

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNIE OLMEDO,

Defendant and Appellant.

F063171

(Super. Ct. No. RF005765A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

A jury convicted appellant, Ernie Olmedo, of felony child abuse (Pen. Code, § 273a, subd. (a)), and found true an enhancement allegation that, in committing that offense, appellant personally inflicted great bodily injury on a child under the age of five years (§ 12022.7, subd. (d)). The court imposed a prison term of seven years, consisting

of the two-year lower term on the substantive offense and five years on the accompanying enhancement.

On appeal, appellant contends the court erred (1) in denying his *Wheeler/Batson*¹ motion, and (2) in instructing the jury on appellant's failure to explain or deny adverse evidence. We affirm.

FACTS

Appellant and Sarah Crosby met while they were both in the Navy and stationed in Norfolk, Virginia.² They began dating in 2006, while appellant was separated from his wife and, in 2007, Crosby became pregnant. E., the son of appellant and Crosby, was born in February 2008 in Virginia. Appellant, who by then was stationed in California, was not present for the birth. Crosby spoke to appellant by telephone before and after giving birth, but appellant did not come to Virginia to see E. Appellant did not meet E. until May 2009, when Crosby brought E. to visit appellant in Ridgecrest, California. At that time, Crosby and appellant were "back in a relationship."

Crosby was scheduled to be deployed in January 2010, and she and appellant agreed that he would take care of E. during Crosby's deployment. On November 1, 2009,³ Crosby and appellant met in Louisiana where E. had been staying with Crosby's mother while Crosby prepared for the change of her "home port" from Virginia to California. They picked up E. and drove to Ridgecrest together, arriving on November 9. Crosby left on November 21 and returned to Virginia. When she left Ridgecrest, E. was in "good" condition. He was "chunky and happy and playful."

Approximately nine or ten days after she left Ridgecrest, appellant informed her by telephone that E. was vomiting "a lot." E. had never been prone to vomiting before. Crosby pressed appellant for an explanation as to why E. was throwing up, but appellant

¹See *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

²Except as otherwise indicated, our factual statement is taken from Crosby's testimony.

³Except as otherwise indicated, further references to dates of events are to dates in 2009.

responded he did not know. At one point, appellant told Crosby he had taken E. to a hospital emergency room, but left without E. being seen by a doctor because, appellant told her, “he was there too long.”

Crosby flew to California, arriving on the night of December 25, and appellant picked her up in Los Angeles the next day. E. was with him. The boy was pale, very thin, had no energy, had dark circles under his eyes and smelled of vomit. They drove back to appellant’s house in Ridgecrest.

The house was not in the same condition as when Crosby had left. It smelled like “dog” and “crap,” the carpets were soiled, there was virtually no food in the house and the refrigerator contained spoiled milk and mildewed food. Crosby cleaned the house.

On December 28, Crosby took E. to the emergency room at Ridgecrest Regional Hospital. She was concerned because E. had slept for 15 hours and then vomited when he woke up. E. was diagnosed with severe constipation. Crosby was instructed to give him stool softeners and rehydration fluids.

On December 29 at approximately 4:43 p.m. Crosby went out to run errands. A few minutes later she received a text message from appellant saying he wanted to give E. a bath. Crosby responded that was fine. She was in the midst of her first errand, at the grocery store, when she received a telephone call from appellant telling her he was at the emergency room with E. Crosby went to the emergency room and met appellant, who told her E. had fallen from the bathroom counter. After being treated in the emergency room, E. was transported to Loma Linda Hospital in San Bernardino.

