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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANDRA FELTON, Defendant and Appellant.	E033333 (Super.Ct.Nos. FSB026722, FSB028320) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Kenneth Barr, Judge. Affirmed.

Paul R. Ward, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr., Supervising Deputy Attorney General, and Karl T. Terp, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III, IV, and V.

Defendant struck his girlfriend's baby daughter -- then less than a month old -- so hard that he broke three of her ribs. In Case No. FSB026722, he pleaded guilty to felony child endangerment (Pen. Code, § 273a, subd. (a)), and he admitted a personal infliction of great bodily injury enhancement (Pen. Code, § 12022.7, subd. (a)). He was placed on probation, with jail time to be served on weekends.

When the baby was five months old, her mother left her with defendant one night so she could go to work. By the time she got back, the baby had two skull fractures, severe brain damage, and numerous other injuries. Defendant threatened to kill the mother if she took the baby to the hospital.

As a result, in Case No. FSB028320, a jury found defendant guilty on one count of felony child endangerment (Pen. Code, § 273a, subd. (a)), with an enhancement for personal infliction of great bodily injury on a child under five (Pen. Code, § 12022.7, subd. (d)), and on one count of attempting to make a criminal threat (Pen. Code, §§ 422, 664). Two "strike" prior conviction allegations (including the conviction in Case No. FSB026722) were found true. Defendant was sentenced to 55 years to life in prison.

In Case No. FSB026722, defendant's probation was revoked, and he was sentenced to an additional six years in prison.

In the published portion of this opinion, we will hold that the trial court erred by ruling that the mother was not an accomplice because she did not have the specific intent necessary to be an aider and abettor. For instructional purposes, an "accomplice" includes a coperpetrator as well as an aider and abettor. There was substantial evidence that the mother, through her criminal negligence in leaving the baby with defendant, was

a coperpetrator of defendant's crime of felony child endangerment (in fact, she had already pleaded guilty to felony child endangerment). Thus, the trial court should have given accomplice instructions. We will also hold, however, that the error was harmless because the mother's testimony was adequately corroborated.

In the nonpublished portion of this opinion, we find no other error. Hence, we will affirm.

I

FACTUAL BACKGROUND

Melanie Littlefield met defendant in September 1999. She was pregnant at the time. In January 2000, their relationship became first romantic, then sexual.

On May 4, 2000, Littlefield gave birth to a daughter, named Cree. She already had a three-year-old son, named Trevaughn. Defendant was very attentive to the baby, as if she were his own.

A. *The Prior Offense*.

On May 31, 2000, Littlefield told defendant "he had to leave because the baby was there now and financially we weren't making it." Defendant called his sister and asked her to come and pick him up. Meanwhile, Littlefield took a shower. She left the baby lying on the couch. While in the shower, she heard the baby crying "like she was hurt." She ran into the living room. Defendant was holding the baby. The "onesie" the baby had been wearing was on the floor. Defendant said the baby had rolled off the couch.

Littlefield took the baby to the hospital. She asked the doctors to take x-rays. The baby's only apparent symptoms, however, were vomiting (which the doctors attributed to

a previous bout of meningitis) and resulting dehydration. After an external examination, they told Littlefield to take the baby home.

The next morning, the baby was still vomiting, so Littlefield took her back to the hospital. There, the baby was seen by Dr. David Tito. He ordered x-rays, which revealed that the baby had three broken ribs, on the left side. There was a fluid-filled space around her brain that was "potentially consistent" with the healing stage of "shaken baby syndrome."

According to Dr. Tito, "It's physically impossible for a 28-day-old baby to roll or roll off the couch [under] their own power." Moreover, the baby's broken ribs could not have been caused by falling off a couch; they would have required a fall of at least five or six feet.

Both children were immediately removed from Littlefield's custody. Defendant and Littlefield were arrested. Littlefield was charged with child abuse, but the charges were dropped almost immediately. Defendant pleaded guilty to child abuse and admitted personally inflicting great bodily injury.

B. *The Current Offense*.

In July 2000, defendant was released from jail. He began visiting Littlefield again. Littlefield kept asking him if he had hurt the baby, but he insisted that the baby had fallen off the couch. At her request, he swore on a Bible. After that, she believed him.

In September 2000, Littlefield regained custody of her children. She had to agree "[n]ever to allow [defendant] around my kids." Nevertheless, in late September or early

October, he started visiting her apartment. On the first visit, he wanted to see Trevaughn, and she let him. The next time, she let him watch the baby for 15 to 20 minutes while she took Trevaughn to school. On his third visit, he looked after both children for about an hour while she went to the Department of Social Services.

On October 25, 2000, defendant watched both children while Littlefield went to work. The baby had been diagnosed with gastroesophageal reflux disorder, which was causing her to vomit "a little," and she had a cold. When Littlefield left, however, at 6:00 or 6:30 p.m., the baby was alert and responsive.

While Littlefield was on a break, sometime before 9:00 p.m., she phoned home. Defendant told her the children were okay. When she persisted in questioning him, he told her to shut up and get off the phone so he could play a video game.

Littlefield got home some time after 11:00 p.m. She found the baby asleep on the couch. When Littlefield tried to pick her up, defendant told her to leave the baby alone and go to bed. About five minutes later, when he came to bed, he brought the baby with him. Littlefield tried to wake her, but "she wasn't responding. She wouldn't stay awake."

