Filed 1/10/13 P. v. Naredo CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALI DAVID NAREDO, Defendant and Appellant.	B232887 (Los Angeles County Super. Ct. No. BA348851)

APPEAL from a judgment of the Superior Court of Los Angeles County, Harvey Giss, Judge. Affirmed.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Ali David Naredo guilty of, among other things, involuntary manslaughter of his seven-month-old son. At trial, the People introduced, over Naredo's objection, his statement to the police that he punched the baby's head. On appeal, he contends that his statement was involuntary because it was coerced by a promise of a benefit or leniency. He also contends that the trial court improperly denied challenges for cause, admitted cumulative autopsy photographs, and failed to instruct the jury properly. We hold that no prejudicial error occurred and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *Prosecution case.*

In May 2007, Jeannie M. and Naredo got married. Away from Naredo due to her military training, Jeannie became pregnant with another man's child. Before the baby, Rian, was born, Jeannie told Naredo the child wasn't his. Although Naredo was upset, he and Jeannie continued to live together off and on, and they were together when Rian was born in March 2008.

On November 6, 2008, Naredo and Jeannie, who was now pregnant with Naredo's child, were living in an apartment, although she had told him she was moving out. That night of November 6, Jeannie put Rian in his playpen and went to take a shower around 6:00 or 6:30 p.m. Naredo was on the bed watching television. While in the shower, Jeannie heard a sound similar to the sound of someone burping a baby: "three like pats, but they were a lot louder." She went into the bedroom and asked Naredo, who was holding Rian, if he had hit him. Naredo said he would never do that. Rian made a noise that sounded as if he was gasping for air.

Thinking Rian was fine, Jeannie went back into the bathroom to change, and Naredo came in to take Rian into the shower. Jeannie noticed that Rian was white, his lips were pale, and his eye was droopy. She asked what was wrong with the baby, but Naredo said nothing. When she repeated her question, Naredo panicked and said,

"What's wrong? What's wrong?" She asked if he had done anything to the baby, but Naredo didn't answer. They drove to the hospital.

Dr. Lisa Kellman saw Rian at Alhambra Hospital. Because he wasn't breathing, he was given CPR and intubated. The right side of Rian's scalp had a huge hematoma and he had "blown pupils," indicating possible head trauma. A CT scan showed multiple comminuted skull fractures and a large septal hematoma, which is a collection of blood in the soft tissue of the scalp and the cranium.

Jeannie told Dr. Kellman she didn't know what happened because she was in the shower. Naredo told the doctor that Rian hit his head on the wall really hard. When Dr. Kellman asked "how," Naredo said something about how babies arch their backs when they cry. In the doctor's opinion, this story was inconsistent with Rian's injuries. Naredo also told a police officer that Rian suddenly jerked his head and struck a wall. Rian slipped out of Naredo's hands, but Naredo caught him. Rian started to shake.

Rian was transported to Huntington Hospital, where Dr. Kristine Thomas cared for him. Rian had massive swelling of the head, bruising to the scalp and head, his pupils didn't react to light (indicating lack of brain function), and his retinas had hemorrhages (indicative of severe blunt force trauma or shaking). The baby's mother told Dr. Thomas she was in the shower when she heard thumping. When she came out, Rian, pale and unresponsive, was in Naredo's arms. Dr. Thomas agreed that the history from Naredo was inconsistent with Rian's injuries. Rian's mother agreed to a do-not-resuscitate order, and Rian died at 12:40 a.m. Dr. Thomas listed the cause of death as blunt force head injury resulting in brain death.

Rian's autopsy confirmed he died from blunt force trauma from multiple blows. Rian had bruises to his left forehead and left back of ear, abrasions on his chin area, and a bruise to the right side of his head. The right side of his face was swollen and he had a subcutaneous hemorrhage under his frontal scalp. He had a depressed skull fracture (the fatal injury), meaning his bone was pushed in, which requires a great deal of force. He also had hemorrhages to his optic nerve.

Detectives interviewed Naredo on November 7 and 11, 2008. Naredo first said that Rian hit his head on the wall and fell to the floor. Then he said he tossed Rian in the air and failed to catch him. When Naredo put Rian on the bed, he fell, hitting his head again. Finally, Naredo said that Rian fell, and when he wouldn't stop crying, Naredo slapped him, causing Rian's head to hit the wall.

