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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.

CONNIE LYNN BARRETT,

Defendant and Appellant.

E055032

(Super.Ct.No. RIF146271)

OPINION

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge.  
(Retired judge of the Tulare Mun. Ct. assigned by the Chief Justice pursuant to art. VI,  
§ 6 of the Cal. Const.) Affirmed.

Patrick J. Hennessey, Jr., 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 Lilia E. Garcia and Stacy  
Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant Connie Lynn Barrett appeals from her conviction of infliction of cruel and inhuman punishment with injury resulting in a traumatic condition on a child (Pen. Code,<sup>1</sup> § 273d, subd. (a); count 1) and simple battery (§ 242; count 3) with a true finding on an allegation as to count 1 that she inflicted great bodily injury on a child under the age of five (§ 12022.7, subd. (d)). Defendant contends the evidence was insufficient to establish that she was responsible for the injuries to the victim, and the prosecutor committed misconduct in final argument by commenting on defendant's failure to produce witnesses and medical experts. We affirm.

## II. FACTS AND PROCEDURAL BACKGROUND

Defendant was charged with seven counts of child abuse (§ 273d, subd. (a)) with allegations as to counts 1 and 2 that she personally inflicted great bodily injury on a child under the age of five. The jury found her guilty of count 1 and of the lesser included offense of battery in count 3; it found her not guilty of the greater offense in counts 3 through 7; and it could not reach a verdict on count 2, on the lesser offenses in counts 4 through 6, or on the great bodily injury allegation attached to count 1. The trial court declared a mistrial as to those offenses and allegations. On the parties' later agreement, defendant admitted the great bodily injury allegation as to count 1 and all remaining counts and allegations were dismissed. Because defendant was convicted only of child abuse in count 1 and of battery as a lesser included offense in count 3, evidence relating

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

to the other counts will be set forth summarily except as directly relevant to an issue raised on appeal.

**A. Child Abuse of Jane Doe 1—Count 1**

Jane Doe 1 was born in December 2007 in Germany, where her mother was serving in the military. In July 2008, her mother was deployed to Iraq and left Jane 1 in the care of the mother's aunt, D. B., in Norco. B. placed Jane 1 in defendant's licensed day care facility between about 7:45 a.m. and 5:30 or 6:00 p.m. on weekdays while she worked. Jane 1 usually cried when she was left at defendant's house, but B. assumed it was because she wanted to be with her mother or B. Jane 1 appeared to be in good health, but she was suffering discomfort from teething. She had been born by cesarean section, and when she was about one month old, she had rolled off the bed while in her mother's care.

After Jane 1 had been in day care for about three weeks, B. noticed a red mark on her cheek. Defendant told B. another child had accidentally hit Jane 1 with a toy. A few days later, on a Friday, Jane 1 came home with a "knot" on her forehead. Defendant said Jane 1 had fallen when she tried to stand up by a toy box. B. testified that Jane 1 could get into a crawling position, but she could not move across the floor or stand. When Jane 1 returned to day care on the following Monday, August 11, 2008, the knot on her forehead and the bruise on her cheek had become worse and had darkened, but Jane 1 otherwise seemed normal, and B. did not notice any other injuries when she bathed the baby over the weekend.

B. dropped the baby off at defendant's day care in the morning of August 12, 2008, after the usual morning routine of feeding her a bottle and playing with her. About 4:30 p.m., defendant's daughter telephoned B. to report that Jane 1 was unconscious, and they could not revive her. Jane 1 had been taken to the hospital by ambulance. At the hospital, B. saw bruises on Jane 1's shoulder, ribs, chest, and eyes; those bruises had not been present when B. dropped the baby off that morning. B. told Riverside County Sheriff's Detective Richard Birmingham that Jane 1 sometimes cried from teething pain, and the sound could be "nerve-[w]racking," but caring for Jane 1 was "not too stressful."

