IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **AMY SAM HO,** Defendant and Appellant.	Case No. B279939

Los Angeles County Superior Court, Case No. BA395107
The Honorable George G. Lomeli, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

By information, the Los Angeles County District Attorney charged appellant with one count of murder (Pen. Code,[1] §187, subd. (a); count 1) and one count of elder abuse (§ 268, subd. (b)(1); count 2). (1CT 244-245.) Appellant pled not guilty. (1CT 248.) A jury found appellant guilty as charged. (4CT 929-930.) Appellant was sentenced to the term of 15 years to life for the second-degree murder. Eight years were imposed for count 2, but stayed pursuant to section 654. Appellant was given credit for 162 actual days in custody. (5CT 1324-1330.) A timely notice of appeal was filed. (5CT 1346.)

STATEMENT OF FACTS

A. Prosecution Evidence

1. Appellant brings her sister (Cora) to the emergency room after rigor mortis had already set in and the hospital staff observes extensive bed sores which had not been treated, which caused sepsis and death

Around 9:00 a.m. on October 10, 2011, appellant, who appeared anxious, approached the registration desk at the emergency room of Beverly Hospital in Montebello, stating that her sister (Cora) needed food and water and she needed help getting her sister out of the car. (7RT 993-995.) When emergency room nurse Christopher Cardenas went to appellant's car to get Cora he saw she was "really crumpled" and in "like, fetal position, and [] very stiff." (6RT 624, 627-628.) Cora had no

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

heart activity and no pulse and it appeared there was no blood flow as it was very difficult to get an IV in her. (6RT 633-634, 636-637; 10RT 1840.)

Dr. Raul Lopez attended to Cora, but found she already appeared to be dead as rigor mortis had already set in and all her limbs were stiff. Despite life-saving measures, Cora had no pulse, no heart activity, no heart rhythm, no breathing, and was completely non-responsive. After all life-saving measures failed, Dr. Lopez pronounced her dead. (10RT 1838-1842, 1844.)

After Cora was pronounced dead, the staff unwrapped fresh bandages which covered areas of Cora's body, although appellant resisted having the bandages removed and became upset when they were removed. Underneath the bandages, nurse Cardenas saw gangrene on Cora's hips, hands, and all over her body. (6RT 637-639; 10RT 1854.)

Dr. Lopez found memorable: (1) the rotting smell and the extent of the malnourishment were remarkable (10RT 1845); (2) there were pressure sores extensively across Cora's thighs, hips, abdomen, and throughout her vaginal area and buttocks (10RT 1847-1848); and (3) the wounds were so extensive that her bone was exposed on her hip and gangrene had set in (10RT 1848). Dr. Lopez had never seen anyone so neglected and had no doubt she had suffered overwhelming infection (sepsis), which led to the collapse of all of her organs and ultimately caused cardiac arrest. (10RT 1849-1850.) Dr. Lopez concluded the wounds had developed over a period of time and someone had neglected to get treatment for these wounds, resulting in her death. (10RT 1850-1851.)

2. Appellant tells hospital staff that the sores were a result of Cora vomiting for several days, but this explanation does not square a doctor's observations of Cora's wounds

When Dr. Lopez asked appellant what had happened, she said Cora had been vomiting for several days, but did not explain the pressure sores. (10RT 1853.) Dr. Lopez, however, was medically certain that he saw gangrene based on visual diagnosis and such gangrene would have taken weeks to develop. He also noted Cora had temporal wasting in her forehead and atrophy to her muscles. (10RT 1863, 1867-1868.)

Appellant told Cardenas she had brought Cora to the hospital to feed her, her sister was still alive, and that she was going to bring her home. Cardenas believed he was mandated to report elder abuse. He noted that Cora had no weight and was nothing more than skin and bone and had a diaper filled with excrement. (6RT 645-646.) He asked the secretary to call the police. (6RT 648.)

3. The police arrive at the hospital and briefly speak to appellant as part of that preliminary investigation into a suspicious death

At 9:30 a.m., Montebello Police Officer Teri Connors arrived at the hospital and spoke with Cardenas and Dr. Lopez before speaking with appellant. (9RT 1518-1521.) Appellant said she had been Cora's primary caretaker for two years, Cora had not eaten, that she had been giving Cora a natural antibiotic, Colloidal Silver, her sister had been walking up until two days earlier, and she believed the doctors were feeding her sister and she could take her sister home. (9RT 1522-1523, 1527.)

Appellant and her husband (Tim Ho) were transported to the police station for interviews and appellant's residence was

secured while a search warrant was obtained. (7RT 1009, 1011-1012; 9RT 1526.) At 1:20 p.m., Sheriff's Detectives Robert Kenney and Joe Espino went to the hospital to investigate. Sulcer told them appellant had said she was Cora's sole caretaker, Cora had been in and out of various convalescent homes most of her life and had spent the last two years in appellant's home. Sulcer had heard appellant tell the hospital staff not to remove the bandages that covered Cora's wounds because they had taken a long time to put on. Appellant had also asked Sulcer repeatedly why they were concerned with Cora's skin. (9RT 1552; 11RT 2138-2139, 2141.) Detective Espino noted Cora's body smelled like decomposition. (11RT 2140.)

4. Appellant's October 10, 2011 police interview

After appellant's house was secured, the detectives interviewed her.[2] (11RT 2141.) During the interview, appellant stated her sister's eyes could still blink when brought to the hospital (3CT 567-568), she was a certified financial planner and she gave up her career to care for Cora (3CT 570), she was Cora's primary caretaker, a full time job (3CT 578), and Cora had been under her care for three years—since Cora left Villa Oak Convalescent Hospital (3CT 583).

Appellant explained how she ended up caring for her sister: (1) Cora had been at Villa Oak for several months, but appellant pulled her out of the hospital so she could gain enough weight for macular eye surgery (3CT 586) and, as Cora had been withdrawn

[2] The interview was recorded and the recording (Peo. Exh. No. 8) was played for the jury at trial. (11RT 2145-2152.) A transcript of the recording that was given to the jury at trial (Peo. Exh. No. 8A) is part of the appellate record. (3CT 564d.)

from the hospital for more than seven days, she lost her bed (3CT 590); (2) Cora had been at the Baldwin Gardens facility in Temple City, but appellant removed Cora because they had changed Cora's diet without telling appellant and Cora started gaining weight (3CT 604-605), they fed Cora junk food and pies (3CT 605), and the staff placed her in a room next to a patient who watched Spanish-language programs (3CT 607); and (3) prior to that, Cora had been at Country Villa in Monrovia for about a year, but appellant took Cora out of Country Villa because Cora was crying every day and there was no choice. (3CT 614.)

Appellant said: (1) the reason Cora had so many skin problems was because she had been regurgitating her food (3CT 619); (2) Cora could walk when she came to live with appellant, but Cora could not climb the stairs (3CT 620-621); (3) when asked where Cora slept in the house, appellant said they moved her from bed to bed and from room to room (3CT 627-628, 630-631); (4) Cora was better off sleeping in a reclining chair (3CT 627); (5) Cora did not die at home and, instead, died at the hospital (3CT 637); and (6) until two days earlier, Cora would stand in the shower, but lately appellant had Cora lie down in the shower stall (3CT 667-669). With regard to what had happened that morning, appellant said she gave Cora extracted juice, but Cora was not swallowing and the juice was coming out of her nose and her right ear (3CT 676) and appellant consequently decided to take Cora to the emergency room (3CT 677).

With regard to Cora's skin, appellant said she applied Colloidal Silver to Cora because it worked much better than the doctor's prescription (3CT 691-692), the skin problem had been getting better and she did not even need to bring Cora to a doctor

for it anymore (3CT 694), Cora did not have bedsores, but her skin was irritated by her vomiting and saliva (3CT 696-697), and there was no gangrene (3CT 698-699). Appellant agreed Cora had lost 20 or 30 pounds over the last three years, but was not concerned because Cora was developmentally disabled and the loss was gradual. (3CT 726-729.) Appellant had thought about taking Cora to a doctor for her sores, but did not because it was Columbus Day and the doctor's office would be closed. (3CT 735.)

Appellant said, "I cannot afford for Cora to die at my home, they might jail me!" (3CT 742.) She said: "People might think I'm not taking care of my sister" and that, when she brought Cora into the hospital, Cora was still blinking her eyes and had asked if Cora had "any chance." (3CT 743.)

Detective Espino found appellant's assertions that Cora was still alive when brought to the hospital inconsistent with the evidence rigor mortis had already set. Rigor mortis generally sets several hours after death. (11RT 2158.) The detective also found odd appellant's insistence Cora did not have bedsores and only had a skin condition, blemishes, or a tearing of the skin. It contradicted her earlier statements that there was a bedsore, but a small one. (11RT 2160.) It appeared to be inconsistent with the assertion appellant only wanted to take her sister to the hospital for treatment for the swallowing problem, but not for the bedsores. (11RT 2161.) It was also a red flag to an investigator that appellant did not want the bandages removed by the doctor. (11RT 2162.)

5. The initial search of Appellant's home

About 7:00 p.m., the detectives went to appellant's home to conduct a search pursuant to a warrant. (9RT 1554-1555.) The detectives found a garage that was not very orderly, a kitchen

filled with dirty dishes, a layer of dust on nearly everything in the house, and bedrooms piled with clothing and other things such as gloves, vitamin supplements, and adult diapers. (9RT 1558-1559; 11RT 2118-2119.) There were several levels to the house and it would require traversing a flight and a half of stairs to reach the master bedroom and bathroom. (11RT 2119-2120.)

6. The autopsy

On October 13, 2011, Deputy Medical Examiner Yulai Wang performed an autopsy on Cora's body and determined her weight was sixty-six pounds, her height was fifty-one inches, and the cause of death was sepsis caused by decubitus ulcers (pressure sores) and pneumonia due to cerebral malfunction and malnutrition. The death was classified as a homicide. (8RT 1229- 1230.) The autopsy did not reveal the presence of any heart disease. (8RT 1236.)

Sepsis is the bacterial infection of the bloodstream involving the whole body. Pressure sores can lead to sepsis because, when the ulcers are infected, the bacteria goes into the bloodstream. That infection impairs the organs, making them fail. This includes the brain, the liver, the heart, the lungs, and the kidneys. (8RT 1231-1232.) Pneumonia could affect respiratory activity, meaning the person would have difficulty breathing. Malnutrition would slow the healing process for the ulcers. (8RT 1233.)

Dr. Wang found Cora was severely malnourished and infected with multiple ulcers on her chest, abdomen, legs, feet, back, buttocks, thighs, anus, and vaginal areas that ranged from Stage I to Stage IV, the stage when the flesh had rotted away all the way to the bone. (8RT 1237, 1239-1240.) The pressure sore on her knee was stage II. The ulcers on the lower back, buttocks,

and upper thighs were stage III or stage IV ulcers. The ulcers on the right buttock exposed bone (stage IV). (8RT 1242-1243.)

Based on the condition of the ulcers, Dr. Wang found it unlikely that she would have been walking two days prior to her death. If someone were up and walking, they would not develop pressure sores. If Cora had been moving around, she would not have developed those ulcers. The severity of the pressure sores on the buttocks and thighs indicated they had developed for several months. (8RT 1234-1235, 1245-1246.)

7. The canine search for the scent of decaying flesh

In order to determine where Cora slept, on October 26, 2011, Coroner's Investigator Karina Peck brought her canine ("Indiana Bones") to appellant's home to search for the scent of decaying flesh. (9RT 1617; 11RT 2120.) Peck found the house cluttered. There were large collections of items piled high and skinny pathways to get around everything. Some items had to be moved to get around the house. (9RT 1626.) The canine alerted to a reclined chair, a suitcase, and a pot, but the alert turned negative when the suitcase and the pot were removed from the area. (9RT 1627, 1632-1633.) The canine alerted strongly to the shower pan in a bathroom attached to the master bedroom. (9RT 1632-1633, 1638; 11RT 2123.)

