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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ANGEL VELASQUEZ,

Defendant and Appellant.

E054514

(Super.Ct.No. INF067312)

**OPINION**

APPEAL from the Superior Court of Riverside County. Thomas E. Kelly, Judge. (Retired judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

David L. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and William M. Wood and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Miguel Angel Velasquez was the father of Sabrina Preto, who was almost two years old when she died. While in defendant's care, Sabrina suffered

numerous internal injuries to her abdomen and head, caused by blunt force trauma, and had bruises on her entire body. Sabrina died as result of these injuries on the morning of November 23, 2009. Defendant claimed that Sabrina's injuries were caused by Sabrina's mother.

Defendant was convicted of one count of child abuse against a victim under the age of eight years by force likely to produce great bodily injury and resulting in death in violation of Penal Code section 273ab.<sup>1</sup> Defendant was sentenced to 25 years to life in state prison.

Defendant claims on appeal that he received ineffective assistance of trial counsel for failing to request a pinpoint jury instruction on third party culpability.

We affirm the judgment.

## I

### FACTUAL BACKGROUND

#### A. *People's Case-in-Chief*

##### 1. *Events occurring between Saturday, November 21, 2009, and Monday, November 23, 2009*

In November 2009, Sonia Camargo lived in an apartment complex located in Riverside County. Angela Silva was her best friend and lived across from Camargo in another apartment. Defendant stayed at Silva's apartment on occasion.

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<sup>1</sup> Defendant was also charged with second degree murder in violation of Penal Code section 187, subdivision (a), but the jury found him not guilty of the charge.

Camargo and defendant had been involved in a sexual relationship. As a result, she gave birth to Sabrina Preto on February 18, 2008.

Around noon on Saturday, November 21, 2009, Camargo gave Sabrina a bath. She also applied lotion to her body. She observed no bruises on Sabrina. Around 4:00 p.m., Camargo saw defendant outside the apartment in the parking lot, and he asked if he could watch Sabrina. They argued over his taking her, but Camargo eventually let him. Sabrina had no injuries and was not sick when Camargo gave her to defendant.

Camargo returned to the apartment complex around midnight. She had sent a text message to defendant around that time, and he responded that Sabrina was fine and was sleeping. They agreed that Camargo would get Sabrina the following morning. Camargo stayed at her own apartment that night and never went to Silva's apartment. She woke up around 7:00 or 8:00 a.m. on Sunday, November 22.

The entire day Camargo remained in her apartment because she felt sick (she was hung over from the night before). Defendant came to her apartment around 5:00 p.m. He entered the apartment and said that it smelled like sex. Camargo responded that he was stupid. Defendant told Camargo that Sabrina was fine and that she was asleep. Camargo never saw Sabrina on Sunday, and Camargo slept in her own apartment that night.

Around 7:00 a.m. on Monday, November 23, defendant woke Camargo up by banging on the front door of her apartment. When Camargo answered the door, defendant was hysterical and told her that Sabrina was not breathing. He told Camargo that Sabrina had an injury to her abdomen. He claimed that the night before, Sabrina had

been lying on the floor in a bedroom in Silva's apartment. Silva's daughter, C.D., had opened the door and it had hit Sabrina in the stomach very hard. Defendant was "flipping out" and telling Camargo that it would "look bad on him."

Defendant and Camargo ran to Silva's apartment (after Camargo took the time to put on a bra even though she was wearing pajamas). Camargo ran to the bedroom. When she entered the bedroom, defendant's two uncles, Immanuel and Mark Espinoza, were there. Sabrina was lying on the bed.

Camargo knelt down next to the bed and grabbed Sabrina's hand. It was cold. There was blood on Sabrina's shirt and on the side of her mouth. There was blood on the bed. Sabrina was wearing pajama pants that Camargo had never before seen. Sabrina had bruising on her hand and face.

Paramedics arrived. Camargo heard defendant in Silva's bedroom crying on the phone to his mother. He was crying hysterically and telling his mother that "it was an accident" over and over.<sup>2</sup> Camargo knelt down in the hallway and prayed with defendant's sister. She did not recall that she laughed on several occasions when she was interviewed by the police. She did not recall that when she was told at the hospital that Sabrina was deceased, she said, "Yes, but this is reflecting on me."

Gwendolyn Gilbert lived in the same apartment complex directly next door to Silva; she shared a bedroom wall with Silva's apartment. She observed paramedics arrive on Monday morning. Prior to the paramedics arriving, around 4:00 a.m., she was

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<sup>2</sup> Camargo did not tell the police that defendant had made these statements.

awakened by loud cursing coming from a male voice in the adjoining bedroom in Silva's apartment.

