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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **RODOLFO PUEBLA NAPOLES et al.,** **Defendants and Appellants.**	**A093189** **(Alameda County Super. Ct. No. CH-28902)**

Defendants Rodolfo Puebla Napoles (Father) and Teresa Rodriguez (Mother)[1] were found guilty of one count of felony child abuse following a joint jury trial. (Pen. Code, § 237a, subd. (a).) The trial court denied probation, sentencing Mother to prison for the four-year middle term and Father to prison for the six-year maximum term. In this appeal, defendants raise a host of challenges to the proceedings below. In the published portion of this opinion, we address two related contentions: that the trial court erred by failing to give a jury unanimity instruction and compounded that error by instructing that unanimity was not necessary. We conclude that no unanimity instruction was required, the instruction actually given was erroneous, but the error was harmless. In

* Pursuant to California Rules of Court, rules 976(b) and 976.1, parts I.B. through IX of this opinion are not certified for publication.

1 Mother's last name is spelled as "Rodrigues" on the information, verdict, minutes of the sentencing hearing and abstract of judgment. The latter two documents show an also known as spelling of "Rodriguez." We use the latter spelling based on Mother's sworn testimony.

the balance of the opinion, we examine each of the other arguments raised by defendants and conclude no reversible error occurred.[2]

FACTUAL BACKGROUND

We view the evidence in the light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence that supports the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The following summary is based on this appellate standard of review.

On May 11, 2000, Mother brought the victim, her three-and-one-half-month-old baby, into the emergency room at St. Rose Hospital in Hayward. The baby was crying and panting and the crying increased whenever she was moved. Nurses noted a large deformity of the left thigh, which lay at an odd angle and was swollen, and bruises on the baby's body and face. Nodules or bumps could be seen and felt around the rib cage consistent with prior fractures. Stabilizing measures were begun and morphine was administered for pain. X-rays were taken in the emergency room and the left leg was splinted to immobilize it. The baby was then transferred by ambulance from the emergency room at St. Rose to Children's Hospital in Oakland, where she was admitted the same day.

The police were notified by hospital personnel, and a detective arrived at the hospital. He interviewed both defendants separately on May 11, 2000, and on several occasions after that date.[3] During the interviews, Father attributed the baby's facial bruising and the leg injury to an accident that had occurred on May 9, two days before the baby was taken to the hospital. He had been carrying the baby when a bicyclist almost hit him, causing him to fall with the baby in his arms. Mother confirmed that on May 9, Father had given her the same explanation. Both parents stated that they had agreed that the leg injury was not serious enough to take the baby to the hospital until May 11. On

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2 In a separate petition for writ of habeas corpus, case number A097425, Mother has raised a number of claims challenging the competence of her trial counsel. We have denied that petition by separate order filed this date.

3 The statements by each defendant made to Munoz were admitted only against each declarant.

June 7, after the detective asked Father about skull fractures suffered by the baby, Father explained that the baby had fallen from a bed (about three feet off the floor) approximately one month before she was taken to the hospital. Aside from these explanations, both parents denied inflicting any injuries on the child, seeing anyone else inflict such injuries or believing that the child was in pain or needed medical treatment before May 11.

Dr. James Crawford, a board certified pediatrician and the medical director of the child abuse unit at Children's Hospital, was the chief prosecution witness. Dr. Crawford testified about the numerous, severe injuries inflicted on the baby during a two-month period. The left femur had been fractured in a fashion that led the doctor to conclude that a twisting force had been applied. Such an injury is categorically uncommon in a three-month old infant, who is unable to walk. The doctor further testified that a baby's fall, while cradled in the arms of an adult, could not explain such a fracture absent the leg twisting away from the holder's body. Once fractured, the bone pieces would have pressed against soft tissue, causing excruciating pain every time the leg was moved until its immobilization. X-ray findings of bone calcification at the fracture site, indicating significant delay in bringing this obvious leg fracture for treatment, was indicative of child abuse inasmuch as it suggested that the persons who delayed obtaining medical care were afraid of the consequences if the injury was identified. The left femur also exhibited a second fracture, which the doctor believed was caused by violent shaking. Based on X-ray evidence of bone calcification at the fracture sites, both fractures of the left femur likely occurred between May 4 and May 6, 2000. Both fractures of the left leg would have been extremely painful during the five-to-seven-day delay in treatment.

Dr. Crawford also testified that the baby suffered fractures of the parietal bones on each side of her skull. These skull fractures required very significant blunt force trauma akin to hitting a windshield in a high speed car crash, sustaining a multistory fall or having something strike the child's head. A three-month-old baby typically could not roll off a bed by itself, and the doctor did not believe a fall from a bed would cause these skull fractures. Likewise, a fall of a person while cradling the baby would not generate

sufficient force to cause these skull fractures. A massive trauma, such as a person falling onto the baby's skull, would have been necessary. These injuries would have resulted in soft tissue swelling, bruising and pain. The baby would have "screamed her head off" at the time of her injury. The fractures occurred a week or more before the May 11, 2000 hospitalization, by which time the swelling had reduced but not disappeared. The skull fractures had not substantially healed when the doctor first examined the baby, and movement of these bones would still have been uncomfortable for the baby.

X-rays also confirmed rib fractures, transverse fractures to the radius of both arms and two separate fractures of the right shinbone. Each would have been very painful. The baby displayed residual bruising around her nose and eyes and a complex bruise on the left cheek. The latter was a human bite mark which could not have been inflicted through gentle or playful contact. The other bruises to different sides of the face evinced multiple blunt injuries from different blows. The doctor could not conceive of a nonhuman mechanism that would explain the injuries to the face and head. Considered in context with the other injuries, they appeared intentional.

The baby's bones had completely healed four months after hospitalization. This ruled out the possibility that the baby suffered from any bone-weakening condition. Apart from the fractures, the baby's bones appeared completely healthy upon her admission to Children's Hospital and thereafter.

In the doctor's opinion, the baby had been intentionally assaulted very violently, through a variety of different mechanisms, resulting in at least a dozen broken bones. In addition, the baby received significant soft tissue injuries resulting from blows to the head and from a bite to the face. The constellation of injuries, the repetitive nature and varying ages of the injuries, as well as the different mechanisms of injury, and the fact that different organ systems were involved was "absolutely and utterly diagnostic of child abuse." Furthermore, the failure to report old injuries that were discovered only when treating the femur fractures was indicative of deception, as was the medical history given by Mother that did not fit the medical evidence.

