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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.

CHRISTEL IRENE JOHNSON,

Defendant and Appellant.

A139389

(Alameda County
Super. Ct. No. H52787)

Christel Irene Johnson tried to take her own life along with that of her profoundly disabled eight-year-old daughter, Lylah. Johnson survived, but Lylah did not. A jury found Johnson guilty of second degree murder, and in a subsequent sanity phase the trial court found her insane at the time of the crime, acquitted her on that basis, and committed her to Napa State Hospital for a maximum term of 15 years to life. She now appeals, limiting her claims of error to the guilt phase. By any measure, the case was a difficult one, but on the law and the evidence it was not a close one. Finding no error in the jury instructions or in the fairness of the trial on any of the grounds asserted by Johnson, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Prosecution's Case

Lylah Johnson (Lylah) was born with severe cerebral palsy and scoliosis in June 2002. Her disability was complicated by a brain injury at birth apparently due to medical malpractice. She could not see, hear or speak. She could not feed herself or move

without help, and by the time of the events here in question, she had to be fed through a tube inserted into her stomach.

Lylah required long hours of practically constant care, so by 2011 Johnson had hired Erica Gastelum as her daytime caregiver during the week and Italina Kirknis as her caregiver on the weekends and some evenings. The hired caregivers together worked a ten-hour shift each day. Johnson had decided to treat Lylah's condition holistically, guided by the advice of a neurodevelopmentalist named Phyllis Libby, who testified for the defense. With Libby's guidance, Johnson had worked out a complicated regimen of feedings, herbal medications, sensory stimulation, chiropractic care, acupuncture, craniosacral work, exercise and massage for Lylah, to which the caregivers were required to adhere. Witnesses familiar with the case testified that Johnson genuinely loved Lylah, and a pathologist who examined her after death agreed that Lylah was "extremely well cared for" during her lifetime.

That all changed suddenly on Wednesday, March 9, 2011, when Johnson lost her temper with Gastelum because Johnson could not locate some medicinal herbs prescribed for Lylah. Johnson was waving a cup of tea in Gastelum's face while berating her. Upset, Gastelum walked away from Johnson. Johnson grabbed Gastelum by an arm and slammed Gastelum's arm in a closing door. Johnson then told Gastelum she was not going anywhere and grabbed her by her ponytail. Johnson struck Gastelum on the shoulder and told her that if she left she would be killing Johnson and Lylah. Gastelum left Johnson's house and reported the abuse to police. She decided not to press charges, however, because she felt it would not be in Lylah's best interests.

Later that day, Johnson called Kirknis saying Gastelum had quit her job and asking Kirknis to report to work early. Johnson was "distraught" and "emotional" and said Gastelum had "abandoned them." Kirknis went to Johnson's home and found Lylah was "fine." On Thursday, March 10, Kirknis took the shift that Gastelum normally would have worked and was exhausted by the end of it. Although Johnson wanted her to start earlier, Kirknis and Johnson negotiated a 1:00 p.m. start time for the next day's work.

On March 11, 2011, when Kirknis arrived at Johnson's residence at 1:00 p.m. she found Johnson's van with the engine running in the garage attached to the house. There were prescription pills spilled out of the bottle onto the kitchen counter. The garage was full of fumes, so Kirknis opened the garage door, which had been closed. Kirknis called 911. She found Lylah lying face down between the van's front seats, but Johnson was lying outside the van. Johnson stood up as Kirknis carried Lylah outside to give her some fresh air. Lylah was not breathing and appeared "blue, purple." Kirknis then carried Lylah back inside the house and laid her on the couch.

When the police responded at approximately 1:05 p.m., they saw the garage door open and Johnson standing by the open driver's door of the van. Johnson got into the van, closed the door, and locked it. The garage smelled of exhaust. There was a vacuum hose coming out of the van's back window, near the exhaust pipe. The vacuum hose fit "snugly" into the van's exhaust pipe. Johnson did not respond to the officers' requests to open the door. She had her eyes closed, but she was breathing. Her skin had a reddish tone, which was typical of carbon monoxide exposure.

Two officers eventually were able to remove Johnson from the van after she appeared to lose consciousness. Paramedics performed a hand drop test on Johnson five times; each time her hand fell, striking other parts of her body and not her face. This indicated she was not truly unconscious.¹ Johnson was taken by ambulance to the hospital and later to a psychiatric facility.

Lylah was taken to Children's Hospital but was pronounced dead at 1:50 p.m. When she died she was eight years old but was only 37 inches long and weighed just 23

¹ The "hand drop test" is a technique commonly used by firefighters and hospital personnel to determine a person's level of consciousness. One witness described the test as follows: "Someone that's unconscious in the prone position laying on their back, or supine position rather. The hand is pulled up above the head and let go and people that are unconscious their hand will drop square on their face. Someone that's not unconscious will allow their hand to hit someplace other than their face. So it might drop off to the chest, it might drop off to the side or might drop off above the head. But people that are truly unconscious their hand will drop squarely on their face."

pounds. The pathologist who performed the autopsy testified that Lylah had advanced cerebral palsy. Her ribs were longer on one side than the other due to curvature of the spine. Her brain weighed just 200 grams, which was “probably one-fourth of the weight that it should have been at her age,” and was “composed primarily of nothing but fluid.” “Most of the cerebral cortex had disappeared due to her disease or her condition. The only part of her brain that was really intact was the lower part of the brain which controls breathing and heart beat.” Despite her deteriorated condition, the pathologist opined that Lylah could have “gone on to live for quite a number of years.” Tests showed Lylah had an 82-percent carbon monoxide saturation level at the time of death. The pathologist opined the cause of death was carbon monoxide poisoning.

On March 12, 2011, a police officer was posted to sit with Johnson at the hospital. At 7:20 a.m., Johnson appeared agitated and said: “I had no help 18 hours a day. I had no other choices. Where is my baby; she cannot be without me; I cannot be without her.” Shortly thereafter Johnson yelled out for Lylah and asked repeatedly if she was “in peace.” Johnson went on to say that “she couldn’t do it anymore. She did it for 18 hours a day for nine years. She said she’s 54 years old and she had no other choice.” At 1:15 p.m., Johnson said she was “hoping that God takes us home” and asked if her daughter had died.

Two days later, when the same officer was sitting with Johnson in the psychiatric facility, she heard Johnson tell a mental health worker that Lylah’s condition was cerebral palsy, that her lungs were growing but not her chest, and it would eventually cause her to suffocate. She said one of Lylah’s caregivers had “quit” and she was “down [to] one caretaker for Lylah and it wasn’t enough.” Johnson said “the week prior [to Lylah’s death] she went online and searched the Web on least painful, easiest ways to commit suicide,” finding out about carbon monoxide. She said she “disassembled her vacuum cleaner and removed the hose.” Johnson said “she cut it and put it in the gas pipe and up through the back window. She said the Internet said open the windows but she said that was too much oxygen, so she closed all the windows.” Johnson reported placing Lylah on her lap, wrapped in blankets, and hearing Lylah cooing and expressing contentment.

