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Parole Recommendation Reversed For Kern Inmate Convicted Of First-Degree Murder by Torture Of Infant

Kern County District Attorney Cynthia Zimmer announced today that the Governor has reversed a decision by the California Board of Parole Hearings that had recommended the parole and release of Michael Panella, an inmate serving a life sentence for the murder by torture of a 20-month-old infant. The recommendation by the Board of Parole came in July of 2021 and set into motion the potential of Panella's release on parole unless the Governor exercised his authority to reverse the decision. In response, both the District Attorney's Office and the family of Baby Jonathan took action to bring the impending release on parole to the attention of the public and the Governor. Baby Jonathan's family sought signatures to help petition the Governor, while the District Attorney's Office highlighted the case publicly and with the Governor's Office.

On November 19, 2021, the Governor exercised his authority to reverse the recommendation for parole that had been issued by the Board of Parole hearings, preventing Panella's imminent release on parole. (Governor's reversal letter attached).

Panella was convicted of First-Degree Murder by torture in 2000 in Kern County and sentenced to 25 years to life in prison in Kern County case SC080135. His appeal was denied in the court of appeals in 5th District Court of Appeals case #F037126 (the opinion, which details the facts of the crime, is also attached).

Panella murdered baby Jonathan on November 27, 1999. At the time of his death, Baby Jonathan was only 20 months old. Baby Jonathan's body had more than 40 bruises to the abdomen, with severe blunt force trauma that caused internal bleeding, which caused Baby Jonathan to bleed to death over the course of 5 to 8 hours. The small bowel was twisted and torn in three different locations. In the week leading up to Baby Jonathan's death, as Panella continued to abuse Baby Jonathan while also ingesting methamphetamine, the baby's mother asked to use Panella's truck to take the baby to the hospital, but Panella refused.

Panella abused Baby Jonathan (the son of a woman he was romantically involved with) over the course of

at least a week. When Baby Jonathan's mother discovered that Jonathan was cold and non-responsive, she begged Panella for help to try to save the baby's life, but Panella refused to help. When first responders arrived, Panella showed little to no emotion. During pretrial transportation and custodial housing, other inmates heard Panella make various statements, such as, "I killed that little bastard," and also heard Panella brag that he was going to get away with murder, "just like O.J. Simpson." One of the in-custody witnesses was transported in the same van as Panella during trial, and although she used a fake name when confronted by Panella, he indicated that he knew who she was, and knew she was going to testify against him. Panella told her that he was surprised she was still alive and told her that if she didn't change her story, she would be "taken care of." The witness grew increasingly fearful when Panella described in detail where the witness was housed, and when she was scheduled to be released from custody.

In the 20 years since Baby Jonathan's death, Panella has attempted to place blame on a number of different people, including the baby's mother (for not taking him to the hospital), and the baby's brother (who was 4 or 5 years old at the time). Panella referred to Baby Jonathan's brother as "a useless bowl of crap."

The recommendation for parole of Panella came before he served even the minimum 25 years of the '25 years *to life*' commitment. This is due to the implementation of increasingly lowered standards for "elderly parole." Initially implemented by state law in 2018, "elderly parole" as first implemented applied to inmates who were sixty years or older and who had served a minimum of 25 years of their sentence. Such inmates, regardless of the total length or severity of their sentence, would be qualified for potential parole once they reached the age of sixty and met had served at least 25 years of their sentence.[1] In 2020, the state Legislature passed amendments to the elderly parole statute in Assembly Bill 3234, which was signed into law by the Governor. AB 3234 reduced the requirements for elderly parole to make it apply to persons *fifty* or older, who had served at least *20* years of their sentence.

By contrast, to be a *victim* of the crime of elder abuse under Penal Code Section 368, a *victim* must be 65 years or older to qualify as an "elder" that is worthy of special consideration and treatment under the law.

As a result of the 2020 amendments to lower the standards for elderly parole, Panella, who was 29 years old at the time of the murder he committed in 1999, became eligible for elderly parole in 2021, as he had reached his fiftieth birthday in November of 2020 and served twenty years of his sentence.

When the Board of Parole initially issued its recommendation, District Attorney Cynthia Zimmer commented: "The state Legislature and the Board of Parole have lost their sense of justice by respectively passing laws that allow for, and ultimately recommending the early release of a man who murdered and tortured an infant. State laws now allow parole of child murderers based on "elderly parole" before they even qualify for the senior discount at McDonald's or to draw Social Security. Michael Panella was rightly convicted of the horrendous crime of torturing baby Johnathan to death, and now is on the brink of release due to state laws that blatantly favor murderers over their victims. Though state laws define *inmates* as "elderly" when they reach their fiftieth birthday, state laws only consider the *victim* of a crime "elderly" when they are 65 years or older. Only the Governor has the authority to stop the injustice of Panella's early release, and we will make every effort to convince the Governor that justice is not served, nor public safety protected by the early release of a child torturer and murderer."

The District Attorney's Office petitioned along with Baby Johnathan's family to prevent Panella's release and encouraged members of the public to submit comments to the Governor's Office encouraging a reversal of the Board's recommendation for parole.

[1] Exemptions applied for those sentenced to death, life without parole, or first-degree murder of a peace officer.

The reversal from the Governor's Office relied on Panella's performance while serving his time in custody as bases for the reversal. Panella circumvented even the modest restitution payments to the victim's family by having funneling money through another inmate that did not owe restitution. Panella admitted the fraud against the victims, which was perpetrated for eight years, was "self-centered" and showed a "lack of empathy for these people and their loss." Additionally, even though Panella continued to use drugs in a custodial setting for eight years after the murder, Panella's fraud against the victim's family began and persisted *after* he claimed to live drug-free. Ultimately, the Governor's reversal concluded that "the evidence shows that he currently poses an unreasonable danger to society if released from prison at this time."

D**istrict Attorney Cynthia Zimmer commented on the reversal:** "While there are many areas where the Governor and I don't see things the same way, it is encouraging to learn that on the issue of whether a convicted child torturer and murderer should be released after 20 years spent using drugs and defrauding the victim's family from prison, we can agree. I applaud the reversal and am grateful to all members of the community that shared their concerns with the Governor's Office."

Above: District Attorney Cynthia Zimmer (left), Assistant District Attorney Joseph Kinzel (right) with family of Johnathen Bell on July 29, 2021 during signature gathering for petition.

Above: Michael Panella (2002)

INDETERMINATE SENTENCE PAROLE RELEASE REVIEW
(Penal Code Section 3041.2)

MICHAEL PANELLA, T-02350
First Degree Murder

AFFIRM: _____

MODIFY: _____

REVERSE: _____X_____

STATEMENT OF FACTS

In 1999, Michael Panella punched his girlfriend's 20-month-old son in the stomach multiple times. The child died from his injuries. The autopsy report revealed that the child had additional bruising on his abdomen, hips, head, and extremities from abuse inflicted by Mr. Panella in the weeks before the life crime.

DECISION

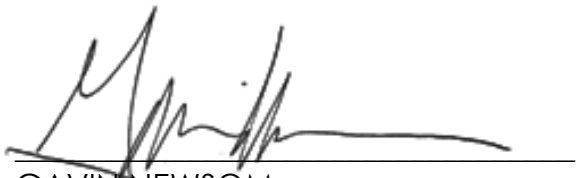
I acknowledge that Mr. Panella has made efforts to improve himself in prison. He has participated in significant self-help programming, including courses on domestic violence and substance use prevention. He completed multiple vocations, earned his GED, and has taken college courses. I also acknowledge that the psychologist who conducted Mr. Panella's comprehensive risk assessment in 2021 found that Mr. Panella represents a low risk for future violence. I commend Mr. Panella for his rehabilitative efforts and encourage him to continue on this positive path. However, these factors are outweighed by negative factors that demonstrate he remains unsuitable for parole at this time.

