Filed 11/7/11

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY JEROME HALL, Defendant and Appellant.	B224359 (Los Angeles County Super. Ct. No. NA079725)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed.

Rodger Paul Curnow, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Stacy S. Schwartz, Deputy Attorney General, for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of **BACKGROUND,** and **DISCUSSION parts A, B, C1, C3 and C4.**

INTRODUCTION

Defendant and appellant Anthony Jerome Hall (defendant) was convicted of the second degree murder of a child a little over a year old (Pen. Code, §187, sub. (a)[1]), and of the assault on that child, who was under eight years old, causing death (§ 273ab). In the published portion of this opinion, we hold that notwithstanding the agreement of the prosecution and defense that the trial court instruct the jury on an uncharged lesser related offense of child abuse (§ 273a, subd. (a)), the trial court did not err by not giving that instruction. We affirm the judgment.

BACKGROUND

On appeal, defendant contends that trial court violated his constitutional and other rights by denying his request to order that immunity be conferred upon the mother, Octavia Martin;[2] excluding Octavia's recorded statements; excluding evidence of Octavia's reaction to learning that her son was dead; and refusing to instruct the jury with CALJIC Nos. 9.37, 6.40, and 4.45.

A. Factual Background

1. Prosecution Evidence

Nathan Jacob Coleman was born in July, 2007.[3] Defendant lived with Nathan and Octavia, his girlfriend and Nathan's mother from a previous relationship. Phyllis was Octavia's mother, and Nathan's grandmother.

---

[1] All statutory citations are to the Penal Code unless otherwise noted.

[2] Because Octavia Martin shares the same surname with another witness, Phyllis Martin, we refer to them using their first names.

[3] We refer to Nathan Jacob Coleman as Nathan or child.

Phyllis testified that on September 19, 2008, between 3:00 p.m. and 3:15 p.m., she received a telephone call from Octavia, who was "hysterical," and told Phyllis that she did not know the whereabouts of Nathan. Octavia told Phyllis that Octavia left Nathan with defendant, and she talked with defendant on the telephone and defendant told her that Nathan had been kidnapped.

An audiotape of a 911 call was played for the jury, and Long Beach Police Department Officer Malcolm Evans testified that he recognized defendant's voice as the voice of the person speaking to the 911 dispatcher. The 911 dispatcher had called defendant, who was at Long Beach Boulevard and 20th Street in Long Beach, and advised him that his girlfriend called them and said defendant had been stabbed. Defendant said that several Hispanic males attempted to stab him in the nearby alley, and took Nathan.

Long Beach Police Department Officer Cesar Velarde testified that at approximately 3:45 p.m., he was dispatched to Long Beach Boulevard and 20th Street, and he spoke with defendant. Defendant told Officer Velarde that defendant and Nathan had departed from a train and they were followed by several Hispanics in a van. Defendant said that the van drove up to him as he was urinating in an alley near Long Beach Boulevard and 20th Street, and three Hispanic males jumped out of the van, beat him, and took Nathan.

Robert Wilson testified that on September 19, 2008, at approximately 4:00 p.m., he discovered the body of a baby in a trash can located in an alley in Long Beach. Wilson's friend called 911. The baby was later identified as Nathan, and a Long Beach Police Department Officer testified that Nathan was wearing a "greenish or tealish-colored t-shirt," green, yellow, blue and white plaid pants, white socks, and one tennis shoe.

Defendant thereafter told Long Beach Police Department officers several different versions of the events that evening. Although the details differed, defendant repeated that Hispanic males jumped out of the van, beat him, and took Nathan. He then denied

knowing what happened to Nathan. Defendant added that the day before Nathan ran from defendant and hit his head on the crib.

Defendant then said he became angry that Nathan ran from him and defendant struck Nathan's face three times using the palm of his hand and Nathan fell down and hit his head on the crib. At approximately 10:00 p.m. Octavia returned home, defendant told Octavia that Nathan has fallen and bruised his head, and she did not need to check on Nathan because he just went to sleep. The next morning defendant told Octavia that he would take care of Nathan so she could get ready to leave for school. At 11:00 a.m. defendant went into Nathan's room and saw a string from a deflated balloon around Nathan's neck. Defendant then put Nathan in a trash bag, got on a train, and dumped Nathan's body in a trash can. Defendant called Octavia and told her a fabricated story that he was assaulted and Nathan was kidnapped.

Denise Bertone testified that she was a registered nurse and a Los Angeles County coroner investigator. On September 19, 2008, at approximately 7:40 p.m. she removed Nathan from the dumpster. Bertone examined Nathan, and estimated that Nathan died between approximately noon and 2:00 p.m. on September 19, 2008.

