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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GLORIA JEAN GRAYSON,

Defendant and Appellant.

F064702

(Kern Super. Ct. No. BF127099A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Patricia L. Brisbois, 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, Catherine Chatman and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

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**INTRODUCTION**

On the evening of March 8, 2009, emergency personnel responded to appellant/defendant Gloria Jean Grayson's residence in Bakersfield, in response to her

911 call that her adopted son, five-year-old Kevin, had collapsed and he was choking. The paramedics determined Kevin did not have a pulse, blood pressure, or heart beat. After heroic efforts by the paramedics and hospital staff, Kevin was pronounced dead, having never responded to any of the emergency treatment.

Kevin had been a relatively healthy child, and he did not have any external injuries which could have caused his sudden death. Defendant was the only adult in the house when Kevin collapsed, and she told law enforcement officers that she had found him in the bathroom after dinner. He was lying on the floor, was not responsive, and appeared to be choking. Defendant also reported that her boyfriend arrived after she had found Kevin, and they both attempted to revive him with CPR before she called 911.

The autopsy revealed something far more serious – Kevin did not choke, but he suffered massive internal injuries to his heart, abdomen, and liver, the vena cava vein had been severed from his heart, and he died from the internal hemorrhages caused by severe blunt force trauma to the chest and abdomen. The pathologist determined that Kevin suffered the trauma while his heart was still beating, based on the extensive nature of the internal bleeding.

During a second interview with officers, defendant repeated her initial account, but, after being confronted with the autopsy results, she stated that she had grabbed Kevin around the neck, and spanked and pushed him, because he had misbehaved with another foster child who lived in her house. Defendant adamantly denied that she punched or kicked Kevin, or that she could have inflicted the fatal internal injuries.

Defendant was charged with count I, second degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a)), and count II, assault on a child under the age of eight years by means of force likely to cause great bodily injury resulting in death (§ 273a, subd. (b)). The prosecution theory was that defendant became angry and frustrated with the five-year-old child

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

because he misbehaved, and she erupted in a rage and inflicted the fatal beating on him because he had acted out that day. The defense theory was that Kevin's grievous internal injuries resulted from the incorrect and incompetent performance of CPR by defendant and her boyfriend, who was a very large man, and they unintentionally damaged Kevin's organs while trying to save him from choking.

After a lengthy jury trial, defendant was found not guilty of count I, second degree murder, and guilty of involuntary manslaughter (§ 192, subd. (b) as a lesser included offense. She was also found not guilty of count II. Defendant was sentenced to the midterm of three years for involuntary manslaughter, which amounted to time served since she had been in custody during the pretrial period.

On appeal, defendant contends her conviction for involuntary manslaughter must be reversed and is not supported by substantial evidence because her conduct toward Kevin "was lawful and within her parental right to discipline her child and there was no evidence to show [defendant] actually caused Kevin to choke...." Defendant also contends that, contrary to the prosecution's evidence, she never had CPR training, and her purportedly improper administration of CPR to Kevin "when he was choking" was similarly insufficient to support her conviction for involuntary manslaughter.

As we will explain, there was no evidence Kevin choked on anything, and the overwhelming evidence refutes all of defendant's theories about why the child died. We affirm.

### **FACTS**

At some time prior to 2006, defendant decided to become a foster parent. Defendant was 58 years old and unemployed. She had been married and her former husband had passed away. She had already raised three biological sons to adulthood, and had 22 grandchildren. At trial, defendant testified she decided to become a foster parent "to just help unfortunate children .... And I don't like being home alone, you know. So I just figured I would start, you know, helping children[]."

In order to become a foster parent, defendant had to take parenting classes, pass a background investigation, and receive certification in CPR. The CPR classes also addressed how to respond when a child is injured or there is an emergency. Defendant's CPR certifications were updated in 2006, 2007, and twice in 2008.

In 2006, defendant completed her training and received her foster home certification. She was certified to have up to four foster children in her home, and she received monthly stipends for each child.

Anthony Gordon had known defendant for 40 years. Gordon had been defendant's boyfriend for about 25 years even though he was married. Gordon was a truck driver. Gordon was cleared to be at defendant's house in the presence of the foster children. He regularly visited defendant's house and provided financial help. Gordon paid defendant's monthly rent of \$1,800, and he also gave her cash. Gordon testified defendant used "[e]very penny I gave her" for the foster children, because the county funds were not always sufficient.

#### **Kevin moves into defendant's house**

Kevin was born in 2003. In April 2004, Kevin was removed from the custody of his biological parents. As of March 2006, Kevin had lived in several different foster homes in Kern County. The court terminated reunification services with his biological parents, and it was about to terminate their parental rights.

In July 2006, defendant contacted the Kern County Department of Human Services about Kevin. She expressed interest in having Kevin placed in her house as a foster child and eventually adopting him. Defendant knew members of Kevin's family, and they had contacted her and urged her to take him in.

In August 2006, the social worker arranged for visits between Kevin and defendant. The visits went well and defendant appeared excited to care for him. Defendant testified she had just "wanted girls" as foster children since she already had

three sons, but she fell in love with Kevin after they met, and she agreed to foster and then adopt him.

In September 2006, Kevin moved into defendant's house as her foster child. Defendant had other foster children living with her throughout the entire time that Kevin was in her house.

In October 2006, defendant informed the social worker that Kevin reported that he had been sexually molested when he lived in one of the prior foster homes. Defendant also reported that Kevin made sexual motions with his body. The social worker filed a report about Kevin's statements.

In 2006 and 2007, Ruth Jackson, one of defendant's social workers, frequently made unannounced visits to defendant's home to check on Kevin and the other foster children. During these visits, defendant said Kevin refused to take and follow directions, he eavesdropped on adult conversations, he fought with the other foster children in the house, he was jealous of the other children, and he would do anything to get her attention from the other children. Jackson saw Kevin push one of the other children, and Kevin told her he was jealous of the other children. Defendant said she thought "she bit off more than she could chew," but she still wanted to proceed with Kevin's adoption.

Jackson reported that defendant did not act frustrated with Kevin, and she realized his limitations because of his age and prior foster placements. Kevin was happy and otherwise doing well. He received Christmas gifts and had toys. There was nothing suspicious about defendant's treatment of him, and Jackson believed the home was stable.

In April 2007, defendant's adoption of Kevin was finalized. He was three years and seven months old.

### **Kevin's relationship with Gordon**

Gordon, defendant's boyfriend, testified he regularly visited defendant's house, both before and after Kevin moved in. He said he had a great relationship with Kevin

and the other foster children, and Kevin looked up to him. Gordon testified he never touched or hit Kevin.

Gordon testified that defendant disciplined Kevin by giving him timeouts. Gordon thought defendant was a great mother and he never saw defendant commit a violent act against anyone. He once saw defendant “swat[]” Kevin “on the butt with an open hand” over his clothes, but she never hurt him.

Gordon testified that when Kevin was four years old, he saw Kevin lying on the floor and “making motions like he was on top of someone sexually.” It was like Kevin “was having sex with somebody.”

Gordon testified defendant never said it was difficult to have Kevin in the house or that she wanted to get rid of him. Gordon testified defendant was “crazy” about Kevin.

### **Kevin at school**

As of 2009, Kevin was five years old. There were three foster children who lived with defendant and Kevin: L.M., a boy who was also five years old, and L.M.’s siblings, who were 2 years old and 14 months old.

In January 2009, Kevin transferred to Endeavor Elementary School and attended Heidi Suburu’s kindergarten class. Suburu testified Kevin loved being in school, playing with his classmates, and working with her.

Suburu knew defendant had been Kevin’s foster parent before she adopted him. She also knew there were other foster children in the house. L.M. attended the same school, but he was in a different class. Suburu testified L.M. always came to school with a snack, but Kevin never did. Suburu asked defendant about sending snacks with Kevin. Defendant sent a snack with Kevin the day after the conversation, but never sent anything with him again. However, L.M. still arrived at school with snacks. Suburu provided Kevin with snacks after that.

Suburu testified defendant said Kevin was clumsy and he fell down easily. About a month after Kevin started school, Suburu noticed a “pretty large mark” on his head.

She asked him what happened. Kevin said he fell and hit a corner. She also noticed scratches on his hands, and asked defendant about it. Defendant said Kevin scratched his hands all the time, and she had to put gloves on him at night so he wouldn't do it.

Matt Diggle, the school's vice-principal, testified that defendant reported Kevin had been sexually molested in a prior foster home. Defendant said Kevin had done things of a sexual nature with her foster children, and warned Diggle that he might sexually act out with other students. Suburu was also advised about this information. Diggle watched Kevin on the playground for several days and never saw any inappropriate behavior, and noticed he had fun with other students. Suburu never saw Kevin act inappropriately.

When Kevin started school in January 2009, he frequently cried and said his stomach hurt. Suburu testified Kevin did not seem upset that he was in school, but she thought he was in some type of distress. Suburu called defendant and asked if something was wrong. Defendant said, "[H]e just cries, it's just Kevin, it's just kind of how he is ...." Defendant did not express any concern to find out if something was wrong with him. Suburu described defendant as being non-sympathetic, "distant, kind of matter of fact," and she acted like it was "Kevin's fault."

Suburu testified that Kevin once gave a "pain cry" in class, and the nurse called defendant to take him home. Defendant gave him medicine and he seemed better. However, Suburu testified Kevin suffered from stomach pain and cried during his entire time in her class.

Diggle testified he once spoke with defendant when she picked up Kevin from school. Defendant expressed "frustration with him. And after hearing from her, it sounded to me like she was frustrated with his behavior in the home." Diggle recalled another conversation with defendant when she said "she wanted to get rid of him."