8. Appellant's second police interview

On October 26, 2011, after the canine search of her home, appellant was interviewed a second time.[3] (11RT 2168.) During

[3] Although the Reporter's Transcript indicates People's Exhibit 8 was played after Doctor Fullerton's testimony (12RT 2789), that appears to be a clerical error as People's Exhibit 8 (continued…)

the interview, appellant said the black pad had been next to the reclining chair, but Detective Espino pointed out there was no room next to the chair to open up the pad. (3CT 766.) Later in the interview, appellant said Cora did not sleep in the shower stall, but on a mattress pad on the floor of the bathroom. (3CT 816.)

Appellant stated that, on the morning she brought Cora to the hospital, she showered Cora by having her lie down in the shower. (3CT 772.) The shower took about an hour and, after the shower, appellant applied colloidal silver to the sores. Appellant believed Cora was awake because they made eye contact although Cora did not make any noises. (3CT 785-788.) Appellant fed Cora some Chinese soup, but Cora regurgitated it. (3CT 793.) Appellant then got Cora dressed to take her to emergency room. (3CT 791.)

When asked when she first noticed that the sores were severe, appellant said, "That did not happen overnight." (3CT 801.) Appellant said that Cora got many sores and that the open sores developed while Cora stayed with appellant. (3CT 802-803.) Appellant helped Cora shower everyday. Appellant thought the sores could have developed over 7 to 10 days, but appellant did not believe the sores were serious enough to warrant medical attention. (3CT 804-805, 808.) Appellant explained that in the past Cora had sores as severe and appellant had cured them. (3CT 808-809.) Appellant said she could not place Cora in a

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was played earlier and People's Exhibits 26 and 26A were introduced into evidence the prior day and the prosecutor indicated that the tape would be set up to play the next day (11RT 2168-2169).

convalescent home because many of the homes would not give Cora her special diet. (3CT 821.)

9. The expert testimony of Dr. Diana Homeier

Dr. Diana Homeier, a physician specializing in geriatric medicine, reviewed Cora's medical records, the autopsy report, and the supplemental Sheriff's report. (10RT 1894-1897.) Dr. Homeier concluded there was definitely neglect in the care of Cora because: (1) both the number and severity of the pressure sores; (2) the malnutrition and weight loss; (3) the failure to seek medical care; (4) the delay in seeking medical care; (5) the isolation of Cora; and (6) the reports made by providers who recognized the neglect as soon as Cora came through the emergency room doors. (10RT 1897-1898.)

Dr. Homeier found Cora had multiple pressure sores ranging from Stage I through Stage IV, including a very large Stage IV pressure wound on her bottom. These wounds did not appear to have received medical attention or adequate care. (10RT 1898.) In particular, Dr. Homeier viewed photographs of Cora's right hip, perineal area, vagina, and anus which revealed a contiguous Stage IV pressure ulcer. With regard to Cora's right hip, there was bone visible in the right hip wound and fibrous tissue around the bone. There was also a lot of breakdown of skin and tissue visible throughout the perineal area, the vagina, and the anus. (10RT 1900-1901.) Dr. Homeier identified Stage II pressure sores on Cora's left lower leg, which included skin breakdown, and on her left elbow area and right armpit, on her right shoulder, and her right lower leg. (10RT 1901-1902.)

Dr. Homeier explained a pressure ulcer is a breakdown in the skin from several forces, mostly pressure, but also friction between a patient and sheet, a shearing force where a patient is

moved from one position to another, moisture, particularly in the area of the buttocks or the perineal area with patients who cannot control their bowels or their bladder and wear a diaper, and immobility and positioning. (10RT 1903-1904.)

With a Stage I pressure ulcer, there is not yet a break in the skin. With a Stage II pressure ulcer, there is a breakdown in the skin sort of like a blister that pops. With a Stage III pressure ulcer, the ulcer goes all the way through the skin and some of the subcutaneous tissue or fat is visible, but not muscle or bone. With a Stage IV pressure ulcer, the ulcer has gone all the way through the skin and the subcutaneous tissue and into the muscle or bone. This is the deepest pressure ulcer. (10RT 1905-1906.) The length of time it would take for a pressure ulcer to go from a Stage I to a Stage V depends on several factors, including the patient, the level of moisture present, the ability of the patient to move themselves at all, the patient's nutritional status, and the type of care they are receiving. It may take weeks or months for a pressure ulcer to progress to a Stage IV level. (10RT 1907-1908.)

In Dr. Homeier's opinion, colloidal silver is not an appropriate treatment for relieving or treating pressure sores in this day and age. There are many ways to treat pressure sores and the most important treatment is to relieve the pressure by turning the patient or putting her on a special mattress. There are also medications and sometimes the dead tissue in the wound needs to be cleaned out with surgery. There are silver-based dressings that can be used, but not colloidal silver. (10RT 1909.)

Dr. Homeier did not believe Cora was walking two days prior to her death because the wound to Cora's thigh was extensive and went to the bone and some of the muscle had been ulcerated

away and it would be difficult to move her legs and hips without muscle present. Also, Cora had contractures where muscles shorten around a joint making it very difficult to walk. (10RT 1910.)

Based on her training and experience, Dr. Homeier opined a reasonable caregiver would have sought treatment at a much earlier stage. Even Stage IV pressure sores can be treated successfully with proper care and surgical removal of dead tissue, antibiotics for infection, proper turning, and dressings. In her opinion, the severity of these wounds indicated neglect. (10RT 1911.)

Dr. Homeier noted Cora was malnourished and a 20-pound weight loss for someone of her weight was highly significant. Dr. Homeier also found a review of Cora's medical records indicated no medical visits between November 2010 and October 2011 when she was brought into emergency. (10RT 1912, 1914.)

Dr. Homeier opined the pressures sores had been there for, at a minimum, weeks or potentially months and that there was a delay in seeking care for the wounds. She also noted appellant told the emergency room physician, Cora had not been eating or walking for two days and those two days may have made a difference. Dr. Homeier also noted that Cora had previously received medical care for pressure sores in 2007. (10RT 1915-1916.) Dr. Homeier concluded a reasonable caregiver, having familiarity with seeing a pressure wound and its treatment, would seek treatment for any further signs of pressure sores. (10RT 1918.)

Dr. Homeier believed Cora was isolated from the Regional Center and others who might be able to help her or recognize what was going on. (10RT 1918-1919.) She noted physicians do

not always recognize neglect, but in this case the physicians, the nurses, and the social worker at the hospital all recognized the neglect immediately. Dr. Homeier concluded the neglect caused Cora's death because she had pressure sores that had become infected. (10RT 1919.)

10. Additional evidence

Police detectives measured the distance between appellant's home and the Beverly Hospital and determined it was 1.18 miles and would take about three minutes to reach the emergency room. (11RT 2126.) There was no evidence in Cora's medical records about a terminal condition or cancer. (10RT 1936.)

11. Cora's medical history from 2003 to 2009

a. Dr. David Voron's testimony

Cora first became a patient of dermatologist, Dr. David Voron, in March 2003. Cora was mentally disabled and non-verbal, but could walk on her own. Appellant brought Cora to her appointments. (8RT 1203-1204.) On Cora's first visit in 2003, Dr. Voron treated her for a common skin growth called dermatrofibroma. (8RT 1205.) Thereafter, he treated her for patchy inflamed areas and for common benign growths. (8RT 1206-1207.) In 2007, Dr. Voron treated Coron for a common skin eruption with dry skin. The last time he saw her was December 27, 2007. (8RT 1208.) Dr. Voron never treated Cora for any pressure sores. (8RT 1209.) At one point, Dr. Voron advised appellant not to apply colloidal silver to Cora's skin. It would not be appropriate to use it to treat pressure sores. (8RT 1211-1212.)

b. Dr. Robert Wang's testimony

Dr. Robert Wang first saw Cora in April 2006 and treated her for minor skin problems such as a follicle infection and perhaps fungus on the feet and nails. He did not treat her for any bed or pressure sores. (10RT 1805-1807.) He prescribed Silvadene and Centany creams to treat skin breakage in the buttock area. (10RT 1808-1809.) Dr. Wang never saw Cora in a home environment and would have no way of knowing if Cora was walking at home. (10RT 1811.) Dr. Wang does not recommend his patients use colloidal silver and would tell them to stop using it if they said that they were using it. (10RT 1813, 1815.)

c. Dr. Jeanette Merkel's testimony

Psychologist Jeanette Merkel evaluated Cora on December 4, 2006, while she was residing at the Glenridge Center. (10RT 1878.) Dr. Merkel determined Cora's mental age was 18 months, that Cora's IQ measured at 9, meaning she was in the profound range of mental retardation, she was operating at a movement level of 14 to 18 months, that she could walk, but not run, and she could perhaps hold a spoon and feed herself or a crayon or pencil. (10RT 1880-1883.) Dr. Merkel found Cora was dependent on help for daily tasks such as dressing, hygiene, bathing, and toileting. Cora wore diapers. (10RT 1886-1887.)

d. Dr. Gu's testimony

In April 2007, Dr. David Gu, an internal medicine doctor, treated patients at the Sunbridge Facility, which later became known as the Baldwin Gardens. His notes for Cora indicated pressure sores, mental challenges, and that she was underweight. On April 4, 2007, Cora weighed 86 pounds and, on May 30, 2007,

she weighed 92 pounds. Dr. Gu ordered antibiotic ointments for treatment of Cora's stage III ulcer wounds. (9RT 1564, 1566-1568.)

e. Dr. Tu's testimony

Cora became a patient of Dr. Gene Tu on May 13, 2009. She weighed 87 pounds and she walked with her sister's assistance. (9RT 1531-1533.) On June 15, 2009, she weighed 87 pounds, had responses to stimuli, and was treated for a urinary tract infection. (9RT 1535.) On June 29, 2009, Cora again weighed 87 pounds. On October 22, 2010, Cora weighed 85 pounds. (9RT 1536.) At this visit, Dr. Tu signed a document appellant brought in that Dr. Tu was told had been prepared by the last nursing home regarding Cora's diet. Cora had a pureed diet because she had no teeth. (9RT 1537-1538, 1548-1549.) Dr. Tu never discussed with appellant the use of colloidal silver. (9RT 1539.)

12. On September 11, 2008, Appellant removes Cora from a convalescent home and never returns Cora to professional care

Records showed Cora was first placed in a convalescent home in 1984 and was housed in a residential facility from 1984 to 2002, that Cora briefly lived with appellant from November 15, 2002, to April 1, 2003, Cora was again housed in a residential facility until December 19, 2006 when she lived with appellant until April 4, 2007, Cora lived in residential facilities from June 9, 2007, to September 11, 2008 when appellant removed her from a facility, and she lived with appellant from that date until her death in October 2011. (7RT 946-948.)

Cora was admitted to Villa Oaks Convalescent Hospital, a 49-bed facility in Sherman Oaks, on August 5, 2008. (11RT 2103-2014.) A little over a month later, on September 11, 2008,

appellant removed Cora from the home on a day pass. Two days later, Cora was discharged from the facility. At the time, she weighed 84 pounds. A social worker for the convalescent hospital recalled appellant yelling, screaming, and being demanding. (11RT 2108-2111.) When appellant brought Cora home in September 2008, she documented Cora's weight as being 88 pounds. (7RT 1043-1044.)

According to Nhon Ly, a social worker employed by the East Los Angeles Regional Center, Cora's removal from professional care was supposed to be temporary and Ly tried to get Cora placed in a facility. Ly found a lot of vacancies that came up both in the East Los Angeles area and in other areas. (7RT 1017-1032.) However, Ly was never able to meet with appellant at her home to complete the Individual Placement Program ("IPP"). During the three times Ly tried to schedule such an appointment, appellant rescheduled each appointment. (7RT 1034-1035.) Ly referred Cora to numerous facilities, but no placement was made because each time appellant would find something wrong with the facility. (7RT 1036-1037.) Ly also mailed information to appellant about In-Home Supportive Services. However, appellant wrote to Ly and told him to stop sending such literature. (7RT 1038-1039.) Ly also informed appellant about respite services, which are funds paid for persons hired by the family, and about day programs where Cora could get help with exercise and walking by herself. (7RT 1041-1042.)

