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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **TERRY HOWARD CORDER,** **Defendant and Appellant.**	**A126579** **(Alameda County Super. Ct. No. CH38879A)**

Terry Howard Corder (defendant) was convicted of second degree murder and assault on a child causing death. The victim, Dylan George (Dylan), was two and one-half years old and in foster care with defendant and his wife, Sherrie Corder (Sherrie). On appeal defendant contends the trial court erred in instructing the jury that voluntary intoxication was not a defense to the assault charge, he was prejudiced by improper references to his invocation of his *Miranda* rights[1] during a police interrogation, and he was prejudiced by the improper admission of hearsay statements and statements that should have been excluded under the marital communication privilege. We affirm.

[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

PROCEDURAL BACKGROUND

In May 2005, the Alameda County District Attorney charged defendant by information with murder (Pen. Code, § 187, subd. (a))[2] (count 1) and assault on a child causing death (§ 273ab) (count 2).[3] A jury found defendant guilty of second degree murder and assault on a child causing death. The trial court sentenced defendant to 25 years to life in prison on the assault conviction; the court stayed a 15-years-to-life sentence on the murder conviction under section 654.

FACTUAL BACKGROUND

Dylan, born in April 2002, was placed in foster care with defendant and Sherrie in September 2004. Also living in the home were defendant's and Sherrie's three daughters, K., M., and S. During the day, Sherrie operated a child care facility in her home.

Sherrie's Trial Testimony

At trial, Sherrie testified that on October 2, 2004, Dylan ate some of his lunch and defendant, who had had a couple of rum and cokes that day,[4] wanted Dylan to eat the remainder of his lunch for dinner. He forced open Dylan's mouth and forced food into it, and Dylan began to gag and bleed from his mouth. Sherrie took Dylan out of his chair, sat him on the floor to clean his mouth, and Dylan bit Sherrie's finger. When defendant forced open Dylan's mouth so Sherrie could remove her finger, Dylan bit defendant's finger.

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[2] All further undesignated section references are to the Penal Code.

[3] Sherrie was also charged under counts 1 and 2 and was charged with child abuse (§ 273a, subd. (a)) as well. She made a deal with the prosecution, under which she pled guilty to the section 273a, subdivision (a) charge (referred to as child endangerment at trial), with an expected sentence of four to six years in exchange for testifying against defendant.

[4] Sherrie testified that defendant was "not sober and not drunk," but she previously told a police officer that defendant had consumed five "lemon twists" before dinner. Defendant testified that, if he drank that evening, he only had one or two drinks.

Defendant said Dylan was lazy and needed to walk around. Dylan began to walk when S. came over and said, "come on, Dylan, let's go." As Dylan and S. walked around the room, defendant hit them on top of their heads with his knuckles, causing them to cry. S. ran toward Sherrie; defendant pushed Dylan on the back of his head and told him to keep walking. Dylan walked around a wall separating the dining and living rooms and defendant hit him each time he came around; defendant hit Dylan hard on the top of his head about seven times.

At one point defendant pushed Dylan from behind to keep him walking, and Dylan fell forward. Defendant picked Dylan up by his earlobes and pushed him to keep him walking. After walking a few feet, Dylan sat down and defendant kicked his bottom. Dylan fell on his back. Defendant kicked Dylan in the head, hard enough to move Dylan's body a few inches.

Sherrie picked Dylan up and put him in a chair. She then gave Dylan a bath. Sherrie testified that, contrary to what she told the authorities, Dylan did not fall in the bathtub. Dylan went to bed and in the morning he was "blue." When defendant saw Dylan, he said " 'it's too bad we couldn't hide his body.' " Sherrie called 911. At defendant's direction, Sherrie lied to the 911 dispatcher and said that Dylan had fallen in the bathtub.[5] Defendant also told Sherrie to take the blame because he owned the house and could care for their daughters.

M. and K.'s Trial Testimony

M., who was five years old in October 2004 and 10 years old at the time of trial, testified that Dylan "got spanked" by defendant the night before his death. She saw defendant try to force Dylan to eat and spank Dylan on his bottom. When M. was interviewed after Dylan had been taken to the hospital, she told the interviewer that defendant hit Dylan on his arm, bottom, and head. She also told the interviewer that she heard Dylan hit his head in the tub. A recording of the interview was played for the jury.