Suburu testified she spoke to defendant about 10 times while Kevin was in her class. Suburu told defendant what a great child he was. During most of these conversations, particularly the last few weeks before Kevin's death, defendant acted

“disgusted at this child.” “[A]s the time went on she would just say I am just tired of him; he’s just terrible at home; I’m just going to get rid of him.” Defendant never expressed happiness that he was doing well at school. Kevin told Suburu that “his mom [referring to defendant] was going to give him away because he was bad.” Suburu believed defendant was going to give Kevin to another foster parent “because she seemed overwhelmed to me.”<sup>2</sup>

On February 9, 2009, defendant took Kevin to his regular pediatric clinic, and reported he had congestion, abdominal pain, and wet the bed. The physician’s assistant determined Kevin had a runny nose. He also believed Kevin had a small umbilical hernia, and referred him to a surgeon to check it out. The physician’s assistant gave them medication for Kevin’s sinuses and to suppress urination.

#### **Kevin’s last week at school**

On Monday, March 2, 2009, Kevin arrived at school with a “red” eye. Suburu believed he might have conjunctivitis. The school nurse thought he looked fine, and he returned to class. Suburu contacted defendant and told her about Kevin’s eye. Defendant said he kept rubbing his eye even though she told him not to.

On Tuesday, March 3, 2009, Kevin arrived at school, and his eye was still red. Suburu called defendant, and defendant again said Kevin kept rubbing his eye against her orders. Suburu testified defendant also said “she’s going to have to get rid of him because he just keeps not obeying.” Suburu asked defendant if she had contacted the doctor to look at Kevin’s eye. Defendant said no.

On Wednesday, March 4, 2009, Kevin arrived at school, and his eye looked even worse. Suburu was extremely concerned the other children would catch “pink eye” from

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<sup>2</sup> Suburu testified that after the school nurse checked out Kevin’s stomach pains, she never saw or heard anything that would have triggered her duties as a mandated reporter. At the conclusion of her testimony, however, Suburu said that she would have to live with the consequences of that decision for the rest of her life.

him. Suburu told Kevin that he needed to go home from school, see the doctor, and get medicine for his eye. Suburu testified Kevin became very upset. He started crying and said he did not want to go home. Suburu thought Kevin was scared, and she did not think that was normal.

Suburu asked her teacher's aide to take Kevin to the principal's office. As the aide walked with Kevin, he collapsed to his knees, and the aide had to carry him. Kevin hugged her, he was very upset, and said he did not want to go home. The aide asked him why. Kevin said, "I just don't want to go home." The aide explained they had to protect the other children from illness because of his eye.

On Friday, March 6, 2009, defendant took Kevin to the pediatric clinic. The physician's assistant determined he had conjunctivitis and allergies. Kevin otherwise appeared normal and healthy. The physician's assistant prescribed antibiotic drops for his eye, and Benadryl and a nasal spray for his allergies. Kevin had previously taken antihistamines, and defendant never reported any problems or reactions. The physician's assistant determined defendant failed to follow-up on the surgery referral for Kevin's possible hernia.

Later on Friday evening, Gordon visited defendant's house. Kevin was happy, he appeared healthy, and nothing was wrong.

#### **Saturday, March 7, 2009**

On Saturday morning, March 7, 2009, Gordon arrived at defendant's house and learned Kevin had soiled his bed. Gordon offered to clean Kevin while defendant made breakfast for everyone. Gordon gave Kevin a bath and defendant prepared breakfast for the children. After breakfast, Kevin went with Gordon while he ran errands. Gordon took Kevin back to defendant's house around noon and gave defendant money for groceries. Gordon testified everything seemed fine.

## **KEVIN'S DEATH**

On Sunday afternoon, March 8, 2009, defendant took Kevin and the three foster children to the park. They returned home and she fixed dinner for them. Kevin died later that night. What happened between the park and Kevin's death was disputed at trial. The following account is from Gordon's trial testimony.

Gordon testified he did not go to defendant's house during the day. Later that evening, possibly around 7:29 p.m., he went to defendant's house. It was dark when he arrived.

As Gordon stood outside defendant's front door, he heard "a bunch of crying, loud crying, carrying on...." Gordon let himself into the house with his key. He saw and heard defendant in the hallway, by the bathroom.

Gordon went to defendant and saw Kevin lying on the bathroom floor. Kevin was on his side, with his head at the door and his feet at the toilet. Kevin was wearing pants and socks but not a shirt. Defendant was kneeling down with Kevin. She was crying and kept asking what was wrong.

Gordon testified he asked defendant, "[W]hat the hell happened ... what's wrong with him." Defendant said she didn't know; she sent Kevin to use the bathroom "like she normally does .... And he didn't respond when she called him. She said she called him several times and he didn't respond and finally she went back to the rest room, and apparently that's where she found him at."

Gordon testified defendant had not called 911. Defendant told Gordon she tried to give him CPR. Gordon asked defendant if Kevin choked or passed out, and defendant said she did not know.

Gordon testified he had been trained to give CPR nearly 20 years earlier, and felt he knew how to perform the procedure. He opened Kevin's mouth to check for anything he could have choked on, and did not find anything. Gordon hit Kevin on the back to see if had swallowed something and nothing came out. Gordon testified he did not use "a

whole lot of force, just enough to try and clear his throat.” Gordon put his ear on Kevin’s chest and could not hear a heartbeat. He checked Kevin’s neck and did not feel a pulse.<sup>3</sup>

Gordon saw a white, milky substance on the bathroom floor by Kevin’s mouth, and thought he might have already thrown up. He did not see any bruises or marks on Kevin’s body to indicate he had been beaten.

Gordon began performing CPR on Kevin. Defendant said she had already tried that, and “I hope I did it right.” Gordon told her that “you can’t stop” and they had to keep doing it. Gordon started chest compressions while defendant did the mouth-to-mouth breathing.

Gordon testified he performed the chest compressions by putting his hands on Kevin’s chest and breastbone area, and pumping up and down. Gordon testified he was six feet two inches tall and weighed about 270 pounds. Gordon believed he might have done 100 chest compressions on Kevin, but testified he “didn’t use a lot of force.” His chest compressions were not “hard enough to hurt him or damage anything,” but enough to try and get his heart moving. Gordon testified he never touched Kevin’s stomach or liver areas. He never heard or felt any bones breaking in Kevin’s body as he administered CPR.<sup>4</sup>

Gordon testified Kevin did not respond to CPR. Gordon turned over Kevin and hit him twice on the back to again try to dislodge anything that might be in his throat, but

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<sup>3</sup> The pathologist later testified that given the extensive nature of the hemorrhages, Kevin suffered the fatal internal injuries while his heart was still beating and he had a pulse.

<sup>4</sup> As we will explain *post*, the defense theory was that Gordon inflicted Kevin’s fatal internal injuries by incorrectly performing CPR and using too much force. The pathologist discounted this theory based on the nature and amount of hemorrhages throughout Kevin’s heart and abdominal cavities.

nothing emerged. Gordon may have grabbed Kevin by the stomach when he tried to clear his throat. Gordon had no idea where the foster children were during this time.

### **Defendant calls 911**

When Kevin did not respond to CPR, Gordon told defendant to call 911, her sister, or somebody to get some help. Defendant first called her sister, Vivian, and told her to come over to watch the other children because Kevin was sick.

At 7:38 p.m., defendant called 911. Gordon believed she made the call about eight minutes after his initial arrival at the house.

During the 911 call, defendant said she had an emergency and needed an ambulance. The dispatcher asked defendant what happened:

“My son was eating and *he fell and hit his head* and he got cho-he, he come to the bathroom to use it and then I come in here to look for him and he was out in the floor. [¶] ... [¶] So I tried to give him mouth to mouth and, and it was hard but he’s not, he’s not —”<sup>5</sup>

The dispatcher asked defendant if he was choking. Defendant replied:

“Well n-- I got food out of his mouth when I was giving him mouth to mouth. I would, I would get food out of his mouth. I would give him, I would do his heart, pump his heart and then I would give him the mouth to mouth and food would come up and I’d kind of turn him to the side a little bit.”

The dispatcher told defendant not to do “any of that anymore,” not to slap him on the back, and leave him alone. Defendant repeated these orders to Gordon.

The dispatcher asked defendant whether Kevin was awake and breathing. Defendant said he was not awake and he was not breathing. Defendant said her friend was there and trying to help.

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<sup>5</sup> While defendant told the 911 operator that Kevin had fallen and hit his head, Gordon testified defendant never told him this as he was trying to revive Kevin. During her initial interviews with the investigating officers, defendant never said Kevin fell and hit his head. There was no evidence that Kevin suffered any trauma to his head that could have caused his death.

The dispatcher told defendant to make sure Kevin was flat on his back, and to kneel next to him and look for food or vomit in his mouth. Defendant handed the telephone to Gordon to hear these instructions. Gordon told the dispatcher there was still food in his mouth, and told defendant to hurry and get it out with her finger. The dispatcher told Gordon to put his ear next to the child's mouth, and asked if he was breathing. Gordon repeated the instructions to defendant, and then told the dispatcher that they could not hear any breathing.

The dispatcher gave Gordon step-by-step instructions on how to give mouth-to-mouth resuscitation and chest compressions. Gordon repeated the instructions to defendant, counted the compressions and breaths, and said they were doing it. Defendant and Gordon said there were still things coming out of his mouth and nose, and the dispatcher told them to clear the fluids and continue.

At trial, Gordon testified that when the dispatcher relayed the CPR instructions, he realized he had been doing the procedure wrong because he was in such a panic, and he had been pumping and having defendant breathe at the same time. Gordon testified he followed the dispatcher's instructions and performed CPR until the emergency personnel arrived.

### **The firefighters arrive**

At 7:44 p.m., Fire Captain Marty Crider and his engine crew arrived at defendant's house on a call that someone was choking. The dispatcher reported CPR was already in progress and to just enter the house. Crider tried the door, but it was locked. Defendant opened the door and pointed to Kevin's direction. Crider testified defendant was not crying and did not show any signs of emotion.

Captain Crider entered the house and heard Gordon counting out CPR compressions. Crider found Kevin lying on his back, face-up, on the bathroom floor.

Gordon stepped away from Kevin as the firefighters arrived. Crider testified Gordon had a blank stare and looked in shock.<sup>6</sup>

The firefighters slid Kevin out of the bathroom and onto the hallway floor so they had more room. Captain Crider testified someone said that Kevin “was choking,” but he could not recall whether defendant or Gordon said that.