Eastern Los Angeles Regional Center service coordinator George Rodriguez typically found vacancies at facilities for persons with developmental disabilities and presented them to the families. Once placed, the patient's care is completely covered. (7RT 939-945.) In January 2009, Rodriguez searched

for placements for Cora and provided appellant with names of facilities with vacancies. (7RT 954, 959-960.) Although Pure Joy II would not be able to meet Cora's needs, Rodriguez also reminded appellant of the La Fonda facility being available. (7RT 961.)

During July 2009, Cecilia Cuevas met with appellant and Cora regarding a vacancy at the Jo-Mi ICF Facility. (9RT 1580-1581.) Cuevas recalled Cora was able to walk and was not verbal, appellant was particular about Cora's diet, appellant stated the facility would not work when told the diet would have to be reviewed, appellant would not permit a head-to-toe examination of Cora when told the facility could not admit a patient with Stage III or Stage IV bedsores, appellant wanted to occasionally sleep over with her sister and was told that this was not permitted in the facility, and Cuevas would have admitted Cora to the facility, but would not have agreed to interact with appellant because appellant wanted the policies and procedures of the facility changed. (9RT 1580-1594.)

In October or November 2009, Pamela Benson of the Pure Joy II facility met with Cora and appellant. Cora was non-verbal and confined to a wheelchair and appeared to have a low level of mental functioning. (7RT 915.) The food appellant proposed was out of the question. Appellant had wanted to come in and prepare the special meals. (7RT 916.) Benson was a little nervous about accepting Cora because of appellant's attitude and made the decision not to accept Cora into the facility. (7RT 917-918, 920.)

Around February 2010, Lillian Sestiaga of Special Adult Care Home met with Cora and appellant. Cora was able to walk in on her own and weighed 80 to 90 pounds. Appellant was

adamant her sister needed to follow a fish and beans diet, but such a diet did not appear to be medically necessary. Appellant was very persistent in what she wanted for her sister. (9RT 1505-1508.) Sestiaga thought Cora was a good fit for the facility, but had concerns about appellant's dietary demands and ultimately denied admission to the facility because of the diet and the difficulties of working with appellant. (9RT 1511-1513.)

Service coordinator Rodriguez explained: (1) the Regional Center prepares an Individual Program Plan (IPP) annually and meets with the client or client's family in connection with preparing the plan, but appellant failed to meet with Rodriguez at any point from 2009 to 2011 to complete any annual IPP (7RT 949-951); (2) throughout 2010, Rodriguez provided appellant with lists of various vacancy referrals, but none resulted in placement and it appeared appellant wanted to dictate the terms of care to persons already trained in the field and it was a challenge for providers to work with her (7RT 965-966); and (3) Rodriguez provided appellant with information about In-Home Supportive Services, a program to help pay for housecleaning, meal preparation, personal care services, and protective supervision as well as information about day programs. (7RT 957-958.) Appellant wrote Rodriguez letters stating it was a burden taking care of Cora and expressing the need to find a placement. (7RT 969-970.) The placements through the Regional Centers were voluntary and families were not legally obligated to accept such services. (7RT 975.)

B. Defense Evidence

Dr. John Fullerton, who specialized in internal medicine and geriatrics, reviewed the law enforcement records concerning the incident at the Beverly Hospital, the hospital records, the

autopsy report, the toxicology screens, the records of Dr. Tu and Dr. Wang, Dr. Homeier's review of the case, Dr. Bonnell's findings, and records from Cora's stays at Baldwin Gardens, Monrovia Country Villas, and Pasadena Villa Oaks. (12RT 2711, 2717-2718.) Dr. Fullerton opined Cora was in the "end-of-life" stages. He opined it was unusual for someone so severely mentally retarded to live past her teens and nearly to age 60 and that, with a patient in terminal decline, you will see things like skin lesions developing and not healing and the patient not wanting to eat or drink even with assistance. (12RT 2721-2722.)

When shown photographs of Cora's bedsores, Dr. Fullerton opined such sores or ulcers were not very unusual and that it was terminal skin failure. (12RT 2723-2724.) Dr. Fullerton opined the proper treatment for the terminal skin failure was not moving or disrupting the patient too often. (12RT 2726.) Dr. Fullerton stated pneumonia develops at the end of life for a number of reasons and antibiotics do not tend to work as well, terminal skin failure and pneumonia are common modes of death for a patient in this state, Cora was born with a malformed brain, and there was a chance that the pressure sores only took 48 hours to develop because they could be Kennedy Ulcers, a severe marker of death coming. (12RT 2727-2729.) He opined that, for a patient in Cora's condition, having her turned regularly would not have been helpful. (12RT 2736-2737.) Dr. Fullerton found it hard to define whether Cora suffered from malnutrition given her size and weight and the fact some weight loss is anticipated at the end of life. (12RT 2739.) He opined the use of colloidal silver would not have hurt Cora. (12RT 2742.)

On cross-examination, Dr. Fullerton conceded he was charging the defense $700 an hour for his testimony (12RT 2745),

there was no evidence that Cora had any terminal cancer or heart disease (12RT 2748-2749), there are situations where people develop ulcers because of poor care and neglect (12RT 2752), there was no evidence that appellant took any steps to position Cora comfortably (12RT 2760), and there was evidence Cora was placed in the shower or near it. (12RT 2760-2761.)

ARGUMENT

I. APPELLANT'S CONVICTIONS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellant contends insufficient evidence was presented to support her conviction for second-degree murder because of insufficient evidence of implied malice (AOB 40-47) and to support her convictions for second-degree murder and elder abuse because of a lack of causation. (AOB 47-50.) Contrary to appellant's assertions, overwhelming evidence was presented to support her convictions.

A. The Standard of Review for Substantial Evidence Claims

Appellate courts review challenges to the sufficiency of evidence by inquiring "whether, on review of the entire record in the light most favorable to the judgment, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt." (*People v. Young* (2005) 34 Cal.4th 1149, 1180, relying on *People v. Rowland* (1992) 4 Cal.4th 238, 269; *see also Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) The conviction must be based on substantial evidence, or, "evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

This Court does not reweigh the evidence, but evaluates whether the evidence presented at trial and the reasonable inferences that could be derived from that evidence supported the jury's conclusions. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Unless it is clearly shown that 'on no hypothesis whatever is there sufficient substantial evidence to support the verdict' the conviction will not be reversed. [Citation.]" (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.)

This Court applies the same standard to convictions based largely on circumstantial evidence. (*People v. Valdez* (2004) 32 Cal.4th 73, 104; see *People v. Marks* (2003) 31 Cal.4th 197, 230-231; see also *People v. Miller* (1962) 57 Cal.2d 821, 826-827.) Although the jury is required to "acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Story* (2009) 45 Cal.4th 1282, 1296.) Even if a reviewing court can reasonably reconcile the circumstances to reach a contrary conclusion to that of the jury, reversal is not appropriate as long as the circumstances reasonably justify the jury's findings. (*Ibid.*)

B. Substantial Evidence of Implied Malice Was Presented

Second degree murder can be supported by either express or implied malice. (§ 188.)

> Implied malice may be proven by circumstantial evidence and has both a physical and mental component. [Citation.] The physical component is satisfied by the performance of an act, the natural consequences of which are dangerous to life. [Citation.] The mental component is established where the

> defendant knows that his conduct endangers the life of another and acts with conscious disregard for life.

(*People v. McNally* (2015) 236 Cal.App.4th 1419, 1425.) A conscientious disregard for life requires a showing of the defendant's subjective "awareness of the risk to life created by his conduct." (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1218.) Conscious disregard is a state of mind in which a person knows his or her conduct is dangerous but does not care that the conduct may hurt or kill another. (*People v. Johnigan* (2011) 196 Cal.App.4th 1084, 1092.)

Substantial evidence was presented at trial, showing appellant knew her conduct was dangerous to Cora's life but did not care her conduct would hurt Cora. Cora was a severely mentally-disabled 60-year-old woman with an IQ of 9 and a mental age of 18 months and was entirely dependent on care for daily tasks such as hygiene, bathing, and toileting. (10RT 1878, 1880-1883, 1886-1887.) Cora was placed in professional care facilities from 1984 to 2002 and then again until September 11, 2008, except for brief periods. Nevertheless, the evidence showed that, on September 11, 2008, appellant removed Cora from a professional care facility and never returned her. (7RT 946-948.)

Although numerous placements were presented to appellant for Cora's professional care, appellant did everything she could to sabotage any placement for Cora including failing to meet with service coordinators to complete the IPP, finding something wrong with every facility referred, and deliberately being difficult for facility coordinators to deal with. (7RT 915-920, 954, 959-961, 965-966, 1017-1037, 1503-1513, 1578-1594.) In addition, appellant was not receptive at all to information provided about in-home care assistance and even asked service coordinators to

stop sending such information. (7RT 957-958, 1038-1039.) Thus, there was strong evidence that from September 2008 until Cora's death in October 2011, appellant actively isolated appellant from professional caregivers.

Not only was there evidence appellant was isolated from professional caregivers, but also there was evidence appellant failed to provide any professional medical care to Cora at all between November 2010 and Cora's death in October 2011. (10RT 1914.) Deputy Medical Examiner Wang found Cora's condition was such it required medical care long before she was brought into the emergency room (which, in fact, was after rigor mortis had already set in). Indeed, Dr. Wang testified Cora was severely malnourished and covered with pressure sores that included Stage IV sores where the flesh had rotted all the way to the bone. He testified such pressure sores would have developed over a period of months. (8RT 1237-1246.) Dr. Wang testified the extent of Cora's malnutrition was severe. She only weighed 66 pounds at death. (8RT 1229-1230.) Dr. Homeier testified the pressure sores had developed over a period of months. (10RT 1915.) She testified that, given the extraordinary level of neglect, had Cora been brought to a medical professional sooner, the pressure sores and the danger they posed would have been immediately recognized. (10RT 1918-1919.)

Given Cora's exposed bone and rotting flesh, it is simply not conceivable appellant was not aware of the urgent need for medical attention long before Cora passed away. Emergency room physician Lopez testified the rotting smell and extent of malnourishment were remarkable, the sores were across much of Cora's body, and the sores were so extensive Cora's bone had been exposed and gangrene had set in. (10RT 1845-1848.) Dr.

Lopez concluded the wounds had developed over a significant period of time and Cora had been severely neglected. (10RT 1850-1851.) Instead of seeking urgently needed medical care for Cora, appellant made a decision not to seek any care and to let Cora rot away and die.

Strong evidence was presented appellant knew what pressure sores were and that they required professional medical treatment. She admitted to police detectives she knew about the pressure sores, they developed while Cora was under her care, and they did not occur overnight. (3CT 801-803.) In April 2007, Dr. Gu ordered antibiotic ointments to treat Stage III pressure sores on Cora. (9RT 1568.)

Also, appellant showed consciousness of guilt by trying to cover up her knowledge of the pressure sores. Appellant told emergency room personnel Cora had been vomiting, but did not explain the pressure sores. (10RT 1853.) Appellant falsely told emergency room personnel that Cora was still alive when brought to the emergency room. (6RT 645-646.) This was despite the fact Cora had no heart activity and rigor mortis had already set in. (10RT 1838-1842, 1844.) And, when the emergency room personnel started to remove bandages appellant had placed over the pressure sores, appellant became visibly upset and tried to get them to stop removing the bandages. (6RT 637-639; 9RT 1552; 10RT 1854; 11RT 2138-2139, 2141, 2161.) Appellant also told detectives she was concerned about people thinking she had neglected her sister and allowed her sister to die. (3CT 742-743.)

