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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.

GISELLE DIWAG ESTEBAN,

Defendant and Appellant.

A137359

(Alameda County
Super. Ct. No. 167876)

I.

INTRODUCTION

Giselle Diwag Esteban was convicted of the first degree murder of Michelle Le and sentenced to an indeterminate prison term of 25 years to life. On appeal, she contends the trial court committed reversible errors by (1) admitting evidence of a statement she gave during a police interview; (2) dismissing a seated juror during her trial; and (3) instructing the jury regarding lying in wait. We affirm.

II.

STATEMENT OF FACTS

A. Background

In the spring of 2003, appellant was going to college at San Francisco State University. Michelle Le, who appellant knew from high school, was attending San Jose State University. Appellant introduced Michelle to Scott Marasigan, a friend and fellow student. Scott and Michelle dated for about a month but broke up after appellant told Scott that Michelle had a “semi-affair” while she was dating him. However, Scott and

Michelle remained lifelong friends; at appellant's trial Scott described Michelle as a warm and generous person who "put others before herself, even when it got her into trouble."

In the fall of 2003, appellant began dating Scott. The couple spent a lot of time with Michelle and it appeared to Scott that appellant and Michelle got along well. At some time during this phase of Scott's relationship with appellant, Michelle confided in him that she was pregnant and planned to get an abortion. At Michelle's request, Scott kept this information to himself. A few weeks later, appellant found out about Michelle's secret and also discovered that Scott already knew it. Appellant was "furious" that this secret had been kept from her.

In the spring of 2005, Scott and appellant broke up, but they reconciled a few months later after appellant discovered she was pregnant. Their daughter was born in late October, and they lived together with her for the next three years. However, about a year after the baby was born, appellant began to express concerns about Scott's friendship with Michelle. Her initial anger about Michelle's secret developed into accusations of sexual misconduct between Scott and Michelle. Scott testified at trial that he never had a sexual relationship with Michelle, and that he tried to convince appellant of this fact, even agreeing not to have contact with Michelle for a period of time. However, appellant could not be convinced, and her hostility only increased with time.

In the summer of 2008, Scott and appellant separated, initiated custody proceedings, and tried to work on co-parenting. In November, appellant was granted a move-away order and took the baby to live with her in San Diego. Scott shared legal custody and had generous visitation which he fully exercised. In June 2009, appellant told Scott she planned to move in with a new boyfriend. Scott objected and in November he filed a request for full custody which took several months to resolve. Meanwhile, in April 2010 appellant broke up with her boyfriend and confided in Scott that she was pregnant and going to have an abortion. Following that incident, appellant and Scott had a series of sexual encounters. Scott testified that there were periods after he ended his

boyfriend-girlfriend relationship with appellant that he would “backslide” and have intimate contact with her.

In August 2010, Scott was granted custody of his daughter and moved her back to Northern California. In October, appellant also returned to the Bay Area. Appellant and Scott began taking a class in high-conflict parenting. At appellant’s request, the instructor facilitated a meeting between appellant, Scott and Michelle. At the meeting, Michelle shared that she had been accepted into a nursing program at Samuel Merritt University (Merritt). Appellant expressed her desire to renew her friendship with Michelle who appeared receptive to that idea. However, after this meeting, appellant became “fixated” on the idea that Michelle broke up her family. Appellant’s obsession plagued her relationship with Scott to whom she constantly expressed her hateful feelings about Michelle.

B. Appellant’s Obsession with Michelle

Scott began saving text messages he received from appellant and also recorded some of their arguments about Michelle. For example, in a recording of a November 2010 conversation that was played for the jury, appellant accused Scott of sleeping with Michelle and driving her to get an abortion. She said that if Scott was not honest with her she would take his life and Michelle’s, and that they both deserved to die for their lies.

On February 17, 2011, appellant and Scott met at a coffee shop. Appellant started talking about someone who had a “big problem” with Michelle. Appellant said she told this person how to find Michelle and that he was going to crash a party where she would be and then disfigure her. When Scott refused to discuss the matter and got ready to leave, appellant threw her coffee at him. Later that day, appellant texted an apology, explaining that she was still very angry about Scott’s “poor choices” and that she had not “even beg[u]n to forgive” him or Michelle.

Later that same day, appellant sent this text message to Michelle: “If you were really anybody’s friend, mine or Scott’s, you would just fuck off and leave my family alone, but all you are is the whore who had nothing better to do and followed me to SF. That’s all you will ever be. The whore who slept with other people’s men and brothers

because no one wanted you. You aren't my friend. You are always just a parasite. . . .” Seconds later, appellant sent a text to both Scott and Michelle, which said: “You two really do deserve each other. I hope you get what you deserve. You are both pathetic. You with no dreams or goals and the other chasing after someone else's dreams because she has none of her own. You are both parasites.”

The next day, appellant sent Scott several text messages about Michelle. Calling Scott an “idiot,” she warned him that Michelle better stop avoiding her calls “because this won't end unless she does.” She accused Scott of falling for Michelle's “act,” and she told him that their daughter was already aware that he had picked his “whore over [his] family.” Appellant also complained that Scott had not given her a birthday gift and that he blew his money on his “whore.” Appellant said that she “took the liberty” of letting Michelle's boyfriend know about their history.

In late February 2011, many of the text messages that appellant sent to Scott were laced with derogatory remarks and threats about the relationship she believed he was having with Michelle. She complained that Scott had pushed her “into insanity” and warned that Scott would deal with his decision and actions for as long as he lived. She said that Scott could not protect anyone, that his “whore will get what she deserves too,” and that she had many ways to make him pay. She told Scott to put a bullet in his brain, to die and make the world a better place, that he and Michelle would pay for their mistakes, and that she was “busy implementing [his] demise.”

In March 2011, appellant continued to send Scott texts berating him for lying and carrying on a sexual relationship with Michelle. She claimed she had seen them together at various places and warned that Michelle had “dug her grave by being a home wrecker and a whore” and said that she “won't be an issue for much longer.” On March 7, appellant wrote: “You still keep seeing your whore. I tried every positive approach and you still kept running back to the whore who made you lie to your family. So now I choose to take the negative and obliterate you and your baggage toting whore from my family. You will never have a good name again. . . .”