Kevin was making gurgling sounds and some fluids were coming out of his mouth. Captain Crider performed abdominal thrusts “which would be proper to assist with the choking patient.” Crider placed his heel of his right hand on Kevin’s upper abdominal area, just below his rib cage. Crider pushed in his stomach by about two inches, but he did not push down hard.

Captain Crider testified he performed that motion three times, and fluid was still coming out of Kevin’s mouth. Kevin did not have a pulse. The firefighters tried to clear Kevin’s throat with their fingers and did not find anything. They administered oxygen. Kevin’s chest should have risen once the oxygen was administered, but nothing happened. One of the firefighters administered three to five more abdominal thrusts to make sure his airway was not blocked, again using the palm of the hand to the stomach. They again administered oxygen and Kevin’s chest finally rose, which indicated air was entering his airway.

Captain Crider testified Kevin still did not have a pulse, and they began CPR in an appropriate manner for a child. As they administered CPR, Kevin started to spit up. The firefighters rolled Kevin on his side, patted him on the back, and used a vacuum device to suction and clear fluids. Crider testified that it was common for a person to gurgle and vomit fluids and food, while CPR was being administered to that person.

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<sup>6</sup> Gordon testified that after he stepped away from Kevin, he noticed the foster children were by the laundry room. He also noticed defendant’s sister, Vivian, had arrived at the house to care for the other children.

Kevin did not respond to CPR, and the firefighters used the defibrillator to shock the heart. Kevin still did not respond.

As Captain Crider's team continued to work on Kevin, Crider testified he could not recall defendant's presence or if she asked what they were doing to help him.

### **The paramedics arrive**

At 7:49 p.m., the paramedics arrived at defendant's house on the dispatch for a choking child. The firefighters were still administering CPR, and advised the paramedics the child was in cardiac arrest and not breathing.

Trevor Burch, one of the paramedics, determined Kevin was not responsive. He did not have a pulse, he was a "flat line," and he had no heartbeat. Burch did not take Kevin's temperature but believed the child felt "a little more cool than normal," which could have been consistent with being in cardiac arrest "for a long enough time for the body temperature to drop." Kevin did not have any "obvious signs of death," such as trauma or rigor mortis, and there were no visible abnormalities on his body.

### **Defendant's statements to the emergency personnel**

Once the paramedics arrived, Captain Crider stepped away from Kevin, sought out defendant, and asked her what happened. Crider testified:

“[D]efendant said [Kevin] was eating dinner and went to the bathroom, and they hadn't seen him for about ten minutes. And then they found him in the bathroom and called us.”

Captain Crider testified defendant said Kevin was on the floor and appeared to be choking, so she called 911. Defendant never said Kevin fell and hit his head. Crider testified defendant "seemed pretty calm for the situation." Defendant did not ask how Kevin was doing or what was wrong with him. She did not show signs of shock as Gordon did.

Burch testified that he noticed defendant and Gordon when he arrived at the house. Burch believed "one of the family members" reported to either the fire department or the

paramedics that Kevin “was eating dinner and went to the bathroom and ten minutes later they found him on the floor in the hallway...” “[W]e were led to believe that he choked on his food...”

Burch further testified:

“But what I do remember is while we were administering care to the patient he was laying in a hallway, and there was a door right next to the hallway. I remember [defendant] walked into the room and closed the door, and it seemed like she was in the room for a few minutes before she came out.”

Captain Crider also saw defendant go into a room and close the door. Crider believed this occurred just after he asked defendant about what happened to Kevin. Defendant remained in the room for three or five minutes. As she walked out, Crider testified defendant was “touching her hair like she had just fixed her hair up,” as if she had “freshened up.”<sup>7</sup>

Burch prepared Kevin for intubation and looked for any evidence that he choked on something. Burch determined there was some vomit in the airway, but there were no other obstructions. Burch testified it was not uncommon for a patient to vomit the contents of his stomach from CPR pressure. Burch cleared the vomit and intubated him. Burch thought that if Kevin had choked on food, it could have gone into his lungs. After the intubation, however, Burch listened to Kevin’s lungs and there were clear lung sounds on both sides.

Burch testified defendant emerged from the closed door at some point before Kevin was placed in the ambulance. Neither defendant nor Gordon was crying. Defendant did not ask any questions about Kevin’s condition or treatment.

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<sup>7</sup> At trial, defendant testified she wore a wig because of a medication condition which resulted in hair loss, and she went into her bedroom to put the wig on while the emergency team worked on Kevin.

The paramedics loaded Kevin into the ambulance, continued to administer CPR, and administered medication to try and stimulate his heart. Burch testified Kevin remained in cardiac arrest and never had a heartbeat.

Captain Crider told defendant he would walk her to the ambulance. Defendant “patted me on the arm and had kind of a half smile which I thought was a little different.” Crider escorted defendant to the ambulance, and she sat in the front passenger seat as Kevin was taken to the hospital. Crider testified defendant appeared calm, and she was not asking questions about Kevin’s condition, crying, or showing emotion.<sup>8</sup>

After the ambulance left the house, Captain Crider remained behind to clean the medical debris from the hallway. A woman had arrived at the house before the ambulance left, and said she was Kevin’s aunt. She asked if they knew what had happened. Crider said it appeared the child had choked. The woman said she would clean up, and Crider noticed for the first time that there were other children in the house.

### **At the hospital**

At 8:06 p.m., Kevin arrived at the hospital’s emergency room. Kevin was only wearing a diaper. Dr. Kevin Whitlow testified Kevin was in full arrest, which meant his heart was not pumping and nothing was working. He was “quite cool” to the touch and unresponsive. He did not have a pulse or a heartbeat. His pupils were dilated, which meant there was no brain activity. His core body temperature was 94.6 degrees. Dr. Whitlow did not see any visible signs of trauma on his body.

Kevin’s throat was full of vomit. The emergency room team used “heroic efforts” to attempt to revive Kevin, including multiple rounds of intravenous drugs, fluids, and

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<sup>8</sup> Captain Crider testified that while they treated Kevin at the house, he had an “internal dilemma” about whether to call the police because he felt something wasn’t right. He decided not to make the call. When he returned to the station, he “just felt something wasn’t right that night.” Crider again thought about calling the police, but there was nothing that stood out to justify the call. A few days later, however, he heard news reports about Kevin’s death and feared he missed something that night.

continued CPR. Kevin never responded, and he never had a pulse or heartbeat. Kevin was basically deceased when he arrived at the hospital, and he was pronounced dead at 9:15 p.m.

### **Defendant and Gordon at the hospital**

Kevin Burch, the paramedic, testified after he left Kevin with the emergency room personnel in the hospital, he saw defendant sitting in the hallway across from the treatment room. She was not crying, and she did not ask Burch about Kevin's condition. Burch remembered that defendant was not crying at either the house or the hospital and "it seemed odd to me. It stood out to me. It seemed different from what I have normally seen."

Gordon testified that after the paramedics took Kevin to the hospital, he followed in his car. Gordon called defendant as he drove to the hospital. Gordon testified defendant had already reached the hospital, and she was crying and said Kevin was not doing well. When Gordon arrived at the hospital, defendant was uncontrollably crying, and he tried to calm her down. Defendant's family also arrived at the hospital and tried to calm her.

### **Defendant's first statement at the hospital**

Dr. Whitlow spoke to defendant at the hospital. He told defendant that Kevin had died, and asked what happened. Defendant said "[t]hey were having dinner at the park [and Kevin was] acting normally. There was no indication that the child had been ill other than the conjunctivitis and upper respiratory tract infection."<sup>9</sup> Defendant said around 7:30 p.m., Kevin finished dinner and went into the bathroom, and he did not

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<sup>9</sup> It is unclear whether defendant told Dr. Whitlow that they ate dinner in the park, or he misunderstood her statement. The trial evidence was that defendant took the children to the park, they went home and ate dinner, and Kevin collapsed in the house after dinner.

return in a reasonable amount of time. She went in the bathroom and found him lying on the floor with vomit in his mouth.

Dr. Whitlow testified the timeline didn't make sense, that "this could have happened at 7:30 p.m. and he arrived in my emergency department just after 8:00 p.m. with a body temperature of 94.5 [degrees]." Dr Whitlow testified "his body temperature should not have dropped almost four degrees in an hour" from the normal of 98.6 degrees, if he was not otherwise exposed to the elements or cold water.

On cross-examination, Dr. Whitlow testified he did not know that Kevin was taking Benadryl. However, Benadryl would have elevated instead of depressed Kevin's body temperature, and it would have taken even longer for Kevin's core body temperature to drop. Dr. Whitlow testified it was possible that performing continuous CPR on a dead body could cause rib fractures and contusions. A broken rib could possibly penetrate an organ and cause internal organ damage.

#### **Defendant's statement to the coroner's investigator**

Regina Mancera, a deputy coroner with the sheriff's department, examined Kevin's body just after he was pronounced dead, while he was still lying in the trauma room. She observed about 20 marks, scars, and contusions on his neck, back, and hands. Some were older injuries, but other scars appeared to be new. He also had some new scars in his mouth.

Mancera spoke to defendant at the hospital. Defendant asked if someone could be present while they spoke. Defendant was calm, and she was not crying. Gordon stayed in the room with defendant.

Mancera asked defendant what happened. Defendant said she took the children the park around 4:30 p.m. or 5:00 p.m. Around 6:30, they got home and she made dinner. L.M. and another foster child used the bathroom. Kevin used the bathroom next, and he did not return. A few minutes later, defendant went to check on him. She found Kevin lying face-up on the bathroom floor. His eyes were open and his skin felt clammy.

He was making noises but not talking. Defendant said she got a cool cloth and started chest compressions. Gordon arrived and took over CPR, and she called 911. Defendant said food came out of Kevin's mouth when they did CPR. Defendant never said Kevin fell and hit his head.