Dr. James Ribe testified that he performed an autopsy examination on Nathan, and based on it opined that Nathan died between 6:00 p.m. on September 18, 2008, and noon on September 19, 2008. The cause of death was blunt force trauma causing "massive depressed skull fracture and multiple rib fractures with crushing chest injuries." He testified that, "Those are the two fatal injuries, the head injury and the chest injury together with multiple superficial injuries."

Dr. Ribe testified that there was "a massive amount of blood covering the skull . . . caused by blunt force trauma," indicating "an extremely severe violent impact of the back of the head, which caused a massive displaced skull fracture." Dr. Ribe likened it to "a person falling off the second floor of a building and landing on concrete." Nathan's ribs were also broken, and his ribcage was crushed, indicating that "a tremendous amount of blunt force was brought to bear against that area," consistent with Nathan's back being

stomped on by an adult's foot. Dr. Ribe also saw "refracturing" on Nathan's ribs, which indicated that they had been previously broken and healed, and were broken again.

Dr. Ribe testified that the membrane connecting the inside of Nathan's lip to his teeth was torn, indicating to Dr. Ribe that Nathan suffered a blow—probably a slap—to his face. Dr. Ribe opined that this injury was inflicted a few hours before Nathan's death.

Dr. Ribe also testified that Nathan sustained a bruise on his left eye that was consistent with being inflicted by a fist punch, and a two inch bruise on his left cheek that appeared to be caused by a blow from a rod or straight object. Dr. Ribe opined that these injuries were inflicted "a couple of hours" to 30 minutes before Nathan's death.

Dr. Ribe testified that Nathan sustained a bruise on the front of Nathan's right ear inflicted by human punches, a large bruise in the center of Nathan's chest most likely caused by a punch from an adult's fist, and four fingertip sized bruises on his left breastbone area caused by a human hand. Dr. Ribe concluded that these injuries were inflicted minutes before Nathan's death.

In addition, Dr. Ribe testified that there were also bruises on Nathan's forehead, left ear, and right cheek. Nathan suffered at least 11 blows to his head and face area, and 25 bruises to the outside of his body excluding the fatal injuries. Dr. Ribe said that it would take several minutes of blows from different directions to receive these injuries.

An audio recording of a telephone message that defendant left on Octavia's cellular telephone on September 22, 2008, was played for the jury. Defendant stated that, "you know I didn't do that on purpose. . . . I love you too much to have something like that happen to him. . . . When I woke up had [t]he [b]alloon tied around his neck and he was dead. The only reason why I didn't call the police . . . is because I was scared and I didn't want you to go through no pain of seeing him like that. . . . I don't want you to think that I'm an evil person like that or I did that on purpose."

A recording of a telephone call placed by defendant to his parents was also played for the jury. During the telephone conversation, defendant admitted to killing Nathan, but claimed that it was an accident. Defendant stated that he hit Nathan on the evening of September 18, 2008, and found him dead in the morning of September 19, 2008.

Defendant said he "just didn't know how to break down and tell [Octavia] that her son had died. . . . [So] I told her that [Nathan] got took or whatever." Defendant also stated that he got on a train and put Nathan in the trash.

2. Defense Evidence

Defendant testified and denied killing Nathan. Defendant last saw Nathan alive on September 18, 2008 at approximately 9:00 p.m. Earlier that day Nathan fell on a hard surface while walking out of the bathroom, which left a red mark on his face. Defendant told Octavia about Nathan's injury. At approximately 10:30 p.m., Octavia came home and checked on Nathan for five or ten minutes. After using the computer and eating dinner, defendant and Octavia went sleep.

Defendant testified that at approximately 9:00 a.m. the next morning he was awakened by Octavia, who was panicking and emotional and told defendant that she accidently killed Nathan. Octavia said that she couldn't stand seeing Nathan like that and she had a plan. Octavia told defendant that he needed to be involved and to take Nathan to Long Beach and say Nathan was kidnapped, so she would not be found responsible for Nathan's murder. Defendant agreed to help because he "loved her and . . . would have [done] anything in the world to keep her from [going] to jail." Octavia spoke to defendant for one hour, during which time defendant was "absolutely silent," and at approximately 10:00 a.m. Octavia left for school. Defendant got out of bed, got dressed, went to the kitchen to obtain a plastic bag, and approximately one hour after he got out of bed he placed Nathan in a trash bag. At approximately 1:00 p.m., defendant left the residence and took public transportation to Long Beach. Defendant then placed Nathan in the first dumpster he saw because Octavia was coming to meet him. Octavia called 911 because defendant could not bring himself to do so. Octavia told defendant during a telephone conversation to continue with the plan.

