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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID PAZ VASQUEZ, Defendant and Appellant.	B265987 (Los Angeles County Super. Ct. No. KA102202)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant David Paz Vasquez guilty of, among other things, the second degree murder of his 20-month-old son, Joshua. Defendant appeals, contending that the trial court erroneously denied for-cause challenges to prospective jurors who ultimately served as jurors, that statements he made were admitted in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), and that the jury should have been instructed on involuntary manslaughter. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

Joshua was born in September 2011. He died on June 12, 2013.

In February 2012, when Joshua was five months old, his leg was broken. His mother, Evelin Sanchez, gave different versions about how it happened. She told children's services it happened either when she removed Joshua from his bouncer or when defendant removed Joshua from his car seat. Sanchez also told a detective that Joshua's leg was broken when defendant forcibly grabbed Joshua by the leg when taking the baby from her.

After Joshua's leg was broken, he was removed from his parents and placed with his grandmother, Esther Salazar, for seven months. His parents reunified with Joshua, and he returned home.[1]

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[1] A roommate lived with the family, but there is no suggestion she was present during the relevant events or implicated in them.

The night before Joshua died, Sanchez bathed him. She did not see any bruises on him. At some point that night, Sanchez heard a slap. Joshua was in his crib, crying and holding his head. Defendant denied that anything had happened. Sanchez, who had seen defendant "tap" Joshua's head in the past, admonished defendant, "I told you not to hit Joshua in the head." She had also seen Joshua, when he did something wrong, tap his own head.

The next morning, June 12, 2013, Sanchez went to work, leaving defendant with the baby. At some point, defendant called Salazar. He sounded nervous and scared. Defendant said that Joshua had fallen from the bed. Salazar went to the hospital, where defendant had taken Joshua. Joshua was dead.

Police Officer Armando Lopez arrived at the hospital at approximately 10:50 a.m. The officer saw Joshua's dead, bruised body. Defendant was in a room, crying and walking back and forth. Officer Lopez went into the room to talk to him, and Salazar came in too. Salazar asked defendant what had happened to the baby. Defendant said Joshua fell off the bed and denied hitting him. The officer asked Salazar to stop talking to defendant, who was becoming more upset and incoherent, and tried to calm defendant down. When defendant became coherent, Officer Lopez asked what happened to Joshua. Defendant said that Joshua fell off the bed while defendant was cooking. Defendant also told the officer he had spanked Joshua in the past. Defendant then said he did not want to talk anymore.

The police drove defendant to the police station where they interviewed him later that night.[2] At first, defendant said he left

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[2] Defendant asserts that by the time of the interview he had been in law enforcement custody for seven and a half hours,

Joshua alone on the bed, and Joshua fell head first onto a plastic toy train car. Then, at the detectives' urging to tell the truth, defendant admitted, "I hit him [¶] . . . [¶] with my hand." Defendant hit Joshua "in his hands" and on the top of his head, twice and "hard." Defendant then hit Joshua on the right side of his body with a shoe. He did not want to kill Joshua. But he admitted that his wife had seen him hit Joshua "in the head" once before, and he had hit Joshua two other times.

Several weeks after Joshua died, detectives interviewed Sanchez. She told them that the night before Joshua died, she heard Joshua cry and saw him holding his head. Defendant said he " 'hit Joshua in the head.' " She admitted that defendant had hit Joshua before "but not that hard."

Coroner James Ribe performed an autopsy on Joshua. Joshua had multiple bruises, including a curved dark red abrasion over the lower center part of his chest, a large dark red abrasion on the right flank of his abdomen, a faint contusion in the right inguinal area, contusions on the right lateral border of the right upper thigh, and bruises to his lower back. Blunt force trauma caused the darker abdominal and chest contusions. Joshua bled into his abdomen. The injuries to Joshua's abdomen were consistent with being hit with a shoe, and the doctor thought it more likely that they resulted from the directed force of a kick. Also, the abdominal "abrasions" were "consistent with the front end of the shoe." Joshua's 10th and seventh ribs were fractured, and the seventh rib had a several-weeks-old fracture. A new fracture went through that old fracture. Such "refracturing or repetitive trauma" is "one of [the] hallmarks of

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beginning from the time Officer Lopez spoke to him at the hospital. As we explain below, this is inaccurate.