When Mr. Panella was sentenced for his life crime, the court ordered him to pay $4,741.76 in direct restitution to the victim's family for mental health and funeral costs. CDCR automatically deducts restitution payments from monies deposited into an inmate's trust account. At his 2021 hearing, Mr. Panella admitted that, for eight years, from 2008 to 2014, he largely circumvented this automatic restitution payment process by directing his family to send money to him through the account of another inmate who did not owe restitution and was not subject to the automatic deduction. He paid the inmate for this service. When the Board questioned Mr. Panella about this misconduct, he replied that he had not intended to harm the victim's family but avoided restitution because "I didn't have an understanding of why this is in place and, and why I owed them

CONCLUSION

I have considered the evidence in the record that is relevant to whether Mr. Panella is currently dangerous. When considered as a whole, I find the evidence shows that he currently poses an unreasonable danger to society if released from prison at this time. Therefore, I reverse the decision to parole Mr. Panella.

Decision Date:
November 19, 2021



GAVIN NEWSOM
Governor, State of California

2002 WL 31876004
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, Fifth District, California.

The PEOPLE, Plaintiff and Respondent,
v.
Michael Todd PANELLA, Defendant and Appellant.

No. F037126.
|
(Super.Ct.No. 80135A).
|
Dec. 27, 2002.

Synopsis
Defendant was convicted in the Superior Court, Kern County, No. 80135A, Richard J. Oberholzer, J., of first degree torture murder and assault resulting in the death of a child. Defendant appealed. The Court of Appeal, Vartabedian, J., held that: (1) evidence was sufficient to support torture murder conviction; (2) jurors did not engage in prejudicial misconduct during voir dire or deliberations; (3) evidence that defendant had previously assaulted victim's brother was admissible; and (4) evidence that defendant threatened witness prior to trial was admissible.

Affirmed.

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

Attorneys and Law Firms

Linda M. Leavitt, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, John G. McLean and Mark A. Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

VARTABEDIAN, J.

***1** Defendant Michael Todd Panella was convicted of the first degree torture murder of 20–month–old Jonathan B. (Pen.Code, § 187.[1]) In addition, he was found guilty of assault resulting in the death of a child under the age of eight. (§ 273ab.) He appeals, claiming the evidence is insufficient to support his torture murder conviction, jury misconduct requires reversal, and error in admitting evidence of prior bad acts and threats to a witness. We affirm.

FACTS

Tammy B. had two sons: Alex, who was born in 1994, and Jonathan, born on March 3, 1998. Friends, neighbors, and relatives testified that Tammy was a good mother and she did not mistreat her children. Both boys appeared healthy and normal and did not have any unusual bruises.

Tammy met defendant in July of 1999 and they started dating. Tammy started staying at defendant's home on a regular basis approximately three weeks before Jonathan's death on November 27, 1999.

In mid-November defendant, Tammy, Alex, and Jonathan went to the home of a friend of Tammy's to take the friend some groceries. Tammy went into the friend's house with Jonathan. Defendant and Alex remained in defendant's pickup truck. Blanca Cruz was in the area outside of the home and heard Alex whining. She saw defendant's hand move and then heard a bang on the truck window. The window was broken. Alex cried. Defendant went into the house and told Tammy to come get Alex, that Alex had broken his window. Alex told Tammy that defendant shoved his head into the window. Defendant told Tammy that he did not touch Alex. Blanca Cruz intended to tell Tammy what happened, but Blanca's boyfriend told her not to get involved. When pressed to say something to Tammy and defendant about the incident, Blanca agreed with defendant that Alex had broken the window.

Tammy and others started to notice that Jonathan had a lot of bruises. When Tammy was asked about the bruises, she replied that she was unaware how Jonathan got the bruises.

When Tammy asked defendant about the bruises, he would say that Jonathan fell or that Alex pushed or hit Jonathan. Tammy moved Alex out of the house the week prior to Jonathan's death. Defendant was angry with Alex because Alex had killed one of his fish. In addition, defendant was angry with Tammy because defendant believed Tammy did not discipline Alex properly.

In the two weeks prior to his death, Jonathan acted sickly and frequently clung to Tammy. On Thanksgiving evening, Thursday, November 25, 1999, Tammy decided she needed to take Jonathan to the doctor. Although defendant had allowed Tammy to use his truck frequently, he refused to let her use his truck to take Jonathan to the doctor. Defendant also told Tammy that if she took Jonathan to the doctor, the authorities would take him away from her.

Tammy called her sister, Melissa Maldonado, and asked her to drive Tammy and Jonathan to Kern Medical Center. Maldonado accompanied Tammy and Jonathan to the hospital. Maldonado could see bruises on Jonathan's face and neck. He said his head and his tummy hurt. Jonathan was seen by the triage nurse at 9:05 p.m. Tammy told the nurse that Jonathan was not acting like himself, and was bruised. Maldonado and Tammy requested that Jonathan be seen right away.

***2** Maldonado left Tammy and Jonathan at the hospital. Tammy and Jonathan waited several hours without being seen. Jonathan was tired, so Tammy called Maldonado and asked her to pick them up. The triage nurse called Jonathan's name to be seen by the doctor at 12:45 a.m., but he was not there. Tammy told people that Jonathan saw the doctor and had to return to the doctor on Monday. She lied about seeing the doctor because she did not want others to think she was a bad mother.

On Saturday, November 27, Tammy packed her belongings and put them by the front door. She intended to move out of defendant's house on Sunday. Saturday morning Tammy got up and fixed pancakes. Jonathan ate only a few bites. Tammy and Jonathan took a nap after breakfast. Tammy left at about 3 p.m. to find some methamphetamine. She left Jonathan at home with defendant. Tammy called defendant while she was out. Defendant said Jonathan was fine. Defendant told Tammy he had fed Jonathan some dinner and Jonathan was asleep. Defendant was working on a pond in the back yard.

Tammy arrived home shortly before 7 p.m. She looked into the bedroom and saw Jonathan lying on the bed. Tammy thought he was asleep. Tammy left to visit her friend, Allene Head, while Allene took her break from her job at Kern Medical Center. Tammy did not arrive home until approximately 10 p.m. Jonathan was still sleeping, and defendant was working on the pond. Defendant and Tammy watched television and then had sex.

Tammy woke up around midnight, went in the bedroom, and got into bed with Jonathan. She reached out for Jonathan. He was cold and hard. Tammy grabbed Jonathan and ran screaming to defendant to call 911. She asked defendant to help her resuscitate Jonathan. He did not help her.

Law enforcement officers and paramedics arrived. Tammy was crying uncontrollably and would not put Jonathan down. She was finally coaxed into putting the baby down. He was dead. Defendant showed little emotion.