Mancera asked defendant about the scars on Kevin's hands. Defendant said he fell off his bike and into rose bushes. Mancera asked about the scratches on Kevin's neck. Defendant said Kevin would scratch himself at night, and she had to put socks on his hands to protect him.

Mancera kept asking defendant about the scratches and injuries. Defendant became irritated and asked why she was asking these questions. Mancera said they were just trying to figure out why Kevin died. Defendant said Kevin had been in nine prior foster homes, and he was molested in one of them. Defendant said Kevin was healthy and did not have any seizures. Mancera asked why Kevin was wearing a diaper. Defendant said he wore it every day and occasionally he would wet the bed. She believed he must have soiled himself and put on a diaper when he was in the bathroom that night.

The police took custody of Kevin's clothing, and discovered blood stains in Kevin's diaper from rectal bleeding.

#### **Defendant's statement to Sergeant McNeal**

At 11:35 p.m., Sergeant McNeal arrived at the hospital, observed Kevin's body, and was briefed by Mancera. McNeal interviewed defendant in a waiting room. McNeal was investigating Kevin's death because of the scratches on his body and blood in the diaper. At that time, there was no indication he had suffered massive internal injuries.

Sergeant McNeal testified defendant's demeanor was "unusually calm, relaxed" throughout their contact, and he felt "she was taking the incident and the death of Kevin King rather casually." She was not crying, emotional, or excited during the interview. The interview was recorded and played for the jury.

Sergeant McNeal asked defendant who had been home that night. Defendant said just herself and the children. He asked her what happened, and asked follow-up questions as she described what happened that evening.

In response to Sergeant McNeal's questions, defendant said she drove the children to the park between 4:30 and 5:00. Kevin played and did not complain about anything. They got home and ate dinner around 6:30. She gave the children their medicines. The children had sandwiches and crackers for dinner.

Defendant said Kevin and the two older foster children ate dinner at a little table while she fed the baby in the high chair. L.M., the oldest foster child, finished dinner and used the bathroom by himself, and then went to the playroom. Defendant said the younger foster child needed to use the bathroom, and defendant helped her and then brought her back to the kitchen.

Defendant said she asked Kevin if he needed to use the bathroom and he said yes. Kevin went in the bathroom by himself. Kevin was in there "for awhile." He didn't call or make any noise. Defendant called out to him, but he did not respond. Defendant said she went to check on Kevin after he was in the bathroom for three or four minutes.

Defendant said the bathroom door was closed, and she did not hear any noise behind the door. Defendant knocked, but Kevin did not say anything. Defendant opened the door, and Kevin was lying on the floor, on his back. His head faced the door and his legs were by the toilet. He was fully dressed and his pants were pulled up.

Sergeant McNeal asked defendant why Kevin wore a diaper. Defendant said Kevin had been molested in a previous foster home, and he wet himself and made sexual comments and movements toward the other foster children. Defendant said Kevin was wearing a diaper that night because he had wet himself earlier.

Sergeant McNeal asked defendant to continue describing how she found Kevin in the bathroom. Defendant said Kevin was lying on the floor, and she told him to get up.

She tried to pull him up, and he was limp. She asked Kevin what was going on and what he was doing. He did not respond, but he made a moaning and groaning sound.

Defendant said she lifted up Kevin and cradled him in her arms, and kept calling him to wake up. He did not respond. She got a cold, wet rag and put his under his neck and over his face. Sergeant McNeal asked if Kevin felt warm, and defendant said yes. She checked his arm and neck for a pulse, and he had a “real light” pulse.

Defendant said Kevin still did not respond so she started CPR. Sergeant McNeal asked defendant if she had CPR training, and she said yes.<sup>10</sup> She pushed on his chest four times. McNeal asked how hard she pushed. She said, “[I]t wasn’t hard.” Defendant blew in his mouth, and it was like he was choking and “trying to bring up something, so I tilted his head to the side,” and food came out of his mouth. She cleaned the food from his mouth so he would not choke.

Defendant said she was still performing CPR when Gordon arrived. She called out to Gordon that she needed help and something was wrong with Kevin. Gordon came to the bathroom and kept working on Kevin, and she called 911. She said she had not called 911 yet because she did not want to leave Kevin.

Defendant said the dispatcher gave CPR instructions, Gordon did chest compressions, and she blew into his mouth. Kevin’s “eyes seemed like they moved,” but he never woke up.

Sergeant McNeal asked defendant what she thought happened to Kevin. Defendant said she had no idea and was puzzled about it. McNeal asked if Gordon ever disciplined or hit Kevin, and she said no. McNeal asked defendant if she ever used physical force with Kevin. Defendant said she would spank his behind with her hand, over his clothes, if Kevin misbehaved after a time-out.

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<sup>10</sup> At trial, defendant conceded she told Sergeant McNeal that she knew how to perform CPR, but testified she never received any CPR training, and the instructor simply gave her completed certificates which asserted that she had taken and passed the course.

Sergeant McNeal asked defendant about the scratches on Kevin's body. Defendant said Kevin got most of the scratches about two months ago, when he was riding his bicycle in the backyard and fell into a bush, and hurt his hands and arms. He also scratched himself.

Sergeant McNeal asked defendant why they found rectal bleeding on Kevin. Defendant replied: "Are you serious?" She had no idea how that could happen. McNeal asked about a small laceration on his forehead that looked fresh. Defendant said he fell on his bike at school and the incident was reported. As they talked about the small cut, defendant asked McNeal: "But back to the rectum, he had blood in his rectum?" McNeal said it appeared so. Defendant said she had no idea. Gordon had not been at the house that day, and he would never hurt the children.

As the interview ended, Sergeant McNeal said that he understood that defendant wanted to see Kevin. Defendant said: "Yes can I please." McNeal testified he escorted defendant into the trauma room to look at Kevin's body and say goodbye. McNeal testified defendant did not display the type of emotion he would have expected "from a mother looking at her dead son." Instead, defendant spoke to Kevin and said, "[W]hat is wrong with you." McNeal told defendant, "[Y]ou do know that Kevin is dead." In response, defendant was "[k]ind of sarcastic but she looked at me and said can't you see I'm sad."

### **Defendant's house**

Around 2:00 a.m., the officers went to defendant's house with her permission, and described it as clean and immaculate. The other foster children were asleep. A social worker from Child Protective Services arrived and took the children into protective custody because of the suspicious circumstances of Kevin's death.

The officers saw a children's plastic picnic-type table and benches in the laundry room. The laundry room door led to the garage. Sergeant McNeal thought it was unusual there were no dirty dishes on the table or in the kitchen, since defendant said she

found Kevin while they were eating dinner. He asked defendant about that, and defendant said “she cleaned the dishes up before she left” in the ambulance with Kevin.

Sergeant McNeal asked defendant to show him the bush in the backyard where fell and suffered the scratches. Defendant showed him a “very small, tiny bush.” McNeal did not see any sharp leaves or thorns on it which were “capable of causing the injuries that I saw on Kevin’s hands.”<sup>11</sup>

There were plastic mats and runners on nearly all the floors to protect the carpet. However, there was no mat in the hallway directly outside the bathroom where Kevin was found, even though there were marks in the carpet which seemed to indicate a mat or runner had been there. Defendant said there had been no runner in that hallway.

Sergeant McNeal later asked Gordon about the plastic mats and runners in the house. Gordon said they put the mats down so the children would not track in dirt. Gordon thought a runner was in the hallway area, but he did not know what happened to it. The police obtained a search warrant to look for the missing mat but never found it.<sup>12</sup>

There were possible small blood smears on the bathroom door, and possible blood splatter on the wall next to the toilet. A criminalist later determined that a sample of the smear taken from the wall next to the toilet consisted of blood which matched Kevin’s DNA. The other samples were too small to test.

### **THE AUTOPSY**

Dr. Thomas Beaver, a forensic pathologist, performed the autopsy, and testified Kevin’s death was a homicide resulting from blunt-force trauma to his chest and abdomen, which caused extensive internal bleeding. Kevin had some scratches and marks on his hands and back, but there were no signs of external trauma that could have

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<sup>11</sup> At trial, defendant testified the bush was large when Kevin fell and scratched himself, and the landlord’s gardener had trimmed it back by the time Sergeant McNeal looked at it.

<sup>12</sup> At trial, defendant testified she never placed a mat in that hallway.

caused internal damage or his death. He did not have any fractured bones. Kevin otherwise appeared healthy and well-nourished.

Dr. Beaver testified Kevin suffered hemorrhages in the liver, both lungs, and the sac around his heart. Kevin's abdomen was "full of blood, and it was liquid blood and clots of blood," which was consistent with blood leaking into the abdomen from a damaged blood vessel or internal injury which occurred while he was still alive. There was evidence of hemorrhaging within the connective tissues around the stomach, liver, and the small intestine, which was also consistent with an internal injury to a blood vessel while he was alive. There was clotted and liquid blood in his chest cavity, pericardial sac, and abdomen. Blood had "filled up the space between the lung and the chest cavity."

The liver was lacerated in two areas. There was extensive hemorrhaging through the soft tissues around and under the liver, indicative of blunt trauma.

There was a tear in the vena cava of Kevin's heart, which "is the large vein that brings all the blood back to the heart." The tear was 0.7 centimeters long (about one-quarter of an inch), and it occurred where the vena cava joined the heart at the right atrium. The tear caused hemorrhaging around the heart, and the blood went into the surrounding soft tissues.

There were pulmonary contusions (or bruises) on both lungs. On the bottom of the right lung, there was an "irregular margin where the blood has filtered out into the tissues under the blood pressure." It was consistent with "blunt trauma to the chest," because when "the force is transmitted to the lung, it can break the small blood vessels in the lung and create a bruise." There was also a bruise on the left lung.

### **Cause of death**

Dr. Beaver testified Kevin suffered internal bleeding into the abdominal, chest, and pericardial cavities. He hemorrhaged so much that he went into shock and died. "So there's been trauma, and blood vessels have been broken. And blood has dissected out through the soft tissues surrounding these organs."