There was overwhelming evidence presented Cora's pressure sores were extraordinarily severe and no one could have failed to see the exposed bone and gangrene, particularly Cora's sole caretaker, appellant, who bathed and diapered Cora. The

evidence showed appellant isolated Cora from professional medical care and allowed her to rot away and die in her home. A reasonable trier of fact could easily have concluded appellant harbored implied malice, acting with conscious disregard for Cora's life.

To support her argument, appellant relies almost exclusively on *People v. Caffero* (1989) 207 Cal.App.3d 678. (AOB 43-44.) Her reliance is misplaced. In *Caffero*, the court found it was reasonably inferable the infant's death was caused by grossly inadequate care at the hands of the parents, but there was no evidence they were actually aware their conduct endangered the infant's life. The parents had consulted the emergency room staff, but were conveyed no sense of urgency about the need for immediate medical attention, the infant's grandmother advised them it was simply colic and diaper rash, and, upon arrival at the hospital, the emergency room staff found no obvious signs of a life-threatening condition and deemed her situation "non-urgent." (*People v. Caffero, supra*, 207 Cal.App.3d at p. 685.)

People v. Latham (2012) 203 Cal.App.3d 319, distinguished *Caffero*. In *Latham*, the child suffered from diabetic ketoacidosis, the parents were provided with education including instruction as to how to recognize the symptoms, a physician's assistant recommended hospitalization, but after the child's blood-sugar rose from glucose treatment, the parents declined to have her taken to the hospital in an ambulance, the child became ill two years later and displayed the symptoms of diabetic ketoacidosis with her symptoms deteriorating over a week, and neighbors had urged the parents to obtain medical treatment, and 911 was only called after the child stopped breathing. (203 Cal.App.3d at pp. 322-323.)

The court in *Latham* found the situation there was not analogous to that in *Caffero* because, among other things, when the infant in *Caffero* was brought to emergency, the triage nurse deemed the situation non-urgent and, in *Caffero*, there was no evidence that the parents knew the condition was life-threatening, and the advice given the mother in *Caffero* by the emergency room personnel she called conveyed no sense of urgency. (203 Cal.App.4th at pp. 333-334.) The *Latham* court explained that its task was not to reweigh or reinterpret the evidence and that a mere conflict in the evidence is not a basis for reversal. The court found that the evidence was far from overwhelming, but the evidence provided a sufficient basis for which a reasonable jury could have found the parents acted with implied malice in failing to obtain medical treatment. (*Id.* at 334.)

This case is similarly distinguishable from *Caffero*. In *Caffero*, the parents took steps to diagnose the problem by calling the emergency room and consulting with the infant's grandmother. Moreover, when the parents took the infant in *Caffero* to the emergency room, even the triage nurse on duty did not believe that there was anything serious going on. In sharp contrast, here, appellant isolated Cora from any medical assistance, preferring to keep her at home and not consult any medical professionals for an entire year while the bedsores went untreated and grew infected and sepsis set in. There is no evidence appellant called any emergency room or doctor in the days leading up to Cora's death. Nor did appellant bring Cora to the emergency room while she still appeared to be in good health. She only brought Cora to the emergency room after rigor mortis had set in and Cora had passed away.

Also, in *Caffero*, there was no evidence the parents, who were parents to a new-born infant, knew the perianal sores were life-threatening and the evidence was they had developed in a matter of days. The infant there had been in the hospital for five days –until about December 22nd – and then released by the hospital. In contrast, here, there was no evidence appellant had sought medical assistance for Cora until it was too late. In fact, there was circumstantial evidence presented suggesting appellant knew Cora had bedsores for a long time before she died. In July 2009, appellant refused to permit a head-to-toe examination of Cora by a facility to check for bedsores. (9RT 1585-1587.) The evidence showed appellant was well aware of the sores, but invented excuses for the sores that made no logical sense such as regurgitation of food. (3CT 619, 696-697.) Appellant showed her consciousness of guilt by denying there was any gangrene (3CT 698-699) and by expressing she did not want Cora to die at home because appellant feared being jailed for not taking care of her sister (3CT 742-743). In addition, appellant covered the bedsores with bandages and did not want the medical staff at the hospital removing the bandages (11RT 2162), a clear sign of consciousness of guilt.

Appellant argues on appeal that the evidence shows she believed she was acting in the best interests of her sister by applying colloidal silver to the bedsores. (AOB 44-45.) The evidence presented at trial, however, supports contrary inferences that a reasonable jury could draw, specifically that appellant was knowingly allowing Cora's bedsores to fester and rot without providing proper medical treatment.

Specifically, Dr. Voron informed appellant in 2003 that she should not apply colloidal silver to Cora's skin. He explained it

would not be appropriate to use that substance for treatment of pressure sores. (8RT 1211-1212.) Dr. Wang who treated Cora in 2006 for minor skin problems testified he would not recommend his patients use colloidal silver and would tell them to stop using it if they said they were using it. (10RT 1813, 1815.) When Dr. Gu treated Cora in 2007, he treated her for pressure sores and ordered antibiotic ointments for the Stage III wounds, not colloidal silver. (9RT 1566-1568.) Moreover, Cora became a patient of Dr. Tu in 2009 and he never discussed with appellant the use of colloidal silver. (9RT 1531-1533, 1539.) Thus, none of the doctors who appellant consulted for Cora's treatment from 2003 through 2009 recommended treatment with colloidal silver and some even expressly recommended against its use. When Cora was specifically treated for Stage III ulcers, Dr. Gu treated her with antibiotic ointments, not colloidal silver. The evidence presented at trial, therefore, weighs heavily against any conclusion that appellant, who consulted all these doctors for Cora's treatment, actually believed that treatment with colloidal silver would be effective to treat pressure sores, particularly Stage III or more serous ones.

Other evidence demonstrates that appellant knew Cora suffered from severe pressure sores and did not obtain proper treatment for the sores. In September 2008, appellant removed Cora from a convalescent hospital and brought her home. (7RT 1043-1044; 11RT 2108, 2110.) In July 2009, after Cora had been living in appellant's home for 10 months, appellant refused to permit a head-to-toe examination of Cora for evidence of Stage III or Stage IV pressure sores. (9RT 1585-1587.) In November 2009 and throughout 2010, appellant, moreover, continued to be

difficult and demanding when it came to placing Cora in a qualified facility. (7RT 917-920; 9RT 1508-1513.)

In addition, there was no possible way appellant was not aware of the seriousness of her sister's condition and the urgent need for medical treatment long before she brought her into the hospital emergency room. Dr. Lopez, who saw Cora as she was wheeled into the emergency room, noted that, in addition to appearing to have already passed away, appeared to be malnourished and dehydrated. (10RT 1838.) She also had a strong odor of rotting emitting from her body. (10RT 1840, 1845.) The pressure sores extended across her thighs, hips, and abdomen, exposing bone on her hips and gangrene. (10RT 1847-1848.) Dr. Lopez opined the wounds had developed over a period of time and someone had neglected to get treatment for the wounds. (10RT 1851.) He had never in his career seen anyone this neglected. (10RT 1850.) He also testified the gangrene had developed over days or weeks. (10RT 1868.) Given these horrible wounds developed over a period of time, appellant could not honestly have believed that treating Cora with colloidal silver was effective in treating the pressure sores. She simply neglected her sister's condition and allowed her to die.

Nurse Cardenas testified Cora had practically no body weight, was skin and bone, and had a diaper filled with excrement. (6RT 645-646.) Appellant, however, admitted she had been Cora's caretaker for three years. (3CT 578, 583.) Appellant also admitted she bathed Cora daily and thus would have unquestionably seen the extent of the pressure sores on Cora's body. (3CT 667-669.) These are all signs of neglect.

Significantly, when appellant brought Cora into the emergency room, appellant tried to prevent the emergency room

personnel from removing the bandages she had placed over the sores, indicating her consciousness of her neglect of Cora. (6RT 636-639; 11RT 2138.) Appellant also indicated her consciousness that she had neglected her sister's urgent need for medical attention by pretending the only thing her sister suffered from was a little bit of hunger and difficulty from vomiting. She did not acknowledge the pressure sores that covered so much of Cora's body. (6RT 646; 9RT 1522-1525, 1527; 10RT 1853-1854; 11RT 2139; 3CT 698-699.)

Appellant asserts no evidence was presented that she actually appreciated the risks to Cora. (AOB 46.) However, no one taking care of someone in Cora's condition could possibly have been unaware of the massive sores across her body, the exposed bone on her hip, the gangrene that had set in, or the tremendous loss of weight she endured. Under these circumstances, it is disingenuous for appellant to complain it was not shown she actually appreciated the danger to Cora.

Appellant argues her neglect of Cora's deteriorating condition is somehow excused because she expended energy into looking at placements for Cora. (AOB 44-46.) This argument is belied by the testimony of the facility coordinators who found appellant was impossible to deal with and the fact that in three years she never found any facility she considered suitable. Moreover, not finding a suitable facility would not excuse appellant's neglect of Cora's condition, including the pressure sores that had developed into gangrene and exposed bone, Cora's immense loss of weight, and apparent starvation and dehydration. Indeed, the records showed appellant stopped bringing Cora to any medical professionals and prevented her from obtaining proper treatment.

Given all of this evidence, contrary to appellant's assertions, substantial evidence of implied malice was clearly presented.[4]

C. Substantial Evidence Was Presented That Cora's Death Was Caused by Appellant's Failure to Act

Appellant contends both the second-degree murder conviction and the elder abuse conviction rest on insufficient evidence appellant's failure to act caused Cora's death. (AOB 47-50.) Appellant urges this Court to rely on defense expert Dr. Fullerton's testimony and to disregard the contrary prosecution evidence. (AOB 47-48.) In reality, she is simply asking this court to reweigh the conflicting expert testimony. That, however, is not the proper task of an appellate court: It was for the jury to evaluate the testimony of the two experts, as well as the bases for their opinions, along with the other evidence presented, and to make the determination. (*People v. Chavez* (2008) 160 Cal.App.4th 882, 891.) "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts." (*People v. Young* (2005) 34 Cal.4th 1149, 1181; see also *People v. San Nicolas* (2004) 34 Cal.4th 614, 660-661 [where conflicting experts disagreed about whether penetration necessarily would have led to hemorrhaging in a perineal tear if the victim had been alive, our Supreme Court upheld the jury's resolution of that factual dispute].)

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[4] Accordingly, appellant's assertion that this Court should reduce the second-degree murder conviction to manslaughter is without merit. Overwhelming evidence was presented showing that appellant subjectively appreciated the risks involved in not obtaining professional medical treatment for Cora.

Dr. Fullerton testified that Cora's death was a consequence of "terminal decline," not neglect. In the face of evidence that Cora suffered from extreme malnutrition, that Cora's pressure sores had progressed to the point where bone was exposed and gangrene had set in, and that appellant neglected to give Cora professional medical attention for these injuries until after rigor mortis had set in and her heart had stopped functioning, a reasonable jury could certainly decide that Dr. Fullerton's testimony was not credible and reject it.

Appellant argues the jury should have rejected the testimony of the lay witnesses to the extensive pressure sores across Cora's body, particularly her hips, buttocks, vaginal, and anal areas because Dr. Robert Wang (the dermatologist) testified he did not see any pressure sores. (AOB 48.) However, Dr. Robert Wang testified he did not have much experience about the history of bedsores because his patients were generally ambulatory. (10RT 1822.) Moreover, when questioned about the wounds, Dr. Robert Wang stated it was possible these wounds were pressure sores, but he was not certain because he did not have a history of Cora being non-ambulatory. (10RT 1833-1834.) The fact Dr. Robert Wang, who admitted having no experience with treating pressure sores, may have not concluded that some wounds were pressure sores in any event was not determinative. The jury could reasonably have chosen to rely on the testimony of eyewitnesses who observed Cora's body near the time of her death, the coroner, and Dr. Homeier, both of whom concluded that Cora suffered from extensive pressure sores. The jury also viewed photographic evidence and could draw conclusions from such photographs.