Johnson said she wanted to make sure she and Lylah were “gone” before the caregiver arrived at 1:00 p.m.

After responding to the immediate emergency, the police obtained a search warrant for Johnson’s home. They retrieved handwritten notes from Johnson’s office, one of which said, “Erica Gastelum killed us.” They also found a number of other documents tending to show that Johnson had contemplated in advance killing Lylah, not just herself. Also, a September 16, 2006, letter addressed to Herb Thomas, the trustee of Lylah’s trust, stated: “I don’t know what happens with the money if Lylah and I are no longer alive . . . my will is to have the rest of the funds going to . . . [her fiancé].” A second letter of the same date was addressed to Dave Park and said: “I’m feeling very weak these days and I want you to know that of all the people I know I trust you the most. In case of my death, I want you to sell my house. I believe we can get \$700,000 to 750,000 for it. It is my will to have this money going to a good cause. I don’t know if it exists but I would love to help single parents with special need children. Please contact Herb Thomas (Trustee) and discuss this with him.”

In addition, the police seized a document labeled a will, dated September 16, 2006, with a handwritten alternative date of August 17, 2008, which stated: “Last Will[.] [¶] I want to be buried together with Lylah in ONE casket. I want to hold my child in my arms. I promised her that I will never leave her, so please respect my wishes and let us be together in death. [¶] I can’t live any longer in a world where people are not willing to help a mother with her special needs child. [¶] . . . All my so-called friends and my family in Germany refused to help me with my child. [¶] In the past 4½ years I went through hell, trying to create a quality life for my child and me[.] I can’t take it any longer. [¶] The government who made all the crazy laws and cuts in funding has killed me and my child as well.” Also dated August 17, 2008, another handwritten note stated: “I, Christel ‘Jenny’ Johnson, am in my right mind writing this statement. I don’t see any reason to continue my life. It has been nothing but a struggle. My heart is broken and I can’t see a happy future. I take my child with me since she can’t live without me. I love Lylah and I know she wants to come with me. I love God and I know God wants me to

come home. My friends didn't have time to help me through this A cold selfish world that I don't want to be on anymore.”

An expert in poisonous gases and their effects on the human body testified that carbon monoxide is a byproduct of incomplete combustion and is a respiratory toxicant. Carbon monoxide ingestion leads first to headache, then to nausea, fatigue, stupor, seizure or coma, and finally death. Oxygen ingestion is the antidote. Carbon monoxide saturation levels of 70 to 75 percent are “typically fatal” for humans. Asked to consider a hypothetical 23-pound child inside a car being exposed to carbon monoxide who then reached a saturation level of 82 percent, the expert opined the child likely was exposed to the poison for one hour. He further opined that a second hypothetical female Johnson's size, who reached the saturation levels measured in Johnson, would likely have been inside the car 20 to 30 minutes less than the hypothetical child.

B. The Defense Case

Libby, based in Oklahoma City, is a neurodevelopmentalist who works with disabled children. She is not a medical doctor but has a Master of Science degree with a specialization in neurological impairment. She holds several certifications in macrobiotic nutrition and health care, lectures around the world on the growth of the brain in children, and has authored articles on these subjects in trade publications.

Libby met Johnson and Lylah in 2004, when Lylah was 21 months old. Lylah was already immobilized by spine curvature, had delayed responses, and did not see or hear well. Lylah suffered from “very, very severe” birth trauma and had the “most severe” case of cerebral palsy of any child Libby had worked with in 38 years. Libby taught Johnson therapeutic tools to promote Lylah's sensory stimulation. Johnson and Lylah visited Libby six months later and Libby was “pleased” with Lylah's strength and therapy regimen. Libby also visited Johnson and Lylah three times at their home in California for several days at a stretch.

The last such visit was in February 2011, when Libby noticed Lylah was “weakening” and “pale.” Johnson appeared tired and concerned over Lylah's worsening condition. Lylah was coughing up a lot of mucous, and Libby felt she was physically

“falling apart.” Libby warned Johnson that Lylah’s life was coming to an end and encouraged Johnson to prepare for that eventuality. Libby thought Lylah would not survive for another year. Johnson was “very depressed” when she called Libby a week after that last visit.

C. Charges and Guilt-phase Trial

On March 14, 2011, Johnson was charged by felony complaint with murder. (Pen. Code,² § 187, subd. (a).) She entered pleas of not guilty and not guilty by reason of insanity in October 2011. (§§ 1016, subds. 2 & 6, 1026.) She had a jury trial in May 2013 on the issue of guilt. At the close of evidence, defense counsel requested a jury instruction on involuntary manslaughter (CALCRIM No. 580). The judge refused the instruction, saying, “No matter how much I can try to find involuntary, I just can’t see a theory of negligence or lawful act done in lawful [*sic*] manner. So I am just compelled not to give involuntary.” He continued: “Once again, I really have tried to look at the most favorable version for Ms. Johnson and I just can’t find a factual basis that a reasonable jury would find an involuntary manslaughter on these facts. I mean, I think an acquittal would be more appropriate than an involuntary manslaughter based on the facts.” Defense counsel responded, “I wouldn’t disagree with you there.”

On May 9, 2013, after deliberating approximately four and a half hours, the jury convicted Johnson of second degree murder, having been instructed on first and second degree murder and voluntary manslaughter.

D. Sanity-phase Trial

On June 6, 2013, Johnson had a court trial on her insanity plea. At the sanity phase, Dr. Emily Keram, a psychiatrist who spent close to twelve hours interviewing Johnson at her attorney’s request, testified that Johnson suffered from major depression with cognitive and emotional impairment and borderline personality disorder. Keram also observed that Johnson had tapered off of her antidepressant medication in the month or two prior to Lylah’s death, which, considered with the other stressors at that time,

² Undesignated statutory references are to the Penal Code.

formed a “catastrophic combination.” Keram also diagnosed Johnson as suffering from Clonazepam overdose and intoxication at the time of her suicide attempt.

Keram opined that Johnson was insane at the time of the offense within the meaning of California law (§ 25, subd. (b); *People v. Lawley* (2002) 27 Cal.4th 102, 169-170) in that she did not understand the wrongfulness of her actions, believing she was “carrying out God’s will” in bringing her daughter and herself “home” to God. Although Johnson was not psychotic or delusional, Keram testified she operated in a “different reality.” Keram also questioned whether Johnson understood the nature of her acts in that she did not “appreciate or understand her actions as actually killing her daughter.”

Psychologist Amy Watt, who spent three to four hours with Johnson, testified for the prosecution. She opined that Johnson was not psychotic, not delusional, not suffering from a dissociative state, and was in control of her faculties at the time of her offense. Watt agreed with Keram’s diagnosis that Johnson suffered from a major depressive disorder and borderline personality disorder. Unlike Keram, however, Watt opined that Johnson was capable of understanding the nature of her actions and knew right from wrong. Johnson did not report to Watt that she had been moved by God to include Lylah in her suicide attempt.