Defendant testified that he lied to the police when he said Nathan had been kidnapped and defendant had struck Nathan. Defendant told the police that he hit Nathan because he knew that, "they wanted somebody and . . . I would not give Octavia up at

that time. I . . . took it all on myself." Defendant told his father that defendant killed Nathan '[b]ecause if I would have told my father the truth, then they would have went after her. . . ."

Defendant testified that he only started taking care of Nathan a week before his death. Defendant never did anything to Nathan two weeks before his death that caused Nathan to suffer multiple rib fractures.

B. Procedural Background

The District Attorney of Los Angeles County filed an information charging defendant in count one with murder in violation of section 187, subdivision (a), in count two with assault on a child under eight years old causing death in violation of section 273ab, and in count three with child abuse in violation of section 273a, subdivision (a). The District Attorney alleged as to count three that defendant willfully caused and permitted a child to suffer and inflicted unjustifiable physical pain and injury that resulted in death, within the meaning of section 12022.95. Defendant pleaded not guilty and denied the special allegation. Count three was dismissed on the prosecution's motion.

The matter was tried before a jury. The jury found defendant guilty of second degree murder as to count one, and guilty of assault on a child under eight years old causing death on count two. The trial court denied probation, sentenced defendant to a term of 25 years to life imprisonment on count two, and stayed sentencing of count one pursuant to section 654.

DISCUSSION

A. Immunity

Defendant contends that the trial court deprived him of his rights to a fair trial; confrontation; compulsory process; and to present a defense, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by denying his request to order that immunity be conferred upon Octavia. We disagree.

1. Background Facts

In connection with the request for immunity and an evidentiary motion discussed in B *post*, a compact disc of Octavia's September 19, 2008, recorded interview by Long Beach Police Department detectives was played for the trial court out of the presence of the jury. Octavia stated that she understood that the detectives were interviewing her because Nathan had been kidnapped.

Octavia told the detectives that at midnight and 2:00 a.m. on September 19, 2008, she was with Nathan because Nathan was teething. Octavia saw that Nathan had a bruise on the left side of his face from his eyebrow to midway on his cheek, and defendant had previously told her that Nathan fell coming out of the bathroom because defendant was running after him. Nathan did not have any other injuries.

Octavia also told the detectives that Nathan woke up at 7:00 a.m. on September 19, 2008, and Octavia fed and bathed Nathan, dressed him in a green shirt, green and yellow pants with a "tic tac toe" design, and Converse shoes, and laid him back down in his crib. Octavia said she last saw her son at about 10:30 a.m. on September 19, 2008, when she kissed him while he was asleep and left the house to go to school. Octavia left Nathan with defendant. Defendant never watched Nathan until the previous week.

Octavia told the detectives that defendant called her and said that he was being followed by a van, and she had a second telephone conversation with defendant and defendant told her that individuals from the van took Nathan while defendant was urinating in an alley, and defendant may have been stabbed. Octavia called 911.

The detectives then showed Octavia a photograph of Nathan, deceased. Octavia asked where they found Nathan, and the detectives responded that they could not reveal that information. One of the detectives said to Octavia, "like I told you before, and I'll tell you once again, what you're telling us and what [defendant] is telling us doesn't make sense. It's not coming together. Having seen the photo identifying your son, is there anything else that you want to tell us? Is there some truth that perhaps you didn't tell us that you'd like to tell us now?" Octavia responded that she did not see Nathan the

morning of September 19, 2008, or during the previous evening. Octavia said she last saw Nathan at about 10:30 a.m. on September 18, 2008.

Octavia said that she told the detectives that she saw Nathan in the morning of September 19, 2008, because "it makes me feel bad that I hadn't seen him before I left." Octavia said that her telling the detectives that Nathan was awake the prior night because he was teething was not true. Octavia also said she fabricated the story that she saw a bruise on Nathan's face. Defendant told her that Nathan had a bruise, and Octavia assumed it was on Nathan's face. Octavia also said that she knew what Nathan was wearing when he was killed because she heard a description of the outfit on the police radio.