Appellant argues that the coroner, Dr. Yulai Wang, wavered on the issue of whether the pressure sores caused Cora's death because Dr. Wang stated at one point that both the sores and the pneumonia caused the sepsis, which resulted in Cora's death. (AOB 49.) This was also the prosecution's position at trial. The prosecutor told the jury that Dr. Yulai Wang "attributed this death to sepsis was specifically as to the pneumonia and the infected decubitus ulcers, of which there were many stages." (13RT 3062.) The prosecutor argued: "And, then, the sepsis and the pneumonia, they are objective symptoms to this particular disease or affliction. These signs didn't go unchecked. There are symptoms. The respiratory problems, the altered state, the loss of consciousness, these are all signs that something is wrong, and she saw the signs, being with Cora every day, and she ignored those signs." (13RT 3095.) The prosecutor explained: "The coroner in this case was very specific. She died from sepsis, and the cause of the sepsis was pneumonia and the infected decubitus ulcers, or infected bedsores. That is the cause of death in this particular case." (13RT 3122.)

In his testimony, Dr. Yulai Wang explained: "In my opinion, both contributed to cause sepsis."[5] (8RT 1251.) He also

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[5] Even Dr. Fullerton agreed the cause of Cora's death was the infected pressure sores with a contributing factor of pneumonia. (12RT 2754.) Appellant argues the jury was told by Dr. Fullerton that the pneumonia would have been untreatable (AOB 48, citing 12RT 2727), but that is not quite what Dr. Fullerton testified. He actually testified that, in terminal end-of-life cases, the antibiotics "don't tend to work like they would have worked if someone wasn't in an end-of-life terminal failure condition." (12RT 2727.) Not tending to work as well is not the

(continued…)

explained that, based on his examination, there was infection in both the lungs and the ulcers. (8RT 1250.) Our Supreme Court has explained:

> "There may be more than one proximate cause of the death. When the conduct of two or more persons contributes concurrently as the proximate cause of the death, the conduct of each is a proximate cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the time of the death and acted with another cause to produce the death." [Citation.]

(*People v. Sanchez* (2001) 26 Cal.4th 834, 847; CALJIC No. 3.41.) "[A]s long as the jury finds that without the criminal act the death would not have occurred when it did, it need not determine which of the concurrent causes was the principal or primary cause of death. Rather, it is required that the cause was a substantial factor contributing to the result." (*People v. Catlin* (2001) 26 Cal.4th 81, 155; accord *People v. Sanchez*, 26 Cal.4th at p. 847.)

Appellant points to CALJIC No. 2.01, which provides that, if the circumstantial evidence permits two reasonable interpretations, the jury must adopt the one that points to innocence. (AOB 49.) This argument was raised and rejected by

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(…continued)
same as saying that pneumonia was untreatable. In any case, the jury was not required to believe that testimony, particularly in light of the fact that appellant, who was the sole caretaker for Cora, failed to seek any professional medical treatment for Cora at all until she had already expired.

the California Supreme Court in *People v. Clark* (2016) 63 Cal.4th 522, which explained:

> The appellate standard of review, however, provides a different role for the appellate court than that accorded to the jury. "We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation]' [Citation.] 'Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]' [Citation.] Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358, 75 Cal.Rptr.3d 289, 181 P.3d 105.)

(*Id.* at pp. 625-626.)

Accordingly, substantial evidence of the cause of death was presented to the jury.

II. TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE

Appellant argues trial counsel rendered ineffective assistance by failing to present a mental health defense (AOB 51-56), failing to present the testimony of a defense pathologist (AOB 56-58), failing to challenge the search warrant on staleness grounds (AOB 58-60), and failing to zealously advocate for appellant (AOB 60-62). Trial counsel was constitutionally effective, and in any event, appellant suffered no prejudice.

A. The Standard of Review under *Strickland*

The Sixth Amendment "right to counsel is the right to effective assistance of counsel. [Citation.]" (*Strickland v. Washington* (1984) 466 U.S. 668, 686.)

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result.

(*Ibid.*) A criminal defendant must show that "counsel's representation fell below an objective standard of reasonableness" (*id.* at p. 688), and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at p. 694). The prejudice prong of *Strickland* "is not solely one of outcome determination. Instead, the question is whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. [Citation.]" (*In re Valdez* (2010) 49 Cal.4th 715, 729, internal quotations omitted.)

A defendant must show counsel's performance was not only deficient, but also "cannot be explained on the basis of any knowledgeable choice of tactics." (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1147.) A reviewing court defers to "reasonable tactical decisions in examining a claim of ineffective assistance of counsel," and entertains a "'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437, quoting *Strickland v. Washington, supra*, 466 U.S. at p. 689.) Indeed, *Strickland v. Washington* imposes a "highly demanding"

standard upon the defendant to prove "gross incompetence." (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382.)

Reversal on grounds of ineffective assistance of counsel is appropriate only where the record affirmatively discloses no rational purpose for counsel's act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 437.) Where the record contains no explanation for challenged representation, an appellate court will reject a claim of ineffective assistance of counsel unless counsel was asked to explain his performance and failed to provide an explanation, or unless there simply could be no satisfactory explanation. (*People v. Earp* (1999) 20 Cal.4th 826, 871.)

B. Trial Counsel Did Not Render Ineffective Assistance by Choosing Not to Present a Mental Health Defense

Appellant claims trial counsel acted ineffectively by failing to present evidence of appellant's mental health issues in rebuttal to the prosecution's implied malice evidence. (AOB 52-56.) "T]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (*People v. Duncan* (1991) 53 Cal.3d 955, 966.) Just because new defense counsel may have presented the defense differently than trial counsel, does not provide the basis for declaring the representation was constitutionally deficient. The Supreme Court has determined judicial scrutiny of a defense attorney's trial performance must be "highly deferential" to the trial attorney, because "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after is has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." (*Strickland v.*

Washington, supra, 466 U.S. at p. 689.) Courts must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (*Ibid.*)

Appellant bases her contention on hindsight, namely the analysis by Dr. Richard Romanoff after her trial in preparation for a motion for new trial. (AOB 52, citing 5CT 1156.) She also bases it on the opinion of another criminal defense attorney. (AOB 55, citing 5CT 1312-1314.) She does not base her contention on information trial counsel had before him while preparing for trial. But, as noted above, "there are countless ways to provide effective assistance in any given case." (*People v. Duncan, supra*, 53 Cal.3d at p. 966.)

In any event, the proposed mental health defense appellant claims should have been presented does not amount to a defense to the charge of implied malice murder. Indeed, appellant only points to an analysis by Dr. Romanoff that appellant had an obsessive-compulsive personality disorder, a hoarding disorder, and a lifelong devotion to her sister. (AOB 53-54.) None of these diagnoses are findings of insanity and none have any bearing on appellant's abject failure to obtain professional medical aid for her ailing sister. The mere fact appellant was a hoarder and obsessive-compulsive did not excuse her failure to obtain medical care for Cora.

As to appellant's lifelong devotion to her sister, as the prosecutor argued at trial, appellant may have started out as "well-intended" in caring for her sister and tried to do her best, but the care took a toll on appellant and eventually Cora became a burden. Appellant told service coordinators that caring for

Cora was taking a toll on her life. (See 13RT 3085.) Appellant described herself as being "struck with Cora" and being "the dumb one in the family who took on Cora." (13RT 3086.) Nevertheless, as the prosecutor argued, "[t]here appears to have entered, sometime along the way, this resentment of taking care of Cora that was present, and that resentment now appears to be that, at some point, she made the decision to wash her hands of it." (13RT 3086.)

All of the points appellant claims would have been made with her proposed mental health defense were actually presented to the jury at trial. The jury heard evidence appellant was a hoarder. (11RT 2119.) The jury heard appellant was difficult to work with and wanted to do things her own way. (9RT 1583-1592; 11RT 2108-2111.) Moreover, the jury heard appellant was devoted to her sister and took on her care for several years before her death, which was clearly an arduous task. (3CT 583.) Thus, even without expert testimony, the jury was fully apprised of appellant's difficulties with being obsessive-compulsive, hoarding, and her devotion to her sister.

Defense counsel's closing argument put the theme of appellant's devotion to her sister front and center:

> They're talking about this woman who spent her life taking care of her sister killing her, murdering her. [¶] The fact that she bathed her, wiped her, took her to the bathroom, dressed her, saw to it she ate, hand-fed her, gave up her own life with her husband, gave up her profession, gave up making a living, did all of this for her sister, and she wanted to kill her, that she killed her? Are you kidding me?

(13RT 3098.) Reasonably competent counsel could clearly have determined lay witness testimony was the best way to present such evidence.

As to the hoarding, defense counsel took the position it was a "red herring" presented by the prosecution only to draw the jury's evidence away from the real issues. (13RT 3106-3107.) Thus, based on counsel's closing argument, it is clear counsel did not present a mental health expert to discuss hoarding and obsessive-compulsive behavior because his position was they were not relevant to the issues before the court, namely how someone who had a lifelong devotion to caring for her disabled sister could possibly have wanted to kill her.

Even assuming counsel did not act reasonably in choosing not to present such a defense, appellant has not demonstrated prejudice - "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra,* 466 U.S. at p. 694.) All of the mental health issues that appellant claims should have been presented to the jury through the testimony of a mental health professional were, in fact, presented to the jury through lay witnesses. Moreover, the fact appellant may have been a hoarder or obsessive-compulsive had little to do with the fact that she allowed her dependent sister to rot away in her home without obtaining professional medical aid for her. Nor did her lifelong devotion to her sister's care mean that, in the end, appellant did not decide she had finally reached her breaking point with caring for her sister. In sum, the presentation of additional expert testimony on these points would not have had any effect on the outcome.

C. Trial Counsel Did Not Render Ineffective Assistance by Failing to Present Testimony by a Pathologist

Appellant asserts that, although trial counsel retained pathologist Dr. Bonnell to testify at trial, counsel acted improperly by failing to retain another pathologist after Dr. Bonnell suffered a heart attack and was unavailable to testify. (AOB 56-58.) The charge of ineffective assistance of counsel is unmeritorious. Dr. Bonnell's wife contacted defense counsel in the middle of trial and informed defense counsel Dr. Bonnell would not be available to testify for health reasons. (11RT 2401-2402.) Dr. Bonnell left no time or opportunity for defense counsel to obtain another expert. Therefore, trial counsel requested the trial court grant a motion for mistrial to allow counsel the opportunity to find and retain and prepare another expert. (11RT 2407.) That the trial court denied the motion for a mistrial does not mean trial counsel acted improperly. Appellant relies on the fact months after his conviction new counsel was retained for the filing of a motion for new trial and that new counsel, having had months to find another expert pathologist found one. (AOB 57-58.) Given several months, it is no surprise new counsel found another expert. The fact that in the middle of trial with the trial court ruling Dr. Fullerton's testimony would be sufficient to cover the issues counsel had no opportunity to find and retain another expert does not mean that trial counsel rendered ineffective assistance. Appellant cannot show trial counsel's actions in this regard fell below an objective standard of reasonableness. (*Strickland v. Washington, supra,* 466 U.S. at p. 688.)

Moreover, appellant has failed to show he was prejudiced by trial counsel's actions. (*Strickland v. Washington, supra,* 466 U.S. at p. 694.) As the trial court pointed out, Dr. Fullerton was able

to cover a lot of what Dr. Bonnell would have testified to and had the opportunity to review Dr. Bonnell's notes. (11RT 2415-2416.)

D. Trial Counsel Did Not Render Ineffective Assistance by Failing to Challenge the Search Warrant on Staleness Grounds

Appellant asserts trial counsel rendered ineffective assistance by failing to challenge on staleness grounds the October 25, 2011, search warrant to search the residence for the residual scent of human remains, biological and physical trace evidence, blood or fluid stains, human hairs, or human tissue. Appellant argues, since the search warrant was obtained 15 days after Cora's death, the information supporting it was "stale." (AOB 58-60.)