“[O]nce the blood vessel is broken then the blood under pressure can spill out. It’s kind of like if you have a garden hose with a leak in it. Once you’ve damaged the hose, the pressure from the water will force the water out through the hole.... [¶] ... [¶] ... *But this is not a trivial injury. This is not the kind of injury you get from a trivial event, because if it was then we’d all have it. But this is a pretty devastating injury....*” (Italics added.)

He further explained:

“[T]he liver injury and the injury to the blood vessel called the vena cava, those injuries require that the force be transmitted through the entire abdomen. Because those structures lie kind of towards the back of the abdomen, and there’s some – there’s space between them. And so the force actually has to go through the abdomen into those structures. So it’s a hard concept. But it requires ... more force because of the special relationship between those organs and the rest of the body.”

Dr. Beaver had seen similar injuries in cases of extreme force resulting from vehicular accidents, which inflicts blunt impacts to bodies. Dr. Beaver explained hemorrhages were markers of trauma, indicating forces “strong enough to break blood vessels while the person had a blood pressure.” A person has blood pressure when the heart is functioning and pumping normally.

Dr. Beaver testified Kevin’s injuries would have occurred while he had blood pressure and his heart was functioning, which would have been before he needed CPR, since a person would not need CPR if he had blood pressure.

“We can’t see the force that was imparted directly. There’s no way to look at that. But we look at what’s left by the trauma. And that’s the hemorrhage, the mechanical disruption of the tissue. And to judge whether that trauma occurred before, when the blood pressure was present or absent, hemorrhage is our marker. *So the more hemorrhage there is, the more we feel there was a blood pressure present when the injury was inflicted as opposed to being inflicted when there was no blood pressure. And CPR does not produce a blood pressure.*” (Italics added.)

The injuries occurred while Kevin had a blood pressure because “[w]ithout the blood pressure you wouldn’t see those hemorrhages. You wouldn’t see that blood dissecting [*sic*] through those soft tissues. It has pressure behind it to make it do that.

You wouldn't see the accumulation of blood and clotted blood in the abdomen and around the heart. That just doesn't happen when you have injuries that are postmortem."

Dr. Beaver testified Kevin's internal injuries were consistent with being inflicted by an adult who kicked or hit him in multiple parts of his body. The hemorrhaging could not have been caused by one kick or punch because there were "a variety of locations where there are injuries. *And so there is more than one event, more than one force being applied to break blood vessels in more than one location.*" (Italics added.) His conclusion was not undermined by the absence of any external injuries on Kevin's body.

"[D]epending on how the force is inflicted ... if it's done with a soft instrument or hands or feet, then there might not be any marks left on the skin. So whether there's marks left on the skin or not is dependent upon the instrument striking the body and where it strikes and the whole mechanics of it.

"So if you strike over the abdomen or the chest where the chest wall is flexible, the force can be transmitted. If you strike over a bone, say over the brow, then the bone underneath won't give, and the skin will tear or abrade. [S]o it just depends on where you hit and with what. If you are hitting with a rough object like a brick, it will abrade the skin. But if you strike with a fist it's not going to cause an abrasion on the skin."

Dr. Beaver testified a female adult, who was 60 years old and weighed 197 pounds (based on a hypothetical consistent with defendant's body), could have inflicted these injuries "to a child without having to be exceptionally strong. The forces, they are significant blows and significant forces. ... I've seen this where adults have done this to children before and also to other adults. And they weren't particularly strong or, you know, they weren't professional boxers or anything." Such injuries could not have been inflicted by another child while "roughhousing, wrestling, pushing and shoving" without much more force, such as a child repeating jumping from a substantial height on the victim's body.

Dr. Beaver testified it would be rare for such fatal injuries to have been caused by someone performing CPR on the victim.

“It’s rare that I see something like this. *And extremely rare that I don’t think I have ever seen this injury in CPR.* But I know that it could happen just based on the anatomy. [¶] ... [¶] I have never seen this lesion in my practice. But just based on the anatomy I think it’s possible to happen.” (Italics added.)

The presence of multiple internal injuries to his heart, lungs, liver, and abdomen were inconsistent with being inflicted by CPR.

“I think if you take the injuries individually ... in my mind I can construct a hypothetical in which the injury could occur during some form of CPR, of chest compression. *But if I take the injuries in totality and look at all of them and say could all of these injuries have been caused by chest compressions, then that takes it out of the realm of possibility.*” (Italics added.)

Dr. Beaver did not see any evidence that Kevin choked from foreign material, and there was no evidence of inflammation or edema in the airway. The presence of vomit in this throat would have been a common complication from CPR.

Dr. Beaver testified it would have taken “minutes, maybe an hour,” and no more than two hours for Kevin to die as a result of hemorrhaging from the tear in the vena cava. Dr. Beaver believed Kevin ate “within a couple of hours” of the fatal injuries. There was partially digested food in Kevin’s stomach, but the digestive process would have stopped as a result of the forces which inflicted the hemorrhages on his abdominal area.

Dr. Beaver testified the toxicology report indicated Kevin had Benadryl in his system. The level was therapeutic, it was not excessive, and it was well short of the toxic range. The presence of Benadryl had no impact on Kevin’s cause of death because it “doesn’t really exert any effects that would alter the way the trauma presented in this case ....”

### **Cross-examination**

On cross-examination, defense counsel asked Dr. Beaver a hypothetical based on Gordon’s performance of CPR – whether a 270 pound man who panicked and lacked

updated CPR training, could unintentionally kill a child if he performed CPR in an imprecise way. Dr. Beaver testified it was possible for a strong and heavy man to crush a child's chest while performing chest compressions, but "[i]t would have to be a really traumatic chest compression, and he would have to be – but I suppose it's possible with a chest compression that's very traumatic."

In response to another hypothetical, Dr. Beaver testified it was possible for a child to have suffered the same injuries after having an allergic reaction to Benadryl, and then fall, choke, stop breathing, and receive CPR from a large man.

On redirect examination, however, Dr. Beaver clarified that based on the extensive nature of the hemorrhages, Kevin's internal injuries were likely inflicted while his heart was still pumping and he had a pulse, respiration, and blood pressure. Dr. Beaver also clarified that a standard CPR compression would not inflict the type of crushing force that would be required to cause Kevin's severe internal injuries.

*"It would be a crushing deformity of the chest. In other words, you have to deform the chest enough to put pressure on those structures that are deep within the chest cavity and the abdominal cavity and tear those blood vessels. So you would need enough force to deform the chest.*

"Now, in a child of five years ... I don't know what that force would be. But adults are capable of generating it. I know that. And pretty much any adult is capable. So the issue is force.

*"[M]y two points would be there has to be sufficient force and there has to be a blood pressure to make those injuries occur. [A]nd time. We have been forgetting that. There has to be time for this blood to accumulate and clot. And so there needs to be minutes, and I think we mentioned even up to an hour or so. So there needs to be some time too."* (Italics added.)

If Kevin had choked and his airway was obstructed, and he was unconscious for 10 minutes before Gordon arrived, his heart would have stopped and it was unlikely he had a pulse while Gordon performed CPR. If Kevin was already dead when the emergency and hospital personnel performed CPR and other lifesaving measures, those medical procedures would not have significantly altered the internal injuries which Kevin

had already suffered since his heart had already pumped out the blood into his organs and he had “bled out.”

### **DEFENDANT’S SECOND INTERVIEW**

Dr. Beaver conducted the autopsy on the morning of March 10, 2009, and advised Detective Miller of the results. Miller told Sergeant McNeal that Kevin’s injuries could not have been inflicted by another child, the rectal bleeding was the result of internal injuries and bleeding, and Kevin suffered the internal injuries within the last few hours of his life.

After the investigators received the autopsy results, Detective Miller and Sergeant McNeal decided to conduct another interview with defendant. McNeal called defendant and asked if she would come to the police department for an interview. Defendant agreed. She did not ask about the autopsy results.

On the afternoon of March 10, 2009, defendant went to the police department for the interview with Detective Miller and Sergeant McNeal. The interview was recorded and played for the jury. Sergeant McNeal advised defendant that Detective Miller had gathered some new information about Kevin. He advised defendant about the *Miranda*<sup>13</sup> warnings and she agreed to answer questions.

Sergeant McNeal asked defendant to tell them exactly what happened before she found Kevin in the bathroom. Defendant repeated her previous account of the evening: Kevin ate dinner slowly. He said he was having trouble swallowing, but he finished his sandwich, and he went to the bathroom. He did not come out of the bathroom, so she called out to him and went to check on him. The door was closed, and she found him lying on the floor. She performed CPR. Then Gordon arrived and performed CPR, and they called 911. Defendant said when she found Kevin in the bathroom, he was moaning and felt warm. She also said food came up as they performed CPR.

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<sup>13</sup> *Miranda v. Arizona* (1966) 384 U.S. 436

Sergeant McNeal asked defendant if Kevin had any problems when he walked from the kitchen to the bathroom. Defendant said he just seemed to walk slowly. Defendant added that when they got home from the park, she went into her room and did not watch the children, so if “he fell,” she was not aware of it.

The officers asked defendant how she usually disciplined the children. Defendant said she gave them time-outs if they misbehaved, fought with each other, if L.M. “passed gas,” or Kevin went to the bathroom in his clothes. Defendant said Kevin relieved himself in his clothes a lot because “he never wanted other kids” in her home, and “he said he just wanted me and him.” Defendant said she would spank Kevin on his rear end with her open hand because “he’s mine,” but she never spanked the foster children.

The officers asked defendant why Kevin was wearing a diaper. Defendant said Kevin relieved himself in his clothes when they got home from the park that night, and he put the diaper on because of that. The officers asked defendant if she got mad at Kevin because of that. Defendant said she told Kevin that he should have asked to use the bathroom at the park. The officers asked if she put Kevin in a timeout. Defendant said no, but that L.M. was on timeout because he pushed Kevin at the park.