On March 18, 2011, Scott drove to appellant's house to pick up cookies he had ordered from his daughter's Girl Scout troop that appellant was supposed to have left for him outside her front door. When Scott arrived, appellant got in his car and Scott recorded their conversation on his phone. Appellant said she was pregnant again, which Scott did not believe.¹ Then she complained that she had tried it "the nice way," but that he was still seeing Michelle more than he was seeing her. Complaining that Scott did not love her at all, appellant repeatedly hit herself in the face with her keys and refused Scott's pleas to stop. Finally, Scott said he was going to call the police. Appellant responded that they would arrest him. Scott did call the police and was arrested, but the charges against him were dismissed.

On May 20, 2011, appellant went to Scott's house to pick up her daughter for a supervised visit. Although a third party was supposed to facilitate the transition between parents, appellant went inside the house and made a scene. Later Scott could not find the spare keys he kept on an entry table. Two days later, his car alarm was activated. He went outside to investigate but found no one. However, when he came back inside, Scott became concerned that appellant had been in the house. He went back outside and found her at his gate. When he went toward her asking for his keys, she led him on a chase, laughing and claiming not to have them. Later, Scott discovered that somebody had tampered with his computer. All of his court-related files pertaining to appellant and anything that had appellant's name on it was missing. Scott used these incidents to apply for a restraining order against appellant and a protective order for his daughter.

C. Michelle's Disappearance

On Friday, May 27, 2011, Michelle was one of eight Merritt nursing students participating in clinical training at Kaiser Medical Center, Hayward. The program was supervised by Laurie Rosa, a registered nurse and Merritt teacher. Rosa paired each student with a hospital nurse who worked in either labor and delivery or the maternity

¹ In late February 2011, appellant called Scott, upset because she had been in a car accident. Scott agreed to pick her up and the two ended up having a one night stand. Scott testified that this was the last sexual encounter he had with appellant.

unit and then monitored the progress of her students throughout their shift. Shortly after 7:00 p.m., a hospital security guard notified Rosa that Michelle did not sign out at the end of her shift in the maternity ward. Rosa searched the ward, sent Michelle a text and also left her a voice mail message but was unable to contact her. A Kaiser nurse who worked in maternity recalled that at around 6:45 p.m., Michelle told her she was going to get something out of her car but she did not see Michelle after that.

At around 7:30 p.m., Kaiser nurse Melanie Wuest took a call in the emergency room. The caller identified herself as a nursing student named Michelle and asked to speak with her teacher. Wuest responded that there were no students working in the emergency room and asked whether the caller wanted to be transferred to another department. The caller said no, repeated that her name was Michelle and said that she needed to let her instructor know she would not be able to return that night because she received a message that her father had a heart attack and she was driving around San Jose trying to find the hospital where he had been taken.

At around 9:00 p.m., Rosa had still not heard from Michelle, so she went to look for her in the parking garage adjacent to the hospital. Rosa and a security guard crossed the pedestrian sky bridge and searched the entire structure before returning to the third floor where she and the nursing students usually parked their cars. While they stood there talking, a white Honda CRV came up the ramp, abruptly stopped and backed up, almost hit another vehicle, and began to speed away. Rosa could not see the driver but she thought it was Michelle's car and she was very concerned that Michelle did not stop to talk to her. She tried to intercept the car on a lower floor but it was traveling too fast.

On Saturday morning, May 28, 2011, Hayward Police Inspector Frazer Ritchie was assigned as the lead investigator in Michelle's missing person case. Ritchie obtained the cell phone records for Michelle's white iPhone and called her number but was put through to voice mail. At around 3:15 p.m., Ritchie sent a text message to Michelle's phone identifying himself and asking the person who had the phone to call him back. Less than five minutes later, Ritchie received a text from Michelle's number which stated

that the responder could not call back because the phone battery was too low.

Approximately an hour later, Ritchie sent another text message that was never answered.

Meanwhile, on the morning of May 28, Scott sent a text message to Michelle asking what she was doing that day. Scott received a reply text that Michelle was on her way to Reno and that she was busy “putting out fires” because people thought she was missing. Scott texted back, asking for clarification, but did not receive a response. On May 29, the police went to Scott’s house at around 1:00 a.m. to talk to him about Michelle’s disappearance. Scott cooperated with the officers, gave them access to his phone and computer and copies of the text messages that appellant sent to him about Michelle. After he talked to the police, Scott sent Michelle another message asking her to call him, but she never did.

D. Appellant’s Activities the Week Michelle Disappeared

1. Wednesday, May 25, 2011

Appellant had a red Blackberry Curve cell phone which she used to send several text messages to Alan Ng, a friend from college who also knew Michelle. Appellant asked for Michelle’s address, suggesting Alan’s girlfriend might have it, and asking him not to tell her or Michelle that she wanted it. Appellant explained that she was trying to serve restraining orders to keep Michelle away from her and her daughter and that the papers had been returned from Michelle’s Oakland address because “apparently” she moved to San Mateo. That evening, Alan responded that his girlfriend did not have Michelle’s address.

Appellant’s cell phone records showed that she placed two calls to the nursing school at Merritt. Marjorie Villanueva, a school administrator, recalled receiving those calls from a woman who identified herself as Jamie. Jamie was calm and friendly. She said she was at the airport and that she was supposed to get together with Michelle, who was a close friend. After confirming that Michelle was a Merritt student, Jamie asked for her phone number, which Villanueva refused to provide. Jamie called back later and asked for Michelle’s number again. Villanueva offered to relay Jamie’s number to

Michelle, but the caller said she was using a borrowed phone. Villanueva left a message for Michelle that her friend Jamie was looking for her.

2. Thursday, May 26, 2011

At around 8:00 a.m., appellant went to Merritt and spoke to Karin Kasper, an administrative assistant at the nursing school. Appellant said she had an appointment with a student services counsel. While Kasper went to look for the counselor, she left appellant in her office. An identification badge for a new faculty member was on Kasper's desk. The new employee, Elaine San Augustin, had been away on a trip and Kasper had the badge ready for her return. The counselor was not at the office that day, so appellant chatted with Kasper about the program and then left.

