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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Appellant,

v.

MARK EDWARD VAUGHN,

Defendant and Respondent.

2d Crim. No.B272301
(Super. Ct. No. VA124267)
(Los Angeles County)

Mark Edward Vaughn appealed his conviction by jury of the second degree murder of 17-month-old Jayden T. (Pen. Code §§ 187, subd. (a), 189¹), and of assault on a child causing death (§ 273ab, subd. (a)). The trial court sentenced Vaughn to a term of 25 years to life in state prison on the assault conviction and stayed the term imposed for murder pursuant to section 654. We affirmed (*People v. Vaughn* (July 8, 2014, B250071 [nonpub. opn.]), but issued an order to show cause returnable to the superior court for a hearing on Vaughn's

¹ All statutory references are to the Penal Code.

petition for writ of habeas corpus. After the hearing, the court granted the writ, ordering a new trial on the ground that Vaughn received ineffective assistance of counsel at his trial. The People appeal. We affirm.

FACTS

*Trial*²

Vaughn was the fiancé of Jayden's mother, Koryne. He is not Jayden's biological father. Koryne, then a nursing student, lived with her mother, Lisa, in Lisa's La Mirada home. On January 20, 2012, Koryne had an early class and Lisa had to work. Jayden's regular babysitters were not available, so Vaughn agreed to watch her until Koryne returned from class. He arrived at about 11:30 p.m. on the night before and stayed the night with Koryne.

On the morning of January 20, Koryne left the house at about 6:00 a.m. Lisa got up at about 6:30 a.m. She got ready for work and then woke Jayden. Lisa got Jayden ready for the day and fed her breakfast. By 8:15 a.m., Vaughn was awake and sitting on the couch with a laptop computer. He took Jayden from Lisa and Lisa left for work. Lisa testified that Jayden was clingy and crying when she left for work.

At about 10:20 a.m. Vaughn called 911, reporting that Jayden had fallen off a chair and was not breathing. Los Angeles County Sheriff's Deputy Patrick Unkle happened to be driving to his assignment at a nearby high school when he heard the dispatch. He arrived at the house about one minute later. Jayden was unresponsive, lying on her back, on the carpeted living room floor near a coffee table. Unkle asked Vaughn what

² The facts as developed at trial are taken from our opinion affirming the judgment. (*People v. Vaughn, supra*, B250071.)

happened. Vaughn said the baby fell from the chair. When Unkle asked whether she hit her head on the table, Vaughn said he did not think so because it sounded like she hit the carpet. Jayden was not breathing. Unkle asked whether Vaughn had started CPR. Vaughn said no and that he was still talking to the 911 dispatcher. Unkle started CPR. He asked Vaughn to give Jayden breaths, while he gave her chest compressions. Vaughn gave two rescue breaths and then stood up and walked into the kitchen. He did not re-engage with Jayden while Unkle was present. Unkle continued to give Jayden CPR until paramedics arrived a few minutes later. He described Vaughn's demeanor during this period as "[e]xtremely calm."

When the paramedics arrived, at about 10:25 a.m., Jayden was in cardiac arrest and "ghost white." She was wearing only a diaper and felt cold to the touch. Her pupils were fixed and dilated. Paramedic Joel Entreken testified that he observed bruising behind both of Jayden's ears, which is indicative of a skull fracture. When he touched her head, he noticed "crepitus," or the "sensation of fracture bones grinding together." Vaughn told the paramedics that Jayden fell off of the chair onto the carpeted floor and hit her head. He also said Jayden vomited while he was on the phone with 911. The paramedic described Vaughn's demeanor as "pretty emotionless . . . like he was just kind of a bystander." Another paramedic described the crepitus he observed on Jayden's head as the worst he had ever felt on a person.