The prosecution also called three different women who had cared for the baby while Mother and Father worked. Each was a friend of the defendants or a family member. Each described bruising they had seen on the baby.

Mother testified in her own defense and denied having seen evidence of broken bones. Father played with the baby and seemed happy with her, while Mother hardly played with her at all. She never noticed bruising, swelling or tenderness in the arms, shinbone or side of the skull, and never noticed anyone handle the baby in a way that could injure her in those places. Mother had noticed little bumps on the baby's ribs, but since the baby did not react to being held around her rib cage, Mother did not take her to the hospital. Mother never saw anyone shake the baby. On May 7, 2000, Father did "bite her, but slowly," while giving the baby playful kisses, which resulted in a bruise on the baby's cheek. Mother was present and saw that the baby did not react. Mother attributed the thigh fracture and the bruises on the nose and forehead to the May 9 bicycle incident. Mother testified that, following this accident, the baby was calm and quiet and did not react to diaper changes or to being picked up. On May 11, Mother took the baby to the hospital because the swelling was not lessening. Aside from the injuries in the bicycle accident, Mother did not know what caused any of the broken bones. She insisted she did not injure the baby in any way and had no reason to believe Father did so.

Father testified in his own defense and denied knowing how the fractures occurred, or seeing symptoms of them. He observed nothing that made him suspicious that the baby was being abused. He denied the report of one neighbor that he would often play loud music while the baby cried. About one month before May 11, 2000, defendants noticed that anytime anyone picked up the baby, she cried a short while, as if she did not like being moved. Father had noticed a lump near the baby's left ribcage and a coin-sized bruise on the baby's left wrist, but did not believe that either warranted medical treatment. On May 6 or 7, Father was playing with the baby and held his lips to her cheek and sucked on her skin. He did not bite the baby or put his teeth on her and did not know what caused the teeth marks to be on her cheek.

Father described an incident in mid-April 2000, when the baby fell from a bed but was not injured. Father also described the bicycle collision, which occurred two days before May 11. He testified that no twisting force was applied to the baby's leg, and the leg injury could not have happened from the fall. The baby's face scraped the pavement a little bit, although she was still cradled when the fall ended. She cried for about 20 minutes, then stopped. He saw no swelling on the leg.

After more than two full days of deliberations, the jury returned guilty verdicts against both defendants.

DISCUSSION

I. *Claims of Instructional Error*

A. *Unanimity Instruction*

Defendants in criminal cases have a constitutional right to a unanimous jury verdict. (*People v. Jones* (1990) 51 Cal.3d 294, 305.) From this constitutional principle, courts have derived the requirement that if one criminal act is charged, but the evidence tends to show the commission of more than one such act, "*either* the prosecution must elect the specific act relied upon to prove the charge to the jury, *or* the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534, italics added; accord, *People v. Jenkins* (1994) 29 Cal.App.4th 287, 298-299.) Relying on this "either/or" requirement, defendants contend the trial court erred by failing to give the unanimity instruction set out in CALJIC No. 17.01.[4] Further, they argue that even if no unanimity instruction was required, the court committed reversible error by giving the

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[4] CALJIC No. 17.01 (6th ed. 1996) provides: "The defendant is accused of having committed the crime of _____ [in Count _____]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count _____] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count ____], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

jury a "non-unanimity instruction." We reject each contention. Although we agree that the trial court erred in giving the non-unanimity instruction, the error was harmless.

1. *No Unanimity Instruction Was Required*

In this case, defendants correctly note that while only one count of abuse was alleged, many separate acts and omissions that might constitute abuse were proved. Thus, they argue, the either/or requirement was triggered.[5] We disagree. Even when the prosecution proves more unlawful acts than were charged, no unanimity instruction is required where the acts proved constitute a continuous course of conduct. (*People v. Diedrich* (1982) 31 Cal.3d 263, 282.) " 'This exception arises in two contexts. The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. [Citation.] The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.] [¶] This second category of the continuous course of conduct exception has been applied to a limited number of varying crimes, including . . . child abuse [citation].' [Citation.]" (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309.) In *People v. Rae* (2002) 102 Cal.App.4th 116, this court explained that this second category requires an examination of the statutory language at issue in order " ' 'to determine whether the Legislature intended to punish individual acts or entire wrongful courses of conduct." ' [Citation.] When the language of the statute focuses on the goal or effect of the prohibited crime, the offense is a continuing one. [Citation.]" (*Id.* at p. 123.) With each category of the continuous course of conduct exception, no unanimity instruction is required because the multiple acts constitute a single criminal event. (*People v. Sanchez* (2001) 94 Cal.App.4th 622, 631.)

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5 Defendants also appear to argue that the either/or requirement arose because defendants could be convicted under different theories of liability. That is, some jurors might believe Father was guilty of directly inflicting an injury on the child, while others disagreed but believed he was guilty of ignoring the child's suffering. We reject this contention. Juror unanimity is not required simply because different theories of liability are presented. (*People v. Russo* (2001) 25 Cal.4th 1124, 1135; *People v. Santamaria* (1994) 8 Cal.4th 903, 918-919; *People v Vargas* (1988) 204 Cal.App.3d 1455, 1465.)

Of course, child abuse is not invariably charged as a course of conduct offense; one act or omission constituting abuse may be sufficient for conviction. *Russo* is instructive in determining whether a unanimity instruction is required. In *Russo*, our Supreme Court concluded that the purpose of the unanimity instruction governs its use. "The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed [the defendant] guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*People v. Russo, supra,* 25 Cal.4th at pp. 1134-1135.)

Two related factors contribute to our decision that the purpose behind the unanimity instruction would not be served by requiring it in this case. First, when the accusatory pleading alleges one violation of Penal Code section 273a, subdivision (a) (hereafter section 273a(a)) for misconduct occurring between two specified dates, "[t]he issue before the jury [is] whether the accused was guilty of the course of conduct, not whether he had committed a particular act on a particular day." (*People v. Ewing* (1977) 72 Cal.App.3d 714, 717.) Second, "[w]here . . . the evidence establishes a pattern of physical trauma inflicted upon a child within a relatively short period of time, *a single course of conduct is involved* and no justification exists for departing from the well-established rule . . . that jury unanimity is not required as to the underlying conduct constituting the violation of section 273a." (*People v. Vargas, supra,* 204 Cal.App.3d at p. 1464.) In *Vargas*, "burns, bruises, contusions, whipping injuries, and bites [were] inflicted within a . . . *10-day period*." (*Id.* at p. 1462.) In *Ewing,* the conviction rested on

evidence of "scratches, scalds, burns and bruises . . . and three separate subdural hematomas, one of which proved fatal," that occurred over a three-month period. (*Ewing*, at p. 716.)

