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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL BABY GARCIA and
YADIRA ONOFRE,

Defendants and Appellants.

G050715

(Super. Ct. No. RIF10006225)

O P I N I O N

Appeal from judgments of the Superior Court of Riverside County, Charles J. Koosed, Judge. Affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant Angel Baby Garcia.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant Yadira Onofre.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Marvin E. Mizell and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Angel Baby Garcia regularly abused his two young children, Crystal and D. One day, he severely injured Crystal by kicking her in the head and stomach. However, rather than seeking immediate medical assistance for her, Garcia and his longtime girlfriend, appellant Yadira Onofre, waited several hours before taking Crystal to the hospital. By then, Crystal was fading rapidly, and she died later that night. In the wake of her death, appellants were tried and convicted of, inter alia, second degree implied malice murder. On appeal, they contend the jury instructions regarding that offense were prejudicially flawed. Onofre also argues the trial court improperly discharged one of her jurors, and there is insufficient evidence she acted in conscious disregard of Crystal's life so as to support her murder conviction. In addition, Garcia claims the court abused its discretion in admitting evidence he abused Onofre, and his attorney was ineffective for not trying to suppress his pretrial confession. Finding appellants' arguments unpersuasive, we affirm the judgments against them.

FACTS

Onofre met and moved in with Garcia in 2006. At that time, Garcia's daughters Crystal and D. were six and eighteen months old, respectively, and Onofre took on the role of their mother. The girls' early years were marked by severe physical abuse. Garcia had a short temper and would often hit, punch and choke them. He also shot them in the back with a BB gun while they were handcuffed, and one time he burned D. with a hot knife. Onofre was aware of the abuse but did little to prevent it. Although Garcia abused her, too, and she left him from time to time, she always returned because she loved him and wanted to keep the family together.

On the morning of November 23, 2010, Garcia got mad at Crystal, then-age five, for eating her breakfast too slowly. He took her into the bedroom, closed the door and kicked her hard in the stomach. Because Crystal was hunched over at the time, Garcia's foot also caught her in the head. The force of the kick was so great it propelled Crystal into the closet doors. It also caused her to start vomiting profusely, become

disoriented and black out. She was still unconscious after Garcia carried her into the living room, so he started giving her CPR, as Onofre and D. looked on in fear. After several frantic minutes, Garcia told Onofre to call the police because Crystal was still not showing any signs of life. A panicked Onofre dialed 911, fearing Crystal was dead or dying. However, Onofre did not press the “send” button on her phone because Garcia announced Crystal was “coming to.”

Once Crystal regained consciousness, she was still very woozy. Onofre took her into the bathtub to wash her off and noticed she had red marks on her stomach and a bruised eye. Crystal also complained her side and head hurt. She did not say what caused her pain, but when Onofre asked Garcia what happened, he admitted he kicked Crystal. Based on Garcia’s past behavior, this came as no surprise to Onofre. She knew full well of Garcia’s violent tendencies and could plainly see Crystal was hurting badly. Yet, Onofre did not feel compelled to seek medical assistance for Crystal. She was worried that if the authorities got involved, Crystal and D. would be taken away from her and Garcia, as had happened once before.¹

Following her bath, Crystal tried to eat but continued to complain that her stomach hurt. Despite her stomach problems, Garcia decided to take her to the store for a “slurpee.” When they got back to the house, Crystal and D. watched television in the living room for several hours. Crystal’s condition did not improve during that time. She remained lightheaded and lethargic, and eventually it got to the point where she was unable to stand on her own or even take a sip of soup without throwing up. As weak and as nauseous as Crystal was, it wasn’t until about 4:30 p.m. – roughly six hours after he kicked her – that Garcia finally decided they should take her to the hospital.

On the way there, Crystal was groaning, shivering and wanted to go to sleep. Onofre and D. tried to keep her awake, but she was fading in and out of

¹ Child Protective Services had previously investigated numerous reports of child abuse at appellants’ home, and on one occasion, they removed Crystal and D. from the home for over a year.

consciousness. Garcia took this opportunity to concoct a lie about how Crystal got injured. He said they should tell everyone that Crystal fell in the kitchen and hit her head on the floor, and that is what he and Onofre told the intake nurses when they arrived at the hospital. Consequently, the nurses did not initially know the gravity of Crystal's injuries. However, seeing that Crystal was having trouble standing up, and being unable to find her pulse, they soon realized she was very ill. They took her to the emergency room for urgent care, but by that time she was fading rapidly and doctors there were unable to save her. She died a couple hours later, at 6:52 p.m.

When interviewed by the police, appellants initially denied any wrongdoing, insisting Crystal accidentally fell and hit her head on the floor. However, they eventually came clean and admitted Crystal was injured as a result of Garcia kicking her in the head and stomach.

Crystal's autopsy was performed by county coroner Christopher Happy, M.D. He testified Crystal had 13 contusions beneath her scalp, indicating she suffered multiple blows to the head. And she had a subdural hematoma and bleeding caused by impact or shaking. Dr. Happy also noticed Crystal had an assortment of cuts, bruises and abrasions over her body, as well as three broken ribs that were in various stages of healing. Given the condition of Crystal's body, Dr. Happy opined she died from "homicidal violence including blunt force head injury."

Dr. Paul Hermann, an independent pathologist who testified for the defense, disagreed with that assessment. While conceding Crystal was "severely abused," Dr. Hermann did not believe her head injuries were fatal. Rather, he surmised she may have died as a result of certain drugs she was given at the hospital.

Appellants were jointly charged with first degree premeditated murder but tried before separate juries. At trial, the prosecution conceded there was insufficient evidence of premeditation and proceeded on the theory of second degree implied malice murder. Under that theory, the prosecution had to prove appellants acted or failed to act

in conscious disregard for Crystal's life. The jury was also instructed on the lesser included offense of involuntary manslaughter based on criminal negligence. In addition, Garcia was separately charged with fatally abusing and assaulting Crystal, and both he and Onofre were charged with child endangerment as to D. After the juries found Garcia and Onofre guilty of the charged offenses, the court sentenced them respectively to 29 years to life and 19 years to life in prison.²

Discharge of Juror

Onofre contends the trial court abused its discretion and violated her constitutional rights by discharging a holdout juror from her jury. Although the issue is close, we believe there was sufficient justification to remove the subject juror – Juror No. 5 – for failing to follow the law and the court's instructions. We therefore uphold the court's decision.