child abuse." Dr. Ribe would not expect to find rib fractures from falling off a bed. Also, "very severe, penetrating blows" caused Joshua's small intestine to be torn off its mesentery (a membrane). Joshua had a two-inch contusion to the back of his head and tiny puncture marks[3] on the right side and back of his head, indicating at least three different impacts. Joshua's skull was covered with blood, also indicating that severe blunt force had been applied to the back of his head. His skull had multiple fractures. The back of Joshua's skull had a "complex comminuted, depressed skull fracture." He had a two and one-half inch wide free-floating bone fragment that had been "pushed slightly inward." The fracture indicated the use of very severe force and the "probability of more than one impact." The amount of force applied to Joshua's head was fatal. The force applied to his abdomen was also fatal. Blunt force trauma caused Joshua's death. Falling on the toy could not have caused Joshua's injuries.

Dr. Karen Imagawa had consulted on Joshua's case when his leg was broken. According to her, Joshua had a comminuted fracture of his femur caused by a combination of bending and compression. In her opinion, either an accident caused the fracture or it was inflicted. She described the parents' history of the injury as "vague" and "inconsistent," because they said it happened when Joshua was taken out of a bouncer or a car seat, and they said that Joshua was fine and not fine after the injury occurred. The most plausible explanation for the injury was that the baby's leg was broken when defendant grabbed it.

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[3] Sanchez testified that the carpet in their home would create similar marks on Joshua's skin when he fell.

As to the injuries Joshua suffered in June 2013, Dr. Imagawa said that no "significant accidental mechanism [ ] would explain" them. A fall from the bed might explain a bruise; it would not explain the internal bleeding, trauma to the abdomen or complex skull fracture.

II. Procedural background

On July 21, 2015, a jury found defendant guilty of count 1, second degree murder (Pen. Code, § 187, subd. (a))[4] and of count 2, assault on a child causing death (§ 273ab, subd. (a)). The trial court sentenced defendant that same day to 25 years to life on count 2. The court sentenced him to 15 years to life on count 1 but stayed that sentence under section 654.

DISCUSSION

I. Jury selection and for-cause challenges

Defendant contends that the trial court erroneously denied his for-cause challenges to Prospective Jurors Nos. 7194 and 4362, who both became jurors. We disagree.

A. *Additional facts regarding voir dire*

1. Prospective Juror No. 7194

Prospective Juror No. 7194 was married with two children under eight. A registered nurse, she had never worked in an emergency room or with children. She wanted to be "objective" but knew herself "to be emotional." The trial court asked her:

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[4] All further undesignated statutory references are to the Penal Code.

"The court: All right. Now the emotions that you're talking about, are you going to convict the defendant just because you don't like the nature of the charges and you're emotional?

"Prospective Juror #7194: As I said, I would consider the evidence[ ]. But I cannot like separate, like, my emotions and, like, you know, the heart and the brain I kind of like mix together in my case.

"The court: All right. Now you're on [*sic*] registered nurse.

"Prospective Juror #7194: Yes.

"The court: When a patient comes in, do you automatically know what's wrong with the patient, just looking at him?

"Prospective Juror #7194: No. We interview the patient. They tell us what they come in for.

"The court: If they can.

"Prospective Juror #7194: Uh-huh.

"The court: If they can't, then what do you do?

"Prospective Juror #7194: You do assessments.

[¶] . . . [¶]

"The court: What the physical symptoms are, what the obvious facts are?

"Prospective Juror #7194: Yes.

"The court: Can you do that for us?

"Prospective Juror #7194: I can do that.

"The court: All right. That's basically what a juror is. You listen to the evidence, and you go through the analytical process starting at the top and working your way down to the bottom. Whatever the bottom is [ ] the conclusion. [¶] You could be an analyst for us, then?

"Prospective Juror #7194: I can do that. [¶] But to mix, like, feelings, of course it's different when you have like a patient

that comes into the hospital you want to take care of. But this case is a murder, a baby murder.

"The court: And it's gonna be real ugly. I can understand that. We're going to have garbage cans suitably placed if you need them. I would invite you folks to bring in boxes of Kleenex if you need those too."

The trial court then asked the entire panel whether they could keep an open mind. Prospective Juror No. 7194 shook her head from side to side.

Later, defense counsel asked Prospective Juror No. 7194 whether she could give defendant a fair trial. The juror said she "would try" but her "emotions would sway" her, "like to not maybe giving him like a fair trial," toward guilt. When counsel asked if the juror's emotions would sway her to voting guilty if there was evidence of both guilt and innocence, the juror said, "yes."