Dr. Daphne Wong, a pediatrician at Children's Hospital of Orange County (CHOC) and the director of that hospital's child abuse team, testified that she evaluated Jane 1 in the pediatric intensive care unit at CHOC. Jane 1's soft spot was "a little bit full" and she had a number of bruises on her face, chest, thighs, and mid lower back. A CT scan revealed old and new subdural bleeding on both sides of her head, and there was additional bleeding in the middle portion of the brain, which "appeared to be acute, a new bleed." She clarified that acute meant "from hours to days," while the older bleeds "looked more subacute than chronic, so usually those would be days to weeks." A CT scan also revealed compression fractures of three thoracic vertebrae, as a result of which Jane 1 was paralyzed in her lower extremities. Another CT scan showed she had epidural bleeding in her lower spine, which appeared to be a new injury. That injury could have resulted from being slammed down hard and having her body hyperextended. Dr. Wong

had never before seen a similar injury; other doctors she spoke to said they had seen such injuries from motor vehicle accidents.

Later MRI's and CT scans showed that Jane 1's brain was starting to atrophy. She had extensive bilateral retinal bleeding. The hemorrhaging in her eyes could not have been caused by bouncing a child on the knee, but usually occurs from severe shaking, in a high-speed motor vehicle accident, from a crush injury, from a fall of two stories, or from a bleeding disorder.

Dr. Wong testified that the effects of shaking a child severely “can be anything from making the child irritable, vomiting, maybe a little more sleepy” to the child becoming comatose. She testified that: “In a case where you have a child that either dies or is severely neurologically devastated, as in this case, then you would see symptoms pretty much immediately, within—it could be from seconds to within a minute or two.” The prosecutor asked: “[I]s it your testimony that a child such as [Jane 1] would exhibit symptoms of either difficulty in breathing, going limp, or anything like that within seconds to a minute?” Dr. Wong responded: “Yes, it is.” Dr. Wong stated her opinion that Jane 1 had been the victim of abusive head trauma and child abuse.

Dr. Wong testified that it was not possible to pinpoint whether a bleed was hours or days old merely by looking at the scans. However, “[i]n cases where you have severe head trauma and someone becomes comatose or dies from it,” they become symptomatic immediately. She testified that retinal hemorrhages cannot be timed very well. Superficial ones can go away within a day, but deeper ones may last six or eight weeks.

Jane 1's retinal hemorrhages were mostly gone within a month. In Dr. Wong's opinion, "th[e] injury that caused th[e] damage happened within minutes of her stopping breathing."

Dr. Wong testified that Jane 1's spinal injuries could not have been caused by bouncing or a playful toss; rather, the baby would have to have been "slamm[ed] . . . down" or dropped directly on her bottom from a height far exceeding one foot.

As a result of her injuries, Jane 1 is on feeding and breathing tubes. She is not mobile, and she requires round-the-clock care.

Defendant's son P., 10 years old at the time of trial, testified that he had seen Jane 1 at his mother's day care when Jane 1 was a baby and he was five.<sup>2</sup> He testified his mother punished him by grounding him, and she never spanked or slapped him. He never saw her spank any of the children at the day care, yell at them, or put her hand on their mouths. He testified that Jane 1 had cried sometimes. He had never talked to anyone about what had happened to Jane 1 but then testified he had talked to defendant about it. He had seen defendant holding Jane 1 to get her to sleep, and defendant put Jane 1 down gently. Defendant would pick up Jane 1 when she was crying and rub her tummy to calm her down. P. did not remember being interviewed about Jane 1 when he was seven.

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<sup>2</sup> The trial took place in August 2011, and Jane's injury occurred in August 2008, meaning P. would have been seven at the time.

P. had been interviewed by trained forensic interviewer, Sarah Walker, on September 3, 2008. P. told Walker that defendant put Jane 1 in a playpen when she cried, and the more the baby cried, the longer defendant left her there. If the baby kept crying, defendant spanked her butt with her hand. If the baby cried too loudly, defendant made a “[m]ean” face and covered the baby’s mouth with her hand. She did the same thing to two other babies who cried a lot. Defendant told Jane 1, in a “[r]eally loud” voice, to stop crying. She would take the baby to the playpen, “just drop[]” the baby in from a height of 6 to 12 inches, and “just walk[] away.” Defendant sometimes spanked P. on the mouth, but she had never done so to Jane 1. Jane 1 sometimes pinched defendant, and defendant pinched her back.