City of Ridgecrest Police Detective Manuel Castaneda testified that he questioned appellant on January 5, 2010, at which time appellant stated the following: After Crosby left the house, appellant, while changing E.’s diaper, decided to bathe E. by taking a shower with him. Appellant took E. into the bathroom, set him on the corner of the sink, turned on the water in the shower and left the bathroom to get clothes for E. and him. When appellant returned to the bathroom approximately three minutes later, he found E. lying on the floor, between the toilet and the sink, his eyes partially open and his pupils

crossed. Appellant called E.'s name but he did not respond. Appellant picked up E., ran outside the bathroom and saw his roommate, Sonny, and told Sonny they had to go to the emergency room. They got in the car and Sonny drove there.

Dr. Stanford Shu testified to the following. He is a pediatrician with a specialty in neurology. He treated E. at Loma Linda Hospital. An MRI scan of E.'s head, done on December 30, showed that E. had suffered various brain injuries, including damage to the frontal lobe and subdural bleeding. Dr. Shu opined that the frontal lobe injury occurred between 15 minutes and 10 days prior to the MRI. He further opined that the subdural bleeding could have been caused by rotational trauma. “[S]haking ... can ... be considered” a rotational trauma. “[I]n [his] experience,” a three-foot fall would not cause the “level of trauma” suffered by E. “Typically,” the kind of brain injuries suffered by E. “require[] a fall of greater than ten feet.”

Dr. Shu also reviewed an “MR spectroscopy” which showed other brain injuries. He opined as follows: It was “more likely” these injuries were caused by rotational trauma than by blunt force trauma; “[g]enerally,” such injuries would not be caused by a three-foot fall; and it was “very unlikely” E.'s injuries were caused by a three-foot fall.

Dr. Mark Massi testified to the following. He is a forensic pediatrician. He treated E. in December 2009 and January 2010. He opined that E.'s injuries were caused by some sort of trauma on or around December 29 and were “[not] consistent with a three-foot fall from this countertop onto [the] floor.” E.'s subdural bleeding was consistent with “acceleration-deceleration injury,” i.e., injury caused by the “repetitive accelerating and decelerating of the head as it moves through space,” as where “the body [is] being held and shaken” E. suffered retinal hemorrhages, the pattern of which is seen only in “catastrophic traumas like crush injuries” and child abuse.

Dr. Ronald Gabriel, called by the defense, testified that he is a pediatric neurologist. He opined as follows: It is “virtually impossible” to cause significant head injury by shaken acceleration alone, unless the force is great enough to also break the neck. E.'s injury “was an impact injury without question.” E.'s injuries were “perfectly

compatible” with a short fall. Children who have tipped over while using a walker and fallen a maximum of two feet have suffered bleeding in the brain leading to death. “Striking a child’s head with a knuckle ... is highly unlikely to cause brain bleeding” unless the force used is equal to a “terrific blow ... by a professional fighter.”

Appellant testified that he recalled on one occasion “giving [E.] a knuckle to the head” in order to get his attention when E. was struggling as appellant tried to get him into a car seat, “but even then it wasn’t that hard because he didn’t cry.” Appellant also testified he recalled only two occasions when he shook E. On one occasion, when E. was not obeying, appellant “grabb[ed] him by the shoulders, ... and in a stern voice [told] him to knock it off.” E. was crying, but that was because appellant “yelled at him, not at the fact that [he] put [his] hands on [E.’s] shoulders and scolded him.” On another occasion, when E. persisted in throwing his food, appellant “put[] one hand on his shoulder, [and] another hand on his shirt,” and again told him to stop.

DISCUSSION

1. Claim of *Wheeler/Batson* Error

“[The California Supreme Court] held in [*Wheeler, supra.*] 22 Cal.3d 258, 276-277, ‘that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution.’ In [*Batson, supra.*] 476 U.S. 79, 96, the United States Supreme Court held that a prosecutor’s use of peremptory challenges to excuse prospective jurors ‘on account of their race’ may violate the equal protection clause of the Fourteenth Amendment to the federal Constitution.” (*People v. Jones* (1997) 15 Cal.4th 119, 159, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Hispanics are a cognizable group for purposes of both *Wheeler* and *Batson* (*People v. Alvarez* (1996) 14 Cal.4th 155, 193), and here, appellant contends and the People do not dispute that of the four prospective jurors who had been peremptorily challenged by the prosecution at the time of the motion, two, E.L. and M.G., were Hispanic.