Application of these principles to the facts in our case demonstrates that no unanimity instruction was required. The information accused the defendants of "a violation of [section 273a(a) occurring] on or between January 30, 2000 through May 11, 2000." This language alerts the jury that the charge consists of a continuous course of conduct, to be proved by evidence of more than one individual act. Thus, from the trial's inception, the jury was aware that this was not a case where one illegal act is charged and several are proven; a case, in other words, requiring a special instruction to protect the defendant's right to a unanimous jury.

In addition, the evidence presented was consistent with the theory alleged in the information. As in the *Ewing* and *Vargas* cases, evidence of the injuries inflicted and an opinion as to their cause was provided by medical professionals. Here, Dr. Crawford testified that over a period of approximately two months the baby was subjected to numerous violent assaults, which caused major injuries (including 12 broken bones) and excruciating pain. Dr. Crawford also testified that the number, repetitive nature and varying ages of the injuries was "absolutely and utterly diagnostic of child abuse." Like those in *Vargas*, the injuries inflicted on the baby in this case "suggest a systematic pattern of abuse rather than separate, isolated incidents." (*People v. Vargas, supra,* 204 Cal.App.3d at p. 1463.)

Based on the language of the charging document and the evidence presented, we believe that any jury disagreement would have been focused on the exact way the charged offense was committed and not on whether one of several discrete crimes had occurred. Thus we find no error in the trial court's refusal to give a unanimity instruction.

2. *The Court Erred by Giving the Non-unanimity Instruction*

At the prosecutor's behest, the court instructed the jury that: "The crime charged, or the lesser included offense, may be violated by a single act or by a series of acts. It is

not necessary for all of the jurors to agree that a defendant committed the same act or acts or omission or omissions." Relying on *People v. Culuko* (2000) 78 Cal.App.4th 307, the People argue in this appeal that if, in fact, jury unanimity as to specific acts is not required, then the court may so instruct. While we do not quarrel with this argument as a general proposition, its logical corollary is that the instruction must properly describe the law. This one did not.

Culuko provides an example of a correct instruction on the extent to which the jury need *not* agree when finding a defendant guilty. In *Culuko*, the defendants were charged with the abuse and murder of the child of one of them. The court gave an aiding and abetting instruction and also instructed the jury that, " 'Those who aid and abet a crime and those who directly perpetrate the crime are principals and equally guilty of the commission of that crime. *You need not unanimously agree, nor individually determine, whether a defendant is an aider or abettor or a direct perpetrator*. [¶] *The individual jurors themselves need not choose among the theories, so long as each is convinced of guilt. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other.*' " (*People v. Culuko, supra,* 78 Cal.App.4th at p. 321; italics added.)

The law is well established that jurors are not required to agree on the specific theory of guilt. (See fn. 5, *ante*, page 7.) Therefore, no unanimity instruction is required when the jury is presented with such alternative theories. (*People v. Melendez* (1990) 224 Cal.App.3d 1420, 1432, disapproved on other grounds in *People v. Majors* (1998) 18 Cal.4th 385, 408.) In *Culuko,* the court's decision to take an additional step and inform the jury that unanimity was unnecessary was upheld because the instruction accurately explained this. (*People v. Culuko, supra,* 78 Cal.App.4th at pp. 323-324.)

As we earlier discussed, child abuse may consist of either a continuous course of conduct or a specific act or omission. A jury may only convict without unanimous agreement as to a specific act when a continuous course of conduct is at issue. When the jury is permitted to convict for a specific act and more of such acts are proved than charged, the interests implicated by the either/or rule are triggered. Here, the charge and

the evidence clearly presented a course of conduct for the jury's consideration. The non-unanimity instruction, however, "unpackaged" the course of conduct by informing the jurors that the defendants could be convicted for a *single* act (or omission), and then informed them that unanimous agreement on the specific act or omission found unlawful was unnecessary. In measuring the effect of this instruction, we presume that jurors are intelligent people, capable of understanding the instruction and applying it to the facts of this case. (*People v. Tatman* (1993) 20 Cal.App.4th 1, 10-11.) Since evidence was presented of more than one specific act, reasonable jurors would have understood that a conviction was permissible if different sets of jurors believed a defendant committed different single acts or omissions constituting abuse, without all 12 agreeing on the commission of any single violation.[6] Such a result would violate the criminal defendant's right to a unanimous verdict. Thus we conclude the court erred in giving this particular non-unanimity instruction.[7]

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[6] In our case, the challenged instruction could lead to a conviction in the following situations: (1) Several jurors could believe that Father directly inflicted the injury to the baby's left leg, while the remainder, who believe he did not, could reach the conclusion he directly inflicted the skull fractures. (2) Several jurors could believe Mother indirectly abused the baby when she failed to obtain prompt medical attention for the left leg injury, while the remainder, who disagree, could believe she abused the baby by failing to seek treatment for the skull fractures.

[7] In child abuse cases where a course of conduct is prosecuted and juror unanimity is not required, it would seem the wiser course to give no instruction, rather than attempt a direction on non-unanimity. One is reminded of the famous football aphorism about attempting a forward pass: "[F]our things can happen—and three [of them] are bad." (Oates, *Woody Hayes, Ohio State Legend, Is Dead,* L.A. Times (Mar. 13, 1987) Sports, pt. 3, col. 2, p. 1.) However, we recognize that, on occasion, it will be appropriate to inform the jury that unanimity is not required. In such a situation, we believe the following language would be appropriate: "The defendant is accused of having violated Penal Code section 273a, subdivision (a), child abuse, [in count ___] by having engaged in a course of conduct between [date] and [date]. The People must prove beyond a reasonable doubt that the defendant engaged in this course of conduct. Each juror must agree that defendant engaged in acts or omissions that prove the required course of conduct. As long as each of you is convinced beyond a reasonable doubt that the defendant committed some acts or omissions that prove the course of conduct, you need not all rely on the same acts or omissions to reach that conclusion."

