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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

KAIAN BRANDON,

Defendant and Appellant.

A129068

(Alameda County  
Super. Ct. No. H45567)

A jury convicted appellant Kaian Brandon of second degree murder and assault on a child causing death. (Pen. Code,<sup>1</sup> § 187, subd. (a); former §§ 189 [Stats. 2002, ch. 606, § 1, p. 3384], 273ab [Stats. 1996, ch. 460, § 2, pp. 2813-2814].) He was sentenced to an indeterminate term of 25 years to life in state prison. Brandon appeals, challenging (1) his trial representation; (2) the admission of impeachment evidence of acts of misconduct; and (3) the jury instructions, some of which he contends were erroneously given and others erroneously omitted. We affirm the judgment.

**I. FACTS**

*A. Circumstances of Crime*

On Tuesday, November 8, 2005, three-year-old Kiara “Kiki” Irwine was ill with a fever and vomiting. Her mother, Danell Johnson, usually worked a shift from approximately 3:00 a.m. to 9:00 a.m., but she did not go to work on Wednesday, November 9, 2005, opting to stay home and care for her child. Kiara seemed better on

<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

Wednesday morning. Her fever had gone down. By the end of the day, the child seemed like herself again. Johnson went to work as usual on Thursday, November 10, 2005. When she returned home about 10:00 a.m. that morning, Kiara seemed fine. Johnson gave the child a shower and dried her off, seeing no bruises on her body. Kiara did not wince or complain of any pain. She played normally on Thursday and seemed to enjoy her dinner that night.

On Friday, November 11, 2005, Johnson left her San Leandro apartment to begin her work shift. She left all four of her children—Kiara, six-year-old T., five-year-old K.S. and baby Ke.—in the care of the baby’s father, appellant Kaian Brandon. Brandon was employed but was off work that week. Before leaving for her job, Johnson checked on her sleeping children. She saw Kiara nestle down deeper under her cover.

Kiara was still being toilet-trained and she sometimes had accidents. In the morning, Brandon discovered that Kiara had soiled herself and her bed with feces. About 9:00 a.m., while Johnson was still at work, she received an emergency call from Brandon, telling her that Kiara was “lifeless.” She told him to call 911 and left immediately for home. When Brandon called 911, the dispatcher advised him how to perform CPR while the paramedics were en route to the home.

Paramedics arrived, finding Kiara lying on her back on the living room floor. Brandon told the paramedics that he found her unconscious on the couch. She was clad only in a shirt. Kiara’s skin was warm but she was not breathing. CPR was performed without success; Kiara’s heart had stopped. She was transported by ambulance to Eden Medical Center.

By this time, Johnson had arrived at home. As she helped the other children into their coats in Kiara’s bedroom, she stepped in feces lying on the floor. Johnson, Brandon and the other children went to the hospital. After 40 minutes of CPR, Kiara still had no heartbeat. She was pronounced dead at the hospital. The doctors told Brandon and Johnson that they suspected that Kiara had suffered a ruptured appendix.

Meanwhile, Alameda County Sheriff Sergeant Richard Carter went to the hospital and observed multiple bruises on Kiara’s body. He met with Johnson and Brandon at the

hospital. At that point, he conducted an interview, not an interrogation. He particularly wanted to talk with Brandon, the last adult who had been with Kiara.

Brandon told Sergeant Carter that when he went in to check on Kiara, she had defecated on herself in bed. He gave her a bath and returned her to bed. Five minutes later, when he went to check on her, the child was not moving. Kiara was lifeless. He called Johnson, who urged him to call 911, which he did. Brandon told the sheriff that the dispatcher instructed him to do CPR, but that he pushed on her stomach, not her chest.<sup>2</sup> During the interview, Brandon kept saying “I can’t believe she’s dead.”

Sergeant Carter also went to the apartment where Brandon and Johnson lived. He found urine and feces on Kiara’s bed sheets. That struck the sheriff as odd when he recalled that Brandon had reported that he took Kiara back to bed after bathing her.

Alameda County Sheriff Deputy Duane Fisher also interviewed Brandon later that day. Brandon told Deputy Fisher that when he went into the bedroom that morning, he discovered that Kiara had defecated on herself. Brandon said that he put her in a bath and then returned her to her room. Five minutes later, when Brandon went back into the bedroom to check on Kiara, she was slumped over and unresponsive on the bedroom floor.

On November 14, 2005, a forensic pathologist conducted an autopsy of Kiara’s body. Her head, neck, torso, legs and left arm showed bruising—the result of blunt force trauma. The body also showed evidence of internal bleeding, organ damage—most significantly, to the liver, pancreas and small intestine—and rib fractures<sup>3</sup> consistent with blunt force trauma. Later, the pathologist opined that the cause of Kiara’s death was multiple blunt injuries. He explained that these injuries were the result of repeated applications of force by someone other than a child. They could not have been caused by a fall or by the performance of CPR. Instead, they were consistent with severe child

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<sup>2</sup> The transcript of the 911 call did not suggest that Brandon performed CPR in an incorrect manner.

<sup>3</sup> One rib fracture was older and already healing. The two recent ones were highly uncommon in small children, according to an expert on child abuse.

battering. Most of these injuries were recent—likely suffered within three days of death.<sup>4</sup> The child would likely have lost consciousness a few minutes after injury.

### B. *Pretrial Matters*

On the same day that the autopsy was conducted, Brandon was arrested. Two days later, he was formally charged with murder and assault on a child causing death. (§ 187, subd. (a); former § 273ab.) He was arraigned that day and referred to the public defender. Brandon was soon represented by Deputy Public Defender Bonnie Narby. In May 2006, Brandon pled not guilty to the charges.

On June 8, 2007, Brandon made a *Marsden* motion challenging Narby. (See *People v. Marsden* (1970) 2 Cal.3d 118, 122-126 (*Marsden*.) The motion was heard in camera on June 15, 2007, before Judge Julia Spain. Brandon expressed his dissatisfaction with Narby’s representation; she responded to these concerns. Finding that there had been a complete breakdown in the attorney-client relationship, Judge Spain granted the *Marsden* motion and referred the matter for the appointment of new counsel. She ordered that a transcript of the hearing be filed under seal.

On July 9, 2007,<sup>5</sup> the public defender petitioned for writ of mandate in this matter, seeking to overturn Judge Spain’s order. The public defender filed a memorandum of points and authorities in support of that petition. It also requested that the transcript of the June 15, 2007 *Marsden* hearing and its memorandum of points and authorities in support of its petition for writ of mandate be sealed.

On August 2, 2007, Judge Larry J. Goodman ordered that the *Marsden* transcript, part of the petition for writ of mandate, and the memorandum of points and authorities in support of that petition be sealed. The next day, Judge Goodman issued an alternative writ of mandate. It appears that no hearing was conducted at this stage—neither

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<sup>4</sup> At trial, a sheriff’s detective who witnessed the autopsy testified that the pathologist told him that Kiara’s injuries were “very fresh” and had probably occurred within 12 hours of her death. The pathologist did not believe that the child would have lived any longer than 12 hours with these injuries.

<sup>5</sup> On August 6, 2007, an identical petition was filed. The record contains no explanation why a second petition was filed.