The burden is on the party claiming *Wheeler/Batson* error to make a prima facie showing that the peremptory challenges had been exercised in violation of the

Constitution. (*Johnson v. California* (2005) 545 U.S. 162, 168.) Appellant argues that the trial court erred “in failing to find that appellant had established a prima facie case of race-based discrimination in the exercise of peremptory challenges against [Prospective Jurors E.L. and M.G.]”

A. Background

On March 17, 2011, the prosecutor used a peremptory challenge to excuse Prospective Juror E.L. from the jury. On March 21, 2011, when jury selection resumed, the prosecutor peremptorily challenged Prospective Juror M.G., at which point defense counsel stated he wanted to make a motion. An unreported sidebar conference was held, after which jury selection resumed.

At the next recess, the court noted that during the previous sidebar conference defense counsel presented a *Wheeler/Batson* motion. The court asked defense counsel if he wanted to “make a statement.” Counsel responded, “The Defense makes a *Batson-Wheeler* motion based on the People’s peremptory challenges” In support of the motion, defense counsel stated appellant was Hispanic, as were Prospective Jurors M.G. and E.L.; the prosecutor had, at that point in the jury selection process, exercised two of her four peremptory challenges against Hispanic prospective jurors; “[t]he majority of the remaining panel have been mainly Anglos”; E.L.’s answers to questions on voir dire demonstrated she was “unbiased” and could be fair and neutral; and similarly, M.G.’s answers indicated she “could be fair, unbiased.” Defense counsel asserted, “there is an inference based on two out of four jurors that [the prosecutor] is excluding Hispanics from the jury pool because of their racial makeup”

The court acknowledged that the defense had made a *Wheeler/Batson* motion during the sidebar conference, and stated:

“I determined and ruled at sidebar and now state that I did not find a prima facie showing under the totality of circumstances that would support the motion. [Appellant] and the challenged jurors may be said to be members of a cognizable group, that is, Hispanics At this point in the proceedings, I don’t see any particular group overtones to the case before the Court at this time. I was unable to determine whether many or all of the

members of an identified group from the jury panel were challenged because the only other reference was one juror, Ms. [L.], and I did not find that there was a disproportionate number of peremptory challenges used against members of the group. The Prosecution had only exercised four challenges, and ... the others were not part of this alleged group. So that was the basis of my ruling at that time.”

The court then asked the prosecutor if she “wish[ed] to say anything.” The prosecutor responded, “Since the Court didn’t find a prima facie showing, I’m not going to comment as to my neutral reasons for why I chose to use peremptories on those two jurors.” The prosecutor then “noted for the record” the makeup of the jury panel by gender, and stated further, “There is currently a Hispanic woman seated in juror seat No. 2. No peremptory challenge has been exercised against her.” Neither the court nor defense counsel disputed the prosecutor’s statements regarding the makeup of the jury panel.

B. Other Applicable Legal Principles

A party “make[s] out a prima facie case ‘by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.’” (*Johnson v. California, supra*, 545 U.S. at p. 168; see also *People v. Bonilla* (2007) 41 Cal.4th 313, 341 (*Bonilla*) [defendant must show inference of discrimination arising from totality of relevant facts].) A party “should make as complete a record of the circumstances as is feasible.” (*Wheeler, supra*, 22 Cal.3d at p. 280.) Only if a party makes the required prima facie showing does the process move to the second stage in which ““the “burden shifts to the State to explain adequately the racial ... exclusion” by offering permissible race-neutral ... justifications for the strikes.”” (*Bonilla, supra*, at p. 341.) In the third stage, ““if a race-neutral ... explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful ... discrimination.”” [Citation.]” (*Ibid.*)

“In deciding whether a prima facie case was stated, we consider the entire record before the trial court [citation], but certain types of evidence may be especially relevant: ‘[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or

has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, ... the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.” (*Bonilla, supra*, 41 Cal.4th at p. 342.)