Michael Mileki, a sergeant from the Los Angeles County Sheriff's Department, interviewed Vaughn at the house after Jayden was taken to the hospital. Vaughn told Mileki that he placed Jayden on a loveseat in the living room, turned on the

TV so she could watch cartoons, and went into the kitchen to make breakfast for himself. While in the kitchen, he heard a “loud thud” and the sound of Jayden crying. It sounded to him as if Jayden had fallen off the couch. He immediately went to her. She was on her back with one foot propped up on the loveseat. Vaughn said that he picked Jayden up and held her for about 30 minutes while she cried. Eventually, she became sleepy. He tried to keep her awake because he was not sure whether she had a concussion. She tried to close her eyes for about 15 minutes and then became unresponsive. At that point, Vaughn called 911. He did not start CPR because he thought she was still breathing. He put her on the floor and waited for the fire department to arrive. Vaughn seemed indifferent during the interview and seemed to feel “no sense of urgency” about the situation.

Jayden’s aunt arrived at the house and confronted Vaughn about what had happened. He told the aunt that he was in the kitchen when he heard a “thump or like a thud.” Jayden was crying and he picked her up to console her. She eventually calmed down, but then she became woozy and he called 911.

Detectives from the sheriff’s department inspected the area where Vaughn said Jayden fell. They found that Lisa’s living room floor was constructed of a plywood subfloor over a concrete slab. The plywood was covered with padding and carpeting. Detectives found no blood, skin, or hair on either the coffee table or the floor. They returned to search the house on five occasions. Trace evidence of DNA was found on a piece of drywall they removed from a bathroom wall directly behind Jayden’s potty chair. Aside from Jayden’s injuries, there were no

signs that a struggle had occurred in the house and the detectives found “no evidence of anything that was used as a weapon.”

On the day of the incident, Koryne asked Vaughn what happened. He told Koryne “that he had set the baby in a chair in [their] living room and went into the kitchen to make food, and . . . he heard a thud and went into the living room and found the baby on her back with her foot up on the chair still.” Jayden was crying so Vaughn picked her up and consoled her. They started playing. About 30 to 45 minutes later, Jayden started moaning and losing consciousness. Two weeks later, in early February 2012, Koryne asked Vaughn whether he put ice on Jayden’s head. He told her that he did. She said, “You didn’t tell me that. Why didn’t you tell me that?” Vaughn replied, “I only told you 90 percent of what happened.” Although Koryne asked Vaughn to tell her the other 10 percent, he refused.

Doctor Lawrence Nguyen, the medical examiner who performed the autopsy on Jayden, testified that he observed extensive hemorrhaging within her scalp and “severe complex skull fractures.” There was a horizontal fracture that extended from the top of the skull all the way to the base of the skull. Other horizontal fracture lines emanated from that fracture. These fractures were caused by an external impact, rather than from internal pressure caused by brain swelling. Nguyen opined that Jayden must have suffered at least two strikes to her head.

Jayden also had bruising around her occipital scalp. Nguyen would not expect to see that bruising after a fall from 20 inches onto a carpeted, padded wooden floor. He would, instead, expect to see that level of bruising after a fall from a height of 10 feet or more. Nguyen observed a round bruise on Jayden’s cheek that could have come from a hand or thumb. In addition, the

medical examiner observed an area of hemorrhage on her neck and trauma below her thyroid. These injuries are typically caused by a blow or by clutching of the neck.

Doctor Carol Berkowitz, an expert in pediatric emergency medicine and child abuse pediatrics, and the co-chair of the Child Death Review for Los Angeles County, reviewed the photographs and report of Jayden's autopsy. She opined that Jayden's injuries were not consistent with a fall from a chair onto a carpeted, padded, wood surface. Instead, her injuries were caused by an "inflicted severe blow to her head." It was not possible for her to say, to a medical certainty, how many blows were inflicted. Berkowitz, however, believed the blows were inflicted by an object, rather than by a hand or a foot. A man of Vaughn's height and weight would be able to inflict these injuries "if he hit the child against a hard object like the wall or some other thing, but I believe it would have had to be contact with something hard." Such a blow would not necessarily damage the wall or leave blood, hair or skin behind.