2. Request and Denial Regarding Immunity

Defendant's counsel stated that he intended to call Octavia as a witness at trial, and he intended to ask Octavia "where she was, what she witnessed, what time she got home," and what "specific interactions" she had with Nathan or defendant. Octavia's counsel stated that Octavia would be invoking her Fifth Amendment right not to testify regarding events occurring prior to September 18 through September 20, 2008, including the injuries purportedly suffered by Nathan two to three weeks prior to his death. The prosecutor stated that he was unwilling to grant use or transactional immunity to Octavia because, among other reasons, the autopsy report indicated that Nathan had preexisting injuries which may lead to charges of child endangerment.[4] Defendant therefore requested, based on the statements Octavia made to the detectives, that the trial court grant immunity to Octavia so she could testify.

The trial court denied defendant's request to grant immunity to Octavia, stating "The *People v. Lucas* is very clear. And the court states in that case, 'the proponent of this request must meet the stringent offer of proof requirements. And those are that the proffered testimony must be clearly exculpatory, the statement must be essential, there

---

[4] Defendant does not contend that Octavia could not exercise her Fifth Amendment right not to testify.

must be no strong governmental interests which countervail such a grant of immunity.' [¶] Now, having listened to the three and a half hours of the interview, I find the following: [¶] Number one, the testimony was in fact ambiguous. [¶] Number two, the testimony was not clearly exculpatory. [¶] Number three, the testimony really only related to the credibility of the prosecution's witness, should she be a prosecution witness and, [*sic*] [¶] Number four, there certainly was a strong governmental interest which did in fact countervail against the grant of immunity. [¶] For those reasons, the request is denied."

3. Analysis

"The grant of immunity is an executive function, and prosecutors are not under a general obligation to provide immunity to witnesses in order to assist a defendant. [Citations.]" (*People v. Williams* (2008) 43 Cal.4th 584, 622; accord, *People v. Samuels* (2005) 36 Cal.4th 96, 127; *People v. Stewart* (2004) 33 Cal.4th 425, 468.) Our Supreme Court has stated that, "[M]any courts—including this court [citation]—have recognized that the power to confer immunity is granted by statute to the executive, that is, to the prosecution (see § 1324), and have questioned whether a trial court possesses inherent authority to grant such immunity. Indeed, addressing this question in *People v. Lucas* (1995) 12 Cal.4th 415 . . . [(*Lucas*)], our court characterized as 'doubtful' the 'proposition that the trial court has inherent authority to grant immunity.' [Citations. . . .] Nevertheless, in *Lucas* and [(*People v.*] *Hunter* [(1989) 49 Cal.3d 957 (*Hunter*))] and other cases [citations], we proceeded to assume that such inherent judicial authority exists and to address whether the defendant met the stringent requirements described in *Hunter* and [*Government of Virgin Islands v.*] *Smith* [(3d. Cir. 1980) 615 F.2d 964 (*Smith*)], under which such relief conceivably might be warranted. . . . [¶] We acknowledged in *Hunter*, *supra*, 49 Cal.3d 957, that it was 'possible to hypothesize cases' in which 'a judicially conferred use immunity might possibly be necessary to vindicate a criminal defendant's rights to compulsory process and a fair trial.' (*Id*. at p. 974.) We reviewed 'the one case which has clearly recognized' such authority—*Smith*, *supra*, 615 F.2d

964—and highlighted two '"clearly limited"' circumstances (both articulated in *Smith*) in which judicially conferred use immunity might be constitutionally necessary. [Citation.] [¶] The first of the two tests . . . would recognize the authority of a trial court to confer immunity upon a witness when each of the following three elements is met: (1) '"the proffered testimony [is] clearly exculpatory; [(2)] the testimony [is] essential; and [(3)] there [is] no strong governmental interest[] which countervail[s] against a grant of immunity."' [Citations.]" (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 468-469, fn. omitted.) "'Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or it is found to relate only to the credibility of the government's witnesses.'" (*Hunter*, *supra*, 49 Cal.3d at p. 974.)

Assuming that he trial court possessed the inherent authority to grant immunity, the circumstances in this case do not meet the stringent requirements described in *Hunter*, *supra*, 49 Cal.3d 957 and *Smith*, *supra*, 615 F.2d 964. Octavia's statements to the detectives were ambiguous. She gave conflicting stories about whether she saw Nathan the evening prior and the morning of the discovery of his body in the trash.

There was also a strong governmental interest in not granting immunity to Octavia. The prosecutor stated that he was unwilling to grant use or transactional immunity to Octavia because, among other reasons, the autopsy report indicated that Nathan had preexisting rib injuries. Defendant argues that there was not a strong governmental interest against the grant of immunity because there is no indication in the record that Octavia was ever prosecuted for physically abusing Nathan. Because Octavia may not have ultimately been prosecuted for abusing Nathan does not mean that, at the time of the trial court's denial of defendant's request, there was not a strong governmental interest in not granting immunity to Octavia.

