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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. NIESIIA JOHNSON, Defendant and Appellant.	B269062 (Los Angeles County Super. Ct. No. KA100181)

APPEAL from a judgment of the Superior Court of Los Angele County, Mike Camacho, Judge. Affirmed with directions.

Marilee Marshall, 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, Senior Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Following a jury trial, defendant Niesiia Johnson, was convicted of second degree murder and assault resulting in a child's death. (Pen. Code, §§ 187, subd. (a),)[1] 273ab, subd. (a).) The prosecution dismissed a torture allegation (§ 206) prior to trial. Defendant was sentenced to 25 years to life in state prison. We affirm the judgment.

II. THE EVIDENCE

Defendant lived in a group home for mentally disabled adults in La Puente. She had been placed there by Regional Center staff. Her bedroom was a converted garage with a door to the outside as well as an entrance to the house's interior. The room had a concrete floor partially covered by thin felt. Although defendant sometimes claimed otherwise, she had no children of her own. She had suffered a miscarriage after she first moved into the group home. Witnesses testified defendant played with dolls and would take them along on outings pretending they were her children.

Defendant at times cared for a friend's two-year-old son, Atreyu M., the victim. Defendant also cared for his four-year-old sister. Defendant frequently brought the children to the group home for several days at a time. She bought baby food and formula for Atreyu even though at two years of age he did not need it. Defendant sometimes claimed Atreyu was her child.

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[1] Further statutory references are to the Penal Code except where otherwise noted.

Defendant also claimed to be the mother of Atreyu's sister. At other times defendant said they were her sister's children.

There was some evidence defendant was abusive toward Atreyu and had been aggressive toward housemates. Neither Angelica Calderon, the group home's owner, nor Cristina Meza, a Regional Center skills instructor, ever saw defendant act inappropriately with the children. But one housemate, Marge Scohberl, told Detective Bob Kenney that defendant would spank Atreyu. Defendant used her hand to spank Atreyu when he didn't "eat right or something."

Another resident, Ray Vicario, did not like it when Atreyu and his sister stayed with defendant. Mr. Vicario did not get along with defendant. Mr. Vicario once told defendant, "Die, bitch." Mr. Vicario testified defendant was verbally abusive when Atreyu did not eat: "I just hear her cussing at him, forcing the boy to eat." Mr. Vicario heard defendant tell Atreyu, "You fucking eat, or you better eat this or I'm not going to cook you nothing no more."

Claud Ealdon Rhoads was a friend of Ms. Calderon. He lived in a trailer on the property. Mr. Rhoads considered defendant "strange" and had experienced two run-ins with her. Once, Mr. Rhoads moved defendant's baby stroller in order to water the lawn. Defendant "blew up" in Mr. Rhoads' words and threatened him saying, "[Y]ou don't know who you are messing with because I'm going to have some of the homeboys from . . . South Central come and take care of you." On another occasion, defendant became mad at Mr. Rhoads and tried to punch him with her fists. Mr. Rhoads deflected the blows.

One weekend beginning July 20, 2012, defendant took Atreyu to Lancaster. They returned to La Puente on Monday, July 23. Ms. Calderon, the group home's owner, noticed Atreyu seemed "a little sad" and was quieter than usual. Atreyu vomited at breakfast and had a small bruise next to his left eye. Defendant said a lamp had fallen on Atreyu when they were in Lancaster. Atreyu's mother wanted her son returned to be at home. But defendant did not return Atreyu to his mother. On Sunday, July 29, Ms. Calderon took defendant and Atreyu to a Taco Bell restaurant. Atreyu vomited again. When defendant removed Atreyu's soiled shirt, Ms. Calderon saw green and blue bruises on his chest. Defendant said Atreyu got hurt playing ball.

In the early morning hours of July 31, Ms. Scohberl, heard the shower running for a long time in the home's shared bathroom. Ms. Scohberl heard defendant talking to someone. Shortly thereafter, defendant knocked on Ms. Scohberl's door and said, "[S]omething [is] wrong with the baby." Defendant asked Ms. Scohberl to call for emergency assistance. Ms. Scohberl found Atreyu lying on the floor or on defendant's bed. He was cold and still. His skin was purple and blue. Ms. Scohberl telephoned an emergency operator.