B. *Defense case.*

Dr. Jan Leestma, a pathologist and neuropathologist, testified that a depressed skull fracture in a seven-month-old baby could result from a fall of five or six feet onto a hard, flat, tile surface. The bruising on the sides of Rian's head could have resulted from the main skull fracture site or could represent separate injury sites. Bruising on the upper left hand portion of Rian's forehead was probably another impact site.

The doctor could not "correlate" what he saw in the autopsy materials "with some elements" of a scenario in which Rian jerked his head back and hit his head on the wall. The depressed skull fracture would be unlikely to occur in a scenario in which the child was hit twice on the head with a closed fist, causing the baby's head to strike the wall.

II. Procedural background.

On March 10, 2011, a jury found Naredo not guilty of second degree murder as charged in count 1 but guilty of the lesser offense of involuntary manslaughter (Pen. Code, § 192, subd. (b)).[1] The jury also found him guilty of count 2, felony assault on a child causing death (§ 273ab), and of count 3, child abuse (§ 273a, subd. (a)). The jury found true an infliction of great bodily injury or death allegation under section 12022.95.

On May 9, 2011, the trial court sentenced Naredo, on count 2, to 25 years to life. The trial court imposed and stayed sentences of four years on count 1 and of 10 years on count 3 under section 654.

---

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

DISCUSSION

I. Admission of Naredo's statement to detectives, if error, was harmless.

Naredo contends that his statement was not voluntary, because it was coerced by promised benefits. We conclude that any error in admitting the statement was harmless.

A. *The interrogation.*

Detectives Ramirez and Marquez interrogated Naredo on two days, November 7 and 11, 2008. The November 7 interrogation began at 3:00 a.m.

At the outset of the interrogation, Detective Ramirez said he just wanted to talk to Naredo, and he wasn't rushing to judgment. When Naredo asked if he was going to get to go home, the detective answered, "I don't see why not." Naredo asked again if he would get to go home, and the detectives told him they were going to talk and "get this straightened out." The detectives said they were there to get to know Naredo, and they proceeded to ask Naredo about his background, family, and wife. When Naredo expressed concerned he wouldn't get to see his baby born, he was told not to worry about that.

The detectives emphasized the importance of telling the truth; they could explain an "accident" or a "bad choice" but not a lie. People make "mistakes" or maybe "something happened that you didn't mean to happen, then . . . that's fine too." "[W]e can explain that and . . . we can work with that." But the detective couldn't work with " '[n]othing happened' or '[t]his miracle happened.' " Naredo said he understood.

Naredo described what happened the day Rian died: Naredo, for example, had breakfast and went to the store and library. When Naredo asked, "what's going to happen once we're done here?", Detective Ramirez said he didn't know. Naredo asked if he was going to be detained "or something like that?" The detective answered, "At this point, no." Naredo asked if he was going to get to go home, and the detective told him they were trying to finish up as soon as they could.

Naredo then described how Rian was hurt. While in the kitchen, Naredo heard a " 'boom.' " The baby had hit his head on the wall and fallen to the tile floor. Detective Marquez told Naredo that Rian's skull was fractured. Then he told him Rian was dead.

Although the detective believed that Naredo loved his son, he didn't believe Rian died from hitting his head on the wall. Detective Ramirez said that babies Rian's age are fussy and hard to handle. Naredo said he wouldn't beat up a toddler, but then he said he threw Rian in the air and failed to catch him. That is how Rian first hit his head, and then he fell and hit his head again.

After a break, the detectives told Naredo they'd talked to the doctors and Naredo's story didn't explain Rian's injuries. Naredo said, "I did not kill my own kid." Saying he knew that, the detective repeated that there wasn't an explanation for all of Rian's injuries. When Naredo asked if they were saying he was lying, the detective said it just didn't match up. The detective repeated that he knew how hard it was to handle a baby—sometimes people lose it for a second. Naredo again denied hitting Rian. After praising Naredo for caring for Rian, the detective said, "Am I going to sit there and let somebody tell you . . . that you intentionally went out and did something to that kid? No." But if there was a mistake or an accident, "then . . . [I'll] say, '. . . this is what happened.' " "I'm sticking up for you." "Because . . . here's the thing. I'm here. I'm sticking up for you." And if the doctors were pointing their fingers at Naredo, then "it's up to me . . . [to] say, 'Hold on. You got it wrong. This is what happened. It wasn't supposed to be that way.' " " 'This is an accident. This was what really happened.' "