3. *The Error was Harmless*

The erroneous failure to give a unanimity instruction is harmless if disagreement among the jurors concerning the different specific acts proved is not reasonably possible.[8] (*People v. Burns* (1987) 196 Cal.App.3d 1440, 1458; accord, *People v. Brown* (1996) 42 Cal.App.4th 1493, 1500-1502 [The failure to give a unanimity instruction is harmless unless there is evidence from which reasonable jurors could both accept and reject the occurrence of at least the same number of acts as there are crimes charged.]; see also *People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) *People v. Jones*, *supra*, 51 Cal.3d at pages 307, 321-322, is instructive. The *Jones* court considered the effect of the jury unanimity requirement on child molest prosecutions, in which the young victim testifies to more offenses than charged and the testimony is generic in nature, devoid of specific details regarding the time, place and circumstances of the many assaults. In *Jones*, the defendant had been charged with 28 acts of molestation of four children, including six acts of molesting one of them. That child testified that he had, in fact, been molested once or twice a month for a period of 23 months. (*Id.* at p. 302) The defendant testified, denied molesting any of the victims, and provided a motive for the victims to fabricate their stories. (*Id.* at p. 303.) The *Jones* court noted that credibility was the "true issue" in the case, as it commonly is in cases of this nature. That is, the victim relates that a "consistent, repetitive pattern of acts occurred" and the defendant denies it. The jury either believes or disbelieves the defendant, but "there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them." (*Jones*, at p. 321-322; accord *People v. Riel* (2000) 22 Cal.4th 1153, 1199-1200; *Stankewitz*, at p. 100.)

In the instant case the court erred by giving the non-unanimity instruction. We conclude that the same harmless error analysis should apply to this different error. The

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[8] There is a split of authority on the proper standard for determining whether the erroneous failure to give a unanimity instruction is reversible. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 561.) Since we find the error harmless even under the more stringent *Chapman* test, we need not decide whether *Chapman* or *Watson* applies. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

vice of this court's misinstruction is that it refocused the jury away from the course of conduct charged to the specific acts proved and created the reasonable possibility of a non-unanimous jury verdict. This possibility exists, however, only to the extent that it is reasonably possible that the jurors would disagree about the specific acts proved. Conversely, when, as here, such disagreement is unlikely because the true issue in the case was a single credibility dispute, the error is harmless.

As in *Jones*, this case was reduced to a single credibility dispute on each prosecution theory. The prosecution case against Mother proceeded on the theory that she had ignored her child's suffering throughout the time period charged. The case against Father rested on the same theory as well as the theory that he was responsible for directly inflicting the injuries. Though the prosecutor briefly referenced the non-unanimity instruction at the beginning of his closing argument, the balance of that argument and his rebuttal clearly reveals his focus on the defendants' course of conduct and not on individual acts or omissions.

In support of the prosecution theories, Dr. Crawford testified that the child's serious injuries resulted from major trauma inflicted in separate incidents during a relatively short time period. He testified further that the trauma was intentionally inflicted by a person, and ruled out accidental causation. Finally, the doctor explained that each of these injuries would have resulted in substantial pain. Both parents defended against the theory that they ignored the child's suffering by denying that they knew or should have known at any point during the relevant time period that the child was injured or in pain. Thus, as to this form of abuse, the jurors could either believe the doctor or the defendants on whether they knew or should have known that the child needed medical attention. Like *Jones*, there is no reasonable possibility that the jurors would disagree as to particular acts or omissions.

As to the theory that Father inflicted the injuries, Father uniformly denied causing any of them.[9] Asked to explain how the injuries might have occurred, Father mentioned at least two accidental falls, one from a bed and the second due to a bicycle collision. Father's complete denial of responsibility was directly disputed by Dr. Crawford, who eliminated accidental, nonhuman causation and specifically testified that the final injury predated the alleged bicycle accident. Again, the central dispute involved a credibility contest between the Father and the doctor. The jury was entitled to believe either one, but there is no reasonable possibility that the jurors partially believed each and disagreed on the infliction of particular substantial injuries. Thus, we conclude that the trial court's error in giving the non-unanimity instruction was harmless.

B. *Child Endangerment Instruction (CALJIC No. 9.37)*[*]

The defendants were each convicted of violating one count of section 273a(a), felony child abuse. The Supreme Court has characterized that provision as "an omnibus statute that proscribes essentially four branches of conduct." (*People v. Sargent* (1999) 19 Cal.4th 1206, 1215.) "Any person who, under circumstances or conditions likely to produce great bodily harm or death, [1] willfully causes or permits any child to suffer, or [2] inflicts thereon unjustifiable physical pain or mental suffering, or [3] having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or [4] willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years." (§ 273a(a); *People v. Valdez* (2002) 27 Cal.4th 778, 783.) *Direct* infliction of abuse refers to the second of these "four branches of conduct" of section 273a(a), while *indirect* infliction is covered by the other three branches of that subdivision. The *direct* infliction of abuse

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[9] The only injury Father did not attribute to an accident beyond his control was the bite mark on the child's cheek. However, in closing argument, both Father's counsel and the prosecutor agreed that that injury would not constitute a felony eliminating any reasonable possibility that some jurors relied on that act to convict.

[*] See footnote, *ante*, page 1.

requires proof of a general criminal intent (*Sargent*, at pp. 1215, 1219-1220, 1224), while *indirect* infliction of abuse requires proof only of criminal negligence (*Valdez*, at p. 789). *Valdez* further held that the statutory definition of the term "willfully" is consistent with the standard for criminal negligence set by the Legislature, and the court restated its view that an act or omission amounting to criminal negligence can constitute a willful violation of the law. (*Id.* at p. 790.)

In reaching the decision to impose a criminal negligence standard for *indirect* infliction of abuse, *Valdez* rejected the defense argument that, to violate section 273a(a), one must have a subjective awareness of the risk. (*People v. Valdez, supra,* 27 Cal.4th at p. 790.) Section 273a(a) "expressly imposes no specific mental state requirement other than willfulness, which as noted, has varying meanings under different criminal statutes. Moreover, the Legislature apparently sought to avoid requiring a subjective mental state in the statute. [Citation.] Section [273a(a)] has consistently been interpreted to contain a criminal negligence standard, and defendant demonstrates no persuasive reason for such a radical and novel departure from existing law." (*Valdez*, at p. 790.)

Additionally, the *Valdez* court addressed an issue not raised in the petition for review. The jury had been instructed, in the language of CALJIC No. 9.37, that "In order to prove this crime, each of the following elements must be proved: [¶] . . . [¶] . . . A person who had care or custody of a child . . . [¶] willfully caused or, as a result of criminal negligence, permitted the child to be placed in a situation where his or her person or health was endangered." (*People v. Valdez, supra,* 27 Cal.4th at p. 792.) Because the jury could have understood the instruction to link " 'willfully' only to the word 'caused' and not to 'criminal negligence,' " the instruction failed to convey the statutory requirements. (*Ibid*.) In our case, Father points out that the jury was given an instruction that suffered from the same defect.**10** We agree, but find the error harmless.

