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

THE PEOPLE,

Plaintiff and Respondent,

v.

DIEGO BURGOS,

Defendant and Appellant.

H039270

(Monterey County

Super. Ct. No. SS111673A)

I. INTRODUCTION

A jury convicted defendant Diego Burgos of second degree murder (Pen. Code, § 187, subd. (a); count 1)¹, assault on a child causing death (§ 273ab, subd. (a); count 2), corporal injury to a child (§ 273d, subd. (a); count 3), and child abuse likely to produce great bodily injury (§ 273a, subd. (a); count 4), and found that defendant personally inflicted great bodily injury in the commission of counts 3 and 4 (§ 12022.7, subd. (d)). The trial court imposed a prison term of 25 years to life for count 2, a consecutive six-year prison term for count 3, and a consecutive six-year prison term for the great bodily injury allegation associated with count 3. The trial court stayed the terms for counts 1 and 4 pursuant to section 654.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

On appeal, defendant contends the trial court erred by (1) admitting statements he made during a police interview after he invoked his right to remain silent; (2) denying his motion for a mistrial after a witness made a statement suggesting defendant might sodomize the child victim; (3) admitting a photograph of the child victim wearing a rosary; and (4) instructing the jury on how to consider his failure to explain or deny evidence. Defendant also contends that these errors were cumulatively prejudicial. For reasons that we will explain, we will affirm the judgment.

II. BACKGROUND

A. Family Background

C.M., the 10-month-old victim in this case, was born in late October of 2010 and was removed from life support on September 5, 2011. C.M.'s mother, Aracely M., had another son, E.M., who had been born in September of 2009.

Aracely met defendant at a dance in Salinas and began dating him in February of 2011. Around May or June of 2011, Aracely and her two children began living with defendant at defendant's parents' home on Clifton Court in Greenfield. After a few months, Aracely, defendant, and the two children moved to a residence on Sixth Street. In August of 2011, they moved to a house on Cherry Avenue. At each residence, the four of them slept in one room together, with the adults on a bed and the children on the floor.

Defendant played with and held E.M. but not C.M. Defendant told Aracely that he hated C.M. Defendant called C.M., "Damn brat, damn idiot," and sometimes called him "stupid." Defendant did not like it when C.M. cried or made noise. On one occasion, defendant bought food only for E.M. and said he did not like C.M. Defendant would look at C.M. "with anger" in his eyes. Defendant once asserted that C.M. "was not going to grow old."

At one point while they were living on Clifton Court, C.M. had a bruise on his head. When Aracely asked defendant about the bruise, defendant said that C.M. might

have hit himself on a table and referred to C.M. as a “stupid brat.” Defendant also posited that E.M. could have caused the bruise. Defendant later said that he had dropped C.M. on the concrete.

While they were living on Sixth Street, Aracely noticed bruises appear on C.M.’s face and body. Defendant had “unexplained answers about the bruises.” Before her relationship with defendant, C.M. never got hurt. C.M. also started to have problems with crawling: he would cry and hold his leg up. C.M. had previously been crawling and learning to walk. Aracely asked defendant why C.M. had bruises on his foot, but defendant said that he did not know.

On August 8, 2011, Aracely had a miscarriage. She had been pregnant with defendant’s child for three months. During her pregnancy, defendant would tell Aracely not to play with C.M. over her stomach so that C.M. could not hurt the baby. Defendant became sad and angry when Aracely had the miscarriage. He blamed C.M., saying, “It is that brat’s fault. It is his fault because of the way he would kick you.”

When defendant took Aracely for medical treatment for the miscarriage, she instructed him to take care of C.M. Defendant said, “ ‘I don’t know if when you return that damn brat will be dead.’ ” After Aracely returned home, she noticed a bruise on C.M.’s cheek. She took a photo of the bruise. She told some family members and friends about the bruise and posted the photo on Facebook.

On August 9, 2011, Aracely and defendant exchanged text messages. Aracely asked if defendant remembered pulling C.M. by his feet. Defendant replied, “No, why?” Aracely wrote that she was going to take C.M. to a doctor the next day because he could not move his legs without crying. Aracely said she thought it was either because of “the hit from the car” or when defendant “[p]ulled his legs.” Aracely’s reference to “the hit from the car” was to an incident in which defendant told her that C.M. was injured because he had been driving too fast. Her reference to defendant pulling C.M.’s legs referred to an incident in which defendant tried to pull C.M. away from Aracely.

Defendant's response to Aracely's text was, "Yea maybe." Defendant talked Aracely out of taking C.M. to a doctor.

On the morning of August 17, 2011, Aracely heard C.M. cry as she was preparing food. Defendant asked Aracely what she would do if she saw her son with red eyes. Aracely asked, "What do you mean by that?" Defendant replied, "Oh, nothing," and left. Aracely went to check on C.M. She saw him wiping his eyes, which were red, and crying. C.M. smelled like cologne. Aracely took C.M. to the emergency room. Aracely said she did not know what had happened. She "was trying to cover up" for defendant.

Around August 26, 2011, Aracely noticed some bloody scratches on C.M.'s back and suspected defendant had caused them. The injuries occurred while C.M. was with defendant.

Also around August 26, 2011, Aracely and defendant were having sex or trying to have sex but were interrupted by C.M.'s crying. Defendant looked angry at the time. The next morning, when Aracely got up, she did not notice any bruises on C.M.'s face. Aracely went to the kitchen; defendant and C.M. remained in the bedroom. While in the kitchen, Aracely heard C.M. cry. She ran to the bedroom and saw that C.M. had a bruise on his head. She asked defendant what had happened. Defendant said, "I don't know. That damn idiot is always - - he could have hit himself in the closet." Aracely accused defendant of kicking C.M. with his boots, but defendant said nothing and went to work.

