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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RYAN CHRISTOPHER MICKEY,

Defendant and Appellant.

D057966

(Super. Ct. No. SWF015286)

APPEAL from a judgment of the Superior Court of Riverside County, F. Paul Dickerson III, Judge. Affirmed in part; reversed in part.

A jury acquitted Ryan Christopher Mickey of murder but convicted him of the lesser-included offense of voluntary manslaughter (Pen. Code,¹ § 192, subd. (a); count 1) and of assault on a child causing death (§ 273ab; count 2). The trial court sentenced

¹ Unless otherwise noted, all statutory references are to the Penal Code.

Mickey to prison for 25 years to life on count 2 and stayed the sentence under section 654 on count 1.

Mickey contends his conviction on count 1 must be reversed because he was acquitted of murder and because the People concede there was no evidence of provocation to support his conviction for the lesser included offense of voluntary manslaughter. He further contends that because there is a lack of evidence to support provocation, count 1 must be dismissed rather than retried.

Mickey also contends his conviction on count 2 must be reversed because of the lack of evidence of provocation on *count 1* and because the trial court prejudicially erred during jury deliberations in responding to notes from the jury that he claims coerced a verdict and by admitting evidence he became violent and belligerent when he drank alcohol heavily.

As we explain, we reverse Mickey's voluntary manslaughter conviction on count 1 and order that count dismissed. In all other respects, we affirm the judgment of conviction.

FACTUAL AND PROCEDURAL OVERVIEW²

The victim in this case was a toddler named K., who was 16 months old when she died in early February 2006 in Mickey's care. Jennifer B. was K.'s mother. K.'s father was Nick B., who was incarcerated at the time of K.'s death.

Jennifer testified that she and K. initially lived with Jennifer's mother, Denise P., and Jennifer's little brother. When K. was about a year old, Jennifer and her daughter moved into a house in Temecula. Jennifer asked her mother for help caring for K. because Jennifer was struggling financially and because she was working a lot of hours in a restaurant and believed her daughter needed more of a set schedule.

About the same time Jennifer and K. moved to Temecula, Jennifer and Mickey met at a party. Jennifer was still married to Nick when she met Mickey. Jennifer told Mickey her husband was incarcerated. Mickey at the time was living in Hawaii. About a month after they met, Mickey moved in with his parents, close to where Jennifer lived. Not long after, Mickey moved into the Temecula house with Jennifer.

² We view the evidence in the light most favorable to the judgment of conviction. (See *People v. Osband* (1996) 13 Cal.4th 622, 690.) Certain portions of the factual and procedural history related to Mickey's claims are discussed *post*, in connection with those issues. Because we reverse and dismiss count 1 and because Mickey does not, as we discuss *post*, *directly* challenge count 2 for lack of substantial evidence, we set forth a relatively brief overview of the facts of this case.

At that time, K. would stay with Denise when Jennifer was at work. When Denise worked, Nancy H. took care of K. On days Jennifer did not work, and on some weekends, K. would stay with Jennifer in the Temecula house.

A few weeks after Mickey and Jennifer began living together in the Temecula house, Mickey agreed to help babysit K. on the days the child was not with Denise. Jennifer was happy with this arrangement because it allowed her to see K. more often.

Mickey and Jennifer left the Temecula house and moved in with Mickey's parents, Gary and Rosan M. About a month later, they rented a room together in a house in Murietta where a friend of Jennifer lived. On the days that K. was not being cared for by Denise and Nancy, K. would be cared for by Jennifer, Nick's mother, Jennifer's grandmother and/or Mickey.

A. K.'s Death

In the days leading up to her untimely death, K. had been sick with flu-like symptoms. When Jennifer picked up K. from Nancy's house on Wednesday, February 1, 2006, Nancy told Jennifer that K. was running a fever, pulling at her ear and experiencing cold-like symptoms. Nancy testified that K. was sleeping more than usual that week, including on that Wednesday, and that the child had a bad cold.

Jennifer took K. to the pediatrician the next day, Thursday, February 2. K. was seen by a nurse practitioner who diagnosed K. with the stomach flu but found the child was properly hydrated and otherwise normal. The nurse practitioner told Jennifer her daughter should avoid dairy products until she felt better.

On Friday, February 3, Jennifer watched K. until about 3:00 p.m. Jennifer then took K. to Mickey's mother's house because Jennifer had to work. Although K. was still sick that day, Jennifer described the child as "alert." Rosan testified that K. slept after Jennifer left for work, and further that K. had no marks, bruises or scratches on her face that day.

Jennifer worked until about 11:00 p.m. on February 3. Mickey, along with K., picked up Jennifer from work, they returned to the Murietta house and they went to bed. During the night, K. awakened and cried out for Jennifer, who responded by giving K. a bottle filled with milk. K. took the bottle and went back to sleep.

The next day, Saturday, Mickey drove Jennifer to work in the late morning. K. was sleeping in the car as they drove. A little later that day, Rosan called Jennifer at work and asked if K. had asthma. When Jennifer responded K. did not have asthma, Rosan told Jennifer that K. was not breathing and that she had told her son Mickey to call 9-1-1. Jennifer hung up the restaurant phone and called Mickey, who confirmed that K. was not breathing.

While Jennifer, in a panic, was attempting to arrange a ride home, Mickey's mother arrived at the restaurant and drove Jennifer to the Murietta house. Jennifer asked to be dropped off a few houses away from the Murietta house in order to collect herself, because she was hysterical and because she did not want to interfere with emergency personnel as they tended to her daughter. When Jennifer arrived at the Murietta house, Rosan met her at the front door and told Jennifer that K. was "fine."

After dropping off Jennifer at work, Rosan testified that Mickey brought the child to her house. Rosan was in the garage when Mickey drove up with K. Rosan testified she saw Mickey get out of the car and then heard K. cry. Although Rosan did not see what happened, she understood that when Mickey took K. out of her car seat, she accidentally struck her head on the car door. Mickey took K. inside and put ice on K.'s right temple for about 10 minutes. Mickey next put a freezer icepack on K.'s temple for about another 10 minutes. Rosan saw that K. had a red mark on her right temple.

While K. slept in the guest bedroom, Mickey started calling car dealers about a car to replace the car he and Jennifer were renting. Rosan suggested he look for a car in Temecula and offered to watch K. Mickey declined and left his mother's house with K. at about 12:30 p.m.