The prosecutor then voir dired the juror:

"[Prosecutor]: . . . [W]hat is the reason – it's because you have your own children that you feel that you're particularly sensitive to children being abused. [¶] I understand that it will be emotional for you. And as the judge has pointed out, there will be tissues passed out. It's hard for everybody. It's not easy for the lawyers either. [¶] But you have had medical experience. You've had training. So to some degree, you've learned how to kind of cut off the emotions when you have to, right?

"Prospective Juror #7194: I just know myself to be very emotional, like even seeing commercials of ASPCA, I scramble to change the channel.

"[The prosecutor]: I get that. But when someone comes into your hospital who is not well – you have geriatric patients?

"Prospective Juror #7194: Of course.

"[The prosecutor]: Where one passes or is very sick, it's sad, but in the moment you do what needs to be done, right?

"Prospective Juror #7194: Yeah.

"[The prosecutor]: Okay.

"Prospective Juror #7194: You would want to take care of them.

"[The prosecutor]: Right.

"Prospective Juror #7194: Yeah.

"[The prosecutor]: So I guess what we're asking you to do, if you think you can do this, in our situation yes, it's gonna be sad, yes, it's gonna be painful, yes, you may want to cry like when you watch those commercials. I get weepy-eyed too. It happens. [¶] But can you still look at all the evidence and make a promise to both sides that you will listen to everything and you will consider it and apply the law and try to make a fair determination of whether he's guilty or not? Do you think you can do that?

"Prospective Juror #7194: I can say, like, right now that I am going to try. I want it to be fair for, like, everyone. But the successfulness of me, like, doing that during the trial, I'm not sure. Right now I can say yes to you.

"[The prosecutor]: I get that. Well, can you at least say that you intend –

"Prospective Juror #7194: I do.

"[The prosecutor]: – to do so?

"Prospective Juror #7194: Uh-huh.

"[The prosecutor]: And if you do start to feel emotional, that's fine. But just remind yourself, like, I know I'm feeling

emotional, it's expected to feel emotional. But I'm going to pay attention to the facts, even though I'm feeling emotional?

"Prospective Juror #7194: Uh-uh. I intend to do that.

"[The prosecutor]: Okay. Being emotional, there's no rule against it. That's fine. It's normal. Okay?

"Prospective Juror #7194: Yes.

"[The prosecutor]: So don't think because you're feeling emotional, that disqualifies you. That's not the case. It's if you're so overcome you can't think anymore. Do you understand?

"Prospective Juror #7194: Uh-huh. Yeah. I understand.

"[The prosecutor]: Based on your job, you do this all the time.

"Prospective Juror #7194: I do –

"[The prosecutor]: Well, you feel kind of emotional, something sad is happening, but you do what you have to at the moment. You take care of the patient.

"Prospective Juror #7194: I understand what you're trying to say. It's just I'm expressing –

"[The prosecutor]: That's fair, I appreciate that. That's fair. . . ."

The defense challenged Prospective Juror No. 7194 for cause, but the trial court denied the challenge based on its finding that the juror was merely "equivocal." When the prospective juror became seated as Juror No. 12 the defense still had a peremptory challenge remaining, which it instead used to excuse Prospective Juror No. 10.

2. Prospective Juror No. 4362

Prospective Juror No. 4362 was single with no children and had served in the Army and Marine Corps. He had previously served on a criminal case, but he could put that case aside and

decide the current one on the evidence and instructions. He might have difficulty with the nature of the charges because he had worked with "victims of abuse and domestic violence." Those experiences might "play" into whether he could be fair to both sides. When the trial court asked if the juror could make a "conscious effort to put aside" his personal experiences, the juror said, "Be honest, I'll try, but no guarantees."

Soon thereafter, the trial court asked the prospective jurors if they could keep an open mind, and they collectively responded affirmatively.

Defense counsel then questioned the prospective juror:

"[Defense counsel]: [Juror #4362], you indicated that you would have no guarantee on fairness. But in order to sit as a juror, you would need to guarantee to us that you can give Mr. Vasquez a fair trial and listen to the evidence and not pre-judge the evidence based on what you've already heard.

"Prospective Juror #4362: Due to the fact of the position I held in the Marine Corps, one of my duties was dealing with, as I mentioned, abuse and domestic violence, help for the victim. And seeing the results of some of the victims and what they had to go through, it was pretty devastating, you know. [¶] Even without what was discussed so far about this case, it will be pretty hard for me, you know, knowing what the family had to go through also.