Brandon, the prosecutor nor defense counsel were present at the time of the ruling. The alternative writ gave Judge Spain the option of vacating her June 15, 2007 order and reinstating Narby as counsel, or showing why Judge Goodman should not do so. The notice stated that if Judge Spain vacated her earlier order, the alternative writ would be discharged and the petition for writ of mandate denied as moot. The alternative writ was served on Judge Spain three days after issuance. On August 9, 2007, Judge Spain vacated her earlier order, reinstated Narby as Brandon's counsel, and denied the *Marsden* motion. Deputy Public Defender Charles Denton appeared at this hearing with Brandon.<sup>6</sup> On August 20, 2007, Judge Goodman dismissed the petition for writ of mandate as moot.<sup>7</sup>

A new public defender—someone other than Narby—now represented Brandon. An amended complaint was filed in April 2008, adding two counts of child abuse against Kiara and K.S. committed before Kiara's death, one of them enhanced by the infliction of great bodily injury on a child. (§§ 187, subd. (a), 273a, subd. (a); former §§ 273ab, 12022.7, subd. (d) [Stats. 2002, ch. 126, § 6, pp. 696-697].) Brandon pled not guilty to all four charges and denied the enhancement allegation.

A two-day preliminary examination was conducted at which Brandon was represented by Deputy Public Defender Barbara Dickinson. On September 18, 2008, he was held over for trial on all four charges and the great bodily injury enhancement. (§§ 187, subd. (a), 273a, subd. (a); former §§ 273ab, 12022.7, subd. (d).) On September 26, 2008, he was charged by information with the same four charges, one enhanced by an allegation of infliction of great bodily injury. (§§ 187, subd. (a), 273a, subd. (a); former §§ 273ab, 12022.7, subd. (d).)

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<sup>6</sup> Denton was the same attorney who filed the petition for writ of mandate. To the extent that Brandon argues that this constituted a conflict of interest, even if we assume that this was pretrial error, he has not demonstrated any trial prejudice resulting from it. (See pt. II.B.2., *post*.)

<sup>7</sup> Our records offer no evidence that Brandon sought extraordinary writ review of Judge Goodman's order.

In October 2008, Brandon pled not guilty to these charges. He also moved to dismiss the information. (§ 995.) That motion was denied on the murder and assault charges, but the two child abuse counts were stricken in March 2009. (§ 273a, subd. (a).)

*C. Prosecution Case-in-chief*

Brandon was tried on the remaining two charges in March 2010, represented by Dickinson. Johnson testified for the prosecution. She told the jury what she knew about the circumstances of Kiara's death, which had occurred on Brandon's birthday. She testified that when a detective asked Brandon at the hospital what had happened, he reported that Kiara had soiled herself. He made her clean up, then sent her to her room after she appeared in the kitchen without any pants on. She did not come back to the breakfast table, so he went to her room, where he found her lying on the bedroom floor.

Initially, Johnson believed that Kiara had died as the result of a ruptured appendix. On Monday, November 14, 2005, sheriff's deputies came to the apartment and told Johnson and Brandon that Kiara had not died of natural causes. Brandon went with the police to talk with them. Johnson also went to the police station. While she was gone, Child Protective Services removed T., K.S. and Ke. from the home. At trial, Johnson admitted that she disciplined her children with a slap or a belt. She admitted that she sometimes wore a ring. She denied killing Kiara.

Brandon's 911 call to police was played for the jury. Brandon had been the only adult with the four children at the time that Kiara was injured. K.S.—who was nine years old at the time of trial—testified that after Kiara defecated on the floor, Brandon punched her sister in the stomach with a closed fist.

A neighbor testified that she heard a man in the next apartment—the one occupied by Johnson and Brandon—say “I don't care if you die.”<sup>8</sup> She thought this happened on the morning of November 11—the same day that the little girl who lived next door died. She told the jury that the police had interviewed her the same day. She told the police that a man and woman had been arguing. After she learned that the woman was at work,

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<sup>8</sup> When he testified, Brandon denied making this statement and noted that Johnson was not at the apartment the morning that Kiara died.

the neighbor changed her statement, saying that she had guessed that the man and woman were arguing. An audiotape of the statement that the neighbor gave to police was played for the jury. The neighbor admitted that she did not tell the police about the man's statement until a week or so after the child died.

A child abuse expert reviewed Kiara's autopsy records. He opined that she sustained multiple blows to various parts of her body that caused great injury, ultimately causing her death. He estimated that 30 percent of her body's blood was found in her abdomen. Her pancreas was torn in half, an uncommon occurrence. He thought it likely that an extremely powerful traumatic blow to the abdomen pushed Kiara's pancreas against her bones, breaking it. In his experience, a young child defecating can trigger an adult to anger and child abuse. The expert opined that if Kiara was behaving normally the day before she died, then her injuries were inflicted after that time.

#### *D. Challenge to Proposed Impeachment Evidence*

After the prosecution rested, Brandon challenged the admissibility of evidence of incidents of violence he committed against his mother and sister. He argued that the prosecution had failed to disclose the 24 police reports during pretrial discovery, noted that the evidence from 1998 through 2000 was older, and urged the trial court to find that the evidence did not constitute evidence of moral turpitude. The trial court found that the disclosure was timely, as the reports were sent to defense counsel as soon as the prosecution received them. It agreed to review the admissibility of specific reports on a case-by-case basis, depending on what Brandon said when he testified. His motion for acquittal was denied. (See § 1118.1.)

#### *E. Defense Testimony*

Brandon testified in his own defense. He told the jury that although he and Johnson argued sometimes, he had been happy living with her and the children. He recalled that Kiara was still sick—still throwing up—the day before she died. That Thursday night, Kiara did not eat much dinner. He did not put the children to bed that night; he assumed that Johnson must have done it. Brandon was asleep, but he woke up when Johnson was getting ready to go to work. She told him not to get up, which was

unusual. Normally, he walked her out to her car when she left for work. He did not do so that night, but went back to sleep after Johnson left.

November 11 was a school holiday, so it was a relaxed morning. The older siblings came running in for breakfast, but Kiara was moving slowly. She was wearing training pants, and Brandon saw that she had defecated on herself. Some of the feces were smeared on her bottom; most of the solid feces had fallen out on the bedroom floor. He spoke to her in a loud voice about this, but he did not yell at her. He removed Kiara's clothes and gave her a quick bath<sup>9</sup> so she could eat breakfast with the other children. He dried her off and told her to go get dressed, which she could do for herself.<sup>10</sup> He went to get breakfast ready. Within five minutes, Brandon noticed that Kiara had not come out to the kitchen, so he went to the bedroom. He found her lying on the floor.

Kiara was not breathing. Brandon panicked, unsure what to do. Everything was moving so fast. There was nothing in her mouth. He hit Kiara on the back, hoping to dislodge anything blocking her breathing. He called Johnson and then called 911. The 911 dispatcher walked him through how to do CPR. He moved Kiara to the living room floor to do CPR.

The paramedics arrived quickly. Brandon told the jury that he told one paramedic that he found Kiara in her room and moved her to the living room. Johnson arrived, the family dressed and they drove over to the hospital. A doctor told Johnson and Brandon that Kiara was not going to live and that she probably had a ruptured appendix.

Brandon kept the police advised of his whereabouts, knowing that they would want to talk with him. He had been the only adult in the house on the morning that Kiara died. He feared that he performed CPR incorrectly, pushing on her stomach rather than her chest. Brandon told the jury that Kiara's injuries were awful, but that he did not know how the child came to be so injured. He suggested that Johnson must have beaten Kiara.