Shortly thereafter, Mickey stopped at a gas station store near the Murietta house and purchased a 24-ounce can of beer. The gas station store clerk testified that in the month preceding K.'s death, Mickey would stop by the store about every other day to purchase a 24-ounce can of beer or cigarettes or sometimes both items.

About an hour later, K. stopped breathing. Police investigators determined that at 1:44 p.m. that day, a call was placed from Mickey's mobile phone to his mother. Police also determined that several other calls were made from Mickey's cell phone over the next several minutes until a phone call was made from his phone to 9-1-1 at 1:55 p.m.

Rosan testified her son Mickey called on Saturday afternoon hysterical and crying, and told her, " Mom, Mom, what do I do? [K.] isn't breathing. She has asthma and I

don't have the inhaler. They never brought it over. What do I do?' " In response, Rosan told Mickey to call 9-1-1. Rosan then called Jennifer at work and informed her that K. was not breathing. Rosan picked up Jennifer from work and together they drove to the Murietta home. On the drive over, Jennifer repeated, " 'No, no, why is this happening?' " and was visibly upset. When they got near the Murietta house, Jennifer got out of the car and Rosan drove up to the house where emergency vehicles were parked. Inside, emergency personnel were trying to revive K.

The dispatch logs regarding the 9-1-1 call from Mickey's mobile phone made at 1:55 p.m. on Saturday, February 4, show the reporting party called about a baby not breathing, dispatch did not know where the party was calling from and the "line disconnected." In response, 9-1-1 dispatch took the phone number used to make the initial report and called that number back a short time later. Dispatch records show dispatch initially was unable to reconnect with Mickey's phone, but ultimately was able to do so and obtain some very basic information regarding the location of the child. However, the log shows the line disconnected a second time and when dispatch called back, the call was placed into voicemail. Finally, the records show that emergency medical responders arrived at the Murietta house about 2:12 p.m.

Mark Rimmer, a firefighter/paramedic for Cal Fire, testified he was the first person to enter the Murietta house. Rimmer and his crew found K. lying on the floor in the front part of the house. Rimmer assessed K. and determined she was not breathing. He immediately noticed what he described as bruising and/or abrasions on K.'s forehead.

Rimmer described Mickey as "[n]ot panicked" while emergency personnel worked on K., although he noted Mickey at times whimpered and had "a little bit of [an] edge to [his] voice." When Rimmer asked Mickey what happened to the child, Mickey responded by providing "bits and pieces of different information," including telling Rimmer the child stopped breathing while being bathed. When Rimmer specifically asked Mickey how the child came to receive the injuries that were visible on the child's forehead, Mickey did not respond.

Paramedic Ryan Ellis testified he followed Rimmer into the house and saw a child, later identified as K., lying on the floor of the living room. The child appeared lifeless, her pupils were unresponsive to light and there was swelling, bruises and a "big lump" on the child's forehead.

Ellis testified that when he first asked Mickey what happened to the child, Mickey said, " 'I don't know.' " When Ellis repeated his question and asked Mickey what he saw, Mickey responded, " 'I tried to wake her up and she wouldn't wake up.' " When Ellis next asked Mickey about the bruising on K.'s forehead, Mickey paused for a few seconds and then said, " 'The door hit her.' " When Ellis asked him "What door?" Mickey pointed to the car parked outside and said, "That car."

After K. was transported to the hospital, police asked Mickey what happened to the child. Murietta Police Officer Dennis Vrooman testified that he spoke to Mickey outside the Murietta residence and that Mickey explained "he had given K. a bath upstairs, and that after the bath had dressed her out in her pajamas, if you will, and put a

clean diaper on her, and put her in the playpen. And then he was getting ready to take a shower himself. Walked out of the room, walked back into the room at some point a few minutes later, and smelled that [K.] had evidently pooped her diapers. [¶] So he then went to the playpen to pick her up, and he saw that—he described several different things that he had seen, that her lips were blue, she had difficulty breathing, she was vomiting, she had gotten limp, and that he attempted C.P.R. and that ultimately [he] called for 9-1-1, called emergency services."

Officer Vrooman also testified he asked Mickey "several times" who Mickey called first when he found K. unresponsive and Mickey told the officer he called 9-1-1 first and made at least four or five calls to emergency services from his mobile phone. Officer Vrooman described Mickey's behavior as "[f]luctuating," noting that Mickey at times "was calm and cooperative, and then he would show signs of worry." During their 15 minute conversation, Officer Vrooman detected the smell of alcohol on Mickey. However, Mickey "vehemently denied" he had been drinking alcohol.

In response, Officer Vrooman administered a preliminary alcohol screening test that established Mickey had a blood alcohol content of .050 percent. Officer Vrooman confronted Mickey with the test results and Mickey again denied he had been drinking any alcohol. Officer Vrooman re-administered the test and it showed Mickey with a blood alcohol content of .051 percent, which confirmed Officer Vrooman's suspicions that Mickey had in fact been drinking alcohol. Despite two positive tests for the presence of alcohol, Mickey continued to deny he used alcohol that day. With Rosan present,

Mickey, however, admitted to Officer Vrooman he smoked marijuana at about 8:00 or 8:30 a.m. that morning.

K. was treated at the emergency room at Rancho Springs Medical Center. Later that night, she was transported to what is now called Rady Children's Hospital in San Diego where she died the following afternoon.

B. Medical Findings Regarding K.'s Death

The medical and pathological findings showed that K. sustained traumatic injuries while under Mickey's exclusive care. Carl Murillo, M.D. was the emergency room physician who treated K. at Rancho Springs Medical Center on February 4, 2006. He testified he saw discolorations and bruising that spread from K.'s right temple, across her forehead, to her left temple and cheek; he also observed on both of K.'s cheeks the presence of petechia, a medical condition that results when small blood vessels are ruptured as the result of pressure on the skin or blood loss; and bilateral retinal hemorrhaging.

In addition, the CT scan showed blood between K.'s brain and skull. These findings were consistent with cardiac arrest. Dr. Murillo testified that, given K.'s injuries and her other physical symptoms including but not limited to her core body temperature, it appeared K.'s injuries were sustained within two hours of her arrival at the hospital and that her injuries were not caused by contact from a car door at 11:00 a.m. earlier that day.