Aracely wrote defendant a text message on August 26, 2011: "Umm love I hope that you don't want to take it out with [C.M.] of what we did yesterday?????" At trial, Aracely explained that she meant "anal sex." When asked for a further explanation, she replied, "About him doing something to [C.M.]." She continued, "Like violation or something like that. Raping, I mean. It's because I felt like [C.M.] had reddish - - like really red and weird in his back. That's what I meant about that."² Aracely asserted that

² As discussed below, defendant moved for a mistrial after this testimony, but his motion was denied.

the text message was not related to the incident in which “the sex was interrupted.” Aracely had also written a text message stating, “Like always you always want to take it out on him and you hate him so u don’t care about wat happens.” In that message, she was referring to the bruise on C.M.’s forehead. Aracely had never seen defendant sexually assault C.M.

After defendant returned from work that day, the family went out to eat, but C.M. was sleepy and did not want to eat.

The following day, August 27, 2011, C.M. was crying a lot, like he was in pain, and he had not crawled in more than a week. A Dish Network employee named Filiberto Vizcarra came to the house to do an installation. While Vizcarra was doing the installation, Aracely went to get him some water. Aracely told defendant to hold C.M., and defendant took C.M. from her arms. C.M. became fussy and then started crying. Defendant tried to quiet C.M. down but became “impatient” and said “he won’t shut up.” Defendant shook C.M. and then threw C.M. on the mattress. When Aracely came back, C.M. was on the bed, crying. She asked defendant what had happened. According to Aracely, defendant did not respond. According to Vizcarra, defendant said, “Well, he won’t shut up. He just won’t shut up.”

On August 28, 2011, Aracely woke up and checked on C.M., who seemed more tired than usual. Although C.M. was breathing, he did not wake up when she checked on him, which was unusual. C.M. and E.M. both slept for much of the day, while Aracely and defendant watched movies. At some point that day, C.M. vomited, and he was unable to eat.

B. Events of August 29, 2011

On August 29, 2011, Aracely got up around 3:30 a.m. to fix lunch for defendant. C.M. was not very responsive. Aracely left a bottle for him and then went to the kitchen. While making food, Aracely got nervous and had a feeling that defendant was stabbing

C.M. She saw “some kind of black shadow” pass through the hallway. The shadow was about defendant’s height and was wearing a black sweater like one defendant had.

Aracely went to the bedroom. When she entered, she saw defendant dressed in his black sweater, jeans, and boots. Defendant was kneeling near C.M., blowing on his face and stroking his hair. C.M. was sobbing. Aracely yelled at defendant and asked what had happened. Defendant told her that “he was going to get his sweater and he accidentally kicked him in the head.”

Aracely felt dizzy and faint. Defendant told her he would take her to the hospital and that Aracely’s mother would take care of the children. Defendant helped Aracely get into the car, then went back to the house. A few minutes later, defendant came back out and began driving. After a while, defendant stopped the car and called Aracely’s mother to check on the children. At that point, Aracely stated that she was feeling better and wanted to be home with her children, so defendant drove them back home. As defendant was helping her out of the car at home, her mother drove up.

Defendant, Aracely, and Aracely’s mother all went inside the house and into the bedroom. C.M. made “a sound of pain” when Aracely’s mother picked him up. C.M. vomited while Aracely’s mother was holding him. Aracely’s mother put C.M. back to sleep. Aracely’s mother said she would take C.M. to a doctor. Defendant said, “No, don’t take him. It’s too cold for him outside”

Aracely’s mother left, and Aracely and defendant went back to sleep. Aracely woke up at around 10 a.m. Both children were still sleeping. When defendant woke up, Aracely noticed that he was “really nervous.” Defendant was also unusually caring toward C.M., checking on him throughout the day and trying to give him a bottle. Defendant was also unusually caring toward Aracely.

At around 5:00 p.m., Aracely brought C.M. into the kitchen and put him in a stroller so she could make food. Defendant had Aracely put C.M. back in the bedroom, saying that the stroller took up too much space in the kitchen and that he would take care

of C.M. Defendant later returned to the kitchen, saying that he had put C.M. to sleep. Aracely started toward the bedroom to make sure C.M. was asleep, but defendant told her that C.M. was okay and asleep, and she did not hear any crying, so she returned to the kitchen.

After making food, Aracely went to the bedroom to check on C.M. She heard C.M. make a sound “[l]ike he couldn’t breathe.” C.M. looked really pale. His mouth was open and his eyes were rolled up. Aracely picked C.M. up and called for defendant. She asked defendant what was happening; defendant said he didn’t know. Aracely put C.M. in bed and told defendant she was going to call 9-1-1. She dialed 9-1-1, but defendant took her cell phone and hung up. Defendant said that Aracely should call her mother instead. Aracely called her mother, who told her to call 9-1-1. Aracely then called 9-1-1 again and reported that her baby was not breathing. At about 8:27 p.m., paramedics arrived, administered to C.M., and transported him to a King City hospital. C.M. was briefly treated at the King City hospital, then flown to Lucille Packard Children’s Hospital.

Aracely talked with the police at the King City hospital. Aracely stated that she did not know what had happened and that she did not know of anyone who could have hurt C.M. She lied in order to protect defendant. After an officer warned her that Child Protective Services might take E.M. away from her, Aracely “started saying the truth.” She showed the officer cell phone photographs of bruises on C.M. When asked why she would continue leaving C.M. with defendant if she suspected him of hurting C.M., Aracely said that she loved defendant and could not prove that defendant was causing the injuries.

Defendant drove Aracely to Lucille Packard. During the drive, defendant said he had the feeling it was going to be their last drive. When they passed Soledad Prison, defendant said he bet he would be going there. He told Aracely he was sorry for everything.

At Lucille Packard, Aracely took some photographs of C.M. in his hospital bed. In one photo, C.M. looked unconscious and had a tube running into his mouth, secured by medical tape. A white shirt was draped over his torso, and a blue beaded rosary was on top of the shirt. Aracely took the photo when C.M. was baptized.