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10 In pertinent part, the jury was instructed: "The Defendants are accused of having violated [section 273a(a)], a crime. [¶] Every person who, under circumstances or conditions likely to produce great bodily harm or death, [¶] 1. willfully inflicts unjustifiable physical pain or mental suffering on a child, or [¶] 2. willfully causes or, as a result of criminal negligence, permits a child to suffer unjustifiable physical pain or mental suffering, or [¶] 3. has care or custody of a

The statute permits conviction for *indirect* infliction of abuse only when a defendant willfully leaves the child in a situation where the defendant knew or should have known that the child's health was endangered. For example, a violation occurs if a parent fails to obtain medical treatment for a child when the parent knew or should have known it was necessary. Despite Father's argument to the contrary, *Valdez* did not intend by its criticism of the instruction to reintroduce the requirement of subjective awareness for *indirect* abuse explicitly rejected in the balance of the opinion. It is not necessary that the parent *know* that medical care is required so long as he or she should have known. In this case, it is undisputed that both parents consciously decided to forego medical treatment for a substantial period of time. According to defendants' own testimony, their delay in seeking medical attention for the femur fractures lasted, at minimum, until the second day following the onset of the fractures; furthermore, defendants *never* sought medical attention for the baby's host of other injuries. According to their own testimony, Mother and Father discussed whether to take the baby for medical treatment, but chose not to do so until May 11, 2000. As to the *indirect* abuse, the only dispute was whether the failure to act occurred when Mother or Father knew or should have known of the injuries. Since the willfulness of the failure to act was not disputed, the omission of the word "willful" before the phrase "criminal negligence" in the pertinent jury instruction was harmless.

C. *Modification of CALJIC No. 3.36*[*]

The court relied on a modified version of CALJIC No. 3.36 to define criminal negligence for the jury. Mother contends the trial court's modification was improper, and Father joins her argument. Unmodified, CALJIC No. 3.36 (6th ed. 1996) provides, in pertinent part: "['Criminal negligence'] ['Gross negligence'] refers to [a] negligent act[s]

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child and [¶] (a) willfully causes or, as a result of criminal negligence, permits the child to be injured, or [¶] (b) willfully causes or, as a result of criminal negligence, permits the child to be placed in a situation where his or her person or health is endangered, [¶] is guilty of a violation of [section 273a(a)], a crime."

[*] See footnote, *ante*, page 1.

which [is] [are] aggravated, reckless or flagrant and which [is] [are] such a departure from what would be the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to a proper regard for *[human life] [danger to human life]* or to constitute indifference to the consequences of those act[s]. The facts must be such that the consequences of the negligent act[s] could reasonably have been foreseen and it must appear that the *[death] [danger to human life]* was not the result of inattention, mistaken judgment or misadventure but the natural and probable result of an aggravated, reckless or flagrantly negligent act." (Italics added.) The court's modification replaced each of the above italicized portions with the phrase "*danger to human life or danger of great bodily injury*." While undoubtedly an expansion of CALJIC No. 3.36, the modification was an accurate expression of the law.

Section 273a(a) prohibits certain acts committed under "circumstances or conditions likely to produce *great bodily harm* or death." (Italics added.) Numerous cases have adopted the standard relied on by the trial court here. (*People v. Valdez, supra,* 27 Cal.4th at p. 790; *People v. Peabody* (1975) 46 Cal.App.3d 43, 48, quoted with approval in *People v. Sargent, supra,* 19 Cal.4th at p. 1217.) As Chief Justice George noted while serving on the Court of Appeal, "Although the CALJIC pattern instructions perform an invaluable service to the bench and bar, [they] are not sacrosanct . . . ." (*People v. Vargas, supra,* 204 Cal.App.3d at p. 1464.) The trial court committed no error in the challenged modification.

D. *Refusal to give Defendants' Instruction on Mistake of Fact*[*]

Mother challenges the trial court's denial of her request for a jury instruction on mistake of fact under CALJIC No. 4.35.[11] She contends it should have been "up to the jury, not the court to decide whether [her] mistake as to her daughter's medical condition

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[*] See footnote, *ante*, page 1.

[11] CALJIC No. 4.35 (6th ed. 1996) states: "An act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus a person is not guilty of a crime if [he] [she] commits an act or omits to act under an actual [and reasonable] belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful."

or her need for medical treatment was reasonable and bona fide." At trial Father joined Mother's request for the instruction and now joins in her challenge on appeal.

In reviewing this claim of instructional error, we must consider the instructions as a whole and view them in the context presented to the jury. (*People v. Tatman, supra,* 20 Cal.App.4th at p. 10.) An erroneous instruction requires reversal only if we determine there is a reasonable likelihood the jury understood and applied the instruction in a manner that violates the Constitution. (*People v. Frye* (1998) 18 Cal.4th 894, 957.)

From our review, we conclude any error in failing to provide this instruction was harmless. In its definition of criminal negligence (CALJIC No. 3.36), the court told the jury, "The facts must be such that the consequences of the negligent act or acts could reasonably have been foreseen and it must appear that the danger to human life or danger of great bodily injury was not the result of inattention, mistaken judgment or misadventure, but the natural and probable result of an aggravated, reckless or flagrantly negligent act." Thus the jury was informed that the danger to the child from failing to obtain medical treatment should "reasonably have been foreseen." Pursuant to this instruction, the jury would have understood that it should consider whether a reasonable mistake impeded an appreciation of this danger and required an acquittal. It is not reasonably probable that a result more favorable to the defendants would have been reached if the requested instruction had been given. (*People v. Beagle* (1972) 6 Cal.3d 441, 455; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

II. *Motion to Sever Mother's Trial*[*]

Mother contends that the trial court abused its discretion in denying her motion to sever her trial from Father's trial. We disagree.