Silva lived with her daughters C.D., who was 11 years old at the time of trial, and Z.W., who was four years old at the time of trial. Silva was dating defendant's brother, Lino Velasquez, at the time of trial. They had started dating in February 2011.

On Sunday, November 22, defendant stayed in C.'s room with Sabrina. Silva was in and out of the apartment from noon to 8:00 p.m. on that day. C. had been in the apartment without her at some point. Silva saw Sabrina and defendant in the bedroom together sometime after 8:00 p.m. on Sunday. Silva only saw Sabrina for a few minutes, and she did not appear to have anything wrong with her.

Silva claimed that while she was watching television with Z. on that Sunday night, Camargo arrived at the apartment and went back into the bedroom with Sabrina.<sup>3</sup> Camargo emerged from the bedroom with Sabrina. Camargo was very intoxicated. She was holding Sabrina in a chair and fell over in the chair. Silva and defendant helped them both off the floor. Camargo was laughing.

Defendant took Sabrina back to the bedroom. Camargo walked to the room behind them, and defendant came back out and then returned to the bedroom. A friend of Camargo's aunt knocked on Silva's apartment door looking for Camargo. Camargo came out of the bedroom to meet her friend. They both left the apartment.

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<sup>3</sup> At trial was the first time that Silva told anyone that Camargo had come to the apartment on Sunday night.

Silva went to bed. Silva claimed for the first time at trial that Lino stayed the night on the couch that night; she never told any officers or investigators who interviewed her prior to trial that Lino was at her house. A few minutes after she went to bed, defendant came to her room and asked for a blanket. He told her that Sabrina had vomited. Silva heard defendant in the bathroom with Sabrina. Sabrina was crying, and defendant was trying to soothe her. Silva fell asleep.

Defendant came into Silva's room around 7:00 a.m. and told her that Sabrina was not breathing. Silva ran to the other bedroom and saw that Sabrina was on the bed not moving. Silva told defendant to get Camargo and then called 911. Silva observed bruises on Sabrina's abdomen.

An interview with Silva conducted around 1:00 p.m. on November 23 was played for the jury. Silva told officers that she and defendant were in the apartment the night before. Sabrina was sleeping when Silva went to bed. Silva told officers that on the prior day, defendant had told her that C. accidentally hit Sabrina with a door and that Sabrina fell and was crying. Silva was asked directly if there were any other adults in the house that night, and she denied it. Silva never mentioned Camargo during this interview.

A.H. was 11 years old at the time of trial. He lived in the apartment complex and was C.'s cousin. A. played at Silva's apartment the day prior to paramedics coming for Sabrina. A. and C. were playing in Silva's bedroom. Sabrina was in the other bedroom. Sometime in the evening while they were playing, A. heard defendant in the other

bedroom with Sabrina yelling at her. Defendant was yelling at her to “sit down” and to “stop.” A. could hear Sabrina crying. It scared A.

A. and C. went into the closet and hid. They stayed in the closet for a couple of minutes and then emerged. They could still hear defendant yelling at Sabrina. A. and C. went to the bathroom to put their ears against the wall to hear what defendant was saying. A. could hear defendant yelling but could not hear what he was saying. A. also heard loud hitting sounds. A. described them as sounds like clapping hands. A. then heard Sabrina crying. C. heard Sabrina crying and screaming when they were in the bathroom. C. heard defendant tell her to be quiet. Defendant sounded like he was mad. A. and C. also heard a loud “banging” noise that sounded like two rocks hitting together or a “thump.” Sabrina was crying after the loud noise. C. thought that defendant was hitting Sabrina.

Defendant exited the room, and A. and C. went in the bedroom where Sabrina was. Defendant looked mad and was sweaty when he exited the room. He went outside and started lifting weights with Mark.

When A. entered the bedroom, Sabrina was sitting on the floor.<sup>4</sup> Her face was red, but A. did not see any marks or bruises. Sabrina was sniffing. Her hair was messed up. She had her arm on her stomach. C. told Sabrina not to cry so that defendant would not come back.

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<sup>4</sup> C. testified that Sabrina was lying on the bed.

A. and C. then went back to the bathroom because they heard defendant come into the apartment. They stayed in the bathroom for three minutes. Defendant was in the bedroom with Sabrina with the door closed.

