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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

KRISTEN LYNN GIBSON,

Defendant and Appellant.

C070109

(Super. Ct. No. 08F09953)

Defendant Kristen Lynn Gibson killed her newborn baby boy by drowning him in a toilet. After a court trial, the trial court found her guilty of both first degree murder and child assault homicide. (Pen. Code, §§ 187, 273ab;¹ see *People v. Wyatt* (2012) 55 Cal.4th 694, 697, fn. 2 (*Wyatt II*) [describing latter offense as “child assault

¹ Further undesignated statutory references are to the Penal Code.

homicide”].) The trial court sentenced defendant to prison for 25 years to life on both counts, staying sentence on the child assault homicide pursuant to section 654, which precludes multiple punishments for multiple criminal charges arising from the same act--the situation here. We deemed defendant to have filed a timely appeal.

Defendant essentially asks this court to reweigh the evidence and find she committed a lesser degree of homicide. Defendant also contends no substantial evidence supports her conviction on the child assault homicide count, because she did not assault her baby within the meaning of the relevant statute. Finally, defendant contends trial counsel was ineffective in failing to research exculpatory medical information. We ordered supplemental briefing regarding the child assault homicide count, in effect asking the parties to brief whether the act of giving birth could constitute an assault on the baby.

As we will explain, we disagree with each of defendant’s contentions and shall affirm the judgment.

FACTS

People’s Case-in-Chief

Marshall Hunter testified that in 2008, he lived in a house in an open relationship with defendant and Latasha Hodges, whom he married before trial. Six children lived there, three he had fathered with Hodges, aged 5 months and 8 and 9 years, two he had fathered with defendant, aged 1 and 6 years, and defendant’s daughter from another relationship, aged 10 years. After Hodges’s last child, Hunter told defendant and Hodges they could not afford more children.

In April 2008, Hunter noticed defendant’s stomach was getting bigger and asked if she was pregnant, which she denied. Defendant told Hunter she saw a doctor who had diagnosed her with ovarian or uterine cysts, which explained her size, and told him she was going to have the cysts removed in July 2008.

On the night of July 8-9, 2008, the whole family was at home and in bed for the night. Hunter woke up at approximately 3:00 a.m. to the sound of a loud bang from the

bathroom, but when he tried the door, it was locked and defendant said from within that she was using the bathroom. He banged on the door and when she unlocked it, he saw defendant sitting on the toilet and blood spots between the door and the toilet, and defendant told him she felt nauseated and thought “her cysts busted.” Defendant remained sitting on the toilet, and when offered medical assistance and invited to take a shower, declined, stating she was having a bowel movement. She denied having a miscarriage. Hunter could see blood on the toilet seat and on defendant’s hand, more than would be expected from menstruation, but could not see *into* the toilet bowl because defendant remained sitting on it. He eventually called 911. During the 911 call, he in part said he thought his “wife” was having a miscarriage, although defendant had denied being pregnant. When emergency personnel removed defendant on a gurney, Hunter heard Hodges yell that there was a baby in the toilet. The time between Hunter hearing the bang and calling 911 was about 5 minutes, and the time from Hunter hearing the bang until help arrived was about 15 to 20 minutes.

Hodges confirmed that after she had her last child, Hunter told both women he did not want any more children, and the “open” relationship was for financial reasons. That night, after Hunter called for her help, she saw blood in the bathroom, and defendant was sitting on the toilet and claimed the blood was from her period. Defendant told Hunter she was not pregnant or having a miscarriage. When asked to shower before going to the hospital, defendant said she was “pooping.” Hodges wiped defendant’s face with a damp towel because she was “in and out” and seemed to be “nodding off.” When Hodges helped defendant stand up so a paramedic could take her, she saw the baby in the toilet and screamed and left the room. She also saw a white umbilical cord hanging between defendant’s legs. Hodges had a federal fraud conviction, for which she had received probation.

Brian Harless, a paramedic, testified he was sent to the house at 3:23 a.m., and arrived five minutes later, following a report of a woman bleeding, possibly after a

miscarriage. Defendant was on the toilet when he arrived in the bathroom, and was able to answer questions coherently. She said “No” when asked if she had “passed anything that appeared to be a fetus.” There was about a liter of blood on the floor and around the toilet. After speaking with defendant for three to five minutes, Harless determined she needed to go to the hospital, helped her off the toilet, at which time she almost fainted, and then he saw the baby in the toilet bowl, with the umbilical cord not attached to defendant. The baby’s nose and mouth were under the surface of the toilet water.

