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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS OTHAY DARTHART et al.,

Defendant and Appellant.

D057950

(Super. Ct. No. FBA009502)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Steven A. Mapes, Judge. Affirmed.

A jury convicted cohabitants Thomas Othay Darthart and Moy Ellis, tried jointly, of the murder of Thomas Timothy Frederic Darthart (Little Thomas), Darthart's 3-year old son with a different woman (Pen. Code,¹ § 187, subd. (a)); assault on a child causing death (§ 273ab); torture (§ 206); and child abuse (§ 273a, subd. (a)). The jury found true allegations of torture-murder special circumstance (§ 190.2, subd. (a)(18)) and, with

¹ All statutory references are to the Penal Code unless otherwise stated.

regard to the child abuse conviction, that defendants willfully caused and permitted the infliction of injury and harm resulting in death (§ 12022.95).

The court sentenced Darthart and Ellis to life without the possibility of parole on the murder count and stayed the sentence on the other counts under section 654.

Darthart and Ellis join in each other's appellate arguments and contend: (1) the trial court erroneously admitted Darthart's pre-arrest statements made to police before he was advised of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), and those statements impermissibly incriminated Ellis; (2) there was insufficient evidence to support the torture-murder special circumstance finding; (3) a required element of torture under section 206 should be the section 189 requirement of a premeditated intent to inflict prolonged pain; (4) the court erroneously instructed with CALCRIM Nos. 540A, 703 and 733; (5) Ellis's trial counsel provided ineffective assistance by failing to move for either a severance of the defendants' trials or separate juries; and (6) the trial court improperly dismissed for cause a juror who could not read or write. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case

At approximately 3:00 p.m. on September 5, 2006,² which was Little Thomas's third birthday, Darthart telephoned 911 and said Little Thomas had fallen in a bathtub the previous night, Darthart had revived him through cardiopulmonary resuscitation (CPR)

² All dates refer to 2006 unless otherwise noted.

and afterwards Darthart went to sleep. The following afternoon, when Darthart awoke, Little Thomas was unconscious and his stomach was swollen but he was not moving, although he was breathing.

Paramedics arrived at Darthart's residence a few minutes later, and Darthart told them Little Thomas was still breathing. However, they noticed Little Thomas was injured, lacked a pulse and showed signs of lividity. They used an electrocardiogram machine but he had no heart rhythm; therefore, the paramedics pronounced him dead. One paramedic described Darthart's and Ellis's demeanors as "fairly nonchalant," and noted they did not cry or show any emotion.

Barstow City Police Sergeant Mark Franey processed the crime scene in the apartment and saw old food and many cockroaches in the refrigerator. No food was in the kitchen cabinets. Sergeant Franey found a paddle with Little Thomas's name and a sad face drawn on one side of it, and Ellis's daughter's name and a sad face drawn on the reverse side. Sergeant Franey also found a folded belt that might have been used to spank someone. Sergeant Franey overheard Darthart and Ellis expressing their love for each other, but they did not mention Little Thomas or express remorse about his death. Ellis stated, "I didn't do anything." Apart from one teddy bear, Sergeant Franey did not see any evidence of possible birthday celebrations for Little Thomas.

Approximately one month before Little Thomas's death, Ellis had told her neighbor, Jenette Gay, that Little Thomas had said he hated Ellis and did not have to do what she said. Ellis concluded he had "the devil in him." Gay encouraged Ellis to overlook Little Thomas's comment because he was just a baby.

Three days before Little Thomas's death, Ellis went to Gay's house and cried continuously for approximately ten minutes without answering Gay's questions about why she was crying. Ellis returned to her home afterwards. Gay knocked on Ellis's door that afternoon but no one answered despite Gay's belief the family was inside. On September 4th, Gay agreed to give Ellis and Darthart a ride to the store. Gay asked about their children's whereabouts, and they said Ellis's 12-year old daughter would look after Little Thomas at home. Gay mentioned she would prefer that the children not be left alone. Ellis and Darthart bought deodorant, soap, toilet tissue, bleach, soap powder and personal hygiene materials at the store. They never mentioned to Gay that Little Thomas's birthday was the next day.

Darthart's Pre-Miranda Police Interview

Barstow City Police Officer Andrew Frank Espinoza was assigned to investigate Little Thomas's death and met Darthart and Ellis at their residence on September 5, between 3:00 p.m. and 4:00 p.m. He invited them to accompany him in an unmarked police vehicle to the detective division annex for an interview. They both agreed, and were not handcuffed or arrested en route to the interview. At the annex, Officer Espinoza asked Darthart if he understood he was free to leave, and Darthart confirmed he understood.

A video recording and transcript of Darthart's interview was introduced at trial. Officer Espinoza started it by offering Darthart something to drink and commiserating with him. After Officer Espinoza obtained Darthart's background and contact information, he told him, "[Y]ou understand that you're not under arrest or anything. We

would just like to talk to you about what happened with your son. I'm sorry about the death of your son. Um, okay, it's unfortunate uh, have what happen, you know, and, but we were called in there and uh, I wanted to talk to with [sic] you about that like we usually we talk with the people in the home." Darthart responded, "Okay," and immediately volunteered, "Yeah, there's some bruises on [Little Thomas's] back, cause we was at the park last Saturday. And he was running around he fell down the bleachers. He [scarred] up the back of his legs."

Darthart explained how Little Thomas got his different injuries, and the events of his last moments of life: At around 11:30 p.m on September 4, Little Thomas hit his eye on a wooden chair. Darthart made him go take a bath, but no one supervised him. Little Thomas fell in the tub and was unconscious. Darthart revived him with CPR, but did not call paramedics or an ambulance. The family went to sleep. Darthart awoke around 2:30 p.m. the following day and noticed Little Thomas had a pulse for a brief while, but his stomach was swollen and green.

Before the interview concluded, Darthart requested a cigarette and got up to get one. A detective directed him to an outdoor spot behind the annex and allowed him to smoke there unattended.