Penal Code section 1098 states a statutory preference for joint trials. (*People v. Pinholster* (1992) 1 Cal.4th 865, 932.) "Under section 1098, '[w]hen two or more defendants are jointly charged . . . they must be tried jointly, unless the court order[s] separate trials.' In light of this legislative preference for joinder, separate trials are

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[*] See footnote, *ante*, page 1.

usually ordered only ' "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." ' [Citations.] A trial court's ruling on a severance motion is reviewed for abuse of discretion on the basis of the facts known to the court at the time of the ruling. [Citations.]" (*People v. Box* (2000) 23 Cal.4th 1153, 1195.) Furthermore, as noted in previous cases, "[t]he Supreme Court has characterized a trial in which the defendants are charged with common crimes against common victims as the classic situation for joint trials." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 344, citing *People v. Hardy* (1992) 2 Cal.4th 86, 168 and *People v. Turner* (1984) 37 Cal.3d 302, 312.)

The present case involves characteristics that made it a model case for a joint trial: a lone noncapital felony charge with a single victim that involved two defendants, with witnesses and defenses common to both defendants. Neither defendant gave an incriminating confession that implicated the other, nor was there any factual basis to expect either defendant would give exonerating testimony about the other if separate trials were held. Furthermore, there was no basis to suggest Mother would suffer from guilt by association with Father since there was no evidence that Father had a criminal past and since the evidence of guilt against Father was not distinctly stronger than the evidence against Mother. (Cf. *People v. Chambers* (1964) 231 Cal.App.2d 23, 27-29.) Mother argues, "[t]he fact that [Father] was targeted by the prosecutor as the primary abuser of his baby daughter lent a stink to [Father] that the jury could not ignore" and that she was tarred by that stigma. Mother never suggests how separate trials would have reduced the evidence of abuse, or insulated her from the jury's disapproval if they believed Father had abused the baby. Since the same evidence regarding the child's injuries would have been admitted even if the severance motion had been granted, the court's decision to deny the motion was not an abuse of discretion.

III. *Mother's Motion to Suppress Statements Given to Police*[*]

Mother challenges the ruling by the trial court denying her motion to suppress statements made during the last three of her four interviews with Detective Muñoz based on a failure to give *Miranda*[12] warnings. At the conclusion of the Penal Code section 402 hearing, the trial court denied the motion on the basis that none of the interviews were custodial in nature and, so, *Miranda* warnings were not necessary. The trial court's ruling was correct.

The standards governing our review of this issue were summarized by the Supreme Court in *Ochoa*. " 'In applying *Miranda* . . . one normally begins by asking whether custodial interrogation has taken place. "The phrase 'custodial interrogation' is crucial. The adjective [custodial] encompasses any situation in which 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " ' [Citation.] 'Absent "custodial interrogation," *Miranda* simply does not come into play.' [Citation.] The test for whether an individual is in custody is 'objective . . . : "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." ' [Citations.] [¶] . . . [¶] The question whether defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] 'Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is . . . reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." [Citations.] The first inquiry . . . is distinctly factual. . . . The second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate determination . . . presents a "mixed question of law and fact" . . . .' [Citation.]

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[*] See footnote, *ante*, page 1.

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

Accordingly, we apply a deferential substantial evidence standard [citation] to the trial court's conclusions regarding ' "basic, primary, or historical facts: facts 'in the sense of recital of external events and the credibility of their narrators . . . .' " ' [Citation.] Having determined the propriety of the court's findings under that standard, we independently decide whether 'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.' [Citation.]" (*People v. Ochoa, supra,* 19 Cal.4th at pp. 401-402.)

Applying these principles to the present case, the trial court correctly found that Mother was not in custody during any of the challenged interviews, and, thus, no *Miranda* violation occurred. The circumstances surrounding the interviews with Mother indicate that Mother was free to terminate them if she had wanted to do so. The detective took an initial recorded statement at Mother's kitchen table on the day the baby was admitted to the hospital (May 11, 2000), and then reinterviewed her twice more at the police station as he learned more about the nature and extent of the baby's injuries (May 12 and June 7). The officer drove Mother to her home on May 11 and also drove her to and from the police station on May 12. Mother and Father brought themselves to the police station for the June 7 interview after the detective asked them to do so. Merely asking someone to come to the police station to answer questions and providing the person a ride to the police station do not render the interview *custodial*. (See, e.g., *People v. Stansbury* (1995) 9 Cal.4th 824, 831-832.) Following each interview, Mother remained out of custody.

Discussing the baby's injuries with Mother was appropriate as part of the ongoing investigation since she had seen and interacted with the baby every day and likely could provide critical observations concerning the baby's condition during the pertinent period when the baby was cared for by Father and by the other caregivers. A reasonable person in Mother's position would expect to receive follow-up inquiries from the police as the officers learned more about the baby's injuries. Mother never exhibited any reluctance to speak with the detective and at all times appeared to be cooperating willingly with his investigation. Under these circumstances, we find no factual basis to conclude that a

reasonable person in Mother's position would have felt her freedom restrained to the degree associated with formal arrest. (*Thompson v. Keohane* (1995) 516 U.S. 99, 112; see *People v. Stansbury, supra,* 9 Cal.4th at p. 830.)

IV. *Defendants' Motion for Judgment of Acquittal*[*]

Both defendants contend the trial court erroneously denied their motions for acquittal under Penal Code section 1118.1, which requires the trial court to enter a judgment of acquittal if there is insufficient evidence at the time of the motion to sustain a conviction of the charged offense. When reviewing the denial of a such a motion made at the close of the prosecution's case, we consider only the evidence then in the record (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1464) and apply the substantial evidence test to it (*People v. Cuevas* (1995) 12 Cal.4th 252, 261). Thus, we review the evidence in the light most favorable to the judgment below to determine "whether it discloses *substantial evidence*—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578, italics added.)

As we have earlier discussed, a violation of section 273a(a) may involve both active and passive conduct affecting the child. (*People v. Valdez, supra,* 27 Cal.4th at p. 784.) The violation can be committed through a continuous course of conduct or be based on specific acts. (*People v. Ewing, supra,* 72 Cal.App.3d at p. 717.) The statute encompasses instances of gross negligence, including situations where a defendant has acted with a sincere, but objectively unreasonable, belief that his or her conduct posed no risk to the child. Thus the statute makes criminal conduct that, in the jury's view on an objective basis, "is such a departure from what would be the conduct of an ordinarily prudent or careful person under the same circumstances as to be incompatible with a proper regard for human life." (*Valdez*, at pp. 790-791.)

Applying this standard to the present case, we find that the evidence presented by the prosecution was more than sufficient to support conviction of both defendants.

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[*] See footnote, *ante*, page 1.