Cynthia Louise Kuelbs, M.D., treated K. at Rady Children's Hospital on February 5, 2006. Dr. Kuelbs testified that when she first saw K. the child "had a bruise

on the corner of her left eye. . . . And she had some little kind of pinpoint areas of bleeding on the left side of her face. We call those petechia. They are just little pinpoint areas of blood. And then there were some circular bruises on her forehead, starting about in the midline and extending over to the right side, and on to her right cheek. And I put there are at least three of these that were about half a centimeter to a centimeter in diameter, about a half inch or so. She had some bruising on her left chin and then a bruise on her right forearm as well."

Dr. Kuelbs noted that K.'s CT scan showed "significant brain swelling" and "bleeding in the subarachnoid space" over "both cerebral convexities." Dr. Kuelbs also noted that the bleeding seen in the CT scan was more around the lobes of K.'s head farther back from the bruising on the outside of the child's face. Dr. Kuelbs testified that a CT scan of K.'s torso showed a laceration of her liver, fluid in the abdominal cavity and a hemorrhage on her adrenal gland on her left side. Dr. Kuelbs opined K.'s injuries were consistent with blunt force trauma, and these injuries led to brain swelling that resulted in cardio-pulmonary arrest and death.

Christopher Swalwell, M.D., was the pathologist who performed the autopsy of K. Dr. Swalwell testified he found multiple external bruises and contusions and a few abrasions around K.'s head and face and found myriad internal hemorrhages around the scalp and brain. Dr. Swalwell also testified he found hemorrhages to K.'s eyes and optic nerve and external bruising on her back with internal tears to the liver and adrenal gland.

Dr. Swalwell opined that all of K.'s injuries occurred at the same time; that they were "fresh or recent injuries," which caused K. to go into cardiac arrest immediately, or within a matter of minutes, after she sustained the injuries; and that all of the injuries were consistent with blunt force trauma, like a punch or kick.

C. Defense Evidence

A neuropathologist testified that slides from K.'s autopsy suggested there was an older layer of blood in K.'s brain. As a result, the expert opined that K. had sustained a brain injury days before she died. The expert further opined that because injury thresholds are lowered after a brain injury, K. began to re-bleed as a result of some lesser trauma, including possibly being hit in the head by a car door such as occurred on the morning of February 4 when K. accidentally struck her head as Mickey was taking her out of the car. This expert further testified that retinal hemorrhages could be caused by pressure in the brain and that liver lacerations could be caused by the use of improper CPR techniques.

A cardiologist testified that K. could not have survived longer than 10 minutes without breathing unless she had been given effective CPR. This expert further testified that K. died when she aspirated vomit during CPR, which caused respiratory and cardiac arrest.

A respiratory therapist testified that a child could sustain bruises from CPR, like those found on K.'s head, when a person uses "a little bit too much force" or when a person is positioning the child's head during CPR.³

DISCUSSION

A. Lack of Evidence of Provocation to Support Voluntary Manslaughter Conviction

Mickey contends, and the People concede, there was insufficient evidence of provocation to support his voluntary manslaughter conviction on count 1. The People nonetheless argue Mickey's voluntary manslaughter conviction should be affirmed because (1) Mickey "benefited" from the trial court's instruction on the lesser included offense of voluntary manslaughter, despite the lack of evidence of provocation, inasmuch as the "jury first had to determine that [Mickey] was guilty of murder and then reduce [that] crime to voluntary manslaughter due to provocation," and (2) an intentional killing without malice, committed during the course of an inherently dangerous assaultive felony, also allegedly constitutes voluntary manslaughter as discussed by this court in *People v. Bryant* (2011) 198 Cal.App.4th 134.

Turning initially to the People's second argument, shortly after the People filed their supplemental respondent's brief our Supreme Court granted review of *People v.*

³ Others witnesses also testified on behalf of the defense. We discuss their testimony and the testimony of the rebuttal witnesses *post*, to the extent their testimony is relevant to the issues raised by Mickey in this appeal.

Bryant (Nov. 16, 2001, No. S196365). Thus, *People v. Bryant* may not be cited as legal authority. (Cal. Rules of Court, rule 8.1115.) We note the People have cited no other authority for this "third theory of voluntary manslaughter" and thus we reject this theory as a basis to support Mickey's voluntary manslaughter conviction.

We likewise reject the People's first argument, which is primarily based on our Supreme Court's decision in *People v. Rios* (2000) 23 Cal.4th 450. There, defendant was acquitted of murder. On retrial, the jury convicted defendant of voluntary manslaughter "for a homicide the jury found to be both unlawful (i.e., neither justified nor excused) and intentional." (*Id.* at p. 453.) As relevant to the instant case, defendant in *People v. Rios* contended the trial court erred in instructing the jury on voluntary manslaughter because the instruction omitted that the killing "must have occurred in a heat of passion upon sufficient provocation" (*Id.* at p. 454.)

The Supreme Court in *People v. Rios* rejected defendant's contention, noting that defendant, in effect, was arguing to be acquitted of voluntary manslaughter even "if the jury believed he committed an intentional, unlawful killing, without provocation or belief in the need to defend himself." (*People v. Rios, supra*, 23 Cal.4th at p. 454.) The court explained that "neither heat of passion nor imperfect self-defense is an element of voluntary manslaughter that the People must affirmatively prove beyond reasonable doubt in order to obtain a conviction for that offense. Manslaughter is an unlawful killing without *malice*, the element necessary for the greater offense of murder. Malice may arise when one kills, without legal justification or excuse, and with specific lethal intent

or conscious indifference to the likelihood of death. However, provocation and imperfect self-defense, though they do not justify or excuse an intentional or consciously indifferent homicide, mitigate the offense by *negating the murder element of malice*, and thus *limit* the crime to manslaughter. By statute and long-standing case law, an intentional but nonmalicious criminal homicide is *voluntary* manslaughter but no lesser offense.

"Accordingly, where murder liability is at issue, evidence of heat of passion or imperfect self-defense bears on whether an intentional or consciously indifferent criminal homicide was malicious, and thus murder, or nonmalicious, and thus the lesser offense of voluntary manslaughter. In such cases, the People may have to prove the *absence* of provocation, or of any belief in the need for self-defense, in order to *establish the malice element of murder*.

"But malice is *not at issue* upon a charge of voluntary manslaughter; indeed, a manslaughter charge concedes the absence of the murder element of malice. Hence, a conviction of voluntary manslaughter is supported by proof and findings . . . that the homicide was unlawful and intentional. There is no additional need for the prosecution to establish that malice was lacking by reason of provocation or a belief in the need for self-defense." (*People v. Rios, supra*, 23 Cal.4th at p. 454.)