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[5] Sherrie also told the story that Dylan fell in the bathtub to the responding paramedic, police officers, friends, and a parent of a child who attended her daycare.

K., who was around six years old in October 2004 and 12 years old at the time of trial, testified that defendant frequently hit Dylan, sometimes in the face. The night before Dylan died, defendant got mad at Dylan because he would not eat. Defendant took Dylan into the bedroom, and K. heard a loud "bang" or "boom" and then heard Dylan cry. When K. was interviewed after Dylan had been taken to the hospital, she lied and said Dylan fell in the bathtub because her mother told her not to tell anyone what actually happened. A recording of the interview was played for the jury. She knew it was wrong to lie, "so [she] decided to tell them what really happened." She also testified that she heard a noise in the bathroom and her mother told her Dylan had hit his head on the faucet.

Medical Testimony

The emergency room physician testified that Dylan had no vital signs when he arrived at the hospital. He had bruises on his forehead and nose. A CT scan revealed evidence of significant swelling on the right side of his brain and a little blood on the left side. The story that Dylan fell in the bathtub and hit his head did not match the "severe massive and fatal" injury. The doctor opined that "multiple repeated traumatic forces of a very severe nature" caused Dylan's injuries. Another doctor also opined that Dylan's injuries were inconsistent with falling in the bathtub.

On October 4, 2004, Dr. Sharon Van Meter, qualified by the court as an expert in forensic pathology, conducted an autopsy of Dylan. He had numerous external bruises and internal areas of blunt force trauma. Most of the bruises were recent, within hours to a couple of days. The brain swelling that caused Dylan's death was caused by multiple blunt force injuries to the head. The injuries could have been caused by someone hitting Dylan's head with their knuckles, kicking his head, or throwing his head against the wall. It was very unlikely the injuries were caused by Dylan hitting his head on a bathtub spigot. There was no evidence of causes of Dylan's injury other than blunt force trauma.

Defendant's Medical Expert Testimony

Dr. Janice Ophoven, qualified by the court as an expert in pediatric forensic pathology, did an independent review of the autopsy of Dylan. Ophoven concluded that

Dylan died from a stroke and opined that Dr. Van Meter had not done a good job of analyzing possible causes of the stroke. Noting the advanced deterioration of Dylan's brain and his elevated sodium level, as well as the facts that he had been losing weight and behaving strangely,[6] she opined that the stroke had evolved over "a considerable amount of time." She opined that minor trauma, such as that which caused the bruise on Dylan's forehead, could have triggered the stroke which caused his death. The bruise could have been caused by a bump against a bathroom faucet. She also admitted the stroke could have been induced by physical trauma such as that described in Sherrie's testimony, although she did not believe that the autopsy showed massive head trauma because there were no skull fractures or bruises on the brain.

Defendant's Testimony

Defendant testified on his own behalf. He testified that he had no problem with boys and did not use physical force to discipline his children or Dylan. The only force he used on Dylan the night of October 2 was that necessary to open Dylan's mouth so Sherrie and he could remove their fingers after Dylan bit them. Later, while Sherrie was giving Dylan a bath, she called for defendant's help. When defendant went into the bathroom, Sherrie said Dylan was throwing a fit and trying to get out of the bathtub. As they tried to control Dylan, he fell and defendant heard a thud; defendant did not see what Dylan hit. When they removed Dylan from the bathtub, there was bruising on his forehead. The next morning, when they discovered Dylan was blue, defendant performed CPR. Dylan began to gurgle, and he expelled some clear liquid and a small piece of hot dog.

Defendant denied saying anything about hiding the body, and he denied telling Sherrie or his daughters to lie. Sherrie threw away her wedding ring because she was afraid the police would be able to identify the ring's pattern on Dylan's head, although defendant did not see Sherrie hit Dylan.

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[6] In particular, Dr. Ophoven referred to Dylan's irritability, biting his tongue, staring, and clenching his fists.

Other Testimony

There was also testimony presented at trial, by both the prosecution and defendant, regarding whether defendant or Sherrie had demonstrated a violent temper in dealing with other children. None of the testimony was highly probative to the issues in the case.

DISCUSSION

I. *The Trial Court's Jury Instructions on Voluntary Intoxication Were Proper*

The trial court instructed the jury, in the language of CALCRIM No. 625, that it could "consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with intent to kill. [¶] . . . [¶] You may not consider evidence of voluntary intoxication for any other purpose." The court also instructed the jury, in the language of CALCRIM No. 3426, that "[v]oluntary intoxication is not a defense to [count 2] . . . ."

