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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JAMES C. LUJAN, Defendant and Appellant.	2d Crim. No. B231123 (Super. Ct. No. 1325752) (Santa Barbara County)

In *Maryland v. Craig* (1990) 497 U.S. 836 (*Craig*), the United States Supreme Court held that a child abuse victim could testify by closed-circuit television under certain circumstances without violating the criminal defendant's right to confront witnesses. In the published portion of our decision, we hold that the same rule applies to a child witness who is not a victim. We also hold that California courts have the inherent authority to order remote testimony in these circumstances.

FACTS AND PROCEDURAL HISTORY

I. Offense Conduct

A. Lena

In the spring of 2006, Lujan was dating Stacy B. When Lujan, Stacy B. and her 17-month-old daughter Lena started living together in a converted garage, Lena was a "very happy" and healthy toddler. Over the next several weeks, that changed.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are identified as those portions between double brackets, e.g., **[[/]]**.

Lujan's family members and others noticed bruises on Lena's shoulder blades, head, neck and chest. They saw she had a black eye and that her fingertips were burnt and red. Lujan told a friend that the injuries to Lena's shoulder blades looked like they were made with "a fucking stick." Others noticed that Lena seemed frightened of Lujan. They saw him swaddle Lena tightly like a "burrito" and put a blanket over her head. They also saw Lujan put Tobasco sauce on Lena's tongue, which became blistered and swollen.

On the morning of June 12, 2006, Stacy B. left Lena with Lujan. Lujan wanted to go with his brother to a flower show, but could not because he was watching Lena. When his attempts to reach Stacy B. failed, Lujan said he became "frustrated" and "hella mad." When Stacy B. returned that afternoon, Lena had a seizure and difficulty breathing. Responding emergency paramedics dislodged an almond from Lena's throat, but she still struggled to breathe.

By the time she arrived at the emergency room, Lena was "near death." The emergency room doctor testified that Lena displayed "classic" symptoms of shaken baby syndrome—namely, bleeding in the brain and bleeding behind the eyes. The injuries had been inflicted within the prior 48 hours. Both of Lena's collarbones were broken, likely caused by a "significant" downward hit directly on those bones.

B. Diego

Three years later, Lujan was living with Meagan D. She had two children, five-year-old Vanessa and four-year-old Diego. Although Lujan was good to Diego at first, by the time they moved into the Budget Motel in Lompoc in mid-July 2009, things had started to deteriorate. Lujan would bite Diego's fingertips and feed him Tobasco sauce. If Diego upset him, Lujan would make Diego stand in the corner with his arms up, head back and knees bent. When the stance became painful and Diego cried, Lujan would call Diego a "little bitch," a "little baby," a "piece of shit." He would also punch him in the sides, back and stomach, and kick him in the back of the legs. These beatings, which both Meagan D. and Vanessa witnessed, occurred on July 16 or 17. By the

morning of July 18, Diego displayed flu-like symptoms. Meagan D. called 911. Lujan left the motel as soon as she did so.

Diego died hours later. The cause of death was blunt-force trauma to the abdomen that ruptured the connection between his stomach and small intestine, causing stomach contents to spill into his abdominal cavity. The autopsy also revealed that Diego had 128 bruises all over his body, including his arms, legs, back, chest, stomach, head and penis.

II. Charges

The State charged Lujan with torturing Lena and Diego, in violation of Penal Code section 206.[1] As to Diego, the State also charged Lujan with second degree murder, in violation of section 187, subdivision (a), and with child abuse causing death, in violation of section 273ab, subdivision (a).[2]

III. Procedures Regarding Remote Testimony

The trial court allowed Vanessa, age seven at time of trial, to testify over a two-way, closed-circuit TV. Vanessa sat in a separate room from which Lujan, his attorney, the district attorney. The jury could see her on a video monitor. Vanessa could view a monitor that showed everyone in the courtroom except Lujan. The judge admonished the jury not to place any weight on the use of the closed-circuit TV procedure. Before allowing this procedure, the judge heard testimony from family therapist Virginia Rohen and Lompoc Detective Suzie Aanured. The judge thereafter found that remote testimony was "necessary for the protection of [Vanessa] because she would be unable to testify in front of [Lujan] because of fear or that [she] would suffer emotional trauma from testifying in open court."