"Information that is remote in time may be deemed stale and thus unworthy of consideration in determining whether an affidavit for a search warrant is supported by probable cause." (*People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652.) If circumstances would justify a person of ordinary prudence to conclude an activity had continued to the present time, then the passage of time will not render the information stale. (*People v. Mikesell* (1996) 46 Cal.App.4th 1711, 1718.)

> "No bright-line rule defines the point at which information is considered stale. [Citation.] Rather, 'the question of staleness depends on the facts of each case.' [Citation.] 'If circumstances would justify a person of ordinary prudence to conclude that an activity had continued to the present time, then the passage of time will not render the information stale.' [Citation.]"

(*People v. Williams* (2017) 15 Cal.App.5th 111, 125, quoting (*People v. Carrington* (2009) 47 Cal.4th 145, 163-164.)

In *People v. Hulland, supra*, 110 Cal.App.4th 1646, a police officer purchased drugs from the defendant but waited 52 days to seek search warrant, the information was too stale to provide probable cause because there was "no information" on any prior or subsequent criminal activity or "any evidence of such activity ever taking place at [defendant's] residence." (*Id.* at pp. 1648, 1652-1653.) Generally, a claim of staleness is raised with regard to the possession of drugs or other contraband easily moved around. The point of a staleness claim in such cases is that there is no basis for believing the items being sought are still on the premises. The instant case provides a very different factual scenario. The evidence being sought through the canine search was not drugs or contraband that could easily be removed from the premises. Rather, it was a scent of decaying flesh and, while there was a possibility that cleaning the house would have reduced the scent, there was no possibility that the scent had been moved from the house like drugs and other contraband might have been. (See *People v. Carrington, supra*, 47 Cal.4th at p. 163-164 [warrant obtained two months following burglaries did not rest upon stale information as stolen checks still could be forged and cashed]; contrast, *People v. Hulland, supra*, 110 Cal.App.4th 1646, 1652 [warrant obtained 52 days following controlled buy rested on stale information given lack of evidence of defendant's subsequent drug activity].) "Substantial delays do not render warrants stale where the defendant is not likely to dispose of the items police seek to seize." (*People v. Stipo* (2011) 195 Cal.App.4th 664, 672; see *United States v. McCall* (4th Cir. 1984) 740 F.2d 1331, 1336 ["'The vitality of probable cause cannot be quantified by simply counting the number of days between the

occurrence of the facts supplied and the issuance of the affidavit.'"].)

As a motion to quash the search warrant based on staleness would have been meritless, counsel was not required to make such a motion. (*People v. Weaver* (2001) 26 Cal.4th 876, 931.) Thus, counsel did not render ineffective assistance.

Moreover, appellant must prove prejudice. (*People v. Mickel* (2016) 2 Cal.5th 181, 198.) Appellant has not shown that the trial court would have granted such a motion to quash. The scent evidence that Cora had been kept in the shower was not critical to the prosecution. Rather, no matter where Cora had stayed in appellant's home, the critical facts were that appellant was Cora's sole caretaker, that appellant had not provided any professional medical care to Cora for a year, and that, when she died, Cora was covered with extreme pressure sores, some where her skin and muscle had completely rotted away to the bone. In addition, it was obvious Cora, who only weighed 66 pounds, suffered from extreme malnutrition. Given the strong evidence of horrific neglect, the evidence Cora had been kept in the shower area was not critical to the trial prosecution.

E. Trial Counsel Did Not Render Ineffective Assistance by Failing to Zealously Advocate

Appellant asserts trial counsel failed to zealously advocate for her because: (1) he informed appellant he did not have time to file a written motion regarding an erroneous jury instruction; (2) he did not argue a lack of financial motivation; and (3) he berated appellant in email communications. (AOB 60-62.) As set forth below, none of these assignments of ineffective assistance has any merit.

With regard to the jury instructions on elder abuse, trial counsel did not provide ineffective assistance. Instead, trial counsel informed appellant he disagreed with the trial court's instructions on elder abuse and had provided the trial court with what he believed to be the correct instructions on criminal negligence for the elder abuse count. (5CT 1212; 13RT 3001-3002.) The appellate record, in fact, contains a copy of trial counsel's proposed instruction and a minute order showing that the proposed instruction was considered by the trial court, but denied. (4CT 860-862.) Thus, trial counsel presented his argument to the trial court, but was overruled. In so doing and preserving his client's appellate rights, he acted within the wide range of professional assistance.

It is true trial counsel suggested to appellant he did not have time to file an additional written brief with the trial court. (5CT 1213.) However, "[c]ompetent counsel is not required to make all conceivable motions or to leave an exhaustive paper trail for the sake of the record." (*People v. Freeman* (1994) 8 Cal.4th 450, 509.) Here, counsel fulfilled his duty of presenting his alternate jury instruction to the trial court. Counsel also suggested to appellant she hire an additional attorney to write a brief or a petition for writ of mandate. (5CT 1213-1214.) The fact counsel proposed to appellant that additional legal assistance might be helpful does not lead to the conclusion that he acted improperly. Rather, it appears trial counsel acted professionally by suggesting every additional step he could imagine to secure her rights.

Moreover, appellant must affirmatively prove prejudice. (*People v. Mickel, supra*, 2 Cal.5th at p. 198.) She has made no attempt on appeal to demonstrate that the standard jury instruction given on elder care was erroneous.

Next, appellant asserts trial counsel rendered ineffective assistance by failing to argue that she did not have a financial motive to murder her sister. (AOB 61-62.) However, as trial counsel pointed out to appellant, he tried to present every relevant point. The mere fact trial counsel focused his attention on some points and not on others and even realized there were minor points he missed is not determinative on the issue of ineffective assistance. (See, e.g., *People v. Moore* (1988) 201 Cal.App.3d 51, 57 ["Reversals for ineffective assistance of counsel during closing argument rarely occur; when they do, it is due to an argument against the client which concedes guilt, withdraws a crucial defense, or relies on an illegal defense."].)

> [D]eference to counsel's tactical decisions in his [or her] closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact," [citation], but which issues to sharpen and how best to clarify them are questions with many reasonable answers.

(*Yarborough v. Gentry* (2003) 540 U.S. 1, 6.) Thus, judicial review of a defense counsel's closing argument is highly deferential. (*Ibid.*)

Trial counsel chose to focus on such issues as the fact that appellant had a life-long devotion to her sister (13RT 3098), the issues concerning witness Cardenas' credibility (13RT 3101), and Dr. Fullerton's testimony about life expectancy and end of life (13RT 3102). That does not mean that he rendered ineffective assistance by not focusing on a lack of financial motive. Counsel could have raised every single issue imaginable or he could have done just as he did here on focus on the most important issues to

sway the jury even if it meant forgetting about minor issues like a lack of financial motive.

Appellant moreover has not demonstrated prejudice. Financial motive was simply not an issue in this trial. The prosecution did not urge the jury to find such a motive. Therefore, the failure of trial counsel to rebut an argument not raised by the prosecution cannot have been prejudicial.

Appellant asserts the most egregious thing trial counsel did was to respond to her emails in a rude and berating way. (AOB 61-62.) However, "[t]he mere '"lack of trust in, or inability to get along with,"' counsel is not sufficient grounds for substitution." (*People v. Taylor* (2010) 48 Cal.4th 574, 600.) And, appellant has failed to show how she was thereby prejudiced since none of the email communications she points to were in front of the jury.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TESTIMONY OF NURSE CARDENAS

Appellant contends the trial court abused its discretion under Evidence Code section 352 in admitting the testimony of Cardenas because Cardenas' history of misconduct rendered his testimony at appellant's trial unreliable. Alternatively, she asserts her trial counsel rendered ineffective assistance for not raising this claim below. (AOB 63-65.)

Prior to Cardenas' testimony, the prosecutor informed the court Cardenas had told her the previous day he had been suspended from nursing and the prosecutor communicated this fact to trial defense counsel. (6RT 601.) The prosecutor indicated Cardenas explained that the conduct leading to his suspension occurred after he left Beverly Hospital and that at Kaiser Hospital he discharged a patient without doctor's order which led to a year-long suspension of his nursing license. The prosecutor

argued the suspension had no relevance to appellant's trial. (6RT 602.) The court, however, proffered it might be germane to cross-examination as to the nurse's competency. (6RT 603.) No objection was made to Cardenas testifying.

Cardenas was the prosecution's first witness. (6RT 623.) On cross-examination, trial defense counsel attacked Cardenas' credibility and brought the license suspension to the jury's attention. (6RT 649-650.) In fact, defense counsel showed the jury Cardenas' misconduct was far worse than simply prematurely discharging a patient, but also included giving Xanax, Ativan, and Vicodin to a patient without doctor's orders for medication. Defense counsel showed the jury through cross-examination that Cardenas had admitted committing these acts of gross negligence, and this misconduct occurred before he went to work at Beverly Hospital. (6RT 653-654.) Defense counsel brought out that the patient to whom Cardenas had given the drugs without a doctor's order had to be transferred to critical care the following day and then died the day after. (6RT 655-656.) Defense counsel also brought out that Cardenas did not merely suffer a suspension of his license, but a revocation. (6RT 651-652.)

Because appellant did not object to Cardenas' testimony at trial on any grounds, he cannot now challenge the admission of Cardenas' testimony on Evidence Code section 352 grounds for the first time on appeal. "[A] defendant may not complain on appeal that evidence was inadmissible on a certain ground if he did not rely on that ground in a timely and specific fashion in the trial court." (*People v. Mickey* (1991) 54 Cal.3d 612, 689; Evid. Code, § 353.) Ordinarily, a failure to object to evidence at trial

forfeits any claim of error associated with the admission of the evidence. (See, e.g., *People v. Dykes* (2009) 46 Cal.4th 731, 756.)

Even assuming the claim has been preserved, it lacks merit. Appellant essentially is arguing the trial court should have prohibited Cardenas from testifying because of issues with his credibility that were presented for the jury's consideration. A trial court has wide discretion when determining whether Evidence Code section 352 provides for the admission of evidence. Its exercise of discretion will be disturbed on appeal only if the trial court's decision exceeded the bounds of reason. (*People v. Mobley* (1999) 72 Cal.App.4th 761, 792-793.) This Court applies the deferential abuse of discretion standard in reviewing a trial court's decision to admit evidence pursuant to Evidence Code section 352. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121; *People v. Weaver* (2001) 26 Cal.4th 876, 933; *People v. Siripongs* (1988) 45 Cal.3d 548, 574.) A trial court abuses its discretion in admitting evidence when its ruling falls "outside the bounds of reason." (*People v. Waidla* (2000) 22 Cal.4th 690, 714, internal quotation marks and citations omitted.) A trial court abuses its discretion when it rules "in an arbitrary, capricious, or patently absurd manner that result[s] in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

> "Prejudice for purposes of Evidence Code section 352 means evidence that tends to evoke an emotional bias against the defendant with very little effect on issues, not evidence that is probative of a defendant's guilt."

(*People v. Valdez* (2012) 55 Cal.4th 82, 133, quoting *People v. Crew* (2003) 31 Cal.4th 822, 842.)

Cardenas' testimony about taking Cora from the car and seeing that rigor mortis had already set in was highly relevant to the charged offenses in this matter.

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

(Evid. Code, § 210; *People v. Mayfield* (1997) 14 Cal.4th 668, 749.)

That there were issues with Cardenas' credibility does not mean that his testimony on direct examination was not admissible. There was nothing confusing or misleading about it. The fact appellant's trial counsel had the means by which he could vigorously attack Cardenas' credibility on cross-examination does not mean his direct examination testimony was inadmissible. "[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 361.)