At 2:29 a.m., Deputy Sheriff Benjamin Fark arrived at the group home. Deputy Fark found Atreyu lying face-up on defendant's bed. Atreyu was not breathing. Defendant, it appeared, was attempting to perform cardiopulmonary resuscitation. Atreyu had blood by his nose and vomit near his mouth. His eyes were swollen shut. His lips were dry and cracked. His face was red and bruised. Deputy Fark saw blood on the bedroom's wall and floor and on a fan. Given Atreyu's

condition, Deputy Fark suspected a crime had occurred. Defendant told Deputy Fark she had gone to take a shower. When she returned, Atreyu was laying face-down on the floor, not breathing.

Paramedics restored Atreyu's heartbeat, inserted a breathing tube, and transported him to a hospital where he was pronounced brain dead. Atreyu died when his heart stopped, on August 1, 2012. Atreyu had been severely beaten all over his body. His entire face was swollen. Atreyu had severe hemorrhaging in his eyes. He had been punched in the forehead at least a dozen times. The back of Atreyu's head had suffered a severe impact against a flat, hard surface. He had a large subdural hematoma, that is, bleeding in his brain. Atreyu had stopped breathing due to severe damage to his brain stem. He had been subjected to a severe spanking. Atreyu had also endured severe blows to his abdomen. And there were marks on his face and chest consistent with having been struck with a thin object, cord, or coat hanger. Atreyu had suffered the injuries to his head and body not long before rescue efforts commenced. Atreyu died of abusive head trauma.

Investigating officers searched the entire house. Bloodstains were found only in the communal bathroom and defendant's bedroom. None of the home's other residents had blood on their bodies or their clothes. No bruising indicating a physical altercation was found on their hands. Officers found broken clothes hangers in defendant's bedroom. Atreyu's blood was found on multiple items in defendant's bedroom including a pair of his jeans and a white Tee-shirt recovered from a laundry basket. Atreyu's blood was also found in the bathtub.

Detectives Bob Kenney and Joe Espino interviewed defendant on July 31, 2012—the day Atreyu was taken to the hospital—and again one week later, on August 8, 2012. Defendant denied inflicting any injury on Atreyu. She admitted she had spanked him with a shoe earlier that day: "I whooped him earlier in the day, like in the morning time . . . ['c]ause he was over there cussing at me and saying no." She blamed an unknown person for Atreyu's condition. She said she had left Atreyu in the bedroom while she took a 5 to 10 minute shower. When she returned, he was injured and nonresponsive. She told Detective Kenney someone must have come in through the unlocked outer door and assaulted Atreyu.

III. DISCUSSION

A. Prior Violent or Aggressive Acts

As noted above, detectives twice interviewed defendant. During those interviews, defendant described prior acts of violence or aggression. She admitted a history of violence, but said that was in her past. She said that as a younger person, when people pushed her buttons, she would "just go off." She denied having been violent towards her current housemates. She denied ever having been violent toward children. Defendant said she had been kicked out of a group home and placed in juvenile hall for assaulting a resident. She admitted putting her foot through a glass window. Defendant denied assaulting a social worker. Defendant admitted she was sent to juvenile hall for biting a police officer. Defense counsel sought to redact defendant's prior acts statements from the interview transcripts

and tapes. The trial court ruled the statements were admissible to explain defendant's erratic behavior in inflicting Atreyu's injuries. Further, the trial court ruled the challenged statements would "give the jury a better view as to what type of person" defendant is. The trial court reasoned the evidence established defendant's history of unpredictable violence. The trial court found the evidence was more probative than prejudicial. (Evid. Code, § 352.)

In closing argument to the jury, the prosecutor argued in part: "Another thing that we know about [defendant] and Atreyu is that [defendant] has a history of suddenly acting violently with very little provocation. She said the she used to 'lay hands on people,' her words. More often when she was 15, she claimed she had changed since then. She talked about constant fighting in group homes. One quote of describing how her temper builds, she stated, 'All the fights and stuff I get in with staff at the group homes and the minors at the group homes that I take it slowly at a time, I let them push my buttons up until it really gets on my nerves. They keep bugging me and keep trying to say stuff.' [¶] We know she wound up at [her current residence] because of a fight at her previous group home and she came directly from [juvenile hall] for assault and battery on a group home resident. She said she bit a Pomona cop. Her explanation for that was, 'What else am I supposed to do if I'm handcuffed and I'm mad, because he dropped me on my face.' Because that made sense to her. [¶] She went on to say at some point during the interviews, 'I don't get upset no more. I used to, but that's why I stopped taking my meds because they got me upset.'" No limiting instruction based on Evidence Code section 1101 was requested nor given sua sponte.