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

[2] Lujan was also charged with willfully inflicting corporal injury on Meagan D., in violation of section 273.5, subdivision (a). The jury acquitted him of that charge.

IV. Verdict and Sentencing

The jury convicted Lujan of all charges with respect to Lena and Diego. The trial court sentenced him to 64 years to life, plus 11 years.

DISCUSSION

I. Remote Testimony of Vanessa

Lujan mounts a three-pronged attack on the court's ruling allowing Vanessa to testify by closed-circuit television (TV). First, he argues that *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) changed the meaning of the Confrontation Clause and always entitles a criminal defendant to face his accusers. Second, Lujan contends that, even if *Crawford* does not confer an absolute right to face-to-face confrontation, the United States Supreme Court has at most tolerated remote testimony by child witnesses who are victims of a crime. (*Maryland v. Craig*, *supra*, 497 U.S. 836.) Extending *Craig* to children who are merely witnesses, Lujan posits, goes too far. Lastly, Lujan asserts that the trial court lacked authority to order two-way, video testimony because the statutory procedures for remote testimony by children set forth in section 1347 apply only to child witnesses who are victims of certain crimes.

A. *Crawford Did Not Overrule Precedent Governing When In-Court Testimony Is Required*

Our Supreme Court recently rejected the argument that *Crawford* modified the United States Supreme Court's approach to determining when face-to-face testimony is required. (*People v. Gonzalez* (2012) 54 Cal.4th 1234.) The Court reasoned that "*Crawford* and its progeny are limited to 'testimonial' *hearsay* statements, and say nothing about whether a witness who testifies *in person* must face the defendant." (*Id.* at p. 1266.)

B. *When Necessary, Non-Victim Child Witnesses May Testify Remotely*

In general, the Confrontation Clause guarantees a criminal defendant "a face-to-face meeting with witnesses appearing before the trier of fact. [Citation.]" (*Coy v. Iowa* (1988) 487 U.S. 1012, 1016 (*Coy*).) But this rule has never been absolute. (*Id.*,

at pp. 1020-1021.) *Coy* itself recognized that face-to-face testimony would not be required when alternate procedures, such as testimony from a remote location, are necessary to further an important government public policy. (*Id.*, at p. 1021; *Craig*, 497 U.S. at pp. 844-845.)

So far, the United States Supreme Court has been called upon to apply *Coy*'s exception in only one case. In *Craig*, the Court upheld a Maryland statute that authorized underage victims of child abuse to testify by one-way, closed-circuit TV upon a witness-specific showing that face-to-face testimony would be traumatic to the child.[3] Tracking *Coy*'s exception, the Court in *Craig* viewed Maryland's interest in "'the protection of minor victims of sex crimes from further trauma and embarrassment,'" as not only important, but "'compelling.'" (*Craig, supra*, 497 U.S. at p. 852.) By requiring a witness-specific showing of trauma, the statute also guaranteed that remote testimony was limited to those situations in which it was necessary to further the State's compelling interest.

Lujan argues that *Craig* marks the outer boundary of when remote testimony is acceptable under the Confrontation Clause. According to Lujan, allowing children who are not victims to testify remotely transgresses *Craig*'s boundary and is unconstitutional. At no point in the *Craig* opinion, however, did the Supreme Court indicate that it was staking out the perimeter of when the Confrontation Clause permits remote testimony. *Craig* simply applied *Coy*'s exception to the facts before it. We now do the same. Because this is a question of constitutional law, our review is de novo. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1154.)

The trial court in this case based its use of remote testimony on its earlier finding that Vanessa would be traumatized by facing Lujan in court. This satisfies the

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[3] Because *Craig* approved of a one-way video feed that did not allow the child to see the courtroom at all, there is no merit to Lujan's subsidiary argument that his confrontation rights were violated because Vanessa could see everyone in the courtroom except him over the two-way video feed.

necessity component of *Coy*'s exception. Consequently, the constitutionality of Vanessa's remote testimony turns on whether the State has an important public policy interest in protecting minor witnesses who are not victims from the trauma of facing in court the perpetrators of the crimes they witnessed. We conclude that the State has such an interest for three reasons.