The fracture to Jayden's skull was so severe that it crossed the suture line, or the line that separates the different bones in the skull. A fall from a chair onto a carpeted surface could not generate sufficient velocity to cause that fracture. To create an injury as severe as Jayden's, a child would have to fall "from probably two stories, or more than that . . . out of a window onto a concrete surface where the fall wasn't broken by any intervening items such as a tree or bushes, or it would occur with an ejection from a car where the child was thrown out of the car and, again, hit concrete."

Berkowitz did not believe Jayden would have cried after she received these injuries, as Vaughn described. She

instead would have been immediately symptomatic because the injury was so massive.

Both experts acknowledged on cross-examination the existence of at least one other expert who found “that a fall of less than . . . three meters by a child can cause these kinds of complex injuries.” Doctors Nguyen and Berkowitz noted their disagreement with that expert. In addition, Berkowitz described a study of “death related to short falls in children. And short falls were one and a half meters.” The study concluded, “[Y]our chance of dying as a result of a short fall . . . was .48 in one million.” The defense called no expert witnesses to rebut the testimony of Nguyen and Berkowitz.

Jayden’s mother, Koryne, and grandmother, Lisa, described some minor injuries Jayden had sustained in the months prior to her death. One or two months before her death, Jayden hit the back of her head on the bathtub. She cried for a couple of minutes and had a bump on her head, but did not lose consciousness. Jayden also fell while running on a neighbor’s driveway. She hit her nose and her hands but had no severe injuries. Finally, Jayden hit her head on a bed rail while she was staying at Vaughn’s house several months before her death. Vaughn explained to Lisa that Jayden was on the bed when he saw her start to roll off. He stuck his hand out to catch her and, in doing so, shoved her into the bed rail. Jayden hit her head, causing some bumps and bruises on her face. Koryne and Lisa took her to the doctor.

In his trial testimony, Vaughn said he loved Jayden. He denied hitting or bashing her head into a wall. Vaughn testified that he put an ice pack on Jayden’s head after her fall. She continued to cry. He took off her pajamas when it seemed

like she was having trouble breathing. He tried to keep her awake because he thought she might have a concussion. Vaughn did not tell the detectives about the ice pack because they did not ask him about it.

Vaughn testified that he was Jayden's disciplinarian and "chief potty trainer." He corrected her by "saying 'no' or just talking to her." On one occasion, Vaughn left Jayden on her potty for an hour because, he told detectives, "I wanted her to go potty." After she did, they shared a big bowl of ice cream.

Vaughn's father described Vaughn as being "soft spoken" with a "soft demeanor." He believed Vaughn had a "very loving relationship" with Jayden. One of Vaughn's friends described Vaughn as having "almost like a father-daughter relationship" with Jayden. The friend had never seen Vaughn involved in a physical fight and described him as not a violent person.

HABEAS CORPUS PROCEEDING

Vaughn's Evidence

Charles Niesen, M.D.

Charles Niesen is a pediatric neurologist. He testified the cause of Jayden's death was brain swelling produced by head trauma. He said the trauma to Jayden's head could have been caused by striking a wooden table top. Such a table was in the living room. It also could have been caused by a fall of less than three meters, aggravated by previous mild head traumas. Such traumas occurring within days of each other can produce severe brain injury, even death.

Niesen recounted that Jayden's mother reported Jayden fell head first onto a concrete driveway during the week

prior to her death. Jayden had also fallen in the bathtub, hitting the back of her head.

Niesen said the autopsy report confirms Vaughn's version of the events. There was a very small bleed in the brain where one would expect it based on the fall Vaughn described. Niesen testified, "[I]f somebody took a baseball bat to Jayden's head or slammed her against the wall, you would have expected more internal hemorrhages which you don't see." The findings of the neuropathologist and the CT scan show none of the typical findings seen in child abuse cases, such as subdural hematomas. Vaughn's version of the events fits the facts of the case with "reasonable medical certainty."