Dr. Crawford's testimony—establishing the constellation of injuries, the repetitive nature and the varying ages of the injuries, the different mechanisms of injury, and the fact that different organ systems were involved—is sufficient to support a conclusion by the jury that this baby had been assaulted very violently over a long period of time. Dr. Crawford also testified that many of the injuries would have been painful for significant periods of time (sometimes days or weeks), supporting a finding that defendants were objectively unreasonable in failing to seek medical attention for the baby sooner. In addition, he offered testimony that the failure to timely report the baby's injuries supports a finding that defendants sought to conceal them. The nature of the spiral fracture to the baby's femur and the evidence of delay by defendants in getting treatment for it, when combined with all of the baby's other injuries, easily suffice to support a conclusion, on an objective basis, that Mother and Father were guilty of conduct that was such a departure from that of an ordinarily prudent person under the circumstances as to be incompatible with a proper regard for human life.

V. *Motion for Mistrial Arising From Impeachment with Immigration Status*[*]

Both defendants contend that the trial court abused its discretion by denying their motion for mistrial after the prosecutor cross-examined Mother concerning her immigration status at the time of the offense. A trial court should grant a motion for mistrial only when the party's chances of receiving a fair trial have been irreparably damaged. (*People v. Silva* (2001) 25 Cal.4th 345, 372.) Such a motion is addressed to the sound discretion of the trial court (*People v. Romero* (1977) 68 Cal.App.3d 543, 548), and we apply the deferential abuse of discretion standard when reviewing the denial of a motion for mistrial (*Silva*, at p. 372).

During cross-examination, the prosecutor asked Mother when she and Father had come to Hayward. Mother responded that they had come "in January" 2000. When questioned further about this, Mother admitted that she and Father had arrived from her sister's home in October 1999. When asked how long she had been in the United States,

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[*] See footnote, *ante*, page 1.

Mother answered "two years" for herself and "something like a year and a half" for Father. The prosecutor then asked, "And you were not here legally, correct?" Mother's counsel objected and a sidebar was held, in which defense counsel argued that the question was extremely prejudicial and requested a mistrial. The court overruled the objection and allowed the questioning to proceed. Mother then admitted that she and Father were in the United States illegally at the time she brought the baby to St. Rose Hospital on May 11, 2000. Mother denied fearing deportation if she brought the baby in for medical treatment, and denied that her illegal alien status affected the responses she made to the questions Detective Muñoz had asked her.

The following morning a further hearing was held on the motion for mistrial. The court noted on the record that it had overruled the objection based on its conclusion that the probative value of the evidence outweighed any prejudice. The court remarked that the evidence was probative of defendants' motive for the delay in taking the baby to the hospital for treatment and indicated a potential motive for Mother's statements to Detective Muñoz. On the issue of the potential prejudice from the questioning, the court found it was speculative whether the information might help defendants in the eyes of the jury, rather than hurt them, by engendering sympathy.

The trial court's ruling was not an abuse of its discretion We agree with the trial court that the evidence was relevant (Evid. Code, § 350) because it provided a motive for the delay in seeking medical treatment for the baby. We also uphold the court's decision to overrule the objection based on section 352.[13] Although we find it unlikely that the evidence engendered sympathy for the defendants and believe it a close question whether the probative value of this evidence outweighed its prejudicial effect, on balance the trial court's determination was rational and therefore fell within the limits of its discretion. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438.) In any event, even if the ruling was

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13 Evidence Code section 352 states: "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."

erroneous, it was harmless. The evidence of Father's involvement in the infliction of extreme violence on the baby and of the involvement of both parents in the failure to treat the injured child was overwhelming. It simply is not reasonably probable that a result more favorable to either defendant would have been reached if the evidence of their immigration status had been kept from the jury. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

VI. *Exclusion of Purported Defense Expert from Testifying at Trial*[*]

Mother claims that the trial court abused its discretion when it precluded defense expert Marianne Pripps-Huertas from testifying to explain Mother's behavior based upon her cultural background.[14] Both the prosecutor and Father had objected to its admission, and the trial court excluded the evidence as more prejudicial than probative under Evidence Code section 352.

Here again, the trial court has discretion to determine whether the probative value of the evidence outweighs its prejudicial effect and whether to admit or exclude that evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 18-20; *People v. Mincey* (1992) 2 Cal.4th 408, 439.) "The court's exercise of discretion will not be reversed on appeal absent a clear showing of abuse." (*Mincey*, at p. 439.)

We find no abuse of discretion. This witness testified outside the presence of the jury to her opinion that culture can affect one's conduct. Specifically, it was her opinion that in the part of Mexico where Mother grew up, parents did not pick up or coddle fussy children, and, in fact, were reluctant to pay attention to a child for fear that this would attract the "evil eye." It was the witness's personal opinion, not empirically based, that an indigenous parent from this region who had a child suffering from injuries would not attempt to comfort or care for the child.

After she completed her testimony, both Father's counsel and the prosecutor objected to allowing the testimony into evidence, citing its lack of relevance and its

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[*] See footnote, *ante*, page 1.

[14] The defense expert's curriculum vitae was marked for identification purposes as defense exhibit A.

inadmissibility under Evidence Code section 352. The trial court sustained the Evidence Code section 352 objection after concluding that Mother's culpability under Penal Code section 273a, subdivision (a) would be determined based on the community standard in California, rather than on any individual standard from another culture. The court stated that any probative value of the testimony in explaining Mother's conduct would be outweighed by the significant danger that the testimony would be used for the improper purpose of applying a different community standard to assess Mother's culpability for the charged offense.

The trial court's assessment is well-reasoned and makes good sense in light of the potential for jury confusion that could have resulted from this testimony. Thus, the court did not abuse its discretion in excluding the testimony.

VII. *Alleged Ineffective Assistance of Mother's Trial Counsel*[*]

Mother challenges the effectiveness of her trial counsel in three respects. She contends that her defense counsel at trial failed: (1) to submit to the trial court translated audio statements and a videotaped statement of Mother's latter three interviews with Detective Muñoz as part of the court's consideration of the motion to suppress; (2) to move to suppress and to object to admission of purported double hearsay from Detective Muñoz about a statement allegedly made to him by Mother's sister, Catalina Rodriguez; and (3) to request the disqualification of the trial judge on the ground of alleged bias.