First, the Court in *Craig* recognized (or, at a minimum, strongly hinted) that the State's compelling interest in protecting child witnesses from trauma reaches *all* child witnesses—not just the subset who are charged as victims. To be sure, *Craig* cited the State's interest in "'the protection of minor victims of sex crimes from further trauma and embarrassment . . . .'" (*Craig*, *supra*, 497 U.S. at p. 852.) But this was the interest directly implicated by the Maryland statute under review in *Craig*. Significantly, the Court stated that this narrower interest was just one aspect of "the State's traditional and '"transcendent interest in protecting the welfare of children."' [Citation.]" (*Id.* at p. 855.) This broader interest encompasses *all* child witnesses, victim or not.

Second, there is no principled basis upon which to distinguish the State's interest in protecting child witnesses who are victims from those who are not. The State's longstanding interest in protecting the welfare of children applies just as readily to children, such as Vanessa, who are forced to witness the abuse of their siblings at close range as it does not the actual victims of such abuse.

Third, viewing the State's interest in protecting non-victim child witnesses as less important is itself constitutionally suspect. Lujan urges us to treat children who are not victims of a crime as *categorically* less traumatized and hence never excused from face-to-face confrontation. Doing so commits the very sin the Supreme Court condemned in *Coy*—that is, making a "generalized finding" about the level of trauma certain groups of witnesses experience when confronting defendants. (*Coy*, *supra*, 487 U.S. at pp. 1020-1021.) This argument is particularly unpersuasive in this case, where Lujan does not dispute the trial court's finding that Vanessa would be traumatized by confronting him, even though she is not the victim of any charged crime.

We hold that child witnesses shown to be traumatized by face-to-face confrontation may testify remotely without violating a defendant's Confrontation Clause rights, whether or not those witnesses are victims of an independent crime committed by that defendant. (Accord, *United States v. Etimani* (9th Cir. 2003) 328 F.3d 493, 498-501 [upholding, under *Craig*, the federal Child Victims and Child Witness Rights Act of 1990, 18 U.S.C. § 3509(a)(2), which authorizes the use of remote testimony for non-victim child witnesses].)

C. *The Trial Court Had Authority To Order Remote Testimony*

Lujan also argues that, even if his constitutional rights were not violated, the trial court lacked the authority under state law to order remote testimony. Lujan contends that section 1347 already speaks to this subject and limits the use of remote testimony to child victims of certain enumerated offenses. (*Id.*, at subd. (b)(1).) By exceeding this statutory grant of authority, he asserts that the trial court's order permitting Vanessa to testify remotely was invalid.

Lujan is correct that the trial court's order falls outside the ambit of section 1347, subdivision (b)(1), because Vanessa is not a victim of a sexual offense, a violent felony or a specified domestic violence offense. But that is not the end of the matter. Trial courts also possess a constitutionally conferred, inherent authority to "create new forms of procedures" in the gaps left unaddressed by statutes and the rules of court. (*James H. v. Super. Ct.* (1978) 77 Cal.App.3d 169, 175; *People v. Avila* (2011) 191 Cal.App.4th 717, 722-723; *Citizens Utilities Co. v. Super. Ct.* (1963) 59 Cal.2d 805, 812-813; see also Cal. Const., art. VI, § 1; Code Civ. Proc., § 187 [codifying this power]).

The propriety of Vanessa's remote testimony turns on whether the trial court had the inherent authority to order remote testimony by a non-victim child witness whom the court found would be traumatized by in-court testimony. We review the existence of this authority de novo. (*Carpenter v. Jack in the Box* (2007) 151

Cal.App.4th 454, 460.) But we review the exercise of inherent authority under the abuse of discretion standard. (*People v. Powell* (2010) 194 Cal.App.4th 1268, 1283).