Littlefield said, "I have to take my baby to the hospital." Defendant responded, "You aren't going no where [*sic*], man. I am not being responsible. I ain't even supposed to be here. If I go to jail, I will kill you all."

Littlefield tried to call Cynthia Wallace, who was her friend and neighbor as well as defendant's sister-in-law. Defendant grabbed the phone and yanked out the cord.

Littlefield then tried to call Wallace on a cordless phone; it rang once before defendant grabbed that phone, too. Wallace, however, had caller ID and returned the call.

Wallace testified that she got Littlefield's call after 11:00 p.m. She arrived at the apartment minutes later. At that point, Littlefield testified, defendant "completely changed," suddenly urging her to take the baby to the hospital. Wallace -- who was a nurse's aide -- examined the baby. The baby's reflexes were not functioning. Her pupils were fixed. There were two knots on her head. Wallace asked, "Did the baby fall?" Littlefield turned and looked at defendant; he said no.

Defendant left before the paramedics arrived, saying again that he was not supposed to be there and adding that "he didn't want . . . no one to think that he did anything." He went to a friend's apartment. He said he had had an argument with his girlfriend, so his friend let him spend the night.

After the baby was admitted to the hospital, she was treated by Dr. Rebecca Piantini, a specialist in child abuse cases. The baby was unconscious and unable to breathe on her own. She had two skull fractures. Blood vessels surrounding her brain were torn and bleeding. Nerve cells throughout her brain had been ripped apart. The retinas of both eyes were bleeding. She had a punctured lung, two broken legs, and possibly a fractured left wrist. There were bruises on her forehead and abdomen.

There were signs of previous bleeding around the brain that was in the process of healing. Also, in addition to the left-side ribs that had been broken in the earlier incident, there were "areas that were suspicious for healing fractures on the right side as well."

In Dr. Piantini's opinion, the baby's injuries could only be the result of child abuse. One of the skull fractures, in particular, would have required as much force as a car accident or a fall from a two-story building head-first onto cement. The fact that both broken leg bones were sheared off at the tip was "highly specific for child abuse." The bleeding in the back of the eye indicated shaken baby syndrome. The abdominal bruises were in areas where bruises "don't just happen accidentally."

After "a beating like th[is]," symptoms would have shown up "right away" -- in less than an hour.

The next morning, the police went to defendant's friend's apartment. They caught defendant trying to escape out a rear window.

When the police interviewed defendant, he told them Littlefield left for work at 6:30 p.m. While she was out, the baby was "okay." There was no one there besides defendant, the baby, and Trevaughn. Littlefield got back at 11:30 p.m. or midnight. Defendant was certain Littlefield would not have hurt the baby. When asked who could have done it, he said, "I don't know."

Littlefield pleaded guilty to child endangerment. Her plea was based on letting defendant be around the baby, not on her personally abusing the baby. She was sentenced to one year in jail.

II

FAILURE TO INSTRUCT REGARDING ACCOMPLICE TESTIMONY

Defendant contends the trial court erred by ruling, as a matter of law, that Littlefield was not an accomplice, and hence by refusing to give accomplice instructions.

A. *Additional Factual and Procedural Background*.

Defense counsel requested accomplice instructions, arguing that Littlefield was an accomplice as a matter of law. The prosecutor disagreed, arguing: "[A]n accomplice has to share the criminal purpose of the . . . coparticipant. . . . She can be criminally negligent without any intention that the crime that [defendant] committed be committed."

The trial court responded: "In looking at the CALJICs for guidance, CALJIC 3.14, which is criminal intent, it is necessary to make one an accomplice. Merely attempting to or aiding or assisting in the commission of a crime without knowledge of the unlawful purpose of the perpetrator and without the intent or purpose of committing, encouraging, or facilitating the commission of the crime is not criminal. . . . [¶] And I think that's exactly what we have here. For her to be an accomplice, she would have to intend that she gave control of the baby or left the baby in defendant's possession so he could abuse the baby."

The trial court then ruled: "[T]he facts are clear and undisputed that she was not a[n] accomplice as a matter of law. So I don't think the accomplice instructions are appropriate and not warranted by the evidence, so they won't come in."

B. *Analysis*.

If there is evidence that a witness against the defendant is an accomplice, the trial court must give jury instructions defining "accomplice." (E.g., CALJIC No. 3.10, 3.14, 3.15, 3.17.) It also must instruct that an accomplice's incriminating testimony must be viewed with caution (e.g., CALJIC No. 3.18) and must be corroborated (e.g., CALJIC No. 3.11, 3.12, 3.13). If the evidence establishes that the witness is an accomplice as a

matter of law, it must so instruct the jury (e.g., CALJIC No. 3.16); otherwise, it must instruct the jury to determine whether the witness is an accomplice (e.g., CALJIC No. 3.19). (*People v. Hayes* (1999) 21 Cal.4th 1211, 1270-1271 and 1271, fn. 17; see also *People v. Zapien* (1993) 4 Cal.4th 929, 982.)