"The second of the two tests referred to in *Hunter*, *supra*, 49 Cal.3d 957, as authorizing a trial court to grant immunity to a defense witness, would recognize such authority when 'the prosecutor intentionally refused to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative exculpatory evidence,' thereby distorting the judicial factfinding process. [Citations.]" (*People v. Stewart*,

supra, 33 Cal.4th at p. 470.) The record does not disclose facts that the prosecutor intentionally refused to grant immunity to Octavia "for the purpose of suppressing essential, noncumulative exculpatory evidence." (*Ibid*.) The trial court did not err by denying defendant's request to order that immunity be conferred upon Octavia.

B. Evidentiary Rulings

Defendant contends that the trial court violated his constitutional rights to due process, a fair trial, and to present a defense, by excluding Octavia's recorded statements, and evidence of Octavia's reaction to learning that Nathan was dead. The trial court did not err.

1. Standard of Review

"A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Ledesma* (2006) 39 Cal.4th 641, 705.)

2. Octavia's Recorded Statements

Defendant contends that the trial court abused its discretion in excluding Octavia's statements made to the detectives because they were admissible as declarations against penal interest. We disagree.

i. Background Facts

During trial, defense counsel sought to introduce Octavia's recorded statements made to the Long Beach Police Department detectives as declarations against penal interest. Defendant's defense was that Octavia, not defendant, killed Nathan. Defense counsel argued that Octavia told the detectives that she had contact with Nathan between midnight and 10:30 a.m., well within the coroner's estimate of when Nathan was killed.

Defense counsel also argued that Octavia told the police that she dressed Nathan in the morning of September 19, 2008, and the description of the clothes she put on Nathan matched the clothes Nathan had on when his body was discovered in the dumpster. The trial court found that Octavia's statements were "unequivocally, sufficiently adverse to [her] interest . . . [but were] not . . . in any way trustworthy," and the trial court denied defendant's motion.

ii. Analysis

Subject to recognized exceptions, the hearsay rule bars out-of-court declarations of nonparties which are offered to prove the truth of the matter stated. (Evid. Code, § 1200.) "The chief reasons for this general rule of inadmissibility are that the statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury cannot observe the declarant's demeanor while making the statements. [Citations.]" (*People v. Fuentes* (1998) 61 Cal.App.4th 956, 960-961.) "An electronic voice recording has no more sanctity than the oral testimony of a witness recounting the same extrajudicial declarations." (*People v. Sundlee* (1977) 70 Cal.App.3d 477, 483.)

Evidence Code section 1230 sets forth an exception to the hearsay rule for a declaration against penal interest.[5] "The proponent of such evidence must show 'that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' [Citation.]" (*People v. Lucas*, *supra*, 12 Cal.4th at p. 462.) "There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception. The trial court must look to the totality of the

---

[5] Evidence Code section 1230 provides, "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry. [Citations.]" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334.)

Octavia's recorded statements were not trustworthy. During the course of the interviews with the detectives, Octavia gave different versions of the events immediately preceding Nathan's death. In one version, Octavia told the detectives that she checked on Nathan at midnight and 2:00 a.m. on September 19, 2008, and shortly after 7:00 a.m. she fed, bathed, and dressed Nathan. In another version, after learning that Nathan was dead, Octavia told the detectives that she had not seen Nathan since the morning of September 18, 2008. Octavia stated that she lied about seeing Nathan during the early morning hours of September 19, 2008, because "it makes me feel bad that I hadn't seen him before I left." Octavia also said that the reason her description of the clothes she put on Nathan matched the clothes Nathan had on when his body was discovered in the dumpster was because she previously heard a description of the outfit on the police radio.

Defendant also contends that Octavia's statements were admissible as third party culpability evidence. Defendant argues that Octavia's recorded statements raised a reasonable doubt as to his guilt. Such evidence need not show a "substantial proof of a probability" that a third party committed the wrongful act; it need only be capable of raising a reasonable doubt of defendant's guilt. (*People v. Hall* (1986) 41 Cal.3d 826, 833.)

"As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.] [T]his principle applies perforce to evidence of third-party culpability. . . ." (*People v. Hall*, *supra*, 41 Cal.3d at pp. 834-835.) In explaining why defendants do not have the constitutional right to the admission of unreliable hearsay statements, our Supreme Court pointed out: "'Few rights are more fundamental than that of an accused to present witnesses in his own defense.