Onofre's jury began deliberating on December 19, 2012. Two days later, on the afternoon of the 21st, it sent the court a note requesting "further clarification between and/or regarding the concepts of criminal negligence and conscious disregard for human life." After conferring with counsel, the court referred the jury to CALCRIM No. 580, which explains the difference between those two concepts.

Thirty minutes later, the jury announced it had reached a verdict on the child endangerment count but was unable to reach a verdict on the murder count. In response to the court's questions, the jury foreperson, Juror No. 6, said the jury was split 11 to 1 on the murder count, with 11 jurors favoring murder and 1 favoring involuntary manslaughter. The foreperson did not believe any further deliberations or instructions from the court would help break the deadlock, and when polled, the rest of the jurors agreed with that assessment.

² The court also ordered appellants to each pay \$7,500 in restitution. Garcia contends that, in ordering him to pay that amount, the court should have made him jointly and severally liable with Onofre. While the court had the discretion to do so, Garcia waived his right to challenge the award by failing to contest it in the trial court. (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

Outside the presence of the other jurors, the court asked the foreperson if any of the jurors had “shut[] down” and were not deliberating. She answered, “That’s not the case. If I may say this. This is the fourth jury I’ve sat on. This is my fourth time as foreman. This was a very good jury. Everybody participated. I’m sorry. I’m getting emotional. [¶] . . . [¶] There was none that shut down, not even until the end.” The court then brought the rest of the jurors back into the courtroom and ordered them to resume deliberations. The court also reminded the jurors of their duty to deliberate and to follow the law as it was provided to them, even if they did not agree with it.

The jury deliberated for 50 minutes that afternoon and then adjourned until December 28. After deliberating for two hours that day, the jury sent the court a note saying it was still deadlocked. Because the trial judge, Charles J. Koosed, was unavailable at that time, Judge Bernard J. Schwartz handled the matter in his stead. While Judge Schwartz was conferring with counsel about the note, the prosecutor said he sensed “there is something going on back there [with the jury] that is inappropriate.” He wanted Judge Schwartz to ask the jurors “whether there’s any misconduct going on during the deliberations and whether or not people are discussing things from their own personal backgrounds” Although defense counsel did not think that was the case, he conceded he could not “stop the court from inquiring whether or not everybody is playing fair and doing what they’re supposed to do.”

That is what Judge Schwartz set out to do after bringing the jury into the courtroom. He asked the foreperson if she believed “there is just a genuine dispute about the facts as opposed to someone not following the law?” The foreperson answered, “I think there’s a genuine dispute concerning the applicability of the law to the circumstance.” Judge Schwartz then asked the rest of the jurors as a group if any of them felt that someone was “not following the law with respect to the deliberations.” After eight of them raised their hand, Judge Schwartz had all of the jurors step outside and proceeded to bring them in individually for questioning.

Speaking to Juror No. 1, Judge Schwartz told her it was okay for jurors to disagree about the facts or how the law applies to the facts, but they can't "substitute their own feelings for the law and then apply that to their decision-making process." Asked for her take on the situation, Juror No. 1 said, "I think it's more feelings involved and . . . just certain words that probably, you know, maybe mean something to one person but mean something different to everybody else." Asked if some of her fellow jurors appeared to be interpreting the instructions and the law differently, she said, "Sort of, yes. [¶] . . . [¶] There's a little confusion with what certain things mean"

When Judge Schwartz asked her if it would be helpful if he provided the jury with further guidance about the meaning of certain words or instructions, Juror No. 1 answered, "You know, I think at this time, there's just a lot of walls built up now. And . . . we've tried and given different explanations and different scenarios and even tried to think of different questions to ask of the court, but it just seems like maybe there's already kind of a wall or where there's no – maybe even if they were to see it – I think it might be more personal. That's my feeling."

Judge Schwartz then took to questioning Juror No. 2. He asked him whether the deadlock was attributable to a difference of opinion about the facts or whether the holdout juror was simply not following the law. Juror No. 2 replied, "I strongly believe they're not following the law." Asked to elaborate, Juror No. 2 said all of the jurors agreed on the child endangerment count, and he felt there were "similar things" on that count that applied to the murder count. However, the holdout juror wasn't willing to go along with that because she didn't like "the title" of the murder charge. In other words, it wasn't "so much the facts" that guided the holdout juror's decision; she simply did not feel comfortable with the title "murder" and wanted to go with involuntary manslaughter instead "without really reviewing anything" or providing "good facts to back up her [position]."

At that point, Judge Schwartz met with counsel outside the presence of the jury and told them he was “more confused than [he] was before.” The prosecutor argued that because the elements of child endangerment were similar to implied malice murder, only sympathy and feelings about the gravity of the charge were preventing the holdout juror from voting for murder. While recognizing that possibility, Judge Schwartz surmised it was also possible the holdout juror was not convinced the elements of murder had been proven beyond a reasonable doubt. Hoping it would shed more light on the issue, defense counsel wanted Judge Schwartz to question the rest of the jurors, and so did the prosecutor. However, fearing that would just result in “eight different opinions,” Judge Schwartz decided to simply bring in the foreperson for further questioning.

After informing the foreperson that many of her fellow jurors disagreed with her assessment of the situation, Judge Schwartz asked her again if the deadlock was based on “a legitimate differing view of the facts” or whether someone was “just refusing to . . . deliberate in good faith” and “substituting their own feelings about what the law should be and not following it.”

The foreperson explained, “[W]hen I said the individual doesn’t feel the law is applicable given these circumstances, I do think the individual is bringing to – to her deliberation process, if you will, her thought process, some personal bias and maybe some experience. It hasn’t been verbalized to anyone. I believe the individual is – believes they are following the jury instructions and the law but is hung up on a few words in those instructions and is perhaps casting applicability based on her own belief system. [¶] . . . [¶] But I feel this individual truly believes that they are following the instructions and following the law. That is my take. One can’t get inside of one’s head. [¶] . . . [¶] I don’t feel the individual has done the best job in articulating what they’re thinking. Has been participatory, for sure. It’s not that the individual has shut down and not willing to talk, but definitely made up their mind kind of early in the game. And

regardless of what explanation or what questions we've asked or what discussion we've had, we seem to always come back to the same points.”