We are mindful that courts must tread carefully when exercising their inherent authority to fashion new procedures. We may not sanction procedures of dubious constitutional validity. (*In re Amber S.* (1993) 15 Cal.App.4th 1260, 1266 (*Amber S.*) Nor may we bless procedural innovations inconsistent with the will of the Legislature or that usurp the Legislature's role by fundamentally altering criminal procedures. (*Hochheiser v. Super. Ct.* (1984) 161 Cal.App.3d 777, 791 (*Hochheiser*); see *People v. Collie* (1981) 30 Cal.3d 43, 55-56 [refusing to create reciprocal discovery procedures], superseded by § 1054.3; *Reynolds v. Super. Ct.* (1974) 12 Cal.3d 834, 837 [refusing to create alibi notice requirements], superseded by § 1054.1 et seq.)

These countervailing concerns are not strongly implicated when it comes to remote testimony by non-victim child witnesses. As explained above, necessity-based remote testimony by child witnesses stands on solid constitutional footing.

Authorizing remote testimony in this context also does not contravene our Legislature's intent. To the contrary, the Legislature in section 1347 itself declared its intent "to provide the court with discretion to employ alternative court procedures to protect the rights *of a child witness*, the rights of the defendant, and the integrity of the judicial process." (*Id.*, at subd. (a), italics added.) This intent is not limited solely to child witnesses who are victims. (Accord, Evid. Code, § 765, subd. (b) [authorizing court to "take special care to protect" witnesses under 14 years of age "from undue harassment or embarrassment"].) Accordingly, necessity-based remote testimony by non-victim child witnesses is consistent with our Legislature's intent, even though it is not specifically authorized by the statute. (*Cf. Rutherford v. Owens Illinois, Inc.* (1997) 16 Cal.4th 953, 967.)

Because the trial court still required the State to comply with the procedural requirements of section 1347, the court effectively used its inherent authority to extend section 1347 to non-victim witnesses. This is an incremental extension and does not

transmogrify criminal procedure in any fundamental way. In light of these considerations, the propriety of remote testimony by child witnesses is much different today than it was when *Hochheiser* held that a trial court lacked authority to allow a child abuse victim to testify remotely. (*Hochheiser, supra,* 161 Cal.App.3d at pp. 791-792.) Because *Hochheiser* was decided before *Coy, Craig* or section 1347 existed, it is no longer good law.

The soundness of our conclusion is confirmed by the many cases that have upheld a trial court's inherent authority to implement a plethora of alternate procedures for witness testimony. Courts have upheld the use of different in-court seating arrangements for children. (*People v. Sharp* (1994) 29 Cal.App.4th 1772, 1780-1786, overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 484.) They have affirmed use of previously videotaped testimony of an adult victim-witness with mental disabilities that was recorded outside the defendant's presence. (*People v. Williams* (2002) 102 Cal.App.4th 995, 1003-1009.) They have even sanctioned the use of one-way, closed-circuit TV in juvenile proceedings where section 1347 does not apply. (*Amber S., supra,* 15 Cal.App.4th at pp. 1264-1266; cf. *People v. Murphy* (2003) 107 Cal.App.4th 1150, 1158 [not allowing use of one-way remote testimony for child victim-witness because trial court made no showing of necessity].)

We hold that the trial court possessed the inherent authority to permit the use of two-way, closed-circuit TV for a child witness after the necessity for that procedure was demonstrated, even though she was not a victim. In light of this holding, we need not address the State's alternative argument that Vanessa was a "victim," within the meaning of section 1347, subdivision (b), of various uncharged crimes.

Because Lujan does not contest the court's finding of necessity, the court also did not abuse its discretion in ordering the procedure in this case. As this procedure comports with state law, we need not address Lujan's additional argument that the violation of state law also violated his federal due process rights.

[[II. Evidentiary Issues

A. *Admission of Vanessa's videotaped interview and post-interview statements*

Following Vanessa's testimony over closed-circuit TV, the State introduced two additional statements by her: (1) a portion of a videotaped interview with a Lompoc police officer recorded hours after Diego's death; and (2) an unprompted, post-interview statement. Both were admitted as spontaneous declarations. We review this evidentiary ruling for an abuse of discretion. (*People v. Poggi* (1988) 45 Cal.3d 306, 318 (*Poggi*).)

To be admissible as a spontaneous declaration, the proponent must establish that (1) a startling event occurred; (2) the utterance "must have been before there has been time to contrive and misrepresent"; and (3) the utterance relates to the circumstances of the startling event. (*People v. Thomas* (2011) 51 Cal.4th 449, 495.) Lujan does not contest that Diego's death was a startling event or that Vanessa's subsequent statements related to that event. He insists, however, that Vanessa's statements were not spontaneous because they were made in response to questions posed hours after her brother's death.