A. had seen defendant hit Sabrina on her hands and her bottom prior to that day.

C. had seen defendant hit Sabrina on the hand but not very hard.

Charlotte Espinoza was defendant's mother. Defendant called her around 7:30 a.m. on November 23, 2009. At trial, she denied that he said he hit Sabrina or caused her injuries. However, she told police on the day of the incident that defendant had told her that he had hit Sabrina. Although she said to the officers that he also said he was responsible for her death, she denied that was what she meant at trial. Defendant never told her that it "was an accident."

## 2. *Police investigation*

Riverside County Sheriff's Deputy Devin Hedge arrived at the apartment complex at 7:30 a.m. Paramedics were already there working on Sabrina. Officer Hedge saw bruises on her abdomen and forehead. There was blood on her nostrils. There was a pool of blood on the mattress where she had been sleeping. Defendant was in Silva's bedroom.

Deputy Hedge asked defendant what had happened to Sabrina. Defendant said he and Sabrina had gone to bed at 9:30 p.m. on November 22. At 6:30 a.m., he found her lips were blue, and she was not moving. Defendant told Deputy Hedge that Sabrina had bruised her abdomen because another child had hit her in the stomach with a door.

Deputy Hedge also spoke with Silva. Silva told him that only defendant, Sabrina, and Silva's daughter Z. had stayed the night in the apartment. She never mentioned Lino or Camargo.

Investigator Randall Thomas arrived at the apartment complex around 2:30 p.m. Investigator Thomas found dried blood in the sink in the bathroom and on the faucet. There were several blood stains on the mattress where Sabrina was found. There were droplets of blood on the wall in the bedroom. Investigator Thomas also found a blanket with a green liquid substance in it that smelled like vomit. In the kitchen trash, Investigator Thomas found a toddler-sized shirt with blood on it. Another blanket found in the bedroom had blood on it.

### 3. *Defendant's interview*

James Merrill was the lead investigator with the Riverside County Sheriff's Department and was assigned to investigate Sabrina's death. He interviewed defendant on Monday afternoon. Defendant immediately asked if there was word about Sabrina. The interview was played for the jury.

Defendant's statement revealed the following. On Sunday morning, Sabrina got up and went out to play in the living room. Defendant was still in the bedroom when he heard her crying. C. told him that she had accidentally hit Sabrina with a door. Sabrina never complained that she was hurt, and she ate breakfast.

Around 9:00 p.m. on Sunday night, defendant put Sabrina to bed. When defendant checked on her sometime later, he saw that she had vomited on the blanket.

Defendant rolled up the blanket and threw it on the floor. He took off her clothes and took her to the shower. At that time, he noticed a red or purple mark on her stomach. He pulled frozen hotdogs from the freezer and put them on the mark.

Defendant woke up at around 6:00 a.m.; Sabrina was not breathing and her eyes would not open all the way. Defendant ran to Silva to get her to call 911.

One of the detectives confronted defendant, saying that the injuries to Sabrina were not from being hit by a door. Defendant then stated that he had been drinking on Sunday and had been sitting in a recliner with Sabrina on the porch. Defendant claimed that they fell back in the recliner and Sabrina hit a cinder block with her stomach and the concrete porch with her head. Defendant admitted that he lied about the bruise on Sabrina's stomach being made by her getting hit with a door. Sabrina spent most of the rest of the day lying on the bed in the bedroom.

Defendant went into the bedroom at around 8:30 p.m., and Sabrina had vomited on the blanket. She was on her stomach and was still asleep. She had vomit on her hair and clothes. He took her to the shower and then put the frozen hot dogs on her stomach. They slept through the night.

When confronted with the blood evidence, defendant stated that she had a chapped lip, and it was bleeding. When told that chapped lips could not account for the amount of blood, defendant stated that Sabrina had been tapping him to wake up, and he turned around and slapped her.

The investigator then advised defendant that Sabrina had died. He started sobbing. He stated then that he slapped her lip and “smacked” her mouth and nose about 15 minutes prior to the time she stopped breathing. He used the back of his hand.

Defendant accused Camargo of hitting her on the buttocks and legs before that night. He admitted that he shook Sabrina when she would not respond to him in the morning; he had shaken her the night before when she had been whining and had crumbled a cracker on the carpet. Defendant also said that he laid on top of her with his full weight trying to get her to go to sleep Sunday night. He claimed the blood on the walls were from her nose and lip that were chapped, but he also admitted that when he hit her she started bleeding.

Defendant added that Sabrina burned herself on a cigarette he was smoking, and when she wouldn't stop crying, he hit her shoulder. On Sunday, he caused a bruise on her buttocks when he slapped her on her bare bottom. Defendant also disclosed that he had pushed her down.