Even if the claim were preserved and the trial court should have excluded Cardenas' testimony, appellant was not prejudiced. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Because of the extensive evidence that Cardenas had committed misconduct, had his nursing license not just suspended by revoked, that a patient he gave drugs to without doctor's orders died two days later, and that such conduct occurred prior to his working at Beverly Hospital where appellant brought Cora's body, defense counsel had an incredible opportunity to attack the very first prosecution witness. The cross-examination on these issues was devastating to Cardenas' credibility.

Nor did defense counsel render ineffective assistance by not objecting to the admission of Cardenas' testimony at trial. Here, trial counsel chose to attack Cardenas through vigorous cross-examination rather than seeking exclusion of his testimony completely. Given the strength of the impeachment material against Cardenas, including evidence that he had his nursing license taken away for giving a patient drugs without a doctor's order and that the patient died two days later, counsel's choice of how to attack Cardenas was well within the wide range of professional representation. Moreover, appellant has not shown prejudice. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) As noted above, the cross-examination of Cardenas was particularly devastating. The key point in Cardenas' testimony – that Cora had already died before she arrived at the hospital – was corroborated by Sulcer's testimony that Cora looked as if she "had passed." (7RT 996.) More significantly, Dr. Lopez testified that Cora appeared to be dead. (10RT 1838.) He also testified that Cora's body smelled as if she were "rotting." (10RT 1845.)

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL

Appellant contends the trial court erred in failing to grant a mistrial following the sudden unavailability of defense expert, Dr. Harry Bonnell. (AOB 65-67.) He is mistaken on this point.

On Monday, June 27, 2016, towards the end of the prosecution case, defense counsel informed the court that over the weekend he had received an e-mail from Dr. Bonnell's wife that the doctor had a heart attack and opted to suddenly retire on his doctor's advice. Counsel said that this was the only witness who reviewed the evidence in the coroner's office. (11RT 2402.) Counsel made an offer of proof as to what the proposed testimony

would have been: (1) bacteria from pneumonia is different from bacteria from decubitis ulcers and, without doing a bacteria culture, you do not know which you have; (2) pneumonia was a more natural way of dying; (3) appellant's conduct was not reckless and possibly not negligent; (4) Cora was not malnourished because there was food in her stomach; and (5) the skin failure is part of end-of-life organ failure. (11RT 2403-2404.)

When the court asked how long it would take to get another doctor, counsel stated he had brought Dr. Fullerton on board, but Dr. Fullerton was not as hands-on and had not looked at the coroner's slides. (11RT 2405.) Counsel argued the jury had heard him say he would put on two doctors and now they were not going to hear from one of them. (11RT 2407.) The court explained the real concern was whether Dr. Fullerton could testify whether the death was caused by something other than appellant's failure to act. The court stated Dr. Fullerton would be able to present the defense as long as he was able to touch on these things as opposed to neglect. (11RT 2408.) Counsel's response was that Dr. Bonnell had more clinical hands-on experience and Dr. Fullerton was more of an "ivory tower type." (11RT 2409.) Counsel made an offer of proof that Dr. Fullerton believed this to be a case of terminal skin failure and Cora would have died even if she had been in an acute care hospital or convalescent hospital. Dr. Fullerton also would opine that the death was not caused by the ulcer conditions. (11RT 2412-2413.)

The court found Dr. Fullerton could cover a lot of what Dr. Bonnell would have testified. (11RT 2414.) The court stated it would allow Dr. Fullerton an opportunity to review Dr. Bonnell's notes and a curative instruction would be given to the jury. (11RT 2415-2416.)

The court properly denied the mistrial request. *People v. Dunn* (2012) 205 Cal.App.4th 1086, addressed a similar situation. In *Dunn*, a child sex abuse case, the defendant moved for mistrial after his retained expert witness unexpectedly became unavailable to testify. (*Id.* at p. 1091.) When the defense counsel informed the court of this problem, the court inquired as to the expert's specialty and the expected nature of her testimony and whether it would be possible to retain another expert. Counsel told the court that he had been unable to retain another expert or to secure the retained expert's presence at trial. (*Id.* at pp. 1092-1093.)

The *Dunn* court explained a motion for mistrial should only be granted if the party's chances of receiving a fair trial have been irreparably damaged. (*People v. Dunn*, *supra*, 205 Cal.App.4th at p. 1094, citing *People v. Clark* (2011) 52 Cal.4th 856, 990.) The court noted that whether a particular incident warrants mistrial requires a nuanced, fact-based analysis best performed by the trial court and that trial court's denial of a motion for mistrial is reviewed under the deferential abuse of discretion standard. (*People v. Dunn*, *supra*, 205 Cal.App.4th at p. 1094, citing *People v. Chatman* (2006) 38 Cal.4th 344, 370, and *People v. Clark*, *supra*, 52 Cal.4th at p. 990.)

The *Dunn* court explained it had not found any California cases discussing whether a mistrial should be granted when an expert witness unexpectedly becomes unavailable or does not appear at trial, but looked to the analogous situation of a motion for new trial based on the absence of testimony from a witness who was expected to appear at trial. (*People v. Dunn*, *supra*, 205 Cal.App.4th at pp. 1094-1095.) In that situation, the court explained, there were four relevant factors: (1) diligence in

securing the witness' attendance; (2) use of available alternate means to obtain the desired evidence; (3) fault for the witness' nonappearance; and (4) the nature of the testimony expected from the witness and its probable effect on the outcome of the trial. (*Id*. at p. 1095.)

Although appellant appears to have used diligence in securing her expert's attendance and was not at fault for the non-appearance, as the trial court pointed out, there were alternate means available to obtain the desired evidence, namely the testimony of Dr. Fullerton. (11RT 2408, 2414.) The court below also noted Dr. Fullerton had the full opportunity to view Dr. Bonnell's notes and a curative instruction would be given to the jury. (11RT 2415-2416.) Appellant's contention appears to boil down to a complaint that Dr. Bonnell was more hands-on than Dr. Fullerton in reviewing the evidence. (AOB 66-67.) However, the mere fact that Dr. Bonnell might have been a more persuasive witness than Dr. Fullerton is not material. Dr. Fullerton made the basic points to the jury that Dr. Bonnell had intended to cover, particularly his opinion that Cora was in the end-of-life stages and in terminal decline. (12RT 2721-2722.) Dr. Fullerton opined to the jury that terminal skin failure and pneumonia were common modes of death for a patient in this state. (12RT 2727.) In addition, cross-examination of the prosecution's expert was also available to the defense to bring out the points it wanted to raise. Thus, the trial court did not abuse its discretion in denying the motion for a new trial.

Even assuming an abuse of discretion, appellant was not prejudiced. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Here, as discussed above, although Dr. Bonnell was no longer available to testify, the defense was not left without an expert. Dr.

Fullerton testified for the defense and presented much of what Dr. Bonnell would have presented.

V. APPELLANT FORFEITED HIS CLAIMS REGARDING THE INSTRUCTION ON LESSER INCLUDED OFFENSES; ALTERNATIVELY, THEY ARE WITHOUT MERIT

Relying on *People v. Kurtzman* (1988) 46 Cal.3d 322, appellant contends the trial court erred by instructing the jury that it could not consider lesser included offenses until reaching a unanimous not guilty verdict on the greater offenses. (AOB 67-72.) He is mistaken.

While instructing on CALCRIM 831, "Abuse of Elder or Dependent Adult," the trial court explained to the jury the following:

> Now, I should say to you, you have count 1, which is second-degree murder, and then the lesser to that is involuntary manslaughter; count 2, you have felony elder abuse, and a lesser to that is misdemeanor elder abuse.
>
> Before you can even consider a lesser crime, you all must unanimously vote not guilty on the greater crime. You cannot move on to the lesser if you all find the defendant -- let's assume you find her guilty of second-degree murder, that's the greater crime, you cannot -- then you don't need to move on to the lesser. You only move on to the lesser if you unanimously find the defendant not guilty of the greater crime.

(13RT 3045.)

The record does not indicate any objection to this instruction until after the jury returned its verdicts and the defense filed its motion for a new trial. Thus, any claim of error has been forfeited. When a defendant objects to a jury instruction, or

believes an instruction needs clarification or amplification, it is his burden to indicate such in the lower court. (*See People v. Guiuan* (1998) 18 Cal.4th 558, 570; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192-1193.) A failure to do so at trial bars appellate review of the issue. (*People v. Guiuan, supra*, 18 Cal.4th at p. 570; *People v. Sully* (1991) 53 Cal.3d 1195, 1218.) An appellate court may review an instruction without an objection, if the substantial rights of appellant were affected thereby. (§§ 1259, 1469; *People v. Rivera* (1984) 162 Cal.App.3d 141, 146; *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.) If the error resulted in a "miscarriage of justice," substantial rights would be implicated and reversible error may arise. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *People v. Rivera, supra*, 162 Cal.App.3d at p. 146.) "Substantial rights" equate with prejudicial error in the case of claimed instructional ambiguity where there is a reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of constitutionally relevant evidence. (*Boyde v. California* (1990) 494 U.S. 370, 380; *People v. Arredondo, supra*, 52 Cal.App.3d at p. 978.) Appellant provides no support for her claim of substantial rights being violated because she fails to show that the jury did not consider the lesser charge. Accordingly, her claim is forfeited.

Even if the merits are considered, they lack merit. In *People v. Kurtzman, supra*, 46 Cal.3d 322, a defendant who was convicted of second degree murder claimed that the trial court erred in instructing the jury "that it must unanimously agree on whether defendant was guilty of second degree murder before 'considering' [the lesser included offense of] voluntary manslaughter." (*Id.* at p. 324.) The court concluded the trial

court had erroneously instructed the jury, reasoning that California law "restricts a jury from returning a verdict on a lesser included offense before acquitting on a greater offense [but] does not preclude a jury from considering lesser offenses during its deliberations." (*Id.* at pp. 324-325.) Pursuant to *Kurtzman*, then, "a trial court should not tell the jury it must first unanimously acquit the defendant of the greater offense before deliberating on or even considering a lesser offense." (*People v. Dennis* (1998) 17 Cal.4th 468, 536, citing *Kurtzman, supra*, 46 Cal.3d at p. 335.)

Here, there was no instructional error. The trial court's instructions to the jury were in reference to the verdict forms, not the deliberations themselves. The trial court's explanation was designed to have the jury reach a verdict on the greater charge before reaching a verdict on the alternate charge and was made in light of the instructions already provided.

And, on a claim of instructional error, the reviewing court "must consider whether it is reasonably likely that the trial court's instructions caused the jury to misapply the law. [Citations.] '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" (*People v. Carrington, supra*, 47 Cal.4th at p. 192.) Thus, overall, the instructions were in reference to voting on the alternate charge. Consistent with the *Kurtzman* holding, the instruction set forth in great detail the law that "simply restricts a jury from returning a verdict on a lesser included offense before acquitting on a greater offense and does not preclude a jury from considering lesser offense during its deliberations." (*People v.*

Kurtzman, supra, 46 Cal.3d at pp. 324-325.) There was no instructional error.

Moreover, any error in the court's instructions was harmless because it is not reasonably probable the jury would have reached a different result absent the error. (See *People v. Watson, supra,* 46 Cal.2d at pp. 836-837 see also *People v. Berryman* (1993) 6 Cal.4th 1048, 1078 [stating *Watson* standard of prejudice applies to *Kurtzman* instructional error].) The evidence plainly established the greater offense was committed. There was no indication this was a close case or the jury was ever deadlocked about the greater offenses. Thus, any instructional error was harmless. (See *People v. Kurtzman, supra,* 46 Cal.3d at pp. 324-325, 336 [finding erroneous instruction on order of deliberations harmless, even where jury initially indicated deadlock on greater offense]; see also *People v. Bacon* (2010) 50 Cal.4th 1082, 1108-1110 [finding jury would not fail to understand that it had discretion to choose the order of evaluating the charges even though there was some instructional ambiguity between oral and written instructions].)