At the time of his death Jonathan was 32 inches tall and weighed 29 pounds. He had at least 50 bruises to his abdomen, hips, head, face, and extremities. The age of the bruises varied. Jonathan had “amazing” trauma to the small bowel. The bowel was twisted and there were multiple tears to the mesentery in the bowel area. In addition, Jonathan had injuries to his pancreas that were three weeks to eight weeks old. Jonathan died as a result of multiple blunt impacts to his abdomen. The mechanism of death was dehydration and internal hemorrhage. The force utilized to cause these injuries was extreme or severe. The abdominal bruises were consistent with multiple fist blows. Jonathan died sometime between 8:00 and 10:00 p.m., the fatal injuries occurring within one to three hours prior to death. Jonathan would have lapsed into unconsciousness within minutes after receiving the abdominal blows.

Sometime after Jonathan's death, Blanca Cruz told Tammy's mother that, on the day the window was broken in defendant's truck, she saw defendant make an aggressive movement toward Alex just before she heard the bang of the window. The mother told Tammy, causing Tammy to become very angry. Tammy went out searching for Blanca. When she found her, she beat her up, forced her into a car and took her to the police station so she could tell police what she had seen. Tammy told Blanca that if she had spoken the truth on the day of the broken window incident, Jonathan would still be alive.

***3** The People filed an in limine motion seeking to admit evidence of the incident when defendant shoved Alex's head into the truck window. Blanca Cruz was scheduled to appear as a witness. She was incarcerated at the time of the hearing and was transported to court in a van. Also present in the van was defendant. When Blanca got in the van, defendant asked for her name. Blanca gave a false name, but defendant said he knew her name was Blanca Cruz and that she was testifying against him. He was cool and calm. He told Blanca he was surprised she was still alive and told her she had better change her testimony or she would "be taken care of." Defendant knew a great deal of information about Blanca's current and prior housing locations in the jail, as well as incidents that had happened in the jail and he also knew her release date. He related this information to Blanca. This frightened Blanca, and she changed seats on the van so she was not sitting as near to defendant.

Three other inmates on the van recounted the incident on the van between Blanca and defendant similarly to Blanca's account. In addition, one inmate testified that defendant said, "I killed the little bastard." Another inmate testified that after the in limine hearing was over, defendant was pleased that Blanca was not a good witness. Defendant commented that he was going to get away with murder just as O.J. [Simpson] did.

Colleen Sullivan, the mother of defendant's two children, testified that after she and defendant separated in early 1999 she took the children to Las Vegas. She called defendant and told him she was going to stay in Las Vegas permanently. Defendant came to Las Vegas and asked Colleen to come back with him. He was agitated and wanted to see the children. Colleen brought the children out of the house to see defendant. He picked up the children and headed towards his car. As defendant tried to throw the children into the car through an open window, Colleen grabbed their legs and pulled on them, defendant continued to push the children into the car. Colleen's father helped get the children away from defendant. The police were called and defendant left before they arrived. One of the children had a bump on his head.

Defense

Pathologist Barry Silverman testified that Jonathan died between 8:30 and 10:30 p.m. and the blows that caused his death occurred one to three hours before death; thus Tammy was home during part of the time period that the blows were administered. He also testified that Jonathan's prior injury to the pancreas was four to eight weeks old, thus occurring outside the time when Tammy was living with defendant.

Witnesses for the defense testified that defendant was good with his children and that Tammy would tell her children to shut up and would swat them on occasion In addition, defendant called a witness to the incident involving Blanca Cruz in the transportation van who testified that she did not hear defendant threaten Cruz. Other witnesses were called to impeach the van occupants' testimony.

DISCUSSION

I. Substantial Evidence of Torture–Murder

***4** Defendant contends his conviction for first degree murder by torture must be reversed because it is not supported by substantial evidence. In particular, he argues the evidence showed only explosive violence as the result of frustration, and this is not sufficient to demonstrate the requisite torture.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578, 162 Cal.Rptr. 431, 606 P.2d 738 ....) ... The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, 82 Cal.Rptr.2d 413, 971 P.2d 618.)

"The essential elements of first degree torture murder are: (1) the acts causing the death must involve a high degree of probability of death, and (2) the defendant must commit the acts with the intent to cause cruel pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose. [Citation .] Intent to kill is not an element of

the offense. [Citation.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432, 6 Cal.Rptr.2d 822, 827 P.2d 388.)

Defendant places substantial reliance on *People v. Steger* (1976) 16 Cal.3d 539, 128 Cal.Rptr. 161, 546 P.2d 665, where the Supreme Court found the evidence was insufficient to support a torture murder conviction.

In *People v. Steger, supra,* 16 Cal.3d 539, 128 Cal.Rptr. 161, 546 P.2d 665, the defendant was convicted of the first degree murder of her three-year-old stepdaughter, Kristen. On appeal, she claimed the evidence was insufficient to support a murder by means of torture and therefore the trial court erred in giving torture murder instructions to the jury.

"Kristen died from head injuries. Viewed in the light most favorable to the People, the evidence discloses the fatal injury, a subdural hemorrhage covering almost the entire left half of the brain, was undoubtedly caused by trauma. The child's body was also covered from head to toe with cuts, bruises and other injuries, most of which could only have been caused by severe blows. Among the injuries were hemorrhaging of the liver, adrenal gland, intestines, and diaphragm; a laceration of the chin; and fractures of the left cheek bone and right forearm. Medical evidence revealed that most of the injuries were inflicted at different times in the last month of Kristen's life. Defendant failed to seek medical help for the injuries.

***5** "Defendant's own statements provided much of the case against her. In testimony she admitted she was continually frustrated by her inability to control Kristen's behavior. The child would wet her pants, stick her tongue out, and generally disobey. To effect discipline, defendant beat Kristen on the buttocks with a belt and a shoe. The beatings were inflicted daily for the final week of the youngster's abbreviated life. Defendant admitted striking Kristen on the back and twice punching her in the arm, causing her to fall down and hit her head on the floor.

"Defendant also told the police in a written statement that on the day before the death, she hit Kristen on the shoulder, knocking her down; she pushed her, banging her head against a wall; and she struck her on the side of the head. Moreover, she orally told an officer, 'I want to make a full confession. I want you to know that I did it. I beat her.' " (*People v. Steger, supra,* 16 Cal.3d at p. 543, 128 Cal.Rptr. 161, 546 P.2d 665.)

The California Supreme Court first discussed why a torture murder conviction requires calculated deliberation: "The element of calculated deliberation is required for a torture murder conviction for the same reasons that it is required for most other kinds of first degree murder. It is not the amount of pain inflicted which distinguishes a torturer from another murderer, as most killings involve significant pain. [Citation.] Rather, it is the state of mind of the torturer—the cold-blooded intent to inflict pain for personal gain or satisfaction—which society condemns. Such a crime is more susceptible to the deterrence of first degree murder sanctions and comparatively more deplorable than lesser categories of murder." (*People v. Steger, supra,* 16 Cal.3d at p. 546, 128 Cal.Rptr. 161, 546 P.2d 665.)