"Section 273ab defines the offense of child abuse homicide. The elements of the offense are: '(1) A person, having the care or custody of a child under the age of eight; (2) assaults this child; (3) by means of force that to a reasonable person would be likely to produce great bodily injury; (4) resulting in the child's death.' [Citations.] The manifest purpose of section 273ab is 'to protect children at a young age who are particularly vulnerable.' [Citation.]" (*People v. Wyatt* (2010) 48 Cal.4th 776, 780, fn. omitted (*Wyatt*).)[7] Defendant contends the court's instructions on voluntary intoxication were in error because, to convict defendant under section 273ab, the jury was required to find that "[w]hen the defendant acted, he was aware of facts that would lead a reasonable person to realize" that his acts would likely result in great bodily injury to Dylan.

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[7] Section 273ab, subdivision (a) provides in relevant part, "Any person, having the care or custody of a child who is under eight years of age, who assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life."

(CALCRIM No. 820.)[8] Defendant asserts that, "[w]hen knowledge or awareness is a required element of a crime, it may be disproven or mitigated by evidence of voluntary intoxication."

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[8] Pursuant to CALCRIM No. 820, the trial court instructed the jury as follows:

"The defendant is charged in [count 2] with killing a child under the age of 8 by assaulting the child with force likely to produce great bodily injury in violation of Penal Code section 273[ab].

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant had care or custody of a child who was under the age of 8;

"2. The defendant did an act that by its nature would directly and probably result in the application of force to the child;

"3. The defendant did that act willfully;

"4. The force used was likely to produce great bodily injury;

"5. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in great bodily injury to the child;

"6. When the defendant acted, he had the present ability to apply force likely to produce great bodily injury to the child;

"AND

"7. The defendant's act caused the child's death.

"Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

"*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"An act *causes death* if:

"1. The death was the natural and probable consequence of the act;

"2. The act was a direct and substantial factor in causing the death;

"AND

"3. The death would not have happened without the act.

"A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

"A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused the death."

Defendant's contention is foreclosed by the California Supreme Court's decision in *Wyatt, supra*, 48 Cal.4th 776. There, the court treated an assault charged under section 273ab like any other assault for the purpose of determining the mens rea required. (*Wyatt*, at pp. 780-781.) The court followed its decision in *People v. Williams* (2001) 26 Cal.4th 779, which reaffirmed the well-established rule that "juries should not 'consider evidence of defendant's intoxication in determining whether he committed assault' " (*id.* at p. 788), despite the fact that assault requires "actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another" (*id.* at p. 790). That knowledge element is analogous to the element of awareness of the likelihood of injury, on which defendant relies in this appeal.

With respect to section 273ab, the *Wyatt* court held, "[A] defendant may be guilty of an assault within the meaning of section 273ab if he acts with awareness of facts that would lead a reasonable person to realize that great bodily injury would directly, naturally, and probably result from his act. [Citation.] The defendant, however, need not know or be subjectively aware that his act is capable of causing great bodily injury. [Citation.] This means the requisite mens rea may be found even when the defendant honestly believes his act is not likely to result in such injury." (*Wyatt, supra*, 48 Cal.4th at p. 781.) Accordingly, under *Wyatt*, the possibility that intoxication prevented defendant from being aware of the likelihood that his acts would cause great bodily injury to Dylan would not have provided a basis to acquit defendant. The trial court did not err.

II. *Defense Counsel's Failure to Object to Prosecutorial Misconduct and the Admission of Evidence That Defendant Invoked His* Miranda *Rights Was Not Ineffective Assistance of Counsel*

Fremont police officers interviewed defendant shortly after his arrest. They informed defendant of his *Miranda* rights prior to the questioning. Part way through the interview, defendant told the police that he wished to consult with an attorney before speaking further, and the interview was terminated. Before defendant testified, his counsel moved to bar the prosecutor from questioning him about his invocation of his

right to counsel. The prosecutor agreed, although he pointed out that defendant also mentioned it in jail phone calls. The trial court summarized: "So I think we're in agreement, you're not going to ask as to the invocation but as to content, not law enforcement related, [the prosecutor] is going to go into it."