Defendant’s husband, William, testified that defendant is a calm person who likes children, and she had never struck her own children or the children in her care. However, William had little involvement in the day care because he left for work at 4:30 a.m. and returned at around 3:30 p.m.

The afternoon Jane 1 suffered her injuries, William passed through the bedroom at about 3:30 p.m. and saw her in the playpen crying. However, he told Detective Birmingham on the night of the event that the baby had been smiling. He was confronted with a transcript of his responses to Detective Birmingham’s inquiries, and he testified he did not recall “a lot of this.” William said he later passed through the bedroom again and saw defendant patting the baby in a calming fashion, and the baby was making “a strange sound” like “hyperventilating.” William thought nothing of it because he had heard his

own child making the same sound. Ten minutes to half an hour later, defendant came out of the room carrying Jane 1, who was limp and had a “blank stare.” William told defendant to call 911 immediately. William began CPR and artificial respiration on Jane 1, and he testified he had been “a bit aggressive” in the lifesaving maneuvers. He was sure he had bruised her chest while performing compressions, but he could not have caused bruising on her eyes or back. He also said he had never seen any bruises on Jane 1 when the paramedics arrived within four minutes of the 911 call.

One of the responding paramedics testified he saw bruising on both sides of the baby’s face and on her forehead, eyes, neck, and chest. He heard William say the baby was accident prone and bumped her head a lot while crying and that the baby had spontaneously stopped breathing.

Detective Birmingham testified that William said on the night of the incident that he had seen bruising on Jane 1’s jaw and one other bruise. William also said Jane 1 had been crying a lot, and she could not stand or crawl; he did not think she could even get on her knees yet.

### **B. Battery of Jane Doe 2—Count 3**

Defendant started caring for Jane Doe 2 in mid-2006 when Jane 2 was about seven months old. Jane 2 could crawl and could pull herself up to standing while holding onto a support. She was healthy, and her mother, Tanya T., had never seen an injury on her. About a month into her time with defendant, Jane 2 started coming home with bruises. Once, she had several nickel-sized bruises in a line down her lower back near her spine,

and she also had a bruise on her leg. Defendant told Jane 2's mother the baby had fallen. Another time, Jane 2 had a split lip and a bloody nose, and a third time, she had a bruise along her jaw. Defendant said she had fallen into the toy box. Jane 2 always cried when they pulled into the driveway of defendant's house. On September 23, 2006, when Jane 2's grandmother, Mary T., picked her up from day care, she did not smile or laugh. When they arrived home, Tanya noticed Jane 2 was not using the left side of her body. Tanya took her to the pediatrician, who directed them to the emergency room. The treating physician at the emergency room said the baby looked fine and sent them home without taking X-rays.

Ten days later, Tanya and Mary noticed Jane 2's arm was swollen, and they again took her to the emergency room. X-rays showed a fracture of Jane 2's upper arm. The physician testified the injury had occurred between September 23 and 26. This type of injury was rare and resulted from the arm being twisted. He suspected abuse and notified the authorities. Jane 2 was detained for four months and then was released to Mary's exclusive care.

### **C. Counts 2 and 4 Through 7**

#### *1. Count 2*

A few weeks after defendant began caring for John Doe 1 in April 2008, John 1 began coming home with bruises. Defendant told his mother that the first bruises under his eyes and on his forehead had occurred when he and another child head-butted each other. Defendant told his mother a second set of bruises on his forehead and behind his

ears occurred when another child hit John 1 with a toy. In July, John 1 had bruising around his nose, and defendant said he had fallen into the toy box. John 1's mother noticed a "clicking" sound from John 1's chest when she carried him on her hip, and he swatted her hand away when she tried to touch or press his ribs. A few days later, she noticed bruises on his spine. In August, John 1's mother took him out of defendant's care after he suffered a large bruise on his forehead and tiny spots behind his ears up into his hairline and down onto his neckline.