C. Medical Examinations

When C.M. was evaluated at Lucille Packard, he was on a respirator because he was not breathing well on his own, and there was no indication of brain function. C.M. had external bruises on his cheek, legs, and ankles. X-rays revealed a skull fracture and fractures in his legs and ankles. The skull fracture was fresh and complex, indicating it was caused by a “high energy impact.” C.M. had fractures in his legs that were healing; the injuries had likely occurred “more than a couple of weeks” earlier. C.M. also had a new, acute fracture of his femur, which was likely caused by someone twisting or pulling his leg forcefully. C.M. had subdural hematomas, which indicated that his head had been shaken. There was evidence that C.M. had sustained head injuries a few weeks earlier as well. Damage behind C.M.’s eyes indicated that his head had been “snap[ped] around.” The three linear bruises to C.M.’s cheeks were a “textbook slap mark.”

C.M.’s injuries would not have resulted from C.M. falling out of bed, tripping and falling, running into furniture, or falling down while learning to walk. The only reasonable explanation for the “constellation of injuries” was that they were inflicted by an adult. C.M.’s death was likely caused by an adult grabbing C.M. by the leg and swinging him “like a hammer,” causing the back of his head to contact something hard. C.M.’s injuries also indicated “a pattern of abusive behavior for some long time.”

On September 5, 2011, life support services were removed from C.M., who eventually stopped breathing. An autopsy of C.M. was performed on September 6, 2011. The autopsy revealed that C.M.’s skull fractures and brain injuries included both recent and prior trauma. The multiple injuries were consistent with C.M.’s head being forcefully struck against a hard, flat surface. Likewise, C.M.’s leg injuries included both

recent and prior breaks, and it would have taken “quite a bit of force” to inflict those injuries. According to the doctor who performed the autopsy, the cause of C.M.’s death was a blunt force trauma to the head. C.M.’s head injury had caused so much swelling in his brain that his breathing and heartbeat had stopped, which had caused a lack of blood flow to the brain.

D. Defendant’s Statements

Defendant was interviewed four times by District Attorney investigators Mark Puskaric and Maribel Torres. The first three interviews took place at Lucille Packard on August 30, 2011.

During the first interview, the investigators suggested that defendant might have done something to cause C.M.’s injuries, in an attempt to get C.M. to stop crying. Defendant denied this. He claimed to have no idea how the injuries happened. Defendant referenced Aracely’s statements about being afraid that someone was harming C.M. Defendant initially denied even touching C.M., but he later admitted that he had slowly pulled C.M. by his ankles to move him. The investigators pointed out that “gently pulling” C.M. by the ankles would not have left bruises. When the investigators also pointed out that defendant had not explained how C.M. got his head injury, defendant noted that C.M. would often “throw himself” around when he was crying. Defendant subsequently stated that C.M. had hit his head while defendant was watching television. The investigators asked defendant about prior bruises on C.M.’s face. Defendant recalled a bruise on C.M.’s cheek caused by the car seat flipping over.

The second interview began a few minutes after the first interview. The investigators asked if anyone had visited that day or the day before. Defendant said that his friend had come over, but he denied that the friend had done anything to C.M.

The third interview began about two hours later, at 9:29 p.m. Defendant denied having kicked C.M. and denied being mad at C.M. for crying. Defendant had opened the closet to get clothes for work and accidentally hit C.M. with the closet door, “but not like

that hard.” C.M. had not woken up. Investigator Puskaric asked if defendant had moved C.M. out of the way with his foot or kicked him. Defendant said he did not remember doing that, but he acknowledged that he sometimes wore steel-toed work boots. After Investigator Puskaric said he thought defendant’s boots would match up to a mark on C.M.’s face, defendant said he had pushed C.M. away from the closet door with his foot, but that he had only socks on, not his boots.

Investigator Puskaric accused defendant of having hit C.M. hard but not on purpose. After sighing, defendant said, “I don’t know, but I think that I just, well, yeah, I hit him.” Defendant explained he had accidentally kicked C.M. when getting his clothes from the closet. Defendant also admitted he had been wearing his steel-toed boots. Defendant continued to claim that the impact had not been hard enough to wake C.M. Defendant denied hitting C.M. any other time or picking him up by his legs.

The fourth interview was on September 1, 2011, after defendant’s arrest. At the beginning of the interview, Investigator Puskaric provided the *Miranda* advisements to defendant. (See *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).) Defendant denied he had ever played with C.M. by throwing him up in the air or holding him by the ankles. Defendant also denied saying that he did not like C.M., denied that he got frustrated with C.M.’s crying, and denied blaming C.M. for Aracely’s miscarriage. Defendant claimed not to know how C.M. got the scratches on his back. Defendant denied that he had ever made a statement about C.M. not growing old, explaining that he might have said that C.M. was “not going to grow up or something.”

E. Defense Case

The defense theory was that the evidence failed to prove that defendant, rather than someone else, had inflicted the injuries on C.M. The defense did not directly blame Aracely but suggested she could have been the perpetrator.

1. Defendant's Testimony

Defendant testified that he and Aracely were both 19 years old when they met in February of 2011. He claimed that he loved both E.M. and C.M. "like [his] sons" and denied telling Aracely that he hated C.M. Defendant did not strike C.M. or cause bruises to C.M. when they lived with defendant's parents. When they lived on Sixth Street and Aracely went to the hospital, C.M. did get bruised accidentally. Defendant forgot that C.M. was in the car and drove to the store without securing C.M. in a car seat, so when the car went around a turn, C.M. "went off to the side" and hit his cheek on the car door. When they lived on Cherry Street, he did not harm C.M. in any way.

Defendant claimed he noticed C.M. was having trouble moving his legs when they were living on Sixth Street. Defendant denied being responsible for C.M.'s leg injuries. He claimed he told Aracely to take C.M. to the doctor, but that she never did and she would not allow defendant to do so.

Defendant acknowledged being sad when Aracely had a miscarriage, but he denied blaming anyone for it. When he told Aracely that C.M. was not going to grow old, he meant that C.M. was "not going to be tall, tall like [defendant]."