The judge declared Johnson insane at the time of the murder, found her not guilty by reason of insanity, and committed her to Napa State Hospital for a maximum term of 15 years to life.³ (§§ 1026, subd. (a), 1026.5.) Johnson appeals, contending: (1) the jury should have been given an instruction on involuntary manslaughter, as requested by defense counsel; (2) she was deprived of the effective assistance of counsel because her attorney did not pursue a “diminished actuality” defense; and (3) the prosecutor committed misconduct by telling the jury not to give defendant the benefit of the doubt.

³ A person committed to a state hospital after a verdict of not guilty by reason of insanity is committed for the longest term applicable to the crime of which she was convicted. (§§ 1026, subd. (a), 1026.5, subd. (a)(1).) Johnson may apply for conditional release due to restoration of sanity after 180 days from the date of the commitment order. (§ 1026.2, subs. (a) & (d); *People v. Beck* (1996) 47 Cal.App.4th 1676, 1681.)

II. DISCUSSION

A. Involuntary Manslaughter Instruction

Johnson claims the court erred in refusing a defense request for a jury instruction on involuntary manslaughter. She contends the evidence would have supported a conviction for involuntary manslaughter, arguing her attempted suicide was a “lawful act which might produce death,”⁴ and the jury could have found she did it “without due caution and circumspection.” (§ 192, subd. (b).) For reasons we shall explain, Johnson’s argument is flawed.

“Generally, involuntary manslaughter is a lesser offense included within the offense of murder.” (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145; accord, *People v. Thomas* (2012) 53 Cal.4th 771, 813.) Instructions on lesser included offenses must be given sua sponte when there is substantial evidence for a jury to conclude the defendant is guilty of the lesser offense but not the charged offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 177 (*Breverman*); *People v. Birks* (1998) 19 Cal.4th 108, 118–119.) Substantial evidence is defined for this purpose as “evidence sufficient to ‘deserve consideration by the jury,’ that is, evidence that a reasonable jury could find persuasive.” (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) “In deciding whether evidence is

⁴ See *In re Joseph G.* (1983) 34 Cal.3d 429, 433 [“most [American jurisdictions], including California, attach no criminal liability to one who makes a suicide attempt”]; *Donorovich-Odonnell v. Harris* (Oct. 29, 2015, D068758) ___ Cal.App.4th ___ [2015 Cal. App. LEXIS 970, at pp. *1–*2]; *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1373 [“Neither suicide nor attempted suicide is a crime under the criminal statutes of California or any other state”]; *People v. Cleaves* (1991) 229 Cal.App.3d 367, 376 (*Cleaves*) [suicide recognized as a product of mental illness, not a crime].) On the other hand, since 1873 California has expressly criminalized assisted suicide: “Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony.” (§ 401; 1 Witkin & Epstein, *Cal. Criminal Law* (4th ed. 2012) *Introduction to Crimes* § 97, pp. 161–162; CALCRIM No. 500.) The Supreme Court has held that the assisted suicide offense applies only to *passive* assistance, while active assistance remains murder. (*People v. Matlock* (1959) 51 Cal.2d 682, 693–694.) The Court has since concluded that the survivor of a suicide pact commits only assisted suicide, however. (*In re Joseph G.*, *supra*, at p. 440.) That rule, of course, has no application here, since Lylah was incapable of agreeing to a suicide pact.

‘substantial’ in this context, a court determines only its bare legal sufficiency, not its weight.” (*Breverman, supra*, at p. 177.) We review de novo the trial court’s decision whether or not the substantial evidence test was met. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Hayes* (2006) 142 Cal.App.4th 175, 181.)

Murder is “the unlawful killing of a human being, or a fetus, with malice aforethought.” (§ 187, subd. (a).) “[M]alice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.” (§ 188.) It is implied when the defendant engages in conduct dangerous to human life, “ ‘knows that his conduct endangers the life of another[,] and . . . acts with a conscious disregard for life.’ ” (*People v. Bryant* (2013) 56 Cal.4th 959, 965; accord, *People v. Chun* (2009) 45 Cal.4th 1172, 1181; § 188 [“when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart”].)

When a homicide, even if committed with malice, is accomplished in the heat of passion or under the good faith but unreasonable belief that deadly force is required to defend oneself from imminent harm, the malice element is “negated” or “mitigated,” and the resulting crime is voluntary manslaughter. (*People v. Bryant, supra*, 56 Cal.4th at p. 968 [“reduced or mitigated”]; *People v. Milward* (2011) 52 Cal.4th 580, 587 [“negated”]; see § 192, subd. (a).) Involuntary manslaughter is also the unlawful killing of a human being without malice, but is statutorily defined as a killing occurring “in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” (§ 192, subd. (b); *People v. Brothers* (2015) 236 Cal.App.4th 24, 30–31.)

In *People v. Butler* (2010) 187 Cal.App.4th 998, 1008, the court distinguished criminal negligence in the context of involuntary manslaughter from implied malice in the context of murder: “Both murder (based on implied malice) and involuntary manslaughter involve a disregard for life; however, for murder the disregard is judged by a subjective standard whereas for involuntary manslaughter the disregard is judged by an

objective standard. [Citations.] Implied malice murder requires a defendant’s conscious disregard for life, meaning that the defendant subjectively appreciated the risk involved. [Citation.] By contrast, involuntary manslaughter merely requires a showing that a reasonable person would have been aware of the risk.”

Although Johnson characterizes her act as an attempted suicide—and nothing more—it is perfectly obvious that a suicide attempt need not involve another party. And by any measure, Johnson’s conduct amounted to more than a botched suicide attempt. Nor can we find in the evidence any basis for believing Johnson did not understand the risk to which she exposed Lylah. A suicide attempt could, we imagine, result in the involuntary manslaughter of another person. But under any view of the evidence in this case, Johnson’s acts went far beyond merely trying to kill herself. Based on her own statements, overheard at the hospital, Johnson volitionally placed Lylah inside the van during the suicide attempt, thus exposing her to danger and the risk of death. Putting the hose into the exhaust pipe so that the fumes would enter the van may have been a lawful act in and of itself, but there is no evidence she did it negligently. Simultaneously placing Lylah into the van (where she could not have gone by herself and from which she could not escape once her mother put her there) was an entirely separate act unrelated to any suicidal intention and incapable of being characterized as either lawful or merely negligent. The combination of her acts took Johnson’s conduct outside the confines of suicide, and her understanding that death would likely follow took it beyond the realm of involuntary manslaughter.⁵

Looking at what happened most favorably to Johnson, the most that might be said is that her killing of Lylah was a “mercy killing.” But a mercy killing is not a form of