Timothy Beard, another paramedic, testified the baby’s umbilical cord was “extremely short . . . meaning it was only probably about an inch or so off of the belly . . . jagged to where it looked like maybe it was torn or . . . not cut the way we would with scissors.” The cord was too short for a clamp, so they tied it off, and Beard intubated the baby while another paramedic tried to deliver medications, but the baby never showed signs of life.

An obstetrician had seen defendant on April 2, 2008, found she was pregnant, and after she asked for an abortion, he referred her to Planned Parenthood, and counseled her to return after the abortion, for a follow-up exam. A Planned Parenthood nurse testified defendant consulted with her on April 14, 2008, but at 29 weeks pregnant it was too late for a lawful abortion, so she was referred for prenatal care and given adoption information. On her pregnancy history form she listed one abortion, one miscarriage, and three live births. When defendant returned on November 28, 2008--after the victim was killed--she was again pregnant, and on her pregnancy history form she listed *two* abortions, one miscarriage, and three births.

A pathologist testified the victim was full-term or post-term, had been born alive, and swallowed fluid in the toilet. Cocaine metabolite was found in the baby but did not contribute to his death. Although the baby lost blood through the umbilicus, he had not “bled out.” The umbilicus was cut in a jagged way, consistent with use of cuticle scissors seen on the bathroom sink. The cause of death was drowning.

Defense Case

Defendant testified she reluctantly agreed to blend the two families. She had used cocaine the night of July 8-9, 2008, and when she sat on the toilet and felt “like a gush come out” “I was just really high and didn’t have emotion one way or the other.” She did not remember what was said when Hunter came into the bathroom, felt “[n]ot there,” but remembered Hodges in front of her and heard water running, then woke up “either in the ambulance or in the hospital.” She did not remember giving birth or cutting the umbilicus, and did not think she did so because the sight of blood made her feel sick. Defendant had known she was pregnant, but did not tell Hunter because it would have made him angry since he had said he did not want more children, and she was scared, so she repeatedly lied to him about having cysts, to explain her growing size. After learning it was too late to abort, she persisted with her cyst story, and planned “to have the baby and, surprise.” Defendant knew using cocaine while pregnant was not good, but used it on a daily basis through 2007 and 2008 because she sought “escape from everything.”

Although defendant had prenatal care during other pregnancies, she did not with this pregnancy, because she was “just scared” about how Hunter would react to the news. Unlike with her three other births, she felt nothing except that she had to urinate, then felt a gush of blood, and saw blood “everywhere” but did not seek help and did not look in the toilet. She felt like she had to “poop” but not that she was having a baby. She learned she gave birth into the toilet when she woke up in the hospital. She did not recall characterizing the victim as aborted, but as a miscarriage, when she returned to Planned Parenthood after again conceiving.

People’s Rebuttal

A recorded interrogation by Detective Bruce Wanner on December 4, 2008 was introduced into evidence. The parties agreed the trial court could use a transcript to facilitate its review of the recording, and the accuracy of that transcript is not challenged on appeal, therefore we will quote from it in our summary.

Defendant told Wanner she was 33, and became a certified legal specialist. After Hodges's last baby, the blended family agreed not to have any more children, but she did not think Hunter would have been angry had she become pregnant, but also stated, "I don't know how he would've taken it." She claimed she did not know she had been pregnant until she woke up in the hospital. She disputed the entries in the medical reports stating she had been told her pregnancy had been confirmed, and said she did not remember being told by Planned Parenthood that it was too late for an abortion. She denied having characterized the victim as an abortion, despite the medical history forms, and suggested she had been referring to her then-current pregnancy.

Eventually, she admitted to Wanner that she knew she had been pregnant, but said she thought she was carrying a dead fetus, because she did not feel movement and did not gain weight. However, she also said she was "gonna have the baby because there was no other choice."