Ellis's Police Interview

While Darthart was smoking a cigarette, Officer Espinoza explained to Ellis that she was not under arrest and was free to leave at any time. She indicated she understood. She was not placed in handcuffs. She told Officer Espinoza that from June 25, San Bernardino County had paid her to be Little Thomas's caretaker. She explained that he

had received his leg injuries from his fall at the park on August 26. They had applied home remedies to the wounds but did not seek medical care because he was "fine." The night before he died, they had allowed him to stay up late for his birthday and he ran around and had a good time before falling and hitting his eye on a chair. But he was "fine." They put him in a bathtub but left him unsupervised because he was independent and could bathe himself. After a while, Darthart told her Little Thomas must have fallen in the tub, and she saw a bump on Little Thomas's forehead. The next day, after they successfully revived him with CPR, they went to bed. Ellis later saw his facial injuries and believed their CPR efforts caused them. Little Thomas's stomach was swollen, and they called the paramedics.

Ellis admitted disciplining Little Thomas with a paddle, including spanking him with it five times on the evening of September 3, because he had soiled himself despite being potty trained. She said they had a rule by which they spanked Little Thomas five times whenever he got in trouble. She said Darthart also had spanked Little Thomas with the paddle that evening. Officer Espinoza told Ellis he had received information from another officer about a belt found in Ellis's apartment and asked whether she had used it on Little Thomas. She paused, said she knew that anything she said could be used against her in court, but confessed, "I'm going to corroborate what your sergeant told you. . . . Yes, there is a belt, and I've used it to spank [L]ittle Thomas with [*sic*]." She also admitted Darthart had used the same belt to spank Little Thomas, most recently on September 3.

Ellis said she generally disciplined Little Thomas by whipping him and requiring him to stand in the corner with his hands in the air. Sometimes he looked back when he was not supposed to, and she and Darthart would "pop him with the belt." She further acknowledged, "Yes, we have spanked him with a wood board, paddle and belt." Ellis admitted she and Darthart caused the injuries to Little Thomas's buttocks and legs with their discipline, but maintained his fall from the bleachers caused the injuries to the back of his knee and the bottom of his calf. She said his head injuries resulted from his fall in the tub and their CPR efforts.

Ellis admitted she had last used methamphetamines three or four days before Little Thomas's death. She had smoked marijuana as recently as 8:00 a.m. on the day he died, after checking on him and concluding he was okay.

Ellis interrupted the interview, asked to see Darthart, and walked to the lobby where Darthart sat. They got cigarettes and walked outside the annex. Officer Espinoza conferred with another detective inside, and later noticed Darthart and Ellis had moved further away from the annex building. After he arrested them, Ellis changed from being unemotional and having a blank stare, and she started crying. She told Officer Espinoza, "You think we killed our baby?"

Darthart's Post-Miranda Interview

That evening, Officer Espinoza realized he had mistakenly failed to record part of Darthart's interview and Ellis's entire interview. Officer Espinoza *Mirandized* Darthart, who agreed to talk in a second interview, which was recorded and played for the jury. Darthart stated that on September 5, he and Ellis awoke around 7:00 a.m. and checked on

Little Thomas, whose heart was beating. Darthart took Ellis's daughter to school, returned and went to sleep until approximately 2:30 p.m. He saw Little Thomas's condition and called 911.

Darthart said he had last disciplined Little Thomas about two weeks earlier but he had used his hand "cause [Little Thomas's] booty was like cut up. So I know, and you can see the markings that you know had been there for a minute." Darthart said that most recently Ellis had whipped Little Thomas with a paddle five times because he had soiled himself. Afterward, Darthart sent Little Thomas to stand in a corner. Darthart said Little Thomas "use[d] to ram his head into the wall" "because [Little Thomas] was mad or whatever" and that was how he got the head bruises. About a week earlier, Ellis had pointed out to him that Little Thomas's arm injuries were caused by them grabbing his arms when he ignored them.

Darthart explained how Little Thomas got some of his injuries: Ellis had whipped his bottom with a paddle because he had peed on himself. Darthart said he did not use a paddle on Little Thomas, only his hands. Further, Little Thomas liked to pick on the sores. Darthart knew Ellis had disciplined Little Thomas with a paddle, and said he "didn't have no problem with that, cause that was her discipline" as Little Thomas's care provider. Specifically, Darthart described "like permanent, like two circles" on Little Thomas's buttocks, clarifying, "[Ellis] said she whupped him the other day so, I have no problem with that. I have no problems with her having to disciplining [*sic*] Little Thomas D., and that's how it was."

Officer Espinoza said Darthart never cried during the interview or at any time that day. Rather, after the second interview, Darthart was giggling, joking and yelling repeatedly, "Set us free. Let my people go."

Autopsy

Dr. Steven Trenkle, a forensic pathologist, performed an autopsy on Little Thomas's body and summarized his findings regarding the cause of death: "I think he was beaten. At some time in the past he had been burned. He had been hit about the head multiple times, and at least in one instance he might have been pushed down and hit his head, or he might have been pushed against a solid object to cause the injuries I saw on the back of the head. And at some point, while he was still alive and breathing, he was under water and drowned. Whether that was intentional, I don't have a way of determining that."

Dr. Trenkle concluded hemorrhaging contributed to the death, stating, "There was a lot of hemorrhage associated with [Little Thomas's multiple injuries]. I didn't find much blood inside the organs of the body." Dr. Trenkle explained, "[Little Thomas] had lesions which should have bled a lot on his extremities where there was no blood at the scene and where that — that is one of the sort of the — a puzzling aspect of the case is if he was alive and had those holes in the back of his legs, there should have been blood everywhere, unless he had already bled out somewhere and then died and then was put in the bed."