[Citations.] [But i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 269.) The trial court did not "exercise its discretion in an arbitrary, capricious, or patently absurd manner." (*People v. Rodriguez, supra,* 20 Cal.4th at pp. 9-10; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 705.)

3. Evidence of Octavia's Reaction upon Being Informed of Nathan's Death

Defendant contends that the trial court erred by excluding under Evidence Code section 352 evidence regarding Octavia's reaction upon being informed of Nathan's death. There was no error.

i. Background Facts

Defendant's counsel sought to introduce evidence regarding Octavia's reaction upon being informed of Nathan's death by the Long Beach Police Department detectives. Defendant's counsel argued that Octavia lacked emotion and "there is not a single parent in that jury that's going to believe that she didn't know the child was dead, nobody who learns that their child is dead is going to react like that, nobody." The trial court stated, "The way that somebody reacts to the death of a loved one is so subjective. . . . [D]ifferent people react differently and I'm not so sure that we can place a lot of credence on how she did or did not react." The prosecutor objected that such evidence was "more prejudicial than probative." The trial court agreed stating that, "under [Evidence Code section] 352, I'm going to exclude it because . . . [there is a] substantial danger of confusing the issues in this case. Everybody over there will have a different impression of what went on in her mind. We don't know. They don't know and for that reason I'm going to exclude that."

ii. Analysis

A defendant in a criminal trial must be afforded certain rights to ensure the basic fairness of the proceedings. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, [citation], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, [citations], the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [Citations.]" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.)

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Evidence Code section 352 provides an exception to the rule that all relevant evidence is admissible, stating that, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "'The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules. . . . [Citation.]'" (*People v. Greenberger, supra*, 58 Cal.App.4th at p. 352.) "[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Defendant's reliance on *People v. Greenberger, supra,* 58 Cal.App.4th at p. 352 and *People v. Reeder* (1978) 82 Cal.App.3d 543, 553, for the proposition that a criminal defendant has a constitutional right to present all relevant evidence in his favor and section 352 must bow to the due process rights of a defendant to a fair trial by presenting all relevant evidence in his favor is misplaced. These cases involve the exclusion evidence of "significant" probative value. Citing *People v. Reeder, supra*, 82 Cal.App.3d at p. 553, the court in *People v. Greenberger, supra*, 58 Cal.App.4th at p. 352, explained, "'We do not mean to imply, however, that a defendant has a constitutional right to

present all relevant evidence in his favor, no matter how limited in probative value such evidence will be so as to preclude the trial court from using Evidence Code section 352.'" Evidence lacking significant probative value may properly be excluded without offending the Constitution. (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.) The application of the ordinary rules of evidence generally does not infringe on a defendant's constitutional rights. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1229.)

Here, evidence of Octavia's audio reaction upon learning of Nathan's death was not of substantial probative value. People react differently, and therefore her subjective audible response is of limited probative value that she, instead of defendant, killed Nathan. The trial court also properly determined that such evidence posed a substantial danger of confusing the issues in this case. The trial court did not err in excluding this evidence.

C. Jury Instructions

Defendant contends that trial court violated his constitutional rights to due process, and a fair trial by refusing to instruct the jury with CALJIC Nos. 9.37, 6.40, and 4.45. We disagree.

1. Standard of Review

We review defendant's claims of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210; *People v. Sweeney* (2009) 175 Cal.App.4th 210, 223.) "The proper test for judging the adequacy of instructions is to decide whether the trial court 'fully and fairly instructed on the applicable law . . . .' [Citation.] '"In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]"' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.)

2. CALJIC No. 9.37

Defendant contends that the trial court erred by refusing to instruct the jury with CALJIC No. 9.37 concerning child abuse—a so-called lesser related offense—because the prosecution and defendant agreed that the trial court could give the instruction. The trial court did not err.

Defendant's counsel asked the trial court to instruct the jury with CALJIC No. 9.37[6], child abuse, as a lesser related offense to assault on a child under eight years old causing death in violation of section 273ab. The prosecutor agreed with defense counsel's request, stating, "There is in theory a fact pattern [that] arguably could be found that [defendant] abused a child, that he struck a child, he was negligent in his care, that he put the child to sleep and somehow the child died in the [*sic*] sleep, not necessarily related to his conduct."[7] The trial court stated, "We don't give lesser related anymore," and denied defendant's request.