⁵ In the course of her argument that the trial court improperly refused to give an involuntary manslaughter instruction, Johnson claims that the trial court misunderstood the crime of involuntary manslaughter because at one point it referred to involuntary manslaughter as a “lawful act done in a lawful manner.” We view that statement either as a momentary slip of the tongue by the judge, or a mistranscription by the reporter. The record as a whole does not suggest the court misunderstood the theory of involuntary manslaughter upon which it was being asked to instruct the jury.

manslaughter recognized under California law. (*Cleaves, supra*, 229 Cal.App.3d at p. 376.) *Cleaves* involved what was arguably an assisted suicide of an AIDS patient who wished to die, where the defendant, like Johnson, was convicted of second degree murder. (*Id.* at pp. 372–374.) The trial court distinguished between assisted suicide and murder on the basis of whether the defendant played an active or passive role in the death. (*Id.* at p. 375.) *Cleaves* received first and second degree murder instructions only. (*Id.* at p. 375 & fn. 5.) He, like Johnson, argued the court erred in refusing an involuntary manslaughter instruction. (*Id.* at p. 379.)

Rejecting that argument, the Fourth Appellate District, Division One reasoned: “a defendant is guilty of murder based on implied malice if he subjectively appreciates the risk to human life arising from his conduct, whereas an involuntary manslaughter conviction is warranted if he did not subjectively realize the risk. [¶] *Cleaves* admitted at trial he knew [the AIDS victim] would die as a result of his tying him up and holding him down on the bed. Given *Cleaves*’s admission of his subjective awareness of the risk, involuntary manslaughter instructions were not warranted.” (*Cleaves, supra*, 229 Cal.App.3d at p. 379.)

In addition to insisting upon his right to involuntary manslaughter instructions, *Cleaves* asked the Court of Appeal to “fashion a manslaughter crime for a killing done at the victim’s request, based on the absence of malice, which does not now expressly exist under California law.” (*Cleaves, supra*, 229 Cal.App.3d at p. 376.) The court declined that invitation. (*Ibid.*) Although Johnson does not ask in a straightforward manner that we engage in such judicial policy-making, we conceive of her arguments as coming close to such a request. A similar argument that a mercy killing should be judicially deemed a voluntary manslaughter was rejected in *In re Thomas C.* (1986) 183 Cal.App.3d 786, 800. (See *People v. Matlock, supra*, 51 Cal.2d at p. 694 [even where the victim solicits aid in committing suicide, “where [another] person actually performs, or actively assists in performing, the overt act resulting in death, such as shooting or stabbing the victim, administering the poison, or holding one under water until death takes place by drowning, his act constitutes murder, and it is wholly immaterial whether this act is committed

pursuant to an agreement with the victim”]; *People v. Protopappas* (1988) 201 Cal.App.3d 152, 172 [listing “mercy killing” as an example of murder committed with the legal concept of malice but without ill-will].)

As in *Cleaves, supra*, it is quite clear from the evidence in this case that Johnson understood the risk to which she exposed Lylah in placing her in the van. Nor is there evidence to support the notion that Johnson’s mental state was merely negligent, or even grossly so. She knew from Internet research that exposure to carbon monoxide was likely to result in death. Although she framed it in religious terms as “going home” to God, there is nothing in the evidence to suggest she did not actually realize she was talking about death. She left a note saying “Erica Gastellum killed us.” Although Johnson may have believed she was acting in Lylah’s best interests by ending her life before she had to endure more acute suffering through a natural death, there is no reason to believe from the evidence presented at trial that she failed to understand that sending Lylah “home” would in fact amount to taking her life. Therefore, we conclude, the trial court did not err in denying Johnson’s request for an involuntary manslaughter instruction.⁶

B. Defense Counsel’s Failure to Present “Diminished Actuality” Defense

1. Legal standards

Johnson complains that trial counsel was ineffective for failing to present a diminished actuality defense at the guilt phase of the trial through Dr. Keram’s testimony. Defendant bears the burden of proving by a preponderance of the evidence that his trial counsel was constitutionally ineffective. (*People v. Centeno* (2014) 60 Cal.4th 659, 674; *People v. Ledesma* (1987) 43 Cal.3d 171, 218.) To demonstrate ineffectiveness, the

⁶ Because we hold the court did not err in denying the instructional request, we need not address which standard of prejudice would apply in the case of error. We note, however, that the jury rejected a voluntary manslaughter theory, which tends to negate any suggestion it would have found Johnson guilty of only involuntary manslaughter. (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1145 [rejection of voluntary manslaughter charge “precludes any possible error in the refusal to instruct on involuntary manslaughter”].)

defendant must show that (1) counsel’s performance was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel’s deficient performance was prejudicial, i.e., there is a reasonable probability but for counsel’s failings, the outcome of the proceeding would have been different.⁷ (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 (*Strickland*); *People v. Ledesma, supra*, 43 Cal.3d at p. 216.)

Scrutiny of counsel’s actions must be highly deferential, and the reviewing court must make every effort to remove the distorting effects of hindsight. (*Strickland, supra*, 466 U.S. at pp. 689–690.) The Supreme Court has recognized “[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” (*Id.* at p. 689.) Thus, in conducting its inquiry, “the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” (*Id.* at p. 690.) To show deficient performance, the defendant must show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” (*Id.* at p. 687.) To show prejudice, she must show “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” (*Ibid.*)

The defense of “diminished capacity” was abolished by the voters in California in 1982. (§§ 25, subd. (a), 28, subd. (b).) Nevertheless, “[e]vidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.” (§ 28, subd. (a).) “To support a defense of ‘diminished actuality,’ a defendant presents evidence of voluntary

⁷ Ineffective assistance of counsel may also be shown if, “ ‘[a]s a result of counsel’s performance, the prosecution’s case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown.’ ” (*People v. Carrasco* (2014) 59 Cal.4th 924, 982 (*Carrasco*).) Johnson makes no such claim in this case.

intoxication or mental condition to show he ‘actually’ lacked the mental states required for the crime. [Citation.]” (*People v. Clark* (2011) 52 Cal.4th 856, 880, fn. 3.) Thus, “the jury may generally consider evidence of voluntary intoxication or mental condition in deciding whether defendant actually had the required mental states for the crime.” (*People v. Steele* (2002) 27 Cal.4th 1230, 1253.) But a mental health expert may not give testimony that the defendant did or did not, in fact, form the mental state required for conviction (§ 29), or that is tantamount to testimony on the ultimate issue. (See *People v. DeHoyos* (2013) 57 Cal.4th 79, 121 [assuming without deciding that section 29 would preclude an expert’s testimony “tantamount to stating an opinion that defendant did or did not have the mental state required for the crime charged”]; *People v. Coddington* (2000) 23 Cal.4th 529, 582–583, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Larsen* (2012) 205 Cal.App.4th 810, 827; *People v. Cortes* (2011) 192 Cal.App.4th 873, 908; *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1364–1365.)