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<sup>9</sup> Brandon did not see any bruises on Kiara's body when he took her out of the bath.

<sup>10</sup> Johnson testified that Kiara needed help getting dressed.

On cross-examination, Brandon denied being angry with Kiara that morning or having an anger problem. He denied holding a gun to his mother's head and threatening to kill her. He told the jury that he was not the kind of man who hit his mother. He admitted having been arrested, but only for an outstanding warrant based on a gun incident.

A sidebar conference was conducted. When the prosecution inquired about Brandon's arrest history, defense counsel objected to the admission of the proffered evidence. She argued that the evidence was irrelevant, pertaining only to a collateral matter. She asked that the prosecutor be found to have committed misconduct and moved for a mistrial. The motion was denied. Defense counsel also objected to improper impeachment with character evidence, without success.

The prosecutor asked Brandon about numerous alleged incidents. She asked whether he struck his mother in the lip in March 1998;<sup>11</sup> whether he knocked his sister down when she came to their mother's aid; and whether he pulled numerous items off the garage shelves. Brandon denied that this incident happened. The prosecution asked if in July 1998, his mother called the police because Brandon was throwing things and breaking things in the house; and if he told the police that she was afraid of him and that he acted this way every day. Brandon admitted that the police were called. When asked about an October 2000 gun incident that was the basis of the outstanding warrant, Brandon testified that "the gun incident didn't happen." Specifically, Brandon denied that he held a gun to his mother's head and said, "Bitch, I'll kill you." He was asked whether, in August 1998, he responded to his mother's request to stop smoking in the house by yelling, flipping over a mattress, spitting in her face, throwing a plant at her, and hitting her in the back of the head. Brandon denied doing so.

When asked if his mother declined to press charges when these acts of violence occurred, Brandon said that his mother made false police reports to get him in trouble and later recanted because the charges were untrue. He admitted being angry with his mother

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<sup>11</sup> Brandon was 17 or 18 years old at that time.

at times, but he denied ever hitting her or pulling a gun on her. He did not recall arguing with his mother in December 1998 about breaking the garage door or slamming her finger in the door. Brandon admitted fighting with his sister, but he did not recall hitting her in January 1999 because she would not let him copy her homework. He pushed her, but did not punch her. He admitted that his mother got a restraining order against him after he intentionally broke a window at her house. He broke the window because he was hurt that his mother lied to police and said that he had threatened her with a gun.

Brandon told the jury that only he and Johnson had access to Kiara shortly before she died. He did not hurt Kiara; so it must have been that Johnson did. When the police asked him shortly after the incident whether Johnson hit the children, he told them she did not, to keep Johnson from getting in trouble. He did not suggest that Johnson hurt Kiara when the police questioned him.

Testifying for the defense, a doctor who attended Kiara at the hospital observed that she had a ring-shaped bruise on one buttock.

#### F. *Verdict and Sentence*

The jury acquitted Brandon of first degree murder, but found him guilty of the lesser included offense of second degree murder. He was also convicted of an assault on a child causing death. (§ 187, subd. (a); former § 273ab.) His motion for new trial on grounds of prosecutorial misconduct was denied. (§ 1181, subd. 5.) He was sentenced to an indeterminate term of 25 years to life in state prison for the assault and a concurrent 15-year-to-life term for second degree murder.

## II. CHALLENGES TO TRIAL COUNSEL

### A. *Cancellation of Order for New Counsel*

On appeal, Brandon raises various *Marsden* errors. First, he contends that after Judge Spain granted his *Marsden* motion, Judge Goodman erred by issuing a writ of mandate cancelling the order for appointment of new counsel and requiring Brandon to go to trial with the previously discharged counsel. This argument is based on two glaring factual errors. First, Judge Goodman did not *cancel* Judge Spain's order for new counsel. Instead, he issued an alternative writ, prompting Judge Spain herself to vacate her order

granting Brandon’s *Marsden* motion and enter a new order denying that motion. Second, Brandon was not represented at trial by Deputy Public Defender Bonnie Narby, the attorney he challenged in his *Marsden* motion. Instead, Deputy Public Defender Barbara Dickinson served as trial counsel.

## B. *Jurisdiction*

### 1. *Review of Magistrate Ruling*

More fundamentally, Brandon asserts that the Judge Goodman’s alternative writ was void for lack of jurisdiction. He argues that Judge Goodman—a superior court judge—had no authority to review the ruling of Judge Spain, who was also a superior court judge. Brandon asks us to void Judge Goodman’s alternative writ and to reinstate Judge Spain’s order granting his *Marsden* motion.

Brandon ignores a key fact—that Judge Spain sat as a magistrate when she first granted the *Marsden* motion. Our resolution of his challenge to Judge Goodman’s alternative writ turns on our understanding of the limited jurisdiction and powers of a magistrate. (Cal. Const., art. I, § 14; see *Gray v. Municipal Court* (1983) 149 Cal.App.3d 373, 376.) These powers are generally restricted to those set forth in the Penal Code, including the authority to issue an arrest warrant, conduct an arraignment, and determine whether to hold a criminal defendant to answer on a felony charge after a preliminary examination. (§§ 806-807, 859, 871-872; see §§ 7, subd. 9, 808, subds. (a)-(c) [magistrate defined]; *Gray v. Municipal Court, supra*, 149 Cal.App.3d at p. 376; see also 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 21(3), 174(4), pp. 45, 247.)

Before trial court unification, felony proceedings began in the municipal court before a magistrate. If the magistrate concluded that there was sufficient evidence to hold the defendant to answer after a preliminary hearing, an information was filed in superior court charging the defendant with a felony. After court unification, the early stages of a criminal case are conducted before a superior court judge who sits as a magistrate. (*People v. Maldonado* (2009) 172 Cal.App.4th 89, 94-96; *People v. Dominguez* (2008) 166 Cal.App.4th 858, 865.) Although all trial court judges now serve as superior court judges, they do not always act in the same role that a superior court

judge did before unification of the municipal and superior courts. Now, a superior court judge retains the authority to review the actions of another superior court judge who acted in a role that could have been reviewed by a superior court before trial court unification. (*People v. Superior Court (Jimenez)* (2002) 28 Cal.4th 798, 804 (*Jimenez*); see *People v. Mena* (2012) 54 Cal.4th 146, 154, fn. 6 [distinguishing between magistrate and trial court judge].)

The distinction between a judge sitting as a superior court judge and a member of the superior court bench sitting as a magistrate is critical to our conclusion that a superior court judge has jurisdiction to review a magistrate's decision. Superior courts have original jurisdiction in mandamus proceedings. (Cal. Const., art. VI, § 10; *Jimenez, supra*, 28 Cal.4th at p. 803.) A superior court has authority to issue a writ of mandate to any inferior tribunal. (Code Civ. Proc., § 1085, subd. (a).) As the proceedings before a magistrate are limited in nature, a judge sitting as a magistrate is deemed to be inferior to a superior court judge for purposes of mandamus review. (*Jimenez, supra*, 28 Cal.4th at p. 803; see *People v. Uhlemann* (1973) 9 Cal.3d 662, 667.) Thus, a superior court judge has jurisdiction to review a magistrate's ruling and to issue a writ of mandate to a magistrate. (*Jimenez, supra*, 28 Cal.4th at p. 803; *Magallan v. Superior Court* (2011) 192 Cal.App.4th 1444, 1453; see § 871.5, subd. (c) [magistrate dismissal of action may prompt motion to superior court to reinstate complaint].)