"[Defense counsel]: Okay. So based on that, can you be fair to Mr. Vasquez?

"Prospective Juror #4362: All I can do, as I answered before, I can try. But if that's all – that's all I can guarantee. I cannot just say yes or no to that question.

"[Defense counsel]: Okay. So you realize that's not a guarantee at all.

"Prospective Juror #4362: I understand that. But I'm answering honestly, like I should be.

"[Defense counsel]: Okay. In your mind, is he already guilty of the charges?

"Prospective Juror #4362: At this point, no."

The defense challenged the juror for cause, because the juror would not say he could be fair. Instead, he wavered and said he would give it his best try. The trial court denied the challenge: "He certainly said he would try. He said there were no guarantees. And then [defense counsel] asked him his current state of mind, and he said the defendant was not guilty at this time. Which is exactly what he's required to do. [¶] I think he's equivocal at best. Challenge for cause will be denied on that ground."

By the time the prospective juror was seated as Juror No. 12, the defense had exhausted its peremptory challenges.

B. *Analysis*

To help ensure a criminal defendant's constitutional right to trial by an unbiased, impartial jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), a juror may be challenged for cause for implied or actual bias (Code Civ. Proc., § 225, subd. (b)(1); *People v. Black* (2014) 58 Cal.4th 912, 916). Implied bias is "when the existence of the facts as ascertained, in judgment of law disqualifies the juror." (Code Civ. Proc., § 225, subd. (b)(1)(B); see also *Black*, at p. 916.) " ' "Actual bias" [is] "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the

substantial rights of any party." [Citations.]' " (*People v. Ayala* (2000) 24 Cal.4th 243, 271-272; see also Code Civ. Proc., § 225, subd. (b)(1)(C).)

" ' "Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation.] The trial court must determine whether the prospective juror will be 'unable to faithfully and impartially apply the law in the case.' [Citation.] A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause. The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. [Citation.]" ' " (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1285; see also *People v. Duenas* (2012) 55 Cal.4th 1, 17; *People v. Weaver* (2001) 26 Cal.4th 876, 910; *Wainwright v. Witt* (1985) 469 U.S. 412, 424, 428.)

To preserve a claim that a for-cause challenge was erroneously denied, the defendant must show that the error affected his or her right to a fair trial and impartial jury. (*People v. Black*, *supra*, 58 Cal.4th at p. 920.) "When a defendant uses peremptory challenges to excuse prospective jurors who should have been removed for cause, a defendant's right to an impartial jury is affected only when he exhausts his peremptory challenges and an incompetent juror, meaning a juror who should have been removed for cause, sits on the jury that decides the case." (*Ibid.*, citing with approval *People v. Yeoman* (2003) 31 Cal.4th 93, 114; see also *People v. Baldwin* (2010) 189 Cal.App.4th 991, 1000-1001.) Therefore, "a defendant challenging on appeal the denial of a challenge for cause must fulfill a trio of procedural

requirements: (1) the defense must exercise a peremptory challenge to remove the juror in question; (2) the defense must exhaust all available peremptory challenges; and (3) the defense must express dissatisfaction with the jury as finally constituted." (*People v. Weaver*, *supra*, 26 Cal.4th 876, 910-911; *People v. Clark* (2016) 63 Cal.4th 522, 565.)

Defendant here did not meet these requirements as to Prospective Juror No. 7194. After the trial court denied the for-cause challenge to Prospective Juror No. 7194, the defense did not thereafter use his remaining peremptory challenge to remove the juror. The record also does not show that counsel expressed dissatisfaction with the jury. The claim of error is therefore forfeited. (*People v. Mickel* (2016) 2 Cal.5th 181, 216; *People v. Avila* (2006) 38 Cal.4th 491, 539.)

Defendant did, however, preserve the issue as to Prospective Juror No. 4362. Although that juror said that the nature of the case would have an emotional impact on him, a juror is not to be disqualified simply because he or she would be emotionally involved. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1090-1091 [for-cause challenge properly denied to juror who did not think she could be fair because she would get "emotionally involved" as "[a]ny juror sitting on a case such as this would properly expect the issues and evidence to have an emotional impact"], overruled on another ground by *People v. Black*, *supra*, 58 Cal.4th at p. 919.) The prospective juror did not unequivocally say he could not be fair to defendant or that defendant was already, in his mind, guilty. True, he equivocated about his ability to be impartial based on the nature of the charges, but he said he would try to be fair. Indeed, Prospective Juror No. 4362

went further and said that defendant, "[a]t this point," was not guilty.