## *2. Count 4*

Defendant cared for John Doe 2 for almost a year, beginning when he was eight or nine months old. Several times, he came home with fresh bruises. In February or March 2008, he had bruising inside his ear, down his neck, and on the side of his face. Defendant said he had fallen into the toy box.

## *3. Counts 5 and 6*

Defendant began caring for John Doe 3 and Jane Doe 3, brother and sister, in December 2005 when John 3 was about two and a half years old and Jane 3 was about one year old. A week later, John 3 had a bruise, which he said a friend at day care had given him. He later refused to answer his mother's questions about how additional bruises appeared on his arms and legs. On various occasions, Jane 3 had bruises on her face, neck, arms, and lower back running down her spine. Defendant said Jane 3 had fallen into the toy box and had fallen by the toy box and injured her neck playing roughly. The children's mother removed the children from defendant's care after Jane 3

came home with scratches all over her face and neck; defendant said the baby had fallen into a cactus.<sup>3</sup>

#### *4. Count 7*

Defendant began caring for Jane Doe 4 in April 2006 when Jane 4 was about 16 months old. Jane 4 once had severe bruising from the top of her head to behind her ear and across her nose. The lines of the bruise were longer than and different from the toys defendant said she had fallen on. Jane 4 once had a bruise in the shape of a handprint.

#### **D. Defense**

Defendant's friend Christine Watson testified defendant and all the children in her care were "always happy and laughing." Defendant cared for Watson's son, who was also a friend of defendant's son P. Watson said her son never complained of abuse at the day care, and Watson never saw any injuries on the children there.

Defendant's friend, Crystal Williams, testified that defendant had cared for Williams's son and daughter for several years. The children occasionally got small bruises in defendant's care but nothing that caused Williams concern. Neither child ever mentioned abuse at the day care, and Williams had never seen defendant get upset or frustrated or hit a child.

Detective Birmingham said he had told B., "This is looking like a shaken baby," and she became "very upset" and used expletives.

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<sup>3</sup> In her testimony, defendant denied having any cactus plants in her yard.

Defendant's adult daughter, Michelle Barrett, testified that she was often home all day in August 2008. She saw children fall and get hurt, including when they tried to get something out of the toy box. She never saw defendant get angry or spank any of the children.

Defendant's adult daughter, Danielle Schmidt, also testified that she was home most of the days in August 2008. She once saw John 2 fall onto a cube-shaped toy, and she "believe[d]" she saw Jane 1 fall and hit the edge of a coffee table, but the baby did not seem to be in much pain afterward. Schmidt said she had never seen defendant lose her temper or hit a child. Shortly before 4:00 p.m. on August 12, she heard Jane 1 crying "louder than normal" in the bedroom with defendant. About 10 minutes later, defendant came out of the room crying. The baby was not moving, and defendant told her husband, "I don't know what happened. Something is wrong with the baby." Schmidt watched William perform CPR on Jane 1. She noticed a bruise on the baby's face, but she did not see the other bruises Dr. Wong noted when examining the baby that night.

Schmidt told Detective Birmingham that Jane 1 had not been crying until defendant entered the bedroom. After that, the child cried for about 10 minutes and then suddenly stopped, and defendant came out with the motionless baby. She also told the detective defendant got upset with the children in her care, and particularly with Jane 1, because she made so much noise.

Defendant testified in her own behalf. She had been a child care provider for 17 years, had taken many classes, had been trained in child CPR, and had become a licensed

day care provider. She testified she had never spanked or shaken a child in her care.

Jane 1 started out as a happy baby but then started “teething pretty bad.” She struggled a lot with defendant and fought to lie down when defendant tried to sit her upright. About the third week she was at defendant’s day care, she hit her chin and cheek while crawling around. Defendant did not think the incident was harmful, and she did not fill out an incident report.