## 2. *Pretrial vs. Postconviction Review*

When considering the writ of mandate, Judge Goodman had several options, one of which was to issue an alternative writ or order to show cause. (See *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1239; *Kowis v. Howard* (1992) 3 Cal.4th 888, 893.) An alternative writ commands the respondent to either do the required act or show cause why it has not done so. (Code Civ. Proc., § 1087; *Lewis v. Superior Court, supra*, 19 Cal.4th at p. 1240; *Kowis v. Howard, supra*, 3 Cal.4th at p. 893.) Judge Goodman's alternative writ properly commanded Judge Spain to either reinstate Narby as Brandon's counsel or show cause why she would not do so. If an alternative writ issues and the respondent chooses to do the required act, the petition for writ of mandate becomes moot. (*Lewis v.*

*Superior Court, supra*, 19 Cal.4th at p. 1240; *Kowis v. Howard, supra*, 3 Cal.4th at p. 893; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-178; see *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1240, fn. 1.) Thus, when Judge Spain ordered Narby reinstated as Brandon's counsel, the petition for writ of mandate filed by the public defender became moot.

The Attorney General argues that because Judge Goodman's exercise of jurisdiction was proper, Judge Spain's order denying the *Marsden* motion is the only order that Brandon can now challenge. In essence, the Attorney General urges us to conclude that by failing to bring an extraordinary writ in our court to challenge Judge Goodman's alternative writ, Brandon forfeited his right to raise this issue on appeal. We disagree. A criminal defendant has a right to seek an extraordinary writ to challenge any pretrial irregularity in a manner that allows an appropriate matter to be returned to the magistrate for proceedings free of defects. At the pretrial stage, prejudice is presumed. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 522, 529; see *People v. Mena, supra*, 54 Cal.4th at p. 163.) However, Brandon did not raise a preconviction challenge to Judge Spain's order. (See, e.g., *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1524-1528; see also *People v. Tena* (2007) 156 Cal.App.4th 598, 615.) Although a pretrial challenge may have been a more effective means of challenging the writ of mandate procedure, Brandon still retains the right to raise the issue on appeal. (See *People v. Mena, supra*, 54 Cal.4th at p. 158.)

However, Brandon's determination not to seek writ relief has consequences. (See *People v. Mena, supra*, 54 Cal.4th at pp. 158, 163.) Any error arising during the pretrial stage prompts reversal of a subsequent conviction only if Brandon demonstrates that the error prejudiced him at trial. Irregularities in pretrial proceedings which are not jurisdictional in the fundamental sense—even those related to the right to counsel—are reversible only if the defendant shows the deprivation of a fair trial or other prejudice at trial as a result of the pretrial error. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 990; *People v. Pompa-Ortiz, supra*, 27 Cal.3d at pp. 529-530; *People v. Tena, supra*, 156

Cal.App.4th at pp. 613-614 [self-representation]; see *Coleman v. Alabama* (1970) 399 U.S. 1, 11 (plur. opn. of Brennan, J.); *People v. Mena, supra*, 54 Cal.4th at p. 162.)

Brandon's complaint against Narby was that she did not have time to give his case the attention it deserved. She urged him to accept a plea agreement rather than go to trial, despite his protestations of innocence. He felt that she did not want to spend the time to defend him properly if he insisted on a trial. Brandon did not raise any *Marsden* challenges to Dickinson, his trial counsel. He does not show that the denial of his pretrial *Marsden* motion deprived him of a fair trial or led to other prejudice at trial. He argues only that the *Marsden* motion was properly granted in the first instance.<sup>12</sup> Thus, even if we found that Judge Spain erred by denying Brandon's pretrial *Marsden* motion, that error would be harmless beyond a reasonable doubt, because it did not affect his subsequent trial. (See e.g., *People v. Tena, supra*, 156 Cal.App.4th at p. 615; *Chapman v. California* (1967) 386 U.S. 18, 24.)

### C. Service

Brandon also contends that there was no jurisdiction to issue the alternative writ of mandate because he was not personally served with the underlying petition for writ of mandate before the judge ruled on it.<sup>13</sup> Statutory law provides that an application for a writ of mandate seeking an alternative writ must be accompanied by proof of service of a copy of the application on the defendant, as the real party in interest. (Code Civ. Proc., § 1107.) The record shows that Brandon was served with a copy of the petition by mail on June 28, 2007—the day after the petition filed on July 9, 2007 was drafted. The alternative writ did not issue until August 3, 2007. Service of the petition for writ of

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<sup>12</sup> Although he also argues that substituting Dickinson for Narby was not a sufficient remedy, he offers no nexus between the alleged error of denying his *Marsden* motion and his conviction after trial.

<sup>13</sup> Brandon's argument suggests that a hearing on the petition for writ of mandate was conducted on July 11, 2007, when he was not present. In fact, July 11, 2007, was the date set for his *preliminary examination*, which appears to have been continued because the writ of mandate was pending, leaving the issue of who would serve as his counsel unresolved. It appears that no hearing was conducted on the petition, which seems to have been determined on the basis of the written filings alone.

mandate was made on Brandon—the real party in interest—well before Judge Goodman ruled on the petition.

Nevertheless, Brandon claims that he was entitled to *personal* service of this petition. We disagree. The statute provides that Code of Civil Procedure section 1010 et seq. govern service of process of a petition for writ of mandate. (See Code Civ. Proc., § 1107.) If personal service cannot be made at a person’s residence, it may be served by mail. (*Id.*, §§ 1011, subd. (b), 1013.) Brandon was continuously incarcerated from the date of his arrest, so any attempt to serve him at his legal residence in the summer of 2007 would have been futile. In such circumstances, we are satisfied that the relevant statutes allow mailing to him in jail<sup>14</sup> as a method of service.<sup>15</sup>

#### D. *Bias*

Next, Brandon contends that the order issuing the alternative writ should be deemed void because it was issued by “a biased decision-maker.” He argues that a conflict existed because the petition for writ of mandate named the superior court as a party, and one argument raised in support of the petition was to avoid an adverse impact

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<sup>14</sup> In his reply brief, Brandon also contends that no showing was made that he actually received this mailing. It is improper to raise issues for the first time in a reply brief, as this deprives the respondent of an opportunity to respond to the issue. (See *Smith v. Board of Medical Quality Assurance* (1988) 202 Cal.App.3d 316, 329, fn. 5; see also 9 Witkin, Cal. Procedure, *supra*, Appeal, § 723, pp. 790-791.) Even if the issue were properly before it, it lacks merit. The proof of service created a rebuttable presumption that the mailing was received at the mailed address, shifting the burden of producing evidence to the presumed recipient. (Evid. Code, § 641; *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 421; see 1 Witkin, Cal. Evidence (5th ed. 2012) Burden of Proof and Presumptions, § 79, pp. 245-246.) Contrary to his assumption, the burden of proof was on Brandon to establish that this notice was *not received*. He has not done so.