On the night in question, she took a bath, and locked the bathroom door for privacy. She claimed not to feel contractions because she was high on cocaine, which she had been using from about 8 p.m. until 2 or 2:30 a.m., a total of 20 lines on 10 occasions. She left the tub, took some more cocaine, and then went to use the toilet after about an hour. She remembered feeling a burst coming out, but did not know if it was her water breaking or a "full-blown period" and thought she fainted, because she remembered nothing else until she woke up in the hospital. When she unlocked the door for Hunter, she walked backwards to the toilet and never looked inside the toilet. She had no memory of cutting the umbilicus. She did remember talking to Hunter. She did remember people asking questions and someone referencing a 911 call, and she remembered riding in an ambulance.

After admitting knowing of the pregnancy, defendant told Wanner she did not remember feeling a birth, but just sat on the toilet and did not look down, because she

was “in a traumatic state I guess.” She never heard the baby make noises but thought it drowned in the toilet “[b]ecause I never did anything about it.”

Verdict

The trial court found beyond a reasonable doubt that defendant knew she was giving birth, and her failure to take any action reflected “a premeditated and deliberate intent to kill.” The court emphasized the evidence that defendant sat on the toilet for as long as an hour after the birth, and her statement that she did not look down, evidencing her awareness of the baby. The court rejected evidence defendant was not lucid, because she unlocked the door for Hunter, and answered questions by him, Hodges and the paramedics, and refused to leave the toilet. Also, “she chose not to provide any prenatal care for the child, and chose to use drugs in a fashion that would obviously be harmful to the child.”

Based on the evidence, the trial court found defendant “premeditated, deliberated, and intended to kill baby boy Gibson” and found her guilty of first degree murder, as well as the child assault homicide charge, which “was actually a simpler charge for this Court to decide. The evidence with regard to that [count] was overwhelming. The key issue for this Court was with regard to [the murder count] and the state of mind of the Defendant at the time of the birth of the child.”

DISCUSSION

I

Malice, Deliberation and Premeditation

Defendant contends no substantial evidence shows malice, deliberation and premeditation, and asks us to reduce the murder verdict.

“When considering a challenge to the sufficiency of the evidence to support a criminal conviction, ‘the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such

that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.]

“In this context, ‘premeditated’ means ‘considered beforehand,’ and ‘deliberate’ means ‘formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.’ [Citations.] The process of premeditation and deliberation does not require any extended period of time. ‘The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.’ ” (*People v. Mayfield* (1997) 14 Cal.4th 668, 767 (*Mayfield*); see *People v. Mendoza* (2011) 52 Cal.4th 1056, 1068-1069 (*Mendoza*).

As our Supreme Court has summarized, “In *People v. Anderson* (1968) 70 Cal.2d 15, we identified three types of evidence—evidence of planning activity, preexisting motive, and manner of killing—that assist in reviewing the sufficiency of the evidence supporting findings of premeditation and deliberation. [Citation.] We have made clear, however, that ‘*Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation.’ ” (*Mendoza, supra*, 52 Cal.4th at p. 1069.)

Defendant’s key contention is that “it is essentially impossible for a woman in the throes of labor to make the cold and calculated decision to kill her newborn, thus making the guilt finding here inherently improbable.” Here, however, the record supports the finding that defendant never intended to allow her baby to live.

First, the trial court could find planning because after defendant learned it was too late to abort, she hid the pregnancy, gave false explanations for her weight gain, sought no prenatal care, used cocaine, and secreted herself in a locked bathroom, in the middle of the night while the household slept, giving her the opportunity to kill the baby at birth and perhaps manage to dispose of the body before the family found out.

Second, the trial court could find motive because the evidence supported a finding that defendant acted either out of fear of the consequences of disobeying Hunter, or fear

of the financial consequences affecting the blended family of having another child, or both.

Third, the trial court could find the manner of killing reflected deliberation, as defendant delivered the baby into a toilet, on which she sat to prevent others from discovering the baby's existence until after it had drowned. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1020 [strangling shows deliberation; "[t]his prolonged manner of taking a person's life, which requires an offender to apply constant force to the neck of the victim, affords ample time for the offender to consider the nature of his deadly act"].) Although she had carried three babies to term and knew something about childbirth, she made no effort to tie off the umbilicus after she cut it with scissors. Although the resulting bleeding did not cause death, defendant's actions reflected her intent to quickly take the victim's life, in any way available to her.