When Judge Schwartz asked if further clarification of any of the words in the instructions might assist the jury in reaching a decision, the foreperson said no. According to her, the holdout juror “believe[s] they understand what those words mean. And it's been a very trying situation. We'll put it that way. We've worked very hard to try to clarify, to ask the right questions, to work it through and – so do I think there's a flat-out disregard for the law? I don't think so. I don't think that's what the intent of this person is. But this individual is definitely seeing this through a different lens than anyone else is on the jury.” Asked if that was because the holdout juror was disregarding the law, the foreperson replied, “That's not my perception based on what the individual is saying. But I think there's also perhaps an undercurrent going on where the individual maybe doesn't want to accept or understand . . . what [the law] is, if that makes sense.”

In the end, Judge Schwartz did not feel comfortable making any decisions in the case, since he was not familiar with all the facts, so he asked the jurors if they could return to court in a week for further proceedings in front of Judge Koosed. When they indicated they could, he asked if any of them wanted to speak to Judge Koosed about the issues they had discussed. Several of the jurors raised their hands, but the holdout juror was not among them.

On January 7, 2013, the day before proceedings were scheduled to resume, the foreperson took it upon herself to send an email to Judge Koosed. The email has been made a part of the appellate record and states as follows:

“I regret we have not been able to deliver a verdict on Count 1. The jury has been divided 11:1, since quite early in the deliberation process.

“When asked by . . . Judge [Schwartz on December 28, 2012] if I believed any jurors were disregarding the law, my response was that I believed the one juror disagreed that the law was applicable to the circumstances of the case. I also stated that I

believed that the juror felt that they were following the law, but had not been able to effectively articulate his/her position in a way that the rest of the jury could understand and that I suspected there were personal biases and experience at play that were clouding the issue for this individual. I did not specifically state that I felt this juror was disregarding the law.

“Since December 28, I have thought carefully about the judge’s question. When I reflect on the deliberation process, several statements made by this one juror, his/her being unreasonably hung up on the applicability of two phrases in the jury instructions/law to this case, an inability to effectively convey the reasoning behind his/her opinion to the rest of the jury, an apparent unwillingness to accept the clarification provided by you or to thoughtfully consider the rationale of other members of the jury over the course of deliberations, I am left with the belief that personal biases, opinions and experiences are interfering with this juror’s ability to objectively evaluate the evidence presented to us during the trial and that this individual is in essence disregarding the jury instructions/law. I realize that this is a very serious statement to make about this juror; however, after careful consideration, it is what I believe to be true ‘beyond a reasonable doubt.’”

When court convened the following day, January 8, Judge Koosed provided counsel with a copy of the foreperson’s email and announced he had reviewed the proceedings that occurred before Judge Schwartz on December 28. It was defense counsel’s position that the jury had exhausted its deliberative efforts, necessitating a mistrial. He did not believe that there was any evidence the holdout juror was disregarding the law or that further questioning of the jurors would be fruitful. In fact, he felt the court’s previous questioning had already come dangerously close to invading the deliberative thought process of the jury. The prosecutor took the position the holdout should be replaced for refusing to follow the law.

Judge Koosed still wasn't convinced one way or the other, so he decided to bring in the foreperson for yet further questioning. He first reminded the foreperson of her initial statements to the effect that the holdout juror appeared to be participating in deliberations and following the law. The foreperson explained that, as reflected in her email, her feelings about the situation had changed over time. She said the jury was working well together at first, but by the time of the hearing before Judge Schwartz on December 28, things had become uncomfortable and it was hard for her to express herself when her fellow jurors were present. After that hearing, however, she felt "there was something going on that wasn't quite right."

Asked what in particular the holdout juror said or did to make her feel that way, the foreperson stated, "It's more or less kind of a summation of a lot of different things that were said during the course of [deliberations] . . . that, you know, in the minds of the rest of us were either irrelevant or not necessarily appropriate. The initial comments had to do with what the possible sentences could be and concerns about that." The foreperson said she "shut that down quickly," however, because she knew they weren't supposed to be discussing or considering that.

"Another concern [raised by the holdout juror] was about whether hospital personnel had acted appropriately in the circumstances." According to the foreperson, "That, too, was something we, you know, we weren't there to discuss the performance of the personnel in the hospital, per se. We had the evidence. We had the testimony. But I think [the holdout juror's] personal expertise and background . . . and perhaps some experience in similar situations were clouding the issue a bit." Asked if the holdout juror talked about her personal experiences, the foreperson said, "At one point in time, yeah[.]" After telling everyone she was a registered nurse, the holdout juror said, "I've seen many women come into the hospital in situations where they might be hesitant to point to the abuser." The holdout juror also told the foreperson over lunch one day that she was "an administrator in the medical environment."

In the foreperson's view, the holdout's experience in this regard gave her a personal bias in the case. She surmised, "I think [the holdout juror] believes that individuals in those circumstances such as [Onofre] are in a state of mind – you know, it's her opinion based on a state of mind that they – nothing is intentional and nothing is conscious, and those are the two words [the holdout juror] is really hung up on, that given her belief system, what she believes is true, is that someone in that circumstances could not intentionally or consciously fail to act or, you know, disregard human life. It would be because of a mindset that just couldn't allow them to do that. [¶] And that didn't make sense to the rest of the jury and it seemed to me a lot like a bias, an experience, and opinion being projected onto this defendant in this situation."

Continuing her explanation as to why she believed the holdout juror was not deliberating properly, the foreperson said that after the jury reached its impasse on December 28, the holdout juror commented that she would "see it differently if [Onofre] had actually abused the child herself." The foreperson felt this comment demonstrated the holdout juror was "unwilling[] to accept the instructions and the law as we had been provided and [was] looking for avenues to somewhat justify her position, but [she] was never really able to do that for the rest of us in a way that we could understand where she was really coming from."

Despite her feelings in this regard, the foreperson was quick to admit the holdout juror never came right out and said she wasn't going to follow the law. In fact, the foreperson felt the holdout juror sincerely believed that she was following the law. Asked if she formed her impressions based on certain things the holdout juror said or did, or whether they were just based on her gut feeling, the foreperson said "there were a number of things that were said over the course" of deliberations that caused her concern. She said "it was a process for me of awareness, if you will, and kind of reaching a point where putting all the pieces together, I don't know what else I can call this other than a disregard for the law."