Detective Ramirez said he believed Naredo made a mistake, that he wasn't like a guy who gets into a car with a rifle looking for somebody to shoot. "There's a difference. . . . [N]ow, you got a whole bunch of people that are sitting there pointing and sitting there and putting you in a certain category, we need to stop that right now." He is not like a drive-by murderer. The detectives repeated that they understood how parents lose their head for a second. "[I]t can happen. . . . You think you're the first person to sit there?" "Now, does that mean they . . . spend the rest of their life in—in Solano stamping license plates? No. That means. . . we get them parenting classes. That means, they get, you know, maybe anger management classes. That means they get help. Okay? Maybe they drank too much. Maybe they do this and we—there's a lot of

different things." "People who make mistakes need help. They don't need to be stamping license plates in Solano for the next thirty-five, forty years."

After explaining that they had to report to the doctors and to their superiors, Detective Marquez said, "[T]his is what being a parent is all about. . . . This is not somebody who needs to go to jail. This is somebody that needs help. This is somebody that needs . . . assistance, like we all do. We can't do it ourselves. We can't do it alone." The detective told Naredo he could be helped by deciding if this was a mistake or preplanned, so that he didn't get lumped in with people who didn't care about their kids. "[A]nd so you made a mistake. Big fucking deal. That is what we're here to say. Big fucking deal. You're doing the right thing. Okay." Although the detective said he couldn't "bullshit" Naredo, because this was going to be a "rough time," he was trying to help him. The detective asked for his trust, but "[a]m I going to make your problems disappear? Fuck no." Although, "I can't help you on some problems—not right now at least—" down the road Naredo would thank him. "But I'm here—the only person that's going to . . . save you for yourself right now . . . ."

After the detective again suggested that Naredo made a mistake and lost his cool, Naredo admitted that Rian fell, and when he cried, Naredo slapped him. When Naredo slapped Rian, his head hit the wall. Naredo asked if there was anything he could do to see his baby being born, and Detective Marquez said, yes, and told Naredo he would be alright.

During a second interview, Naredo told the detectives he punched Rian's head twice. Near the end of the interrogation, when Naredo expressed distress at not seeing his baby born, Detective Ramirez said he couldn't promise him anything, but "nobody knows anything about what's going to happen tomorrow." "There's no guarantees." Naredo reminded the detective, "I told you I'll cooperate and do whatever you want. Your partner said that there could be programs, that there could be anger management, that there could be something." The detective told him, "It's not up to me." When Naredo asked if the detective was going to help him, the detective said he couldn't tell him that.

When the detectives told Naredo he was being charged with murder and that they had no control over the charge, Naredo replied, "I thought you did."

B. *Admission of the statement.*

An involuntary confession—one that is not free because the defendant's will was overborne—is inadmissible at trial under the due process guarantees of the United States and California Constitutions. (*Mincey v. Arizona* (1978) 437 U.S. 385, 398; *People v. Massie* (1998) 19 Cal.4th 550, 576; *People v. Smith* (2007) 40 Cal.4th 483, 501.) A confession is involuntary when elicited by a promise of some benefit or leniency, whether express or implied, and the wrongful inducement and the defendant's statement are causally linked. (*People v. Holloway* (2004) 33 Cal.4th 96, 115; *People v. Maury* (2003) 30 Cal.4th 342, 404-405; *Colorado v. Connelly* (1986) 479 U.S. 157, 164, fn. 2.) But mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by a promise of some benefit or leniency, does not render a subsequent confession involuntary. When the defendant, however, is given to understand that he or she might reasonably expect more lenient treatment at the hands of the police, prosecution, or the courts, in consideration of making a statement, even a truthful one, the inducement may render any ensuing statement by the defendant involuntary and, thus, inadmissible. (*Holloway*, at p. 115.) Although detectives may not lead a suspect to believe he might get the benefit of more lenient treatment if a statement is made, detectives may point out the benefit that flows naturally from a truthful and honest course of conduct. (*People v. Jimenez* (1978) 21 Cal.3d 595, 611-612, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17; see also *People v. Hill* (1967) 66 Cal.2d 536, 549.) There can be a fine line between permissibly urging a suspect to tell the truth by outlining the benefits that may flow from confessing and impermissibly making an implied promise of lenient treatment in exchange for a confession. (*Holloway*, at p. 117.)