On Friday, August 8, 2008, Jane 1 had no bruises. The following Monday, B. told defendant that Jane 1 had fallen onto a coffee table at B.’s house, and defendant noticed a knot on the baby’s forehead and a mark by her temple. It did not worry her, even though B. remarked that it looked as though the baby had been beaten, and Jane 1 was more fussy than normal.

On Tuesday, August 12, Jane 1 woke from her nap at around 3:00 p.m. When defendant picked her up, she “let out a screech . . . [¶] . . . [¶] . . . a high-pitched scream.” Defendant changed her diaper and noticed she was sweaty and red all over. The baby began hyperventilating from crying so hard. Defendant splashed water on her and held her under a fan, but it did not help, and the baby’s breathing became labored. Defendant bounced her on her knee, and she seemed to calm down. William came into the room and remarked that the baby’s breathing was odd. Soon after that, the baby suddenly “tightened up, and . . . just went limp” with a blank stare.

Defendant hurried to the living room to ask William for help. She had her mobile telephone with her, but she did not call 911 until William urged her to do so. William

performed CPR and artificial respiration. The baby had bruises on her face when the paramedics arrived, but they were the bruises the baby had on Monday morning.

#### **E. Rebuttal**

Detective Birmingham testified that defendant told him in an interview that she heard Jane 1's high-pitched screech once or twice before. In her testimony, defendant denied ever hearing that sound before. The detective testified that Schmidt had told him defendant became frustrated because Jane 1 was so loud.

#### **F. Sentence**

The trial court sentenced defendant to the middle term of four years on count 1 and the low term of four years on the great bodily injury allegation attached to that count.

Additional facts are set forth in the discussion of the issues to which they pertain.

### **III. DISCUSSION**

#### **A. Sufficiency of Evidence**

Defendant contends the evidence was insufficient to establish that she was responsible for the injuries to Jane 1.

##### *1. Standard of Review*

When a criminal defendant argues the evidence was insufficient to support her conviction, “we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the

same in cases in which the People rely mainly on circumstantial evidence. [Citation.] “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. ““If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.”” [Citations.]” [Citations.]’ [Citations.] The conviction shall stand ‘unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].”’ [Citation.]” (*People v. Cravens* (2012) 53 Cal.4th 500, 507-508.)

## 2. Analysis

Defendant argues that Dr. Wong’s testimony about finding some older bleeding as well as new, acute bleeding, in Jane 1’s skull, raised a “legitimate question[]” as to whether defendant caused Jane 1’s injuries. She suggests the injuries could have been caused by the passage through the birth canal<sup>4</sup> or by a fall from the bed.

However, B. testified that Jane 1 was healthy and uninjured when she began attending defendant’s day care. Within three weeks, she had a bruise on her cheek. The next week, she had a large knot on her forehead as well as extensive bruising. On

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<sup>4</sup> Jane 1 was born by Cesarean section, however.

August 12, Jane 1 was normal, except for that bruising, when B. dropped her off at day care.

Defendant admitted she was alone in the room with Jane 1 at around 3:30 p.m. when the baby became unresponsive, although before that she had seemed normal and had been smiling. Schmidt testified the baby had not been crying before defendant entered the room, and at around 4:00 p.m., Schmidt heard the baby crying “louder than normal,” but the baby had suddenly stopped crying when alone in the room with defendant. Defendant came out of the room carrying the limp baby. William testified defendant had been alone in the room with the loudly crying, moving baby 10 to 30 minutes before she came out with the motionless baby.

Defendant’s son P. told a forensic interviewer defendant spanked Jane 1, covered her mouth when she cried, dropped her into the playpen from a height of six inches to one foot, and left her there until she stopped crying. He said defendant yelled at the baby while making a mean face and pinched her.

Detective Birmingham testified that on the night of August 12, defendant’s daughter told him defendant got frustrated with the children, particularly Jane 1, because Jane 1 cried so much, and defendant raised her voice.