Thus, the court in *People v. Rios* held "that a conviction of voluntary manslaughter may be sustained *upon proof and findings that the defendant committed an unlawful and intentional homicide*. Provocation and imperfect self-defense are not additional elements of voluntary manslaughter which must be proved and found beyond reasonable doubt in

order to permit a conviction of that offense." (*People v. Rios, supra*, 23 Cal.4th at pp. 469-470, italics added.)

We conclude *People v. Rios* is inapposite to the instant case. Indeed, unlike the situation there where the jury found on retrial that defendant committed an unlawful and intentional homicide, and thus defendant could not complain when he was found guilty of the lesser included offense of voluntary manslaughter rather than murder, in the instant case the jury *acquitted* Mickey of murder in the *same* trial it found him guilty of voluntary manslaughter. Because there was no evidence of provocation to support Mickey's voluntary manslaughter conviction and because the jury acquitted Mickey of murder, Mickey, unlike defendant in *People v. Rios*, did not receive a "benefit" when he was convicted of the lesser included offense of voluntary manslaughter.

The People also rely on *People v. Thompson* (1961) 193 Cal.App.2d 620. Briefly, in that case defendant was convicted of voluntary manslaughter in a nonjury trial. He argued on appeal that his conviction should be overturned because there was no evidence of a "sudden quarrel or heat of passion" (e.g., provocation) within the meaning of former section 192. (*Id.* at p. 621.)

In rejecting defendant's argument, the court in *People v. Thompson* noted: "When it is shown that defendant committed a homicide the crime is murder unless the evidence affirmatively shows circumstances of mitigation which would bring the crime within the definition of manslaughter. . . . There is in the record at bar no evidence of any quarrel or heat of passion—nothing better than suspicion. . . ."

"The finding of voluntary manslaughter was erroneous but not prejudicially so. ' "When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder . . . in such a case the verdict should be murder of the second degree" ' [Citations.] That is the situation here. The evidence warrants a holding of second degree murder but not manslaughter, and appellant cannot complain of a finding more favorable to him than the law and the evidence warranted. [Citations.]" (*People v. Thompson, supra*, 193 Cal.App.2d at pp. 627 -628.)⁴

We conclude that *People v. Thompson* also is inapposite here. Unlike the situation in the instant case where Mickey was acquitted of murder, defendant in *People v. Thompson* was found by the trier of fact to be a second degree murderer. Thus, to the extent there was no evidence of provocation, defendant there actually benefited by being convicted of the lesser included offense of voluntary manslaughter because he was in fact a murderer. However, in the instant case Mickey received no such benefit, as we have

⁴ Our Supreme Court in *People v. Rios* discussed *People v. Thompson* as follows: "[*People v.*] *Thompson's* comments that it was 'technically correct' to say there could be no voluntary manslaughter conviction, and that such a conviction was 'erroneous,' are ambiguous. If the Court of Appeal meant only that the evidence did not entitle the defendant, charged with murder, to *instructions* on the lesser offense of voluntary manslaughter, its remarks are unobjectionable. But insofar as these passages were intended to convey that a *conviction* of voluntary manslaughter is 'technically' impossible and 'erroneous' in every case unless there is affirmative proof of provocation (or imperfect self-defense), they are mistaken for the reasons set forth at length in this opinion." (*People v. Rios, supra*, 23 Cal.4th at pp. 468-469, fn. 13.)

noted, as the jury here acquitted him of murder in the same trial in which it convicted him of voluntary manslaughter, despite the lack of evidence of provocation.

In light of our conclusion, the next issue becomes whether Mickey can be retried for voluntary manslaughter. The People contend retrial is warranted under the "general reasoning" of *People v. Rios* and under the reasoning proffered by this court in *People v. Bryant*. We disagree.

"The Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment [citation], provides that no person shall 'be subject for the same offense to be twice put in jeopardy.' It has long been settled, however, that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his [or her] first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction. [Citations.] This rule, which is a 'well-established part of our constitutional jurisprudence [citation], is necessary in order to ensure the 'sound administration of justice':

" 'Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he [or she] has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.' [Citation.]

"Permitting retrial after a conviction has been set aside also serves the interests of defendants, for 'it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution.' [Citation.]" (*Lockhart v. Nelson* (1988) 488 U.S. 33, 38-42 [109 S.Ct. 285].)

However, "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow 'the State . . . to make repeated attempts to convict an individual for an alleged offense,' since '[t]he constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' [Citations.]" (*Burks v. United States* (1978) 437 U.S. 1, 11 [98 S.Ct. 2141]; see also *Lockhart v. Nelson, supra*, 488 U.S. at p. 40 [observing that *Burks v. United States* "was careful to point out that a reversal based solely on evidentiary insufficiency has fundamentally different implications, for double jeopardy purposes, than a reversal based on such ordinary 'trial errors' as the 'incorrect receipt or rejection of evidence.' "].)

Here, as we noted the People concede there was no evidence of provocation to support Mickey's voluntary manslaughter conviction. Given that concession and the fact

the jury acquitted Mickey of murder, we conclude the Double Jeopardy Clause bars his retrial for voluntary manslaughter.

B. Lack of Evidence of Provocation and Mickey's Conviction for Assault Resulting in Death

Mickey next contends his conviction for assault on a child causing death must be reversed because he contends if the trial court had refrained from giving the instruction on voluntary manslaughter, as he argued at trial, "it is reasonably probable that [he] would have been acquitted on *both* counts in this case." (Italics added.) To support this contention, Mickey focuses on the "procedural course of jury deliberations," including at least three notes submitted by the jury during those deliberations, and on the evidence (or lack thereof, according to Mickey) of his guilt on count 2, among other subject matters.

1. Brief Additional Background

During deliberations, the jury submitted a note, stating: "As a jury we have all agreed to a verdict on first degree and second degree under count 1 but we are at an impass[e] on the other count [e.g., voluntary manslaughter]. [¶] We have not considered count 2 charges." As we discuss in more detail *post* (in connection with Mickey's separate but related claim the trial court allegedly coerced the verdict), the court brought the jury into the courtroom and discussed the meaning of "heat of passion," as requested by the jury foreperson.