Dr. Trenkle opined Little Thomas might have been injured during the week of his death, but other injuries were inflicted the day before he died. The burns on the back of

Little Thomas legs likely occurred more than three days before his death. Some of Little Thomas's injuries likely were painful; specifically, "Those large lesions on the back of both legs, on the back of the calves, behind the knees, over both buttocks, those are burns that — and they're like second degree burns. They're not like just a sunburn where the skin just gets red, but they're deeper than that. But they're — the nerve fibers, the nerve cells, the pain fibers are still intact. And so those would be quite painful at the time that it's incurred, whenever that injury [was] incurred and after that." Dr. Trenkle found in his internal examination that Little Thomas had suffered subdural hematoma, and had bruises on his forehead from impact. Little Thomas also had a contusion of the brain caused from either a blow to the back of his head or his head impacting some object.

The prosecutor asked Dr. Trenkle this hypothetical incorporating Darthart's explanation of Little Thomas's injuries: "[A]ssume in the late night on September 4[], that [Little] Thomas hit his eye on a wooden chair, [and afterwards] was placed in a bathtub, that he fell once in the bathtub, was found unconscious, was given CPR, was brought back to where he was responding or at least his eyes were open. Assume further that two nights before, he was spanked with that board, a hand, or a belt five times, assume that approximately ten days before that he slid down some bleachers at a park on his rear end, and assume that two weeks prior to his death that he was given five swats with that wooden paddle board. [¶] Are those explanations consistent with the injuries you saw?"

Dr. Trenkle disputed Darthart's explanation, responding, "[T]here are many more injuries than I think can be accounted for by those instances. I don't think you can get

those lesions on the back of his buttocks or his thighs by — by a scraping or abrading type of injury." Dr. Trenkle classified Little Thomas's manner of death as homicide.

A toxicology report showed Ellis's blood contained amphetamines, methamphetamine and marijuana at the time of her arrest.

Ellis's Trial Testimony and Defense

Ellis testified she was engaged to marry Darthart, and since June had cared for Little Thomas when Darthart was at work at a restaurant. However, she stopped in mid-August after Darthart got into an altercation with her, grabbed her hair and pushed her against the wall because he disliked how she talked to Little Thomas. Darthart threatened to kill her if she turned Little Thomas against him. Ellis testified that this incident caused her crying spell about which Gay had testified. Ellis admitted reconciling with Darthart after this incident. She did not inform Officer Espinoza about the altercation. The end of her caretaking duties coincided with the end of Darthart's restaurant job.

Ellis testified she had spanked Little Thomas on his buttocks five times, but denied hitting him with a paddle or a belt, or having told Officer Espinoza anything to that effect. On August 26, Ellis went to her mother's house and her family told her Little Thomas had injuries to his buttocks. Ellis acknowledged those injuries "were bad," although she regarded them as treatable. Little Thomas had a bruise on his rib and one on his upper arm, and Darthart said the bruises came from him snatching up Little Thomas. On August 28, Ellis saw Little Thomas's injuries from his fall at the ballpark but they seemed treatable to her. The night of September 4, she and Darthart disciplined Little Thomas by striking his chest three times with the palm of his hand, likely causing his

chest injuries. She conceded she did not tell Officer Espinoza about that because she loved Darthart and was covering up for him. She acknowledged she and Darthart were the only two adults at home with Little Thomas during the nine days before he died.

At trial, Ellis admitted making the paddle, claiming she sought to scare the children but not to discipline them. She told Officer Espinoza she had used methamphetamine about four days before Little Thomas's death. She confirmed that on September 5, Little Thomas was in the bed next to her; however, she did not check to see if he was okay because Darthart had checked. She had smoked marijuana and returned to bed.

Angel McGraw,³ Ellis's sister, spent approximately a year and a half living with Ellis, and she never saw Ellis hit Little Thomas. Ellis's other sister, Antranett, used to live with Ellis and never saw her hit Little Thomas. On August 26, Antranett was preparing to bathe Little Thomas and observed what appeared to be burn marks on his buttocks and a bruised wrist and rib. He had difficulty removing his pants because of his injuries. Little Thomas said about his injuries that "his daddy did it." She informed her brother, Reon Dean, and her mother, Linda, about the injuries but she never called the police.

Dean testified Little Thomas said his dad did the injuries, and Dean got extremely angry, cursed, yelled and had to leave his mother's home. Dean never contacted law

³ Ellis's sisters and mother share the same last name; accordingly, we refer to them by their first names to avoid confusion, and not out of disrespect.

enforcement authorities. He was aware Ellis was told about the injuries that day but he did not know whether she did any thing about it.

Linda saw Little Thomas's injuries on August 26, and he said his daddy did it. Linda telephoned Ellis, told her about the injuries, and encouraged her to leave Darthart and return to live at home. Linda never contacted law enforcement authorities about Little Thomas's injuries.

Darthart's Defense

Darthart's mother, Terri Tolliver, testified Little Thomas had lived with her from he was approximately 11 months old until approximately 5 months before he died. He was potty trained and happy when he lived with her. Darthart had a good relationship with Little Thomas, and she did not believe Darthart was capable of harming him.

Darthart's long-time friend, Harold Johnson, said Darthart and Little Thomas had a loving relationship. He never saw Darthart discipline Little Thomas, and did not believe Darthart would harm a child.

Darthart's sister, Latoya Darthart, said Darthart was a good parent to Little Thomas and she never saw him discipline him. Darthart was never physically violent with anyone in their household.

Dale Somers, a toxicologist, tested Ellis's blood, which contained amphetamines and cannabinoids. He also described behavior exhibited by someone under the influence of methamphetamine.

DISCUSSION

I.

Darthart contends the trial court erroneously admitted into evidence his first police interview in violation of *Miranda*.