Surveillance footage from cameras at the Merritt campus showed that appellant used San Augustin's identification badge at 8:40 a.m. to gain access to a faculty break room. At 5:11 p.m., she used the badge at the faculty entrance to the building, and then to gain access to various locations at the nursing school between 5:17 p.m. and 7:11 p.m.

Appellant's cell phone was used to make three calls to Kaiser Hayward. The first call at around 10:45 a.m. was answered by Scott Moore, a charge nurse in the emergency department. The caller identified herself as Michelle and said she was starting an internship on Friday. At trial, Moore testified that the caller sounded "desperate" to know her preceptor's name, and where and when she was to report. This call was unusual because nursing students normally obtained this information from their school. Moore told the woman that Michelle was not scheduled to work in the emergency department that Friday. A few hours later, the woman called back and asked many of the same questions.

At around 2:30 p.m., the third call from appellant's cell phone to Kaiser was answered by nurse manager Bessy Wentz. The caller said she was a "skilled lab instructor for Samuel Merritt" and asked whether the Merritt nursing students were going to be there. Wentz confirmed that the students were there every Thursday and Friday but she refused to provide names of students who would be attending.

3. Friday, May 27, 2011—the Day Michelle Disappeared

Kaiser Hayward nurse Scott Moore received another telephone inquiry about Michelle that was made from appellant's cell phone. This time the caller said she was Michelle's instructor at Merritt and she wanted to confirm the name of Michelle's preceptor so she could arrange a meeting. Moore remembered this call because the caller gave the name of a former preceptor who Moore happened to know and Moore also knew that person was not working at the hospital that day. Also, the caller told Moore that Michelle was on probation which was something that schools usually kept confidential. The caller wanted to confirm that Michelle was to report for her program at 7:00 p.m. Moore told the caller that 7:00 was not necessarily the start time because some programs started earlier in the afternoon.

At around 9:00 p.m. appellant sent her friend Brian Degraf the following text message: "how do you unlock an iPhone?" Later, she explained to Degraf that she had found an iPhone earlier that day when she was at the Kaiser pharmacy.

4. Saturday, May 28, 2011

At 1:00 a.m., appellant sent Scott the following text message: "Where is Michelle?" Later that morning, appellant was late picking her daughter up from Scott for a supervised visit. During the visit, appellant drove to the Apple store, explaining to the chaperone that she needed to unlock a white iPhone that she had received from her brother. An Apple store employee testified at trial that he reset the iPhone for appellant, who told him that her daughter had accidentally put a pass code on the phone, and appellant wanted it removed. When they left the mall, appellant asked the chaperone to drive and then spent her time in the car using the iPhone.

At around 3:00 p.m., appellant took her daughter and nieces to Chuck-E-Cheese in Newark. However, almost as soon as they arrived, appellant abruptly left the children with the chaperone, telling her that she left the stove on in her apartment. When appellant returned less than an hour later, she did not have the white iPhone.

E. Appellant's Recorded Statement

On May 28, shortly before midnight, Inspector Richie went to appellant's Union City apartment and interviewed her for approximately two hours. Without appellant's knowledge, Ritchie audio-recorded the interview, which was subsequently played for the jury at trial.

After Ritchie identified himself and was invited in, he told appellant that he was there about Michelle. Appellant responded, "Oh, God, what about her?" Ritchie said she had gone missing and the police wanted to find her. Appellant said she could not help with that; she had been trying to get in touch with Michelle for over a week to tell her to stay away from her daughter. Ritchie said that Michelle disappeared from work on Friday night and some of her friends had reported that she and appellant had a "tumultuous" relationship. Appellant responded, "[s]he was my best friend who slept with my then fiancé."

Appellant said she had called Michelle several times in the past two days and left messages but none were answered. Appellant said she mostly just wanted Michelle to stay away from her five-year-old daughter. Ritchie asked if appellant had her phone with her. As she showed him her phone, appellant said that her messages to Michelle had been automatically deleted. She further explained that the reason she still had copies of older messages she had sent to other people was because she manually saved them.

In response to questions about what she had done on the day Michelle disappeared, appellant said that she took a walk in the evening because she was restless, talked on the phone with her friend Virgili, and eventually fell asleep on the couch. Ritchie asked what appellant had done during the day on Friday. Appellant said she volunteered at her daughter's school, took a nap and then, at around 4:15 p.m., she went to Kaiser to talk to member services about coverage because she was pregnant with Scott's baby. Appellant went to the Union City Kaiser but it was closed, so she then went to Kaiser Hayward. She parked in the lot on the floor near the maternity ward. The member services department was closed, so she used the bathroom and then went back to her car. By that time, it was around 6:00 or 6:30 p.m. and, as she was driving away,

appellant saw Michelle walking between buildings on the pedestrian bridge. Appellant said that she was not close enough to see Michelle's expression or demeanor but that she was pretty sure it was her.

When Richie asked for details about appellant's encounter with Michelle, appellant questioned whether she should be talking to him. Richie assured her she was not under arrest and said that he was not accusing her, just asking questions. Appellant asked if the police had talked with "everybody else," pointing out that Michelle had "slept with a lot of other people's boyfriends."

Richie said the police were in the process of getting security camera footage from Kaiser and asked whether it would show that appellant and Michelle had a confrontation. Appellant could not recall having a discussion, argument or physical altercation with Michelle. Appellant said she did not remember much about the previous day other than that she was already in her car when she saw Michelle, she got home around 7:00 p.m., and she did some text messaging with friends. Pointing out that "you show up at her workplace— . . . —and then she goes missing," Ritchie asked "[h]ow does that look?" Appellant admitted that the circumstances "look bad obviously," but repeatedly stated that she did not know where Michelle was. Richie admitted that he was having trouble believing how little Michelle remembered about what happened on Friday. Michelle said that she had been off her medication because she was three months pregnant.

Richie said that if there had been some kind of fight, now would be the time to tell him about it. Appellant responded, "I don't know." Appellant said she did not know what happened to Michelle. She said she was telling him what she could remember, explaining that she had just been sleeping and that lately she had been forgetting a lot. Richie said that a surveillance video from the parking lot showed appellant's car driving right past Michelle's car. Appellant said she probably did, but she did not know Michelle worked there until after she saw her on the pedestrian walkway and she was already leaving by then.