"The reason most often cited in support of these instructions is that an accomplice is inherently untrustworthy because he or she 'usually testif[ies] in the hope of favor or the expectation of immunity.' [Citation.] In addition, an accomplice may try to shift blame to the defendant in an effort to minimize his or her own culpability. [Citation.]" (*People v. Tobias* (2001) 25 Cal.4th 327, 331, quoting *People v. Coffey* (1911) 161 Cal. 433, 438.)

"For instructional purposes, an accomplice is a person 'who is liable to prosecution for the *identical offense* charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 142-143, italics added, quoting Pen. Code, § 1111.) "In order to be an accomplice, the witness must be chargeable with the crime as a principal [citation] and not merely as an accessory after the fact [citations]. [Citation.]" (*People v. Sully* (1991) 53 Cal.3d 1195, 1227.) Principals include those who "directly commit the act constituting the offense" as well as those who "aid and abet in its commission . . . ." (Pen. Code, § 31.) Accordingly, "perpetrators are accomplices within the meaning of section 1111 [citations] . . . ." (*People v. Belton* (1979) 23 Cal.3d 516, 523, fn. omitted; accord, *People v. Gordon* (1973) 10 Cal.3d 460, 468.)

"[T]he dividing line between the actual perpetrator and the aider and abettor is often blurred. It is often an oversimplification to describe one person as the actual perpetrator and the other as the aider and abettor. When two or more persons commit a crime together, both may act in part as the actual perpetrator *and* in part as the aider and abettor of the other, who also acts in part as an actual perpetrator." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120.) Moreover, "the aider and abettor's guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state." (*Id*. at p. 1117.)

The trial court relied on the general principle that "An aider and abettor . . . must 'act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.]" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123, italics omitted, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 560.) Even the Supreme Court has said that an "accomplice" must act with such knowledge and intent. (E.g., *People v. Prettyman* (1996) 14 Cal.4th 248, 259.) As long as the issue is vicarious criminal liability, and not the duty to give accomplice instructions, this is all well and good.

Under Penal Code section 1111, however, "accomplice" is not synonymous with aider and abettor; a perpetrator can be an accomplice. And, depending on the nature of the crime charged against the defendant, a perpetrator may be able to commit it without intending to do so, and without any knowledge that the defendant intends to do so. For

example, the accomplice may be the perpetrator of a crime that does not require specific intent, whereas the *defendant* is the aider and abettor or *coperpetrator*.

Here, Littlefield could commit felony child endangerment without any intent that defendant commit it. This crime requires "circumstances or conditions likely to produce great bodily harm or death." (Pen. Code, § 273a, subd. (a).) It can be committed by "'both active and passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect.' [Citation.]" (*People v. Sargent* (1999) 19 Cal.4th 1206, 1215-1216, quoting *People v. Smith* (1984) 35 Cal.3d 798, 806.)

Littlefield committed felony child endangerment, if at all, by inflicting harm indirectly -- i.e., by leaving the baby with defendant. Under these circumstances, felony child endangerment requires at least criminal negligence. (*People v. Valdez* (2002) 27 Cal.4th 778, 781, 787-791.) "'Under the criminal negligence standard, knowledge of the risk is determined by an objective test: "[I]f a reasonable person in defendant's position would have been aware of the risk involved, then defendant is presumed to have had such an awareness."' [Citations.]" (*Id*. at p. 783, quoting *Williams v. Garcetti* (1993) 5 Cal.4th 561, 574.)

As the trial court correctly found, there was no evidence that Littlefield intended defendant to hurt the baby. It follows that she did not *aid and abet* the commission of felony child endangerment. Nevertheless, there was evidence that she committed felony child endangerment *as a coperpetrator*. As she did not directly inflict the harm, she did not have to know that leaving the baby with defendant could result in great bodily harm, as long as a reasonable person would have known. Defendant had inflicted great bodily

injury on the baby before. Littlefield had agreed, for the protection of her children, not to let defendant near them. Also, the baby had older, healing injuries of which Littlefield inferably might have been aware. The jury could find that a reasonable person would have known that leaving the baby with defendant presented a risk of great bodily harm. (See *People v. James* (1987) 196 Cal.App.3d 272, 284 [where there was evidence that mother knew the defendant was abusing her daughter but failed to protect her, mother was accomplice to the defendant's felony child endangerment].) Finally, the likelihood that defendant would inflict great bodily harm was precisely what made Littlefield criminally negligent. She created a danger to the baby; defendant escalated this same danger to the level of actual injuries.

Accordingly, there was sufficient evidence that defendant and Littlefield were coperpetrators of the same crime. And if Littlefield was a coperpetrator, then she was an accomplice. This is true even though she was not an aider and abettor, i.e., even though she did not intend defendant to commit the crime.

At oral argument, the People argued for the first time that Littlefield committed felony child endangerment (if at all) the moment she left her baby in defendant's care; even if she had come back and found the baby unharmed, she would still have been guilty of felony child endangerment. Thus, she and defendant could not be found guilty of the "identical offense." At our request, both sides filed supplemental briefs on this point.