After viewing the videotape, reading the transcript, and meeting Vanessa, the trial court found Vanessa's statements to be spontaneous declarations because her statements were "in response to the event that her brother had just died" and "unlikely" to be the product of reflection.

This finding was not an abuse of discretion. The court asked the right question: Were Vanessa's declarations made "without deliberation or reflection" and while the speaker was "under the stress of excitement"? (*People v. Raley* (1992) 2 Cal.4th 870, 892-893.) Moreover, the court properly weighed the factors courts have relied upon in evaluating spontaneity. The court acknowledged that Vanessa made her statements two to three hours after she left the Budget Motel. It also recognized that she was responding to questions. These factors pointed toward a finding that her statements were not spontaneous. (See *People v. Washington* (1969) 71 Cal.2d 1170, 1176 [lapse of

time]; *Poggi, supra,* 45 Cal.3d at pp. 319-320 [prompted questions].) Other factors pointed toward the finding that her statements were not a product of reflection. Vanessa was young and relatively unsophisticated. The circumstances of her statement also indicated that she was under emotional strain, as she was crying, repeating herself and dwelling on the subject of her brother's death. (See *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1713 [age and lack of sophistication]; *People v. Clark* (2011) 52 Cal.4th 856, 926 [demeanor].). The ultimate outcome of the trial court's balancing of these facts was not arbitrary.

Lujan distinguishes this case from other cases where declarations have been upheld as spontaneous. But a case-by-case comparison is not particularly helpful because the cases turn on an intensely fact-drive inquiry that does not readily translate between cases. (*Poggi, supra,* 45 Cal.3d at p. 318.) This is why "the discretion of the trial court is at its broadest when it determines whether this requirement is met" (*ibid.*), and we conclude there was no abuse of discretion.

B. *Admission of Meagan D.'s videotaped interview*

Following the cross examination of Diego's mother, Meagan D., the trial court ruled that the State could play for the jury the videotaped police interview of Meagan D. That videotape was recorded the day of Diego's death and before her testimony at the preliminary hearing. Lujan's trial counsel had confronted Meagan D. several times on cross examination with inconsistencies between her trial testimony and her testimony at the preliminary hearing. Meagan D. was regularly using methamphetamine at the time of the preliminary hearing. The trial court found that Lujan had conducted a "pretty broad impeachment [of Meagan D.] with the use of what [she] could recall, couldn't recall because of the use of methamphetamine." The court accordingly found that the entire videotape, recorded at a time when her drug use was less rampant and her memory fresher, was properly admitted as a prior consistent statement. Lujan asserts that this ruling is incorrect and in violation of Evidence Code section 352. We review both claims for an abuse of discretion. (*People v.*

Eubanks (2011) 53 Cal.4th 110, 144-145; *People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.)

Lujan's main point is that the trial court erred, not in admitting the videotaped statement *at all*, but in admitting *too much* of that statement. Lujan conceded below that Meagan D. had been impeached on the details of Diego's beating and could properly be rehabilitated by portions of the videotape dealing with the beating. But the full duration of the videotaped statement, he argues, contains other extraneous and prejudicial evidence. In particular, Lujan challenges the admission of those portions regarding (1) his statement that Meagan D. was supposed to have had an abortion rather than have Diego; (2) his prior acts in harming a former girlfriend's daughter; and (3) Meagan D.'s nearly hysterical crying for several minutes at the beginning of the tape.

Lujan first asserts that the trial court was obligated to examine every statement in the videotape and match it with a statement on which Meagan D. was impeached on cross examination. He is incorrect. Prior consistent statements may be admitted in response to a specific prior inconsistent statement under Evidence Code section 791, subdivision (a). They may also be admitted in response to "[a]n express or implied charge . . . that [the witness's] testimony . . . is recently fabricated or . . . influenced by bias or other improper motive" under Evidence Code section, subdivision (b). (See Evid. Code, § 1236 [hearsay exception for statements meeting Evid. Code, **§** 791].)