Background

In pre-trial proceedings, Darthart sought to exclude from evidence his first interview with Officer Espinoza, arguing it violated *Miranda* and possibly had legal consequences for the admissibility of the second, post-*Miranda* interview. During proceedings in limine regarding the circumstances of Darthart's first interview, his testimony was consistent with Officer Espinoza's regarding several material points. Darthart admitted he voluntarily went to the police annex, was never placed under arrest or handcuffed, remained alone in the annex lobby during Ellis's interview, and nothing or no one impeded him from walking outside, for example to get some fresh air, while he awaited a ride home from the police department. Darthart confirmed that when Ellis and he went outside the annex to smoke, they walked away from the annex to speak privately. Within five minutes, before they could finish their cigarettes, the detectives arrested them.

After the court heard testimony from Officer Espinoza and Darthart and counsels' arguments, it concluded Darthart had voluntarily accepted Officer Espinoza's invitation to be transported to the annex, and was not in custody during the first interview. The court noted Darthart could have told Officer Espinoza, "My child just died, I need some time, you know, this is not a good time, can we talk later," but he did not. Further, Officer

Espinoza was polite to Darthart at the annex, sympathizing with him and inquiring about the circumstances of Little Thomas's death. Throughout the interview, he treated Darthart as a witness and not as a suspect. Afterwards, Darthart was allowed to smoke and Ellis was allowed to join him. Darthart was waiting for a ride back home, thus indicating he did not feel he was under arrest or impeded from leaving the annex.

Applicable Law

A person interrogated by law enforcement officers after being taken into custody must first be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him and that he has a right to the presence of an attorney, either retained or appointed. (*Miranda, supra*, 384 U.S. 436.) Statements taken in violation of this rule are generally inadmissible. (*Stansbury v. California* (1994) 511 U.S. 318, 322.)

The determination whether a statement is coerced or voluntary does not turn on any one fact, no matter how apparently significant, but rather on the totality of the circumstances. (*People v. Neal* (2003) 31 Cal.4th 63, 79.) The essential question with respect to voluntariness is whether the defendant did not freely choose to confess because influences were brought to bear which overpowered his will to resist. (*People v. McWhorter* (2009) 47 Cal.4th 318, 347 (*McWhorter*)). Where the facts are undisputed, we review a trial court's determination that a confession was voluntary independently, "in light of the record in its entirety, including "all the surrounding circumstances — both the characteristics of the accused and the details of the [encounter]" " (*People v. Neal, supra*, at p. 80; see also *McWhorter, supra*, at pp. 346–347.)

It is the trial court's responsibility to resolve disputed facts about the circumstances surrounding the challenged statement and then determine whether the protections of *Miranda's* admonitions were required. On appeal, this court must accept the trial court's resolution of disputed facts, including the credibility of witnesses, as long as that resolution is supported by substantial evidence. " 'Considering those facts, as found, together with the undisputed facts, we independently determine whether the challenged statement was obtained in violation of *Miranda's* rules.' " (*People v. Farnam* (2002) 28 Cal.4th 107, 178.)

The pivotal determination here is whether a reasonable person in appellant's position would have felt he was in custody. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442; *People v. Stansbury* (1995) 9 Cal.4th 824, 830.) The test for whether a defendant is in custody has been described as whether a reasonable person in that position would "have felt he or she was not at liberty to terminate the interrogation and leave." (*Thompson v. Keohane* (1995) 516 U.S. 99, 112.) "An accused is in custody when, even 'in the absence of an actual arrest, law enforcement officials act or speak in a manner that conveys the message that they would not permit the accused to leave.' " (*U.S. v. Kirsh* (2d Cir. 1995) 54 F.3d 1062, 1067.) Indicia of custody for *Miranda* purposes include: whether the suspect was formally arrested, what was communicated to the suspect about his detention, the length of the detention, the location, the ratio of officers to suspects, and the demeanor and nature of the officer's questioning. (See *People v. Lopez* (1985) 163 Cal.App.3d 602, 608 (*Lopez*.)

"Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495.) "[A] police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear on the question whether the individual is in custody for purposes of *Miranda*." (*Stansbury v. California, supra*, 511 U.S. at p. 324.)

A statement obtained in violation of *Miranda* is itself not admissible. However, as long as the first statement was neither obtained through a deliberate violation of *Miranda* nor through coercive means, a subsequent, *Mirandized* statement is generally admissible if it is itself voluntary. (*Oregon v. Elstad* (1985) 470 U.S. 298, 309, 318; see also *Missouri v. Seibert* (2004) 542 U.S. 600, 619–622 (conc. opn. of Kennedy, J.)) If the first statement was actually the product of unconstitutional coercion, a second statement may be inadmissible, even if *Miranda* warnings were given, if under the totality of the circumstances, the court concludes that the second confession has been obtained by exploitation of the original illegality rather than in a manner which dissipates the taint. (*McWhorter, supra*, 47 Cal.4th at p. 360.)

Here, the court's finding that Darthart voluntarily went to the police interview is supported by sufficient evidence in the form of testimony from Officer Espinoza and Darthart. Based on an analysis of the *Lopez* factors, we conclude Darthart was not in custody during the first interview. Darthart agreed to go to the police annex. He was not handcuffed on the way there or before his arrest. He was not arrested before the first

interview. He was not interviewed by Officer Espinoza together with other police officers before his arrest. Officer Espinoza told him he was free to leave. Darthart testified Officer Espinoza did not ask him coercive questions. The officer treated Darthart kindly during the interview, offering him something to drink and sympathizing with him. Officer Espinoza did not use an aggressive or confrontational tone of voice with Darthart, and granted him a break to smoke outside the building. Following his interview, and while Ellis was being interviewed, nothing or no one impeded Darthart from leaving the annex while he awaited a ride back home. When Ellis joined him in the yard for a cigarette, they were free to talk away from the presence of the police briefly.

Having concluded Darthart's first interview was non-custodial and did not violate *Miranda*, we have no reason to review the second interview, which was preceded by *Miranda* warnings and which Darthart gave voluntarily.

II.