Defendant denied putting cologne in C.M.'s eyes. He admitted that after he put cologne on one day, he had left the bottle only about two and a half feet off the floor instead of where it should have been stored.

Defendant denied causing the scratches on C.M.'s back. When Aracely accused him of being responsible, he showed her that his fingernails were very short. He did not use any other instrument to scratch C.M. Defendant denied kicking C.M. and causing the bruise on his head. Defendant denied refusing to buy food for C.M.

On Monday, August 29, 2011, Aracely was in the kitchen when defendant got up and went to the bathroom. Both children were still sleeping, but defendant soon heard C.M. start crying. Defendant went back to the bedroom to put his toothbrush away. He noticed C.M. was sweating a lot, so he kneeled down and began to give him air. Aracely

entered the bedroom looking weak and pale, then fell down on the floor. Defendant helped her up. Aracely said, “maybe I’m just imagining things” and said that she had seen someone tall, dressed in all black. Defendant decided to take Aracely to the hospital, so he called her mother to come take care of the children. He became impatient and decided to leave with Aracely. He called Aracely’s mother after driving for a while and confirmed she was heading to their house. At that point, Aracely was feeling better, so they returned home. Aracely’s mother arrived at their house a few minutes later. Defendant told Aracely’s mother not to take C.M. out because it was too cold outside. Defendant became worried about C.M. when he continued to sleep and would not get up to eat. He did not take C.M. for medical treatment but would have done so if Aracely had asked him to.

Defendant denied that he would ever take C.M. by the legs and swing him so that his head bashed against a wall. When he was talking to the investigators at the hospital, he was very sad, tired, and confused. Defendant asserted that he had told the truth during the parts of the interview that he remembered. During the third interview, he was tired and angry, so he was “agreeing.” He could not remember the questions that he agreed with.

On cross-examination, defendant did not remember hitting C.M. with a closet door, and he did not remember telling investigators about that incident, even after his interview was played. Defendant also did not remember pushing or kicking C.M. with his foot or telling the investigators that he had done so.

2. Other Defense Witnesses

Johnny Gonzalez, a supervisor at defendant’s workplace, testified that defendant worked 43 to 76 hours per week between February and August of 2011.

Lourdes Lopez, who rented a room in her house to defendant and Aracely, never saw defendant strike or hit C.M. Lopez had entered defendant’s and Aracely’s bedroom on the day C.M. was taken away by an ambulance. She saw that C.M. looked “bad.”

Aracely was on the phone with her mother. Lopez told Aracely to call 9-1-1. Defendant was not in the bedroom at the time.

Defendant's father testified that Aracely did not "take care of her children the way a mother should." He asserted that Aracely would not feed C.M. He kicked Aracely out of his house after she broke a stereo with a hammer.

Defendant's mother saw C.M. cry one day while Aracely was "playing with her Facebook." On another occasion, Aracely explained that C.M. was crying because he was hungry and there was no milk.

F. Convictions and Sentence

The jury convicted defendant of second degree murder (§ 187, subd. (a); count 1), assault on a child causing death (§ 273ab, subd. (a); count 2), corporal injury to a child (§ 273d, subd. (a); count 3), and child abuse likely to produce great bodily injury (§ 273a, subd. (a); count 4), and found that defendant personally inflicted great bodily injury in the commission of counts 3 and 4 (§ 12022.7, subd. (d)).

At the sentencing hearing, the trial court imposed a term of 25 years to life for count 2, a consecutive six-year term for count 3, and a consecutive six-year term for the great bodily injury allegation associated with count 3. The trial court stayed the terms for counts 1 and 4 pursuant to section 654.

III. DISCUSSION

A. Admission of Defendant's Statements

Defendant contends the trial court erred by allowing the jury to hear his fourth interview by Investigators Puskaric and Torres, which took place at the Monterey County Jail. Defendant contends the investigators violated his *Miranda* rights by continuing to interrogate him after he invoked his right to remain silent.

1. Proceedings Below

At the hearing on defendant's motion in limine to exclude his statements, the trial court reviewed the interview transcripts and heard testimony from Investigator Puskaric, Investigator Torres, and defendant.³

Investigator Puskaric began the fourth interview by telling defendant that the investigators wanted to give him another opportunity to talk with them "about this whole situation with [C.M.]." Investigator Puskaric advised defendant of his *Miranda* rights: "First of all, you have a right to remain silent. Anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer and to have him present with you while you're being questioned. And if you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one. Do you understand those rights? Do you understand what I just . . ." Defendant replied, "Yeah."

Investigator Puskaric asked defendant "Do you understand that? Okay, now having all of that, having understanding all that and having that in mind, uh, I'd like to talk to you again about this whole situation. Would you, are you willing to talk to us about it again?" Defendant responded, "Well, that's the, that's, well, like I don't have like anything what to say." Investigator Puskaric asked, "You don't have anything else to say?" Defendant replied, "No, that's it." Investigator Puskaric asked, "Than what you've already told us?" Defendant replied, "Yeah."

Investigator Puskaric continued, "Okay. You don't wanna-. So you understand your rights, um, I'd like to ask you a couple questions then about it, I mean, you know, obviously we susp-, we suspect that there's probably more that happened than what, that what we talked about the last time. You know, I think I even said that to you last time,

³ Defendant's in limine motion sought to exclude all of his statements to Investigators Puskaric and Torres on the basis of *Miranda* violations, but on appeal he only claims a *Miranda* violation as to the fourth interview.

you know, I thought there was more to it, that you just weren't telling us everything.” Defendant replied, “No, that's it.”

Investigator Puskaric asked, “That's just it? Alright. Nothing else to add? Alright. Is there anything you wanna tell me that, um, or say to me about this incident that maybe I didn't ask you about? Any, maybe some questions I didn't ask you about that you wanna ask me or wanna say anything or make any comments or anything?” Defendant replied, “No.” Investigator Puskaric asked, “No?” Defendant responded, “No, that's it.”