“The trial court’s determination that no prima facie showing of group bias has been made is subject to review to determine whether it is supported by substantial evidence.” (*People v. Jenkins* (2000) 22 Cal.4th 900, 993.) “Since the burden of proof is on the moving party, it is axiomatic that when a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the showing reviewed on appeal is that made by the moving party to the trial court. [Citation.] ‘The focus of the prima facie inquiry “is on the objecting party’s contentions and the record.”’” (*People v. Trevino* (1997) 55 Cal.App.4th 396, 404.)

“Because of the trial judge’s knowledge of local conditions and local prosecutors, powers of observation, understanding of trial techniques, and judicial experience, we must give ‘considerable deference’ to the determination that [the defendant] failed to establish a prima facie case of improper exclusion. [Citation.]” (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 782.) “[T]he law recognizes that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality. The evidence may range from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative.” (*Wheeler, supra*, 22 Cal.3d at p. 275.) Counsel may develop a distrust for a potential juror’s objectivity ““on no more than the “sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another” [citation].” (*People v. Johnson* (1989) 47 Cal.3d 1194, 1215-1216; accord, *People v. Turner* (1994) 8 Cal.4th 137, 171, disapproved on another

ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) “Jurors may be excused based on “hunches” and even “arbitrary” exclusion is permissible, so long as the reasons are not based on impermissible group bias.’ [Citations.]” (*People v. Watson* (2008) 43 Cal.4th 652, 670.)

C. Contentions and Analysis

Here, the record reveals that appellant based his *Wheeler/Batson* motion on the following: (1) he is Hispanic, (2) of the four prospective jurors challenged by the prosecutor at the time of his motion, two were Hispanic; (3) “[t]he majority of the remaining panel [i.e., the panel remaining after Prospective Juror M.G. was excused] [were] mainly Anglos”; and (4) the answers of the two challenged Hispanic prospective jurors to questions posed on voir dire showed that both were unbiased and could fairly perform their duties as jurors. These factors were not sufficient to establish a prima facie case of group bias.

The fact that appellant and Prospective Jurors E.L. and M.G. are Hispanic supports an inference of discrimination but is not dispositive. (*People v. Thomas* (2012) 53 Cal.4th 771, 794.) Nor is appellant’s cause advanced by the fact that, as appellant points out, 50 percent of the prosecutor’s peremptory challenges—two of four—were directed at Hispanic prospective jurors. As our Supreme Court stated in *Bonilla* in rejecting a *Batson-Wheeler* claim where the prosecution had peremptorily challenged 100 percent of the African-Americans in the jury pool—two of two—“the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible. “[E]ven the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion.”” (*Bonilla, supra*, 41 Cal.4th at p. 343.)

In addition, we note that the record shows the following: At the time of the motion, the prosecutor noted that one female Hispanic venireperson was seated in the jury box and had not been challenged; neither the court nor the defense challenged this claim; subsequently, the prosecutor accepted the panel three times; and the only female

Hispanic-surnamed prospective juror peremptorily challenged by the prosecution following the court's ruling on the *Wheeler/Batson* motion was added to the panel *after* the court's ruling. Thus, it appears that at least one Hispanic person served on the jury, and “[a]lthough the circumstance that the jury included a member of the identified group is not dispositive [citation], ‘it is an indication of good faith in exercising peremptories ...’ and an appropriate factor to consider in assessing a *Wheeler/Batson* motion.” (*People v. Clark* (2011) 52 Cal.4th 856, 906; accord, *People v. Cornwell* (2005) 37 Cal.4th 50, 69-70, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 420, fn. 22 [no inference of bias in excusing one of two African-American prospective jurors, given that the other African-American prospective juror was passed repeatedly by prosecutor and sat on jury].)