Lujan's demand for a more granular, statement-by-statement analysis rests on the premise that the trial court applied Evidence Code section 791, subdivision (a). However, the court's ruling appears instead to be grounded on subdivision (b). "'The mere asking of questions may raise an implied charge of an improper motive.'" (*People v. Andrews* (1989) 49 Cal.3d 200, 210.) Because the State sought to introduce Meagan D.'s post-event interview to counter the charge that her preliminary hearing testimony was the product of drug-enhanced lies (see *People v. Kennedy* (2005) 36 Cal.4th 595,

614-615, overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405), Evidence Code section 791, subdivision (b) would seem to be more on point.

Admission of a prior consistent statement under Evidence Code section 791, subdivision (b) does not, however, open the proverbial floodgates by automatically "establish[ing] that [an] entire recording was admissible." (*People v. Riccardi* (2012) 54 Cal.4th 758, 803.) Meagan D.'s statement that Diego was not aborted was appropriately admitted because it addressed why Lujan had beaten Diego, a topic covered on cross-examination. However, the trial court did appear to have abused its discretion in admitting the other challenged portions of Meagan D.'s videotaped testimony because those topics were not addressed during cross-examination. Admission of these statements was therefore error. But that error was not prejudicial under *People v. Watson* (1956) 46 Cal.3d 818, 836. The injury to Lujan's ex-girlfriend's child referred to Lena's beating, which was already before the jury. Additionally, Meagan D.'s emotional state, although more evocative on the videotape, was duplicative of other testimony that Diego's death was "very traumatic" and "very shocking" to her. For much the same reason, we find that any error in admitting these statements under Evidence Code section 352 was not prejudicial.

Nor did this evidentiary error violate Lujan's federal constitutional rights because a trial court's abuse of discretion in admitting evidence "does not implicate the federal Constitution." (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) None of the cases Lujan cites is to the contrary.

III. Instructional Issues

A. Refusal to give sua sponte third-party culpability instruction

Based on the evidence he presented and argued, it appears that Lujan's theory of defense was that Lena and Diego were beaten by their mothers (Stacy B. and Meagan D.), and not him. Lujan argues that the jury might have mistakenly thought, based on the nature of his defense, that he first needed to prove Stacy B. or Meagan D. were guilty beyond a reasonable doubt before the jury could use his evidence of third-

party culpability to raise a reasonable doubt as to *his* guilt. Lujan requested no instruction to dispel this potential danger. He nevertheless contends on appeal that the trial court had a sua sponte duty to so instruct.

Even if not forfeited (see § 1259), our Supreme Court has roundly rejected Lujan's argument that trial courts have a sua sponte duty to give the instruction he now requests. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 823-825; *People v. Albilez* (2007) 41 Cal.4th 472, 516-517.) Lujan attempts to circumvent this precedent by recasting the failure to provide a sua sponte instruction as a due process violation, but *Albilez* also rejected that argument. (*Albilez, supra*, at p. 517.) Moreover, the cases Lujan cites do not address this situation. Any error is, moreover, harmless. The trial court gave the standard instructions regarding reasonable doubt and the presumption of innocence. (*E.g., People v. Hartsch* (2010) 49 Cal.4th 472, 504.) Moreover, no party urged the jury to entertain the torture logic Lujan now says the jury would naturally follow.

B. Child witness demeanor instruction

Lujan next contends that the trial court erred in giving CALCRIM No. 330, which explains how to assess the credibility of children under the age of 11. Section 1127f obligated the trial court to give this instruction once the State requested it. Lujan asserts that this instruction violates due process by directing jurors to disregard evidence that a child witness might be lying solely because of the child's age.

This argument has been repeatedly rejected. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1393-1394, superseded on other grounds, as noted in *People v. Levesque* (1995) 35 Cal.App.4th 530; *People v. McCoy* (2005) 133 Cal.App.4th 974, 980; *People v. Jones* (1992) 10 Cal.App.4th 1566, 1572-1574; *People v. Harlan* (1990) 222 Cal.App.3d 439, 454-457.)