Investigator Puskaric asked, “Now you understand, you understand why you're in jail, right?” Defendant replied, “Yeah.” Investigator Puskaric said that defendant was going to go to court, and that when defendant went to court, an attorney would be appointed to represent him. Investigator Puskaric recommended defendant tell the attorney “everything he needs to know,” because the attorney would be “there to help you.” Defendant responded, “Uh, hmm.”

Investigator Puskaric asked, “Alright? And is there nothing else more that you wanna talk to us about?” Investigator Torres asked, “[I]f we had a couple of just, uh, more questions for you, are you willing, would, would that be okay?” Defendant replied, “Um, well, yeah.” Investigator Torres asked, “Yeah?” Defendant repeated, “Yeah.” Investigator Torres continued, “[S]o you're willing to, okay, 'cause I know we had a couple questions for you, but we wanted to ask you if that would be okay. Yes?” She noted, “Okay. You're nodding your head, yes.”

At the hearing on defendant's motion to exclude his statements, Investigator Puskaric testified that he did not think defendant had invoked his right to remain silent by saying that he had nothing more to add to their earlier conversations. “It's not that he didn't want to tell me, in his mind he didn't have anything new to add.” Investigator Torres testified that she also understood defendant to be saying that he had nothing to add to his earlier statements.

Defendant testified that he was very tired by the end of the third interview, after which he was arrested. It was too loud in jail for him to get much rest. When the investigators conducted the fourth interview two days later, he told them “[t]hat I didn’t have anything more to say to them.” Defendant was trying to communicate that he did not want to talk anymore. He felt he “was forced like to talk to them.” He agreed he was not clear in expressing himself.

The trial court found no *Miranda* violation. The trial court found that defendant’s responses were “not ambiguous.” “What he says is, I don’t have anything else to add. It’s not that I don’t want to talk to you, it’s that I told you everything that I have to say.” The trial court did not perceive “any assertion [of] the right to remain silent.”

2. Analysis

The Fifth Amendment of the United States Constitution states that no person “shall be compelled in any criminal case to be a witness against himself [or herself].” In *Miranda*, the United States Supreme Court confirmed that “the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.” (*Miranda, supra*, 384 U.S. at p. 467.)

The *Miranda* court set forth the required advisements, explaining that an accused must “be adequately and effectively apprised of his [or her] rights” and also that “the exercise of those rights must be fully honored.” (*Miranda, supra*, 384 U.S. at p. 467.) The Court also set forth the procedure to be followed after the advisements have been given: “If the individual indicates in any manner, at any time prior to or during questioning, that he [or she] wishes to remain silent, the interrogation must cease. At this point he [or she] has shown that he [or she] intends to exercise his [or her] Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.” (*Id.* at pp. 473-474, fn. omitted.)

Although a suspect is not required to use the exact words of the *Miranda* warnings when invoking his or her right to silence (see *People v. Carey* (1986) 183 Cal.App.3d 99, 104-105), the United States Supreme Court has made it clear that, following an initial waiver, a subsequent invocation of the right to remain silent must be unambiguous in order to require the police to cease questioning (*Berghuis v. Thompkins* (2010) 560 U.S. 370 (*Berghuis*)). In *Berghuis*, the court explained the reason for this rule: “A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that ‘avoid[s] difficulties of proof and . . . provide[s] guidance to officers’ on how to proceed in the face of ambiguity. [Citation.]” (*Id.* at pp. 381-382.)

The California Supreme Court has further explained that “when a suspect under interrogation makes an ambiguous statement that could be construed as an invocation of his or her *Miranda* rights, ‘the interrogators may clarify the suspect’s comprehension of, and desire to invoke or waive, the *Miranda* rights.’ [Citations.]” (*People v. Farnam* (2002) 28 Cal.4th 107, 181 (*Farnam*)). The California Supreme Court has also held that “ ‘[a] defendant has not invoked his or her right to silence when the defendant’s statements were merely expressions of passing frustration or animosity toward the officers, or amounted only to a refusal to discuss a particular subject covered by the questioning.’ [Citations.]” (*People v. Williams* (2010) 49 Cal.4th 405, 433-434 (*Williams*)). The determination of whether a defendant has invoked his or her right to silence often depends on the context of the statements. (*Id.* at p. 429; see also *People v. Jennings* (1988) 46 Cal.3d 963, 978 (*Jennings*); *In re Joe R.* (1980) 27 Cal.3d 496, 515 (*Joe R.*)).

On appeal, we “review the record and make an independent determination of the question” of whether the defendant has invoked his or her *Miranda* rights, but we may “ ‘give great weight to the considered conclusions’ of a lower court that has previously reviewed the same evidence. [Citation.]” (*Jennings, supra*, 46 Cal.3d at p. 979.)

Defendant contends he “clearly and unambiguously expressed his desire to remain silent” when he responded “No” after being read his *Miranda* rights and being asked if he had “anything else to say.” Defendant points out that he also responded “No” when Investigator Puskaric asked if there was anything he wanted to say “about this incident” that he wasn’t already asked about.

The Attorney General contends defendant’s responses were not unambiguous assertions of the right to remain silent, analogizing to cases such as *Williams, supra*, 49 Cal.4th 405, in which the statement “ ‘I don’t want to talk about it’ ” was held to be not an invocation of *Miranda* but rather an expression of frustration with the interrogating officer’s failure to accept the defendant’s assertion that he did not know the victim. (*Id.* at p. 434.) Other cases have similarly found that when a defendant indicates he or she has nothing more to say, the defendant is not necessarily expressing the desire to cut off questioning altogether. For instance, in *Joe R., supra*, 27 Cal.3d 496, a minor told the police, “ ‘That’s all I have to say’ immediately after the officer confronted him with adverse evidence.” (*Id.* at p. 516.) The California Supreme Court found this was not a sufficiently clear invocation of the minor’s desire to halt the interview; it was reasonable to conclude “that what the defendant was saying was, That’s my story, and I’ll stick with it.” (*Ibid.*; see also *People v. Martinez* (2010) 47 Cal.4th 911, 944, 950 [defendant did not invoke right to remain silent when, after officer asked why the victim would accuse him, defendant responded, “ ‘That’s all I can tell you’ ”].)