The trial court was in the best position to evaluate these responses. (*People v. Scott* (2015) 61 Cal.4th 363, 378 [" ' "[A]ppellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor) . . . gleans valuable information that simply does not appear on the record." ' [Citations.]"]; *People v. Gonzales*, *supra*, 54 Cal.4th at pp. 1284-1285; *People v. Farnam* (2002) 28 Cal.4th 107, 133-134 & fn. 8 [trial court did not exceed its discretion by denying defense cause challenges to prospective jurors, including one who said he "might be more inclined" to vote for death penalty but that he would " 'do [his] best' to keep an open mind"].) Where, as here, a prospective juror's responses are equivocal or conflicting, the trial court's determination as to the juror's true state of mind is binding on an appellate court. (*People v. Vines* (2011) 51 Cal.4th 830, 853.) Indeed, a juror who, like Prospective Juror No. 4362, candidly states his preconceptions and expresses concerns about them but who also indicates a determination to be impartial, may be preferable to a juror who categorically denies any prejudgment. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 488-489.)

The record amply supports the trial court's conclusion that the juror could be fair, and we therefore reject defendant's contention that the juror should have been removed for cause.

II. Custodial interrogations and *Miranda*

Defendant contends that the trial court should have excluded, under *Miranda*, his statements to (1) Officer Lopez at the hospital and (2) the detectives at the police station.

A. *Additional facts*

Officer Lopez testified that when he saw defendant at the hospital, defendant was being "I guess, detained by [hospital] security" standing outside the door. As we summarized above, Officer Lopez asked defendant what had happened to Joshua, and defendant said that Joshua had fallen from the bed. Defendant also said that in the past he had spanked Joshua. Defendant did not object to Officer Lopez's testimony under *Miranda*.[5]

Defendant did, however, object to Detective Eddie Brown's testimony. During the detective's testimony at trial, the prosecutor sought to play the audiotape of defendant's interview with detectives. Defense counsel objected, under *Miranda*, that defendant was in custody when he made the statements. The trial court ruled that the defendant was not under arrest: the interview was "pre-autopsy," where cause of death had not been established. Also, although defendant was a suspect, so was mother, grandmother and the roommate. The court denied the

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[5] At a sidebar during Officer Lopez's testimony, defense counsel made an offer of proof that when the detectives arrived, Detective Eddie Brown told Salazar that defendant was under arrest. The trial court had already denied defendant's *Miranda* motion to exclude statements defendant made to detectives. Defense counsel did not renew the motion or make any other motion based on Officer Lopez's testimony.

motion to exclude defendant's statements. The audiotape of the interview was then played for the jury.[6]

Detective Brown also testified that officers transported defendant to the police station. When Detective Brown saw defendant at the station, defendant was not handcuffed. Defendant was taken to an interview room, and the door was closed. Detectives Brown and T. Martinez interviewed defendant, and Detective Luis Valdivia was present to interpret. The interview began at 7:40 p.m. and lasted about 40 minutes. The detectives did not read defendant his *Miranda* rights before or during the interview. At the beginning of the interview, Detective Brown asked whether defendant came to the station "on your own free will," but defendant did not directly respond; instead, he said he did not want to be there, he wanted to be with his wife and child. Defendant did say he understood he could leave "anytime you want." Defendant then proceeded to tell his story; that is, he initially said that Joshua fell from the bed onto a toy, and then defendant admitted he hit Joshua with his hand and a shoe.

B. *Any* Miranda *violation was not prejudicial.*

"*Miranda* requires that a suspect be given certain advisements to preserve the privilege against self-incrimination, or to ensure its voluntary and intelligent waiver, during the inherently coercive circumstances of a 'custodial interrogation.' [Citation.]" (*People v. Webb* (1993) 6 Cal.4th 494, 525-526.) Absent a custodial interrogation, *Miranda* does not apply.

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[6] Defense counsel renewed her objection under *Miranda* during Detective Brown's testimony, and the court denied the motion again.

(*People v. Mickey* (1991) 54 Cal.3d 612, 648.) The test for whether a suspect is in custody is objective; the question is whether there was a formal arrest or a restraint on the freedom of the suspect's movement to the degree associated with a formal arrest. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400 (*Leonard*).) In making this determination, "[t]he totality of the circumstances surrounding an incident must be considered as a whole. [Citations.] Although no one factor is controlling, the following circumstances should be considered: '(1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning.' [Citation.] Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were 'aggressive, confrontational, and/or accusatory,' whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview. [Citation]" (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403-1404; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.)