The People's argument, though appealing, is flawed. Felony child endangerment is a continuous course of conduct crime. (See *People v. Culuko* (2000) 78 Cal.App.4th

307, 325 [Fourth Dist., Div. Two].) Moreover, as we noted in *People v. Heath* (1998) 66 Cal.App.4th 697, "an offense may have been 'committed,' so as to subject its perpetrator to liability for the completed offense as opposed to an attempt to commit it, but still remain in progress for purposes of determining aider and abettor liability. [Citation.] Thus, . . . for purposes of aiding and abetting liability a burglary continues until the perpetrator finally departs from the structure, even though the crime is technically complete upon the initial entry. [Citation.] Similarly, . . . a robbery continues for purposes of aiding and abetting until the stolen property is carried to a place of temporary safety, even though the crime is technically complete when the property is taken from the victim's person or immediate presence. [Citation.]" (*Id*. at p. 707, citing *People v. Montoya* (1994) 7 Cal.4th 1027, 1045-1047 [burglary] and *People v. Cooper* (1991) 53 Cal.3d 1158, 1165-1166 [robbery].)

Littlefield's offense was "complete," for purposes of her guilt, the moment she left the baby with defendant. However, it was not "complete," for purposes of aider and abettor liability, until she returned home. During this time, defendant became her coperpetrator by directly inflicting injury on the baby. True, Littlefield's guilt did not depend on defendant's; she would have been equally guilty, with or without his participation. But the same is true in every "late joiner" case -- when the crime has already been committed by the perpetrator, but is still ongoing as to the accomplice. This fact did not preclude defendant from becoming Littlefield's coperpetrator.

We cannot say Littlefield was an accomplice as a matter of law. Defendant had been left with the children safely before; he had convinced Littlefield, by swearing on a

Bible, that he had not hurt the baby. Thus, alternatively, the jury could have found that Littlefield acted reasonably and was *not* criminally negligent. Littlefield's status as an accomplice presented a question of fact. The trial court therefore erred by failing to define accomplice and by failing to instruct the jury on what to do if it found that Littlefield was an accomplice.

If the trial court had given accomplice instructions, presumably it would have given CALJIC No. 3.14. This instruction, as trial court noted, would have stated that an accomplice must have "knowledge of the unlawful purpose of the perpetrator" and "the intent or purpose of committing, encouraging or facilitating the commission of the crime . . . ." It would have led the jury to find that Littlefield was not an accomplice.

But this does not suffice to render the error harmless. For the reasons already stated, in this case, CALJIC No. 3.14 would have been legally incorrect. The trial court's duty to instruct sua sponte "on general principles of law that are closely and openly connected with the facts presented at trial" (*People v. Ervin* (2000) 22 Cal.4th 48, 90) would have included a duty to modify or to replace this standard instruction. By giving CALJIC No. 3.14 in unmodified form, the trial court would only have replaced one error with a different error.

We do conclude that the error was harmless, but for a different reason. An erroneous failure to give accomplice instructions is deemed harmless as long as there is "sufficient" (or "ample") evidence of corroboration. (*People v. Lewis* (2001) 26 Cal.4th 334, 370 [sufficient]; *People v. Arias*, *supra*, 13 Cal.4th at p. 143 [ample].) "'Corroborating evidence may be slight, may be entirely circumstantial, and need not be

sufficient to establish every element of the charged offense. [Citations.]' [Citation.] The evidence 'is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' [Citation.]" (*People v. Lewis*, *supra*, at p. 370, quoting *People v. Hayes*, *supra*, 21 Cal.4th at p. 1271 and *People v. Fauber* (1992) 2 Cal.4th 792, 834.)

Here, there was more than ample evidence to corroborate Littlefield's testimony. Defendant had admitted causing similar injuries to the baby when she was left with him before. When interviewed by the police, he insisted that Littlefield "didn't do nothing to that baby, I know she didn't." He admitted that the baby was fine when Littlefield left, around 6:30 p.m., and that she was in his sole care until about 11:30 p.m., when Littlefield got back. Wallace testified that Littlefield called her around 11:00 p.m. Moreover, when Wallace asked if the baby fell, Littlefield turned to defendant, who said no. Thus, defendant implicitly admitted that the baby had been in his care, and not Littlefield's, when she was injured.

As defendant points out, the investigating officer who interviewed Wallace testified that Wallace said Littlefield called her "around 1:00 in the morning." Defendant also claims a second investigating officer testified that he arrived at the scene at 1:30 a.m., and the paramedics were still there. Defendant theorizes that Littlefield actually caused the injuries to the baby herself, between 11:00 p.m. and 1:00 a.m. Defendant's theory is inconsistent with his own insistence that Littlefield did not do it. Moreover, the second officer's testimony was far from clear; 1:30 a.m. seems to have been when he got a second call, telling him that, unlike the paramedics, the emergency room physicians

suspected child abuse. In any event, the Supreme Court at most requires ample corroboration, not corroboration beyond a reasonable doubt.[1]

Finally, as we will discuss in part III, *post*, defendant's efforts to flee after the crime were relevant and admissible to show consciousness of guilt. "Flight tends to connect an accused with the commission of an offense and may indicate that an accomplice's testimony is truthful. [Citations.] As such, the flight of one who knows he is suspected of committing a crime may be sufficient to corroborate the testimony of an accomplice. [Citation.]" (*People v. Perry* (1972) 7 Cal.3d 756, 771-772; accord, *People v. Garrison* (1989) 47 Cal.3d 746, 773.)