Here, defendant’s responses to Investigator Puskaric’s questions were not, in context, unambiguous invocations of the right to remain silent. Defendant was not asked if he wanted to talk to the officers but rather whether he had anything to add to his prior statements. When he responded “No,” defendant was telling the officers he had nothing to add, not expressing a request for the interview to end. Viewed objectively, defendant’s statements reflected, at most, “only momentary frustration and animosity toward [the investigators].” (*Jennings, supra*, 46 Cal.3d at p. 978; see also *People v. Stitely* (2005) 35

Cal.4th 514, 535 (*Stitely*) [reasonable officer would have concluded that when defendant stated, “ ‘*I think it's about time for me to stop talking,*’ ” he “expressed apparent frustration, but did not end the interview”].) Given the ambiguity, Investigator Torres was entitled to attempt to clarify defendant’s intent and desire to waive his *Miranda* rights by asking, if it would “be okay” if the investigators asked a couple more questions of him. (See *Farnam, supra*, 28 Cal.4th at p. 181.) Since defendant responded, “Yes,” the investigators reasonably understood defendant to have clarified that questioning could proceed. (See *Stitely, supra*, at p. 535.)

On this record, we conclude defendant did not unambiguously invoke his right to remain silent, and thus that the trial court did not err by declining to exclude the fourth interview.

B. Denial of Mistrial Motion

Defendant contends the trial court erred by denying his motion for a mistrial, which followed Aracely’s testimony about being concerned that defendant would rape C.M. Defendant contends the error violated his rights to a fair trial and due process under the Fifth, Sixth, and Fourteenth Amendments and under the California Constitution.

1. Proceedings Below

As described in the Background section of this opinion, Aracely was questioned at trial about a text message she sent defendant on August 26 expressing her hope that defendant would not “take it out with” C.M. what they had done the night before. When the prosecutor sought to admit this text message during motions in limine, he told the trial court, “There’s going to be testimony from Aracely M[.] that the night before[,] Aracely M[.] and [defendant] were unable to have sex because [C.M.] was crying, and that upset [defendant].” However, during trial, when asked about the meaning of her text message, Aracely stated that she meant “[a]nal sex.” When asked for a further explanation, she replied, “About him doing something to [C.M.]” She continued, “Like violation or

something like that. Raping, I mean. It's because I felt like [C.M.] had reddish - - like really red and weird in his back. That's what I meant about that."

After the above testimony, defendant's trial counsel objected and moved for a mistrial, arguing that Aracely's unexpected testimony had caused "irreparable harm." The prosecutor argued that the testimony was not "cause for a mistrial" and that "further problems" could be avoided with leading questions. Defendant's trial counsel argued that if the trial court did not declare a mistrial, it should at least admonish the jury "to disregard that." Defendant's trial counsel did not oppose the prosecutor "leading her."

The trial court declined to admonish the jury at that point, because it did not know "what her answers mean." The trial court ruled that the prosecutor could ask leading questions and that it would consider admonishing the jury later.

The prosecutor's subsequent leading questions established that Aracely was not referring to defendant being upset because C.M. had interrupted sex. The prosecutor also established that Aracely had never seen defendant sexually assault C.M. Defendant did not renew his request for a jury admonition, and none was given.

2. Analysis

" " "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. . . ." [Citation.] A motion for a mistrial should be granted when " " "a [defendant's] chances of receiving a fair trial have been irreparably damaged." ' ' ' [Citation.] 'Although most cases involve prosecutorial or juror misconduct as the basis for the motion, a witness's volunteered statement can also provide the basis for a finding of incurable prejudice.' [Citation.]" (*People v. Dement* (2011) 53 Cal.4th 1, 39-40 (*Dement*), abrogated on other grounds by *People v. Rangel* (2016) __ Cal.4th __ [2016 WL 1176584].) On appeal, "[w]e review a ruling

denying a motion for mistrial for abuse of discretion. [Citation.]” (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1029.)

Defendant asserts that “[i]t is difficult to imagine anything more prejudicial” than testimony about suspecting someone of raping a baby. He contends courts have found prejudice from less damaging evidence, such as prior arrests and gang membership. None of the cases defendant relies upon involved a mistrial motion because of unanticipated evidence, however, but rather the issue of whether certain evidence should have been excluded as more prejudicial than probative pursuant to Evidence Code section 352. (See *People v. Guizar* (1986) 180 Cal.App.3d 487, 491-492; *People v. Deeney* (1983) 145 Cal.App.3d 647, 657; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905; *People v. Anderson* (1978) 20 Cal.3d 647, 650.)

The Attorney General argues that Aracely’s statement about rape was “confusing, brief, non-responsive, and ambiguous,” such that the trial court did not abuse its discretion by determining that it had not caused incurable prejudice. (See *Dement, supra*, 53 Cal.4th at p. 40 [“brief and isolated” comment that defendant had bragged about killing his brother did not require granting of a mistrial].) The Attorney General also argues that the statement was insignificant in the context of the entire trial. (See *People v. Bolden* (2002) 29 Cal.4th 515, 555 (*Bolden*) [no mistrial required; “fleeting reference” to a parole office, suggesting that defendant had served a prison term for a prior felony conviction, was “not significant in the context of the entire guilt trial”].)