<sup>15</sup> Brandon received personal service of the petition after the August 3, 2007 issuance of the alternative writ. On August 2, 2007, Judge Goodman granted the public defender’s motion to file parts of the petition and supporting exhibits under seal. He ordered that a redacted copy of the points and authorities filed in support of the petition be served on Brandon. A copy of the redacted petition was personally served on him on August 6, 2007. Although Brandon suggests that this personal service was provided because the public defender knew that mailed service was insufficient, it seems more likely that he received personal service of the petition because Judge Goodman ordered personal service of the related documents.

on that court resulting from the need to appoint private counsel if Judge Spain's initial grant of the *Marsden* motion were allowed to stand. Thus, he reasons, Judge Goodman's order issuing the alternative writ violated his due process rights because the judge's court had an economic interest in the outcome. Brandon asserts that the writ of mandate should have been determined by a judge from another court. (See U.S. Const., 5th & 14th Amends.)

The claim of error fails for two reasons. Procedurally, a claim of judicial bias must be raised in the trial court or the defendant forfeits any claim of error on appeal. (*People v. Farley* (2009) 46 Cal.4th 1053, 1110.) By failing to raise this concern in the trial court—either before or during trial—Brandon has forfeited it. Substantively, the claim of error is meritless. For all practical purposes, the “superior court” named in the petition for writ of mandate was Judge Spain, not the entire Alameda County Superior Court system. The public defender briefly cited potential increased court costs resulting from delay of criminal cases as a reason in support of a writ of mandate.<sup>16</sup> Judge Goodman did *not* cite this reason for the issuance of the alternative writ. Instead, he ruled that at the early stage of the proceedings—even before a preliminary hearing had been conducted—Narby had not had a fair opportunity to demonstrate her trustworthiness. As Judge Spain had not allowed sufficient time for the relationship between Brandon and Narby to be tested, Judge Goodman held that Judge Spain abused her discretion in granting the *Marsden* motion.

#### E. *Subsequent Marsden Motion*

Brandon also contends that the trial court erred by not conducting a hearing on a second *Marsden* motion. He asserts that he made a second motion at the August 9, 2007 hearing. After being advised that Judge Spain intended to vacate her order granting his *Marsden* motion and to reinstate Narby as his counsel, Brandon said: “I don't feel like

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<sup>16</sup> In so doing, the public defender cited the California Supreme Court's similar concerns. When cautioning against an expansive view of the need to appoint new counsel for an unhappy defendant, the court has noted that a broader right to new counsel would “add to the expense of the state in furnishing counsel for the indigent . . . .” (*People v. Williams* (1970) 2 Cal.3d 894, 906.)

you got it wrong. I feel like the first decision was right, and I understand they kind of put pressure on you . . . . So there's nothing you can really do but, . . . I feel like this decision is wrong. And I read in this document[] that I do have a right to . . . another Marsden hearing. So I'm not sure when or how I can go about that as of right now, but I do want to . . . state that . . . I want that to be done . . . ." Judge Spain explained that all she could do at that time was to set aside the earlier ruling. Another hearing was set for August 17, 2007, at which time she told Brandon he would be free to bring up whatever issues he had. Brandon agreed.

The document Brandon referred to appears to be the order issuing the alternative writ, which held that Narby had not had sufficient time to develop her relationship with the defendant. The few days between the August 3, 2007 issuance of the alternative writ and the August 9, 2007 hearing before Judge Spain did not allow time for Narby to demonstrate her trustworthiness to Brandon. Clearly, for Judge Spain to have granted a *Marsden* motion at that stage would have been an abuse of discretion.

A *Marsden* motion requires some clear indication that a criminal defendant seeks substitute counsel. (*People v. Dickey* (2005) 35 Cal.4th 884, 920; *People v. Mendoza* (2000) 24 Cal.4th 130, 157.) Viewed in this context, the result of Brandon's exchange with Judge Spain seemed to be an expression of his intent to file a *Marsden* motion in the future, not to make such a motion at the August 9, 2007 hearing.

By the time of the August 17, 2007 hearing, Brandon was represented—not by Narby—but by a different public defender. There is no record of any attempt by Brandon to make another *Marsden* motion in this matter. On the record before us, we are satisfied that Brandon's comments about his future plans at the August 9, 2007 hearing did not rise to the level of a new *Marsden* motion.

#### F. *Conflict of Interest*

##### 1. *Aspect of Ineffective Assistance of Counsel*

In his final challenge to his trial counsel, Brandon contends that his conviction should be reversed because he was represented before and at trial by a public defender who should have been disqualified for a conflict of interest. He reasons that by

petitioning for a writ of mandate to overturn Judge Spain’s order granting his *Marsden* motion, the entire public defender’s office acted against his interests. By continuing to represent him after its petition led Judge Spain to vacate her order granting that motion, his public defender at trial could not and did not represent him properly. He reasons that the alleged failures of defense counsel demonstrate the prejudice he suffered as a result of this improper representation. Brandon asks us to reverse his convictions as a result of this error.<sup>17</sup>

The right to representation free of conflicts of interest is part of the right to effective assistance of counsel. (*Doolin, supra*, 45 Cal.4th at p. 417; *People v. Roldan* (2005) 35 Cal.4th 646, 673 (*Roldan*), disapproved on other grounds in *Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.) Thus, to prevail on a claim of conflict of interest, a defendant must demonstrate both that counsel actively represented conflicting interests and that prejudice occurred—that an actual conflict of interest adversely affected counsel’s performance. (*Mickens v. Taylor* (2002) 535 U.S. 162, 166, 171, 175 (*Mickens*); *People v. Rundle* (2008) 43 Cal.4th 76, 169, 172-173 (*Rundle*), disapproved on other grounds in *Doolin, supra*, 45 Cal.4th at p. 421, fn. 22; see *Strickland v. Washington* (1984) 466 U.S. 668, 686-688, 694-695.)

An actual conflict of interest is a division of loyalties that adversely affects counsel’s performance. (*Mickens, supra*, 535 U.S. at p. 172, fn. 5; *Doolin, supra*, 45 Cal.4th at p. 418.) Brandon argues that a conflict of interest existed because the public defender sued him by bringing its petition for writ of mandate, bringing that petition ex parte, failing to obtain any representation for him at that proceeding, and withholding

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<sup>17</sup> Implicitly, Brandon appears to assert that both his federal and state constitutional rights to counsel were implicated by this claim of error. (See U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15.) Once, different standards applied under the federal and state Constitutions. The California Supreme Court recently eliminated those distinctions, holding that the federal standard also applied when determining whether any violation of the state constitutional right to counsel occurred. (*People v. Doolin* (2009) 45 Cal.4th 390, 419-421 & fn. 22 (*Doolin*)).) Thus, our discussion of the Sixth Amendment claim also resolves the state constitutional right to counsel claim of error.

resources from his defense. Of these contentions, only the withholding of resources could have affected his trial. (See *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 990; *People v. Pompa-Ortiz*, *supra*, 27 Cal.3d at pp. 529-530; pt. II.B.2., *ante*.)

Brandon's claim of withholding of resources is thin, raising the specter that he posits merely a theoretical division of loyalties, which is insufficient to establish an actual conflict of interest. (See *Mickens*, *supra*, 535 U.S. at p. 171; *Rundle*, *supra*, 43 Cal.4th at p. 169; *Roldan*, *supra*, 35 Cal.4th at p. 673.)