Ritchie asked if there was anything in the apartment that belonged to Michelle. Appellant said there shouldn't be, and gave the officer permission to look around saying

“I’m pretty sure you’re not going to find anything.” Appellant was “pretty sure” that Michelle had been wearing white scrubs the previous day at Kaiser. At one point, appellant stopped the conversation so she could text her friend Virgili that Michelle was missing and continued to use her cell phone several times during the interview.

Ritchie asked if appellant could recall what happened during her “meeting” with Michelle the previous day. Appellant said she came home tired. Ritchie asked if Michelle was getting in appellant’s business and interfering with her child. Appellant denied that, but said Michelle would surface every now and then and appellant would hear about it from her five year old. Appellant complained that Ritchie kept asking the same questions. She told him she had just received a text from Virgili, who reminded her that they had talked on the phone on Friday night until 10:59 p.m.

Ritchie asked when appellant had last been in Michelle’s car. Appellant said she did not remember being in that car the previous night, but she had been in Michelle’s car many times over the years. When Ritchie asked again, appellant said she just did not remember, pointing out that it was now almost 4:00 a.m.² Ritchie asked if appellant had any of Michelle’s belongings in her car, and if his partner could take a look. Appellant said no. She said she had let him in her house, told him what she knew and, at this point, her friend Virgili was advising her by text message to stop talking. When Ritchie asked what the friend was saying, appellant responded: “Virgili is telling me, ‘You have an alibi. Stop talking to them now.’ ” Appellant laughed as she shared this text message with Ritchie.³ He asked why someone would not want to help the police find a missing person. Appellant responded that she and Virgili did not trust the police who had not assisted them in the past when they were both victims of domestic abuse. Appellant also suggested that Michelle might not want to be found. and opined that if Michelle was really missing. the police should be out looking for her instead of “sitting here questioning me.”

² The interview at appellant’s apartment concluded around 2:00 a.m..

³ This court has reviewed the audio recording of the May 28 interview that was introduced into evidence at trial.

Ritchie asked if appellant could help find Michelle. She said she could not, but then suggested checking social media, identified some potential suspects, and shared some background about how both she and Michelle ended up moving to the Bay Area for college. Appellant said that she could not take any medication because of her pregnancy which was why she had trouble sleeping and memory problems. Around this time in the interview, appellant appeared to express some emotion and said that she did not want Michelle to “be gone.” Appellant said that she did not think that she and Michelle could ever be friends again, but she wanted the police to find her. Then she agreed to let the officers look around in her garage.

After some general social conversation, Ritchie asked if appellant thought she may have had an argument with Michelle the previous night. Appellant responded, “No, I don’t. I don’t recall. I don’t. If I did, I would tell you.” Appellant said that Michelle was not an adversary but she was never a friend. She showed Ritchie the call log on her phone, volunteering that she and Michelle used to have text message wars before she changed her number. Ritchie asked about a call appellant made to Kaiser Hayward. Appellant said she made two calls to member services about insurance coverage for her pregnancy. Ritchie asked if Michelle ever answered any of appellant’s calls. Appellant said no. After Ritchie finished going through the phone log, appellant offered to back her car out of the garage so they could look around. Ritchie said he was concerned about finding something of Michelle’s and appellant said there was nothing of hers there.

Ritchie asked whether Kaiser’s surveillance cameras were going to show anything surprising. He said that he understood appellant was having memory problems because she had been off her medication and explained that he was trying to help jog her memory. He asked for appellant’s help because she knew Michelle, but appellant said she had no idea where Michelle was. She could not think of a way to jog her memory about what happened when she saw Michelle at the Hayward Kaiser. Ritchie asked if appellant had called Kaiser the previous day looking for Michelle. Appellant said that she called Kaiser to ask about their nursing program but did not recall asking about the nursing

students. Ritchie said that Kaiser recorded phone calls and that he would check the records.

Ritchie said that if Kaiser's surveillance cameras showed that appellant did have a confrontation with Michelle, "all the fingers will be pointing in your direction." Appellant responded, "I realize that, and now you're telling me this after you told me I wasn't a suspect." Ritchie replied that appellant was not a suspect if she did nothing more than send text messages, but queried what the surveillance cameras would show. He asked what Michelle had said or done that was so bad. Appellant said that just being around her daughter was not okay because her daughter was getting the impression that Michelle was "her new mommy."

At this point in the interview, Ritchie took a phone call updating him about the investigation. Then he told appellant that Scott's mom had reported that she found appellant in Scott's house going through his computer. Appellant responded that Scott's mom was just trying to keep her son out of jail, which was something she did "all the time."

Ritchie asked if appellant had been in Michelle's new car and appellant said she did not remember, but she did not think so; she did not even know Michelle had a new car. When Ritchie brought up the surveillance video again, appellant said she did not know what to tell him. He asked for the truth and appellant responded that she had a lack of memory about a lot of things. Appellant said that the scratches on her hand happened when she was at Chuck-E-Cheese with her daughter. Ritchie asked several questions about appellant's interaction with Michelle the previous day and appellant could not recall anything.

Ritchie asked if appellant drove Michelle's car on Friday night and she responded "I don't remember." She told Ritchie the email addresses she had for Michelle and gave him permission to look at her email account. Ritchie asked to see appellant's computer. Appellant asked if he wanted to look "[r]ight now." Ritchie said yes, and then asked if appellant understood that she was not under arrest. Appellant responded "Okay. But I also understand that I'm looking like a suspect right now."

After consulting with his associates, Ritchie asked appellant to put her phone down. He told her he was going to freeze her apartment and get a warrant to conduct a full search of the apartment and garage. He asked appellant if she had Michelle's phone, which she denied, and whether Michelle had been at Chuck-E-Cheese with her on Saturday afternoon, which she also denied. Richie then informed appellant that she was being "detained" for investigation.⁴

F. Forensic Evidence

Police found human blood on the third floor of the parking structure adjacent to Kaiser Hayward. DNA analysis established that the blood matched Michelle's blood sample. Police also reviewed May 27, 2011, videotape from surveillance cameras at the parking structure, which showed that a 2006 Honda CRV that matched the description of appellant's car was on the third floor of the parking structure at approximately 7:04 p.m. At 7:14 p.m., a woman who matched appellant's height and weight was seen walking in the parking structure toward a stairwell leading to the third floor. At 7:30 p.m., a woman wearing white or light-colored scrubs who police believe was Michelle walked across a pedestrian sky bridge from Kaiser to the adjacent parking structure.