Defendant argues that Dr. Wong identified two separate subdural bleedings, one on each side of Jane 1’s head, and one of which was older than the other. She testified even the more recent bleeding could have been hours to several days old. Dr. Wong testified subdural hematomas can be caused by shaking, car accidents, and the birth canal

of the mother, and that retinal hemorrhaging can sometimes last six to eight weeks. However, Dr. Wong testified Jane 1's injuries were of a type that would have resulted within seconds or minutes of the force that caused them, and even a fall from a two-story building could not have caused the massive injuries. The injuries were consistent with someone violently and deliberately shaking the baby.

Finally, the pattern of injuries supported the jury's verdict: Children, particularly infant children with no previous injuries, came home from defendant's care with bruising on their foreheads, faces, or lower backs near their spines. Defendant never notified the parents as she was required to do by law, but she waited until the parents questioned her. Frequently, she told the parents their child had fallen on a toy or fallen into a toy box.

In short, defendant's argument turns the standard of review on its head—she merely presents the evidence in the light most favorable to her own position rather than the light most favorable to the jury's verdict. (*People v. Cravens, supra*, 53 Cal.4th at pp. 507-508.)

We conclude substantial evidence supports defendant's conviction.

#### **B. Prosecutorial Misconduct**

Defendant contends the prosecutor committed misconduct in final argument by commenting on defendant's failure to produce witnesses and medical experts.

## *1. Additional Background*

### (a) Argument about parent testimony

In argument to the jury, defense counsel stated: “And who did [the prosecutor] bring in to testify? And I’m not saying anything bad about being a first-time mother or a young mother because it’s the most difficult time in your life. It really is. But he brought in a bunch of young ladies with only children, without a lot of experience, who had little babies learning to walk, learning to crawl, who maybe didn’t have that level of experience, who maybe when they look back now three, four, five years later, yeah, a big bump like the one on the pumpkin, that was a huge wound.”

In rebuttal, the prosecutor argued: “You know, it was interesting. All these women were asked—[defense counsel] describes them as young women . . . . Young first-time mothers that she describes, well, they didn’t think it was abuse. And it was interesting—I wrote it on my binder—two of them said the same thing. And that was, I trusted her, I believed her, for she is a daycare worker, one who opens up her house with that sign. She has seen over 150—taken care of 150 to 200 kids; right? That is a lot of children. [¶] How many parents came in here to defend her? How many? I have the burden of proof. That rests on my shoulders. She is on trial, a serious one. How many parents of those 150 to 200 came in to defend [her]?”

Defense counsel objected on the ground of burden shifting, and the trial court admonished the jury: “I would just remind the jury that the People do have the burden of proof, but they can comment, I think, on the state of the evidence, and that is part of the

state of the evidence.” The prosecutor continued: “And that burden rests solidly on my shoulders, and I have no problem with it. Two. Two parents that sat there—that still—one of them still sits there. Her daughter described these parents as family. Of 150 to 200 parents, 2 came in. Two.”

(b) Argument about expert testimony

Defense counsel also argued: “Now, what happened to [Jane 1]? [The prosecutor] said that the evidence from his doctor was unrefuted. He said that. Unrefuted. He said it over and over again. Well, there was no—I’m not saying that we needed to refute it, because what did she tell you? She told you she didn’t know when the injury had occurred. She said seconds to minutes to days to weeks. She said that when the bleeding gets to a certain point, symptoms will manifest themselves within minutes of the bleeding getting to a certain point. But she tells us there is [*sic*] old hematomas; there is [*sic*] new hematomas. Some are weeks—days to weeks old; some are hours to days old. She can’t tell you anything definitively about when they occurred.”