We turn now to an examination of the responses of Prospective Jurors E.L. and M.G. to questions posed to them during voir dire. E.L. indicated the following: She had been employed as a “[r]ecords analyst” at Wasco State Prison for 20 years; she “audit[ed] inmate files.” She had no “associations” with correctional officers, and except for “a few [inmates] that come through screening,” she had “no real contact” with inmates. There was nothing about her employment that caused her “to think [she would be] less than fair” She had served on three juries, each of which reached a verdict. She would be fair, and she would “follow the law.”

Prospective Juror M.G. indicated she worked as a “packer”; her husband worked in maintenance; she has two daughters, ages 19 and 25, and a 15-year-old son; she had served on a jury in a criminal case and the jury reached a verdict; and she could be fair.

The following exchange with the prosecutor, appellant argues, demonstrates the prosecutor's racial bias:

“Q. [Prosecutor] Is [your son] your baby?

“A. [Prospective Juror M.G.] Baby.

“Q. Do you feel kind of protective of him because he is the baby?

“A. Yes.

“Q. Did he ever get in any trouble in life? And I don’t necessarily mean any criminal trouble.

“A. Nothing so far. He’s been a good boy so far.

“Q. How old is he?

“A. He’s 15.

“Q. Okay. Anybody ever say something bad about your son? A schoolmate or a teacher disagreed? And it doesn’t have to be this huge thing.

“A. Well, maybe when he was in first grade when he was a real—you know, a clown. He used to make the kids laugh and stuff.

“Q. Did he get in trouble for it?

“A. Oh, yes.

“Q. And how did you go about handling that?

“A. Oh, well, I took some games away from him that he liked playing or stuff like that. It was something pretty simple.

“Q. [Defense counsel] brought up the—all the Ps again, the five Ps. I talked to everybody last week about the trifecta, which is: Did it. Feel bad about it. But I don’t think there should be any penalty for it.

“You see [appellant]. He’s sitting here every day. Looks like a nice young man. Could be your son; right?”

“A. Yes.” (Italics added.)

At this point, the court sustained a defense objection, after which the questioning continued:

“Q. Do you think there’s anything about [appellant]’s appearance that, sitting here right now, you don’t think you could be fair? You just look at him and think, ‘I just think the D.A.’s office is up to their old tricks again?’

“A. No.

“Q. So you don’t come into the courtroom with any of that perception?”

“A. No.”

Appellant argues that the italicized portion of the voir dire quoted above establishes the overt racial bias of the prosecutor because “[t]he only reasonable explanation” for asking Prospective Juror M.G. whether appellant, who was 29 years old,⁴ “could be her 15-year-old son, is that appellant and her son are both Hispanic.” Appellant further argues: “This conclusion is all the more obvious given that the prosecutor did not engage in similar questioning with any of the other veniremembers.”

As to the latter point, which requires that we compare the prosecutor’s questioning of Prospective Juror M.G. with that of other prospective jurors, the following statement by our Supreme Court in *Bonilla* is instructive:

“[T]his is a ‘first-stage’ *Wheeler/Batson* case, in that the trial court denied Bonilla’s motions after concluding he had failed to make out a prima facie case, not a ‘third-stage’ case, in which a trial court concludes a prima facie case has been made, solicits an explanation of the peremptory challenges from the prosecutor, and only then determines whether the defendant has carried his burden of demonstrating group bias.... Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor’s proffered justifications for his strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution’s actual proffered rationales, and we thus decline to engage in a comparative analysis here.” (*Bonilla, supra*, 41 Cal.4th at p. 350.)

We, too, decline to engage in comparative juror analysis, in this first-stage case.