Thus the evidence shows express malice, based on defendant's explicit intent to kill the baby, as well as her "intent to do an act in wanton and willful disregard of an unreasonable human risk." (1 Witkin & Epstein, Cal. Criminal Law (5th ed. 2012) Crimes Against the Person, § 105, p. 897.)

Based on a stray comment by the trial court about cocaine use and lack of prenatal care, defendant contends the court relied on "evidence" not presented in court. But defendant testified she used cocaine daily throughout her pregnancy. Further, she testified that although she had sought prenatal care during other pregnancies, she failed to do so on this occasion, despite a specific recommendation to do so. These facts tended to show defendant's indifference as to whether the baby would live or die, which was relevant to her intent. (See Evid. Code, § 210.) The trial court did not state the cocaine contributed to *death*, as the evidence showed death by drowning.²

² Defendant also contends the photographs depicting the scissors the pathologist thought might have been used to cut the umbilicus were not authenticated. No trial objection was

In short, “Here, there is ample evidence supporting an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse.” (*People v. Hughes* (2002) 27 Cal.4th 287, 371.)

Throughout her briefing, defendant contends the facts support a lesser crime. In particular, defendant repeatedly likens her case to *People v. Chavez* (1947) 77 Cal.App.2d 621 (*Chavez*). *Chavez* does not assist her.

Chavez concealed her pregnancy from her family, delivered her baby into a toilet, then eventually removed it and cut the umbilical cord with a razor blade, but did not tie the cord off because she thought the baby was dead. She then wrapped the body and hid it, and went about her normal activities until the body was discovered. An autopsy concluded the baby was born alive, but bled to death, although defense testimony raised questions about the methodology used by and resulting conclusions of the autopsy surgeon. (*Chavez, supra*, 77 Cal.App.2d at pp. 622-624.) *Chavez* found substantial evidence the baby had been born alive and died due to “negligence of the appellant in failing to use reasonable care in protecting its life, having the duty to do so.” (*Id.* at p. 627.) *Chavez* upheld the jury verdict of involuntary manslaughter. (*Id.* at pp. 628-629.)

We have previously endorsed the holding that *Chavez* committed criminal negligence by breaching a duty to care for her newborn baby and therefore was liable for involuntary manslaughter, citing it for the proposition that: “The failure to use due care in the treatment of another where a duty to furnish such care exists is sufficient to constitute that form of manslaughter which results from an act of omission.” (*People v. Villalobos* (1962) 208 Cal.App.2d 321, 328.) But *Chavez* did not discuss whether the facts in that case *might* also have supported murder liability. Cases are not authority for propositions not considered. (*Hart v. Burnett* (1860) 15 Cal. 530, 598.)

lodged, therefore this point is forfeited. (Evid. Code, § 353, subd. (a); *People v. Eubanks* (2011) 53 Cal.4th 110, 142.) Moreover, the pathologist was clear that drowning caused death, not bleeding out from the umbilicus.

The trial court herein found the facts of *this case* amounted to first degree murder, and for the reasons we have explained, the evidence supports the finding that defendant acted with the explicit intent to kill, with premeditation and deliberation.

II

Child Assault Homicide

Defendant contends no substantial evidence supports the child assault homicide conviction. We disagree.

A. Standard of Review

The question before us is whether there was substantial evidence from which the trial court rationally could find the crime occurred. In answering that question, we construe all facts and reasonable inferences in favor of the trial court's verdict. "We review the whole record in a light most favorable to the judgment to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could find beyond a reasonable doubt that the accused committed the offense." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 859; see *Mayfield*, *supra*, 14 Cal.4th at p. 767.)

B. The Law

At the time of the killing, the child assault homicide statute provided in relevant part: "Any person, having the care or custody of a child who is under eight years of age, who assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life." (§ 273ab; Stats. 1996, ch. 460, § 2, p. 2814.)

"The elements of the offense are: '(1) A person, having the care or custody of a child under the age of eight; (2) assaults this child; (3) by means of force that to a reasonable person would be likely to produce great bodily injury; (4) resulting in the child's death.' " (*People v. Wyatt* (2010) 48 Cal.4th 776, 780 (*Wyatt I.*))

The “assault” required for section 273ab embraces simple assault as defined by section 240. As summarized by our Supreme Court:

“Section 240 defines the crime of simple assault as ‘an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.’ Although assault does not require a specific intent to injure the victim, the defendant must ‘actually know[] those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another.’ [Citation.] No actual touching is necessary, but the defendant must do an act likely to result in a touching, however slight, of another in a harmful or offensive manner.” (*Wyatt II, supra*, 55 Cal.4th at p. 702.)