Our Supreme Court has stated, "A defendant has no right to instructions on lesser related offenses, even if he or she requests the instruction and it would have been supported by substantial evidence, because California law does not permit a court to instruct concerning an uncharged lesser related crime unless agreed to by both parties. ([*People v.*] *Kraft* [(2000)] 23 Cal.4th [978,] 1064-1065; [*People v.*] *Birks* [(1998)] 19 Cal.4th [108,] 136-137.)" (*People v. Jennings* (2010) 50 Cal.4th 616, 668.) In overruling

---

[6] CALJIC No. 9.37 provides in part, "Every person who, under circumstances or conditions likely to produce great bodily harm or death, [willfully inflicts unjustifiable physical pain or mental suffering on a child,] [or] [willfully causes or, willfully and as a result of criminal negligence, permits a child to suffer unjustifiable physical pain or mental suffering,] [or] [has care or custody of a child and [¶] [a] [willfully causes or, willfully and as a result of criminal negligence, permits the child's person or health to be injured,] [or] [¶] [b] [willfully causes or, willfully and as a result of criminal negligence, permits the child to be placed in a situation where his or her person or health may be endangered,]] [¶] is guilty of a violation of Penal Code § 273a, subdivision (a), a crime."

[7] The prosecutor originally charged defendant in Count 3 with child abuse in violation of section 273a, subdivision (a). The trial court granted the prosecution's motion to dismiss Count 3.

its decision in *People v. Geiger* (1984) 35 Cal.3d 510, in which the court permitted a defendant to determine unilaterally on what lesser related offenses a trial court must instruct the jury, the court in *People v. Birks, supra,* 19 Cal.4th at page 136 stated that a criminal defendant does not have "a unilateral entitlement to instructions on lesser offenses which are not necessarily included in the charge."

Defendant argues that the requested jury instruction should have been given because the prosecutor agreed it could be given. In support of his contention, defendant relies on *People v. Birks, supra,* 19 Cal.4th at page 136, footnote 19. In that footnote, the court explained, "that our decision does not foreclose the parties from agreeing that the defendant may be convicted of a lesser offense not necessarily included in the original charge." (*Ibid.*) This statement, however, does not support defendant's contention that a trial court errs if it does not instruct the jury on an uncharged lesser related offense notwithstanding the agreement of the prosecution and defense to have the trial court give the instruction, and defendant does not cite to any authority that such a refusal to give the instruction would constitute error.

There is no statute or authority requiring that the jury be instructed with an uncharged lesser related offense. Section 1093, subdivision (f) provides, "The judge may then charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party . . . ." Section 1093.5 states, "Before the commencement of the argument, the court, on request of counsel, must: (1) decide whether to give, refuse, or modify the proposed instructions . . . ." Unless the trial court is required by statute or case law to give a jury instruction, it does not have to do so. For example, a trial court may refuse to give an instruction if it is not supported by substantial evidence (*People v. Bolden* (2002) 29 Cal.4th 515, 558) or would be "confusing and not helpful to the deliberative process." (*Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 528; see *Harris v. Oaks Shopping Center* (1999) 70 Cal.App.4th 206, 209 ["trial court is not required to give every instruction offered by a litigant. . . . Irrelevant, confusing, incomplete or misleading instructions need not be given"].) The ultimate decision of whether to give an instruction on an uncharged lesser related offense

should not be removed from the trial court. (See *People v. Lam* (2010) 184 Cal.App.4th 580, 583 [in a case involving claims of ineffective assistance of defense counsel for failing to request a lesser related offense instruction, the court said "even if counsel had requested the instruction, no reasonable possibility existed that the prosecutor *and trial court* would have agreed to it because no substantial evidence supported it" (italics added)].

The Supreme Court in *People v. Birks, supra,* 19 Cal.4th at pages 123, 127 through 130 did say that a defendant could not unilaterally require the instruction on an uncharged lesser related offense because such a requirement would be unfair to the prosecution and interfere with its charging determination. The court, however, also noted, with regard to such an instruction, "there can be no clear standards for determining when a lesser offense, though not necessarily included in the charge, is nonetheless related for instructional purposes. This leaves an accused potentially infinite latitude to argue a sufficient link." (*Id.* at p. 131.) The court added, "[t]he resolution of requests for instructions on lesser related offenses thus involves nuanced "'questions of degree and judgment."' [Citation.]" (*Ibid*; see 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 632 ["There can be no clear standards for determining when a lesser offense though not necessarily included in the charge, is nonetheless 'related' for instruction purposes. This uncertainty creates an increased likelihood that trial and appellate courts will disagree in a particular case, and that appellate precedents will conflict, thus detracting from the fair and efficient administration of justice"].) Thus, the reasons given in *People v. Birks* for overruling *People v. Geiger, supra,* 35 Cal.3d 510 were not restricted to the impact of a lesser related offense instruction upon the prosecution, but involved other difficulties with such an instruction. Accordingly, *People v. Birks* should not be read to require an uncharged lesser related offense instruction when the prosecutor agrees to it.