In closing argument, the prosecutor stated: “And how many doctors on the side of defense? How many?” Defense counsel objected, and the trial court sustained the objection. The prosecutor continued: “Well, I called two doctors.<sup>[5]</sup> Those are the only

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<sup>5</sup> In connection with count 2, Dr. Lorena Vivanco, a forensic pediatrician, testified that X-rays taken on August 29, 2008, showed John 1 had three separate rib fractures. She testified it is more difficult to fracture an 11-month-old child’s rib than an adult’s rib, because the child’s ribs are more flexible. The fractures could not have been caused by another child’s hitting John 1 with a toy, by a fall from a stroller, or by bumping into a table, but they could have been caused by a severe motor vehicle accident, a fall of three or four stories, or by someone squeezing his chest very hard. In

*[footnote continued on next page]*

doctors you heard in this trial. The only ones. And [defense counsel] and I seem to have a disagreement as to what Dr. Wong says. Please—this is a serious case—get readback of Dr. Wong. I am confident in that. Dr. Wong didn't say this could have been seconds to minutes to days to weeks. There are different things she commented on. But she was very specific, and you will find it in that testimony when she said the symptoms from the injury caused would have occurred within seconds to minutes. She said it numerous times. Seconds to minutes. Meaning whoever had [Jane 1] during those seconds to minutes created that injury.” The prosecutor further explained why Dr. Wong’s expert testimony was inconsistent with the defense theory.

## 2. *Analysis*

A prosecutor has a duty to prosecute vigorously, but he must refrain from improper methods calculated to produce a wrongful conviction. (*Berger v. United States* (1935) 295 U.S. 78, 88.) Under the federal Constitution, a prosecutor commits misconduct by using “deceptive or reprehensible methods to persuade the jury . . . [that] infect the trial with such “unfairness as to make the resulting conviction a denial of due process.”” (*People v. Parson* (2008) 44 Cal.4th 332, 359.) Under the state Constitution, a prosecutor commits misconduct even when his actions “do not result in a fundamentally unfair trial.” (*Ibid.*)

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*[footnote continued from previous page]*

Dr. Vivanco’s opinion, the fractures were four to six weeks old when the x-rays were taken. If the fractures had been caused by squeezing, there would not likely have been external bruising.

It is generally permissible for a prosecutor to comment on the state of the evidence or on the defendant's failure to call logical witnesses, introduce material evidence, or rebut the prosecution's case. (*People v. Medina* (1995) 11 Cal.4th 694, 755; *People v. Varona* (1983) 143 Cal.App.3d 566, 570 ["where a defendant might reasonably be expected to produce such corroboration," "a prosecutor may argue to a jury that a defendant has not brought forth evidence to corroborate an essential part of his defensive story."].) However, a prosecutor may not suggest that "a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.)

(a) Comment on parents' testimony

First, defendant contends the prosecutor impermissibly shifted the burden by commenting on the fact that she called only two of the many parents who had left their children in her care. As noted, however, defense counsel first raised the issue that the prosecutor had brought in only young, inexperienced mothers to testify, and more experienced mothers would not have been alarmed by the types of injuries common to children learning to crawl and walk.

A prosecutor may respond in rebuttal to defense counsel's arguments even if the response might otherwise have been improper in closing. (*People v. Hill* (1967) 66 Cal.2d 536, 560.) Here, the prosecutor's rebuttal argument that defendant could have called more parents to testify, responded directly to defense counsel's argument that the prosecutor called only young, inexperienced parents.

(b) Comment on expert testimony

Second, defendant contends the prosecutor impermissibly shifted the burden by commenting on her failure to call her own expert medical witnesses. Defendant's theory of the case was that Jane 1's injuries had been inflicted by another, possibly B., before Jane 1 arrived at the day care on August 12. As noted, defense counsel argued to the jury that Dr. Wong's testimony had left open that possibility.

The prosecutor disagreed with defense counsel's characterization of Dr. Wong's opinion. In light of the defense theory and defense counsel's argument supporting it, it was proper for the prosecutor to comment that defendant had failed to call medical witnesses to rebut Dr. Wong's testimony that Jane 1's injuries would have manifested themselves immediately. In context, the prosecutor did nothing more than argue that defendant had "not brought forth evidence to corroborate an essential part of [her] defensive story." (*People v. Varona, supra*, 143 Cal.App.3d at p. 570.) We conclude the prosecutor did not commit misconduct in his argument.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

CODRINGTON

J.