#### 4. *Medical testimony*

An autopsy was conducted on November 24, 2009. There were 18 separate injuries to Sabrina's head. She had four bruises on her forehead, one on her ear, and one on her cheek. She had a laceration on the inside of her lip. The laceration on the inside of her lip would have been caused by a blow to the mouth. She had scratches on her chin. She had a large bruise on her abdomen. She had bruises on her left shoulder and on her buttocks. She had bruises and scrapes on her legs, feet, and hands.

The time of death was uncertain but was sometime between the evening of November 22 and when she was found not breathing the next morning. The injuries were inflicted no more than 24 hours before her death. The head injuries were extensive enough to have caused bleeding in her brain and death. The internal injuries were caused by blunt force trauma. The injuries would have required a significant amount of force, and she suffered at least eight blows to the head. Sabrina had tearing and bleeding in her abdomen.

It was not likely the injuries to Sabrina's abdomen were caused by falling on something or by a door hitting her. It was unlikely the injuries to her head were caused by falling on a cinder block. The head injuries could have been caused by hitting a wall or a floor hard. There were multiple injuries on the head; they were not from a single fall.

B. *Defense*

On Saturday, defendant called Mark, his uncle, into the bedroom at Silva's apartment and showed him a welt or handprint on Sabrina's buttocks. Defendant was upset and blamed it on Camargo. During the year prior to Sabrina's death, Silva had heard Camargo make negative comments about Sabrina. Camargo said that she did not want or love Sabrina. When Sabrina was born, she told friends that she did not want to hold her.

The emergency room doctor stated that Camargo showed very little emotion when he notified her that Sabrina had died. Family members who were present told Camargo

that someone had beaten Sabrina up, and she responded, “Yeah, but this is reflecting on me.”

Defendant’s sister, Elena Velasquez, lived in the same complex. On November 23, defendant knocked on her door; he was crying and hysterical. She immediately ran to Silva’s apartment. Camargo was in the room with Sabrina when Elena arrived and showed no emotion. Elena never heard defendant tell his mother that Sabrina’s death was “an accident.”

Defendant testified that in November 2009, the two most important people in his life were Sabrina and Camargo. He was in love with Camargo. In August 2009, defendant observed Camargo slap Sabrina in the mouth. In September 2009, Camargo slapped Sabrina on the back, causing her to fall down. In October 2009, Camargo told defendant she had “screwed up” and showed him bruises on Sabrina’s face and buttocks. Defendant had never abused Sabrina.

When defendant took Sabrina on Saturday, she had bruises on her buttocks. On Sunday night, Camargo came to Silva’s apartment, and she was very intoxicated. Camargo went into the bedroom and grabbed Sabrina while she was sleeping. She took her to the rocking chair in the living room. Camargo was rocking in the chair and fell back in the chair while holding Sabrina. Defendant took Sabrina back to the bedroom. Camargo also went back to the bedroom. Defendant left Camargo in the bedroom with Sabrina alone. Camargo was in the bedroom alone with Sabrina for 15 to 20 minutes

with the door closed. Defendant heard what sounded like Sabrina being slapped, and Sabrina started crying.

Defendant went to the bedroom. Camargo was standing over Sabrina. Sabrina was bleeding from her mouth, and her hair was messed up. Her shirt was pulled up and the back of her pants were down. Defendant asked what she was doing. Camargo responded, “Fuck this. I’m out of here.” She then left.

Defendant calmed Sabrina and then had her lie down. He left the room, and when he came back she had vomited. When defendant woke up the next morning, Sabrina was not breathing. Defendant claimed that “99 percent” of what he told the police were lies. He had lied for Camargo.

## II

### THIRD PARTY CULPABILITY JURY INSTRUCTION

Despite the fact that no CALCRIM or CALJIC instructions on third party culpability exist, and the California Supreme Court has rejected that the failure to give such instructions is prejudicial, defendant contends that his counsel was ineffective by failing to request third party culpability instructions. He insists his federal constitutional due process and fair trial rights were infringed due to the omission of the instruction.

#### A. *Additional Factual Background*

Prior to trial, the People moved to exclude any evidence regarding Camargo abusing Sabrina. The People argued it was not admissible third party culpability evidence. Defendant responded that the evidence was proper third party culpability

evidence. The parties argued the motions. The trial court allowed in the evidence that Camargo had battered Sabrina in the past and the observations of injuries to her on the day she was given to defendant. Evidence that Camargo had abused Sabrina and that she was alone with Sabrina the evening before her death was presented to the jury, as set forth in detail, *ante*.

There was a short discussion of the jury instructions on the record. There was no objection to the instruction packet. There was no inclusion of a third party culpability instruction.