Michelle's 2011 white Honda CRV was found parked approximately half a mile away from Kaiser Hayward. Elaine San Augustin's identification badge was on the front passenger seat of the car. Police collected several loose black hairs from the driver seat of the vehicle. DNA analysis established that the hair matched appellant's hair sample. Appellant's DNA also matched the major profile of a swab taken from the steering wheel and turn signal stem in Michelle's car. Blood on the interior doors and carpets was analyzed and matched Michelle's DNA.

During the execution of the search warrant at appellant's apartment on the morning of May 29, police collected a pair of white sneakers that appellant had attempted

⁴ At some point during the morning of May 29, appellant was transported to the police station, where she was interviewed by two other Hayward police inspectors for approximately 30 minutes. That videotaped interview was not introduced into evidence at trial.

to put on when Inspector Ritchie arranged for her to be transported to the police station for further questioning. DNA analysis established that a blood stain on the heel of appellant's left shoe matched a sample of Michelle's blood.

Appellants' cell phone records tied her to Michelle's disappearance in several ways as discussed above. Those records also showed that appellant used her phone in the Kaiser Hayward parking structure on May 26, 2011, at 4:12 p.m., 4:32 p.m. and 8:55 p.m. On May 27, the day Michelle disappeared from work, appellant's cell phone was in the Kaiser Hayward parking garage when she used it to send 91 text messages between the hours of 3:11 p.m. and 7:12 p.m.

A senior computer forensics examiner employed by the F.B.I. recovered data from the hard drive of appellant's computer which showed that she conducted approximately 300 Internet searches for the name "Michelle Le." Other searches included: "Is there a certain chemical that can induce heart attacks without leaving a trace"; "How to find someone who doesn't want to be found"; "How to follow someone without getting caught"; "How to induce a heart attack"; and "Where to buy potassium chloride."

On July 29, 2011, Scott was cleaning out his car when he found Michelle's white iPhone under a backseat floor mat. Scott promptly turned the phone over to the police.

On September 7, 2011, appellant was arrested for Michelle's murder. On September 17, Michelle's remains were found underneath dirt and brush in the Pleasanton-Sunol area. Hayward police had focused their search in that area because cell tower records showed that appellant's cell phone and Michelle's cell phone were both there for a period of 20-30 minutes. Michelle was identified by dental records, but a cause of death could not be determined.

III.

DISCUSSION

A. Admission of Appellant's Statement

Appellant contends that the trial court committed reversible error by denying her pretrial motion to suppress evidence of her May 28 interview by Inspector Ritchie. She argues that her audiotaped statement was inadmissible because (1) Ritchie conducted a

custodial interrogation without advising her of her *Miranda* rights,⁵ and (2) admissions she made during the interview were involuntary and coerced.

1. Background

At a pretrial hearing, Inspector Ritchie testified about the circumstances surrounding the May 28 interview. Ritchie was assigned the lead investigator role that morning, and during the day he and his team interviewed potential witnesses. Michelle's friends and family members reported that appellant and Michelle had a tumultuous relationship, and that appellant had sent Michelle threatening text messages in the past. Consequently, appellant was identified as a person of interest and potential suspect.

Shortly before midnight, Ritchie and five other officers went to appellant's apartment complex in Union City. Ritchie was wearing a polo shirt with a Hayward police emblem and a Kevlar vest that said "police" in several places. The other officers wore black windbreakers that said "police" in white lettering. When appellant answered her door, she did not make direct eye contact, but she did not appear to be alarmed, although she did act like she was tired. Ritchie explained why he was there and asked for permission to enter appellant's apartment. Appellant gave her consent and three officers accompanied Ritchie inside.

Ritchie asked whether anyone else was in the apartment. Appellant responded that she was alone and gave permission for the officers to confirm that fact by looking around. Appellant sat with Ritchie at her dining table and was calm and cooperative while the other three officers looked around the apartment. After they confirmed that nobody else was there, one officer stayed with Ritchie while the others left to interview Scott. Ritchie conducted the interview at appellant's dining room table. Appellant sat on one side and he sat across from her. The other officer either stood or sat off to his right on his side of the table. During the course of the interview, appellant was not prevented from standing up or leaving the room. A few times, Ritchie excused himself to take a phone call, but the other officer was always present in the room with appellant.

⁵ *Miranda v. Arizona* (1966) 384 U.S. 436.

When Ritchie first disclosed that he was there to talk about Michelle, appellant seemed frustrated that this person was “back in her life” and that the “subject matter was in front of her,” but Ritchie explained there was a concern Michelle had disappeared involuntarily, and that he was talking to anybody who knew her and might shed some light on where she could be.

Ritchie testified that when he first arrived at appellant’s apartment he had no intention to arrest or detain her. But during the course of the interview, two circumstances changed. First, appellant made several disconcerting statements. Appellant contradicted herself on some topics, provided strange explanations for her conduct, and essentially admitted that she had contact with Michelle near the time of her disappearance. Second, near the end of the interview, Ritchie got a call from one of the officers who had gone to interview Scott. Scott had showed the officer several text messages from appellant threatening bodily harm to both Scott and Michelle. He also disclosed that appellant had taken their daughter to the mall and to Chuck-E-Cheese on May 28. At that time, the officers already had Michelle’s cell phone records which showed that her phone had “pinged” off cell towers in the areas near the mall and the Chuck-E-Cheese at the times that appellant and her daughter were at those same locations.

In light of these developments, Ritchie believed he had probable cause to arrest appellant. He advised her that he was going to secure her apartment for a search warrant, placed her in handcuffs, and informed her that she was being detained.