The voluntariness of a suspect's statement is determined based on the totality of the circumstances. Those circumstances include " 'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity'

as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.' " (*People v. Williams* (1997) 16 Cal.4th 635, 660.) Questioning by the police may include exchanges of information, summaries of evidence, an outline of theories of events, confrontation with contradictory facts, debate, and even exaggerated statements implying that the police have more knowledge about a crime than they actually possess. (*People v. Holloway, supra*, 33 Cal.4th at p. 115; see also *People v. Jones* (1998) 17 Cal.4th 279, 299.) Only those "psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable" are inadmissible. (*People v. Ray* (1996) 13 Cal.4th 313, 340.)

"In order to introduce a defendant's statement into evidence, the People must prove by a preponderance of the evidence that the statement was voluntary. [Citation.] If a statement is found to be involuntary, the statement and other evidence derived from it are inadmissible for any purpose." (*People v. Vasila* (1995) 38 Cal.App.4th 865, 873.) We accept "the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained." (*People v. Smith, supra*, 40 Cal.4th at p. 502.)

The detectives here did not engage in coercive tactics by suggesting that sometimes people make "mistakes" and "lose it", and "accidents" happen. This was nothing more than suggesting a theory of events, which is permissible. (*People v. Holloway, supra,* 33 Cal.4th at p. 115.) Also, detectives did suggest that people who make mistakes don't need to spend the rest of their lives in prison "stamping license plates" and that parents who lose their head for a second get parenting or anger management classes. But they did not tell Naredo he would receive such services in lieu of prison if he gave a statement implicating himself in Rian's death.

But even if a defendant's confession was involuntary, its admission will be found harmless if there is no reasonable probability its admission contributed to the verdict. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 994, citing *Chapman v. California*

(1967) 386 U.S. 18, 24; *Arizona v. Fulminante* (1991) 499 U.S. 279, 309.) " 'To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citation.] Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is 'whether the . . . verdict actually rendered in *this* trial was surely unattributable to the error.' [Citation.]" (*People v. Neal* (2003) 31 Cal.4th 63, 86.)

Any error in admitting Naredo's statement here to police was harmless. The injuries to Rian occurred while Jeannie and Naredo were home alone with him. Moreover, they occurred while Jeannie was in the shower, and Naredo was alone in the bedroom with Rian. In the shower, Jeannie heard three or four thumps. She asked Naredo, who was holding Rian, if he had hit him. When Jeannie finally noticed something was wrong with Rian and asked what happened, Naredo didn't answer her.

When Rian's treating physician asked what happened, Naredo said Rian arched his back and hit his head against the wall. All of the doctors who testified—including Rian's treating physicians, the coroner, and the defense expert witness—agreed that Rian died from blunt force trauma to the head resulting in brain death. They also agreed it was unlikely all of his injuries could have resulted from hitting his head against the wall or from a short fall from a bed.

Therefore, in the absence of Naredo's confession, the evidence was that Rian sustained a depressed skull fracture while alone with Naredo. That fracture resulted from a blunt force trauma of some force. According to the treating physician and coroner, that injury could not have resulted from Rian hitting his head against the wall. The inevitable conclusion from this evidence was Naredo inflicted the injury. Moreover, the jury, even with Naredo's confession before them, rejected a second degree murder verdict, finding Naredo guilty instead of involuntary manslaughter, felony assault on a child causing great bodily injury, and child abuse. It is not reasonably probable the statement contributed to the verdict.

II. The trial court did not err by denying challenges for cause.

Naredo next contends that the trial court improperly denied his challenges for cause to Prospective Juror No. 11 and Juror No. 8.

A. *Additional facts: voir dire.*

1. Juror No. 11.

Juror No. 11 said that if you're guilty, "you are guilty." And although it was up to the prosecution to state the evidence, if the evidence "is there," then there shouldn't be a trial. If the prosecution has the evidence already, "then why go through a trial?" When the trial court advised that people can see things differently, the juror said she understood that, but "that's my personal belief." She had an infant and wasn't getting much sleep, and therefore she didn't think she would be "a hundred percent here."