On direct examination, defendant testified that Sherrie threw away her ring so that it would not be linked to Dylan's injuries. On cross-examination, the prosecutor suggested that testimony was false because defendant had not told that to anyone before. He questioned defendant about why he did not tell that to his friend Kevin Russell, to whom defendant made phone calls from jail. The prosecutor also elicited testimony that defendant had invoked his right to counsel:

"Q: But you freely admit you didn't tell [the police] some important stuff?

"A: They didn't hear the whole story.

"Q: Because you cut off the interview, right?

"A: No, I didn't realize I cut off the interview.

"Q: You cut off the interview with the police, didn't you?

"A: The police stopped it.

"Q: At your request?

"A: No, I didn't request them to stop.

"Q: No. What you requested was your attorney, right?

"A: Yes."

The prosecutor also played to the jury a recording of a jail call from defendant to Russell, in which defendant informed Russell that he had invoked his right to counsel, stating "Once they started talking homicide, and like trying to say like I, like, I did something, it's like you're going to have to talk to my attorney, and they got pissed off because they didn't get all of the information they wanted."

Defendant contends it was a violation of the federal Constitution to allow the jury to hear that he invoked his *Miranda* rights, and prosecutorial misconduct to elicit the challenged testimony. In *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), the United States Supreme Court addressed the constitutional propriety of using an arrested person's

silence to impeach an explanation subsequently offered at trial. The court explained that although "the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (*Doyle*, at p. 618, fn. omitted; see also *People v. Lucero* (2000) 23 Cal.4th 692, 718.)

Citing *People v. Champion* (2005) 134 Cal.App.4th 1440, the People contend that defendant invited the prosecutor's questions by asserting that the police stopped the interview. However, defendant said that *after* the prosecutor asked, in explaining why the police did not hear defendant's whole story, "Because you cut off the interview, right?" The prosecutor's questions on cross-examination were not a "fair response" to an assertion made by defendant. (*Id.* at p. 1448.)

Although defense counsel successfully moved to bar questioning about defendant's invocation of his *Miranda* rights before defendant testified, counsel did not object to the cross-examination challenged on appeal.[9] Defendant asserts that defense counsel was not required to object in order to preserve the issue for appeal, because he had obtained the prior ruling from the trial court. But defendant provides no reasoned argument or citations to authority that he was not required to request enforcement of the prior ruling. Any such contention has been forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) Defense counsel also failed to object to the portion of the jail call recording containing references to defendant's invocation of his right to counsel. Indeed, in moving to exclude questioning regarding the invocation, counsel implicitly agreed that the invocation could come before the jury as part of the jail call.

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[9] Defense counsel did successfully object, on the basis that it called for a legal conclusion, to the prosecutor's question, "And at that point they had to stop the interview, right?" But defense counsel did not object on the basis that the prosecutor's questions were contrary to the trial court's earlier ruling.

Defendant contends that any forfeiture constituted ineffective assistance of counsel. To establish ineffective assistance, a defendant must show (1) counsel's performance was deficient and fell below an objective standard of reasonableness and (2) it is reasonably probable that a more favorable result would have been reached absent the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694.) A reasonable probability is a "probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) While we generally do not reach claims of ineffective assistance on direct appeal, defendant contends we should do so here because "there could not have been any valid trial strategy for defense counsel to refrain from objecting," especially in light of counsel's earlier motion to bar the evidence. But, even assuming counsel's performance was deficient, defendant's ineffective assistance of counsel claim must be rejected because he has failed to demonstrate a reasonable probability the outcome of his trial would have been different had his counsel objected and succeeded in preventing the jury from hearing about his invocation of his right to counsel. (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008-1009 (*Mesa*) ["the *Strickland* 'reasonable probability' standard applies to the evaluation of a Sixth Amendment claim of ineffective assistance of counsel, even when defense counsel's alleged error involves the failure to preserve the defendant's federal constitutional rights"].)

Defendant contends the evidence that he invoked his right to counsel was prejudicial because it might have led the jury to believe he had something to hide. However, the evidence against defendant was overwhelming. Although Sherrie could be impeached by the fact that she changed her original story, and although there were significant differences between her account of how Dylan was injured and the accounts of M. and K., all three uniformly testified that defendant hit Dylan. Unless all three were lying, this meant that defendant was lying when he testified that he did not hit Dylan on the night of the incident and did not physically discipline Dylan on other occasions. Moreover, the prosecution's medical witnesses testified it was highly unlikely Dylan's injuries could have been caused by the bathtub fall that defendant described, and

defendant did not offer in his testimony any other explanation for Dylan's numerous injuries. Even defendant's medical expert, who suggested that Dylan had been experiencing an evolving stroke for some time, offered no explanation for Dylan's injuries and agreed that the blows described by Sherrie could have caused Dylan's death. In light of the logical explanation offered by the prosecution's evidence, and the absence of any other adequate explanation for Dylan's injuries, it is not reasonably probable the verdict would have been different had the jury not heard that defendant invoked his right to counsel.