Pursuant to Evidence Code section 1101, with exceptions not relevant here, "(a) . . . [E]vidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." The Attorney General does not argue the present evidence was admitted to prove something other than defendant's disposition to commit a violent act.

The Attorney General argues though defendant forfeited any Evidence Code section 1101 objection by failing to specifically rely on it in the trial court. An objection interposed in the trial court must be based on the specific legal grounds asserted on appeal. (Evid. Code, § 353, subd. (a); *People v. Morris* (1991) 53 Cal.3d 152, 188.) We agree defendant's trial attorney never explicitly used the word "propensity" to describe her objection. Defense counsel argued there was no evidentiary foundation for the allegations of prior violent conduct. And she argued, "I don't want the . . . jurors to take it for the truth." Defendant's trial counsel objected: "[T]here is no real evidence as far as this is hearsay, this is coming from reports from D.C.F.S. and things of that nature." But defense counsel expressly argued the challenged evidence "paint[ed] [defendant] as a violent" person. Whether this was sufficient to preserve the Evidence Code section 1101 objection is a close case. (*People v. Holloway* (2004) 33 Cal.4th 96, 128.) But for purposes of discussion, we assume the objection met the specificity requirement imposed by

Evidence Code section 353, subdivision (a). And, for purposes of discussion, we assume the trial court erroneously admitted the entirety of the prior misconduct testimony evidence.

We conclude defendant was not prejudiced. We apply the *People v. Watson* (1956) 46 Cal.2d 818, 836, standard of review. (Evid. Code, § 353, subd. (a); *People v. Holloway, supra,* 33 Cal.4th at pp. 128-129; *People v. Welch* (1999) 20 Cal.4th 701, 749-750; *People v. Anderson* (1978) 20 Cal.3d 647, 651.) The evidence pointing to defendant as the perpetrator was compelling. Atreyu had been in defendant's care for 10 consecutive days during which time bruises appeared on his body, he became sad and quiet and he repeatedly vomited. On July 23, 2012, Ms. Calderon observed that Atreyu was sad and quiet. She saw a bruise on Atreyu's face. Several days later, on July 29, she saw additional bruising on his chest. Ms. Calderon twice saw Atreyu vomit. Defendant gave varying explanations for the bruises first to Ms. Calderon and later to detectives. Defendant admitted she only spanked Atreyu with a shoe. Atreyu's blood was found in defendant's bedroom, on her clothes and in the communal bathroom. No blood was found in any other room. No blood or injury was found on any housemate. There was no evidence anyone else was or could have been responsible for the beating. Further, defendant's claim of innocence was implausible. It is not reasonably probable the jury would have returned a verdict more favorable to defendant absent her statements to the detectives. Knowing defendant had a history of violence may have reinforced the jury's conclusion of defendant's guilt. But there is no doubt the jury would have convicted her absent that knowledge.

Defendant asserts circumstantial evidence pointed to Mr. Vicario or Mr. Rhoads as the assailant. Mr. Vicario was a fellow group home resident. Mr. Rhoads was Ms. Calderon's friend who lived in a trailer on the property. Both men had had confrontations with defendant. But Mr. Vicario told detectives he was at the hospital that night. And surveillance video confirmed he was at the hospital between 11:53 p.m. on July 30 and 1:25 a.m. on July 31. Mr. Vicario walked back to the house from the hospital, arriving at 3:00 or 4:00 a.m. Atreyu had been assaulted prior to 2:29 a.m., when Deputy Fark arrived on the scene. Mr. Vicario did not have any blood on his clothing or his body. His hands were not injured. There was no blood in his bedroom. Mr. Rhoads testified he had taken a pain reliever that night, went to bed around 10:00 p.m. and did not wake up until the morning. There was no blood in his trailer.