Judge Koosed recognized the delicacy of the situation and the need to preserve the sanctity of the deliberative process. While acknowledging a disagreement over the facts or how to apply the facts to the law is not cause for a juror's removal, there were a number of things that troubled him about the case. First, even though the foreperson quashed the topic when it was broached, the holdout juror mentioned the issue of punishment, "which is a big no-no and would be considered misconduct." Second, the holdout juror stated she had "some sort of special experience or expertise in the field" and "[t]hat is clearly not in evidence and clearly not appropriate to rely on." And third, the court felt the holdout juror was "viewing the law in a way that demonstrates . . . she's not following it."

Based on those reasons, the court found good cause to discharge the holdout juror and replace her with an alternate juror. Once the alternate juror was sworn in, the court ordered the jurors to start their deliberations anew on both counts. Two hours later, the jury announced it had reached a verdict. It found Onofre guilty of murdering Crystal in the second degree and of endangering the safety and wellbeing of D.

The law is clear. While a juror may not be discharged for "harbor[ing] doubts about the sufficiency of the prosecution's evidence" (*People v. Cleveland* (2001) 25 Cal.4th 466, 483), the failure to follow the court's instructions is grounds for removal (*People v. Loker* (2008) 44 Cal.4th 691, 749). Indeed, when a juror strays from an instruction, it creates dual concerns for the court. Not only does it undermine the efficacy of that particular instruction, it suggests the juror may be willing to disregard other instructions as well. (*People v. Ledesma* (2006) 39 Cal.4th 641, 738.)

In reviewing a court's decision to remove a juror for cause, we apply the "abuse of discretion standard, and will uphold such decision if the record supports the juror's disqualification as a demonstrable reality. [Citations.] The demonstrable reality test "requires a showing that the court as trier of fact *did* rely on evidence that, in light of

the entire record, supports its conclusion that [cause for removal] was established.” [Citation.] To determine whether the trial court’s conclusion is “manifestly supported by evidence on which the court actually relied,” we consider not just the evidence itself, but also the record of reasons the court provided. [Citation.] . . . [Citation.]” (*People v. Williams* (2013) 58 Cal.4th 197, 292.)

The first reason Judge Koosed provided for his decision to remove the holdout juror was that she expressed concern about Onofre’s possible punishment. However, when the holdout juror raised this topic during deliberations, the foreperson knew it was improper and immediately cut her off, and thus it is unlikely the brief discussion of this topic, in and of itself, tainted the proceedings or constituted grounds for removal. (See *People v. Lavender* (2014) 60 Cal.4th 679, 687-689 [reminder or admonishment to jurors that they are not to consider certain topics is generally sufficient to prevent resulting prejudice].) Still, the fact the holdout juror brought up the subject of punishment is troubling because the trial court expressly instructed Onofre’s jury that it must reach its verdict without any consideration of that issue. (See CALCRIM No. 3550.) The holdout juror’s failure to follow this simple instruction raised a broader concern about whether she was looking for a basis – apart from the facts and the law – to justify her position.

It wasn’t simply the holdout juror’s consideration of Onofre’s possible punishment that contributed to this concern. Judge Koosed was also worried the holdout juror was basing her decision on her personal experience rather than the evidence adduced at trial. His instructions made it clear the jurors had to base their findings solely on the evidence presented at trial, and they could not consider information from any other source during their deliberations. (CALCRIM Nos. 200, 3550.) Yet, according to the foreperson, the holdout juror spoke openly about her nursing experience when they were discussing the case. She not only brought her personal experience to bear in evaluating the response of the medical personnel who treated Crystal in the hospital, she also said

she had personally “seen many women come into the hospital in situations where they might be hesitant to point to the abuser.”

While jurors are “expected to bring their individual backgrounds and experiences to bear on the deliberative process” (*People v. Manibusan* (2013) 58 Cal.4th 40, 57), the trial court feared the holdout juror was trying to tell the rest of the jurors “how things are” based on her work in the medical field. Even defense counsel conceded this was a problem. When Judge Koosed described the holdout juror’s comments about her work experience as being “inappropriate and misconduct,” Onofre’s attorney said, “I absolutely agree with the court 100 percent.” Thus, there was unanimous agreement between the trial judge, the prosecutor and defense counsel on this particular issue.

Another reason to question the holdout juror was provided by Juror No. 2, who “strongly believed” the holdout juror was not following the court’s instructions. In his view, the holdout juror’s opinions were not based on the strength of the evidence presented at trial. Rather, the only reason the holdout juror was unwilling to vote for murder is because she did not like the sound of that charge. Although the holdout juror was willing to convict Onofre of child endangerment for failing to act, she simply could not conceive of convicting anyone of murder for failing to act. In other words, her “feelings” about the label of the charges seemed to play a powerful role in her decision-making process.

The foreperson also got this impression, based on statements the holdout juror made. The foreperson said the holdout’s “belief system” prevented her from finding a conscious disregard for human life based on the failure to act, and it would be a different situation in her mind if Onofre had “actually abused [Crystal] herself.” But the law, as reflected in the court’s instructions, clearly authorized the jury to convict Onofre of murder based on her failure to protect Crystal from Garcia’s abuse and her failure to seek prompt medical treatment for Crystal after Garcia kicked her. While the holdout juror was certainly entitled to believe Onofre’s inaction did not rise to the level of

conscious indifference to human life so as to support a conviction of second degree murder, the fear is that she categorically concluded the failure to act could *never* be a proper basis to convict someone of that offense. Although the record is not entirely clear on this issue, it appears the holdout juror judged the case based on her own set of standards as opposed to the legal standards provided by the court.

Onofre argues the various statements attributed to the holdout juror merely show she had a different view of the evidence than the other jurors, and if the trial court really wanted to find out if she was deliberating in accordance with the court's instructions, it should have questioned her individually about the situation. However, trial judges have broad discretion to conduct whatever inquiry they think is necessary to investigate an allegation of juror misconduct. (*People v. Engelman* (2002) 28 Cal.4th 436, 442.) Given all the information it had from the other jurors, the court was not required to question the holdout juror about her alleged misconduct prior to removing her from the jury. (See generally *People v. Cleveland, supra*, 25 Cal.4th 466, 485 [a "court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations."].)