Defense counsel challenged for cause Juror No. 11. Before deciding the challenge, the trial court questioned the juror further. When asked if she couldn't be fair because of the nature of the charges, the juror answered "[n]ot necessarily. [¶] I just feel that a lot of times I guess cases shouldn't have, you know, gone to trial when there is significant evidence that the prosecution has already." When the trial court explained that somebody would have to decide "you are not having a trial because you are guilty," the juror answered that if the case was like what happened in Arizona, "we all know he did it. There [are] witnesses who saw him . . . do what he did, and yet he's getting a trial[.]" When asked if the juror thought this case fell in that category, she answered, "I don't know because I haven't heard the evidence." She said she could keep an open mind. When the trial court further explained that even though there might be no question a defendant shot someone, there could be a question what was his state of mind and what was the precise crime he committed. The juror said she understood. The trial court denied the challenge to cause as to Juror No. 11, and the defense used its first peremptory to excuse the juror.

2. Juror No. 8.

By the time Juror No. 8 was placed on the panel, the defense had already exhausted its peremptory challenges. During voir dire, the juror said he had an eight-

year-old grandson, and it might cause a "little bit" of a problem in judging this case. But when asked if it would cause him to be unfair, the juror answered, "No." The juror later said that he felt sad for the victim, but his feelings for the child would not affect how he looks at the evidence, "but it will be there." When his daughter got married, "that was my wors[t] nightmare." When defense counsel asked if there was anything about his experiences or feelings that would cause him to vote guilty despite the evidence, the juror answered, "It will be kind of hard not to." He added, "But I would respond." When asked if it would "be so hard that you think you might not be able to do it," the juror said, "I probably would be, too."

Juror No. 8 later told the trial court it would be "kind of hard to keep an open mind." The court asked, "But will you attempt to do it? And you are assuming that certain evidence is going to come in. If that evidence comes in, you can act on it and do what you think is appropriate when it comes time to rendering a verdict, if it comes in. [¶] You understand that?" The juror said he understood. When the prosecutor asked the juror if he would be fair and listen to all of the evidence before making a decision, the juror said, "That's correct."

The defense made a for-cause challenge to Juror No. 8, but the trial court found that the juror was "suitable to sit after the court's last question which rehabilitated the juror, if there was anything prior to that which was cause for concern."

B. *An incompetent juror was not forced on Naredo.*

Because the trial court refused to excuse Prospective Juror No. 11, Naredo used a peremptory challenge against her. By the time Juror No. 8 was on the panel, Naredo had exhausted his challenges. Naredo therefore now contends that by refusing to excuse Prospective Juror No. 11 and Juror No. 8 for cause, an incompetent juror (Juror No. 8) was forced on him. We disagree.

Reversal under circumstances like those here is proper only if a defendant exhausts all of his or her peremptory challenges *and* an incompetent juror is forced on the defendant. (*People v. Yeoman* (2003) 31 Cal.4th 93, 114; but see *People v. Bittaker* (1989) 48 Cal.3d 1046; see also *People v. Baldwin* (2010) 189 Cal.App.4th 991 [noting

inconsistency between *Yeoman* and *Bittaker*].) " 'Either party may challenge an individual juror for "an actual bias." [Citation.] "Actual bias" in this context is defined as "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 *People v. Barnwell* (2007) 41 Cal.4th 1038, 1051 ["A juror who is actually biased is unable to perform the duty to fairly deliberate and thus is subject to discharge].)

Whether to remove a prospective juror for cause rests within the trial court's wide discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146-1147; *People v. Waidla* (2000) 22 Cal.4th 690, 715.) Where a juror gives conflicting testimony as to his or her capacity for impartiality, the determination of the trial court on substantial evidence is binding on the appellate court. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 488; *People v. Mendoza* (2000) 24 Cal.4th 130, 169; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035-1036; *People v. Kaurish* (1990) 52 Cal.3d 648, 675.)

Neither Juror No. 8 nor Prospective Juror No. 11, who did not sit on the jury, were incompetent. Juror No. 11's fatigue, due to caring for an infant, was not a ground, in the trial court's discretion, to excuse her for cause. There is no other indication in the record that the juror would be inattentive or unable to physically perform the duties required of a juror. The other ground for challenging the juror is equally unavailing. Citing the shooting in Arizona of, presumably, Congresswoman Gabrielle Giffords, Juror No. 11 initially expressed doubt about the need for a trial when there is clear evidence of the defendant's guilt. The trial court explained to the juror that even where there might be no doubt the defendant committed the act, there could be a question as to his state of mind and what crime he committed. The juror said she understood. Similarly, although Juror No. 8 expressed difficulty with the case because he had a young grandson, he also told the trial court and prosecutor he could be fair and keep an open mind. Where, as here, the jurors gave conflicting testimony, the trial court's determination of impartiality is

binding on us. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 488.) The trial court did not err by denying the challenges for cause.