Sergeant McNeal told defendant they knew she was not being truthful because Kevin’s body was terribly injured. Defendant asked what he meant. The officers said Kevin’s injuries were significant and caused by an adult, and she had to “come clean” about what happened. McNeal told defendant that during her 911 call, she said Kevin fell and hit his head; that she never told the officers this story in their prior interview, and they believed she lied to the operator. McNeal told defendant that if she continued to lie, it was not going to work for her because the autopsy revealed Kevin had internal injuries. Defendant said Kevin must have fallen if she said that to the 911 operator, and there was so much going on that she could not remember what she said.

Detective Miller said Kevin suffered severe trauma to his chest, and he was repeatedly and violently punched in his stomach, abdomen, and liver. They told

defendant she hit Kevin so hard that it severed an artery in his heart, and asked how it happened. Defendant said she did not know, and she did not punch him. Miller said Kevin's injuries were not caused by CPR, but by violent trauma. The officers told defendant that she hit him so hard, "like a freight train hitting a car," that his lungs and internal organs filled with blood. They said Kevin collapsed in the bathroom "because his little body had pumped his blood out" from the internal injuries "caused by you."

Defendant insisted that she never punched Kevin; she did not know how Kevin died, or why he had internal injuries. The officers repeatedly accused her of lying and urged her to tell the truth. The officers asked if she was trying to blame Gordon for Kevin's death. Defendant said no, that Gordon never touched Kevin, and he arrived after she found Kevin in the bathroom.

The officers asked defendant if she grabbed Kevin's neck. Defendant said she only touched Kevin's neck when the 911 operator gave the CPR instructions to tilt back his head. The officers said Kevin must have done something to trigger her rage, most likely when he relieved himself in his clothes. Defendant said no, that she did not touch him.

### **Defendant reveals she grabbed Kevin's neck**

As the interview continued, defendant slightly changed her story and said: "I did grab Kevin by the neck but I didn't ... punch Kevin in his stomach now that is the truth." Defendant said LM and Kevin were eating dinner at the table. LM got up from the table and said Kevin had touched his private area. Defendant told Kevin that he knew he was not supposed to do that. She also told Kevin to go to the bathroom. "That's when I grabbed Kevin" by the neck and also grabbed his shirt. She kept telling Kevin that he knew better than to touch L.M.'s private area. She had no idea as "far as the strength that I grabbed him."

“[Q] Did you shake him around a little bit? Trying to shake some sense into ‘em?”

“[A] Yeah, uh well yeah I held him like that and I shook him but not, not up here. And that’s all I did ....”

Defendant said she did not punch or kick Kevin, and she did not know how his stomach and abdomen got hurt. The officers again said they knew she did it. Defendant said: “I did grab him here and I shook Kevin,” but she never punched him. Defendant said it happened after Kevin said he could not swallow. Kevin had finished eating his sandwich.

The officers suggested it was probably an accident, she just lashed out, and she was not acting rationally. They said they were going to take a break and leave defendant alone in the interview room to think about things. They asked if she might hurt herself if left alone. Defendant replied: “I wouldn’t hurt myself. I’m just trying to get to the bottom of what happened to Kevin.... I did grab Kevin around his neck like this like I told you. As far as hittin’ Kevin in his stomach like you guys said, I didn’t hit Kevin in his [s]tomach.”

#### **Defendant gives another account of the incident**

The officers asked defendant to start over again, explain her statement to the 911 operator that Kevin fell down, and tell them what happened. Defendant said they got home from the park, and Kevin said he had relieved himself in his clothes. Defendant told him to change and gave him a diaper. Kevin changed and put his wet clothes in the garage, like he always did. Defendant said Kevin came back into the house, and the children sat at their little table for dinner. Kevin said he could not swallow, but then he finished his sandwich. Kevin got up from the little table, his leg must have caught, and he fell backwards and hit his head.

Defendant said L.M. also got up from the table, and said Kevin had touched his private area.<sup>14</sup> Defendant thought Kevin touched L.M. before he fell backwards. Defendant said Kevin did not get in trouble because of relieving himself in his clothes. Defendant said she asked Kevin why he kept touching L.M. when she had taught him not to.

Defendant said when Kevin touched L.M.'s private area, "then that's when I grabbed Kevin" and told him that he knew better, and she was tired of him doing that. She did not hit, punch, kick or spank him. She grabbed his neck and shirt collar, and admitted it was "closer to his throat." She asked Kevin if he needed to use the bathroom, and he said no. She told him to go anyway.

Detective Miller asked defendant if she could have hit and then grabbed him. Defendant said that she was not aware if she did. "I just grabbed 'em to what extent I can't say, the strength but I know I grabbed 'em, Kevin why do you keep doing this ...."

The officers told defendant that Kevin must have caused her to have a "fit of anger," she grabbed his throat and neck, Kevin received the injuries to his chest and abdomen, and he collapsed in the bathroom from his internal injuries. The officers also said that Kevin's body temperature dropped quickly, which meant she failed to immediately get help since she knew she caused his injuries. Defendant said she did not know Kevin collapsed in the bathroom, and she immediately tried to help him when she found him. She did not want to leave Kevin alone to call 911, and she made the call after Gordon arrived and started CPR.

### **Defendant says Kevin was going to leave her home**

Defendant said Kevin touched the foster children who had been in her house and made sexual comments to them. The officers asked defendant what might have happened

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<sup>14</sup> As we will discuss *post*, L.M. was later interviewed and said that he was sent into the garage to finish his dinner (because of misbehaving), and he heard defendant and Kevin make loud noises in the kitchen, "like a monster," and it sounded like: "RAAAH."

if Kevin kept touching the other foster children in their private areas. Defendant replied: “What was going to happen – I was – Kevin was going to leave my home....” She tried to get help for Kevin’s problem of relieving himself and sexually touching the other children, but the social services agencies kept referring her to other departments and she could not get him the right help.

“... I did get frustrated ‘cause I couldn’t get help with him. Because I loved Kevin I wanted the best for Kevin but I, I even told them that Kevin keep, keep givin’ me problems and, and if I can’t get any help then they gonna have to remove him out of my home.”

Defendant said Kevin had been damaged by living in nine foster homes. She did not know about all his problems until after Kevin moved into her house, “[c]ause I probably wouldn’t have took him in my home then....” She told Kevin’s social worker about his disclosures that he had been sexually molested in another foster home. She also reported every time that Kevin sexually touched another foster child in her house. The social worker told defendant the other foster children were not in a safe home if Kevin kept touching them.

The officers asked defendant how Kevin’s heart was severed. Defendant said she did not know, but revealed that she “pushed” Kevin “straight up the hallway” and told him to go to the bathroom, but he did not fall. They asked defendant how she pushed Kevin. “Around his neck, go to the bathroom Kevin....”

The officers said they knew the “timeline” of when Kevin died from the autopsy, and that ruled out anyone else causing his death except for her.

“[Defendant]:           Okay, if I caused his death like this I caused it. I’m sorry that I did but I – you can’t –

“Miller:                   Are you sorry that you did?

“[Defendant]:           You don’t know what I’ve been through yes –

“Miller:                   Are you sorry that you did?

“[Defendant]: That is my son yes I am very sorry.”

Defendant again said she did not hit Kevin in the stomach.

The officers reminded defendant that during their previous interviews, they asked if she had done anything physical to Kevin and she said no. They asked defendant why she failed to previously disclose these details. Defendant said she did not lie, but she had “so much on my mind I didn’t even think about it ‘til we standing here, sitting here talking ... and I’m telling you the truth ....”

The officers told defendant she caused Kevin’s death and asked if she was sorry. Defendant said she was sorry she grabbed Kevin if that caused his death. “[I]f you say I caused his death then yes I’m sorry for that but all I did was grabbed him up here.” The officers asked why Kevin’s blood was on the bathroom wall, and why he was bleeding from his rectum. Defendant said she did not know. They said his internal injuries were so severe that it caused the rectal bleeding.

Defendant said she was devastated that the officers said she killed Kevin, but repeatedly said she never punched or kicked him in the abdomen or stomach.

At the conclusion of the interview, the officers advised defendant that she was under arrest for Kevin’s death, and she was taken into custody.<sup>15</sup>

### **L.M.’s STATEMENTS**

On March 11, 2009, the day after defendant was arrested, a forensic interview was conducted with five-year-old L.M., the oldest foster child living in defendant’s house. L.M.’s interview was recorded and played for the jury.

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<sup>15</sup> The police initially investigated Gordon as a suspect in Kevin’s death, and possibly whether the child had been sexually molested, particularly because of Kevin’s rectal bleeding. Gordon was eliminated as a suspect when it was determined that defendant was the only adult in the house when Kevin was injured. The rectal bleeding was later determined to be the result of Kevin’s massive internal injuries, and there was no evidence of sexual molestation.

L.M. said he liked living at defendant's house, and he was not afraid of her. She did not spank or hit him. L.M. did not think Kevin was worried about being with defendant.

L.M. remembered the day that Kevin was found on the bathroom floor. They came home from the park and ate dinner at the little table. Kevin told defendant he could not swallow his sandwich. L.M. said Kevin's "mouth and his cheeks were like this with food in his mouth."

L.M. said defendant told him to go into the garage to finish his dinner.<sup>16</sup> L.M. ate his dinner in the garage, and the other children stayed at the little table. When he was in the garage, L.M. heard noises and words from defendant and Kevin in the house. L.M. said the noises from Kevin and defendant "were loud," "like a monster," and sounded like: "RAAAH."

L.M. said he finished his dinner and went back into the house. He saw "pee" on the floor where Kevin had been sitting, and he knew Kevin had done it because he had done it there before. L.M. said defendant told Kevin to get up. Kevin and defendant went to the bathroom. He did not hear Kevin say anything after he went to the bathroom.

L.M. had to use the bathroom. He went to the hallway and saw Kevin lying on the bathroom floor, and defendant was with him. L.M. said Gordon arrived. Gordon told L.M. to use the other bathroom. L.M. said the ambulance came, and they tried to make Kevin breathe, but Kevin could not breathe.

At trial, L.M. testified as a prosecution witness. He was eight years old at the time of trial. L.M.'s testimony about Kevin's death was consistent with his pretrial statement except for two points: L.M. testified he did not remember telling defendant that Kevin

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<sup>16</sup> Defendant stated she regularly sent L.M. into the garage, if he passed gas during a meal.

tried to touch him. L.M. did not remember telling someone that he heard noises from the house when he was in garage.