In an affidavit in support of Vaughn's petition for writ of habeas corpus, Niesen declared: "The significance of small distan[ce] falls in children is emphasized by the work of Dr. Plunkett. [Fn. omitted.] He has described death-causing injuries from playground equipment in infants and children from heights of 2-4 meters. Though it is unclear whether such falls produced the type of skull fracture sustained by Jayden, significant brain swelling can occur after almost 'incidental' falls from short distances in the playground. There is a plausible explanation that Jayden's severe head trauma could have been caused by accidental trauma, as described by [Vaughn]."

Niesen stated Plunkett's study is the only study he relied on. He said "like any stud[y] it has shortcomings," but it is "a valuable contribution to the literature." Niesen admitted that 116 physicians wrote a letter to the British Medical Journal stating that Plunkett made serious errors. Niesen testified, however, that other doctors believe in Plunkett's study and that subsequent studies have confirmed his findings.

Janice Ophoven, M.D.

Janice Ophoven is an expert in pediatric forensic pathology. Ophoven said the two prior injuries suffered by Jayden could have caused concussions. Head injury can occur but does not immediately become symptomatic. A person may remain asymptomatic for a significant period of time.

The first CT scan showed Jayden's brain massively swollen. The nerve at the back of the eye was swollen. This was all at the extreme when Jayden arrived at the hospital. There is no way Jayden could have gotten to that level of advanced deterioration in the time frame at issue in the trial.

Previous concussions or mild head traumas that occur within days of each other can produce severe brain injury, even death. This is known as Second Impact Syndrome. Jayden's previous falls may have placed her at increased risk for further injury. Ophoven said this "certainly could have resulted in . . . the severe brain swelling that cost Jayden her life."

Ophoven said that pediatric head injuries can be caused by a short distance fall. She referred to the work of "Dr. Plunkett and others." She concluded, "There is a plausible explanation that Jayden's severe head trauma could have been caused by accidental trauma."

Roberto Flores de Apodaca, Ph.D

Roberto Flores de Apodaca is a forensic psychologist. He conducted tests on Vaughn. He said Vaughn does not have a psychiatric disorder and is not prone to violence.

Anna Mena

Anna Mena is Vaughn's mother. She testified Vaughn doted on Jayden and was happy to take care of her.

When Mena arrived at Jayden's house after the incident, Vaughn was visibly shaken and very nervous.

People's Evidence

Roberto Corrado

Roberto Corrado was Vaughn's counsel at his trial. Corrado agreed that expert witnesses would be crucial to an effective defense.

Corrado said in a declaration that he spoke with three doctors. Testifying at the hearing, he said he spoke with five doctors. But he did not remember the doctors' names or their specialties, except for Doctor Charles Hyman. Corrado spoke with Hyman, but he told Corrado the case was not within his area of specialization, which is fractures. Corrado sent materials relating to the case to another doctor, but did not retain him because he wanted \$23,000. That doctor told him only that Jayden did not die right away from her injuries. None of the doctors Corrado spoke with would have been helpful because each doctor told him the evidence was not consistent with Vaughn's story. Corrado asked his investigator to locate an expert witness, but his investigator was not successful.

Lawrence Nguyen, M.D.

Lawrence Nguyen performed the autopsy of Jayden and testified at trial. Nguyen disagreed with Doctors Niesen and Ophoven that Jayden's injuries could have been caused by a short fall. He said the vast majority of articles do not support the premise that a short fall could cause a complex fracture such as Jayden's. Nguyen said there were other indications of abuse such as bruising on Jayden's body.

Jeremy Deisch, M.D.

Jeremy Deisch is a surgical neuropathologist. He examined Jayden's brain and dura mater. He said the injuries to Jayden's brain are consistent with high-energy trauma. Her injuries are not consistent with a short fall onto a carpeted wooden floor. Nor could her injuries be explained by second impact syndrome. There is no evidence of a prior injury to Jayden's brain.