Later that same day, the jury sent another note stating: "After further deliberation, we, the members of the jury are at a deadlock. We have also considered Count 2 and it

hinges on the deadlock." The trial court again called the jury into the courtroom. The jury foreman told the court that the jury was still at an impasse on count 1 and had not reached a verdict on count 2.⁵ In response, the court noted the late hour and suggested the jury adjourn for the day and return the following Monday, after a long weekend, to continue deliberations. The court noted it did *not* want the jury to rush to a verdict.

Late in the afternoon the following Monday, the jury sent a note, stating: "We have a verdict on count 1. [¶] Now we want to know the difference between CALCRIM [Nos.] 3515 and 252. [¶] Clarity on proof of union." The court in writing responded CALCRIM No. 3515⁶ indicated that count 2 was a "separate crime" and was to be "analyzed independently of the crime charged in count 1," and directed the jury to

⁵ Mickey in his brief unpersuasively argues that this note declared a deadlock on *both* the lesser-included offense for count 1 *and* on count 2. The record shows otherwise.

⁶ As instructed, CALCRIM No. 3515 provides: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one."

CALCRIM No. 820⁷ "for clarification on [the] issue of proof of union or joint operation of act and wrongful intent." The following day, the jury returned its verdicts.

2. Analysis

Although, as we have found, Mickey was correct in arguing at trial there was no evidence of provocation to support a voluntary manslaughter instruction,⁸ we are

⁷ CALCRIM No. 820, as modified, provides: "The defendant is charged in Count 2 with killing a child under the age of 8 by assaulting the child with force likely to produce great bodily injury resulting in death. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant had care or custody of a child who was under the age of 8; [¶] 2. The defendant did an act that by its nature would directly and probably result in the application of force to the child; [¶] 3. The defendant did that act willfully; [¶] 4. The force used was likely to produce great bodily injury; [¶] 5. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in great bodily injury to the child; [¶] 6. When the defendant acted, he had the present ability to apply force likely to produce great bodily injury to the child; [¶] [AND] [¶] 7. The defendant's act caused the child's death. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. An act causes death if: [¶] 1. The death was the natural and probable consequence of the act; [¶] 2. The act was a direct and substantial factor in causing the death; [¶] AND [¶] 3. The death would not have happened without the act. [¶] A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that caused the death."

⁸ Typically, a defendant facing murder charges requests that the court instruct on the lesser included offense of voluntary manslaughter and the issue on appeal in such cases is whether the trial court erred in refusing to give that instruction based on the lack of evidence of provocation or imperfect self defense. (See *People v. Rios, supra*, 23 Cal.4th at p. 468.)

unconvinced that this instruction prejudiced him in connection with his conviction on count 2 for assault on a child resulting in death.

Initially, we note that Mickey does not *directly* challenge the evidence supporting that conviction, although a substantial portion of his argument on this issue consists of rearguing the facts and inferences to be drawn from those facts, as if he was before the trier of fact. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 12-13 [in a challenge to the sufficiency of the evidence, a reviewing court reviews the entire record to determine whether it contains substantial evidence from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt; views the facts in the light most favorable to the judgment; draws all reasonable inferences in its support; and does not reweigh the evidence, resolve conflicts in the evidence or reevaluate the credibility of witnesses].)

In any event, there is ample evidence in the record to support the jury's conviction on count 2 for assault on a child resulting in death. (See § 273ab; see also *People v. Bolin* (1998) 18 Cal.4th 297, 331 [in making a substantial evidence determination, we look for substantial evidence and we cannot reverse a conviction for lack of evidence unless it appears that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conviction].)

In addition, Mickey does not dispute that the trial court properly instructed the jury on count 2. He also does not dispute that the trial court properly instructed the jury it was to consider counts 1 and 2 *separately*, as provided *ante* in CALCRIM No. 3515 (e.g., the

jury "must consider each count separately and return a separate verdict for each one."].) And the record shows that when the jury asked for clarification about the difference between CALCRIM No. 3515 and CALCRIM No. 252, the court in writing responded, "CALCRIM No. 3515 means that count 2 is a *separate crime and must be analyzed independently of the crime charged in count 1.*" (Italics added.)

Despite his efforts to bootstrap the lack of evidence of provocation on count 1 to his argument the jury compromised the verdict on count 2, there is nothing in the record to suggest that the jury did *not* follow the court's clear instructions regarding its need to consider count 2 separately. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 25; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107.) For this separate and independent reason, we reject Mickey's argument the jury's verdict on count 2 resulted from a "compromise verdict."

C. *Coercion of the Verdict on Count 2*

1. *Additional Background*

As noted *ante*, the jury submitted a note late in the afternoon on February 4, 2010, apprising the court that it was deadlocked on count 1 and that it had considered count 2 and "it hinges on the deadlock." The trial court summoned the jury into the courtroom and, over the defense's objections, spoke to the jury foreman about this note, including as follows:

"THE COURT: Have you reached a verdict or are you at an impasse on Count 2 as well? Because, remember, I'll need verdicts or know you're deadlocked on both counts.

"[Jury Foreman]: We have *not* reached a verdict. (Italics added.)

"THE COURT: On Count 2?

"[Jury Foreman]: On Count 2, yes.^[9]

"THE COURT: Okay. And you're still at an impasse on Count 1?

"[Jury Foreman]: Correct.

"THE COURT: All right. Well, given the hour—it's 4:35 [p.m.]—allow me to suggest this.

"First, I can't take partial verdicts. You've got to discuss Count 2. You've got to be thorough. I'm sure all of you understand this. You've been at this for a long time. Perhaps you ought to take the next three days, think about what we had talked about, let things settle, and then come back on Monday with fresh eyes for everyone and rediscuss it.

"I can tell you that I've started another trial, but I'm not in the jury selection process. So I will be able to break from that trial quickly to be able to take any questions.

"What I don't want to do, [jury foreperson], is send you back there and tell you, 'You know what? In 15 minutes you have to reach a verdict on Count 2.['] That doesn't

⁹ See footnote 5, *ante*.

make any sense. It's not fair, obviously, to law enforcement or the defense, given how much time, effort, and energy has been spent on your behalf, as well, just to try to go back and finish it in 15 minutes.

"So how does that sound to you [jury foreperson], for everybody to be able to think about it? And then Monday—because I know you're close. One way or the other, I know you're close. . . . [¶] . . . [¶]

"[Jury Foreman]: We would like to take the opportunity to let it settle, come back Monday and talk about it. And then we can talk to you on Monday.