The jury, however, was instructed on reasonable doubt twice (CALCRIM Nos. 103 & 220). It first was instructed, “A defendant in a criminal case is presumed to be innocent. This presumption requires the People to prove the defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt until I specifically tell you otherwise. [¶] . . . [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal, and you find him not guilty.”

At the end of the case, they were instructed as follows: “A defendant in a criminal case is presumed to be innocent. This presumption requires the People to prove the defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell

you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.”

B. *Analysis*

“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. [Citations.]” (*People v. Price* (1991) 1 Cal.4th 324, 440; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-696 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

Here, defendant’s counsel did not request a pinpoint instruction on third party culpability. As noted by both parties, no such instructions are provided for in either CALJIC or CALCRIM. Defendant claims that competent counsel would have crafted a pinpoint instruction and requested that such instruction be given in this case. The People respond that since the instruction is not included in CALCRIM or CALJIC, defendant’s trial counsel did not have an obligation to request the instruction. We need not resolve the issue as the California Supreme Court has repeatedly concluded that any failure to so

instruct the jury is not prejudicial. “““[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” [Citation.]’ [Citation.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

In *People v. Earp* (1999) 20 Cal.4th 826, the defendant requested in the lower court that an instruction be given to the jury that would have read as follows: “. . . ‘Evidence has been offered that a third party is the perpetrator of the charged offense. It is not required that the defendant prove this fact beyond a reasonable doubt. In order to be entitled to a verdict of acquittal, it is only required that such evidence raise a reasonable doubt in your minds of the defendant’s guilt.’” The request was denied. (*Id.* at p. 887.) Our Supreme Court found the defendant was not prejudiced by the refusal to give the proffered pinpoint instruction on third party culpability. It held: “Even assuming that this proposed instruction accurately pinpointed the defense theory, defendant suffered no prejudice from the trial court’s refusal to give it. The jury was instructed under CALJIC No. 2.90 that the prosecution had to prove defendant’s guilt beyond a reasonable doubt, and the jury knew from defense counsel’s argument the defense theory that [another man], not defendant, had committed the crimes. Under these circumstances, it is not reasonably probable that had the jury been given defendant’s proposed pinpoint instruction, it would have come to any different conclusion in this case. [Citation.]” (*Ibid.*)

More recently, in *People v. Hartsch* (2010) 49 Cal.4th 472, our Supreme Court explained why third party culpability instructions are generally ineffective: “We have noted that similar instructions add little to the standard instruction on reasonable doubt. [Citation.] We have also held that even if such instructions properly pinpoint the theory of third party liability, their omission is not prejudicial because the reasonable doubt instructions give defendants ample opportunity to impress upon the jury that evidence of another party’s liability must be considered in weighing whether the prosecution has met its burden of proof. [Citations.]” (*Id.* at p. 504; see also *People v. Gutierrez* (2009) 45 Cal.4th 789, 824-825 [although defendant testified his companions were responsible for the victim’s death, any error in not giving third party culpability instruction was harmless because “jury was instructed on reasonable doubt and burden of proof, and could have acquitted defendant had it believed defendant’s testimony”].)

We see no reason to depart from this established precedent. In fact, defendant does not even address or discuss these cases either in his opening brief or in his reply brief.

In this case, the absence of a special instruction on third party culpability was not prejudicial. As in *Earp* and *Hartsch*, the jury here was instructed on the presumption of innocence and the prosecutor’s burden of proof beyond a reasonable doubt, as set forth, *ante*. In closing argument, the People specifically stated that the question to be resolved by them was whether defendant or Camargo committed the crime. Defense counsel emphasized the defense theory of the case, which was that Camargo caused Sabrina’s

death, and recounted the evidence of Camargo's guilt. Moreover, although defendant tried to pin the abuse on Camargo, the evidence was weak. Only defendant's friends supported his claim, and the evidence that Camargo was with Sabrina the night before she died only came about at the time of trial. On the other hand, the evidence of his guilt was strong. Defendant was with Sabrina when the abuse occurred, and he was heard abusing Sabrina by C. and A.

Considered in its entirety, the jury charge and the argument of counsel in this case adequately apprised the jurors that a third party culpability defense could give rise to a reasonable doubt as to defendant's guilt. It is not reasonably probable that the jury would have found defendant not guilty of murder if defense counsel had prepared and requested a special instruction on third party culpability. (*People v. Earp, supra*, 20 Cal.4th at p. 887.) We find no ineffective assistance of counsel.

### III

#### DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI  
J.

We concur:

McKINSTER  
Acting P. J.

CODRINGTON  
J.