As it stands, the record supports the holdout's disqualification as a demonstrable reality. While we are not presented with an unmistakable instance of juror misconduct in this case, we are satisfied that the court gave careful consideration to the issue and that its decision to remove the holdout juror is manifestly supported by evidence on which it relied. It certainly cannot be described as an abuse of discretion, so we are powerless to disturb it. We discern no violation of Onofre's right to a unanimous verdict by an impartial jury or to due process of law.³

³ In light of this holding, we will not consider Onofre's subsidiary argument that, assuming the holdout juror was improperly removed, retrial is barred by double jeopardy principles, other than to say the California Supreme Court has rejected this argument. (*People v. Hernandez* (2003) 30 Cal.4th 1.)

Sufficiency of the Evidence

Onofre also contends there is insufficient evidence to support her conviction for second degree implied malice murder. We disagree.

The standard of review for assessing the sufficiency of the evidence to support a criminal conviction is “highly deferential.” (*People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 538.) Our task is to review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence of the defendant’s guilt. (*People v. Alexander* (2010) 49 Cal.4th 846, 917.) “Although we must ensure the evidence is reasonable, credible, and of solid value” (*People v. Jones* (1990) 51 Cal.3d 294, 314), reversal is not warranted unless ““upon no hypothesis whatever is there sufficient substantial evidence to support the judgment.”” [Citation.]” (*People v. Cravens* (2012) 53 Cal.4th 500, 508.)

Generally, to support a conviction for second degree implied malice murder there must be evidence the defendant deliberately performed “““an act, the natural consequences of which are dangerous to life”” [Citation.]” (*People v. Cravens, supra*, 53 Cal.4th at p. 508, italics added.) Because there was no evidence Onofre ever committed an *act* that harmed Crystal, and her liability stemmed from her *failure to act*, she contends her conviction for second degree murder cannot stand.

However, it is well established that when a person has a legal duty to act, his or her failure to do so may trigger criminal consequences (*People v. Heitzman* (1994) 9 Cal.4th 189, 197-199), including liability for second degree implied malice murder (*Potter v. Hornbeak* (E.D.Cal. 2011) 2011 WL 306180, aff’d at *Potter v. Hornbeak* (9th Cir. 2012) 469 Fed.Appx. 645; *People v. Latham* (2012) 203 Cal.App.4th 319; *People v. Rolon* (2008) 160 Cal.App.4th 1206; *People v. Burden* (1977) 72 Cal.App.3d 603). Onofre does not dispute that, as Crystal’s caretaker and de facto parent, she had a legal duty to protect her from physical harm and obtain medical treatment for her. But she insists the above cases were impliedly overruled by *People v. Whisenhunt* (2008) 44

Cal.4th 174 and that our Supreme Court's opinion in that case precludes a conviction for implied malice murder based on an omission, as opposed to an affirmative act. We do not read *Whisenhunt* in such a sweeping manner.

In *Whisenhunt*, the defendant was convicted of capital murder for burning and beating his girlfriend's child to death. On appeal, he argued the trial court should have instructed on the lesser included offense of second degree implied malice murder based on his failure to take the girl to the hospital once she was injured. The California Supreme Court rejected this argument based on the fact there was "no substantial evidence to support defendant's theory of implied malice murder." (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 217.) At one point in its discussion, the court also remarked "defendant provides no authority [for his claim] that a failure to act can, on its own, constitute an 'intentional act' for implied malice murder." (*Ibid.*, fn. omitted.) The court did not address the merits of that claim, however, and therefore, from a precedential standpoint, the remark is largely insignificant. (See *People v. Ochoa* (1993) 6 Cal.4th 1199, 1211 [cases are not authority for issues they did not decide].) Because the court rejected the defendant's argument on other grounds, we do not believe the remark signaled the court's disapproval of the well-established principle that the failure to act may, in some circumstances, support a conviction for second degree implied malice murder. (See *Potter v. Hornbeak, supra*, 2011 WL 306180 at p. 9 [interpreting subject remark as a "procedural determination regarding the adequacy of briefing in that case, not a substantive interpretation of California law"].)

In order to be guilty of second degree implied malice murder, the person must also know his or her conduct or inaction endangers the life of another. (*People v. Cravens, supra*, 53 Cal.4th at p. 508.) Onofre claims she was ignorant of what Garcia did to Crystal in the bedroom on the day in question, and therefore she had no idea Crystal's life was in danger. The record tells a different story.

At trial, Onofre admitted she knew Garcia was a violent person who had regularly abused D. and Crystal for years. She also admitted that, after Garcia carried Crystal out of the bedroom, she got scared and dialed 911 because Crystal was not showing any signs of life. Onofre did not see what caused Crystal to lose consciousness, but even before Garcia told her he had kicked Crystal, Onofre knew something very bad had happened to her. In fact, in her police interview Onofre told investigators she thought Crystal was dead when she failed to respond to Garcia's initial efforts to revive her. Even after Crystal came to, the danger was not over. Onofre noticed scratches and bruising on Crystal's head and chest, and the child complained of being in pain. She also exhibited considerable nausea, dizziness and lethargy over the course of the day, which signaled she was not well. Nevertheless, Onofre waited over six hours before taking Crystal to the hospital and then lied to the police and medical personnel about what happened to the poor child. Based on all of these facts, the jury could reasonably conclude 1) Onofre knew Garcia had seriously injured Crystal, and 2) by failing to seek medical aid for Crystal sooner in the day, Onofre knew she was putting Crystal's life in danger. (See *Potter v. Hornbeak*, *supra*, 2011 WL at pp. 11-13; *People v. Latham*, *supra*, 203 Cal.App.4th at pp. 327-335; *People v. Rolon*, *supra*, 160 Cal.App.4th at pp. 1219-1221; *People v. Burden*, *supra*, 72 Cal.App.3d at pp. 619-621.)

Onofre's final attack on the sufficiency of the evidence relates to the issue of causation. Relying on the fact that it was Garcia's actions in kicking Crystal that led to the child's death, Onofre claims "the prosecution failed to adduce evidence that prompt medical attention may have kept Crystal alive," and therefore her failure to seek immediate medical aid for Crystal was not the cause of Crystal's death. We are not persuaded.