In arriving at a torture murder conviction, the jury "may ... consider all the circumstances surrounding the killing." (*People v. Steger, supra,* 16 Cal.3d at p. 546, 128 Cal.Rptr. 161, 546 P.2d 665.) Included in those circumstances is the severity of the victim's wounds. But the Supreme Court admonished that undue weight should not be given to this evidence because "the wounds could in fact have been inflicted in the course of a killing in the heat of passion rather than a calculated torture murder." (*Ibid.*) Although a defendant need not have intended to kill, the defendant must have the defined intent to inflict pain. (*Ibid.*)

The Supreme Court concluded that the defendant could not properly be convicted of the torture murder of Kristen. "Viewed in the light most favorable to the People, the evidence shows that defendant severely beat her stepchild. But there is not one shred of evidence to support a finding that she did so with cold-blooded intent to inflict extreme and prolonged pain. Rather, the evidence introduced by the People paints defendant as a tormented woman, continually frustrated by her inability to control her stepchild's behavior. The beatings were a misguided, irrational and totally unjustifiable attempt at discipline; but they were not in a criminal sense wilful, deliberate, or premeditated." (*People v. Steger, supra,* 16 Cal.3d at p. 548, 128 Cal.Rptr. 161, 546 P.2d 665.)

***6** The Supreme Court found that the fact that "Kristin was injured on numerous occasions only supports the theory that several distinct 'explosions of violence' took place, as an attempt to discipline a child by corporal punishment generally involves beating her whenever she is deemed to misbehave." (*People v. Steger, supra,* 16 Cal.3d at pp. 548–549, 128 Cal.Rptr. 161, 546 P.2d 665.) But the Supreme Court did not dismiss entirely a claim that numerous wounds over a long period of time would not provide evidence of torture

murder. The Supreme Court found that the fact that wounds were inflicted over a long period of time may lend support to a torture murder conviction. (*Id.* at p. 548, 128 Cal.Rptr. 161, 546 P.2d 665.)

The Supreme Court did state, "In holding the evidence does not support a conviction of first degree murder, we do not imply, of course, that a murder of a child can never be torture murder. In appropriate circumstances a child batterer can be found to be a torturer. All we hold is that here the prosecution did not prove defendant murdered her stepchild with a wilful, deliberate, and premeditated intent to inflict extreme and prolonged pain." (*People v. Steger, supra,* 16 Cal.3d at p. 549, 128 Cal.Rptr. 161, 546 P.2d 665.)

The limits of the *Steger* holding are illustrated by a subsequent California Supreme Court case. *In People v. Mincey, supra,* 2 Cal.4th 408, 6 Cal.Rptr.2d 822, 827 P.2d 388, the Supreme Court reaffirmed that "just as child abuse can involve torture, a misguided attempt at discipline can involve an intent to cause cruel pain and suffering. There is no legal immunity from conviction for first degree torture murder because the victim happened to be a child." (*Id.* at p. 434, 6 Cal.Rptr.2d 822, 827 P.2d 388.)

A torture murder conviction was upheld in *Mincey* based on the following: "The prosecution presented evidence that the police had on two prior occasions responded to calls involving physical injuries to James. In this case, the physical evidence relating to the killing of five-year-old James included blood throughout the bedroom, belts and a board with blood and feces, and a large clump of brown hair consistent with James's hair. Dr. Irving Root, the physician who performed the autopsy, testified that James had incurred hundreds of injuries within 24 to 48 hours of death; that he had been beaten with hands, belts, and a board; that the beating lasted hours; that James might have lost the ability to feel any sensation of pain for as much as an hour before his death; that the shearing of the tissues in James's buttocks was caused by a substantial force being applied with a straight edge; that the tear two to three inches inside James's rectum was not caused by the application of force outside the rectum but was consistent with a tear caused by a fingernail; and that there were puncture marks behind both of James's knees." (*People v. Mincey, supra,* 2 Cal.4th at p. 435, 6 Cal.Rptr.2d 822, 827 P.2d 388.)

Thus child abuse resulting in death may or may not equal a torture murder; each case turns on the particularized facts. In support of his argument, defendant cites a litany of cases in which torture convictions have been affirmed based on evidence of conduct more vicious than what is present in this case. From these cases, he argues that the evidence here does not equate with other cases that found sufficient evidence of torture murder. "When we decide issues of sufficiency of evidence, comparison with other cases is of limited utility, since each case necessarily depends on its own facts." (*People v. Thomas* (1992) 2 Cal.4th 489, 516, 7 Cal.Rptr.2d 199, 828 P.2d 101.)

***7** Although the facts here do not reach the high level of egregiousness found in some other cases, the evidence supports the conclusion that the killing of Jonathan was torture murder. First, unlike the victim in *Steger,* there was no evidence that Jonathan acted out, misbehaved, or offered resistance, provoking an effort to control his behavior or producing an angry response. (See *People v. Raley* (1992) 2 Cal.4th 870, 8 Cal.Rptr.2d 678, 830 P.2d 712.) Also, unlike the defendant in *Steger,* who admitted anger and/or frustration with the child victim, there was no evidence that defendant or others had problems with Jonathan's behavior. The evidence was the opposite. Many testified that Jonathan was a good baby and was not difficult. Alex was the child that required attention and discipline. Defendant told Tammy that she needed to discipline Alex more. In his note to Tammy written by defendant on Thanksgiving, defendant said he cared for Tammy but she needed to stop defending Alex because it was not helping Alex. He stated, "You know how much I care for Jonathon [*sic*] and believe it or not I do care for Alex also." There was no evidence that Jonathan provoked defendant. (Compare *People v. Miller* (1990) 50 Cal.3d 954, 993, 269 Cal.Rptr. 492, 790 P.2d 1289.)

On the morning of the killing, defendant asked Tammy to leave Jonathan with him because he did not want to be alone. If defendant was frustrated with Jonathan's behavior he would have no reason to seek out Jonathan's companionship when it was not necessary. The jury could infer that defendant wanted to be left alone with Jonathan so he could batter the defenseless child without interference from or detection by others.

There was evidence presented that Tammy and defendant disagreed on how to discipline Alex and because of these disagreements Tammy chose Alex over defendant. Defendant was angry with Tammy because she would let Jonathan sleep in the bed with them. She had packed her belongings prior to Jonathan's death and was planning to move out on Sunday

(the day after Jonathan's death). From this the jury could have inferred that defendant had a cold-blooded revengeful intent to inflict pain on Jonathan for the personal satisfaction of causing emotional pain to Tammy.

Although there are no statements from defendant that would show his intent, "[i]ntent is a state of mind which, unless established by the defendant's own statements, must be proved by the circumstances surrounding the commission of the offense." (*People v. Proctor* (1992) 4 Cal.4th 499, 531, 15 Cal.Rptr.2d 340, 842 P.2d 1100.) That defendant demonstrated an insidious effort to hide his intent by silence should not protect him from liability for his actions. Furthermore, defendant told one of the inmates on the van that he "killed the little bastard." This is not the statement of a caretaker who momentarily loses control and inflicts injuries in a misguided attempt at discipline. Defendant's statement evidences an uncaring, cruel attitude towards Jonathan. In addition, those who saw defendant after Jonathan was found dead characterized defendant's reaction to Jonathan's death as cold, with no signs of grief. Defendant discouraged Tammy from taking Jonathan to the doctor by telling her that they would take him away from her. This was not part of an unreflective explosion of violence but demonstrated a calculated attempt to prevent Jonathan from receiving appropriate medical attention and allowing his suffering to continue. While it is nearly incomprehensible to believe that someone would torture a small child, all of the above factors combined provide substantial evidence from which a jury could conclude the acts were committed "with the intent to cause cruel pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose ." (*People v. Mincey, supra,* 2 Cal.4th at p. 432, 6 Cal.Rptr.2d 822, 827 P.2d 388.)