By statute, “A battery is any willful and unlawful use of force or violence upon the person of another.” (§ 242.) Our Supreme Court has elaborated, as to assault, as follows:

“ ‘[A] defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery.’ [Citation.]

“[A] defendant may be guilty of an assault within the meaning of section 273ab if he acts with awareness of facts that would lead a reasonable person to realize that great bodily injury would directly, naturally, and probably result from his act. [Citation.] The defendant, however, need not know or be subjectively aware that his act is capable of causing great bodily injury. [Citation.] This means the requisite mens rea may be found even when the defendant honestly believes his act is not likely to result in such injury.” (*Wyatt I, supra*, 48 Cal.4th at p. 781; see *id.* at p. 786.)

C. Analysis

Defendant contends “no evidence established she actually applied physical force against her child or that she had actual knowledge that any act would directly result in application of such force.” She compares the facts here to those in other cases, such as where caregivers beat children, and contends her acts were not as severe and therefore she did not apply sufficient force to fall within the statute. In supplemental briefing she also argues that the physical act of delivering a child, the final contraction pushing the

child from the mother into the world, cannot be deemed an intentional act sufficient to constitute an assault.³

The People first argue the evidence shows “the child hit its head on the hard container” of the toilet. But the record does not support their claim. It shows the baby’s head had a cone shape the pathologist viewed as consistent with the shape of the bottom of a toilet bowl, not that the baby *hit* its head on a hard surface.

The People also argue that “dropping a child into a liquid filled container is an act that would be likely to produce great bodily injury to the child.” In their supplemental briefing, however, the People concede that delivery of a baby into a hostile environment is not necessarily an assault, such as where the mother is trapped in the snow on her way to get help, or passes out after birth and is unable to assist the baby, but contend the trial court could find that on the facts of *this* case, defendant constructed a hostile environment for the purpose of killing the child.

We agree that the trial court could find on these facts that defendant’s act of delivering, or pushing, her baby into the toilet with the intention to kill it was an assault. Although the final contraction delivering the baby may have been involuntary in the literal sense, defendant’s act of knowingly placing herself in a position where such delivery would likely kill the baby, with the explicit intent to kill that baby, is an assault.

Contrary to defendant’s view, this is not a case of mere non-feasance, where due to cocaine use or post-partum stress or pure physical exhaustion following labor, defendant was unable to care for her newborn baby. (Cf. *Singleton v. State* (1948))

³ Defendant also contends no substantial evidence shows she was conscious of her actions or even that she knew she was giving birth, but these are claims the trial court rejected explicitly as to the murder charge. As indicated by our discussion in Part I, *ante*, on these facts the trial court could find defendant was not so intoxicated by cocaine nor so affected by blood loss or stress of childbirth, as to preclude the finding that she was conscious of what she was doing and intended to kill the victim.

33 Ala.App. 536, 542-543 [35 So.2d 375, 380-381] (*Singleton*.) *Singleton* concluded “this court is unwilling to attach criminality to non-feasant acts of a mother resulting during the travail of childbirth even though such non action result [*sic*] in the death of the baby. Particularly is such view correct where, as in this case the mother is ignorant, uneducated, and unattended.” (*Singleton, supra*, 33 Ala.App. at p. 543 [35 So.2d at p. 381]; see also, e.g., *Commonwealth v. Pugh* (2012) 462 Mass. 482, 497-501 [969 N.E.2d 672, 686-688] [no evidence mother delivering alone and faced with breech birth had feasible alternatives]; *State v. Osmus* (1954) 73 Wyo. 183, 201 [276 P.2d 469, 475] [“Children are born of unattended mothers on trains, in taxis and in other out of the way places, and we fear to open up a field for unjust prosecutions of actually innocent women”]; *id.* at p. 210 [276 P.2d at p. 479] [baby “was the first child to which defendant had given birth. There is no evidence that she could have done anything different from what she did”]; accord *Vaughan v. Commonwealth* (1989) 7 Va.App. 665, 676 [376 S.E.2d 801, 807] [no malice where 16-year-old experiencing first birth failed to care for baby after delivery].)