Whether a suspect was in custody for *Miranda* purposes is a mixed question of fact and law. (*Leonard*, *supra*, 40 Cal.4th at p. 1400.) "When reviewing a trial court's determination that a defendant did not undergo custodial interrogation, an appellate court must 'apply a deferential substantial evidence standard' [citation] to the trial court's factual findings regarding the

circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, 'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave' [citation]." (*Ibid.*; *People v. Kopatz* (2015) 61 Cal.4th 62, 80.)

1. Defendant's statements to Officer Lopez

Defendant did not object to Officer Lopez's testimony below. He therefore now contends that his trial counsel provided ineffective assistance for failing to object to admission of his statements to the officer. A defendant raising a claim of ineffective assistance of counsel must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) Defense counsel here was not ineffective for failing to object to the statements under *Miranda*, because defendant was not in police custody when he spoke to Officer Lopez. Although Officer Lopez said that "hospital security" had "detained" defendant, it is unclear on this record what the officer meant. Defendant was visibly upset and moving from one end of the room to the other end. A reasonable inference, therefore, is that hospital security was there to ensure defendant did not get out of control. Even if detained, there is no evidence that the security officer detained defendant at the request of law enforcement. *Miranda* is only applicable while the suspect is in official custody; "[n]ongovernmental security employees that act without police cooperation have been regarded as private citizens unaffected by *Miranda*." (*In re Deborah C.* (1981) 30 Cal.3d 125, 131; *In re Paul P.* (1985) 170 Cal.App.3d 397, 401.)

Nor does the record show that Officer Lopez conducted a custodial interrogation. Rather, "[g]eneral on-the-scene questioning as to facts surrounding a crime" does not require *Miranda* warnings. (*Miranda*, *supra*, 384 U.S. at p. 477; *People v. Clair* (1992) 2 Cal.4th 629, 679 [officer who arrived at scene of burglary with gun drawn did not violate *Miranda* by asking the defendant who he was, if he lived in the apartment, what he was doing there, and if he knew the resident].) On this record, it appears that Officer Lopez was the first law enforcement officer to arrive at the hospital. When he arrived, medical staff directed him to Joshua's body. After seeing Joshua, Officer Lopez saw defendant, who was upset. The officer did not tell defendant he was under arrest or otherwise not free to leave. Instead, the officer tried to calm down the agitated defendant. After defendant was calmer, the officer asked what had happened to Joshua. After telling the officer that Joshua fell from the bed, defendant said he did not want to talk to the officer anymore. Given the totality of these circumstances, this limited questioning was nothing more than a general, on-the-scene investigation that did not rise to the level of a custodial interrogation. Defense counsel, therefore, did not provide ineffective assistance of counsel by failing to object to Officer Lopez's testimony.[7]

2. Defendant's statements to detectives

Where a suspect has been told he is free to leave and the totality of the circumstances show that he was free to leave, courts have found that interrogations were not custodial. In

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[7] In any event, as we discuss below, admission of the officer's testimony did not prejudice defendant.

Leonard, for example, police suspected the defendant of committing six murders. Detectives went to the defendant's home and transported him to the station, where they interviewed him for three and a half hours. (*Leonard*, *supra*, 40 Cal.4th at p. 1398.) At the outset of the interview, the defendant was told he was not under arrest and free to leave. (*Ibid*.) The defendant was allowed to interrupt the interview to make phone calls. After the interview, the defendant was allowed to return home, although he was arrested later that night. *Leonard* found that the defendant was not in custody, because he was told he could leave and in fact was free to move about the station. (See also *People v. Kopatz*, *supra*, 61 Cal.4th at p. 81 [investigatory interview lasting less than an hour in unlocked room, which was not hostile, menacing or accusatory and after which the defendant was not immediately arrested was not custodial].)

Similarly, here the totality of the circumstances shows that defendant was not in custody when he gave statements to detectives at the police station. At the outset of the interview, the detectives tried to confirm that defendant came to the station of his own free will. Defendant did not directly respond, saying instead that he wanted to be with Joshua and his wife. Defendant, however, agreed that he could leave anytime. The interview was not long, lasting approximately 40 minutes. Two detectives questioned defendant, and a third was present to interpret. There is no indication that defendant's movements were restricted before or during the interview. He was not handcuffed, and although the door to the room was closed, there is no indication it was locked. Significantly, the detectives' questioning was not aggressive, confrontational, threatening,

intimidating or accusatory. (*People v. Aguilera*, *supra*, 51 Cal.App.4th at p. 1164.)