Ellis challenges the sufficiency of the evidence supporting the true finding on the torture-murder special circumstance under section 190.2, subdivision (a)(18). She first concedes, "There is no question in this case that [Little Thomas] was subjected to considerable abuse and that that abuse was the cause of his death. There is also little doubt that Darthart and Ellis were responsible for that abuse, Ellis most likely having been an aider and abettor by virtue of her having not intervened, as she was required by law to do, in the abuse she saw inflicted upon [Little Thomas]." Ellis continues, "[I]t is imperative that this court examine the instant record for evidence of [her] state of mind. And to this end, while there is certainly evidence of abuse, or of the failure to intervene in

the abuse, there is nothing indicating Ellis intended to cause extreme suffering on [Little Thomas] for sadistic reasons. Indeed, there was no record whatsoever of child abuse in the home prior to [Little] Thomas's death and by all other indications, Ellis was a caring and responsible mother to both [Little Thomas] and her daughter." Darthart joins in the challenge.

Here, the prosecution tried the case under the theory that defendants committed first degree murder of felony murder torture.⁴

"The law governing sufficiency-of-the-evidence challenges is well established and applies both to convictions and special circumstance findings. [Citations.] In reviewing a claim for sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or special circumstance beyond a reasonable doubt. We review the entire record in the light most favorable to the

⁴ The jury was instructed with CALCRIM No. 540A: "The defendant is charged in Count 1 with murder, under a theory of felony murder. To prove that the defendant is guilty of first degree murder under this theory, the People must prove that: 1. The defendant committed or attempted to commit torture; 2. The defendant intended to commit torture; AND 3. While committing or attempting to commit torture, the defendant did an act that caused the death of another person. A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent. To decide whether the defendant committed or attempted to commit torture, please refer to the separate instructions that I will give you on that crime. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder. The defendant must have intended to commit the felony of torture before or at the time of the act causing the death. It is not required that the person die immediately, as long as the act causing the death and the felony are part of one continuous transaction." The court also instructed the jury with CALCRIM No. 540B, regarding coparticipant aiding and abetting of torture.

judgment below to determine whether it discloses sufficient evidence — that is, evidence that is reasonable, credible, and of solid value — supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Jennings* (2010) 50 Cal.4th 616, 638-639.)

"Under the applicable statute, first degree murder is punishable by death or life in prison if the murder 'was intentional and involved the infliction of torture.' (§ 190.2, subd. (a)(18).) Proof of a murder committed under the torture-murder special circumstance requires (1) proof of first degree murder, (2) proof that the defendant intended to kill and torture the victim, and (3) proof of the infliction of an extremely painful act upon a living victim. [Citation.] The torture-murder special circumstance thus is distinguished from first degree murder by torture in that it requires defendant to have acted with the intent to kill and applies where the death involved the infliction of torture, regardless of whether the acts constituting the torture were the cause of death." (*People v. Jennings, supra*, 50 Cal.4th at p. 647.)

The California Supreme Court stated, "[F]or purposes of proving murder by torture, the intent to inflict extreme pain 'may be inferred from the circumstances of the crime, the nature of the killing, and the condition of the victim's body.' [Citation.] But

we also have 'cautioned against giving undue weight to the severity of the victim's wounds, as horrible wounds may be as consistent with a killing in the heat of passion, in an "explosion of violence," as with the intent to inflict cruel suffering.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1213-1214 (*Cole*)). "It does not follow, however, that because the severity of the victim's wounds is not necessarily determinative of the defendant's intent to torture, the nature of the victim's wounds cannot as a matter of law be probative of intent. Intent is a state of mind. A defendant's state of mind must, in the absence of the defendant's own statements, be established by the circumstances surrounding the commission of the offense. [Citation.] The condition of the victim's body may establish circumstantial evidence of the requisite intent." (*People v. Mincey* (1992) 2 Cal.4th 408, 433.)

"First degree felony murder does not require proof of a strict causal relation between the felony and the homicide, and the homicide is committed in the perpetration of the felony if the killing and the felony are parts of one continuous transaction." (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1016.) Here, the court instructed the jury regarding aiding and abetting, including with CALCRIM Nos. 400 and 401. "[T]he dividing line between the actual perpetrator and the aider and abettor is often blurred. It is often an oversimplification to describe one person as the actual perpetrator and the other as the aider and abettor. When two or more persons commit a crime together, both may act in part as the actual perpetrator *and* in part as the aider and abettor of the other, who also acts in part as an actual perpetrator." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120.)

The forensic pathologist's testimony was crucial in establishing Little Thomas was tortured, his injuries were inflicted over several days, and his varied injuries covered several parts of his body. He received scrapes, bruises, burns, subdural hematoma, suffered from massive bleeding and drowned. He suffered pain from his injuries. Ellis admitted she and Darthart had exclusive custody of him at least nine days before his death. They both admitted whipping Little Thomas, and both were aware the other also whipped him. Darthart approved of Ellis's discipline, notwithstanding his claim that following that discipline, Little Thomas's "booty was like cut up." Darthart also said he and Ellis discussed that they bruised Little Thomas's arm by tugging at him.

Ellis admitted knowing of Little Thomas's injuries from as early as August 26, when her mother pointed them out to her. Those injuries were so severe that they angered Ellis's brother and all her family members who saw them. Nevertheless, Ellis did not get medical help for Little Thomas or report his injuries to the authorities. Ellis complained to Gay that Little Thomas said he hated her, and would not heed her. Ellis's prolonged crying at Gay's house the day before Little Thomas died, coupled with her decision to leave the children at home while they went shopping for cleaning agents, despite Gay's disapproval of that decision to leave the children unattended, reasonably could cause the jury to infer that Ellis and Darthart knew Little Thomas's condition was deteriorating, and they did not want Gay or anyone else to see Little Thomas, or to know about his injuries on the eve of his birthday. Ellis stated she had punished Little Thomas for peeing and soiling himself. Despite indicating to Officer Espinoza she knew her answers to his questions would likely be used against her, she admitted disciplining Little

Thomas with a belt. Further, Ellis disapproved of Little Thomas wetting and soiling himself, and believed he had "the devil in him"; based on that, a jury reasonably could infer she hit him with the requisite intent to "cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose." (*People v. Mungia* (2008) 44 Cal.4th 1101, 1136)

The jury could have reasonably disbelieved Ellis's story regarding the altercation with Darthart, which purportedly resulted in her removal as Little Thomas's caretaker, because she continued living with Darthart afterwards. Further, she did not report that incident to the police at any time before trial, despite the fact such disclosure could have assisted the police investigation and might have been exculpatory. Ellis evinced consciousness of guilt by withholding such critical information from the police.