Defendant argues that this error was also prejudicial with respect to his conviction of attempted criminal threat. As he notes, Littlefield was the only witness who could testify that he threatened her. With respect to this offense, however, Littlefield was not an accomplice; she was the victim.

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[1] In his supplemental brief, defendant argues that Littlefield could have been found to be his accomplice because there was evidence that the injuries occurred after she returned home. He did not raise this argument in his opening or reply brief, and it is not within the scope of our request for further briefing. Thus, he has waived it. (*People v. Culuko*, *supra*, 78 Cal.App.4th at p. 330.)

In any event, evidence that she was present at the time would be insufficient to require accomplice instructions. Regardless of whether such evidence might suffice to raise a reasonable doubt concerning defendant's guilt, it would be too speculative to show that Littlefield participated in the crime. (*People v. Lewis*, *supra*, 26 Cal.4th at p. 369 ["[a]lthough Pridgon was at the scene of the crime and had intimate knowledge of the robbery and murder, this fact without more merely means that he was an eyewitness and not necessarily an accomplice to the crimes"].)

Penal Code section 1111, by its terms, is offense-specific. It defines an accomplice as "one who is liable to prosecution for *the identical offense*"; to support "*[a] conviction*," it requires that the accomplice's testimony be corroborated by evidence "tend[ing] to connect the defendant with the commission of *the offense* . . . ." (Italics added.) For example, in *People v. Tenner* (1944) 67 Cal.App.2d 360, the evidence showed that a prostitute orally copulated the defendant, but she resisted when he tried to sodomize her. The appellate court reversed the defendant's oral copulation conviction, on the grounds that the prostitute was an uncorroborated accomplice. However, it affirmed his attempted sodomy conviction, noting: "The evidence relating to the second count . . . presents a different kind of case. [A]fter the other acts were committed the appellant attempted an act of sodomy. The resistance of the prosecutrix and her prevention of the act removed her from the role of an accomplice . . . ." (*Id*. at p. 363; accord, *People v. Boyce* (1980) 110 Cal.App.3d 726, 736 [testimony of defendant's accomplice in sale of stolen property did not require corroboration as to initial receiving of the property]; *People v. Wynkoop* (1958) 165 Cal.App.2d 540, 546 [testimony of defendant's accomplice in first burglary did not require corroboration as to second and third burglaries].)

Defendant argues that, if Littlefield was an accomplice to felony child endangerment, she had a motive to "make [him] look as bad as possible" on both counts. Be that as it may, the bare existence of such a motive is insufficient to trigger the corroboration requirement. Indeed, this is a corollary of the rule that Penal Code section 1111 is offense-specific. Similarly, a person who has committed a related but not

identical offense need not be corroborated (*People v. De Paula* (1954) 43 Cal.2d 643, 648), even though he or she may be trying just as hard as an accomplice would to curry favor or to shift blame.

We conclude that, although the trial court erred by failing to give accomplice instructions, reversal is not required.

III

EVIDENCE OF FLIGHT AND FLIGHT INSTRUCTION

Defendant contends the evidence of flight should have been excluded, and a flight instruction should not have been given, because he fled for reasons unrelated to the charged crimes.

Defense counsel objected to the testimony of the arresting officers as irrelevant. He argued that defendant had not yet been accused of any specific crime, and "lots of people run from the cops." The trial court overruled the objection. Defense counsel then added, " . . . I would nunc pro tunc object on 352 grounds as well." The trial court acknowledged this objection.

Defense counsel also objected to an instruction on flight. The trial court overruled the objection and gave a standard flight instruction. (CALJIC No. 2.52 (6th ed. 1996).)

Defendant's argument on appeal differs somewhat from his argument at trial. He argues -- citing the clerk's transcript -- that one of the conditions of his probation was that he have no contact with the victim. He then argues that the evidence of flight related to this probation violation, not to the charged crimes. For example, he points out that he kept saying that he was not supposed to be at Littlefield's apartment.

There are at least three problems with this argument. First, there was no *evidence* of this probation condition. There was evidence that defendant's contact with Cree violated Littlefield's agreement with the Department of Social Services, but there was no evidence that it violated his probation. Accordingly, in light of the evidence actually presented at trial, defendant's flight related solely to the charged crimes.

Second, as the People point out, this never actually became a probation condition. Admittedly, defendant's plea agreement recited that he would "be required to have no contact with the victim [and] no unsupervised contact with children . . . ." The trial court, however, placed him on probation without this condition. The only condition relating to Cree required defendant not to "attack, strike, threaten, harass, stalk or sexually abuse the victim Ciree [*sic*] T." He was not prohibited from contacting her or being with her. Indeed, when defendant objected to drug testing as a probation condition, the prosecutor argued, "[D]ue to the fact that this is a crime against a child *and the defendant would be one of the caretakers for the child potentially*, we believe that term should remain." (Italics added.)

Third and finally, even assuming there was some evidence that defendant's flight related to a probation violation, the jury could still reasonably infer that it actually related to the charged crimes. According to Littlefield, when she said she was taking the baby to the hospital, defendant replied, "*I am not being responsible*. I ain't even supposed to be here. If I go to jail, I will kill you all." (Italics added.) Moreover, Wallace testified that defendant said he "just didn't want to be there *because he didn't want to be accused of*

doing something." (Italics added.) Defendant's own statements suggest that he was trying to avoid the consequences of battering the baby, not merely of violating probation.