### **DEFENSE**

The defense theory was that Kevin's fatal injuries were the result of the well-intentioned but inept administration of CPR by both defendant and Gordon, particularly given their alleged inexperience and Gordon's large size and strength, and the prolonged attempts by the paramedics and hospital staff to resuscitate Kevin.<sup>17</sup> This theory was advanced through cross-examination of the prosecution's medical witnesses. The defense did not call its own expert to address Kevin's cause of death.

Defendant's four siblings testified as character witnesses, that she was a loving and attentive mother to her biological and foster children, and she was not a violent person.

#### **Defendant's testimony**

Defendant testified she did not know anything about Kevin's history before she became his foster mother. Kevin later told her that he had been sexually abused at another foster home. After she adopted him, defendant asked the social workers and agencies for help to deal with Kevin's problems. Defendant advised them that she was "going to have to let Kevin go if they can't help me" and his problems became worse. Kevin repeatedly scratched himself, and she had to put socks over his hands to prevent it.

Defendant testified she did not know what happened to Kevin; she did not beat him; she did not inflict the fatal injuries; and she never harmed any of the foster children placed in her care. She testified consistent with her prior statements – they went to the park, they came home, and the children ate dinner. Kevin complained he could not swallow because his throat hurt. L.M. passed gas, and defendant sent him into the garage

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<sup>17</sup> According to their trial testimonies, defendant weighted about 197 pounds, and Gordon was six feet two inches tall and weighed about 270 pounds.

so it would not stink. After dinner, L.M. used the bathroom, and then the younger foster child used the bathroom. Defendant helped her. Defendant then sent Kevin to the bathroom.

Defendant said that at some point during dinner, Kevin touched L.M.'s private area. Defendant also testified that when she told Kevin to use the bathroom, Kevin's leg must have caught on the little table because he fell backwards.

Defendant testified that because Kevin touched L.M.'s private area, she grabbed defendant on the front of his shirt collar, shook him, scolded him, swatted his behind, and pushed him down the hallway. She did not grab his neck, punch, or kick him. Defendant told Kevin to use the bathroom, and then he would be in a "timeout" by the front door.

Defendant testified she cleaned up the kitchen and did not see Kevin standing at his time-out by the front door. She called, but he did not respond. She went to the bathroom and knocked on the door. Kevin again did not respond. She opened the bathroom door and found him on the floor. Defendant testified Kevin was still alive because she pulled him on her lap and his eyes were moving.

Defendant testified she thought Kevin passed out from choking. She dabbed him with a cold, wet cloth but he did not wake up. She found a "faint" pulse and started administering CPR. She pressed her hands over the area of his heart. Food started to come up from Kevin's stomach and out of his mouth.

Defendant testified Gordon arrived, checked Kevin's pulse and respiration, and started CPR. More food emerged from Kevin's stomach and mouth. Defendant described Gordon as hysterical. Gordon also performed the Heimlich maneuver; he held Kevin up, put his hands around his middle, and pushed. Gordon also slapped Kevin's back because something was coming up. Kevin's eyes were moving and defendant believed he was still alive. Gordon told defendant to call 911. Defendant said she called her sister first so she could come and watch the other children, and then she called 911.

The 911 operator gave them directions, and she gave the telephone to Gordon. They kept doing CPR until the fire truck arrived.

Defendant testified she was very upset at the hospital, and her family had to calm her down. Defendant said she did not lie to Sergeant McNeal when they spoke at the hospital, but some of the details about what happened came to her “later.” She invited the officers to look around her house even though Kevin had just died, and it was very late. After they left, her family stayed to comfort her, and she couldn’t sleep.

Defendant testified that during her second interview with the officers, they repeatedly accused her of killing Kevin and lying to them. Defendant testified she never kicked or punched Kevin, and never lied to the officers.

### **Cross-examination**

Defendant admitted she was frustrated that Kevin kept touching L.M.’s private area in a sexual way, but she was trying to get him help. She denied that she wanted to give him “back,” but she just wanted help for his problems.

Defendant conceded she did not initially tell the officers that Kevin had touched L.M.’s private area, or that she grabbed and pushed Kevin that night, and failed to mention these facts until midway through the second interview. Defendant explained that the officers did not ask about these things when they spoke at the hospital.

Defendant testified she had to be certified in CPR to receive her foster home approval, but claimed she never took the class and the instructor simply gave her completed certificates which asserted that she had taken and passed the course. Defendant conceded she told the officers that she knew how to perform CPR, but the instructor never showed her a video or asked her to demonstrate her knowledge on a dummy.

### **REBUTTAL**

Bibi Carrasco was a CPR instructor and certifier with Kern Bridges, the agency which certified defendant to receive foster children. Carrasco testified that to receive

CPR certification, a person had to pass a written examination, and show competency on chest compressions, blows, and breaths. Defendant was certified. Carrasco never told her that she did not have to take the course or pass the examination. Carrasco conceded there was no evidence to show defendant received any specific instructions. However, there would be documentation if a person failed the written examination.

## **DISCUSSION**

### **DEFENDANT’S CONVICTION FOR INVOLUNTARY MANSLAUGHTER IS SUPPORTED BY SUBSTANTIAL EVIDENCE**

Defendant contends there is insufficient evidence to support her conviction of the lesser included offense of involuntary manslaughter. Defendant argues the jury rejected the prosecution’s theory that defendant deliberately assaulted Kevin and inflicted his internal injuries, given the jury’s not guilty verdict for second degree murder. Defendant thus asserts that at the most, the evidence showed she grabbed Kevin’s shirt, swatted his behind, and pushed him down the hall to use the bathroom, and such conduct was insufficient to establish involuntary manslaughter since she simply exercised her lawful parental right to discipline Kevin. She also asserts Kevin was choking, and her inept administration of CPR could have caused Kevin’s internal injuries. She asserts that based on either theory, her conduct would not have satisfied the legal requirements for involuntary manslaughter.

#### **A. Substantial Evidence**

“In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

“The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 2.)

“The standard of appellate review is the same in cases in which the People rely primarily 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 be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.’” [Citations.] ‘Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove [her] guilt beyond a reasonable doubt.’ [Citation.]” (*People v. Bean* (1988) 46 Cal.3d 919, 932–933; *People v. Stanley* (1995) 10 Cal.4th 764, 792–793.)

### **B. Murder and Involuntary Manslaughter**

Defendant was tried for the second degree murder of Kevin, which is an unlawful killing committed with malice aforethought, but without the elements of willfulness, deliberation, and premeditation that elevate the killing to the first degree. (*People v. Robertson* (2004) 34 Cal.4th 156, 164 (*Robertson*), overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1200–1201; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) “Malice may be express or implied. Malice is express ‘when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.’ [Citation.] It is implied ‘when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.’ [Citation.] More specifically,

‘malice is implied “when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.” [Citation.]’ [Citation.]” (*Robertson, supra*, 34 Cal.4th at p. 164.)

While defendant was charged with second degree murder, the jury found her not guilty of that offense, and guilty instead of involuntary manslaughter as a lesser included offense. (See, e.g. *People v. Thomas* (2012) 53 Cal.4th 771, 813.) “ ‘Manslaughter is the unlawful killing of a human being without malice.’ [Citation.] Involuntary manslaughter is manslaughter during ‘the commission of an unlawful act, not amounting to a felony,’ or during ‘the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.’ [Citation.] ‘The offense of involuntary manslaughter requires proof that a human being was killed and that the killing was unlawful. [Citation.] A killing is “unlawful” if it occurs (1) during the commission of a misdemeanor inherently dangerous to human life, or (2) in the commission of an act ordinarily lawful but which involves a high risk of death or bodily harm, and which is done “without due caution or circumspection.” ’ [Citation.]” (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1140.) There also exists a nonstatutory form of the offense, which is based on the predicate act of a noninherently dangerous felony committed without due caution and circumspection. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1007 (*Butler*).

“The lesser included offense of manslaughter does not include the element of malice, which distinguishes it from the greater offense of murder. [Citation.]” (*People v. Cook* (2006) 39 Cal.4th 566, 596.) Moreover, involuntary manslaughter is inherently an unintentional killing. (*People v. Hendricks* (1988) 44 Cal.3d 635, 643.)

“[C]riminal negligence is the governing mens rea standard for all three forms” of involuntary manslaughter (*Butler, supra*, 187 Cal.App.4th at p. 1007) , “regardless

whether the conduct underlying the offense is a misdemeanor, a lawful act, or a noninherently dangerous felony. That is, when a defendant commits a misdemeanor *in a manner dangerous to life*, the defendant's conduct 'qualifies as gross negligence,' and culpability for involuntary manslaughter is warranted because the defendant has performed an act ' "under such circumstances as to supply the intent to do wrong and inflict some bodily injury." ' [Citations.] Similarly, when a defendant commits a lawful act or a noninherently dangerous felony with criminal negligence, the defendant is presumed to have had an awareness of, and conscious indifference to, the risk to life, regardless of the defendant's actual belief. [Citations.]' (*Id.* at p. 1008, italics added.)

A conviction for involuntary manslaughter may be predicated on the defendant's commission of a misdemeanor battery, but "it must still be shown that such misdemeanor was dangerous to human life or safety under the circumstances of its commission...." (*People v. Cox* (2000) 23 Cal.4th 665, 675.)