***8** Substantial evidence supports the jury's finding of torture murder.

II. Jury Misconduct

"A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; [citations].) A defendant is 'entitled to be tried by 12, not 11, impartial and unprejudiced jurors. "Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." [Citations.]' [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 578, 66 Cal.Rptr.2d 454, 941 P.2d 87.)

Defendant filed a motion for new trial on the grounds of juror misconduct. He supported his motion with declarations from Juror No. 10 and Juror No. 11. The motion raised several grounds of misconduct by the jurors. The trial court denied the motion. We discuss each ground separately.

A. Concealment of Information on Voir Dire by a Juror

During voir dire the trial court asked the jurors if anyone knew the defendant or anyone on the witness list. The witness list included two witnesses with the same last name as defendant; Matthew Panella and Patty Panella.[2] None of the jurors indicated any familiarity with either defendant or the two witnesses with the same last name. One juror mentioned that she knew defense counsel. Upon further questioning, the juror assured the court that knowing defense counsel would not affect the juror's decision in any way. The court stated: "If would be different if you knew one of the parties. If you knew the defendant, for example, that would be different, but knowing one of the attorneys shouldn't affect your ability to be fair and impartial." During further questioning, the court asked the prospective jurors if there was anything that might affect their ability to be impartial. There was no affirmative response from the prospective jurors.

The declaration of Juror No. 10 filed in support of the motion for new trial states the following:

> "Juror No. 9 stated he had lived in Frazier Park for many years and knew of the Panella family when the Panellas resided in Frazier Park. He stated that many persons from Frazier Park use narcotics. He was implying the defendant was a narcotics user. In response, Juror No. 1 commented, 'that's very enlightening.' Juror No. 9 said that methamphetamine users or 'tweekers' are up all night and that the defendant was working on the pond in the backyard because that's what 'tweekers' do. Juror No. 9 further stated the defendant had been in the garage at the time Tammy ... discovered Jonathan ... was dead,

> because that's probably where he had his personal 'stash' of narcotics."

Juror No. 11 also filed a declaration and included a description of the statements made by Juror No. 9.

> "A juror, who I believe was Juror No. 9, said he knew the Panella family when he lived in Frazier Park. He said that many of the people who live in Frazier Park use methamphetamine. He said people who use methamphetamine are up all night and that Panella was working on the pond at night in the backyard because that's what narcotics users do. He also said Panella had been in the garage at the time the baby was found because that's probably where he kept his drugs."

***9** "[D]uring jury selection the parties have the right to challenge and excuse candidates who clearly or potentially cannot be fair. Voir dire is the crucial means for discovery of actual or potential juror bias. Voir dire cannot serve this purpose if prospective jurors do not answer questions truthfully. 'A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct. [Citations.]' " (*In re Hamilton* (1999) 20 Cal.4th 273, 295, 84 Cal.Rptr.2d 403, 975 P.2d 600.)

Defendant claims that Juror No. 9 committed misconduct by concealing his knowledge of the Panella family during voir dire; his undisclosed familiarity with the family constituted an unrevealed bias that made him unfit to serve.

The jurors were asked if they knew defendant or any of the witnesses on the witness list. The declarations of Jurors Nos. 10 and 11 stated respectively that Juror No. 9 "knew of the Panella family" and "knew the Panella family." Juror No. 9 was not asked if he knew any relatives of the defendant. There is nothing in the declarations of the jurors to indicate that Juror No. 9 knew defendant or the listed witnesses and thus gave false answers during voir dire. All the jurors were asked if there was anything that might affect their ability to be impartial. The declarations of Jurors Nos. 10 and 11, while indicating that Juror No. 9 had some familiarity with the Panella family, do not establish the strength of any relationship or knowledge. Thus the record does not demonstrate that Juror No. 9 had any reason to believe at the time of voir dire that his impartiality might be affected. "[N]ot every aspect of every potential juror's background can be explored during voir dire." (*People v. Majors* (1998) 18 Cal.4th 385, 420, 75 Cal.Rptr.2d 684, 956 P.2d 1137.) Defendant has failed to show that Juror No. 9 gave false answers on voir dire or concealed a bias.

B. Interjection of Information into Deliberations that was not Evidence at Trial

In addition to the extraneous information interjected by Juror No. 9 (as set forth above) regarding drug use in Frazier Park and drug use by defendant, the declarations of Juror No. 10 and Juror No. 11 contained comments concerning the incident involving defendant and his two children. Juror No. 10's declaration states:

> "During a discussion concerning the incident involving the defendant's son and daughter in Las Vegas, Juror No. 5 commented he was concerned about the reasons why the defendant did not get to see his children often and that it would not surprise him if there had been prior events involving the children and Colleen Sullivan which caused Ms. Sullivan to deny defendant access to the children and caused her to move so far away from him, I had the impression Juror No. 5 was implying there had been violent confrontations between the defendant and his children and Ms. Sullivan."

Juror No. 11 related a less detailed but similar account regarding the comment about defendant and his own children.

> ***10** "One of the jurors said he wondered why Panella did not get to see his kids and that maybe it was because something had occurred

> between Panella and the kids that made their mother, Colleen Sullivan, refuse to allow Panella to see them."

Defendant claims that the interjection of this extraneous information into jury deliberations was prejudicial misconduct. The comments regarding defendant's relationship with his children are argued to be misconduct because the discussion carried the prior bad act admissible testimony beyond it's limited admissibility and into an area of violent-character evidence. Defendant maintains he was prejudiced by this information in "this close case."

First, we disregard the impressions of Juror. No. 10 concerning what she thought Juror No. 5 was implying by his comments. "[E]vidence that the internal thought processes of one or more jurors were biased is not admissible to impeach a verdict. The jury's impartiality may be challenged by evidence of '*statements* made, or conduct, conditions, or *events* occurring, either within or without the jury room, of such a character as is *likely* to have influenced the verdict improperly,' but '[n]o evidence is admissible to show the [*actual*] *effect* of such statement, conduct, condition, or event upon a juror ... or concerning the *mental processes* by which [the verdict] was determined.' [Citations.]" (*In re Hamilton, supra,* 20 Cal.4th at p. 294, 84 Cal.Rptr.2d 403, 975 P.2d 600, Evid.Code, § 1150.)

We also disregard the comments attributed to Juror No. 5 regarding defendant's relationship with his children. " 'The reason for a rule barring a juror from testifying concerning his own mental processes—frankness and freedom of discussion in the jury room, [citation]—applies with equal force to testimony by other jurors concerning objective manifestations of those processes.' " (*People v. Elkins* (1981) 123 Cal.App.3d 632, 637, 176 Cal.Rptr. 729.) The comments attributed to Juror No. 5 appear to be nothing more than the juror thinking out loud, verbalizing his mental processes. The statements did not reflect a bias, the receipt of outside information, discussion of the case with nonjurors, or a sharing of improper information. (See *In re Hamilton, supra,* 20 Cal.4th at pp. 294–295, 84 Cal.Rptr.2d 403, 975 P.2d 600.) Juror No. 5 did nothing but share some of his inner thoughts with the other jurors. The sharing of a juror's mental processes is not admissible evidence for the court to consider when a challenge has been made to the validity of a verdict. (*People v.. Duran* (1996) 50 Cal.App.4th 103, 112, 57 Cal.Rptr.2d 635.)

The information interjected into deliberations by Juror No. 9 regarding the use of drugs in Frazier Park, that the Panella family lived in Frazier Park, how "tweakers" behave, and his opinion regarding why defendant acted the way he did on the night in question, amounts to the receipt of outside information by the jurors and is juror misconduct. Juror No. 9 was not just expressing his inner thoughts, he was representing as fact incidents that were outside the record.