"It is settled law that the reason flight is relevant is because it may demonstrate consciousness of guilt. [Citations.]" (*People v. Hill* (1967) 67 Cal.2d 105, 120.) "Indeed, the inference of consciousness of guilt from flight is one of the simplest, most compelling and universal in human experience. [Citation.]" (*People v. Williams* (1997) 55 Cal.App.4th 648, 652.) "[T]he existence of other crimes which may explain the defendant's flight goes to the weight, not to the admissibility, of evidence." (*People v. Mason* (1991) 52 Cal.3d 909, 942.) " . . . 'It is for the jury to determine to which offenses, if any, the inference [of consciousness of guilt] should apply.' [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 502, quoting *People v. Mendoza* (2000) 24 Cal.4th 130, 180.)

Moreover, "[the] flight instruction . . . adequately conveyed the concept that if flight was found, the jury was permitted to consider alternative explanations for that flight other than defendant's consciousness of guilt. [Citations.]" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1152-1153.)

We conclude that the trial court did not err by admitting, or by instructing on, the evidence of flight.

IV

TESTIMONY ABOUT METHODS OF CHILD ABUSE

Defendant contends the trial court erred by admitting testimony about possible methods of inflicting child abuse. Alternatively, he contends his counsel rendered ineffective assistance by failing to object to this testimony.

A. *Additional Factual and Procedural Background*.

Detective Patricia Nuss-Fredericks had considerable education, training, and experience in the field of child abuse. She testified:

"Q. [¶] . . . [¶] Have you had cases like this where infants have been injured in the kind -- with the kinds of injuries we have seen here on Cree?

"A. Yes.

"Q. Including the skull fractures?

"A. Yes.

"Q. And the abdominal bruising?

"A. Yes.

"Q. Punctured lungs?

"A. Yes.

"Q. Obviously, the children in these cases are too small to be witnesses; correct?

"A. Correct.

"Q. Have you had occasion to speak with suspects and have them describe for you what they have done to these babies?

"A. Yes.

"Q. In other words, the mechanisms that they used to inflict these types of injuries.

"A. Yes.

"Q. What types of mechanisms are used to inflict, first of all, the abdominal injuries?

"[DEFENSE COUNSEL]: Excuse me. Object to relevance.

"THE COURT: Overruled.

"THE WITNESS: To the abdominal area it would be blunt force trauma.

"Q. BY [THE PROSECUTOR]: Are there some common ways that that blunt-force trauma is inflicted?

"A. Yes.

"Q. What are they?

"A. For bruising, it could be an object striking a child, but usually, the reenactments I have had defendants do, it's the fist or the feet that cause the injury to abdominal areas. If there is no cut in the skin, then the force is usually the back of a fist that leaves either the internal injury or the bruising -- light bruising, even, on the abdominal area, but the inside, because of the force of the hit, is what is injured.

"Q. The force of the strike?

"A. Correct.

"Q. And that's why it's called blunt force trauma, right, because there is a force that's not cutting through the skin?

"A. That's correct.

"Q. As far as the head injuries that we have heard about, the skull fractures on a child of five months, you have had defendants reenact how they have inflicted those types of injuries?

"A. Yes.

"Q. What types of mechanisms have been used to do that?

"A. On an injury where there the skull gets fractured, where it didn't fall on the ground, where the skin wasn't pierced, it's usually the fist, the back of the fist that slams to a child's head, the knuckle area, leaving bruising usually on the head. A baby impact -- the baby could be hit up against a wall, but generally we have bruising on the skull in that area to show that type of an impact. If not, it's usually the mechanism of a hand and a foot at times, but usually the foot will pierce the skin. The hand doesn't.

"Q. As far as the broken ribs that we have heard about, what type of mechanism is involved according to the reenactments you have had from defendants?

"A. There are two. You can have a blunt force trauma to the ribs where you strike a child and the ribs break. But usually on that type of a hit, you would expect a little bruising where the impact was. In this case the baby's ribs are broken internally and there is no bruising on the ribs on the outer area, and the mechanism is a squeezing motion, that by squeezing the baby the ribs actually burst away from the sternum, either in the back or front from where the pressure is exerted, and that's usually during the shaking motion of the child.

"Q. Now, just so we're clear on a few things, Detective, you don't claim to be a medical doctor or a nurse or anything like that; correct?

"A. That's correct.

"Q. But your understanding of the mechanisms of these injuries is based on your experience, both with the defendants you have talked to and with others involved in the investigation, including many medical experts over the years?

"A. Yes. [¶] . . . [¶]

"Q. So also, so we are clear for the jury, you are not rendering an opinion about the exact method of injury used in this particular case?

"A. No, I am not.

"Q. What you are telling us, though, is that the defendants in other cases with this type of [in]jury have demonstrated that there is a way that they can inflict this type of injury using just the hands and feet that they have?

"A. Correct."

Aside from the one relevance objection noted above, defense counsel did not object to any of this testimony.