Defendant contends the erroneous admission of the propensity evidence diluted the state's burden. Defendant thus contends we should review the error under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 23-24. (See *People v. Hoze* (1987) 195 Cal.App.3d 949, 954 ["If passions are aroused, the jury may convict simply because the defendant is a bad [person], not because he [or she] is proven guilty."].) Even were we to apply that standard, for the reasons discussed above, we would find the error harmless beyond a reasonable doubt.

B. Photographs

Defendant argues the trial court abused its discretion under Evidence Code section 352 and denied her a fair trial. Defendant argues the trial court allowed the jury to view 19 photographs of Atreyu taken at the hospital and during the autopsy. Defendant asserts the photographs were more prejudicial than probative. They were relevant in light of Atreyu's mother's testimony that before he left home with defendant, Atreyu had no injuries whatsoever on his body. Our review is for an abuse of discretion. (*People v. Cage* (2015) 62 Cal.4th 256, 283; *People v. Duff* (2014) 58 Cal.4th 527, 556-557.) The trial court's decision will be upheld unless the photographs' prejudicial effect clearly outweighed their probative value. (*People v. Duff, supra,* 58 Cal.4th at p. 557; *People v. Bonilla* (2007) 41 Cal.4th 313, 353.)

There was no abuse of discretion. The photographs, while troubling, were clearly relevant and probative. They were evidence of how the crime occurred. They showed what had been done to the victim. The photographs helped the jury understand the nature and force of the blows inflicted as described by witnesses. They corroborated that testimony. The photographs also served to discredit defendant's claim she administered only a spanking. (*People v. Booker* (2011) 51 Cal.4th 141, 170, 171; *People v. Solomon* (2010) 49 Cal.4th 792, 842-843; *People v. Bonilla, supra,* 41 Cal.4th at pp. 353-354; *People v. Pollock* (2004) 32 Cal.4th 1153, 1170-1171.) Any revulsion to the facts in this case was attributable to the defendant's actions, not to the photographs. (*People v. Cage, supra,* 62 Cal.4th at p. 284; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1215-1216, disapproved

on another point in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) Further, the prosecution bore the burden of proving defendant acted with malice. (§ 187, subd. (a); *People v. Bryant* (2013) 56 Cal.4th 959, 964-965; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1221-1222.) The photographs were relevant evidence on the question of malice. (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 471; *People v. Carey* (2007) 41 Cal.4th 109, 127.) The trial court could reasonably conclude the probative value of the photographs outweighed any prejudicial effect. Because there was no abuse of discretion, there was no violation of defendant's constitutional fair trial rights. (*People v. Cage, supra,* 62 Cal.4th at p. 284; *People v. Sattiewhite, supra,* 59 Cal.4th at p. 472; *People v. Riggs* (2008) 44 Cal.4th 248, 304.)

Even if the trial court had abused its discretion, we would find the error harmless beyond a reasonable doubt. As discussed above, the evidence pointing to defendant as the perpetrator was compelling. There was no substantial evidence anyone else was or could have been responsible. Defendant's claim of innocence was implausible. There is no likelihood the jury would have returned a verdict more favorable to defendant absent the photographic evidence.

C. Cumulative Error

Defendant contends she is entitled to reversal because of cumulative error. We find no prejudicial legal error. Therefore, we reject defendant's argument the cumulative effect of all the errors requires reversal. (*People v. Jones* (2013) 57 Cal.4th 899, 981; *People v. Edwards* (2013) 57 Cal.4th 658, 746.)

D. The Abstract of Judgment

The trial court imposed a $60 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)) and an $80 court operations assessment (§ 1465.8, subd. (a)(1)). The parties agree the abstract of judgment must be amended to so reflect.

IV. DISPOSITION

The judgment is affirmed. Upon remittitur issuance, the superior court clerk is to prepare an amended abstract of judgment: reflecting imposition of a $60 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)); stating an $80 court operations assessment was imposed (Pen. Code, § 1465.8, subd. (a)(1)); and deliver a copy to the Department of Corrections and Rehabilitation.

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TURNER, P.J.

We concur:

KRIEGLER, J.

KIN, J.*

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