Applying the evidentiary rules established by sections 25, 28 and 29 has been compared to venturing into a “legal ‘bog.’ ” (*People v. Nunn, supra*, 50 Cal.App.4th at p 1364.) It seems reasonably clear, however, that, although there is a line beyond which an expert may not go (see *People v. Larsen, supra*, 205 Cal.App.4th at p. 828 [testimony about hypothetical situations similar to the actual case would “come dangerously close to the territory *precluded* by sections 28 and 29”]), expert testimony may be given in response to hypothetical questions based on the facts of the case, so long as the expert does not opine on the effect of the mental disorder on the defendant’s capacity to form the required mental state (§§ 25, subd. (a), 28, subd. (a)), and does not testify whether the defendant did or did not have a required mental state (§ 29), or whether he or she “lacked the capacity or ability to control his or her conduct” (§ 29.2). We understand this to mean the expert may not only describe in detail the defendant’s symptoms and diagnoses, but may offer an opinion in response to a hypothetical question on whether a person with the defendant’s mental infirmities and in the defendant’s circumstances would tend to be impaired in forming the required mental state. Thus, the premise of Johnson’s ineffective

assistance argument here—that expert testimony concerning her mental state was potentially relevant at the guilt phase—is correct, but as we shall explain, she still fails to carry her burden of showing deficient performance or prejudice.

2. Defense counsel's argument to the jury

We next summarize defense counsel's closing argument to the jury, outlining his theory of defense. First defense counsel argued the prosecutor had failed to show Johnson had either the intent to kill or conscious disregard for Lylah's safety, and therefore the reasonable doubt standard required an acquittal of murder. Counsel also argued that Lylah was brain dead and not conscious at the time Johnson exposed her to carbon monoxide poisoning. Consequently, counsel argued that jury "empathy" was "appropriate in this case given Johnson's emotional struggles over the years that she cared for Lylah."

Alternatively, defense counsel argued that Johnson acted in the heat of passion, provoked to act when told that Lylah was dying and that Gastelum was quitting as Lylah's caregiver. He suggested the prosecutor had not proved "she killed her daughter with malice," emphasizing the prosecution's burden of proving guilt beyond a reasonable doubt. He emphasized Johnson's "level of despair and hopelessness," suggesting she was "not in her right mind," and asked the jury to "put yourself in my client's shoes when you consider whether [the People] have proven intent."

He emphasized that premeditation and deliberation are required for a first degree murder conviction. He urged: "There was no deliberation here. This was a cry for help. Cry made from despair and hopelessness. Somebody who didn't know what else to do. . . . Where is Lylah going to end up? In a foster home? No one else was prepared to take on Lylah. My client was only thinking about Lylah's benefit." He dismissed the prosecution's reliance on Johnson's writings in 2006 and 2008, "where she was talking about suicide and going to God with Lylah." The notes, he said, "don't show that she had been thinking about this for five years." Instead, they showed only "how hard it was overall [*sic*] these years."

Defense counsel also said he had a “problem” with the autopsy pathologist’s opinion that Lylah could have lived several years longer, saying the pathologist did not have the familiarity with Lylah’s condition that Libby did. The pathologist did not “even have the benefit to see Lylah when she was alive. He was just examining her body” and could not “see how her condition was improving or deteriorating”

Counsel further pointed out the pathologist testified Lylah’s “brain was mostly dead. The only part still working are the parts that keep her heart going and her breathing going on. But all her cerebral cortex, all the parts that give you consciousness, that was all gone before the carbon monoxide poisoning. I’m not interested in getting into a big philosophical discussion about it, but they have to prove that my client killed a person. And I know it’s offensive to my client for me to suggest otherwise, but you could decide this case and say, if she wasn’t even conscious when she got in the van, that’s not a murderer. [¶] [The prosecutor] says that human heart has no place in jury deliberations. I couldn’t disagree more. I think someone mentioned this during jury selection, but I don’t remember who. But to really get in someone’s shoes and understand what’s going on in her head, you need to have some empathy on some level to figure out what they were thinking, you need to try to understand what they were going through. If you think—I think you should vote note [*sic*] guilty on the murder.”

Counsel then presented a voluntary manslaughter theory to the jury, stressing it was the prosecutor’s burden “to prove beyond a reasonable doubt” that there was not provocation. He argued that the “sudden quarrel or heat of passion” required to reduce the crime to manslaughter was provided by “being told your daughter is dying and then losing your own definite caregiver, that to me sounds like pretty decent provocation.” “My client leaves a note and says Erica killed us. Clearly she was acting under the influence of Erica leaving. That was the provocation.”

The overall impression we have of this defense theory is that Johnson’s trial counsel, faced with a difficult set of facts, did his best to instill a sense of empathy in the jurors, while giving them options to express their empathy—if they read the facts as he

invited them to do—in a way that minimized her criminal exposure, within the confines of the law.⁸

3. *The ineffective assistance of counsel claim should have been raised by habeas petition*

Nevertheless, Johnson contends her trial counsel could have and should have done more for her at the guilt phase by going into her history of mental illness. Ordinarily claims of ineffective assistance of counsel are more appropriately raised by way of a petition for writ of habeas corpus. (*Carrasco, supra*, 59 Cal.4th at pp. 980–981; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.) When a claim of ineffective assistance of counsel is made on appeal, and when the record sheds no light on why counsel acted or failed to act, we will affirm the judgment “ “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation” ’ ” (*Carrasco, supra*, at p. 982.)

Here, trial counsel was not asked on the record to explain the scope of his investigation or the reasons for presenting the defense he did. Nevertheless, Johnson claims there was no need to file a habeas petition in this case because there are psychological reports already in the record—and medical testimony at the sanity phase—to demonstrate the availability of potentially helpful guilt phase testimony going to her mental condition. She argues this case comes within an exception to the habeas requirement because there “simply could be no satisfactory explanation” for skipping over that evidence in the guilt phase and presenting it only in the sanity phase. She further asserts that because trial counsel failed to present a potentially meritorious mental

⁸ The prosecution objected on the ground that this appeal to empathy went so far as to invite jury nullification. The parties disagree as to whether defense counsel’s argument was proper (i.e., whether jury nullification does or does not violate the law). (Compare *People v. Williams* (2001) 25 Cal.4th 441, 449–463 [juror may be excused based on an unwillingness to follow the law] with *id.* at p. 449 [“It long has been recognized that, in some instances, a jury has the ability to disregard, or nullify, the law”].) We are not called upon here to resolve whether the prosecution’s objection was well-taken and we do not address it. We do note, however, that defense counsel did expressly tell the jurors that he was not asking them to nullify.

state defense, the claim of ineffective assistance of counsel is cognizable on direct appeal, citing *In re Sixto* (1989) 48 Cal.3d 1247, 1257 and *People v. Williams* (1988) 44 Cal.3d 883, 936.