B. *Analysis*.

Defendant argues that this evidence was irrelevant. The People concede that this argument has been preserved for appeal, and we agree. When the prosecutor asked, "What types of mechanisms are used to inflict . . . the abdominal injuries?," defense counsel objected based on relevance. The trial court overruled the objection. Admittedly, defense counsel did not object again. The rest of the challenged testimony, however, dealt similarly with the "mechanisms" by which Cree's injuries could have been inflicted. As the trial court had already overruled one relevance objection, further

relevance objections would appear futile. Therefore, the issue was preserved for appeal even without them. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648.)

The evidence, however, was plainly relevant. As defense counsel noted in closing argument, this case was like a crime committed inside a black box. Cree's injuries were so severe and so appalling that the jury might well have doubted that defendant was physically capable of inflicting them. Dr. Piantini testified that one of the skull fractures was in a particularly thick part of the skull; causing it required as much force as a head-first fall from a two-story building onto cement to cause it. Similarly, she testified: "[I]t's very hard to bruise the abdomen. When you have [an] abdominal bruise, there is quite a degree of force involved." Dr. Tito testified that breaking a baby's ribs would require "significant force"; it was not "as simple as squeezing a melon," but rather "as if you were trying to squeeze and rupture a softball." Detective Nuss-Fredericks's testimony affirmed that defendant could have done all this with his bare hands.

Defendant even concedes that: "The testimony might have been relevant to rebut a suggestion that Mr. Felton could not have inflicted the injuries by himself or without a weapon." He argues, however, that: "In the absence of such a suggestion, the testimony was utterly irrelevant." We disagree. Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "Defendant's not guilty plea put in issue all the elements of the charged offenses. [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 146.) "'[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.'"

(*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 69 [112 S.Ct. 475, 116 L.Ed.2d 385].) Detective Nuss-Fredericks's testimony had at least a "tendency in reason" to prove that defendant did inflict the injuries. In fact, defendant's argument is sneakily circular -- if the People had *not* introduced this testimony, then surely defendant *would* have argued that he could not have inflicted the injuries.

Defendant claims Detective Nuss-Fredericks conceded that her own testimony was irrelevant. Not so. She simply admitted that she was "not rendering an opinion about the exact method of injury used in this particular case[.]" She promptly added, however, that she *was* rendering an opinion that the injuries *could* have been inflicted using only hands and feet. This was relevant.

Defendant also argues that the evidence was subject to exclusion under Evidence Code section 352. Defense counsel waived this argument by failing to object on this ground. (Evid. Code, § 353, subd. (a).) Defendant therefore contends that this very failure to object constituted ineffective assistance. As we have already discussed, however, this testimony had significant probative value. Although it was unpleasant, the jury heard far more gruesome testimony from Dr. Piantini and Dr. Tito. If defense counsel had objected, the trial court would have had discretion to overrule the objection. Defendant therefore can show neither deficient representation nor prejudice. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1126-1127 [failure to object under Evid. Code, § 352 was not ineffective assistance where "the trial court could have overruled the objection"]; *People v. Barnett*, *supra*, 17 Cal.4th at pp. 1130-1131 [failure to object under Evid. Code,

§ 352 was not ineffective assistance where "defendant fails to demonstrate that an objection on section 352 grounds would have been successful"].)

Finally, defendant argues that this testimony included inadmissible hearsay. Once again, defense counsel waived this argument by failing to object on this ground. And once again, defendant contends this failure to object constituted ineffective assistance.

Detective Nuss-Fredericks was testifying as an expert. "An expert may generally base his opinion on any 'matter' known to him, including hearsay not otherwise admissible, which may 'reasonably . . . be relied upon' for that purpose. [Citations.] On direct examination, the expert may explain the reasons for his opinions, including the matters he considered in forming them." (*People v. Montiel* (1993) 5 Cal.4th 877, 918, quoting Evid. Code, § 801, subd. (b).) That is all Detective Nuss-Fredericks did.

Defendant claims that Detective Nuss-Fredericks "specifically denied offering an expert opinion about how Cree was injured." Once again, he is referring to her admission that she did not know how Cree was injured. However, she was offering expert testimony about how Cree *could have been* injured.

Defendant also argues that this was improper expert testimony because it was not "sufficiently beyond common experience . . . ." (See Evid. Code, § 801, subd. (a).) We believe -- indeed, we hope -- a lay jury does not know how much force to apply, or how to apply it, to fracture a baby's skull or break her ribs. Just as Dr. Piantini and Dr. Tito could give expert testimony on these matters, so could Detective Nuss-Fredericks.

Because Detective Nuss-Fredericks gave proper expert opinions that were properly based on hearsay, defendant cannot show that his counsel's failure to object on either ground was unreasonable or prejudicial.

V

PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

Defendant contends the prosecutor committed misconduct in closing argument by telling the jury it could consider his prior guilty plea as propensity evidence.

A. *Additional Factual and Procedural Background*.

The trial court instructed the jury -- both before and after evidence was presented -- that:

"Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial.

"This evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purposes of determining if it tends to show:

"The existence of the intent which is a necessary element of the crime charged;

"The identity of the person who committed the crime, if any, of which the defendant is accused;

"A motive for the commission of the crime charged;

"The absence of an accidental cause of the injuries to the victim. [¶] . . . [¶]

"You are not permitted to consider such evidence for any other purpose." (CALJIC No. 2.50 (6th ed. 1996).)