Lujan nonetheless contends that these decisions are wrongly decided because CALCRIM No. 330 takes the issue of credibility away from the jury. In support of his argument, Lujan cites *United States v. Rockwell* (3d Cir. 1986) 781 F.2d 985. *Rockwell* is distinguishable. There, the court told the jury not to resolve a credibility

contest between two witnesses because credibility was "collateral to the main issue." (*Id.* at p. 988.) CALCRIM No. 330 does no such thing. Lujan further contends that there is a "reasonable likelihood" a jury would understand the instruction to preclude consideration of Vanessa's demeanor in assessing her credibility, but the decisions noted above have repeatedly rejected this argument. Lujan provides no basis to revisit those cases.

C. Erroneous immunity instruction

In listing the factors for the jury to consider in evaluating the credibility of witnesses, the trial court listed the factors set forth in CALCRIM No. 226, but also gave the following instruction: "Was the witness given immunity? Meagan D[.] was given use . . . and derivative use immunity when she testified at the preliminary hearing on November 19th, 2009. Use and derivative use immunity does not preclude the prosecution from charging the witness with a crime in the future. It does prevent the prosecution from using the witness' testimony at the hearing against the witness in the future. Use and derivative use immunity prevents a witness from refusing to testify by claiming the privilege against self-incrimination."

Lujan argues that this instruction constituted a flawed "pinpoint" instruction that improperly highlighted "facts" favorable to the State (i.e., that Meagan D. received immunity to overcome her Fifth Amendment privilege) and invited the jury to speculate why she was not charged with Diego's torture and murder. We evaluate jury instructions de novo. (*People v. Lopez* (2011) 198 Cal.App.4th 698, 708.)

Pinpoint instructions are designed to supplement the general jury instructions. They may cover only the proponent's theory of the case, and they must not highlight "specific evidence" or "improperly impl[y] certain conclusions from [that] evidence." (*People v. Wright* (1988) 45 Cal.3d 1126, 1137.) The instruction here certainly called the jury's attention to the *fact* that Meagan D. was granted immunity, but that is unquestionably proper. (*People v. Hunter* (1989) 49 Cal.3d 957, 978.) It was, in fact, *Lujan* who elicited the facts surrounding Meagan D.'s immunity; Lujan also did not oppose raising immunity as an issue to be considered as part of credibility. More to the

point, the instruction merely provides legally-accurate definitions of use and derivative use immunity, and explains why such immunity precludes invocation of the self-incrimination privilege. It does not point to any *specific evidence*. Indeed, this instruction was aimed at heading off improper argument or speculation that Meagan D. was granted full transactional immunity as part of a "deal." We therefore conclude that the content and wording of this instruction was a proper pinpoint instruction.

Nor, as Lujan suggests, did this instruction invite the jury to speculate as to why Meagan D. was not charged for Diego's torture and murder—at least not any more than Lujan himself invited such speculation by implicating her. Lujan asserts that the State could have unfairly used this instruction to bolster Meagan D.'s credibility by arguing that her preliminary hearing testimony was more truthful because she might be rewarded with a broader grant of transactional immunity if she told the truth. But the State never made this argument. More importantly, the *possibility* that this argument might be made does not necessitate a curative instruction. (*People v. Hampton* (1999) 73 Cal.App.4th 710, 723.)

In short, the trial court's instruction was legally correct and calculated to foreclose factually misleading arguments and speculation. There was no error.

IV. Cumulative Error

Lujan argues that the instructional, evidentiary and procedural errors examined thus far, viewed together, warrant reversal. Because we have found only one error, there are no errors to "add up."

V. Sufficiency of the Evidence

Lujan further contends that there was insufficient evidence to support the jury's implicit findings that (1) he was the person who tortured Lena; and (2) he tortured Lena and Diego with the requisite mental state.

We examine only "'whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt.'" (*People v. Assad* (2010) 189 Cal.App.4th

187, 194.) To do so, we determine whether "the supporting evidence is reasonable, inherently credible, and of solid value," but we "review the evidence in the light most favorable to the prosecution, and must presume every fact the jury could reasonably have deduced from the evidence. . . . Issues of witness credibility are for the jury. [Citation.]" (*Ibid.*) "'. . . [T]he judgment is not subject to reversal on appeal simply because the prosecutor relied heavily on circumstantial evidence and because conflicting inferences on matters bearing on guilt could be drawn at trial. . . .'" (*People v. Massie* (2006) 142 Cal.App.4th 365, 373 (*Massie*.)