2 The Interview Was Not a Custodial Interrogation

“ ‘Before being subjected to “custodial interrogation,” a suspect “must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” ’ [Citation.]” (*People v. Leonard* (2007) 40 Cal.4th 1370, 1399-1400 (*Leonard*)). In this case, appellant challenges the trial court’s ruling that Inspector Ritchie was not required to advise appellant of her *Miranda* rights during the

May 28 interview at her apartment because she was not subjected to a custodial interrogation.

“An interrogation is custodial when ‘a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.’ [Citation.] Whether a person is in custody is an objective test; the pertinent inquiry is whether there was ‘ “ ‘a “formal arrest or restraint on freedom of movement” of the degree associated with a formal arrest.’ ” ’ [Citation.] [¶] Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] When reviewing a trial court’s determination that a defendant did not undergo custodial interrogation, an appellate court must ‘apply a deferential substantial evidence standard’ [citation] to the trial court’s factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, ‘a reasonable person in [the] defendant’s position would have felt free to end the questioning and leave’ [citation].” (*Leonard, supra*, 40 Cal.4th at p. 1400.)

The interview conducted at appellant’s apartment before Inspector Ritchie made the decision to detain her did not constitute a custodial interrogation. As the trial court found, at that stage in the case the officers were searching for a missing person and they were talking to people that might have information about where she had gone. Ritchie told appellant exactly that, and she unequivocally invited him into her apartment, gave the officers consent to look around, and agreed to talk about Michelle. Like the trial court, we have listened to the audiotape of the interview which confirms that appellant remained calm and cooperative throughout the interview. The trial court observed that at one point appellant “sort of argued” with Ritchie about whether she was a suspect, but she continued to engage with him and to provide him with pertinent information about Michelle, her friends, social habits and other potential suspects.

Appellant contends that the interrogation was custodial because the objective facts show that a reasonable person in her situation would not have felt free to leave her home. In this regard, appellant points out that she was three months pregnant, wearing her bedclothes, and that she had no place else to go at that late hour. However, these

circumstances do not relate to the nature of appellant's interaction with Inspector Ritchie but rather to the fact that she was interviewed in her own home. "An interrogation conducted within the suspect's home is not per se custodial. [Citation.] On the contrary, courts have generally been much less likely to find that an interrogation in the suspect's home was custodial in nature. [Citations.] The element of compulsion that concerned the Court in *Miranda* is less likely to be present where the suspect is in familiar surroundings. [Citation.] Nevertheless, an interrogation in the suspect's home may be found to be custodial under certain circumstances. [Citation.]" (*U.S. v. Craighead* (2008) 539 F.3d 1073, 1083 (*Craighead*)).

Because the interview took place in appellant's apartment, the pertinent question is not whether she felt that she was free to leave, but whether a reasonable person in her situation would have understood that she was free to "stop the interview" and ask the officers to leave at any time. (*People v. Linton* (2013) 56 Cal.4th 1146, 1167 (*Linton*); see also *Craighead, supra*, 539 F.3d at p. 1083.) Here, the circumstances outlined above support the trial court's finding that a reasonable person in appellant's situation would have understood that she could have terminated the interview at any point before Inspector Ritchie made the decision to detain her.

Appellant identifies three additional circumstances which allegedly establish that she was in custody during the entire May 28 interview: (1) She was the chief suspect of a murder; (2) Several armed police "descended" on her apartment; and (3) The officers' "approach" could not have been anything but "extremely intimidating."

First, the record undermines appellant's factual premise that she was already the chief suspect when Inspector Ritchie knocked on her door. At that time, Ritchie was working a missing person case and appellant was a person of interest and only a potential suspect. In any event, "*Miranda* warnings are not required simply because a person has become a suspect in the officer's mind. [Citations.]" (*Linton, supra*, 56 Cal.4th at p. 1167.)

Second, appellant is correct that six officers went to her apartment on the night in question, but she fails to acknowledge that only four went inside and, as soon as they

confirmed she was alone, only two stayed to interview her. Furthermore, there was nothing unusual about the fact that the officers who came to appellant's house were armed and in uniform. The more pertinent facts are that no officer drew a weapon or took any action to restrain appellant's liberty until Inspector Ritchie made the decision to detain her. (Compare *Craighead, supra*, 539 F.3d at p. 1079 [eight armed officers from three agencies; some officers unholstered firearms in defendant's presence; some officers directed defendant to unfurnished storeroom in the back of the house where one officer blocked his exit].)

Finally, appellant's idea that the officers' "approach" must have been "extremely intimidating" is inconsistent with the audio-tape recording of the events that transpired. That evidence substantially establishes that the officers were neither aggressive nor particularly confrontational. It also proves that appellant was calm and cooperative throughout the interaction.

Appellant contends that her cooperation was "vitiating" by the fact that her detention was illegal, and her detention was illegal because it was unsupported by a reasonable suspicion that she had committed a crime. This logic is flawed. The legality of a detention becomes an issue only if the person was actually detained. Here, appellant was not detained but instead invited the officers into her home and engaged with them for close to two hours under circumstances in which a reasonable person would have felt free to terminate the interview and ask the officers to leave.

3. Appellant's Statement Was Voluntary

Appellant separately argues that her May 28 statement was inadmissible because the two-hour interview at her home "bore all the earmarks of a coercive interrogation."

"Any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion is inadmissible pursuant to the Fourteenth Amendment to the federal Constitution and article I, section 7 of the California Constitution. [Citations.] To determine the voluntariness of a confession, courts examine 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession.' [Citation.] In making this determination, courts apply a 'totality of the circumstances' test, looking

at the nature of the interrogation and the circumstances relating to the particular defendant. [Citations.] With respect to the interrogation, among the factors to be considered are ‘ “ ‘the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity’ ’ ” [Citation.] With respect to the defendant, the relevant factors are ‘ “ ‘the defendant’s maturity [citation]; education [citation]; physical condition [citation]; and mental health.’ ” ’ [Citation.] ‘A statement is involuntary [citation] when, among other circumstances, it “was ‘ “extracted by any sort of threats . . . , [or] obtained by any direct or implied promises ” ’ ” ’ [Citation.]” (*People v. Dykes* (2009) 46 Cal.4th 731, 752 (*Dykes*).