Carol Berkowitz, M.D.

Carol Berkowitz is an expert in pediatric emergency medicine and child abuse. She testified at Vaughn's trial. She testified that Jayden's injuries could not have been caused by a short fall onto a carpeted floor. There were no significant injuries in prior falls that are consistent with second impact syndrome. There are bruises on Jayden's body that could not have been caused by medical intervention. The fracture to her skull indicates the application of severe force.

Dereck McCrae, M.D.

Dereck McCrae was Jayden's pediatrician. He last saw Jayden two months before her death. He never saw any signs that Jayden had a serious head injury.

Joel Entreken

Joel Entreken is a paramedic who responded to Jayden's emergency call on January 20, 2012. He said the paramedics did not handle Jayden in any manner that would cause her body to bruise.

Koryne Turner

Koryne Turner, Jayden's mother, is a registered nurse who works in newborn and infant critical care. She has

received training in identifying concussions. She said Jayden's prior falls did not cause a concussion.

Trial Court's Findings

The trial court found that Vaughn's trial counsel's performance was deficient. Counsel's failure to conduct an adequate investigation resulted in his failure to call crucial expert witnesses.

The trial court stated: "Corrado claimed that he spoke with three or more doctors. . . . [N]one of the doctors Corrado spoke with appear to have been experts in a pertinent field (neurology or pathology); the only doctor whose expertise Corrado remembered was an expert in fractures. . . . Moreover, only one of the doctors approached a substantive discussion with Corrado because only that doctor reviewed the materials from the case."

The trial court also found counsel's deficient performance was prejudicial. The court stated: "If Corrado had presented expert testimony at trial to bolster Petitioner's version of events, the trial would have been the battle of the experts that occurred at the evidentiary hearing [on the O.S.C.] instead of just a battle between the accused Petitioner, who had every motive to lie, and the People's disinterested expert witnesses. In Petitioner's case, which was based upon circumstantial evidence on both sides, testimony by either Nielsen or Ophoven was 'the sort of "neutral, disinterested" testimony that may well tip the scales and sway the fact-finder.'" (Quoting *Pavel v. Hollins* (2d Cir. 2001) 261 F.3d 210, 264.)

DISCUSSION

I

The Sixth Amendment right to counsel is the right to effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*)). A defendant claiming ineffective assistance of counsel has the burden of showing counsel's representation fell below an objective standard of reasonableness and resulting prejudice. (*Id.* at p. 687; *People v. Mayfield* (1993) 5 Cal.4th 142, 185.) Prejudice requires: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694.)

We do not apply the lesser "more likely than not" standard of prejudice found in section 1473, subdivision (b)(3)(A). (Stats. 2016, ch. 785 § 1, eff. Jan. 1, 2017.) That standard applies to "new evidence"; that is, evidence "that could not have been discovered prior to trial by the exercise of due diligence" (*Id.* at subd. (b)(3)(B).) Here, there is no showing the expert evidence could not have been discovered prior to trial by the exercise of due diligence.

In reviewing an appeal from the grant of a writ of habeas corpus, the trial court's conclusions of law and its resolution of mixed questions of law and fact are subject to independent review. (*In re Marquez* (1992) 1 Cal.4th 584, 603.) Mixed questions include whether counsel's assistance was ineffective and whether the ineffective assistance resulted in prejudice to the defendant. (*Ibid.*) The trial court's findings of fact are given great weight when supported by substantial evidence. (*Ibid.*)

II

The People contend Vaughn failed to meet his burden to demonstrate deficient performance.

Vaughn is a young man sentenced to 25 years to life. Vaughn's trial counsel conceded that expert testimony was vital to Vaughn's defense. Yet trial counsel interviewed at most five doctors. He could not testify that any of them had a relevant specialty. He could remember the name of only one. Experts with relevant specialties were available for Vaughn's defense. Vaughn's habeas counsel produced two. With so much at stake for his client, Vaughn's trial counsel's performance fell far below any objective standard of reasonableness.