The jury also heard that neither Darthart nor Ellis reacted with remorse while the medical personnel were at their home and declared Little Thomas dead, or afterwards during the interview with Officer Espinoza. The jury could conclude that Darthart's prolonged giggling and statements to "set my people free" appeared inappropriate under the circumstances, and evinced consciousness of guilt. We conclude that based on the totality of the circumstances, the jury reasonably could infer that both defendants were guilty of torture-murder special circumstance.

Appellants rely on other cases involving gruesome facts, in which the court concluded there was insufficient grounds for a finding of torture-murder special circumstance: *People v. Mungia, supra*, 44 Cal.4th 1101; *People v. Tubby* (1949) 34 Cal.2d 72; *People v. Steger* (1976) 16 Cal.3d 539; *People v. Walkey* (1986) 177

Cal.App.3d 268. These cases do not alter our conclusion that the evidence here was sufficient. As this court has stated, "We agree that a comparison to the facts in other cases is of little value in assessing the sufficiency of the evidence in a particular case." (*People v. Pre* (2004) 117 Cal.App.4th 413, 423.)

III.

Ellis contends admission of Darthart's out-of-court statements to police as described above violated her confrontation rights under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*), and *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).

The United States Supreme Court held in *Crawford* that the confrontation clause of the Sixth Amendment of the federal Constitution prohibits "testimonial hearsay" from being admitted into evidence against a defendant in a criminal trial unless (1) the declarant is unavailable as a witness and the defendant has had a prior opportunity to cross-examine him or her, or (2) the declarant appears for cross-examination at trial. (*Crawford, supra*, 541 U.S. at pp. 53, 59 & fn. 9.)

Aranda and *Bruton* stand for the proposition that a "nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120–1121.) The People concede the trial court erroneously admitted Darthart's extrajudicial statements, but claim the error was harmless beyond a reasonable doubt in light of the overwhelming evidence against Ellis.

The trial court addressed the *Aranda-Bruton* issue in a pre-trial motion in limine and ruled that those cases did not apply because both Darthart and Ellis had a duty to care for Little Thomas, and any statement by one caretaker implicating the other would also be a statement against penal interest and therefore subject to traditional hearsay rules. The court, relying on *People v. Greenberger* (1997) 58 Cal.App.4th 298, later ruled that although Darthart's statements inculcated Ellis, they were also self-incriminating: "[Darthart's] not shifting blame, rather he's sharing blame. He's not sharing blame in my view to mitigate his own actions." The court concluded, "[I]n no way do I see [Darthart's] answers here lack trustworthiness in that he's trying to put it on another person. He's saying what he observed, what he and they did."

With the parties' consent, the court gave the jury a limiting instruction: "You have heard evidence that Defendant Thomas Darthart made statements out of court. You may consider that evidence only against him, not against any other defendant. ¶ You have heard evidence that Defendant Moy Ellis made statements out of court. You may consider that evidence only against her, not against any other defendant."

Even assuming the trial court's admission of Darthart's extrajudicial statements violated Ellis's constitutional rights, we agree any error was harmless beyond a reasonable doubt. (*People v. Jennings, supra*, 50 Cal.4th at p. 652 [standard of review for *Crawford* error].)

In the context of a new trial motion brought on grounds the court erroneously admitted into evidence Darthart's statements, which the trial court denied, it analyzed Ellis's statements alone, and concluded any error in admitting Darthart's extrajudicial

statements was harmless: "Let's say that the jury shouldn't have had that *Miranda* statement from Mr. Darthart. So let's peel that away, for argument's sake, and consider the evidence that . . . was offered against Ms. Ellis by her own mouth. Not just when she testified and was impeached with prior statements, but also when she chose to take the witness stand. [¶] She was dishonest with law enforcement when she was interviewed. And eventually came clean about a paddle. She was initially dishonest about disciplining the child or using physical hands or a paddle. She eventually came clean about that. She admitted she was personally present and did indeed discipline the child. That she was a caretaker for the child. [¶] She admitted a variety of things that put her in the place to protect [L]ittle Thomas. I think, even if you were to peel away that piece of evidence offered against Mr. Darthart, that based on the evidence that Ms. Ellis from her own mouth provided law enforcement, as well as other witnesses provided to law enforcement. I think that she still would have been convicted for this crime."

We agree with the trial court. Darthart's and Ellis's statements to the police were similar on material points. Accordingly, Ellis's statements in the police interview, taken with the forensic and other evidence — including Gay's testimony Ellis believed Little Thomas had the devil in him, and that he had said he did not have to do what she said — would have supported her conviction. Ellis told Officer Espinoza she was Little Thomas's caretaker and spent a good deal of time with him when Darthart was at work. She was at the crime scene during the critical days before Little Thomas died. She admitted to having a five-hit rule that she used to discipline the three-year-old boy with a paddle and belt for no other reason than that he had soiled himself.

In an attempt to distinguish their two statements, Ellis challenges Darthart's claim in his opening brief that they both told police they "spanked" and "disciplined" Little Thomas, clarifying that Darthart said to police that Ellis would "whip" or "whup" the baby. Ellis argues, "To be sure, to hear that a parent has whipped a young child, as opposed to spanked or disciplined the child, would certainly have a far more deleterious effect, as whipping someone sounds considerably more serious than spanking or disciplining." Ellis cites no reference for that assertion, which we conclude is merely speculative, and therefore we need not credit it.