“As with *Miranda* claims, the trial court’s legal conclusion as to the voluntariness of a confession is subject to independent review on appeal. [Citations.] The trial court’s resolution of disputed facts and inferences, its evaluation of credibility, and its findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence. [Citations.] The state bears the burden of proving the voluntariness of a confession by a preponderance of the evidence. [Citation.]” (*Dykes, supra*, 46 Cal.4th at pp. 752-753.)

In the present case, the audiotape and Inspector Ritchie’s pretrial testimony about the circumstances surrounding the interview establish, among other things, that Ritchie consistently sought confirmation from appellant that her cooperation with his investigation was voluntary. He asked if officers could enter the apartment; he asked if they could look around the apartment; he asked if he could look at appellant’s phone; and he asked if he could look in her car. The evidence also shows that appellant exercised her own independent will in responding to these requests, granting most of them but expressly refusing to allow the police to look in her car. Furthermore, although appellant said she was tired, she never asked to terminate the interview. Instead, it appears that she freely engaged in a wide ranging dialogue about her tumultuous history with both Scott and Michelle. Finally, appellant did not confess to any crime, but instead consistently maintained that she did not remember anything that was pertinent to Michelle’s disappearance.

Appellant contends that, although she did not confess to a crime, she was coerced by Ritchie to make two damaging admissions: that she saw Michelle the day she disappeared, and that she was at Chuck-E-Cheese near where Michelle's phone pinged off a cell phone tower on May 28. According to appellant, Ritchie employed two improper interrogation techniques to extract these admissions from her.

First, Ritchie allegedly deprived appellant of sleep while threatening and cajoling her and continuously peppering her with questions until she finally made extremely damaging admissions. The evidence does not support this theory. The entire interview lasted less than two hours and there is no evidence that Ritchie said or did anything which deprived appellant of sleep. Furthermore, appellant's argument that she was worn down by Ritchie's incessant questioning is inconsistent with the sequence of events during the interview. Most notably, the very first time Ritchie asked appellant what she had done during the day on Friday, appellant disclosed that she went to Kaiser Hayward and saw Michelle there. Finally, appellant does not actually identify any threats that were allegedly made and the audiotape of the interview shows that Ritchie neither used a threatening tone nor peppered appellant with questions.

Appellant's second contention is that her admissions were extracted with promises of leniency. "A confession elicited by any promise of benefit or leniency, whether express or implied, is involuntary and therefore inadmissible, but merely advising a suspect that it would be better to tell the truth, when unaccompanied by either a threat or a promise, does not render a confession involuntary. [Citation.]" (*People v. Davis* (2009) 46 Cal.4th 539, 600.)

In the present case, appellant fails to identify any concrete promise that was allegedly made to her. Instead, she argues that Ritchie's statements that she was not under arrest and that he was trying to exclude potential suspects were implied promises that appellant was not a suspect. Even if such a promise could be implied, that would not be a promise of leniency. Nothing Ritchie said could be reasonably interpreted as a promise that appellant would receive any future benefit if she made some damaging

admission. Nor is there any basis for concluding that appellant's incriminating statements were motivated by any promise express or implied.

Appellant mistakenly relies on *People v. Vasila* (1995) 38 Cal.App.4th 865 (*Vasila*). The primary issue before the *Vasila* court was whether a promise of leniency constitutes coercion when the promise is actually kept. In that case, there was no dispute that investigators made express promises of leniency; they told the defendant that if he disclosed where illegal firearms were hidden they would not institute a federal prosecution against him and they would release him on his own recognizance. (*Id.* at p. 875.) The *Vasila* court found that the defendant's decision to lead investigators to the illegal firearms was motivated by these promises of leniency and was therefore involuntary. (*Id.* at pp. 875-877.) *Vasila* is factually inapposite because in this case Inspector Ritchie did not make any promise whatsoever. Thus, *Vasila* does not alter our conclusion that appellant's statement was voluntary.

B. The Dismissal of a Seated Juror

Appellant contends that she was denied her constitutional rights to due process and a fair jury trial because the trial court dismissed a juror in the middle of trial.

1. Background

The jury began hearing evidence on Monday, October 1, 2012. On the morning of October 11, the trial court informed the parties that "Juror Number 7" had contacted the court and reported that she would be unable to attend the trial that day because she was at the hospital with her mother who was experiencing a medical emergency.

The trial court made a record of the information that Juror Number 7 had provided to the court clerk. Her mother was 98 years old, required a full time caregiver because of her age and frailty, and had been taken to the hospital that morning because of breathing problems. Her mother, who did not suffer from dementia, had been experiencing confusion and disorientation for a few weeks and then when the breathing problems arose that morning she was rushed to the hospital. Juror Number 7 said that she might be able to return to court the following Monday but that it would depend on what happened with her mother.

The trial court identified three options: order Juror Number 7 to appear; recess the trial until Monday to see if she could return; or excuse her “on hardship grounds, for want of a better category of a reason,” and replace her with an alternate. Everyone agreed that the first option was inappropriate, but the parties disagreed about the other two. Appellant argued that a short trial recess until Monday was reasonable under the circumstances. Appellant’s trial counsel pointed out that Friday was not a trial day, they were not behind schedule, and Juror Number 7 had not asked to be excused. The prosecutor argued that Juror Number 7 was experiencing a medical emergency involving an elderly parent and the court should do what the system was set up to do, seat the alternate and proceed with the trial.

The trial court elected to excuse Juror Number 7 and seat an alternate, giving several reasons. First, although the trial was “ahead of schedule,” that was a relative term because the schedule that was set was a “safe” one. There was no “reason to just keep jurors committed to this trial any longer than is reasonable.” Second, the fact that the juror did not ask to be excused was irrelevant; the issue was that they had a juror who could not continue “right now,” and “that’s what we have alternates for.” Third, Juror Number 7’s mother was 98 years old, was taken to the emergency room, and there was no way to know if she could return to court on Monday. Fourth, even if the medical issue was resolved by Monday, Juror Number 7 could well have ongoing concerns and become preoccupied with her mother’s condition. Fifth, there was a real danger that Juror Number 7 would not be able to complete the trial even if her mother did survive the current medical crisis.

