bias against the defense, or that this juror had information about appellant's case. The trial court did not abuse its discretion in declining to conduct a further inquiry.

Appellant relies on *People v. Pride* (1992) 3 Cal.4th 195 (*Pride*) and *Collins v. Rice* (9th Cir. 2004) 365 F.3d 667 (*Collins*) overruled in *Rice v. Collins* (2006) 546 U.S. 333, to establish error. These authorities do not assist her.

First, in *Pride, supra,* 3 Cal.4th 195, the trial court investigated after the defense alleged that the jury foreman had been seen "shaking his head, rolling his eyes, and 'glaring' at [the] defendant." The foreman allegedly mouthed the phrase "son-of-a-bitch," and then said something inaudible to two nearby jurors. The foreman also shook his head and glared at the defendant as the jury left the courtroom at recess. (*Id.* at p. 259.) During the court's investigation, however, the foreman denied some of these accusations, and he provided explanations for his perceived actions. (*Id.* at pp. 259–260.) The foreman assured the court that he had not prejudged the penalty phase issue. The other jurors did not remember the alleged incident, and all jurors still had an "open mind" about sentencing. (*Id.* at p. 260.) The appellate court found no error or misconduct after the trial court denied a motion to excuse the foreman or, in the alternative, to declare a mistrial. (*Id.* at pp. 259, 260.)

Second, in *Collins, supra,* 365 F.3d 667, the Ninth Circuit Court of Appeals analyzed whether a prosecutor purposefully discriminated when exercising a preemptory strike against an African-American female during voir dire. (*Id.* at pp. 673, 676.) The prosecutor had contended, in part, that the potential juror had "turned away and rolled her eyes" during jury selection. (*Id.* at p. 674.) The majority concluded that the prosecutor

did not provide credible race-neutral justifications for excusing this potential juror. (*Id.* at p. 687.) A dissenting justice took issue with the majority opinion for several reasons. (*Id.* at pp. 687–688 (dis. opn. of Hall, J.).) The dissent concluded that deference to the trial court's findings was proper regarding acceptance of the prosecutor's race-neutral explanations. (*Id.* at pp. 690–691.) The United States Supreme Court agreed with the dissenting opinion and reversed the Ninth Circuit's opinion. (*Rice v. Collins, supra,* 546 U.S. at p. 342.)

Appellant's cited authorities do not require reversal. First, *Pride* is distinguishable. The misconduct alleged in *Pride* was far more egregious than the conduct alleged in this matter. Second, *Collins* is inapposite to the present situation. The Ninth Circuit did not analyze alleged juror misconduct or the circumstances when a trial court must investigate alleged juror misconduct. Cases are not authority for propositions not considered or decided. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1134.) Moreover, California courts are not bound by decisions of the lower federal courts, even on questions of federal law. (*McLaughlin v. Walnut Properties, Inc.* (2004) 119 Cal.App.4th 293, 297; *Black v. Department of Mental Health* (2000) 83 Cal.App.4th 739, 747.)

Based on this record, the trial court did not exercise its discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice. (See *People v. Rodrigues, supra,* 8 Cal.4th at pp. 1124–1125.) Accordingly, an abuse of discretion did not occur when the court declined to conduct further inquiry, and this claim fails.

IV. There Was No Cumulative Error.

Appellant claims reversal is required based on alleged cumulative errors. "Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial. [Citations.]" (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) A claim of cumulative error is essentially a due process claim. (*People*

v. Rivas (2013) 214 Cal.App.4th 1410, 1436.) The test is whether the defendant received a fair trial. (*Ibid.*)

Here, appellant's claim of cumulative error is without merit because we have rejected all individual claims. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057 [cumulative prejudice argument rejected because each individual contention lacked merit or did not result in prejudice].) Appellant was entitled to a fair trial, but not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) Taking all of appellant's claims into account, we are satisfied that she received a fair adjudication.

DISPOSITION

The judgment is affirmed.

_____
LEVY, Acting P.J.

WE CONCUR:

_____
FRANSON, J.

_____
MEEHAN, J.