IV.

Ellis contends her trial counsel provided ineffective assistance by failing to move either for severance of the defendants' trials or separate juries because Darthart's extrajudicial statements were "extremely detrimental to [her] case."

As the California Supreme Court has observed: "The Legislature has expressed a preference for joint trials. [Citation.] Section 1098 states that multiple defendants jointly charged with a felony offense 'must be tried jointly, unless the court order[s] separate trials.' This rule applies to defendants charged with 'common crimes involving common events and victims.'" " (*People v. Carasi* (2008) 44 Cal.4th 1263, 1296.)

Under section 1098, "a trial court *must* order a joint trial as the 'rule' and *may* order separate trials only as an 'exception.'" (*People v. Alvarez* (1996) 14 Cal.4th 155, 190.)

We review a trial court's ruling on a severance motion for abuse of discretion — "a deferential standard based on the facts as they appeared when the ruling was made."

(*People v. Carasi, supra*, 44 Cal.4th at p. 1296.)

A severance ruling that was "correct when made will stand unless joinder causes such ' " 'gross unfairness' " 'as to violate defendant's due process rights." (*People v. Carasi, supra*, 44 Cal.4th at p. 1296.) "Even if the court abused its discretion in refusing to sever, reversal is unwarranted unless, to a reasonable probability, defendant would have received a more favorable result in a separate trial." (*People v. Avila* (2006) 38 Cal.4th 491, 575.)

When a claim of ineffective assistance of counsel is based on counsel's failure to make a motion, the defendant must show that had reasonably competent counsel made such a motion, it would have been successful. (See *People v. Grant* (1988) 45 Cal.3d 829, 864–865.) A defendant seeking relief on the basis of ineffective assistance of counsel must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. (*People v. Fosselman* (1983) 33 Cal.3d 572, 584; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-696 (*Strickland*).) It is not necessary to determine whether counsel's challenged action was professionally unreasonable in every case, however. If the reviewing court can resolve the ineffective assistance claim by first deciding whether there is a reasonable probability that the outcome would have been different absent counsel's challenged actions or omissions, it may do so. (*Strickland*, at p. 697.)

We conclude that if defense counsel had made a severance motion, the trial court would have granted it based on its comments on the issue in the context of Ellis's new

trial motion: "[T]he only thing I can see is maybe a tactical thing on counsel's part to not move to separate this . . . or not flush this out at the beginning of trial and ask for separate juries, because that probably would have been the appropriate way to handle it if counsel was that concerned about [Ellis's] rights. [¶] In my mind, as a trial court judge, there is no way I could see keeping out Mr. Darthart's statement about what a co-caretaker did in the case when this type of crime is maybe one of omission or commission. It could be either way as a parent. Because if he was aware of the abuse that was going on and failed to protect, or improper discipline or failed to protect or failed to call doctors, just by being aware, this is all indicative of his state of mind. Which is to this state of guilt, if you will. [¶] So my mind, I would be depriving the jury of information they would need in order to consider whether or not Mr. Darthart is guilty of the crime alleged. And it would seem unfair for me to do that. *So it seems to me the better practice would have been to ask for a separate jury where they wouldn't have heard that statement.* But that motion wasn't made before trial for a separate jury." (Emphasis added.)

Nevertheless, we conclude any error was harmless because it is not reasonably likely Ellis would have achieved a better outcome if the cases had been separately tried. It appears to us Ellis's counsel made a tactical decision to have a joint trial because Darthart's extrajudicial statements that he had no problem with her discipline of Little Thomas favored her. Further, Ellis's own statements, combined with the forensic evidence and other evidence outlined above, overwhelmingly support Ellis's conviction. The claim of ineffective assistance of counsel lacks merit in light of our conclusion Ellis has failed to establish any merit to her substantive claims or prejudice from the alleged

errors. (*People v. Price* (1991) 1 Cal.4th 324, 440, superseded by statute as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.)

V.

A.

Appellants contend "a premeditated and deliberated [*sic*] intent to inflict prolonged pain should, as a matter of law, be a required element of section 206 torture, at least as used in section 189, even though not expressly contained in the words of the provision."

The California Supreme Court has rejected this notion: "Contrary to defendant's argument, *premeditated and deliberate* intent to torture is not an element of the torture-murder special circumstance." (*Cole, supra*, 33 Cal.4th at pp. 1227-1228; accord, (*People v. Pre, supra*, 117 Cal.App.4th at p. 420 ["The intent required for a conviction of the offense contained in section 206 differs from the intent required for murder by torture since the torture offense in section 206 does not require that the defendant act with premeditation or deliberation or that the defendant have an intent to inflict *prolonged* pain"]; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1204, ["[S]ection 189 does not itself define the crime of murder by torture" whereas "virtually the entire text of section 206 defines the crime of torture, and the statutory language does not require the intent to inflict prolonged pain."].)

B.

Appellants contend that torture is defined differently in CALCRIM No. 540A and for purposes of torture felony murder than it is defined for the crime of murder by torture,

thus making the former a lesser included offense of the latter.⁵ They note section 189 was revised to include section 206 (torture) as one of the enumerated felonies defining first degree murder; accordingly they conclude, "murder by torture as a separate theory of guilt has been rendered moot and meaningless, having been effectively eliminated from the Penal Code — albeit without any indication of this having been the desired intent by either the voters or the legislature."

Initially, we note that appellants forfeited this alleged instructional error by failing to raise it in the trial court. (See *People v. Bolin* (1998) 18 Cal.4th 297, 328 [finding forfeiture when "[t]he instruction correctly states the law, and defendant did not request clarification or amplification" at trial]; *People v. Ledesma* (2006) 39 Cal.4th 641, 697 [same].) Nevertheless, we review the merits of his contention to forestall any claim of ineffective assistance of counsel.