Under well-established principles of causation, "The defendant may . . . be criminally liable for a result directly caused by his or her act, even though there is another contributing cause." (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements,

§ 37, p. 243.) “[A]s long as the jury finds that without the [particular] act [or omission] the [result] would not have occurred when it did, it need not determine which of the concurrent causes was the principal or primary cause of [the result].” (*People v. Catlin* (2001) 26 Cal.4th 81, 155.) However, a defendant cannot be held liable for his or her conduct or inaction if the part it played ““was so infinitesimal or so theoretical that it cannot properly be regarded as a substantial factor in bringing about the particular result.”” [Citations.]” (*Ibid.*, italics omitted.)

In arguing her failure to seek help for Crystal sooner was not a substantial factor in her death, Onofre assumes the child’s fate was sealed after Garcia kicked her, and nothing could have been done to save her after that point. However, the record shows Crystal’s condition deteriorated significantly over the course of the day, indicating the lengthy delay in seeking assistance contributed to her demise. In addition, Dr. Happy testified that if Crystal had been taken to the hospital immediately after she was injured, doctors could have monitored her condition and done a variety of things to treat her and alleviate her symptoms. For example, doctors could have given Crystal drugs and used various techniques to help her breathe, stabilize her heart rate and decrease her brain swelling. Although Dr. Happy could not say for certain that Crystal would have survived had she been taken to the hospital right away, the evidence was sufficient to support the jury’s finding that Onofre’s failure to obtain prompt medical aid for Crystal was a substantial factor in her death. We discern no reason to disturb the jury’s finding in that regard.

Adequacy of Jury Instructions

Onofre and Garcia both take aim at the trial court’s instructions to the jury. In their view, the instructions impermissibly permitted the jury to find them guilty of

second degree murder based on ordinary negligence and without a finding of foreseeability. The claim does not withstand scrutiny.⁴

The trial court instructed appellants' juries that, in order for a person to be guilty of murder, he or she must not only have intentionally committed a prohibited act, or intentionally failed to do a required act, they must have done so with the requisite specific intent for that crime, namely malice. After explaining the requirements for express malice, the court stated, "The defendant acted with implied malice if, one, he [or she] intentionally committed an act; two, the natural and probabl[e] consequences of the act were dangerous to human life; three, at the time he [or she] acted, he [or she] knew his [or her] act was dangerous to human life; and four, he [or she] deliberately acted with conscious disregard for human life." (See CALCRIM No. 520.)

The court also stated parents and caretakers have "a legal duty to help care for [their] child and furnish medical attention. If you conclude that the defendant owed a duty to Crystal and the defendant failed to perform that duty, *his [or her] failure to act is the same as doing a negligent or [an] injurious act*. If you find the defendant guilty of murder, it is murder of the second degree." (See CALCRIM No. 520.)

Seizing on the italicized text, appellants contend the reference to a negligent act allowed the jury to convict them of second degree implied malice murder based on ordinary negligence. However, the instructions clearly stated that implied malice required proof appellants acted or failed to act in conscious disregard of the victim's life – which is a more culpable mental state than ordinary negligence (*People v. Watson* (1981) 30 Cal.3d 290, 296) – and that is what the prosecutor emphasized in closing argument, as well. At no point was the jury ever told that ordinary negligence could suffice to support a conviction for second degree murder.

⁴ Arguably, appellants forfeited this claim by failing to raise it below. However, because they assert the court's instructions amounted to an incorrect statement of the law, we will consider it. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.)

Any doubt as to this issue was removed by the court's instructions on the lesser included offense of involuntary manslaughter. In instructing on that offense, the court explained, "When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter. The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk is . . . murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter.

"The defendant committed involuntary manslaughter if, one, the defendant committed a crime [i.e., child abuse] or a lawful act in an unlawful manner [i.e., improper child discipline]; two the defendant committed the crime or act with criminal negligence; and three, the defendant's acts . . . unlawfully caused the death of another person. . . . [¶] . . . Criminal negligence involves more than ordinary careless inattention or mistake in judgment. A person acts with criminal negligence when, one, he or she acts in a reckless way that creates a high risk of death or great bodily injury; and two, a reasonable person would have known that acting in that way would create such a risk. In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act." (See CALCRIM No. 580.)

In addition, the jury was told that, in order to prove the crime of murder, "the People have the burden of proving beyond a reasonable doubt that defendant acted with intent to kill or with conscious disregard for human life. If the People have not met

either of these burdens, you must find the defendant not guilty of murder” (See CALCRIM No. 580.)

These extensive instructions on involuntary manslaughter made it clear to the jury that second degree implied malice murder and involuntary manslaughter require different mental states. The instructions repeatedly brought home the fact implied malice murder requires conscious disregard for human life, while involuntary manslaughter is grounded in the concept of negligence. But not just *any* type of negligence. Rather, the instructions plainly stated involuntary manslaughter requires *criminal* negligence, which is characterized by recklessness, not the sort of careless inattention or mistakes that constitute ordinary negligence. By defining and contrasting implied malice murder and involuntary manslaughter, the court fulfilled its duty to instruct on the legal principles applicable to the case. Viewing the instructions as a whole, they did not impermissibly dilute the mental state required for second degree implied malice murder.

Appellants also allege the court’s instructions failed to include the concept of foreseeability. However, in instructing on the requirements of implied malice murder, the court not only stated the defendant must have committed an act or omission that caused the death of another person, it explained, “An act causes death if the death is the direct, natural and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence [is] natural and probable, consider all of the circumstances established by the evidence.” (See CALCRIM No. 580.)

Although the court did not expressly mention the terms “foreseeable” or “foreseeability,” a natural and probable consequence is one that is reasonably foreseeable under the totality of circumstances presented. (*People v. Smith* (2014) 60 Cal.4th 603, 11; *People v. Medina* (2009) 46 Cal.4th 913, 920; *People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.) Therefore, the court’s instructions sufficiently conveyed the

requirement of foreseeability. (See generally *People v. Roberts* (1992) 2 Cal.4th 271, 319 [“The criminal law . . . is clear that for liability to be found, the cause of the harm not only must be direct, but also not so remote as to fail to constitute the natural and probable consequences of the defendant’s act.”].)