We agree with the Attorney General that the trial court did not abuse its discretion by determining that defendant’s chances of receiving a fair trial were not “ ‘ ‘ ‘ ‘irreparably damaged’ ’ ’ ’ ” by Aracely’s statement explaining her text message about defendant “tak[ing] it out with [C.M.]” (See *Dement, supra*, 53 Cal.4th at p. 40.) The issue in this case was whether defendant was the person who had inflicted C.M.’s injuries, which were most likely caused by someone grabbing C.M. by the feet and swinging him like a hammer or a bat so that his head struck a flat, hard surface. The jury

heard evidence that someone had previously inflicted similarly shocking injuries upon C.M. Under the circumstances, Aracely's statement expressing a fear that defendant might commit sodomy was unlikely to have significant shock value, particularly since no sex crime was charged and there was no medical testimony about sexual abuse of C.M. Further, because Aracely's attempts to explain the text message were ambiguous and confusing, the trial court reasonably decided to allow the prosecutor to ask leading questions aimed at clarifying that the text message actually referred to C.M. interrupting defendant and Aracely when they were having sex. Although Aracely thereafter claimed she was *not* referring to interrupted sex, the prejudicial effect of Aracely's statement was minimized by her admission that she had never seen defendant sexually assault C.M. Ultimately, in the context of the entire trial, this brief exchange was insignificant, such that the trial court did not abuse its discretion by failing to grant a mistrial. (See *Bolden, supra*, 29 Cal.4th at p. 555.)

C. Admission of Photograph

Defendant contends the trial court erred by admitting—over defendant's Evidence Code section 352 objection—a photograph of C.M. “wearing a rosary because he had just been baptized.” Defendant asserts that the error violated his rights to due process and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution and under article I, sections 15 through 17 of the California Constitution.

1. Proceedings Below

During in limine motions, the prosecutor sought to use 17 photographs to illustrate a timeline. Defendant's trial counsel objected to one photo of C.M.'s skull injury and three photos showing C.M. while he was still alive. One of the photos, later admitted as Exhibit 125, depicted C.M. in a hospital bed with his eyes closed. A white shirt is draped over his torso, and a blue beaded rosary is laid on top of the shirt. A tube secured by medical tape is running into C.M.'s mouth, and there is a small quantity of blood under C.M.'s nose and over his upper lip.

Defense counsel objected to the photo as inflammatory and irrelevant under Evidence Code section 352. The prosecutor responded that it was part of the timeline and showed that C.M. was alive on August 30, 2011, with life support services attached to him. The trial court overruled the objection.

At trial, Aracely testified that she took the photo when C.M. was baptized while he was unconscious at Lucille Packard.

2. Analysis

On appeal, defendant renews his claims that the photo of C.M. was irrelevant and more prejudicial than probative.

“ ‘ “The rules pertaining to the admissibility of photographic evidence are well-settled. Only relevant evidence is admissible [citations], and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is defined in Evidence Code section 210 as evidence ‘having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.’ The test of relevance is whether the evidence tends ‘ “logically, naturally, and by reasonable inference” to establish material facts such as identity, intent, or motive. [Citations.]’ [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence. [Citations.]” [Citation.]’ [Citation.]” (*People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167 (*Carter*).)

“ ‘The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citations.] The court’s exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]’ [Citation.]” (*Carter, supra*, 36 Cal.4th at p. 1167; see Evid. Code, § 352 [trial court has discretion to “exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption

of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury”].)

Defendant first argues that the photograph was not relevant to show the timeline of C.M.’s hospital stay or that he was on life support, because these were not disputed issues at trial. We disagree. As the Attorney General contends, the photograph was relevant to corroborate Aracely’s testimony about the timeline of C.M.’s injuries and death. The photograph also illustrated the medical treatment C.M. received, which would help the jurors understand C.M.’s injuries. The photograph was not “somehow rendered irrelevant simply because defendant did not dispute the cause of death or the nature and extent of the victim’s injuries. [Citations.]” (*People v. Heard* (2003) 31 Cal.4th 946, 975.)

With respect to the prejudicial effect of the photograph, defendant asserts the prosecution could have taken “a less inflammatory photograph of [C.M.] during his one-week stay at the hospital,” i.e., one in which he was not “posed with a rosary.” He describes the photograph as suggesting that C.M. was “a little angel” and stirring up emotions related to “religious belief.” He cites *People v. Gurule* (2002) 28 Cal.4th 557, 624 for the proposition that reference to a victim’s religious background carries the potential to inflame the jury’s passions against the defendant.

In *People v. Osband* (1996) 13 Cal.4th 622, the Supreme Court found that a photograph of the murder victim on her birthday, with Christmas presents, was properly admitted even though it brought tears to the eyes of a testifying relative. (*Id.* at pp. 676-677.) The court held that the photograph was relevant to show that a witness had properly identified the victim and that “ ‘[t]he possibility that [the photograph] generated sympathy for the victim[] is not enough, by itself, to compel its exclusion. . . .’ [Citation.]” (*Id.* at p. 677.)

Here, the fact that C.M. was depicted with a rosary, which could engender sympathy for the victim, did not render it so inflammatory as to outweigh its probative

value. The photograph would not have engendered significantly more sympathy than, for instance, the photographs showing C.M. as a smiling toddler in the days before his untimely death. Having reviewed the photograph, we conclude that its probative value was not “clearly . . . outweighed by” its prejudicial effect and thus that admission of the photograph over defendant’s objection was not an abuse of the trial court’s broad discretion. (*Carter, supra*, 36 Cal.4th at p. 1167.)

“ ‘Even if we were to agree with defendant that the trial court erred in admitting the photographic . . . evidence in question, we nonetheless would conclude that any error in admitting such evidence was harmless under the *Watson* standard.’ [Citations.]” (*Carter, supra*, 36 Cal.4th at p. 1170; see *People v. Watson* (1956) 46 Cal.2d 818, 836.) The photograph “did not disclose to the jury any information that was not presented through the testimony of witnesses,” and it was not particularly inflammatory. (*Carter, supra*, at p. 1170.) Thus, it is not reasonably probable that the admission of the photograph affected the jury’s verdict.

D. CALCRIM No. 361

Defendant contends the trial court erred when it instructed the jury pursuant to CALCRIM No. 361 that it could draw adverse inferences from his failure to explain or deny matters asserted to be within his knowledge.