A. Lujan as perpetrator of Lena's torture

No one saw Lujan violently shake Lena in 2006, but ample circumstantial evidence supports his conviction as the perpetrator. Lena was happy and healthy prior to Lujan's arrival in her life. Thereafter, many people, including some of Lujan's family members, started noticing bruises; they also noticed how Lena would cower from Lujan. Lujan was the sole person with Lena immediately prior to her seizure. After the paramedics arrived, Lujan was heard to say, "I fucked up" several times. Lena was also found with injured fingertips and a blistered tongue from Tobasco sauce, injuries similar to those suffered by Diego. Tellingly, Lujan does not challenge the evidence to support his involvement in Diego's injuries and death. Notwithstanding Lujan's presentation of contrary evidence, the evidence outlined here is sufficient to sustain this conviction.

B. Intent to torture

The State also adduced sufficient evidence of Lujan's intent to torture Lena and Diego. Under section 206, a defendant must intend to cause "cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose . . . ." A "sadistic purpose" involves "the infliction of pain on another person for the purpose of experiencing pleasure. [Citation.]" (*People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1203.) A defendant's intent is necessarily proven through circumstantial evidence. (*Massie*, 142 Cal.App.4th at p. 371.) It may be inferred from "the circumstances of the offense" (*People v. Hale* (1999) 75 Cal.App.4th 94, 106),

including whether the defendant "deliberately str[uck] his victim on an area of the body that [was] already injured" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430), and the severity of the injuries (*Massie*, *supra*, at p. 371).

As to Lena, the jury heard evidence that Lena was shaken with enough force to sheer the blood vessels in her brain and behind her eyes. Lujan claims there was no proof that he *knew* shaking a baby might cause brain injury. But the jury could reasonably infer that he knew that shaking a baby as hard as he did would cause pain. Premeditation is not required. (*Massie*, 142 Cal.App.4th at p. 372.) Lujan also contends he did not act with the purpose of revenge or sadism. However, the evidence revealed that he was "hella mad" at Stacy B. for leaving him with Lena and thus may have shaken Lena to get back at Stacy B. The evidence further demonstrated a pattern of conduct leading up to the shaking: repeated placement in a straight-jacket-like "burrito," the blistering of her tongue with Tobasco sauce, and the breaking of her collarbone by a method Lujan himself correctly identified (a stick). All of these are consistent with the intent to inflict pain.

As to Diego, both Vanessa and Meagan D. testified that Lujan repeatedly punched Diego in the sides. This is consistent with a desire to inflict pain. (See *People v. Hamlin*, *supra*, 170 Cal.App.4th at p. 1430.) Furthermore, the sheer number and severity of Diego's injuries (punches hard enough to rupture his intestinal tract and 128 bruises all over his body) support a finding that Lujan acted with a sadistic desire to inflict pain. That these injuries were preceded by a history of forcing Diego to stand in the corner in a pain-inducing crouch, by burning his fingertips, and by pouring Tobasco sauce on his tongue only reinforces the inference of sadistic purpose.

Lujan asserts that the jury could have viewed Diego's injuries as "misguided discipline." Lujan argues that a defendant who intends to discipline a child (even if that discipline is unjustified) does not, under *People v. Steger* (1976) 16 Cal.3d 539, 548, act with a "wilful, deliberate and premeditated intent to inflict extreme and prolonged pain." But the intent element for the substantive torture crime charged here is

different from the intent element for torture-murder at issue in *Steger*. (*Massie*, *supra*, 142 Cal.App.4th at p. 371.) So *Steger* is inapt. Moreover, our task is merely to assess the substantiality of the evidence. The jury in this case was well within its province to find that the extreme and ultimately deadly injuries Diego suffered were the product of a sadistic desire to inflict pain rather than overzealous parenting.

The evidence was sufficient to sustain Lujan's convictions.**]]**

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

HOFFSTADT, J.*

We concur:

YEGAN, Acting P. J.

PERREN, J.

* Assigned by the Chairperson of the Judicial Council.

Edward H. Bullard, Judge

Superior Court County of Santa Barbara

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