## 2. Standard of Prejudice

Even if we assume *arguendo* that an actual conflict of interest existed at trial, Brandon must demonstrate specific, outcome-determinative prejudice. This requires a showing of an adverse affect on counsel's performance resulting from the conflict of interest. (*Doolin*, *supra*, 45 Cal.4th at p. 420; *Roldan*, *supra*, 35 Cal.4th at pp. 673-674; see Cal. Const., art. VI, § 13.) As a defense counsel conflict of interest is a form of ineffective assistance of counsel, the defendant must show prejudice resulting from counsel's deficient performance—a reasonable probability that the proceedings would reach a different result if defense counsel had been competent. (*Mickens*, *supra*, 535 U.S. at p. 166; *Doolin*, *supra*, 45 Cal.4th at p. 417; *Rundle*, *supra*, 43 Cal.4th at pp. 171, 174.) An actual conflict must be demonstrated. (*Mickens*, *supra*, 535 U.S. at p. 172, fn. 5; *Doolin*, *supra*, 45 Cal.4th at p. 418.)

In a narrow class of attorney conflict of interest cases, prejudice is presumed. (*Mickens*, *supra*, 535 U.S. 162, 166; *Doolin*, *supra*, 45 Cal.4th at p. 418; *Rundle*, *supra*, 43 Cal.4th at pp. 171-173; *Roldan*, *supra*, 35 Cal.4th at p. 673.) Citing only older case law, Brandon asserts that prejudice must be presumed in his case. However, the United States and California Supreme Courts have made clear that this presumption applies only if the more traditional ineffective assistance of counsel analysis proves inadequate. (See *Mickens*, *supra*, 535 U.S. at p. 166; *Rundle*, *supra*, 43 Cal.4th at p. 173.) More typically, the defendant must demonstrate that counsel actively represented conflicting interests and must also show prejudice—that an actual conflict of interest adversely affected counsel's performance. (*Mickens*, *supra*, 535 U.S. at pp. 166, 171, 175; *Doolin*, *supra*, 45 Cal.4th

at p. 417; *Rundle, supra*, 43 Cal.4th at pp. 169, 171-172, 174; *Roldan, supra*, 35 Cal.4th at p. 673.) We are satisfied that the traditional ineffective assistance of counsel analysis is appropriate to determine Brandon's conflict of interest claim of error.

### 3. *Application to Brandon's Case*

Brandon cites three trial counsel failures as evidence of prejudicial error: the failure to call witnesses to testify to his good character in order to counter the prosecution bad character evidence; the failure to ensure that the trial court instructed the jury to consider his unrecorded statements with caution; and the failure to require the trial court to correctly instruct the jury on involuntary manslaughter. (See pts. III. & IV., *post.*) An ineffective assistance of counsel claim fails on an insufficient showing of either incompetence or prejudice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) Thus, Brandon must establish both incompetence and prejudice in order to prevail on this conflict of interest claim of error.

The determination whether counsel's performance was adversely affected by the asserted conflict of interest turns on whether counsel failed to represent the defendant as vigorously as counsel would have if no conflict had arisen. In this inquiry, we are bound by the record. If the claimed adverse effect is an omission, we determine whether omitted arguments or actions would likely have been made by a defense counsel who did not have a conflict of interest, and whether a tactical reason—other than the claimed conflict of interest—exists for the omission. (*Doolin, supra*, 45 Cal.4th at p. 418.)

Overall, it appears to us that trial counsel vigorously defended Brandon's case. She made repeated efforts to keep impeachment evidence from the jury. (See, e.g., *People v. Frye* (1998) 18 Cal.4th 894, 998-999, disapproved on other grounds in *Doolin, supra*, 45 Cal.4th at p. 421, fn. 22 [defense counsel at odds with prosecution].) She argued—based on slim evidence—that because Johnson also had an opportunity to have injured Kiara, a reasonable doubt existed about Brandon's guilt.

Brandon's claim that trial counsel failed to call witnesses who could testify about his good character does not establish incompetence. The decision whether to call witnesses is generally considered to be a matter of trial tactics for defense counsel to

determine. A disagreement between a defendant and defense counsel about trial tactics does not constitute a conflict of interest. (See *People v. Williams*, *supra*, 2 Cal.3d at p. 905 [appointment of another attorney not required].) As we shall explain, the bad character evidence that Brandon complains of was proper impeachment. (See pt. III., *post.*) Even if we assume a conflict of interest, nothing in the record on appeal establishes that a different course of action would have produced convincing evidence of good character. (See, e.g., *Rundle*, *supra*, 43 Cal.4th at p. 174.)

Brandon's remaining claim—that defense counsel was incompetent for allowing the trial court to commit two instructional errors—also fails because, as we shall explain, those errors were harmless. (See pt. IV., *post.*)

### **III. PRIOR MISCONDUCT EVIDENCE**

#### *A. Facts*

Brandon also contends that the trial court erred by allowing the prosecution to cross-examine him on prior acts of misconduct. He argues that the questioning was about instances of misconduct that were neither acts of moral turpitude nor tended to undermine his credibility. In a motion in limine,<sup>18</sup> Brandon asked the trial court to preclude the prosecution from referring to any of his uncharged incidents. He did not want the prosecution to introduce evidence of alleged child abuse against K.S. that initially formed the basis of one of the two counts that were then dismissed. Once the prosecutor stated that she did not intend to introduce this evidence, the trial court granted the motion in limine. However, it noted that if defense counsel cross-examined a witness in a manner that opened up the issue, an inquiry would be permitted. Brandon also asked the trial court for an order requiring the prosecution to disclose any prior bad acts it intended to use against the defense at a hearing to be held outside the presence of the jury. (Evid. Code, § 402.) That motion was granted, as was his request that all in limine rulings be binding at trial.

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<sup>18</sup> The question of what prior bad acts were admissible into evidence arose in several contexts in the trial court. We discuss only those related to the issue Brandon raises on appeal.

The prosecution filed its own motion in limine seeking to be allowed to impeach Brandon—should he testify—with evidence that he held a gun to his mother’s head and threatened to kill her. The prosecution argued that this October 2000 assault and threat against Brandon’s mother resulted in a misdemeanor conviction of a crime of moral turpitude. The motion referenced police reports of various acts occurring in 2000 against Brandon’s mother and sister. The trial court ruled that if Brandon testified and portrayed himself as a nonviolent person, then “all” his bad acts would become relevant evidence.

After the prosecution rested, Brandon’s counsel was given copies of police reports that the prosecutor had recently obtained. The 1998-2000 reports detailed incidents of Brandon’s violence and destructiveness against members of his family. Defense counsel objected that the discovery was late, but the trial court overruled that objection. It indicated that it would permit Brandon to object during trial in order to allow it to determine which evidence would be admitted and which would not, on a case-by-case basis. It also stated that if Brandon chose to testify and characterized himself as a calm person without a history of violence, then the proffered evidence would become relevant to counter this inaccurate portrayal.

When he testified, Brandon denied injuring Kiara, suggesting instead that Johnson must have done so. On cross-examination, Brandon denied being angry when Kiara defecated on herself or having an “anger problem.” When the prosecutor asked if he was the sort of person who would pull a gun on his mother, hit her or threaten to kill her, Brandon said that he was not.

When the prosecution asked him about his arrest record, he told the jury that he had been arrested numerous times, all related to the violation of a single outstanding warrant. Over defense counsel’s objection, the prosecution was permitted to question about whether he engaged in specific instances of violent conduct at specific times. Brandon denied most incidents and explained others. He admitted that the police were called about some complaints. With this context in mind, we turn to the specific contentions that Brandon raises challenging the evidence of his prior misconduct.