An examination of the prosecution's closing argument reinforces the conclusion that evidence of defendant's invocation of his *Miranda* rights did not prejudice him. The prosecutor stressed the prosecution's expert medical testimony and the testimony of defendant's children that undermined defendant's version of events; defendant's decision to withhold information from the police during his interview was barely mentioned. In a closing argument and rebuttal that consumed more than 55 transcript pages, one paragraph was devoted to this point. (See *People v. Hinton* (2006) 37 Cal.4th 839, 868 [in part because "the prosecutor never again mentioned the invocation during trial or closing argument" the error was not prejudicial]; cf. *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1527 [defendant prejudiced where invocation "featured prominently in the prosecutor's jury argument"].)

III. *Defense Counsel Did Not Render Ineffective Assistance in Failing to Object to Testimony Under the Marital Communication Privilege*

Defendant contends defense counsel rendered ineffective assistance in failing to object to portions of Sherrie's testimony in which she testified that defendant referred to the possibility of hiding Dylan's body and suggested she should take the blame for the death. Defendant argues the testimony was inadmissible under the marital communication privilege, under which a spouse can prohibit another spouse from testifying to the content of a communication between them. (Evid. Code, § 980.)[10]

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10 Evidence Code section 980 provides: "Subject to Section 912 and except as otherwise provided in this article, a spouse (or his guardian or conservator when he has a guardian

Defense counsel did not render ineffective assistance in failing to object on the basis of the marital communication privilege. Under section 985, subdivision (a) of the Evidence Code, there is no privilege "in a criminal proceeding in which one spouse is charged with . . . [a] crime committed at any time against the person or property of the other spouse or of a child of either." The court in *Dunn v. Superior Court* (1993) 21 Cal.App.4th 721, held the exception encompassed a foster child living with a married couple, where the husband was accused of murdering the foster child.[11] That decision is directly applicable here, and we decline defendant's invitation to reject its reasoning or to distinguish it. We conclude the challenged testimony was admissible and any objection on the basis of the martial communication privilege would have been futile.

IV. *Any Error in the Admission of Hearsay Statements Was Harmless*

Defendant contends the trial court erred in admitting testimony from Cherie Derrick, a friend of Sherrie, who testified that an unnamed person warned Derrick "to not have [her] son alone with" defendant. Defendant argues the evidence was inadmissible hearsay. Defendant also contends defense counsel was ineffective in failing to object to testimony from Andrea Briscoe, another friend, to whom Sherrie complained that defendant did nothing around the house and went on a motorcycle trip without leaving the family any money. Briscoe also testified she had "been warned" about defendant's behavior around boys. Defendant argues the testimony was also inadmissible hearsay.

Any error in the admission of the evidence or in defense counsel's failure to object to its admission was harmless. For the reasons described in part II. above, there is no reasonable probability (*People v. Welch* (1999) 20 Cal.4th 701, 749-750; *Mesa*, *supra*, 144 Cal.App.4th at p. 1008) the outcome of the case would have been different had the

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or conservator), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife."

11 The exception at the time was located at former section 972 of the Evidence Code, with minor differences in wording that are not relevant in this case. (*Dunn*, *supra*, 21 Cal.App.4th at p. 723, & fn. 3.)

jury not heard about the vague, unattributed warnings received by Derrick and Briscoe or Sherrie's marital complaints as reported by Briscoe. Significantly, the jury heard much more vivid testimony from prosecution rebuttal witness Ian Silva, who testified to three incidents he observed in which defendant demonstrated extreme anger toward Silva's son (twice) and Derrick's son (once); Silva told his wife that his son should never be around defendant alone. Derrick and Briscoe's vague and brief testimony added little to Silva's testimony. For the same reason there was no cumulative prejudice from the admission of the hearsay testimony and admission of the evidence of defendant's invocation of his *Miranda* rights.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.