***11** "Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias. [Citations]" (*People v. Nesler, supra,* 16 Cal.4th at p. 578, 66 Cal.Rptr.2d 454, 941 P.2d 87.)

The effect of out-of-court information upon the jury is assessed in the following manner: "When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. [Citation.] Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant. If we find a substantial likelihood that a juror was actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." (*People v. Nesler, supra,* 16 Cal.4th at pp. 578–579, 66 Cal.Rptr.2d 454, 941 P.2d 87.)

Defendant argues that the information involving drugs that was discussed in the deliberation room added a sinister element to defendant's activities on the night of Jonathan's death. Furthermore, he argues that the comments by Juror No. 9 carried with them a level of expertise based on the juror's personal experience and that jurors may not inject their own expertise into deliberations. In making this argument defendant alleges the comments were extremely damaging to his case because, although there was evidence of drug use by Tammy, there was no evidence that defendant used drugs.

Contrary to defendant's argument, there was evidence in the record that he used drugs. Tammy testified that she had a conversation with the defendant about getting drugs and he wanted her to go out and get him some. Tammy also testified that defendant wanted to see if David (the drug supplier) would buy a gun from defendant, but David would not take a gun. Tammy testified that defendant wanted her to get the methamphetamine for him. She said that if she was able to obtain methamphetamine for defendant she would also have taken some.

Thus the jury was aware that both defendant and Tammy were in the market for drugs, and presumably were drug users. There was nothing in the evidence at trial or in the comments by Juror No. 9 that suggested that defendant's use of drugs influenced his behavior on the night in question. The question in this case was whether Tammy or defendant murdered Jonathan. The jury was aware by clear inference from the testimony at trial that both Tammy and defendant were drug users. There was nothing in the evidence that portrayed one as more of an abuser or a different type of an abuser from the other. Thus, the evidence of drug use by both balanced whatever effect an allegation of drug use would have on the juror's decision. Juror No. 9's comments, while misconduct, was not likely to have influenced a juror in his or her decision nor did it demonstrate bias on the part of Juror No. 9.

***12** "[T]he jury is a 'fundamentally human' institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution. [Citation.] '[T]he criminal justice system must not be rendered impotent in quest of an ever-elusive perfection.... [Jurors] are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.' " (*In re Hamilton, supra,* 20 Cal.4th at p. 296, 84 Cal.Rptr.2d 403, 975 P.2d 600.)

C. Comments on Defendant's Failure to Testify

Juror No. 10's declaration includes the following allegation:

> "During the deliberations, Juror No. 1, Juror No. 9 and Juror 8, commented that they wanted to have heard the defendant testify at the trial. Juror No. 9 specifically, said 'What does he have to hide. If he's so innocent, why didn't he get up there and testify'."

Juror No. 11's declaration also included a portion about the defendant's failure to testify. It stated:

> At some point during the deliberations, at least half of the jurors wondered why the defendant did not testify on his own behalf. The Foreperson said the defendant had a right not to testify and that we were not supposed to read anything into the fact that he did not testify."

In *People v. Hord* (1993) 15 Cal.App.4th 711, 19 Cal.Rptr.2d 55, it was discovered that during deliberations some of the jurors discussed the defendant's failure to testify. We found the misconduct was not prejudicial. First we found no evidence of an agreement or open discussion among the jurors evidencing a deliberate refusal to follow the court's instructions that they were not to consider defendant's failure to testify. (*Id.* at p. 726, 19 Cal.Rptr.2d 55.)

The jury here was instructed pursuant to CALJIC No. 2.60 not to consider defendant's failure to testify. As in *Hord* there is nothing in the affidavits presented to the trial court to demonstrate that the defendant's failure to testify was a subject of discussion or agreement by the entire jury or to show that these were nothing more than transitory comments made during deliberations. As pointed out in *Hord,* the jury was well aware that defendant did not testify and thus the comments did not interject any new material into deliberations. (*Id.* at pp. 726–728, 19 Cal.Rptr.2d 55.)

In *Hord* one juror made an oblique remark about a party not saying anything to protect himself. We found this comment more prejudicial than the statement of other jurors expressing a curiosity wondering why the defendant did not testify, but we found the statement did not require reversal. In finding there was no prejudice, we relied heavily on the fact that "the foreperson admonished his fellow jurors and reminded them they could not consider defendant's not testifying during deliberations." (*People v. Hord, supra,* 15 Cal.App.4th at p. 728, 19 Cal.Rptr.2d 55.)

The present facts bear considerable similarity to what occurred in *Hord.* The juror's comment here wondering why defendant would not testify if he claimed he was innocent is much like the comment made in *Hord.* Also, the foreperson here admonished the jurors that they were not to consider that defendant did not testify. There is nothing to demonstrate that

the jurors continued their comments after this admonishment from the foreperson. Here, as in *Hord,* there is no substantial likelihood that defendant suffered actual harm. (*People v. Hord, supra,* 15 Cal.App.4th at pp. 728–729, 19 Cal.Rptr.2d 55.)

***13** A rigid rule that prejudicial misconduct cannot be cured by jury self-admonition would ignore "the very purpose of permitting and requiring jury deliberations: through group discussion of the law and the evidence, our common law system trusts that jurors who express wrong ideas about the evidence, the law, and their duty as jurors will be guided to a correct view of the case. In the absence of an opportunity for jurors to express such wrong conceptions and thereafter change their thinking, a jury trial might just as well conclude with the submission of ballots from the jury box at the close of the case." (*Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, 1136, 122 Cal.Rptr.2d 139.)

Defendant contends the fact that the foreperson admonished the jury here should not be given the same weight as it was in *Hord* because the foreperson committed other acts violating the court's orders. For instance, the foreperson allowed an immediate vote on guilt or innocence to be taken as soon as the jury began deliberations and the foreperson bullied Juror No. 10. (See subsection D below.)

Juror No 10 and Juror No. 11 both stated that a vote on defendant's guilt was taken within minutes of the commencement of deliberations without having first discussed the evidence. The jury was instructed, "you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors." (CALJIC No. 17.40.) They were also told that "it is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict." (CALJIC No. 17.41.)

Although it was not advisable to take an immediate vote shortly after entering the jury deliberation room, deliberations did not end with the initial vote. The jury deliberated over the course of three days; thus the verdict was not decided by an immediate vote. The foreperson, having just assumed that role, may have been reluctant to intervene at such an early point in the deliberations or may not have been clear on the instructions given by the court. The written instructions were requested by the jury 10 minutes after they began their deliberations, presumably after the jury took their initial vote. We do not attribute negative connotations to this alleged failure by the foreperson to prevent an early vote such that his admonition given later during deliberations should be ignored. Also, as shall be discussed, we do not find that the foreperson participated in any bullying of Juror No. 10.

Defendant has failed to show there is a substantial likelihood he has suffered actual harm from the jurors' unauthorized discussion regarding his failure to testify.

D. Badgering and Coercion of Juror No. 10

Juror No. 10 states the following in her declaration concerning how she was mistreated in the jury room:

"Throughout the deliberations I was subjected to harassment and verbal abuse by the other jurors. Specifically, the inferences I derived from the evidence were called 'stupid'. I was yelled at and intimidated by other jurors and repeatedly told I should vote guilty. I was scolded for being 'close-minded'. I told them that I was considering the evidence objectively. I was accused of voting 'not guilty' because I had a bias against the district attorney's office.