1. Proceedings Below

The trial court instructed the jury pursuant to CALCRIM No 361 as follows: “If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.”

In requesting the above instruction, the prosecutor asserted that defendant had failed or refused to explain some of the statements he made during the police interviews. Defendant's trial counsel responded that defendant *had* explained or denied "the adverse testimony," noting that, for instance, defendant had explained his comment about C.M. not growing old. Defendant's trial counsel asserted that defendant could not have been expected to explain some of his other statements, because they were made at a time when he was "exhausted and [so] confused he didn't know what he was saying."

In ruling that it would give the instruction, the trial court noted that the instruction "is properly given" when the defendant's explanation "can be viewed as implausible or evasive." The trial court found that some of defendant's explanations for his interview statements "could be regarded as implausible" and thus, it would give the instruction. The trial court later indicated that it believed application of the instruction was "a credibility question for resolution by the jury."

2. Analysis

"CALCRIM No. 361 rests on the logical inference that if a person charged with a crime is given the opportunity to explain or deny evidence against him [or her] but fails to do so (or gives an implausible explanation), then that evidence may be entitled to added weight." (*People v. Vega* (2015) 236 Cal.App.4th 484, 496.)

"The pertinence of CALJIC No. 2.62 depends upon the facts of the case. [Citation.] If the defendant has not been asked a question calling for an explanation or a denial, as a matter of law the instruction may not be given. [Citation.] Additionally, if the defendant does not answer such a question because of some fact which precludes his [or her] knowledge of it (like an alibi which removes him from the scene), a denial of guilt is deemed to have been made. [Citation.] If he [or she] fully accounts for his [or her] whereabouts and denies the crime, the mere fact that defendant's story is contradicted by other prosecution evidence does not pave the way for giving the instruction, because contradiction is not by itself a failure to explain or deny. [Citations.]

However, if the defendant tenders an explanation which, while superficially accounting for his [or her] activities, nevertheless seems bizarre or implausible, the inquiry whether he [or she] reasonably should have known about circumstances claimed to be outside his [or her] knowledge is a credibility question for resolution by the jury. [Citations.]” (*People v. Mask* (1986) 188 Cal.App.3d 450, 455.)

Defendant contends that the instruction is applicable “only where the defendant fails to explain or address *whole* portions of the prosecution’s case.” However, the cases he cites do not support his contention; they stand for the proposition that where a defendant testifies about only certain crimes, an instruction such as CALCRIM No. 361 may be given regarding his or her failure to deny additional crimes. (See *People v. Ing* (1967) 65 Cal.2d 603, 611-612; *People v. Perez* (1967) 65 Cal.2d 615, 621; *People v. Thorton* (1974) 11 Cal.3d 739, 760, disapproved on another ground by *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12].)

Defendant asserts that the instruction was not warranted because he “denied every component of the prosecution’s case.” (See *People v. Marks* (1988) 45 Cal.3d 1335, 1346 [instruction on failure to explain or deny evidence was unwarranted where defendant “testified extensively to a version of the events that contradicted the prosecution’s case in all important respects”].) Defendant points out that on both direct and cross-examination, he denied inflicting the bruises on C.M.’s cheek, scratching C.M.’s back, fracturing C.M.’s legs, spraying cologne in C.M.’s eyes, kicking C.M., and killing C.M.

Defendant acknowledges that he claimed a lack of memory as to some of the incidents preceding C.M.’s death, but he asserts that “failure of recall is not a proper basis to give the instruction.” Defendant relies on *People v. De Larco* (1983) 142 Cal.App.3d 294 (*De Larco*), in which the defendant was convicted of second degree burglary based on testimony by an eyewitness who saw the defendant inside an auto repair shop late at night and evidence that the defendant’s fingerprint was on a flashlight

inside the shop. (*Id.* at pp. 298-299.) At trial, the defendant explained that he had handled some tools while visiting a friend at the shop several days before the burglary (*id.* at p. 299), but he claimed he did not recall touching the flashlight. (*Id.* at p. 309.) The appellate court determined that the trial court had erred by giving an instruction on the defendant's failure to deny evidence, explaining, "Obviously, if defendant admitted having touched tools in the shop days prior but could not specifically remember the flashlight, and in addition denied having been in the shop that evening, he could not disclose any further facts that would shed light on his innocence." (*Ibid.*)

Other cases have held that a defendant's claimed lack of memory of certain events *can* support the giving of an instruction on failure to deny evidence. For instance, the instruction was properly given in *People v. Sanchez* (1994) 24 Cal.App.4th 1012, where the defendant "gave detailed and specific testimony" about consuming alcohol on the day of the crimes "but had no memory of inculpatory events during that same afternoon." (*Id.* at p. 1030.) The instruction was also properly given in *People v. Kozel* (1982) 133 Cal.App.3d 507 (*Kozel*), where the defendant's "lack of memory was selective" and the jury "could have found that [this memory loss] was feigned." (*Id.* at p. 531.)

In this case, on cross-examination, defendant claimed he did not remember hitting C.M. with a closet door, and he did not remember telling investigators about that incident, even after his interview was played. He also did not remember pushing or kicking C.M. with his foot or telling the investigators that he had done so. Defendant's claimed lack of recall pertained to very significant facts about the cause of C.M.'s injuries, which distinguishes the instant case from *De Larco*, where the defendant claimed not to remember the particular objects he touched while at an automotive shop. Here, as in *Kozel*, the evidence supports the conclusion that defendant's "lack of memory was selective" and that defendant had feigned his failure to recall the closet door incident and significant portions of his statements to the police. (*Kozel, supra*, 133 Cal.App.3d at p. 531.) Thus, CALCRIM No. 361 was properly given.

E. Cumulative Prejudice

Defendant contends the cumulative impact of the alleged errors violated his federal due process rights. (See *People v. Hill* (1998) 17 Cal.4th 800, 844 [“a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error”].) However, we have found no errors to cumulate.

IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

GROVER, J.