Admissibility of Evidence that Garcia Abused Onofre

Garcia contends the trial court abused its discretion and violated his due process rights by admitting “uncharged acts of violence involving Onofre.” Again, we disagree.

The challenged evidence came from a variety of sources. Onofre testified she and Garcia had a tumultuous relationship that often involved arguing and fighting. She said she gave as good as she got at times, but after Crystal and D. moved in with them, Garcia escalated the violence to include punching, kicking and choking, and most of the time Onofre ended up getting the worst of it during their fights. In fact, D. testified that Onofre had so many bruises on her arms and legs that she did not like to wear dresses. There was also evidence that Onofre’s sister saw Garcia point a rifle at Onofre’s head on one occasion in 2007. The incident occurred during a heated argument, but afterwards Onofre claimed everything was fine.

“Evidence of prior criminal acts is ordinarily inadmissible to show a defendant’s disposition to commit such acts. (Evid. Code, § 1101.) However, the Legislature has created [an] exception[] to this rule in cases involving . . . domestic violence,” as reflected in Evidence Code section 1109. (*People v. Reyes* (2008) 160 Cal.App.4th 246, 251.) Under that section, evidence of the defendant’s prior acts of domestic violence is generally admissible to show his propensity to commit such acts. (Evid. Code, § 1109, subd. (a)(1); *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1028.) While such evidence is subject to exclusion if it is unduly prejudicial within the meaning of Evidence Code section 352, the trial court has broad discretion in this area. Its “exercise of discretion will not be disturbed on appeal except upon a showing that it

was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233.)

Garcia concedes the challenged evidence was not unduly remote or particularly confusing. Nevertheless, he insists it was uniquely prejudicial because Onofre, in her position as the children’s mother, “occupied a role viewed with a special reverence” in our society. Indeed, he argues “the heightened lack of respect for women demonstrated in an act of violence on a mother ranks with acts of violence on any esteemed female figure or female/goddesses integral to religious belief systems.” But the same could be said for acts of violence committed against innocent children. In fact, as compared to Crystal and D., Onofre cut a far less sympathetic figure because she was in a better position to defend herself and rid herself of Garcia than they were. While not attempting to minimize the abuse Onofre endured, we do not think it was unduly prejudicial in light of what Garcia subjected Crystal and D. to on a regular basis and what he did to Crystal in the end.

On the other hand, the evidence Garcia abused Onofre was highly relevant to show his willingness to inflict violence on people he loved and to prove he acted in conscious disregard of Crystal’s life when he kicked her in the stomach. The evidence amply demonstrated Garcia’s propensity to commit acts of domestic abuse such as those involved in this case, which is precisely what Evidence Code section 1109 allows. For all these reasons, we uphold the trial court’s decision to admit the challenged evidence. The court’s ruling did not violate Evidence Code section 352 or Garcia’s right to a fair trial.

Garcia’s Confession

Garcia contends his attorney was ineffective for failing to challenge the admissibility of his confession on due process grounds. Garcia’s argument is premised on his belief the police coerced him into talking after running roughshod over his *Miranda* rights. (See *Miranda v. Arizona* (1966) 384 U.S. 436.) Although the police did

exert some pressure on Garcia when they interviewed him, his statements were not involuntarily rendered in violation of due process. Therefore, defense counsel was not remiss for failing to move to suppress them.

Garcia first spoke to the police on the night that Crystal died. During that interview, Garcia claimed Crystal fell off her chair while she was eating breakfast and hit her head on the kitchen floor. He insisted the incident was an accident and he was in the other room when it occurred.

The following day, after Crystal's autopsy had been performed, the police drove Garcia to the police station for further questioning. Once they got to the interview room, Investigator Merrill told Garcia, "I'm gonna read you your rights, okay? Make sure you understand 'em and then we'll sit down and talk." After Garcia said, "Yeah," Merrill informed him per *Miranda* he had the right to remain silent, anything he said could be used against him, he had the right to an attorney, and if he could not afford an attorney one would be appointed for him. Merrill did not rattle off these rights in uninterrupted fashion. Rather, he paused after each particular right and asked Garcia if he understood what it meant. Each time Garcia answered in the affirmative. He also answered "yes" at the end of the admonishment when Merrill asked him if he understood each of the rights that were explained to him. Merrill then proceeded to interview Garcia about the circumstances of Crystal's death. He did not expressly ask Garcia if he wanted to waive his *Miranda* rights.

Merrill told Garcia a lot had changed since the night before, and if there was anything he wanted to tell the police, now was the time to do it. Merrill also said they had talked to Onofre for a long time and had stacks of reports on the case. However, instead of confronting Garcia with that information, Merrill tried to build a rapport by telling Garcia he did not think he was a bad person, but simply someone who was trying to take care of his kids under difficult circumstances.

Merrill told Garcia, “You keep trying to make things better for your kids. I think in my heart of hearts, I know what you’re feeling. I know what you were going through with your kids, okay? Happens to every dad, okay? But when mistakes happen, there sometimes comes a point where you just gotta understand that you made a mistake and you gotta do your best to get it off your chest. ‘Cause otherwise, if you hold it inside you it’s just gonna keep destroying you. Angel, you know what happened yesterday. And I saw you cry, I saw your tears. I know you’re upset. I know you didn’t want anything to happen to Crystal . . ., but it did. And as we sit here now, we’re going over this over and over again, you know what happened. You know why it happened. Angel, now is the time to tell us.”

Alluding to his first interview, Garcia claimed he had already explained what happened to Crystal, but Merrill said he did not believe the child died from a fall. He told Garcia he needed “to do the right thing by Crystal. Now’s your one last chance to be the right dad for her one last time. I know it’s tearing you up inside, but if you tell us what happened, we can talk it through. I don’t think you’re a monster, I don’t think you’re a bad guy, but if you don’t tell us your side, you don’t tell us what happened, that’s what we gotta think; that’s what other people will think. . . . You tell me your story and then you’re not a monster, you’re not this bad person that did this horrible thing. You’re a dad who made a mistake. . . . But you need to step up and be a dad for them . . . one more time. Crystal deserves that. [Onofre] deserves that. But Angel, if you don’t talk to us and you don’t tell us what happened, we’re gonna assume the worst. . . . We know what happened. We know a lot, but what we don’t know is why and you’re the only person that can answer that. Now’s the time to dig deep. . . . You hold a lot of power in this. You have the power to do the right thing.”