## B. *Moral Turpitude*

### 1. *Gun Threat*

On appeal, Brandon first argues that the trial court erred by allowing the prosecution to question him about an October 2000 misdemeanor conviction he suffered after holding a gun to his mother's head and threatening to kill her. After Brandon denied being angry when Kiara defecated on herself or having more general anger issues, the prosecutor elicited repeated denials that he had ever threatened to kill his mother or held a gun to her head. More generally, he testified that his relationship with his mother was good.

Brandon's claim of error is flawed in several respects. First, strictly speaking, no *evidence* of an October 2000 incident was admitted. A question from the prosecutor is not evidence. Only a witness's answer is evidence. (See *People v. Flores* (2007) 153 Cal.App.4th 1088, 1092; CALCRIM No. 222; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 844.) Brandon's denials of the prosecutor's inquiries do not constitute evidence of an affirmative answer. However, if we assume *arguendo* that the jury did not believe those denials, then we would evaluate whether the implication that the questions raised—that the incidents, in fact, occurred—constituted proper impeachment.

Second, Brandon asserts—erroneously—that the prosecution questioned him about an October 2000 misdemeanor assault *conviction*. Based on this assumption, he contends that because one can commit misdemeanor assault without using a weapon, unless the prosecution put on specific evidence of weapon use, the use of his misdemeanor conviction against him was improper.<sup>19</sup> Although it appears that Brandon

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<sup>19</sup> When a prior *felony conviction* is used to impeach a criminal defendant who chooses to testify at trial, the prosecution is limited to the fact of the conviction and the nature of the crime committed. Details and circumstances of the prior offense are not admissible. (*People v. Schader* (1969) 71 Cal.2d 761, 773; *People v. David* (1939) 12 Cal.2d 639, 645-646; see 3 Witkin, Cal. Evidence, *supra*, Presentation at Trial, §§ 308, 310, pp. 434, 436-437.)

may have actually suffered a misdemeanor conviction<sup>20</sup> stemming from the October 2000 incident that formed the basis of the cross-examination, the prosecution did not refer to any conviction. Instead, the jury heard questioning about the underlying *conduct*, including his weapon use.

Third, Brandon's overriding contention—that pointing a gun at his mother and threatening to kill her is not a crime of moral turpitude—is baseless. A witness may be impeached with any prior conduct constituting evidence of moral turpitude regardless of whether the conduct resulted in a felony conviction, if the trial court concludes that the evidence is more probative than prejudicial. (*People v. Clark* (2011) 52 Cal.4th 856, 931.) Brandishing a deadly weapon and threatening to use it constitutes a crime of moral turpitude. (*People v. Cavazos* (1985) 172 Cal.App.3d 589, 595; see *People v. Lepolo* (1997) 55 Cal.App.4th 85, 89-90.) Evidence of a misdemeanor *conviction* is inadmissible hearsay, but the underlying *misconduct* may be admissible if it evinces moral turpitude. (*People v. Wheeler* (1992) 4 Cal.4th 284, 300; *People v. Lepolo, supra*, 55 Cal.App.4th at pp. 89-90.) Even misdemeanor misconduct involving moral turpitude may suggest a willingness to lie, rendering the evidence relevant for impeachment. (*People v. Wheeler, supra*, 4 Cal.4th at pp. 295-296.)

Whether the misdemeanor misconduct tends to prove moral turpitude turns solely on the misconduct itself, not on the label applied to define the statutory offense that the misconduct constitutes. (*People v. Ayala* (2000) 23 Cal.4th 225, 273; *People v. Wheeler, supra*, 4 Cal.4th at pp. 297-300; *People v. Lepolo, supra*, 55 Cal.App.4th at pp. 89-90.) The questions asked of Brandon inquired about whether he threatened to kill his mother at gunpoint. As that misconduct evidences moral turpitude, the trial court did not abuse its discretion by permitting the prosecution to inquire about it.

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<sup>20</sup> Although Brandon states in his brief that he was convicted of misdemeanor aggravated assault, the record on appeal does not contain evidence of the specific offense underlying the conviction.

## 2. Broken Window

Brandon also contends that the trial court should not have allowed the prosecution to ask whether, in October 2000, he broke a window at his mother's house. On cross-examination, he admitted that he intentionally broke the window, leading his mother to get a restraining order against him. He testified that his mother made a false report to police that he had threatened her with a gun. Hurt that she would do this, he broke the window.

A witness may be impeached by evidence displaying moral turpitude. (*People v. Clark, supra*, 52 Cal.4th at p. 931.) Vandalism is a crime of moral turpitude.<sup>21</sup> (*People v. Campbell* (1994) 23 Cal.App.4th 1488, 1492-1495; see *People v. Lepolo, supra*, 55 Cal.App.4th at p. 90 [dicta].) The trial court acted within its discretion to allow the prosecutor to elicit this misdemeanor misconduct evidence of moral turpitude.

We would also find this evidence independently admissible to impeach Brandon's testimony that he did not have anger issues. (See pt. III.C., *post.*) The trial court acted within its discretion when it allowed the prosecution to ask him about this incident.

## C. Impeachment on Anger Issues

Brandon also contends that the trial court erred by allowing the prosecution to ask a series of questions during cross-examination about his past conduct in order to impeach his testimony. He contends that the incidents forming the basis of these inquiries did not bear on his credibility. The prosecution's theory of the case was that Brandon killed Kiara in anger, after she defecated on the floor. His anger was the motive for the killing, according to the prosecutor. When she cross-examined him, Brandon denied that he was angry with Kiara on the morning that she died. More generally, he denied having an anger problem. He also testified that his numerous arrests were the result of one outstanding warrant against him. After an unreported sidebar, the trial court permitted

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<sup>21</sup> In support of this contention, the People cite *People v. Muniz* (2011) 198 Cal.App.4th 1324 (review granted Dec. 14, 2011, S196916, review dismissed Oct. 17, 2012). As the California Supreme Court had granted review in that case, the case may not properly be cited. (Cal. Rules of Court, rules 8.1105(e)(1), 8.1115(a).)

the prosecution to ask a series of questions about Brandon's involvement in prior incidents that—if true—would tend to demonstrate that he did have anger issues, that he had a history of striking family members, and that his arrests were not solely the result of an outstanding warrant.

Brandon denied that he was the type of man who would hit his mother. The prosecution asked whether—after his mother criticized his behavior—Brandon had hit her in the lip in March 1998. He denied that this incident occurred, later denying that he had ever struck her. Brandon also denied that he knocked his sister down when she came to their mother's aid in the same incident and going into his mother's garage and pulled items off the shelves.

Brandon also denied that in August 1998, after his mother told him to stop smoking in the house, he flipped over a mattress; spat at his mother; pushed her head into a wall; threw a plant at her; and hit her in the back of the head. Brandon told the jury that he did not do these things. The prosecution asked about a December 1998 report that Brandon had an argument with his mother about breaking the garage door. He could not recall the argument. When asked if he slammed the garage door on her finger, Brandon denied doing so.<sup>22</sup> He also could not recall a 1998 incident, when his mother woke him, he refused to turn down his radio and cursed at her. When questioned about whether in January 1999, he hit his sister because she refused to let him copy her homework, Brandon told the jury that sometimes he might have pushed her, but he did not strike her. During the course of these inquiries, Brandon admitted that his mother had obtained a restraining order against him.