In closing argument, the prosecutor stated: "And, finally, Mr. Felton admitted guilt in court. He pled guilty. He admitted to inflicting the great bodily injury to Cree. I suggest that it is more reasonable to believe that he did it on this occasion. It is proven that he did it before, and therefore that's evidence that he did it the second time."

In his own closing argument, defense counsel responded: "[Y]ou are to consider the prior conviction for a limited purpose. Now, the judge read this to you two times actually before the evidence started. . . . And then he read it to you again after the evidence was introduced . . . . Now, it's very limited. . . .

"I would respectfully disagree with my colleague. . . . You should not consider it as evidence that he did it the second time. It is only offered for the limited purpose as indicated in the instruction -- and that's No. 2.50. It is only for the limited purpose of showing the existence of the intent, the identity of the person and a motive for the commission of the crime charged and the absence of an accidental cause of the injuries. . . .

"The thing that you have to do -- and this is so hard, I realize -- you cannot consider this as evidence of bad character. You can't say, 'Gosh. He's a terrible person. He pled guilty to this crime. Therefore he's guilty of this crime.' You can't do that. That wouldn't be right. I hate to wrap myself in the flag, but that's un[-]American. We don't do things that way in this country. We don't just round up the usual suspects. We

require our government to prove the case beyond a reasonable doubt, not just by saying, 'Well, this guy must have done it because he did it before.'"

Finally, in rebuttal, the prosecutor stated: "[Defense counsel] tried to explain the purpose for which you can use that evidence of the other offense, the offense committed in June of 2000 by Mr. Felton. Don't be confused. The instruction is very simple. You can use that evidence to identify Mr. Felton as the perpetrator in this case. . . . The only question, as [defense counsel] said, is who did it? And you can use the evidence, as the instruction plainly tells you, to identify the perpetrator. And we know he did it before. We know he's the one who did it this time."

After the jury had retired to deliberate, defense counsel moved for a mistrial based on prosecutorial misconduct: "[T]his is all relating to the 1101-type evidence that came in over my objection. [¶] [I]n argument the D.A. said . . . something to the effect of 'this is evidence that he did it a second time.' And I think that comes too close to character evidence. So on that basis I would move for a mistrial." The trial court denied the motion.

B. *Analysis*.

Although the People concede that defendant preserved his present contention by moving for a mistrial, we do not accept this concession. "To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury. [Citation.] . . . 'The purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury,

instruct counsel and forestall the accumulation of prejudice by repeating improprieties, thus avoiding the necessity of a retrial. . . .' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 553, quoting *Horn v. Atchison, Topeka and Santa Fe Railway Co.* (1964) 61 Cal.2d 602, 610.) Here, defense counsel frustrated this purpose by waiting until the jury had already retired before moving belatedly for a mistrial. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1017.)

The fact that the trial court denied defendant's motion for a mistrial does not prove that an objection would have been futile. As we will discuss below, the prosecutor's initial remarks were ambiguous. If defense counsel had objected, the trial court might have clarified the law, or insisted that the prosecutor do so. But he did not object; moreover, he did not request an admonition. Thus, defendant waived the objection.

Separately and alternatively, the trial court properly denied the motion for a mistrial. "'When [a prosecutorial misconduct] claim focuses on comments made by the prosecutor before the jury, a court must determine at the threshold how the remarks would, or could, have been understood by a reasonable juror. [Citations.] If the remarks would have been taken by a juror to state or imply nothing harmful, they obviously cannot be deemed objectionable.' [Citation.]" (*People v. Cox* (2003) 30 Cal.4th 916, 960, quoting *People v. Benson* (1990) 52 Cal.3d 754, 793.) "To the extent of any ambiguity in the prosecutor's statements, we do not lightly infer that he intended them to have their most damaging meaning, or that the jury would draw that meaning from the other, less damaging interpretations available. [Citation.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 530.)

"[D]espite the prohibition against admitting evidence of an uncharged crime to demonstrate a defendant's criminal propensity, such evidence is admissible to show identity . . . . [Citation]." (*People v. Catlin*, *supra*, 26 Cal.4th at p. 120.) Here, the prosecutor argued, "It is proven that he did it before, and therefore that's evidence that he did it the second time." Because "it" is ambiguous, this argument, standing alone, arguably could be understood as a forbidden appeal to propensity reasoning. We do not believe, however, that reasonable jurors would have understood it this way.

In context, "it" referred to a set of highly similar circumstances, including the identical victim and identical types of injuries. These similarities were what made the prior offense admissible to show identity; defendant does not argue otherwise. Moreover, the trial court had just instructed the jury that it could consider the prior offense as evidence of intent, identity, motive and/or absence of accident, but not for any other purpose. In response to the prosecutor's argument, defense counsel cited this instruction; he reiterated the permitted purposes of the evidence, and he emphasized that they did not include propensity. Finally, the prosecutor himself clarified that he was asking the jury to consider the prior offense as evidence of identity.

We conclude that the prosecutor was asking the jurors to use the prior offense as evidence of identity, not as evidence of propensity, and that reasonable jurors would have understood this. Accordingly, there was no misconduct.

VI

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

GAUT
J.