Also, whether the detectives had identified defendant as a suspect before questioning him is not dispositive of whether *Miranda* warnings were required. (*People v. Linton* (2013) 56 Cal.4th 1146, 1167.) "The mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in noncustodial settings." (*Minnesota v. Murphy* (1984) 465 U.S. 420, 431; see also *People v. Moore* (2011) 51 Cal.4th 386, 402.) Here, the trial court noted that the interview occurred pre-autopsy, and, at that point in time, there were multiple suspects, including mother. Also, that the detectives at some point during their interview exhorted defendant to tell the truth, thereby suggesting they suspected defendant of harming Joshua, did not convert the interview into a custodial interrogation. Even a detective's "expressions of suspicion . . . are not necessarily sufficient to convert voluntary presence at an interview" to custody, in the absence of other evidence of a restraint on the person's freedom of movement. (*Moore*, at p. 402.) We therefore conclude that there was no *Miranda* violation.

3. Prejudice

Even if we agreed that defendant's statements to Officer Lopez and to the detectives were obtained in violation of *Miranda*, we would conclude that the error was harmless beyond a reasonable doubt. (See generally *People v. Neal* (2003) 31 Cal.4th 63, 86 [*Miranda* violation reviewed under harmless beyond a reasonable doubt standard in *Chapman v. State of California* (1967) 386 U.S. 18, 24.) Defendant concedes that the introduction of any statements in violation of *Miranda* did not prejudice him as to count 2, assault on a child causing death. We

conclude that it also did not prejudice defendant as to count 1, second degree murder. As to defendant's statements to Officer Lopez, defendant merely told the officer that Joshua fell from the bed and had spanked Joshua in the past. These statements did not incriminate defendant. And they were duplicative of ones he made to Salazar, who testified at trial.

As to both statements, defendant was not prejudiced by their admission as there was overwhelming evidence of second-degree-implied-malice murder. Although Joshua's mother testified that defendant had hit Joshua on the head at least once before, the evidence suggested that it had happened more than once before. Joshua, when he did something he thought was wrong, would tap his own head. Also, Joshua's rib had been "refractured," which was a "hallmark" of child abuse. The evidence was also undisputed that Joshua's leg was broken when he was just five months old. Mother gave different explanations for this, but one was that defendant forcibly grabbed Joshua's leg. As a result of this incident, Joshua was removed from his parents for seven months. The morning Joshua died, he was alone with defendant. Defendant explained that Joshua incurred his extensive injuries—abdominal bleeding, multiple skull fractures, and fractured ribs—by falling from the bed onto a plastic toy, a notion thoroughly discredited. According to Dr. Ribe, severe blunt force trauma caused Joshua's injuries, not a fall from a bed. Also, a fall from the bed could not explain Joshua's abdominal abrasions, which were consistent with the shape of a shoe. Given this overwhelming evidence of defendant's guilt, any error in admitting his incriminating statements was harmless.

III. Involuntary manslaughter

Defendant next contends that the trial court had a sua sponte duty to instruct on involuntary manslaughter.[8] We disagree.

A trial court must instruct, sua sponte, on the general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case. (*People v. Moye* (2009) 47 Cal.4th 537, 548; *People v. Abilez* (2007) 41 Cal.4th 472, 517; *People v. Breverman* (1998) 19 Cal.4th 142, 154, superseded on another ground by § 189.) This duty includes a duty to instruct on lesser included offenses when there is substantial evidence from which the jury could conclude the defendant is guilty of the lesser offense but not the greater. (*People v. Thomas* (2012) 53 Cal.4th 771, 813; *People v. Manriquez* (2005) 37 Cal.4th 547, 584, 587.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) In deciding whether there is substantial evidence of a lesser included offense, we do not evaluate the credibility of witnesses, a task for the jury. (*Manriquez*, at p. 585.) We independently review whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Booker* (2011) 51 Cal.4th 141, 181.)

Murder is "the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) Malice

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[8] The trial court refused to instruct on voluntary manslaughter and defense counsel did not request an involuntary manslaughter instruction.

aforethought is express or implied.[9] (*People v. Bryant* (2013) 56 Cal.4th 959, 964.) "It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.) It is also implied when the defendant engages in conduct dangerous to human life, knows that his conduct endangers another's life, and acts with conscious disregard for life. (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30 (*Brothers*).)