III. Autopsy photographs.

Over Naredo's objection under Evidence Code section 352, the trial court admitted autopsy photographs of Rian with his skin pulled back from his scalp. (People's Exhibits. 24, 25, 26.) Naredo contends that the photographs were inadmissible, in that they were cumulative and that their admission violated his federal due process rights.

"The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory." (*People v. Crittenden* (1994) 9 Cal.4th 83, 133-134; see also *People v. Coleman* (1988) 46 Cal.3d 749, 776.) The court's exercise of its discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. (*Crittenden,* at p. 134; *People v. Lewis* (2009) 46 Cal.4th 1255, 1282.) If the photographs, though "gruesome," would clarify a medical examiner's testimony, then they may be admitted in the court's discretion. (*Coleman*, at p. 776.) Autopsy photographs may therefore be admitted as pertinent because they show the " 'nature and placement of the fatal wounds' " or support the prosecution's theory of how the murders were committed or illustrate the testimony of the coroner and percipient witnesses. (*People v. Loker* (2008) 44 Cal.4th 691, 705.)

Though certainly "gruesome" and perhaps especially disturbing because of Rian's young age,[2] we cannot conclude that the trial court abused its discretion by admitting the autopsy photographs. The trial court found that the photographs were admissible if they went to a "verified part of the doctor's theory" and that they could be used to rebut any suggestion that a fall caused Rian's injuries. Although the doctors who treated Rian had testified that his injuries were inconsistent with a mere fall, the autopsy photographs were relevant to disproving that theory.

---

[2] The court told counsel, "There is no question these are disturbing photographs. I have seen those many times in my life before, never gotten accustom[ed] to them." Immediately before they were shown to the jury, the court told the jury to "brace" itself.

Nor were they simply cumulative of the doctors' testimony. Photographs of a murder victim need not be excluded as cumulative "simply because testimony also has been introduced to prove the facts that the photographs are intended to establish." (*People v. Crittenden*, *supra*, 9 Cal.4th at pp. 134-135.) Although there was no dispute that Rian died as a result of blunt force trauma to the head resulting in a depressed skull fracture, there was a dispute as to what could cause such a fracture, as well as the other injuries to Rian's head. The defense theory was Naredo threw Rian into the air and failed to catch him. The prosecution theory was Naredo repeatedly punched Rian. The autopsy photographs tended to show the extent of the injuries. Photographs 24 and 25, for example, showed the extent of the bleeding which was otherwise not evident. Photograph 24 also showed that part of Rian's bone had detached. Photograph 26 showed Rian's swollen and red brain. It also showed that a few pieces of his brain had slightly detached. The photographs therefore illustrated the extensive damage to Rian's brain and skull.

Not only were the photographs relevant and, in the trial court's discretion, admissible under Evidence Code section 352, their admission did not violate Naredo's federal constitutional rights. "A defendant has the general right to offer a defense through the testimony of his or her witnesses [citation], but a state court's application of ordinary rules of evidence—including the rule stated in Evidence Code section 352—generally does not infringe upon this right [citations]." (*People v. Cornwell* (2005) 37 Cal.4th 50, 82, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Although the United States Supreme Court, in *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303, "determined that the combination of state rules resulting in the exclusion of crucial defense evidence constituted a denial of due process under the unusual circumstances of the case before it, it did not question 'the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures.' [Citation.]" (*Cornwell*, at p. 82; see also *People v. Ayala* (2000) 23 Cal.4th 225, 301.)

IV. The trial court did not improperly respond to the jury's question.

When the jury, during deliberations, asked a question, the trial court simply directed them back to the instructions. We reject Naredo's contention that the court erred.