In re Sixto, of course, was a habeas matter and included a declaration from trial counsel explaining the circumstances surrounding his failure to investigate a potential diminished capacity defense. (48 Cal.3d at pp. 1257–1258.) *People v. Williams*, too, was an appeal accompanied by a habeas petition, and the court discussed ineffective assistance of counsel specifically in connection with the habeas petition. (44 Cal.3d at pp. 935–937.) There is no general exception to the habeas requirement for claims of ineffective assistance of counsel that arise from counsel’s failure to present a mental defense.

In this case, although there was certainly medical evidence available which would have allowed defense counsel to put before the jury evidence of Johnson’s long-standing depression and borderline personality disorder, there is nothing in the record to suggest the willingness of the identified witnesses to testify, in answer to a hypothetical question, that such mental problems would have tended to prevent a person in Johnson’s circumstances from forming malice. Without such testimony tying the mental disorder to the legal issues before the jury it is not clear how informing them of Johnson’s history of depression would have allowed them to conclude she had not, in fact, formed express or implied malice. Based on the appellate record before us, it is not at all apparent that any of the expert witnesses would have supported such a theory. In fact, as matters stand, we do not know whether the opinions reflected in the record of the sanity phase of the trial comprise the full scope of the evidence available to defense counsel at trial. The record, for instance, does not negate the possibility that defense counsel may have been in possession of additional information that convinced him a diminished actuality defense was unlikely to succeed. Or he may have thought the potential defense witnesses would not stand up well to cross-examination. (See *People v. Rodriguez* (2014) 58 Cal.4th 587, 623–624, fn. 5 [“presenting expert mental health testimony inherently risks inviting damaging cross-examination”].)

The ineffective assistance issue Johnson presents should have been pursued in a habeas petition, if at all. Johnson has not shown that her trial counsel's actions were the result of ignorance of the availability of the defense or the scope of allowable testimony,⁹ failure to investigate the facts or the law, or other shortcoming amounting to professional incompetence. Based on the appellate record alone, we simply cannot know the full scope of defense counsel's investigation or his tactical considerations. Nor does the appellate record supply sufficient information to show that a defense based on diminished actuality had a reasonable chance of success. Johnson has the burden of proof on her claim of ineffective assistance of counsel, and she cannot carry that burden by asking us to assume away all of the possibilities that may explain why trial counsel did not mount a case for mental illness at the guilt phase, leaving incompetence as the only rational explanation. Giving wide latitude, as we must, to varying strategies that different lawyers may competently employ, we cannot say trial counsel's strategy here was professionally deficient.

4. *There has been no showing of a failure to investigate*

Johnson variously describes counsel's shortcoming as a failure to raise the diminished actuality issue, or as a failure to investigate the issue. Preliminarily, although it may be said with certainty that defense counsel did not *present evidence* of diminished actuality at trial or request a jury instruction on that theory (CALCRIM No. 3428), it cannot be said with any assurance that he did not *investigate* such a defense.

The courts have recognized that counsel has a duty to reasonably investigate the facts and the law pertaining to a potential defense or to make a reasonable decision that a particular investigation is not necessary. (*Strickland, supra*, 466 U.S. at pp. 690–691; *In re Cudjo* (1999) 20 Cal.4th 673, 692; *In re Jones* (1996) 13 Cal.4th 552, 565.) The

⁹ Indeed, as Johnson herself points out, the prosecution's motions in limine addressed the possibility that evidence of Johnson's mental disorder would be introduced by seeking and receiving a court order limiting the introduction of such evidence as required under sections 28, subdivision (a) and 29. Therefore, it is practically inconceivable that defense counsel was unaware of the possibility of introducing testimony by Keram or others in connection with a diminished actuality defense.

distinction between failure to investigate a defense and failure to present a defense is important because *failure to investigate* a potentially meritorious defense has sometimes been found to be ineffective assistance of counsel (e.g., *In re Cordero* (1988) 46 Cal.3d 161, 181 [failure to investigate then valid defense of diminished capacity due to intoxication]; *People v. Frierson* (1979) 25 Cal.3d 142, 162–164 [same, decided in connection with accompanying habeas petition]) precisely because it is not possible for a lawyer to make an informed tactical decision not to raise a given defense if he or she has not researched and investigated that defense. (*Wiggins v. Smith, supra*, 539 U.S. at pp. 527–528; *People v. Williams, supra*, 44 Cal.3d at p. 943.)

By conflating the failure to investigate with the failure to present evidence, appellate counsel relies upon failure-to-investigate cases in the death penalty/mitigating evidence context that have no application to the facts of this case. (*Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1205–1206 [failure to investigate various aspects of mental defense for schizophrenic and brain-damaged defendant beyond initial cursory screening by a psychologist, raised by federal habeas petition in case where death penalty had been imposed]; *Wiggins v. Smith, supra*, 539 U.S. 510, 516–517 [failure to investigate defendant’s dysfunctional family history for presentation of mitigating evidence at capital sentencing trial, raised by federal habeas petition]; *Williams v. Taylor* (2000) 529 U.S. 362, 395–396 [federal habeas case raising ineffective assistance of counsel based on counsel’s failure to investigate and present mitigating evidence of defendant’s “nightmarish childhood”]; *In re Lucas* (2004) 33 Cal.4th 682, 727–728 [petition for writ of habeas corpus granted where defense counsel failed to fully investigate mitigating evidence for presentation in penalty phase of capital case].) We find those cases clearly distinguishable and of little aid to Johnson. Among other things, the issues were uniformly raised in habeas petitions, not on direct appeal. The cited cases also involved a proven failure to investigate, not simply a failure to present available evidence.

Here, defense counsel clearly had significant information at his disposal regarding possible mental defenses and thus he cannot be accused of a complete failure to

investigate, and we cannot infer from his ultimate failure to present the defense that his investigation was inadequate. We have no mea culpa admission or other record demonstrating that counsel failed to research applicability of a mental defense or failed to follow up on the medical opinion offered by Keram. For all we know, counsel may have consulted with Keram or other medical professionals about possible testimony at the guilt phase and may have concluded that such testimony would not be sufficiently beneficial to present at trial. On direct appeal we cannot find a failure to investigate.

5. The record does not negate the possibility of a legitimate tactical purpose

It is true that a claim of ineffective assistance of counsel may be corrected on appeal if there could simply be no tactical reason for counsel's challenged action or inaction. (*Carrasco, supra*, 59 Cal.4th at p. 982.) Johnson faults counsel's decision to present Keram's expert testimony at the sanity phase of trial but not at the guilt phase.