"THE COURT: Right. And, again, you know, there's no rush here. I'm not going anywhere. And you're going to be here. I can break from my trial. I can take any questions.

"I will say this to you. Remember this. You've been together for a long time. And positions can harden one way or the other. I'm sure you have all experienced that. What I would ask you to do is this. Whatever your position is, take a look at it from the other side.

"There's a thing, you know, called confirmation bias. And what will happen is, all of a sudden, you're just talking with people who agree with you and not listening to the people who don't agree with you. It's difficult. As you can tell, this task is difficult. But think about what the other side is saying and whether it makes sense.

"Remember this. You are not advocates. Remember I read that instruction to you? You are not advocates. You're judges of the facts, like I'm the judge of the law.

You're the judge of the facts. And go through the facts again. You know, go through everything again if you need to.

"I'm just saying, try to look at it through the other person's eyes, from their perspective, and see if it makes sense. I'm not telling you to change your mind. But what I'm saying is sometimes it can help when you have a really open discussion. Because, remember, you don't have a proprietary interest in this one way or the other. You are judges of the facts, not advocates. And I just want to remind you of that. And maybe that's something for you to think about this weekend.

"Now, I'm not going to take any verdicts today, [jury foreman], because you don't have any verdict on Count 2. I'm just going to send you back out.

"All of you, have a great weekend and then come back here Monday. And then maybe take the other side and think about it. I don't know if that is helpful or not. But remember your position is like my position. You don't have a stake in this one way or the other. You're just trying to get at what is the truth, applying the facts as you find them to the law that I gave you to try to reach a fair and just verdict, if you can."

As noted *ante*, the following Monday the jury continued their deliberations and late that afternoon the jury in a note announced it had reached a verdict on count 1 and wanted to know the difference between CALCRIM Nos. 3515 and 252 in connection with count 2, as discussed *ante*. The jury returned a verdict the following day.

2. *Governing Law and Analysis*

Mickey's contention the statements by the trial court coerced the jury is based in part on the vintage case of *Allen v. United States* (1896) 164 U.S. 492, 501-502 [17 S.Ct. 154] and has come to be known as the "*Allen* charge" or the "dynamite charge," so called because it was designed to "blast" a verdict out of a deadlocked jury. (*People v. Gainer* (1977) 19 Cal.3d 835, 842, 844.) Whether statements of a trial judge amount to coercion of a verdict depends on the particular facts of each case. (*People v. Burton* (1961) 55 Cal.2d 328, 356, overruled on another ground as stated in *People v. Brown* (1994) 8 Cal.4th 746, 755-757.)

"In *Allen v. United States* . . . , the Supreme Court approved a charge . . . which encouraged the minority jurors to reexamine their views in light of the views expressed by the majority, noting that a jury should consider that the case must at some time be decided. In *People v. Gainer* . . . , however, our state high court disapproved of *Allen* in two respects. The *Gainer* court found 'the discriminatory admonition directed to minority jurors to rethink their position in light of the majority's views' was improper, inasmuch as, by counseling minority jurors to consider the majority view, whatever it might be, the instruction encouraged jurors to abandon a focus on the evidence as the basis of their verdict. [Citation.] The second issue with which the *Gainer* court took issue was the direction the jury ' "should consider that the case must at some time be decided," ' noting such a statement was inaccurate because of the possibility the case might not be retried.

[Citation.] In other words, it is improper to instruct the jury in language that suggests that if the jury fails to reach a verdict the case necessarily will be retried. [Citation.]" (*People v. Moore* (2002) 96 Cal.App.4th 1105, 1120.)

Thus, our high court in *People v. Gainer* concluded that further use of the "Allen charge" in California was prohibited because that charge "instructs the jury to consider extraneous and improper factors, inaccurately states the law, carries a potentially coercive impact, and burdens rather than facilitates the administration of justice" (*People v. Gainer, supra*, 19 Cal.3d at pp. 842-843.)

In *People v. Moore* the court on facts similar to the instant case rejected an argument analogous to the one advanced by Mickey here. There, after the jury had deliberated for about a day on count 1 for attempted, premeditated murder, the jury advised the court in writing that it was able to reach a verdict on count 2, but could not reach a unanimous verdict on count 1. (*People v. Moore, supra*, 96 Cal.App.4th at pp. 1118-1120.) In response, and over the objection of defendant, the court directed the jury to deliberate further on count 1, instructing the jury as follows:

"What I am going to do right now, ladies and gentlemen, is I have further instructions and directions to give you as to Count One. . . .

"It has been my experience on more than one occasion that a jury which initially reported it was unable to reach a verdict was ultimately able to arrive at verdicts on one or more of the counts before it. To assist you in your further deliberations, I'm going to further instruct you as follows:

" 'Your goal as jurors should be to reach a fair and impartial verdict if you are able to do so based solely on the evidence presented and without regard for the consequences of your verdict regardless of how long it takes to do so.

" 'It is your duty as jurors to carefully consider, weigh and evaluate all of the evidence presented at the trial, to discuss your views regarding the evidence, and to listen to and consider the views of your fellow jurors.

" 'In the course of your further deliberations, you should not hesitate to re-examine your own views or to request your fellow jurors to re-examine theirs. You should not hesitate to change a view you once held if you are convinced it is wrong or to suggest other jurors change their views if you are convinced they are wrong.

" 'Fair and effective jury deliberations require a frank and forthright exchange of views.

" 'As I previously instructed you, each of you must decide the case for yourself, and you should do so only after a full and complete consideration of all of the evidence with your fellow jurors. It is your duty as jurors to deliberate with the goal of arriving at a verdict on the charge if you can do so without violence to your individual judgment.

" 'Both the People and the defendant are entitled to the individual judgment of each juror.

" 'As I previously instructed you, you have the absolute discretion to conduct your deliberations in any way you deem appropriate. May I suggest that since you have not been able to arrive at a verdict using the methods that you have chosen, that you consider

to change the methods you have been following, at least temporarily and try new methods.

" For example, you may wish to consider having different jurors lead the discussions for a period of time, or you may wish to experiment with reverse role playing by having those on one side of an issue present and argue the other side's position and vice versa. This might enable you to better understand the other's positions.

" By suggesting you should consider changes in your methods of deliberations, I want to stress I am not dictating or instructing you as to how to conduct your deliberations. I merely find you may find it productive to do whatever is necessary to ensure each juror has a full and fair opportunity to express his or her views and consider and understand the views of the other jurors.