Garcia asked if he could see Onofre, and Merrill told him, “In a little bit. Okay? But right now we need to talk. What happened? Come on Angel.” Garcia then asked Merrill if he would be willing to tell him what Onofre had told him. Merrill said

“that’s not the way this works. You need to tell me. You need to dig deep and tell me what happened.” When Garcia said he could not do that, Merrill told him, “Yeah you can. . . . I’m not here to judge you You [can] tell us anything, you tell us everything and you’re gonna feel better.”

At that point, Garcia admitted he had gotten mad at Crystal for no reason and kicked her “pretty hard” in the stomach. Explaining how Crystal’s eye got injured, Garcia said she was “kinda hunched over” when he kicked her, and his foot “kinda hit her in the head[.]” However, Garcia claimed he did not know how Crystal got her other injuries. He said he had never hit her that hard before and did not specifically intend to hurt her.

As our Supreme Court has explained, “The test for determining whether a confession is voluntary is whether the defendant’s ‘will was overborne at the time he confessed.’ [Citation.] “The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were ‘such as to overbear [the defendant’s] will to resist and bring about confessions not freely self-determined.’ [Citation.]” [Citation.] In determining whether or not an accused’s will was overborne, “an examination must be made of ‘all the surrounding circumstances — both the characteristics of the accused and the details of the interrogation.’ [Citation.]” [Citation.]’ [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 404; accord *Colorado v. Connelly* (1986) 479 U.S. 157.)

One of the circumstances courts look to in assessing whether a confession is voluntary is whether the defendant fully understood and freely waived his *Miranda* rights. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *United States v. Perdue* (10th Cir. 1993) 8 F.3d 1455, 1466.) Garcia claims he was too young (22 years old) and too unsophisticated (limited prior experience with the criminal justice system) to comprehend the *Miranda* rights that Investigator Merrill read to him at the start of the interview. However, the rights – four simple admonishments – are not particularly

complicated. Indeed, they are so well known they “have become part of our national culture.” (*Dickerson v. United States* (2000) 530 U.S. 428, 430.) Moreover, the record shows Merrill read Garcia his *Miranda* rights one-by-one, and after each one, Garcia expressly acknowledged he understood what it meant. Garcia also answered yes at the end of the admonishment when Merrill asked him if he understood those rights. At no time did Garcia express confusion or seek clarification about what Merrill was telling him. Therefore, it would be pure speculation to believe he answered falsely and was actually ignorant of his rights.⁵

As for the waiver issue, Garcia correctly notes that Merrill never expressly asked him if, knowing his rights, he wanted to give them up and continue talking with the police. Rather, Merrill just proceeded to question him once he made it clear he understood his rights. However, waivers come in many forms. While the better practice is for the police to obtain an express waiver from the suspect, “in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.” (*North Carolina v. Butler* (1979) 441 U.S. 369, 373, fn. omitted.) Indeed, “[o]nce the defendant has been informed of his [*Miranda*] rights, and indicates that he understands those rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them.” (*People v. Whitson* (1998) 17 Cal.4th 229, 248, quoting *People v. Johnson* (1969) 70 Cal.2d 541, 558, disapproved on other grounds in *People v. DeV Vaughn* (1977) 18 Cal.3d 889, 899, fn. 8.)

While Garcia was reluctant to admit what he did to Crystal, he never expressed any reluctance about talking to Merrill. Nor did he express any confusion

⁵ In arguing Garcia’s confession was involuntary, appellate counsel also claims Garcia “apparently had no formal education.” The claim is based on Garcia’s probation report, which states Garcia completed “0” grades of school. However, the word “unknown” appears on the comment line of the education section of the report, indicating the probation officer probably was unable to obtain any information about Garcia’s education level. The report also indicates Garcia was born in California, which has mandatory education laws.

about what his rights were or what Merrill was asking him. And throughout the interview, Garcia's answers were on point and quite articulate as a whole. Therefore, it is reasonable to conclude that, by acknowledging he understood each and every one of his *Miranda* rights and then proceeding to answer Merrill's questions, Garcia knowingly and intelligently waived those rights. (*People v. Whitson, supra*, 17 Cal.4th at pp. 247-250; *People v. Medina* (1995) 11 Cal.4th 694, 752; *People v. Sully* (1991) 53 Cal.3d 1195, 1233; *People v. Davis* (1981) 29 Cal.3d 814, 823-826; *People v. Nitschmann* (1995) 35 Cal.App.4th 677, 680-683.)

Notwithstanding the waiver issue, Garcia argues his confession was involuntary because Merrill "manipulated him into the belief that he could not refuse to talk" and "psychologically primed [him] to confess." Merrill did express empathy and understanding to Garcia, in an effort to make him to feel more at ease and to get him to open up. However, "'there is nothing inherently wrong with efforts to create a favorable climate for confession.' [Citation.]" (*United States v. Santos-Garcia* (8th Cir. 2002) 313 F.3d 1073, 1079.) While the police cannot extract a confession by threats, violence or improper influence (*People v. Benson* (1990) 52 Cal.3d 754, 778), "mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. [Citation.]" (*People v. Jimenez* (1978) 21 Cal.3d 595, 611, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17.) Moreover, when "'the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made. [Citation.]" (*Id.* at pp. 611-612.)

Merrill did not make any improper threats or promises to Garcia during the interview. He did tell Garcia that people would think the worst of him if he didn't tell the truth, and that if he told the truth he would feel better for doing the right thing by Crystal, but that sort of encouragement is within the realm of permissible police conduct. (See

People v. Carrington (2009) 47 Cal.4th 145, 176; *People v. Davis* (2009) 46 Cal.4th 539, 600.) On balance, we do not believe Merrill crossed the line in terms of using oppressive, threatening or coercive interrogation tactics. Nor do we believe Garcia's free will was overcome at the time he confessed. Therefore, his confession was not involuntary, and his attorney not ineffective for not trying to suppress it. (See *People v. Thompson* (2010) 49 Cal.4th 79, 122 [defense counsel's failure to make futile motions does not constitute ineffective assistance of counsel].)

DISPOSITION

The judgments are affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.