***14** "On the third day of deliberation, I told the Foreperson I had taken enough abuse and to inform the judge that the jury could not reach a unanimous verdict. I stated I wanted to leave the jury room, '*now* ' and that I could no longer tolerate being everyone's target. Juror No. 12 agreed we could not reach unanimous agreement. Upon telling the Foreperson I wanted to leave the room and that he should inform the judge of the impasse, the Foreperson stood between the exit door and where I was seated. I was intimidated and felt I was not free to leave the room. I began sobbing. I could not understand why the Foreperson would not inform the judge that we could not reach a unanimous verdict. One of the jurors asked for a break[.] After the break, I felt I could no longer endure any further mental abuse and that continued insistence that the Foreperson advise the judge of the impasse was futile. Regrettably, I decided to change my vote to 'guilty'.

"I believe the defendant is 'not guilty' of the crimes charged. I changed my verdict only because of the Foreperson's refusal to declare a deadlocked jury and because of continuous badgering and harassment by the other jurors. I felt that if I continued to insist upon my opinion based on the evidence, that the defendant was not

guilty, it would have been futile and would only subject me to further abuse by other jurors.

"At the time the judge polled the jury, I did not know it was appropriate to inform the court that the verdict of 'guilty' I had rendered was not freely and voluntarily rendered or that it was appropriate to inform the court of the behavior of other jurors during the trial and during the deliberation process."

Juror No. 11's declaration included comments regarding difficulties encountered by Juror No. 10 during deliberations. It stated:

> "During the deliberations, the other jurors who were voting guilty yelled at Juror No. 10 and made her burst into tears on several occasions. They would not let her talk and many times talked over her all at the same time. On the last day of deliberations, Juror No. 10 said she had had enough abuse and wanted to leave the jury room. She told the Foreperson to let the judge know that the jury was deadlocked, but the Foreperson continued to talk. He was standing near the exit door. Juror No. 10 again began to cry which resulted in all of us taking a break. After the break, we deliberated over the evidence and took a final vote resulting in all twelve jurors voting 'guilty' "

Defendant asserts that the coercive actions of the jury in general and the threat posed by the foreperson when he physically prevented the juror from leaving the room resulted in the loss of defendant's constitutional right to a unanimous jury verdict. Defendant claims that the facts here are distinguishable from other cases where heated disagreement occurred in the jury room because the foreperson used physical dominance to prevent the holdout juror from informing the court of the problems in deliberations. Defendant equates the foreperson's conduct to action amounting to false imprisonment.

***15** "Jurors have a duty to discuss the case with fellow jurors. The exchange of views may well become vigorous. Comments may be acerbic, critical, even agitated .... [R]emarks may be candid, even unflattering. But cutting and sarcastic words do not ipso facto constitute jury misconduct." (*Tillery v. Richland* (1984) 158 Cal.App.3d 957, 977, 205 Cal.Rptr. 191.) Freedom of discussion in the jury room would be chilled if comments made in the heat of discussion during deliberations become a vehicle for attacking the verdict of the jury. (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 819, 89 Cal.Rptr.2d 505.) The California Supreme Court recently reiterated these concepts in *People v. Engelman* (2002) 28 Cal.4th 436, 446, 121 Cal.Rptr.2d 862, 49 P.3d 209, when it stated, "[J]urors, without committing misconduct, may disagree during deliberations and may express themselves vigorously and even harshly: '[J]urors can be expected to disagree, even vehemently, and to attempt to persuade disagreeing fellow jurors by strenuous and sometimes heated means.' [Citation] During deliberations, expressions of 'frustration, temper, and strong conviction' may be anticipated." The comments made during deliberations amount to nothing more than the heated discussions that naturally occur at times during jury deliberations.

The fact that the foreperson stood between the exit door and Juror No. 10, without more, does not establish physical dominance against a holdout juror such that the verdict should be overturned. Not only does Juror No. 10 fail to allege that she was prevented from leaving the room at the time the foreperson stood near the door, but the jury took a break and Juror No. 10 was free to move about at this time. She was not precluded from reporting to the court at this time that she was being physically dominated or falsely imprisoned if she thought this were so. When the jurors returned to the room, they deliberated and reached a verdict. Additionally, after the verdicts were read by the court, defense counsel requested that the jurors be polled individually and polled as to each count separately. Prior to polling the jury on each count, the court instructed the jury that if the verdict as read by the clerk was "your verdict ... if you would answer yes when your number is called; if it was not, would you please answer no." One juror asked for clarification regarding what the court meant and the court again told them what the question was. All jurors, including Juror No. 10, individually answered yes when questioned separately for each count. Juror No. 10 thus had ample opportunity to report her problem with the verdict if she chose to do so; she did not.

The trial court did not err when it denied the motion for new trial based on jury misconduct.

III. Prior Acts of Defendant

The People made an in limine motion to admit evidence of uncharged acts of the defendant. In particular they sought to admit the incident when defendant pushed Alex's head into the window of his vehicle and when defendant grabbed his two children in Las Vegas and attempted to shove them through the window of his vehicle. The People claimed the evidence was admissible pursuant to Evidence Code section 1101 to prove defendant's intent, motive, and absence of accident.

***16** The court and counsel first discussed the issue during defendant's motions in limine to exclude evidence. The court allowed the evidence regarding Alex for the reasons stated by the prosecution. At a later time, the court and counsel discussed the People's motions in limine and the issue was revisited. At this time defendant argued that the evidence of his prior acts was not admissible as common plan or scheme evidence because the acts were not distinctively similar to the crime alleged. In addition, defendant argued the evidence was also not admissible as evidence of motive because there was no evidence of how the prior conduct would establish motive. The People argued that the evidence was admissible to show intent or motive and that there was substantial similarity.

The trial court admitted the evidence ruling as follows:

> "The Court is going to allow, grant, the People's motion to use the November 1999 incident regarding the child who was in the truck, specifically the five year old, Alexander, incident and the February 1999 incident involving the children.
>
> "The Court does note that those are significantly different than the other incidences that were offered by the People, those other incidences [*sic*] involving adults.
>
> "This case involves a child and the reaction of the defendant toward a child. The court sets up that as one of the factors of identity with respect to these two incidences [*sic*], and the Court is going to allow those two incidences [*sic*] but not the others."

"Evidence Code section 1101, subdivision (a) prohibits admitting evidence of prior conduct to show a defendant's disposition to act similarly on a specific occasion. This general rule, however, is substantially qualified in Evidence Code section 1101, subdivision (b), which provides, 'Nothing in this section prohibits the admission of evidence that a person committed a crime ... when relevant to prove some fact (such as motive, opportunity, intent, ... identity ... [absence of mistake] or accident ...) other than his or her disposition to commit such an act.' Such evidence must tend logically, naturally and by reasonable inference to prove the issue upon which it is offered." (*People v. Evers* (1992) 10 Cal.App.4th 588, 598, 12 Cal.Rptr.2d 637.)

Defendant claims that the trial court prejudicially erred when it admitted evidence of these two prior bad acts. In particular, he argues the acts were not similar enough to be probative on the issue of identity. In addition, he argues the trial court failed to exercise its discretion as required under Evidence Code section 352 or abused its discretion in admitting the evidence.