" I also suggest you reread [various jury instructions]. These instructions pertain to your duties as jurors and make recommendations on how you should deliberate.

" The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by the instructions. . . .

" The decision the jury renders must be based on the fact[s] and the law. You must determine what facts have been proved from the evidence received in the trial and not from any other source. A fact is something proved by the evidence or by stipulation.

" Second, you must apply the law I state to you to the facts as you determine them and in this way, arrive at your verdict.

" 'You must accept and follow the law as I state it to you regardless of whether you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflict[s] with my instructions on the law, you must follow my instructions.

" ' . . . The decisions you make in this case must be based on the evidence received in the trial and the instructions given by the Court. These are the matters this instruction requires you to discuss for the purpose of reaching a verdict. [¶] . . . [¶]

" 'You should keep in mind the recommendations this instruction suggests when considering the additional instructions, comments and suggestions I have made in the instructions now presented to you. I hope my comments and suggestions may have some assistance to you.

" 'You're ordered to continue your deliberations at this time. If you have other questions, concerns, requests or any communications you desire to report to me, please put those in writing on the form my bailiff has provided you with. Have them signed and dated by your foreperson and then please notify the bailiff.' " (*People v. Moore, supra*, 96 Cal.App.4th at pp. 1118-1120.)

Following the trial court's additional instruction, the jury recessed for the weekend and returned the following Monday, when a verdict of guilty was reached on count one after two additional hours of deliberation. (*People v. Moore, supra*, 96 Cal.App.4th at p. 1120.)

Much like Mickey here, defendant in *People v. Moore* argued the trial court's instruction was coercive and improper. The court disagreed and concluded the trial court's additional instruction did not constitute an improper *Allen* charge: "The trial court did not direct the jurors that 'the case must at some time be decided.' To the contrary, the court instructed that the 'goal as jurors should be to reach a fair and impartial verdict *if you are able to do so* based solely on the evidence presented and without regard to the consequences of your verdict [or] regardless of how long it takes to do so.' . . . Nothing in the trial court's charge was designed to coerce the jury into returning a verdict. [Citation.] Instead, the charge simply reminded the jurors of their duty to attempt to reach an accommodation." (*People v. Moore, supra*, 96 Cal.App.4th at p. 1121.)

Moreover, the court in *People v. Moore* noted the trial court's additional instruction merely "directed the jurors to consider carefully, weigh and evaluate all of the evidence presented at trial, to discuss their views, and to consider the views of their fellow jurors. Finally, the court instructed that it was their duty as jurors to deliberate with the goal of arriving at a verdict on the charge '*if you can do so without violence to your individual judgment.*' . . ." (*People v. Moore, supra*, 96 Cal.App.4th at p. 1121.)

The court in *People v. Moore* further noted that "the jury was never directed that it was required to reach a verdict, nor were any constraints placed on any individual juror's responsibility to weigh and consider all the evidence presented at trial. The trial court also made no remarks either urging a verdict be reached or indicating possible reprisals for failure to reach an agreement. In short, it is clear the trial court took great care in

exercising its power 'without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency. . . . Nothing in the trial court's comment[s] in the present case properly may be construed as an attempt to pressure the jury to reach a verdict' [Citation.]" (*People v. Moore, supra*, 96 Cal.App.4th at p. 1121; see also *People v. Whaley* (2007) 152 Cal.App.4th 968, 974-977, 981 [approving the trial court's supplemental instruction to a deadlocked jury that was based on the instruction used in *People v. Moore, supra*; compare *People v. Gainer, supra*, 19 Cal.3d at 840-841 [trial court erred in giving an instruction that encouraged jurors to consider the numerical division among them in forming or reexamining their views and that implied if the jury failed to reach a verdict the case would be retried].)¹⁰

The holding and reasoning of *People v. Moore* provides meaningful guidance on the issue before us. Like the trial court in *People v. Moore*, the trial court here additionally instructed the jury that it should take its time in deliberations and refrain from rushing to a verdict. Also like the trial court in *People v. Moore*, here the trial court recommended the jury reconsider the evidence in order to help it reach a verdict, if at all possible. Thus, the record shows the court in the instant case placed no constraints on any individual juror's responsibility to weigh and consider the evidence presented at trial. (See *People v. Moore, supra*, 96 Cal.App.4th at p. 1121.)

¹⁰ Here, there is no evidence the trial court had any information about the numerical divisions in the jury on the various counts on which the jurors had not agreed at the time of the court's supplemental instruction.

What's more, the trial court in the instant case also suggested the jurors listen to and consider the other jurors' views in determining what makes sense and in deciding the facts. In making this suggestion, however, the trial court here, like the trial court in *People v. Moore*, was careful to note that in considering the views of others it was still up to the individual juror to make up his or her own mind, as the court here repeatedly reminded the jurors they were "judges of the facts" and "not advocates."

In addition, although the trial court here stated it could not take "partial verdicts," the record shows the court was referring to the fact that the jury had not yet completed its deliberations on count 2 and that until the jury completed those deliberations it was not able to take verdicts on count 1, which the record shows the jury at that time was, in any event, deadlocked on the lesser included offense of voluntary manslaughter on count 1. Indeed, in making the additional instruction to the jury the trial court here reminded the jury that its role was to get at the truth and "try and reach a fair and just verdict, *if you can*." (Italics added.) Thus, like the charge by the trial court in *People v. Moore*, the additional instruction by the trial court here did not coerce the jury into returning a verdict. (See *People v. Moore, supra*, 96 Cal.App.4th at p. 1121.)

The trial court here also made no remarks indicating possible reprisals if the jury failed to reach a verdict. In short, like the trial court in *People v. Moore*, the trial court in the instant case took care in exercising its power " 'without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and

expediency.' " (See *People v. Moore*, *supra*, 96 Cal.App.4th at p. 1121.) We thus conclude the trial court did not coerce the jury to reach a verdict on count 2.

D. Admission of Evidence Mickey Became Violent When Drinking Alcohol

1. Additional Background

During pretrial proceedings, the trial court ruled to admit evidence showing that Mickey had a blood alcohol percentage of .05 at the crime scene. As noted *ante*, Officer Vrooman testified that Mickey smelled of alcohol at the crime scene and that Mickey denied he had been drinking alcohol that day, even after Officer Vrooman showed Mickey the test results establishing the presence of alcohol. On cross-examination, defense counsel established that Mickey was not stumbling or slurring his speech or showing other signs of intoxication (e.g., bloodshot eyes).