"Both voluntary and involuntary manslaughter are lesser included offenses of murder. [Citation.] When a homicide, committed with malice, is accomplished in the heat of passion or under the good faith but unreasonable belief that deadly force is required to defend oneself from imminent harm, the malice element is 'negated' or, as some have described, 'mitigated'; and the resulting crime is voluntary manslaughter, a lesser included offense of murder." (*Brothers*, *supra*, 236 Cal.App.4th at p. 30.) Involuntary manslaughter, to the contrary, is a killing without malice. It is statutorily defined as a killing occurring during "the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b); see generally *Brothers*, at p. 31.) Our California Supreme Court has also concluded that section 192 encompasses an "unintentional killing in the course of a noninherently dangerous felony committed without due caution or circumspection." (*Brothers*, at p. 31.)

Our colleagues in Division Seven have reasoned that "if an unlawful killing in the course of an inherently dangerous

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[9] Here, the People pursued a theory of second degree implied malice murder.

assaultive felony without malice must be manslaughter . . . and the offense is not voluntary manslaughter . . . the offense is involuntary manslaughter." (*Brothers*, *supra*, 236 Cal.App.4th at pp. 33-34, citing *People v. Bryant*, *supra*, 56 Cal.4th at p. 970; see also *Bryant*, at pp. 970-971 (conc. opn. of Kennard, J.).) Thus, relying on *Bryant* and Justice Kennard's concurrence, the court in *Brothers* found that an instruction on involuntary manslaughter as a lesser included offense of murder must be given when a rational jury could entertain a reasonable doubt that an unlawful killing was accomplished with implied malice during the course of an inherently dangerous assaultive felony. (*Brothers*, at p. 34.)

Defendant thus argues that the jury here should have been instructed on involuntary manslaughter because there was substantial evidence from which the jury could have concluded he killed Joshua without malice during the course of an inherently dangerous assaultive felony as he acted in frustration and anger.[10] We reject this argument. Where the defendant "indisputably has deliberately engaged in a type of aggravated assault the natural consequences of which are dangerous to human life, thus satisfying the objective component of implied malice as a matter of law, and no material issue is presented as to whether the defendant subjectively appreciated the danger to human life his or her conduct posed, there is no sua sponte duty

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[10] To the extent defendant also suggests he was entitled to an involuntary manslaughter instruction because there was no evidence he intended to kill Joshua ("I did a mistake, because I hit him . . . but, it was [Joshua's] fault"), intent to kill is not an element of implied malice. (*Brothers*, *supra*, 236 Cal.App.4th at p. 34.)

to instruct on involuntary manslaughter." (*Brothers*, *supra*, 236 Cal.App.4th at p. 35.) Such is the case here. There was no evidence from which a reasonable juror could entertain a reasonable doubt that defendant had acted in conscious disregard of the risk his conduct posed to Joshua. Even if we ignored defendant's admission that he hit Joshua, the remaining evidence fails to show he acted without implied malice. Joshua's injuries were of the sort that no reasonable jury could have believed occurred from a fall from the bed. Defendant had a history of assaulting Joshua: defendant broke Joshua's leg when Joshua was five months old; defendant hit Joshua on the head often enough that Joshua tapped his own head when he was "bad"; and one of Joshua's ribs had an old fracture. The evidence also showed that defendant knew his behavior endangered Joshua or that defendant acted in conscious disregard of Joshua's life, because mother had told defendant not to hit Joshua on the head. Moreover, Joshua had been removed from his parents for seven months, during which time the parents took parenting classes. Thus, there was no material issue as to whether defendant appreciated the danger to Joshua's life defendant's conduct posed—he had been told it did.

Defendant, however, refers to evidence that losing his job and caring for the baby caused him stress. This evidence might be relevant to voluntary manslaughter, which is not at issue, but it does not show an absence of implied malice.

We therefore conclude that the trial court did not have a sua sponte duty to instruct on involuntary manslaughter. Given that conclusion, we need not address defendant's alternative contention that his trial counsel provided ineffective assistance of counsel by failing to request that instruction.

DISPOSITION

The judgment is affirmed.[11]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BACHNER, J.*

We concur:

EDMON, P. J.

LAVIN, J

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[11] Because we affirm the judgment, we need not consider defendant's contention that his presentence conduct credits must be recalculated.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.