2. Analysis

Penal Code section 1089 states in relevant part: “If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the

jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.”

“Removal of a juror under section 1089 is committed to the discretion of the trial court, and we review such decisions by asking whether the grounds for such removal appear in the record as a demonstrable reality. [Citation.]” (*People v. Thompson* (2010) 49 Cal.4th 79, 137 (*Thompson*)). “Removing a juror is, of course, a serious matter, implicating the constitutional protections defendant invokes. While a trial court has broad discretion to remove a juror for cause, it should exercise that discretion with great care.” (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052, fn. omitted.) Thus, the reviewing court applies a demonstrable reality test which entails a “more comprehensive and less deferential review” than the substantial evidence inquiry by requiring “a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion” (*Id.* at p. 1052.)

In the present case, the trial court provided a comprehensive explanation for its decision to remove Juror Number 7 and expressly relied on the pertinent evidence including that Juror Number 7’s mother was extremely old and frail, that she had been experiencing significant health problems in recent weeks, and that she had a medical emergency requiring hospitalization on a scheduled trial day. Furthermore, the court recognized that even if the current crisis passed, there was a danger that Juror Number 7 would be called away again, and that even if she could return she might well be distracted by her mother’s ongoing health issues. This evidence substantially supported the trial court’s ruling that there was good cause to release Juror Number 7. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1028-1030 (*Cunningham*) [juror’s father suffered a stroke during lengthy murder trial and juror became preoccupied with his impending death]; *Leonard, supra*, 40 Cal.4th at p. 1410 [juror’s father-in-law had been killed in an automobile accident]; see also *Thompson, supra*, 49 Cal.4th at p. 138 [“both trial-related and non-trial-related stress can provide good cause for discharging a juror”].)

Appellant mistakenly contends that excusing Juror Number 7 was reversible error because the trial court “violated” Code of Civil Procedure section 204 and rule 2.1008 of

the California Rules of Court. These provisions apply to the very different situation of evaluating a potential juror's request for an exemption from service for undue hardship. Appellant implicitly concedes her mistake in her reply brief, but also argues that the hardship exemption rules provide useful guidance in this context. This new theory, unsupported by authority or reasoned analysis, does not alter our conclusion.

Finally, appellant contends that the court erred because Juror Number 7 did not ask to be discharged. “ ‘Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty ‘to make whatever inquiry is reasonably necessary’ to determine whether the juror should be discharged.’ [Citation.]” (*Cunningham, supra*, 25 Cal.4th at p. 1029.) A request to be discharged is not required to trigger this duty and thus the absence of such a request is not dispositive. (*Leonard, supra*, 40 Cal.4th at p. 1410.) Here, as the trial court found, other factors supported the decision to release Juror Number 7 so that she could tend to a medical emergency.

C. The Lying In Wait Jury Instruction

Appellant contends the trial court committed reversible error by instructing the jury on the lying in wait theory of first degree murder because there is insufficient evidence to support a conviction under that theory.

1. Background

The trial court used a modified version of CALCRIM No. 521 to instruct the jury on two theories of first degree murder: “(1) the murder was willful, deliberate, and premeditated; and (2) the murder was committed while lying in wait or immediately thereafter.” The jury was told, “You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.”

Regarding the lying-in-wait theory of first degree murder, the jury was instructed as follows:

“The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if: [¶] 1. She concealed her purpose from the person killed;

[¶] 2. She waited and watched for an opportunity to act; [¶] AND [¶] 3. Then, from a position of advantage, she intended to and did make a surprise attack on the person killed.

“The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation. [¶] A person can conceal his or her purpose even if the person killed is aware of the person’s physical presence. [¶] The concealment can be accomplished by ambush or some other secret plan.

“The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you may not find the defendant guilty of first degree murder. [¶] Any murder which is not proven to be first degree murder is second degree murder.”

2. Analysis

“A trial court must instruct the jury on every theory that is supported by substantial evidence, that is, evidence that would allow a reasonable jury to make a determination in accordance with the theory presented under the proper standard of proof. [Citation.] We review the trial court’s decision de novo. In so doing, we must determine whether there was indeed sufficient evidence to support the giving of a lying-in-wait instruction. Stated differently, we must determine whether a reasonable trier of fact could have found beyond a reasonable doubt that defendant committed murder based on a lying-in-wait theory. [Citations.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1206.)

Applying this test, we conclude that substantial evidence supports the decision to give a lying-in-wait jury instruction in this case. Evidence that appellant concealed her purpose from Michelle includes her own admission to Inspector Ritchie that she had been trying for several days to contact Michelle to tell her to stay away from her daughter; appellant’s text messages to Alan Ng claiming she was trying to serve Michelle with legal papers; and her phone calls to both Merritt and Kaiser Hayward when she impersonated people who would have a legitimate reason to make contact with Michelle. Evidence that appellant waited and watched for an opportunity to act includes surveillance video and phone records which show that appellant spent significant time in

the Kaiser Hayward parking garage on May 26 and May 27, 2011. Much of this same evidence was also relevant to establish the third element of lying in wait—a surprise attack from a position of advantage. In addition, there were appellant’s Google searches, evidence establishing that appellant was the last person who saw Michelle alive, and the forensic evidence tying appellant to Michelle’s murder.

Appellant contends the lying-in-wait instruction was unsupported because there was no evidence regarding the manner in which Michelle was killed. Absent that crucial information, appellant contends, the jury could not have found that Michelle’s attacker concealed his or her purpose or was upfront about it, or that the killer waited for any period of time to attack. According to appellant, the murder may not have been a surprise at all and therefore there is no evidence to support “the speculation that this was a lying in wait offense.”

There are at least two problems with appellant’s sufficiency of the evidence argument. First, the absence of evidence regarding the manner in which Michelle was murdered is a red herring because, as reflected in the jury instruction quoted above, the lying-in-wait theory of first degree murder does not require that the murder was committed in a particular manner. Second, appellant’s assessment of the evidence rests on the false premise that direct evidence of lying in wait was required to support the challenged instruction. As discussed above, overwhelming circumstantial evidence supports the trial court’s decision to give the instruction.

IV. DISPOSITION

The judgment is affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.