In contrast to *Singleton*, malice has been found where a mother deliberately eschews assistance, thereby ensuring the baby’s death. One court pointed out: “The jury could have found the death of the baby was brought about *by deliberately allowing it to be born under these unnecessarily unfavorable circumstances*. As a wife of a serviceman, excellent medical care was available without charge. She chose to have the baby unattended on a very cold bathroom floor with a bed and help available. She allowed it to remain on the floor unattended for several minutes, making no effort to determine if it was alive or keep it alive. Such circumstances are sufficient to justify an inference of malice.” (*State v. Shephard* (1964) 255 Iowa 1218, 1235 [124 N.W.2d 712, 722] emphasis added; accord *State v. Robot* (R.I. 2012) 49 A.3d 58, 77-81 [malice where mature woman hid pregnancy, sought no prenatal care, gave birth while secreted in the bathroom, and rebuffed help]; see also *State v. Collins* (Tenn.Crim.App. 1998) 986

S.W.2d 13, 15-19 [college student hid pregnancy, did not seek prenatal care, delivered baby into a toilet, and rebuffed help; when paramedics arrived, she denied pregnancy, but the baby's drowned corpse was later found in the toilet; held, defendant had "an awareness "that the conduct [was] reasonably certain to have caused the result" ' '].)

While such authorities discussed in the supplemental briefing directly address liability for murder rather than assault, they illustrate the critical difference between the cases of a mother caught unaware or unprepared who must cope with an unexpected birth alone, or a mother who lawfully chooses to give birth at home but becomes debilitated from the throes of labor, rendering her unable to attend to the baby, and a mother who chooses to give birth in a manner that will harm the baby, with the explicit intent to kill it. The evidence in this case, viewed in the light favorable to the trial court's resolution of the conflicting testimony, supports the latter state of facts. Therefore, even assuming that at the *instant* of birth defendant was disoriented and incapable of acting voluntarily, she had set the stage for the baby's death long before. She had birthed children before, under medical supervision, but declined prenatal care for this baby, hid her pregnancy from her family, and feared the effect of its birth on the family. She locked herself in the bathroom in the middle of the night and ingested cocaine to quell the labor pains. She resisted efforts to help her, by Hunter and by Hodges, and refused to get up from the toilet, thus ensuring that the baby remained underwater and died. This view of the facts is supported by the record. Viewed in the light most favorable to the verdict, defendant acted "with awareness of facts that would lead a reasonable person to realize that great bodily injury would directly, naturally, and probably result from [her] act." (*Wyatt I, supra*, 48 Cal.4th at p. 781.)

Thus, on these particular facts, the trial court could rationally find that defendant committed an "assault" under section 240, which, given the fatal result, in turn supports her liability for child assault homicide as provided by section 273ab.

III

Ineffective Assistance of Counsel

Defendant faults trial counsel for failing to consult with independent medical experts to prepare for trial, claiming ineffective assistance of counsel.

To prevail, defendant must show her attorney acted below the standards of professional care and there is a reasonable probability she would have obtained a better result in the absence of counsel's failings. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) However, " 'In some cases . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal.' " (*Id.* at p. 218.)

Defendant emphasizes the importance of the medical testimony that was given, but provides no explanation *based on the record* showing that any contrary *exculpatory* medical evidence exists, or that trial counsel should have been able to find an expert that would provide favorable defense evidence. Instead, defendant presents citations to authorities or treatises which, in her view, show there are extant medical views that would or might have contradicted the People's evidence. But none of those materials were presented to the trial court, and it is not our role to take evidence and resolve academic debates. Further, as the People point out, it is possible defense counsel *did* consult with one or more medical experts, but declined to call them for tactical reasons.

The record is silent on this point, therefore, the record does not demonstrate incompetence of counsel and defendant must seek relief, if at all, via habeas corpus. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)⁴

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

MAURO, J.

⁴ Although not relevant to this appeal, we note for completeness that we have expanded appellate counsel's appointment to include assisting defendant in preparing a habeas corpus petition in the trial court.