But defense counsel may have believed the evidence developed as a result of the insanity plea—including both Keram's opinion and Watt's contrary opinion (see *Kansas v. Cheever* (2013) 571 U.S. ___, 134 S.Ct. 596, 598)—would have unduly complicated the guilt phase of the trial, while leaving the jury with inconclusive and conflicting evidence as to the effect of Johnson's underlying mental condition on her actual formation of malice. After all, the diagnoses given by Keram (depression and borderline personality disorder) did not point automatically and unerringly to diminished actuality, and any such suggestion surely would have been challenged by the prosecution. Keram testified at the sanity phase that Johnson's history of clinical depression, combined with her religious beliefs, made her unaware of the *wrongfulness* of taking Lylah's life. Whether Keram also would have testified, or would have been allowed to testify, in response to hypothetical questions, that the same mental conditions would have operated to impair the formation of an intent to kill or conscious disregard of another's safety is by no means certain from the record. (See *People v. Coddington, supra*, 23 Cal.4th at p. 582; *People v. Cortes, supra*, 192 Cal.App.4th at p. 908; *People v. Nunn, supra*, 50 Cal.App.4th at pp. 1364–1365; see also § 29.)

Defense counsel did present Libby’s testimony, which, while not expert opinion per se, gave the jury a basis for concluding that Johnson was overwhelmed with grief at the thought of losing Lylah and that Gastelum’s departure as Lylah’s caregiver pushed Johnson beyond her ability to cope—and perhaps beyond her ability to form malice aforethought. From this portrayal he developed an argument that Johnson had not harbored malice in connection with Lylah’s death. He may have believed that such testimony by a witness involved with and sympathetic to the family and yet having some medical background would make a more profound impact on the jury than that of a thoroughly detached expert, whose medical testimony may have been perceived as sterile and whose conclusions would have spawned rebuttal by the prosecution.

Counsel may have considered acquittal equally or more likely without requiring the jury to grapple with the dueling expert testimony. After all, defense counsel’s chosen path allowed him to portray Johnson to the jury as a loving mother faced with extraordinary stress caused by nearly nine years of raising a severely disabled child. He obviously hoped to persuade them Johnson was overwhelmed—and driven to the actions she took—by what appeared to be her daughter’s impending death, exacerbated by the perceived abandonment by her most trusted caregiver. He expressly argued that the prosecution had not proved malice aforethought, vigorously seeking an acquittal based on reasonable doubt. Trial counsel repeatedly urged the jurors to “put [themselves] in [his] client’s shoes”—to the point that the prosecutor essentially accused him of inviting jury nullification.

In sum, Johnson has not shown that defense counsel’s course of action was other than a legitimate defense tactic. There was, after all, evidence of planning activity in this case that could have persuaded the jury Johnson had formed the intent in advance to take Lylah’s life, which made a diminished actuality defense a risky strategy. Counsel may have concluded, in light of the other evidence, he was no more likely to secure an acquittal by portraying Johnson to the guilt-phase jury as mentally-compromised and overmedicated with Clonazepam. Of course, the chosen strategy deprived Johnson of an

instruction under CALCRIM No. 3428 on the murder charge,¹⁰ but the jury did acquit Johnson of first degree murder, even without evidence of her mental disorder. It is difficult to see how a more favorable verdict would have been obtained even if the evidence of her depression and borderline personality disorder had been put before the jury.

C. Prosecutorial Misconduct

1. Johnson's contention and the governing law

Johnson complains that the prosecutor committed prosecutorial misconduct in the guilt-phase argument by telling the jury it should not give Johnson “the benefit of the doubt.” Of course, we recognize the presumption of innocence and the requirement of proof beyond a reasonable doubt as bedrock principles underlying the federal constitutional guarantees for criminal defendants. (*Estelle v. Williams* (1976) 425 U.S. 501, 503; *In re Winship* (1970) 397 U.S. 358, 362–364 (*Winship*).) We further recognize that prosecutorial argument urging the jury to disregard those guarantees or attempting to relieve the prosecution of its evidentiary burden would be improper. And, of course, the prosecution is never relieved of its burden of proving guilt beyond a reasonable doubt. (*Winship, supra*, at pp. 362–364; CALCRIM No. 220.)

Indeed, prosecutors have an independent duty to uphold the law and a general duty to guard the defendant’s right to a fair trial. (*People v. Sherrick* (1993) 19 Cal.App.4th 657, 660 [the prosecutor has a dual role as “the defendant’s adversary” and as “‘guardian of the defendant’s constitutional rights’ ”]; *People v. Daggett* (1990) 225 Cal.App.3d

¹⁰ That instruction reads in pertinent part: “You have heard evidence that the defendant may have suffered from a mental (disease[,]/ [or] defect[,]/ [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with the required intent or mental state, specifically: _____ <insert specific intent or mental state required, e.g., “malice aforethought,” “the intent to permanently deprive the owner of his or her property,” or “knowledge that ...”> . If the People have not met this burden, you must find the defendant not guilty of _____ <insert name of alleged offense>.”

751, 759 [“ ‘It is a prosecutor’s duty to see that those accused of crime are afforded a fair trial’ ”]; see generally, *Berger v. United States* (1935) 295 U.S. 78, 88 [a prosecutor “may strike hard blows, [but] he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one”].)

A prosecutor’s argument violates the federal Constitution when it amounts to a pattern of conduct that “ ‘ ‘ ‘infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.’ ” ’ ” (*People v. Adams* (2014) 60 Cal.4th 541, 568; see *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) When a claim of misconduct is based on the prosecutor’s comments before the jury, the question is whether there is a reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Adams, supra*, at p. 568.)

2. *Factual background*

We have previously adverted to the fact that defense counsel urged the jurors to employ “empathy” and to use their “heart[s]” in deciding Johnson’s fate. The Attorney General argues this amounted to an argument that the jury should engage in prohibited nullification. Johnson disputes that “empathy” and “sympathy” are synonymous, and claims that empathy is a proper jury consideration, while sympathy is not.

Be that as it may, the prosecutor argued in rebuttal, without defense objection, as follows: “[The defense attorney] talked to you about how Ms. Johnson deserves, she deserves the benefit of the doubt. Ladies and gentlemen of the jury, that is not what the law says. That is a plea for you to ignore the law, and I knew it would get to this. I knew it. And that’s why I’ve talked to you so many times about following the law. You must follow the law. Because to give her the benefit of the doubt is to nullify, is to ignore your oath, ignore responsibility, ignore your legal duty. There will be no instruction that Judge Hashimoto gives you that says give her the benefit of the doubt, to do so would be

illegal. To nullify based on anything like sympathy, prejudice, bias, would be illegal. You must follow the law. If anyone goes back there and starts even to come close to that, you got to let us know.^[11] You must follow the law.”

After closing arguments, and immediately after the just-quoted rebuttal, the court instructed the jurors, reminding them of the presumption of innocence and requirement of proof beyond a reasonable doubt, as it had instructed them from the outset of voir dire. The court also reminded them, “Nothing that the attorneys say is evidence[.] [I]n their opening statements and closing arguments, the attorneys discuss the case but their remarks are not evidence.” And it instructed, “If you believe that the attorneys [*sic*] comments on the law conflict with my instructions, you must follow my instructions.” It also reminded the jury to decide the relevant facts from the evidence presented at trial and not to “let bias, sympathy, prejudice, or public opinion influence” their decision. In addition, the court instructed the jury with CALCRIM No. 224, which included the admonition: “If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence.”