This is not a case of second-guessing counsel's tactical choices. There could be no valid reason for not conducting a thorough investigation and calling expert defense witnesses.

III

The People contend Vaughn failed to meet his burden to demonstrate prejudice.

The People argue the trial court applied the wrong standard in assessing prejudice. But the trial court's ruling states: "As discussed *ante*, to demonstrate prejudice, Petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"" (Citing *In re Hardy* (2007) 41 Cal.4th 977, 1018; quoting *In re Avena* (1996) 12 Cal.4th 694, 721.) That is the correct standard for assessing prejudice.

Even assuming the trial court misapplied the standard, any error would be harmless. Prejudice presents a

mixed question of law and fact over which we exercise our independent review. (*In re Marquez, supra*, 1 Cal.4th at p. 603.) We reach the same conclusion as the trial court.

As the trial court pointed out, Vaughn had a compelling and obvious reason to lie in giving his testimony. The People presented experts at trial who testified that Vaughn's testimony was inconsistent with the physical evidence. As a practical matter, Vaughn had no defense without experts who would support his testimony. But for his trial counsel's deficient performance, he would have had those experts.

The People attack the credibility of Vaughn's experts. But his experts are specialists in the relevant fields of pediatric neurology and pediatric forensic pathology. Their declarations and testimony gave cogent support for Vaughn's version of the events. A reasonable juror could easily find them credible. Moreover, for Vaughn to prevail, it is not required that his experts be entirely convincing; they need only raise a reasonable doubt.

It is reasonably probable that but for counsel's unprofessional error, Vaughn would have obtained a more favorable result. The probability is sufficient to undermine confidence in the result. (*Strickland, supra*, 466 U.S. at p. 694.)

The People's reliance on *Harrington v. Richter* (2011) 562 U.S. 86 (*Harrington*), is misplaced. There, a jury found Richter guilty of murder, attempted murder, burglary and robbery. The Court of Appeal affirmed and the California Supreme Court denied review. The California Supreme Court also denied Richter's petition for a writ of habeas corpus asserting ineffective assistance of counsel. Richter claimed counsel was deficient in failing to present expert testimony on

serology, pathology, and blood splatter patterns. He reasserted his claims in the federal district court, which also denied relief. The Ninth Circuit Court of Appeals, however, reversed the district court.

In reversing the Court of Appeals, the United States Supreme Court made it clear it was not considering what is at issue here: the proper application of *Strickland*. (*Harrington, supra*, 562 U.S. at p. 101.) Instead, the court considered whether the Court of Appeals properly applied an exception to the rule barring federal habeas relief to persons in custody pursuant to a state court judgment. (28 U.S.C.S. § 2254(d).) The exception applies where the state court adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law” (*Id.*, subd. (d)(1).) In discussing the statutory exception, the court stated, “A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself. [¶] . . . It bears repeating that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” (*Harrington, supra*, 562 U.S. at pp. 101-102 [131 S.Ct. at pp. 785-786].)

Thus, under *Harrington* a defendant seeking federal habeas relief from an adverse state court judgment bears a much heavier burden than when the case involves a review under the *Strickland* standard itself. Under *Strickland*, the defendant must show only a “reasonable probability” of a more favorable result. Under *Harrington*, the defendant must show that no “fair minded jurist[]” could agree with the state court’s decision. (*Harrington, supra*, 562 U.S. at p. 102.) *Harrington*’s analysis of prejudice is based on that higher standard. The analysis does not

apply where, as here, the review is under *Strickland* itself.
(*Harrington*, at pp 101-102.)

DISPOSITION

The judgment (order) is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

William C. Ryan, Judge

Superior Court County of Los Angeles

Jackie Lacey, District Attorney, Phyllis C. Asayama
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