In order for Mother to establish that she was denied the effective assistance of counsel, she must show that her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and that counsel's performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Scott* (1997) 15 Cal.4th 1188, 1211.) A defendant cannot prevail unless she can demonstrate actual prejudice caused by counsel's error. (*Strickland*, at p. 694; *People v. Hart* (1999) 20 Cal.4th 546, 623-624.) "To the extent the

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[*] See footnote, *ante*, page 1.

record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 333; accord, *Hart,* at pp. 623-624.) "A claim for ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Since the appellate record before us neither includes the transcripts of Mother's challenged statements, nor shows the reasons for defense counsel's pertinent actions and omissions, the ineffectiveness claims cannot be raised in the appeal and, instead, must be considered in conjunction with Mother's separate petition for habeas corpus. (*Mendoza Tello*, at pp. 267-268.)

VIII. *Sentencing of Father to the Aggravated Term of Six Years in Prison*[*]

Father challenges the trial court's imposition of the six-year upper term for his conviction. We conclude the court was acting within its discretion when it imposed the aggravated term.

At the sentencing hearing, the court stated that it had read and considered the probation officer's report, along with the written submissions of counsel. After referring to its extensive experience in dealing with cases of abuse and neglect, the court remarked that it held no assumptions or stereotypes concerning abusers based on gender or any other factor. Instead, the court stated that it looked to "the cold, hard physical evidence." The court cited the testimony of Dr. Crawford as showing that the baby was savagely abused, with "not one or two injuries, but about 12 broken bones." Based on the circumstances of how the baby was being cared for, the court concluded that at least one of the codefendants had inflicted the injuries and one of them had allowed the abuse to occur, without identifying which defendant had been responsible for each aspect. Based on the evidence, the court rejected the possibility that the injuries had been inflicted by someone other than the defendants. The court further noted that there had been too much

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[*] See footnote, *ante*, page 1.

abuse to be ignored, and that since both defendants had testified under oath that the baby had no symptoms and was not crying, then both defendants must have lied under oath about what had happened. The court concluded that both defendants had failed to obtain the aid that the baby needed to ease its suffering. Given the situation, the court found that there simply was no rational scenario where either of the defendants could have been acquitted of the offense charged.

The court determined that granting either defendant probation would be wholly inappropriate under the circumstances. With regard to the appropriate length of sentence, the court noted the presence of aggravating factors applicable to both defendants including the great violence and seriousness of the injuries (Cal. Rules of Court,[15] former rule 421(a)(1), now rule 4.421), the vulnerability of the victim (former rule 421(a)(3)), and the fact that defendants took advantage of a position of trust or confidence to commit the offense (former rule 421(a)(11)). The only mitigating factor applicable to both defendants was the absence of any prior criminal record, which the court found to be insignificant in view of the extreme seriousness of the current offense and the extreme nature of the aggravating factors. (Former rule 423(b)(1), now rule 4.423.)

The court sentenced Father to the aggravated six-year upper term, finding that the aggravating circumstances significantly outweighed the one mitigating circumstance. With regard to Mother, the court found the presence of one significant additional mitigating factor: Mother finally sought aid for the baby. Accordingly, the court assessed that the aggravating and mitigating factors were balanced as to Mother, and sentenced her to prison for the four-year midterm.

A sentencing court may impose the upper term if, "after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." (Rule 4.420(b).) On appeal, we may reverse a trial court's discretionary sentencing decision only if the court has abused its discretion. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822,

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15 All rule references are to the California Rules of Court.

831.) To show abuse of discretion, the party attacking the sentence has the burden to show the discretionary sentencing decision was irrational or arbitrary. "In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review. [Citations.]" (*Du*, at p. 831.) Furthermore, a court may rely upon a *single* factor in aggravation to support imposition of an upper term (*Cruz*, at p. 433; *People v. Castellano* (1983) 140 Cal.App.3d 608, 615) and reject all mitigating factors, either expressly or impliedly (*People v. Salazar* (1983) 144 Cal.App.3d 799, 813). Lastly, a court's reliance upon an impermissible or unproven aggravating factor will not require reversal or modification of sentence if it is not reasonably probable that the trial court would have imposed a more favorable sentence in the absence of the alleged error. (*People v. Scott* (1994) 9 Cal.4th 331, 355.)

The court's sentencing choice for Father falls within the scope of its discretion. Father's assertion that his sentence went beyond the jury's known verdict is utterly without merit. Each of the aggravating factors cited by the court is supported by the evidence of gross neglect shown in failing to seek medical attention for the baby during the two-and-one-half-month period before her May 11, 2000 hospitalization. Father's argument presumes that the jury found him guilty based on the least serious version of culpability possible under the evidence presented at trial. Father bases this contention on the hearsay recollections of his trial counsel of informal conversations counsel had with some of the jurors after the trial. Defense counsel's recollections were inadmissible under Evidence Code sections 1150 and 1200.[16] Meanwhile, Father ignores other

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16 Evidence Code section 1150 states: "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined. [¶] (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict."

evidence supporting the trial court's conclusion that the gross neglect charged to both defendants had continued for weeks or months.

A trial court is entitled to look at the whole record in the case when selecting the appropriate sentence, and, if it determines that factors in aggravation did occur, there need not be a jury finding on the matter to support the court's order. (*People v. Fulton* (1979) 92 Cal.App.3d 972, 976.) We reject Father's claim that the imposition of the upper term was the result of the court's bias or of prejudging the evidence against him and conclude that the sentence was a proper exercise of the court's discretion.

IX. *Cumulative Error*[*]

Lastly, defendants contend that reversal is required due to the cumulative effect of the trial court's errors. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844-845.) Based on our review of the entire record, defendants' contention falls short. We have already rejected most of defendants' arguments on their merits. We conclude the cumulative effect of the errors we have identified is relatively minimal and does not compel a reversal of either defendant's conviction.

CONCLUSION

The judgment entered as to each defendant is affirmed.

Evidence Code section 1200 states, in relevant part: "(a) 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. [¶] (b) Except as provided by law, hearsay evidence is inadmissible."

[*] See footnote, *ante*, page 1.

SIMONS, J.

We concur.

STEVENS, Acting P.J.

GEMELLO, J.

People v. Napoles et al. (A093189)

Superior Court of Alameda County, No. CH-28902, Robert K. Kurtz, Judge.

Michael B. Dashjian, under appointment by the Court of Appeal, for Defendant and Appellant Rodolfo Puebla Napoles.

Patricia N. Cooney, under appointment by the Court of Appeal, for Defendant and Appellant Teresa Rodriguez.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Ronald A. Bass, Senior Assistant Attorney General, René A. Chacón and Laurence K. Sullivan, Deputy Attorneys General, for Plaintiff and Respondent.