Typically, in order for prior bad acts to be admissible to prove identity, the "prior acts and charged acts must bear striking and distinctive similarities so as to support a reasonable inference that the same person committed both." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 585, 103 Cal.Rptr.2d 492.) But, the "distinctive modus operandi does not apply when the prior and charged acts involve the same perpetrator and the same victim. The courts have concluded that evidence of prior quarrels between the same parties is obviously relevant on the issue whether the accused committed the charged acts ." (*Ibid.*)

***17** "*People v. Zack* [(1986)] 184 Cal.App.3d 409, 229 Cal.Rptr. 317, discusses this principle. The defendant was convicted of murdering his wife, and the evidence included the defendant's prior assaults on her. After reviewing the precedents, the court concluded, 'From these precedents, as well as common sense, experience, and logic, we distill the following rule: Where a defendant is charged with a violent crime and has or had a previous relationship with a victim, prior assaults upon the same victim, when offered on disputed issues, e.g., identity, intent, motive, etcetera, are admissible based solely upon the consideration of identical perpetrator and victim without resort to a "distinctive modus operandi" analysis of other factors.' [Citation.] Similarly in *People v. Linkenauger* [(1995)] 32 Cal.App.4th 1603, 38 Cal.Rptr.2d 868, the defendant was convicted of murdering his wife, and the evidence included prior marital discord and assaults on her. The court stated, 'Appellant contends that evidence of marital discord and prior assaults does not support the inference that he intended to commit a premeditated murder. We disagree. The evidence had a tendency in reason to show appellant's intent to beat, torture, and ultimately murder JoAnn. It was properly admitted to show ill will

and motive.... [¶] Evidence concerning marital discord and appellant's prior assaults also supports the inference that appellant committed the offense.... As we have indicated, by reason of the marital discord and his prior assaults upon JoAnn, the jury could logically draw the inference that appellant had again assaulted her.' [Citation.] *In People v. Daniels* [(1971)] 16 Cal.App.3d 36, 93 Cal.Rptr. 628, the defendant was convicted of attempted murder of his wife, and the evidence included prior assaults upon her. The court stated, 'Evidence showing jealousy, quarrels, antagonism or enmity between an accused and the victim of a violent offense is proof of motive to commit the offense.... Likewise, evidence of threats of violence by an accused against the victim of an offense of violence is proof of the identity of the offender.' [Citation.]" (*Rufo v. Simpson, supra,* 86 Cal.App.4th at p. 586, 103 Cal.Rptr.2d 492.)

While the incident involving Alex did not involve the identical victim in the truest sense of the word as the murder of Jonathan, the sound reasoning of the above cases applies to the situation here. Defendant's assaults were directed to Tammy's children. Defendant was not pleased that Tammy was leaving him and did not believe that Tammy properly disciplined her children. In this sense, Tammy and her children were a family unit and were the victims of defendant's violent behavior. The evidence was admissible, without a requirement of distinctive modus operandi, because of the relationship between defendant and Tammy's family. Defendant claimed that Tammy mistreated her children and was the one who caused Jonathan's death. That defendant mistreated Tammy's children was highly relevant to show defendant's ill will and motive towards them. Defendant " 'was not entitled to have the jury determine his guilt or innocence on a false presentation that his and the victim's relationship ... [was] peaceful and friendly.' " (*People v. Garcia* (2001) 89 Cal.App.4th 1321, 1335, 107 Cal.Rptr.2d 889.) Thus, contrary to defendant's argument, strong similarities were not required for the evidence to be admitted on the question of identity.

***18** The evidence regarding Alex was also admissible on the question of absence of accident. When defendant was questioned about Jonathan's bruises, he would tell Tammy that Jonathan fell or had some other type of accident that caused the bruising. Whether Jonathan's prior bruising occurred accidentally or not was relevant to the question of torture murder. The fact that defendant struck Alex close in time to Jonathan's death refuted a claim that Jonathan's previous bruises were accidentally incurred.

The incident involving defendant's children in Las Vegas sheds light on defendant's intent. The two circumstances were significantly similar. Upon hearing that his cohabitant was going to leave him defendant acted violently towards the children of the cohabitant. The fact that defendant had been violent towards children in the past shortly after his cohabitant made clear her intention to leave him was proof of similar intents. The evidence refuted defendant's claim he did not commit the murder of Jonathan because it tended to show that defendant harbored the same intent under similar circumstances.

Next, defendant argues the trial court did not exercise its discretion under Evidence Code section 352 and/or, if it did exercise its discretion, it abused its discretion. He contends the evidence should not have been admitted because it lacked distinctive similarity and was more prejudicial than probative.

The parties argued the application of Evidence Code section 352 in their written papers as well as their oral arguments before the trial court. Thus, the trial court was well aware of the application of Evidence Code section 352 to the question before it. "A trial court ' "need not expressly weigh prejudice against probative value——or even expressly state that [it] has done so...." ' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 178, 99 Cal.Rptr.2d 485, 6 P.3d 150.)

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citations]. Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724, 94 Cal.Rptr.2d 396, 996 P.2d 46.)

Defendant's defense was that Tammy was a bad parent and was the person who killed Jonathan. As previously discussed, the prior bad acts of defendant were very relevant to the jury's determination of guilt. Compared to the injuries inflicted upon Jonathan that led to his death, the two prior bad acts were minor. The witnesses to the incidents were independent witnesses, not connected to the killing. The bad act evidence did not consume an extraordinary amount of time. The trial court did not abuse its discretion when it admitted this evidence.

IV. Admission of Threats to Blanca Cruz

***19** Defendant contends it was error for the trial court to allow a "mini-trial" on the threats made by defendant to Blanca Cruz in the van while they were being transported to court. He argues that the "van incident" testimony was relevant to the credibility of Blanca Cruz's testimony regarding the truck incident involving Alex and defendant and thus the jail van incident was clearly collateral and inadmissible.

Defendant's argument misses the mark. While the threats made to Blanca Cruz by defendant in the transportation van were relevant to her credibility (see *People v. Olguin* (1994) 31 Cal.App.4th 1355, 37 Cal.Rptr.2d 596), they were relevant on a far more important ground unrelated to Blanca Cruz's credibility. Evidence that a defendant threatened a witness "is clearly admissible to show consciousness of guilt." (*People v. Pinholster* (1992) 1 Cal.4th 865, 945, 4 Cal.Rptr.2d 765, 824 P.2d 571.)

Defendant threatened Cruz when she was being transported to court to testify at the in limine hearing to determine if her testimony regarding the incident regarding Alex would be utilized at trial. Defendant believed the Cruz would be a witness against him. His comments were clearly threats to her and an attempt to dissuade her from testifying. Such comments demonstrated a consciousness of guilt and were admissible regardless of whether the incident regarding Alex was admissible at trial. In addition, defendant made a statement in the van that, "I killed the little bastard." This was admissible as an admission by defendant. (Evid.Code, § 1220.)

The threats and comments made by defendant in the van were highly relevant to the crime in question. The evidence presented at trial regarding this incident was not simply testimony of a collateral matter. Defendant's argument fails.

DISPOSITION

The judgment is affirmed.

WE CONCUR: ARDAIZ, P.J., and CORNELL, J.

All Citations

Not Reported in Cal.Rptr.2d, 2002 WL 31876004

Footnotes

1 All future code references are to the Penal Code unless otherwise noted.
2 Neither Patty nor Matthew testified at trial.