Further we reject appellant’s claim that the only reasonable interpretation of the prosecutor’s comments is that she challenged Prospective Juror M.G. solely because she was Hispanic. This claim may not be raised on appeal because it was not a basis for appellant’s motion at trial. (*People v. Trevino, supra*, 55 Cal.App.4th at p. 404 [in *Wheeler/Batson* context, when trial court finds no prima facie showing of discrimination, the showing reviewed on appeal is that made by moving party in trial court]; *People v.*

⁴Appellant’s date of birth is May 7, 1981.

Christopher (1991) 1 Cal.App.4th 666, 673, fn. 4.) And, in any event, it is without merit. The age difference notwithstanding, another reasonable explanation for the challenged questioning is that the prosecutor may have been concerned that Prospective Juror M.G., the mother of a son who had gotten into some minor trouble, would be favorably disposed to the plight of another mother's son in trouble of a far more serious sort.

Appellant's claim that nothing in the responses of the challenged venirepersons indicates they could be less than fair was raised below and therefore may be raised on appeal. However, although the responses of Prospective Jurors M.G. and E.L. may not suggest a reason for a challenge, by the same token we note that nothing in the record suggests any racially discriminatory reasons for the questioned peremptory challenges. In *People v. Thomas*, our Supreme Court found that "Although no obvious reason appears why the prosecutor would have chosen to strike [two African-American venirepersons peremptorily challenged by the prosecutor], the absence of a reason that is apparent on the record does not, in the context of all the other circumstances, suggest that the reason was race. Here, 'the prosecution's pattern of excusals and acceptances during the peremptory challenge process reveals no obvious discrimination ...' against African-American jurors." (*People v. Thomas, supra*, 53 Cal.4th at p. 795; see also *People v. Cornwell, supra*, 37 Cal.4th at p. 70 ["circumstance that the juror was not subject to exclusion for cause certainly did not support an inference that the exercise of a peremptory challenge against her was motivated by group bias"]; but see *People v. Gray* (2001) 87 Cal.App.4th 781, 789 [where prosecutor excluded every African-American male examined on voir dire—total of three—and record showed legitimate reasons for peremptory challenge of two of them, defense nonetheless made out prima facie case of discrimination on voir dire by showing there was "no apparent, legitimate reason to exclude" the third African-American male venireperson].) Here, too, no obvious reason appears why the prosecutor chose to have Prospective Jurors E.L. and M.G. removed from the jury. However, "in the context of all the other circumstances" (*People v. Thomas, supra*, at p. 795), notably the prosecutor's acceptance of the panel with at least

one Hispanic juror, the record does not suggest the prosecutor acted based on impermissible discriminatory reasons. On this record, we conclude that the totality of the facts did not give rise to an inference of discrimination.

2. Claim of Instructional Error

The trial court instructed the jury pursuant to CALCRIM No. 361 as follows:

“If [appellant] failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. [¶] If [appellant] failed to explain or deny, it is up to you to decide the meaning and importance of that failure.”

Appellant contends this instruction was given in error because, he asserts, he “did not fail to explain or deny any evidence against him which he could reasonably have been expected to deny or explain because of facts within his knowledge.”

The People disagree and point to appellant’s testimony as to the following: He had been taking E. to “naval base doctors,” but on December 18 he became dissatisfied with the care E. was receiving and took E. to Ridgecrest Regional Hospital. However, he left before E. could be seen by a doctor because he and E. had been there “for some time” and he (appellant) “didn’t believe [they] were getting appropriate service” E. continued to have trouble with vomiting over the next several days, yet appellant did not take him to a doctor, and E. did not see a doctor until Crosby took him to the hospital on December 28. The People argue that appellant failed to explain why he did not take E. to a doctor in the period from December 18 through December 28, despite the child’s ongoing problems with vomiting during that period, and that therefore giving CALCRIM No. 361 was proper.