" " "Criminal negligence" ' exists when the defendant engages in conduct that is ' "aggravated, culpable, gross, or reckless" ' ; i.e., conduct that is ' "such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or in other words, a disregard of human life or an indifference to consequences." ' ' ' (*Butler, supra*, 187 Cal.App.4th at p. 1008.) Criminal negligence has also been described as existing " 'when a [person] of ordinary prudence would foresee that the act would cause a high degree of risk of death or great bodily harm.' " (*Ibid.*)

"Both murder (based on implied malice) and involuntary manslaughter involve a disregard for life; however, for murder the disregard is judged by a subjective standard whereas for involuntary manslaughter the disregard is judged by an objective standard. [Citations.] Implied malice murder requires a defendant's conscious disregard for life, meaning that the defendant subjectively appreciated the risk involved. [Citation.] In contrast, involuntary manslaughter merely requires a showing that a reasonable person

would have been aware of the risk. [Citation.] Thus, even if the defendant had a subjective, good faith belief that his or her actions posed no risk, involuntary manslaughter culpability based on criminal negligence is warranted if the defendant's belief was objectively unreasonable. [Citations.]" (*Butler, supra*, 187 Cal.App.4th at pp. 1008–1009.)

“Involuntary manslaughter, like other forms of homicide, also requires a showing that the defendant's conduct proximately caused the victim's death. [Citations.]” (*Butler, supra*, 187 Cal.App.4th at p. 1009.) Proximate causation requires that “the death was a reasonably foreseeable, natural and probable consequence of the defendant's act, rather than a remote consequence that is so insignificant or theoretical that it cannot properly be regarded as a substantial factor in bringing about the death. [Citations.] Whether the defendant's conduct was a proximate, rather than remote, cause of death is ordinarily a factual question for the jury unless ‘undisputed evidence ... reveal[s] a cause so remote that ... no rational trier of fact could find the needed nexus.’” [Citation.] A jury's finding of proximate causation will be not disturbed on appeal if there is ‘evidence from which it may be reasonably inferred that [the defendant's] act was a substantial factor in producing’ the death. [Citation.]” (*Id.* at pp. 1009–1010.)

### **C. Analysis**

Defendant contends that given the jury's finding that she was not guilty of second degree murder, it rejected the prosecution's theory that she engaged in any deliberate acts, and there is insufficient evidence to support the lesser offense of involuntary manslaughter.

Defendant's arguments are both legally and factually meritless. While involuntary manslaughter is an unintentional killing, it is still based on conduct which evinces “a disregard for life,” one which is “judged by an objective standard” and “merely requires a showing that a reasonable person would have been aware of the risk” posed by that person's conduct. (*Butler, supra*, 187 Cal.App.4th at pp. 1008–1009, fn. omitted.)

“Thus, even if the defendant had a subjective, good faith belief that his or her actions posed no risk, involuntary manslaughter culpability based on criminal negligence is warranted if the defendant’s belief was objectively unreasonable. [Citations.]” (*Ibid.*)

Defendant does not dispute that she was the only adult in the house when Kevin collapsed. In contrast to her trial strategy, she does not blame Gordon or the emergency personnel for causing Kevin’s fatal injuries through their performance of CPR. Instead, she argues that her conduct of disciplining Kevin, and her own purported incompetent administration of CPR, may have exacerbated Kevin’s alleged choking and resulted in his death, but does not constitute involuntary manslaughter.

In making this argument, defendant essentially concedes she engaged in certain behavior toward Kevin, but asserts that such behavior did not amount to the requisite misdemeanor battery or criminal negligence to support an involuntary manslaughter conviction. Defendant’s substantial evidence arguments fail under the weight of the trial evidence. The pathologist’s testimony about Kevin’s cause of death was essentially undisputed – there was no evidence that Kevin choked on anything, the child suffered grievous internal injuries which were inflicted with great force on multiple parts of his body, and the vena cava vein was severed. These injuries were inflicted while Kevin’s heart was beating, and his heart pumped out blood through the damaged veins and vessels which hemorrhaged throughout the pericardial sac, stomach, and abdomen. A child could not have inflicted these injuries, but an adult of defendant’s weight and height could have done so, with punches and kicks to different portions of the body. The internal injuries could not have been inflicted after Kevin lacked a pulse or heartbeat, or by the administration of CPR unless Kevin’s chest had been crushed during the process.

In her multiple statements to the 911 operator, emergency team, medical personnel, and law enforcement officers, defendant created a scenario where Kevin had trouble swallowing during dinner, and he may have fallen and hit his head. He went to the bathroom and might have choked. He inexplicably collapsed but was still alive when

she found him. However, Kevin's body already felt cold when the paramedics arrived at defendant's house, and his lowered body temperature at the hospital was inconsistent with defendant's timeline.

The jury's involuntary manslaughter verdict was based on the obvious conclusion that the autopsy exposed defendant's statements as falsehoods, and defendant engaged in grossly negligent conduct which resulted in Kevin's death. This conclusion is supported by substantial evidence. When the officers confronted defendant with the autopsy results, she initially repeated the same story but eventually changed her account, and admitted she became angry at Kevin because he touched L.M.'s private area during dinner, and she knew the other foster children might be removed from her house if Kevin continued to sexually act out against them. Defendant admitted: "I did grab Kevin by the neck but I didn't ... punch Kevin in his stomach now that is the truth." She had no idea as "far as the strength that I grabbed him."

"[Q] Did you shake him around a little bit? Trying to shake some sense into 'em?"

"[A] Yeah, uh well yeah I held him like that and I shook him but not, not up here. And that's all I did ...."

Defendant said: "I did grab him here and I shook Kevin," but she never punched him. "I did grab Kevin around his neck like this like I told you. As far as hittin' Kevin in his stomach like you guys said, I didn't hit Kevin in his [s]tomach."

Detective Miller asked defendant if she could have hit and then grabbed him. Defendant said that she was not aware if she did. "I just grabbed 'em to what extent I can't say, the strength but I know I grabbed 'em, Kevin why do you keep doing this ...." Defendant later added that she "pushed" Kevin "straight up the hallway" and told him to go to the bathroom, but he did not fall. The officers asked defendant how she pushed Kevin. "Around his neck, go to the bathroom Kevin."

The officers reminded defendant that during their previous interviews, they asked if she had done anything physical to Kevin and she said no. They asked defendant why she failed to previously disclose these details. Defendant said she did not lie to them, but she had “so much on my mind I didn’t even think about it ‘til we standing here, sitting here talking ... and I’m telling you the truth ....” Defendant repeatedly insisted she did not hit or punch Kevin in the stomach.

Perhaps the most poignant circumstantial evidence of Kevin’s death was provided by five-year-old L.M., the oldest foster child who lived in the house. L.M. told investigators that he went into the garage to finish his dinner.<sup>18</sup> L.M. stated that while he was in the garage, he heard loud noises and words from defendant and Kevin, the loud noises sounded “like a monster,” and it sounded like: “Raaah.” When L.M. returned to the kitchen, he saw urine on the floor and believed Kevin had relieved himself. Kevin and defendant went in the bathroom, and they did not come back. L.M. later saw Kevin lying on the bathroom floor and carried to the ambulance.

The entirety of the record, and the inferences from the circumstantial evidence, provide substantial evidence that defendant engaged in grossly negligent conduct far more serious than grabbing Kevin’s neck or collar, or pushing him down the hall. This conduct likely occurred when L.M. was in the garage and heard the loud noises from defendant and Kevin, after which Kevin went into the bathroom. It is extremely likely that Kevin was hemorrhaging by the time he reached the bathroom and collapsed. When Gordon arrived, Kevin did not have a pulse or heartbeat. As the pathologist explained, Kevin would have already suffered all of the internal injuries and hemorrhages before his heart stopped beating.

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<sup>18</sup> Defendant conceded L.M. went into the garage because he passed gas during dinner, and she routinely told L.M. to do so when he did that.

Based on this evidence, there is substantial evidence defendant's infliction of these injuries on Kevin resulted from her commission of a battery which was "dangerous to human life or safety under the circumstances of its commission..." (*People v. Cox, supra*, 23 Cal.4th at p. 675.) The commission of battery to a five-year-old's chest and abdomen, with the type of force that resulted in Kevin's fatal injuries, clearly constitutes gross negligence. A reasonable person would have been aware of the risk posed by that person's conduct, and "culpability for involuntary manslaughter is warranted because the defendant has performed an act ' "under such circumstances as to supply the intent to do wrong and inflict some bodily injury." ' [Citations.]" (*Butler, supra*, 187 Cal.App.4th at pp. 1008–1009.)

In the face of this evidence, defendant cites a variety of her inconsistent statements and asserts that at the most, she grabbed Kevin's shirt, swatted his behind, and pushed him down the hall to use the bathroom. She argues such conduct was insufficient to establish involuntary manslaughter since the touching "was lawful and within her parental right to discipline her child and there was no evidence to show [defendant] actually caused Kevin to choke."

Defendant's "parental right" argument is meritless. The right to discipline one's child includes the right to inflict reasonable corporal punishment. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1050.) However, such punishment is not justifiable when it is not warranted by the circumstances, i.e., it is not necessary or it is excessive. (*Ibid.*) " "[B]oth the reasonableness of, and the necessity for, the punishment is to be determined by a jury, under the circumstances of each case." [Citation.]" (*Ibid.*)

While there are gradations in the amount of discipline a parent may legally inflict upon a child, these levels are not even at issue in this case. As the pathologist explained, the nature of the hemorrhages meant that Kevin was punched or kicked in different parts of his body, and his injuries were similar to those caused by the great force from a

vehicular collision. The battery inflicted upon Kevin was not reasonable under any standard of parental discipline.

Defendant further asserts her purported improper administration of CPR to Kevin “when he was choking” was similarly insufficient to support her conviction for involuntary manslaughter. This argument is based on her trial testimony that she never actually received CPR training. Defendant’s testimony was undermined by the CPR class certifications, the foster home certification, and her repeated statements to the investigators that she had been trained to perform CPR. In any event, Dr. Beaver testified without contradiction that there was no evidence Kevin choked on anything, he still had a pulse and heartbeat when he suffered the grievous internal injuries and hemorrhages, CPR could have inflicted these internal injuries only if the child’s chest had been crushed in multiple areas, and there was no evidence that happened to him.

We thus conclude defendant’s conviction for involuntary manslaughter is supported by overwhelming evidence and similarly reject her due process claims.

**DISPOSITION**

The judgment is affirmed.

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Poochigian, J.

WE CONCUR:

\_\_\_\_\_  
Kane, Acting P.J.

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Franson, J.