"'[T]here is no federal constitutional right of a defendant to compel the giving of lesser-related-offense instructions. [Citation.]' [Citation.]" (*People v. Foster* (2010) 50 Cal.4th 1301, 1343; see also *People v. Kraft, supra,* 23 Cal.4th at p. 1064 [defendant not

entitled to instruction on lesser related offense even if supported by evidence].) Defendant, is relying solely on the prosecutor's acquiescence in the request for the instruction. As there is no requirement that the trial court give an uncharged lesser related offense instruction even if the defendant and prosecutor agree to have it given, the trial court's refusal to give the instruction did not constitute error.

Even if the failure to give the instruction constituted error, such an error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendant's defense was that he never struck the child—the victim. In addition, in view of defendant's statements and other evidence that he killed the child, there is not a reasonable probability that defendant would have received a more favorable result had the instruction been given. (*Ibid.*)

3. CALJIC No. 6.40

Defendant's counsel asked the trial court to instruct the jury with CALJIC No. 6.40,[8] concerning the offense of accessory after the fact. The prosecutor opposed the giving of such instruction, and the trial court denied the request.

Defendant argues that the trial court should have granted his request that the jury be instructed with CALJIC No. 6.40 on the theory that being an accessory after the fact is a defense to the charges. The offense of accessory after the fact however is not a defense to murder or assault on a child under eight years old causing death; rather, it is a theory of

---

[8] CALJIC No. 6.40 provides in part, "Defendant is accused [in Count[s]___] of having committed the crime of being an accessory to a felony in violation of § 32 of the Penal Code. [¶] Every person who, after a felony has been committed, harbors, conceals or aids a principal in that felony, with the specific intent that the principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that the principal has committed that felony or has been charged with that felony or convicted thereof, is guilty of the crime of accessory to a felony in violation of Penal Code § 32. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A felony, namely_____, was committed; [¶] 2. Defendant harbored, concealed or aided a principal in that felony with the specific intent that the principal avoid or escape [arrest] [trial] [conviction or punishment]; and [¶] 3. Defendant did so with knowledge that the principal [committed the felony] [was charged with having committed the felony] [was convicted of having committed the felony]."

criminal liability based on a different offense. (§ 32.) As noted *ante*, at the very least both parties must agree before a trial court is permitted to instruct concerning an uncharged lesser related crime even if the defendant requests the instruction and it would have been supported by substantial evidence. (*People v. Jennings*, *supra*, 50 Cal.4th at p. 668.) The prosecutor did not agree to instruct the jury with CALJIC No. 6.40. Thus, for that reason, the trial court did not err.

4. CALJIC No. 4.45

Defendant contends that trial court had a sua sponte duty to instruct the jury with CALJIC No. 4.45, and it erred in failing to give the instruction. We disagree.

"[A] trial court's duty to instruct, sua sponte, or on its own initiative, on particular defenses is more limited, arising 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 195.)

CALJIC No. 4.45 provides, "When a person commits an act or makes an omission through misfortune or by accident under circumstances that show [no] [neither] [criminal intent [n]or purpose,] [nor] [[criminal] negligence,] [he] [she] does not thereby commit a crime." A defense that defendant killed Nathan by accident is inconsistent with his defense presented in the case. Defendant testified that he did not kill Nathan, and he merely assisted Octavia in disposing of Nathan's body after his death. Defendant also testified that he did not tell the police the truth when he said he hit Nathan the night before Nathan's death.

There was evidence that defendant had two telephone conversations during which he admitted to killing Nathan, but claimed it was an accident. Defendant however testified that he did not tell his father the truth, in one of the conversations, when he said he killed Nathan. In addition, evidence of the extreme nature and extent of the injuries sustained by Nathan is inconsistent with a defense that defendant accidently killed Nathan. Dr. Ribe testified that Nathan died as a result of a blunt force trauma that caused

a "massive depressed skull fracture and multiple rib injuries with crushing chest injuries" and that the skull injury indicated "an extremely violent impact of the back of the head," similar to "a person falling off the second floor of a building and landing on concrete." Dr. Ribe further testified that Nathan's rib and chest injuries were consistent with being caused by Nathan's back being stomped on by an adult's foot. There was also uncontroverted evidence that Nathan received other numerous and extensive injuries immediately before and at the time of his death. The trial court did not err by not instructing the jury with CALJIC No. 4.45.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.