“[T]he test for giving the instruction [on a defendant’s failure to explain or deny evidence against him or her] is not whether the defendant’s testimony is believable. [The instruction] is unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear.” (*People v. Kondor*

(1988) 200 Cal.App.3d 52, 57.)⁵ We note that in the instant case, appellant indicated on direct examination that although E. was vomiting during the period in question, appellant “[thought he] had it under control,” and that “[E.] looked okay. He was playing with the kids.” Appellant indicated that “[o]ther than the throwing up and stuff,” E. “seemed okay.” However, even if we were to conclude that the foregoing testimony constitutes an explanation of appellant’s failure to get medical attention for E. after December 18, and that therefore CALCRIM No. 361 should not have been given, we would not reverse the judgment.

In assessing whether the erroneous giving of CALCRIM No. 361 is prejudicial, we apply the harmless error standard adopted in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Saddler* (1979) 24 Cal.3d 671, 681-683 [applying *Watson* standard to erroneous giving of CALJIC No. 2.62]; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1471 [same].) Thus, the relevant inquiry is whether it is “reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*Watson, supra*, at p. 836.) When we apply this standard, we conclude, for a

⁵The instruction at issue in *People v. Kondor, supra*, 200 Cal.App.3d 52, was CALJIC No. 2.62, an earlier version of CALCRIM No. 361. CALJIC No. 2.62 states: “In this case defendant has testified to certain matters. [¶] If you find that [a] [the] defendant failed to explain or deny any evidence against [him] [her] introduced by the prosecution which [he] [she] can reasonably be expected to deny or explain because of facts within [his] [her] knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] The failure of a defendant to deny or explain evidence against [him] [her] does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that [he] [she] would need to deny or to explain evidence against [him,] [her,] it would be unreasonable to draw an inference unfavorable to [him] [her] because of [his] [her] failure to deny or explain this evidence.”

Although there are some differences between the two instructions, for purposes of the issue raised by appellant, cases addressing CALJIC No. 2.62 are equally applicable to CALCRIM No. 361. (See *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1067.)

number of reasons, that any error in instructing the jury with CALCRIM No. 361 was harmless.

First, the court instructed pursuant to CALCRIM No. 200 that “[s]ome of these instructions may not apply depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.” As the court stated in *People v. Lamer, supra*, 110 Cal.App.4th at page 1472, “courts have noted that the fact that juries are instructed, pursuant to CALJIC No. 17.31, to ‘disregard any instruction which applies to a state of facts which you determine does not exist,’ ... mitigates any prejudicial effect related to the improper giving of CALJIC No. 2.62.” CALCRIM No. 361 does not apply unless the jury finds that the accused unreasonably failed to explain or deny evidence against him. If, as appellant maintains, the evidence did not support that preliminary finding, the jury would presumably have followed CALCRIM No. 200 and disregarded the challenged instruction. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139 [jurors are presumed to understand and follow instructions]; *People v. Sanchez* (2001) 26 Cal.4th 834, 852 [same].)

Second, portions of the challenged instruction are favorable to the accused. CALCRIM No. 361 states that a defendant’s failure to deny incriminating evidence does not by itself prove guilt, and that the prosecution must still prove each element of the crimes beyond a reasonable doubt. (Cf. *People v. Lamer, supra*, 110 Cal.App.4th at p. 1472 [noting aspects of CALJIC No. 2.62 that were favorable to defendant].)

Finally, at no time during closing argument did the prosecutor refer to appellant’s failure to explain why he did not get medical attention for E. after December 18. (Cf. *People v. Lamer, supra*, 110 Cal.App.4th at p. 1473 [erroneous giving of CALJIC No. 2.62 harmless, in part because prosecutor did not refer in closing argument to defendant’s failure to explain adverse evidence].)

On this record, it is not reasonably probable that a jury would have reached a result more favorable to appellant in the absence of the giving of CALCRIM No. 361.

DISPOSITION

The judgment is affirmed.

PEÑA, J.

WE CONCUR:

WISEMAN, Acting P.J.

LEVY, J.