The prosecution was entitled to put on evidence relevant to establish Brandon's anger, as this was its theory of his motive for killing Kiara. (Evid. Code, § 1101, subd. (b).) The questions that the prosecution asked constituted proper impeachment, because they tended to counter Brandon's denial about having anger management issues and minimizing the reason for his arrests. Relevant evidence includes evidence relevant to

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<sup>22</sup> A copy of a police report was marked for identification, but was not admitted into evidence.

the credibility of a witness. (*Id.*, § 210.) Evidence tending to contradict defense evidence is proper impeachment evidence. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1025.) Evidence of uncharged crimes may be admissible to impeach a witness's credibility. (See Evid. Code, § 1101, subd. (c).) Brandon knew before he testified that if he attempted to paint himself as a nonviolent person, this evidence would be admissible to impeach him. He opted to testify, knowing that this evidence might be offered to counter his testimony.

No witness—not even a criminal defendant testifying on his or her own behalf—is entitled to a false aura of veracity. (*People v. Chavez* (2000) 84 Cal.App.4th 25, 28.) The trial court properly allowed Brandon's prior misconduct to be brought to the jury's attention by the prosecution's questioning in order to dispel the impression that Brandon gave that he did not have anger management issues.<sup>23</sup>

#### IV. JURY INSTRUCTIONS

##### A. *CALCRIM No. 358*

Brandon also raises two instructional challenges on appeal. First, he contends that the trial court erred by failing to instruct the jury *sua sponte* that his unrecorded statements should be viewed with caution. The jury heard evidence that, at different times, Brandon offered different explanations about where he first saw the injured Kiara—in her bedroom or in the living room. The prosecution argued that these discrepancies tended to prove that Brandon was lying about how Kiara came to be injured, because if he had truly come upon her after she had been hurt, he would have recalled the circumstances vividly.

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<sup>23</sup> Brandon contends that he should not have been questioned about the 1998 and 1999 incidents, because they were too remote at the time of the 2010 trial and because these incidents occurred when he was a juvenile. He argues that they should have been excluded as more prejudicial than probative. (See Evid. Code, § 352.) Assuming *arguendo* that defense counsel raised an Evidence Code section 352 objection during the unreported sidebar before the prosecution began questioning Brandon about these incidents, we would uphold the trial court's exercise of its discretion to admit this evidence.

The trial court instructed the jury on CALCRIM No. 358: “You have heard evidence that the defendant made oral or written statements before the trial. You must decide whether or not the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such statements.”

This standard instruction includes an optional sentence that the trial court did not give: “Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.” (CALCRIM No. 358.) In the trial court, there was no discussion about whether to give this additional sentence as part of the jury instruction. On appeal, Brandon contends that the trial court erred by not including this latter clause in its instruction.

When the evidence requires it, a trial court must give this cautionary jury instruction *sua sponte*. The purpose of the cautionary instruction is to aid the jury’s determination whether Brandon made the statements that the evidence suggested he did. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 392-393; *People v. Mayfield* (1997) 14 Cal.4th 668, 776.) Brandon reasons that the differing oral statements attributed to him tend to show that he lied about these events. Even if we assume *arguendo* that the trial court erred in failing to caution the jury to view these oral statements with caution, Brandon must establish that it is reasonably probable that the jury would have reached a result more favorable to him if this instruction had been given. (See *People v. Carpenter, supra*, 15 Cal.4th at p. 393; *People v. Stankewitz* (1990) 51 Cal.3d 72, 94.) He has not done so.

Overall, the evidence of Brandon’s differing accounts of whether he bathed Kiara and then returned her to bed was relatively insignificant when contrasted with other evidence in this case. The manner of Kiara’s death, the fact that she suffered injuries so severe and repetitive that they could not have been accidental, K.S.’s testimony that Brandon had hit Kiara, the fact that he was the only adult present at the time Kiara sustained her mortal injuries, and the suggestion that he had ongoing anger management

issues constitute overwhelming evidence of Brandon's guilt. Even if we assume *arguendo* that the trial court erred in not giving this cautionary instruction, we would conclude that any error was harmless. (See, e.g., *People v. Carpenter*, *supra*, 15 Cal.4th at p. 393.)

B. *CALCRIM No. 580*

Brandon also contends that the trial court committed prejudicial error when it misinstructed the jury on involuntary manslaughter. When instructing on the definition of involuntary manslaughter—one of the lesser included offenses of the charged offense of murder—the trial court told the jury that if the prosecution did not prove intent to kill or conscious disregard for human life, it was required to acquit Brandon of *involuntary* manslaughter. The correct jury instruction explains that if the jury finds no intent to kill or conscious disregard for human life, it is required to find the defendant not guilty of *voluntary* manslaughter. (See *CALCRIM No. 580* [Jan. 2006 ed.].) The jury acquitted Brandon of first degree murder, but found him guilty of the lesser included offense of second degree murder. On appeal, Brandon asks us to reverse his second degree murder conviction.

The jury was properly instructed that if it found that Brandon had an intent to kill or conscious disregard for life, then he was guilty of murder. Brandon reasons that the combined effect of the correct and incorrect jury instructions told the jury that it could only find him guilty of involuntary manslaughter if it also found him guilty of murder. Thus, he urges us to conclude that all of the instructions effectively eliminated the possibility of a verdict of the lesser included offense of involuntary manslaughter.

Regardless of our view of this theory, it is clear that the trial court misinstructed the jury on the lesser included offense. Brandon contends that the error raises federal constitutional issues, requiring us to test prejudice under the *Chapman* standard. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) The California Supreme Court has rejected this view. (*People v. Lasko* (2000) 23 Cal.4th 101, 111-113.) Instead, when a trial court misinstructs a noncapital jury on a lesser included offense, we must apply the *Watson* standard to determine whether prejudice occurred. We may only reverse a

conviction on a charged offense based on this error if our examination of the entire case makes it reasonably probable that the defendant would have obtained a more favorable outcome in the absence of the error. (*Id.* at p. 111; see *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Brandon’s prejudicial error argument fails to take into consideration the effect of the jury’s guilty verdict on the other count—that of assaulting Kiara by means of force likely to produce bodily injury, resulting in her death. (Former § 273ab.) The challenged jury instruction does not undermine the assault conviction. In reaching its verdict on the assault count, the jury necessarily found that Brandon *committed an act* that would directly and probably result in the application of force to the child. Thus, the jury necessarily rejected Brandon’s defense—offered against both charges—that he did not *inflict the injuries* that mortally wounded Kiara.

The multiple, extensive and brutal injuries that Kiara sustained strongly suggest an intent to kill on Brandon’s part. (See, e.g., *People v. Lasko, supra*, 23 Cal.4th at p. 112.) As the jury concluded that Brandon actually injured Kiara, there is no reasonable possibility that it would have found that he inflicted those injuries without an awareness of the risk of great bodily injury or death posed by those severe injuries.<sup>24</sup> The instructional error was not prejudicial. (See *People v. Lasko, supra*, 23 Cal.4th at pp. 111-113.)<sup>25</sup>

The judgment is affirmed.

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<sup>24</sup> The assault verdict also required the jury to conclude that a *reasonable person* would have realized that these acts would probably result in great bodily injury.

<sup>25</sup> We also reject Brandon’s contention that cumulative errors resulted in prejudice.

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Reardon, Acting P.J.

We concur:

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Rivera, J.

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Sepulveda, J.\*

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\* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.