3. *The lack of a contemporaneous objection forfeited the claim*

To preserve a claim of prosecutorial misconduct for review, the defense must ordinarily object, citing prosecutorial misconduct, and must request an admonition. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1241; *People v. Brown* (2003) 31 Cal.4th 518, 553.) By failing to object at trial, Johnson forfeited any claim of misconduct, unless the misconduct was so extreme that it could not have been cured by a timely admonition. (See, e.g., *People v. Wrest* (1992) 3 Cal.4th 1088, 1105; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1402–1403.) Johnson recognizes this rule but asks the court to review the misconduct claim despite the lack of objection because the

¹¹ In 1998 CALJIC added a pattern instruction requiring jurors to report juror misconduct or nullification to the court. (CALJIC No. 17.41.1 (Jan. 1998 new) (6th ed. 1997).) The instruction was dropped from the Seventh Edition of CALJIC in 2003. The jury in this case received no such instruction.

prosecutor's particular misstatements of law violated the fundamental constitutional guarantee of the presumption of innocence (*Estelle v. Williams*, *supra*, 425 U.S. at p. 503) and lightened the prosecution's constitutional burden of proof beyond a reasonable doubt (*Winship*, *supra*, 397 U.S. at pp. 362–364). He claims these are purely legal issues that we may reach in our discretion. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *In re Sheena K.* (2007) 40 Cal.4th 875, 884, 887, fn. 7) We decline that request.

The courts have recognized that the alleged harm caused by a prosecutor's remarks may be cured by the trial court's reminding the jury of the presumption of innocence, admonishing them that the prosecutor's remarks are not evidence and no adverse inference may be drawn from those remarks, and warning that any improper comment must be disregarded. (See *People v. Price* (1991) 1 Cal.4th 324, 460–462; *People v. Dick* (1962) 200 Cal.App.2d 424, 432–434; *People v. Chilcott* (1937) 18 Cal.App.2d 583, 587–589.) Because a contemporaneous objection and request for admonition could have cured the alleged error, the failure to object forfeited the claim.

4. *The court's instructions, in any event, cured any alleged misstatement*

But even on the merits, we are far from persuaded that reversal is required. First, we think it unlikely the jury understood the argument as being anything other than a response to defense counsel's argument. It amounted to an exhortation to "follow the law" and not to engage in nullification. We do not think the jury would have understood the prosecutor's remarks as diminishing the prosecution's burden of proof or undermining the presumption of innocence, which had been stressed by the judge since voir dire, or as overriding the judge's instructions on those points. As noted above, further instructions emphasizing the prosecution's high burden of proof and reminding the jurors that "[n]othing . . . the attorneys say is evidence" followed closely on the heels of the prosecutor's remarks and would not have been lost on the jury.

In fact, since what amounted to curative instructions actually were given almost immediately after the prosecutor's remarks, we conclude the instructions did cure any possible harm attributable to the statements. Certainly under the generally applicable state standard, any prosecutorial error must be deemed harmless. (*People v. Watson*

(1956) 46 Cal.2d 818, 836.) Even assuming error of federal constitutional dimension and a correspondingly rigorous standard of prejudice (*Chapman v. California* (1967) 386 U.S. 18, 24), we would find the error harmless beyond a reasonable doubt, for as discussed below, the jury returned the most favorable judgment supported by the evidence, demonstrating it did give Johnson the benefit of the doubt.

5. *Counsel was not ineffective for failing to object*

As a backup argument, Johnson contends her attorney was ineffective in failing to object to the prosecutor's remarks. (See *People v. Centeno, supra*, 60 Cal.4th at p. 674.) Johnson has not shown trial counsel performed below the level expected of a " "diligent, conscientious advocate." ' ' (*People v. Bennett* (1998) 17 Cal.4th 373, 383.) There is no basis for concluding he failed to object due to ignorance or misunderstanding of the law. On the contrary, the record suggests he failed to object because the prosecutor's argument directly responded to his own plea for jury empathy and, arguably, nullification. (See fn. 8, *ante*.) Defense counsel may have believed he opened the door to the prosecutor's remarks, an objection would have drawn more attention to the prosecutor's point and, in light of his own argument, could have triggered a negative response from the court. Judged in context, the failure to object appears to have been a tactical decision.

Johnson also has not shown a reasonable probability of a better result had trial counsel objected to the prosecutor's rebuttal argument, even assuming the court would have sustained an objection. (*Strickland, supra*, 466 U.S. at p. 694; *People v. Price, supra*, 1 Cal.4th at p. 440.) The jury rendered the most favorable verdict it reasonably could have rendered by acquitting Johnson of first degree murder, despite the evidence of premeditation and planning, including her note that Gastelum "killed us," which reflected her understanding that death of Lylah was among the expected results of her acts. Her statements while in the hospital, overheard by a police officer, confirm that her actions were purposeful and that she understood death could result. Her own handwritten notes further showed she had contemplated death on a number of occasions and always assumed Lylah would be taking that journey with her. In light of this evidence, we think

a more favorable outcome extremely unlikely, even if the prosecutor’s remarks had been officially declared improper.

A conviction of something less than second degree murder was not likely because her crime did not qualify as voluntary manslaughter. The “provocation” suggested by the defense attorney in closing argument to support a voluntary manslaughter conviction—that Gastelum’s departure provoked the suicide attempt and murder—did not qualify as legal provocation because its source was not the victim. (See, e.g., *People v. Trinh* (2014) 59 Cal.4th 216, 233 [“a heat of passion defense must arise from provocation supplied, or reasonably believed to have been supplied, by the victim or victims”]; *People v. Lee* (1999) 20 Cal.4th 47, 59 [same].)¹² Lylah did nothing to provoke Johnson and therefore a lawful conviction of voluntary manslaughter was not a realistic possibility.

By rejecting the charge of first degree murder and convicting Johnson instead of second degree murder, the jury did give Johnson the benefit of the doubt, to the extent doing so was consistent with the evidence and the law. Johnson has not shown that her attorney’s failure to object to any misstatement by the prosecutor—or the purported misstatements themselves—prejudiced the defense or rendered the outcome of the trial unreliable.

III. DISPOSITION

The judgment is affirmed.

¹² CALCRIM No. 570, given at Johnson’s guilt-phase trial, does not include this requirement. Thus, Johnson’s jury was given the option of convicting her of voluntary manslaughter even though the “provocation” she complained of did not amount to legal provocation. In that sense, it is arguable the jury was given a more lenient option than that to which Johnson was strictly entitled, and yet it convicted her of second degree murder.

Streeter, J.

We concur:

Reardon, Acting P.J.

Rivera, J.

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