During the defense's cross-examination of Jennifer, she acknowledged telling Mickey when they were dating that she would leave him if he drank alcohol. Jennifer also acknowledged Mickey likely would be "fine," or words to that effect, after drinking a can of beer.

During the direct examination of Rosan, the prosecutor asked her why Mickey lied to police at the crime scene about drinking alcohol. Rosan, who had been sitting with Mickey inside the Murietta house when police questioned him about drinking alcohol on the day of the crime, responded Mickey lied because Mickey had promised his mother he would abstain from drinking alcohol. Rosan also testified about an incident that occurred

while Mickey and Jennifer were living with her and her husband when Mickey and Jennifer argued after Mickey had been drinking alcohol.

Of particular significance to the issue at bar, the prosecutor next asked Rosan if she recalled telling Officer Vrooman at the crime scene that Mickey became violent and belligerent when he drank alcohol. Over the defense's objection, Rosan testified Mickey did *not* become violent and belligerent when he had a "few drinks," but rather "only when he's really, really drunk."

Outside the presence of the jury, defense counsel inquired of the trial court why it had overruled his objection to the questions about Mickey becoming violent and belligerent when he drank alcohol. The court responded as follows:

"THE COURT: . . . The reason I allowed it in is because the Court doesn't feel that's character evidence. That's a personality trait of a human being when they're drinking, they become violent, and that is connected to the incident because there's evidence before the trier of fact that he'd been drinking and he lied about it. So I understand the connection [the prosecutor] is trying to make. I don't think that has anything to do with [his] character. It has to do with alcohol having an effect on a person's personality or brains so they act in a way other than they would normally act when they're sober."

Later, during this same colloquy, the court further explained its ruling to admit this evidence:

"THE COURT: [I]f someone has been drinking, they take on a certain personality trait, that is because the chemical reaction of the alcohol in the brain and how the brain is responding to that chemical substance, whether it's alcohol, whether it's heroin, whether it's methamphetamine, that is not character evidence. That's why I allowed it in, because I understand the point [the prosecutor] is trying to make.

"But you also did get out the point with the detective and that's why this is going to be a question of fact for the jury. Because the detective [e.g., Vrooman] said, [']look, I talked to him, he didn't seem like he was under the influence, he wasn't slurring his words.['] And so Ms. Mickey said on the stand he's not—[']he's only like this when he's been drinking a whole lot.['] And you got[] out the fact that, hey, he'd been drinking some, but he wasn't under the influence.

"So the question of fact for the jury was did alcohol have an impact on Mr. Mickey's conduct at the time these injuries occurred. I mean, I assume, [the prosecutor] that's going to be the issue given. I've been listening to all of this that's why it has nothing to do with character and everything to do with the specific factual situation at that time and how alcohol did or did not affect his judgment or his responding to whatever was going on because we just don't know at this point."

2. *Analysis*

To resolve this issue we need not decide whether the trial court erred when it admitted the testimony that Mickey became violent and belligerent when he drank heavily because we conclude on this record that even if the admission of such testimony

was in error, it was not prejudicial. (See *People v. Watson* (1956) 46 Cal.2d 818, 836-837 (*Watson*) [reversal required "only if a reasonable probability exists that the jury would have reached a different result had [the] evidence been excluded."].)¹¹

Indeed, the record shows that Mickey's blood alcohol percentage was about .05, below the .08 limit set forth in Vehicle Code section 23152, subdivision (b); that he did not show any signs of alcohol intoxication (e.g., slurred speech, red, bloodshot eyes) at the crime scene; and that he only became violent and belligerent when, according to his mother, he was "really, really drunk," which was *not* the case on the day of the crime scene.

In addition, the jury saw the convenience store video of Mickey purchasing a 24-ounce beer on the day of the crime. Thus, the jury knew Mickey had bought alcohol that day and lied to police about drinking it shortly before K. stopped breathing. Mickey does not dispute that this evidence was properly admitted by the trial court.

¹¹ Mickey argues for application of the more stringent test of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824] (*Chapman*), claiming the error affected the fairness of his trial. However, generally "violations of state evidentiary rules do not rise to the level of federal constitutional error" (*People v. Samuels* (2005) 36 Cal.4th 96, 114), and we discern no reason to depart from that rule here. (See also *People v. Benavides* (2005) 35 Cal.4th 69, 91 [applying *Watson* standard of prejudice to trial court's error in admitting evidence that because the victim's mother associated with a known child molester, the jury must have concluded defendant also was a child molester]; *People v. Malone* (1998) 47 Cal.3d 1, 22 [rejecting *Chapman* standard of prejudice in determining whether trial court's error in admitting other crimes evidence was prejudicial].) In any event, even if we applied the *Chapman* standard of prejudice, on this record we still would conclude the trial court's error in admitting evidence that Mickey became violent and belligerent when he drank *heavily* harmless beyond a reasonable doubt.

The jury also heard Rosan testify that Mickey was not violent or belligerent when he and K. arrived at his mother's house earlier in the day before K. stopped breathing, or later in the day at his own house at the crime scene. Rosan's testimony was corroborated by the testimony of Officer Vrooman, who was recalled as a witness and testified that Mickey was neither violent nor belligerent when being questioned by police at the crime scene.

Thus, even if the trial court improperly admitted evidence that Mickey becomes violent and belligerent when he drank a substantial quantity of alcohol, that error was harmless because on this record the evidence strongly suggests that Mickey consumed a single, 24-ounce can of beer on the day of the crime and that he was not drunk or exhibiting signs of alcohol intoxication, or acting in a violent or belligerent manner, at the crime scene. Therefore, it was not reasonably probable he would have received a more favorable verdict absent the admission of such evidence, particularly in light of Mickey's decision not to challenge directly the substantial evidence in the record supporting his conviction on count 2. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125; *People v. Malone* (1988) 47 Cal.3d 1, 22.)

DISPOSITION

Mickey's conviction on count 1 (§ 192, subd. (a)) is reversed and ordered dismissed. The trial court is directed to amend the abstract of judgment accordingly, with the amended abstract reflecting the imposition of a single prison term of 25 years to life for count 2 (§ 273ab). The trial court is ordered to forward a certified copy of the

amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.