A trial court must instruct the jury, 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.) But where "the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

Here, the jury was instructed with CALCRIM No. 820: "The defendant is charged in Count 2 with killing a child under the age of eight years by assaulting the child with force likely to produce great bodily injury in violation of Penal Code section 273[ab]. To prove that the defendant is guilty of this crime[,] the People must prove that: [¶] [1.] The defendant had care or custody of [a] child who was under the age of eight[;] [¶] [2.] The defendant did an act that by its nature would directly and probably result in the application of force to the child[;] [¶] [3.] The defendant did that act willfully[;] [¶] [4.] The force used was likely to produce great bodily injury[;] [¶] [5.] When the defendant acted, he was aware of facts that would lead a reasonable person to realize [that] his act by its nature would directly and probably result in great bodily injury to the child[;] [¶] [6.] When the defendant acted, he had the present ability to apply force likely to produce great bodily injury to the child[;] [¶] and [7.] *The defendant's act caused the child's death*. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. It does not require that he or she intend to break the law, hurt someone else, or gain some advantage." (Italics added.)

The jury was further instructed: "An act causes death if: [1.] The death was the natural and probable consequence of the act; [2.] The act was a direct and substantial

factor in causing the death; and, [3.] The death would not have happened without the act. [¶] A natural and probable consequence is one that a reasonable person should know is likely to happen if nothing unusual intervenes. [¶] In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. A substantial factor is more than [a] trivial or remote factor[.] However[,] it does not need to be the only factor that caused the death."

During deliberations, the jury asked, "Would the judge give us a simplified explanation of count 2, see [No.] 7 specifically. We have a few people on the fence." Discussing the question with counsel, the trial court said it didn't want to elaborate because "I'm doing something very dangerous with the instruction, if I go any further. It speaks for itself." Defense counsel objected. The court, however, told the jury: "Here's what's frustrating. I cannot ask you a series of questions as to where your head is at, because then I'm already engaged in becoming a member of the jury. And I can't be the 13th juror while you are deliberating on this case. All I can do is look at number seven and try to decipher what your question specifically is asking. [¶] If it's asking whether the word 'act' is singular or plural, you can read the balance of the instruction and it may or may not assist you, everything that appears after that by way of language of the instruction. [¶] That's the best I can do."

The trial court did not abuse its discretion by referring the jury back to the instructions. The instructions were full and complete. They informed the jury that Naredo's act had to have caused Rian's death, and they explained what is an "act causing death." As the court said, explaining "act" in any further detail was risky.

V. Jury instructions.

The trial court failed to instruct the jury with CALCRIM No. 301,[3] regarding

[3] CALCRIM No. 301 provides: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

witness testimony and No. 302,[4] regarding how jurors are to weigh conflicting testimony. The People concede the error, but contend it was harmless. We agree.

Where conflicting evidence has been presented at trial, the trial court has a sua sponte duty to instruct the jury with, for example, CALCRIM Nos. 301 and 302. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1261-1262 [trial court's failure to instruct jury with CALJIC No. 2.22, the predecessor to CALCRIM No. 302, was error, albeit harmless, in light of conflicting evidence presented at trial]; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885; accord, *People v. Cleveland* (2004) 32 Cal.4th 704, 751.) The failure to give the instruction, however, can be harmless error. (*Virgil*, at p. 1262; *People v. Carpenter* (1997) 15 Cal.4th 312, 393.)

The gist of CALCRIM Nos. 301 and 302 was in other instructions which were given to the jury. The jury was instructed with, for example, CALCRIM No. 220 (in deciding whether the People proved their case beyond a reasonable doubt the jury "must impartially compare and consider all the evidence that was received throughout the entire trial"); CALCRIM No. 223 ("Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge. . . . You must decide whether a fact in issue has been proved based on all the evidence"); and CALCRIM No. 226 (the jury must judge the witnesses' credibility, considering factors such as, "How reasonable is the testimony when you consider all the other evidence in the case?"); CALCRIM No. 332 (how to evaluate an expert witness's testimony).

---

[4] CALCRIM No. 302 provides: "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

The prosecutor also did not argue in his closing argument that more witnesses supported conviction than the number who opposed it. Rather, the prosecutor told the jury it had to determine from "all that evidence" "what is true" and to "look at the evidence in total. Don't pick one piece out . . . ." Because it is not reasonably probable that the jury would have reached a different result had CALCRIM Nos. 301 and 302 been given, the trial court's error in failing to give the instruction is harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 831.)

VI. Cumulative error.

Nor does the cumulative effect of the purported errors require reversal. As we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial,' " we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236; see also *People v. Butler* (2009) 46 Cal.4th 847, 885.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.