We reject the unsupported contention that murder by torture and felony murder torture, which appellants correctly recognize have similar, albeit not identical, elements, cannot coexist as different theories of first degree murder. The Legislature has spoken on this subject, and it is not for this court to rewrite the law. (See *People v. Green* (1982) 130 Cal.App.3d 1, 8-9, fn. 6 [noting it was not within the court's province to change existing law regarding the requisite intent for aiding and abetting].) In any event, we perceive no unfairness or constitutional infirmity merely because the Legislature has

⁵ The court also instructed the jury with CALCRIM No 810 regarding torture as defined in section 206.

adopted slightly different elements to establish each crime, both of which lead to first degree murder under section 189.

The California Supreme Court has stated that felony murder and murder with express or implied malice have different elements but " 'there is but a single statutory offense of murder. . . . "Felony murder and premeditated murder are not distinct crimes." ' " (*People v. Brasure* (2008) 42 Cal.4th 1037, 1057.)

C.

Appellants contend the court erroneously instructed with CALCRIM Nos. 703⁶ and 733⁷ because "however otherwise appropriate that instruction is as to accomplices in

⁶ CALCRIM No. 703 provides: "If you decide that a defendant is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstance of [section 190.2, subdivision (a)(18)] Infliction of Torture, you must also decide whether the defendant acted either with intent to kill or with reckless indifference to human life. In order to prove this special circumstance for a defendant who is not the actual killer but who is guilty of first degree murder as an aider and abettor, the People must prove either that the defendant intended to kill, or the People must prove all of the following: 1. The defendant's participation in the crime began before or during the killing; 2. The defendant was a major participant in the crime; AND 3. When the defendant participated in the crime, he or she acted with reckless indifference to human life. A person *acts with reckless indifference to human life* when he or she knowingly engages in criminal activity that he or she knows involves a grave risk of death. The People do not have to prove that the actual killer acted with intent to

the special circumstance setting, it is not appropriate where the torture-murder special circumstance is alleged pursuant to section 190.2, subdivision (a)(18) [because] the torture-murder special circumstance provision expressly requires that the defendant have intended to kill, whereas the accomplice instruction (CALCRIM [No.] 703) says that no intent is required."

The People concede the error, but claim it was harmless beyond a reasonable doubt because "while the prosecutor did not correct the conflict in the instructions and neither defense counsel addressed the special circumstance elements, the jury expressed no confusion and returned no acquittals. Moreover, there was no confusion as to the necessity of finding an[] intent to torture to return the first degree murder findings.

kill or with reckless indifference to human life in order for the special circumstance of Infliction of Torture [section 190.2, subdivision (a)(18)] to be true. If you decide the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer, then, in order to find this special circumstance true, you must find either that the defendant acted with intent to kill or you must find that the defendant acted with reckless indifference to human life and was a major participant in the crime. If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that he or she acted with either the intent to kill or with reckless indifference to human life and was a major participant in the crime for the special circumstance of Infliction of Torture [section 190.2, subdivision (a)(18)] to be true. If the People have not met this burden, you must find the special circumstance has not been proved true for that defendant."

⁷ CALCRIM No. 733 provides: "The defendants are charged with the special circumstance of murder involving the infliction of torture in violation of [section 190.2, subdivision (a)(18)]. To prove that this special circumstance is true, the People must prove that: 1. The defendant intended to kill [Little Thomas]; 2 The defendant also intended to inflict extreme physical pain and suffering on [Little Thomas] while that person was still alive; 3 The defendant intended to inflict such pain and suffering on [Little Thomas] for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason; AND 4. The defendant did an act involving the infliction of extreme physical pain and suffering on [Little Thomas]. There is no requirement that the person killed be aware of the pain."

Additionally, the case involved overwhelming evidence of an intent to kill. These appellants battered and burned a three-year old victim for several days, bled him, burne[d] him, then extinguished what little life he had left by drowning him. These acts manifested an unmistakable intent to kill."

This type of error violates the United States Constitution and therefore is reviewed under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, which requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman*, at p. 24.) "To say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous." (*Yates v. Evatt* (1991) 500 U.S. 391, 403 (*Yates*), disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates*, at p. 403.) "[T]he appropriate inquiry is 'not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" (*People v. Quartermain* (1997) 16 Cal.4th 600, 621; accord, *People v. Neal* (2003) 31 Cal.4th 63, 86.)

As noted, there was overwhelming evidence of appellants' guilt; accordingly, any alleged instructional error was harmless beyond a reasonable doubt.

VI.

Appellants contend the trial court improperly dismissed a potential juror for cause solely because he could neither read nor write, arguing that the right to trial by a jury drawn from a representative cross-section of the community is guaranteed under the federal and state constitutions. They concede that the issue is forfeited on appeal because they stipulated to the juror's dismissal, but they nonetheless invite us to address the matter on the merits. We decline to do so.

The below colloquy sets forth the court's discovery the potential juror was illiterate and the parties' agreement to dismiss him for cause:

"The Court: . . . [A Juror] approached . . . Deputy Alcantara on the way up or outside the jury room. He was a little embarrassed, and he indicated he could not read or write. And at this time my thought was that we would go ahead and excuse him. [¶] Does counsel have an objection to excusing this juror?"

[Ellis's counsel]: I don't. No, I don't think we can excuse — argue against it because the statute allows that, I mean, requires that you excuse him if they can't read or write or understand.

[The prosecutor]: No, I don't.

[Ellis's counsel]: Or understand English.

[Darthart's counsel]: I don't object.

The Court: Okay. All right. Just making sure. All right. So he's excused for cause."

We conclude that in light of the parties' agreement that the court should dismiss the juror, any error was invited. (*People v. Seaton* (2001) 26 Cal.4th 598, 639 ["[a]ny error, however, was invited by defense counsel, who stipulated that the court could excuse [a juror]"]; *People v. Ervin* (2000) 22 Cal.4th 48,73 ["criminal convictions [are not to be] overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced"].)

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.