VI. THE TRIAL COURT ACTED APPROPRIATELY IN DENYING THE MOTION FOR MISTRIAL BASED ON ALLEGED JURY MISCONDUCT

Appellant contends the trial court erred in failing to order a mistrial following jury misconduct involving the dictionary definition of "kill" or "murder" or "reasonable doubt." (AOB 72-78.) He is mistaken.

A. Relevant Proceedings below

On July 8, 2016, during jury deliberations, juror 8 provided the court with a note that stated (as described by the trial court):

We've had a note generated by juror 8, I believe, and it states the following:

"Judge, juror number 2," who was formerly alternate number 1, now juror number 2, "brought in a book with the definition of 'kill' to aid in the deliberations," and I advised counsel in chambers of that note.

The court explained:

The court's intention is to follow the procedure outlined in the case of *People v. Ryner*, R-y-n-e-r, 164 Cal.App.3d 1075, regarding prejudice and the presumption of prejudice, rebuttable presumption, if you will.

Seemingly, this is misconduct under CALJIC 1.03, which the court read to the jury, in that:

"You must not independently investigate the law or consider or discuss facts as to which there is no evidence. In addition, you must not conduct research or disseminate information on any subject."

The court's intention is, again, as discussed with counsel in chambers, to proceed in the following way:

One, to bring out each juror individually and inquire of them in the following fashion, did that particular juror and/or – does that particular juror recall discussions occurring regarding the definition that the – juror number 2 provided to them.

Two, to the extent that they do recall that being the case, do they recall the definition that was actually provided by the dictionary.

> And then, three, can that particular juror entirely disregard the definition as contained in the dictionary and specifically follow the instructions on the law provided to the jury by this court, if so ordered.
>
> If they say they can, I will so order, and then go on with the next juror.
>
> I advised counsel that I will bring out the presumably, offending juror last and make the same inquiry, and if that juror answers, as do the other 11 jurors, that they can totally disregard that definition provided and follow the law specifically as reflected in the instructions, then it's the court's inclination to retain that juror.
>
> I did ask, just out of the abundance of caution, whether counsel will stipulate, the prosecution said they would, the defense said that they need a few moment to think about it.

(14RT 3902-3904.)

Thereafter, the court brought in the jurors one by one. Juror 1 recalled juror 2 bringing in a dictionary, but did not recall juror 2 sharing any definition he looked up. Juror 1 assured the court it could disregard anything heard from juror 2 and follow the court's instructions. (14RT 3905-3906.) Juror 3 recalled juror 2 bringing a dictionary to look up the definition of the term "to kill," but did not believe the jurors discussed anything with regard to the dictionary, and could disregard anything stated with regard to it. (14RT 3907-3908.) Juror 4 recalled juror 2 reading something out loud from the dictionary, but did not recall what it was and did not pay attention. Juror 4 did not recall if any other jurors heard what juror 2 said and agreed he could totally disregard whatever he heard juror 2 read. (14RT 3909-

3910.) Juror 5 recalled juror 2 reading the definition of "kill" or "murder" from the dictionary, but could not recall what was read and agreed to totally disregard anything heard. (14RT 3911-3912.) Juror 6 recalled someone bringing up a word and looking it up, but did not recall what the word was or what the definition was and agreed to specifically follow the court's instructions regarding the law. (14RT 3913-3914.) Juror 7 recalled that juror 2 brought in a dictionary and that there was a reference to the definition of a word, but did not recollect what the word in question was or what juror 2 read out loud and agreed to totally disregard it and specifically follow the instructions given by the court. (14RT 3914-3915.) Juror 8 actually sent the note to the court about juror 2 bringing in the book with a definition of "kill," but did not recall juror 2 reading any definition out loud and agreed to totally disregard what may have occurred regarding the dictionary and to specifically follow the instructions of the court. (14RT 3916-3917.) Juror 9 recalled juror 2 looked up the definition of "kill" and read it out loud, but was not influenced in any way by juror 2's actions and agreed to totally disregard (14RT 3918.) Juror 10 recalled juror 2 reading something, but was not listening at the time and could not recall the exact word juror 2 defined and agreed to completely disregard the definition juror 2 gave and specifically follow the law provided by the court. (14RT 3919-3920.) Juror 11 did not recall what word juror 2 tried to defined, was not influenced by what juror 2 read, and agreed to entirely disregard what may have been read and specifically follow the instructions on the law provided by the court. (14RT 3921-3922.) Juror 12 did not recall juror 2 bringing in a dictionary at all or of any terms being defined and agreed to specifically follow the law provided by the court. (14RT 3922-

3923.) Juror 2 admitted he brought in a dictionary and that it was inappropriate to do so, that he read the term "kill" out loud, but agreed he could put the dictionary definition of "to kill" aside and follow the instructions on the law given by the court. (14RT 3924-3925.)

The court explained that, under *Ryner*, when a juror engages in misconduct, it raises a presumption of prejudice which can be rebutted by proof that no prejudice actually resulted. The court found it appeared the presumption of prejudice had been overcome and there was no reasonable probability that actual harm occurred based on all the responses received. (14RT 3926.) The prosecutor noted the dictionary was directed only at one juror, who did not even listen to juror 2 reading from it. The prosecutor also noted there had been five days of deliberations. (14RT 3927.) Defense counsel proffered there was an inference that juror 2 was acting inappropriately and such was directed at juror 8. (14RT 3928.) The court was inclined to let juror 2 remain and noted that juror 8 did not appear to be upset and was "all smiles." (14RT 3929.)

B. Applicable Law and Legal Analysis

Every criminal defendant has a right to a trial by an unbiased, impartial jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16.) "An impartial jury is one in which no member has been improperly influenced [citations] and every member is 'capable and willing to decide the case solely on the evidence before it.' [Citations.]" (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) Juror misconduct occurs when a juror or potential juror violates his or her oath, duties, or admonitions, when a juror receives outside information, discusses the case with nonjurors, or shares improper information with other jurors.

(*Id.* at p. 294.) Section 1089 authorizes the trial court to exercise broad discretion to discharge a juror upon good cause, if the juror is "found to be unable to perform [her] duty, . . ." (*People v. Millwee* (1998) 18 Cal.4th 96, 142, fn. 19.)

Removing a juror for cause should be exercised with great care. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) To excuse a juror for misconduct, the juror's inability to perform must appear in the record as a "demonstrable reality." (*People v. Virgil* (2011) 51 Cal.4th 1210, 1242.) The "demonstrable reality" test "requires a showing that the court as trier of fact did rely on evidence that, in light of the entire record, supports its conclusion that bias was established." (*People v. Barnwell, supra*, 41 Cal.4th at pp. 1052-1053, original italics.) As a result, the reviewing court must be confident the trial court's conclusion is manifestly supported by evidence on which the court actually relied. (*Id.* at p. 1053.)

Although juror misconduct generally raises a rebuttable presumption of prejudice, the verdict is to be set aside only if there appears a "substantial likelihood" of juror bias. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 696-697.) Bias is shown if (1) the extraneous material is, judged objectively, inherently and substantially likely to have influenced the juror or (2) the nature of the misconduct and the surrounding circumstances show it is substantially likely the juror was actually biased against the defendant. (*Ibid.*) The "demonstrable reality" test "requires a showing that the court as trier of fact did rely on evidence that, in light of the entire record, supports its conclusion that bias was established." (*People v. Barnwell, supra*, 41 Cal.4th at pp. 1052-1053; *People v. Virgil* (2011) 51 Cal.4th 1210, 1242.)

First of all, defense counsel in the instant matter agreed "any presumption of impropriety has been overcome with the answers." (14RT 3927-3928.) Consequently, he forfeited for appellate review any claim that the trial court's decision finding no prejudice due to juror bias (see AOB 75 ["both the prosecutor and defense counsel agreed with the court's ruling"]). (*People v. Holloway* (2004) 33 Cal.4th 96, 126 ["defendant has waived this claim by his failure to seek a more extensive or broader inquiry of the juror at the time, or in any other way to object to the trial court's course of action"]; accord *People v. Foster* (2010) 50 Cal.4th 1301, 1341 [defendant's claim on appeal forfeited as he did not at the time of the hearing propose additional questions for the juror]; *People v. Russell* (2010) 50 Cal.4th 1228, 1250 [failure to object to trial court's questioning of juror forfeited challenge to that questioning on appeal].)

In any event, the record shows there was no prejudice due to juror bias. The reading of the definition of "to kill" by juror 2 was brief. More significantly, it appears that no one paid any attention to the reading. Indeed, juror 12 had no recollection of the incident at all. Others, including jurors 1, 3, and 8 recalled the dictionary, but never heard juror 2 read any definition. Jurors 4, 5, 6, 7, 10, and 11 recalled juror 2 reading a definition, but did not pay attention at all. Juror 9 heard juror 2 read the definition, but was not influenced by it. Moreover, all the jurors, including juror 2, agreed that they were not influenced by the dictionary and that they would follow the court's instructions on the law rather than an outside source. Thus, following the court's thorough examination of all the jurors, it cannot be concluded as a demonstrable reality that the jurors were actually biased against appellant as a result of the dictionary reading.

People v. Harper (1986) 186 Cal.App.3d 1420, does not support appellant's claim of prejudicial error. In *Harper*, as here, a juror recited to fellow jurors the dictionary definition of a term and, in *Harper*, the term was "murder." (*Id.* at p. 1426.) In *Harper*, as here, the misconduct was brought to the attention of the trial court before the jury returned a verdict and the trial court took the opportunity to correct the error and obviate the prejudice. (*Id.* at p. 1427.) Also, in *Harper*, as here, there was no evidence that was any further discussion of the dictionary definition and the jurors were given a specific admonishment to follow the instructions of the trial court. (*Ibid.*)

Appellant also relies on *People v. Ryner* (1985) 164 Cal.App.3d 1075, 1082, and argues the trial court violated procedures outlined in *Ryner* by considering jurors' statements as to the effect of their ability to fairly and impartially decide the case. (AOB 75.) However, in *Ryner*, the jurors all stated they could still "fairly and impartially try the case" and this was noted to be prohibited evidence to rely on under Evidence Code section 1150. (*Id.* at pp. 1082-1083.) Here, in sharp contrast, the jurors were never asked whether they could "fairly and impartially" decide the case. They were only asked whether they could simply disregard the dictionary definition given, which was the trial court's method of admonishing the jurors to disregard anything they may have heard about the dictionary and follow the instructions given by the court. Thus, there was no error.

Nor is there anything in the record demonstrating the trial court relied on any of the jurors' subjective feelings about the dictionary definition. Indeed, the court below merely stated that it found the presumption of prejudice had been overcome, not

that it was relying on the jurors' subjective feelings about the effect of the dictionary definition. (14RT 3926.)

Consequently, the trial court's decision finding the presumption of prejudice had been overcome should be upheld by this Court, particularly in light of the fact the jurors all either did not hear juror 2 reading a definition from a dictionary or assured the court they would disregard what they heard.

VII. APPELLANT FORFEITED HIS CLAIM REGARDING THE TESTIMONY OF CANINE HANDLER KARINA PECK; ALTERNATIVELY, IT IS WITHOUT MERIT

Appellant contends the trial court erred in admitting the testimony of canine handler Peck because her testimony involved a new scientific approach under *People v. Kelly* (1976) 17 Cal.3d 24, 30, and *Frye v. United States* (D.C. Cir. 1923) 293 F.3d. 1013. (AOB 78-84.) Appellant forfeited his claim by not raising it below. (AOB 83-84 [appellant arguing ineffective assistance of trial counsel for failure to raise *Kelly*/*Frye* claim below].[6]) It is settled that such a claim must be first raised in the trial court to preserve it. (*People v. Ochoa* (1998) 19 Cal.4th 353, 414 [failure to object to evidence on *Kelly* grounds in the trial court means *Kelly* claim not preserved for appeal]; *People v. Kaurish* (1990) 52 Cal.3d 648, 688 [court not required to raise *Kelly*/*Frye* objection

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[6] Appellant asserts that, if this Court finds his *Kelly* claim forfeited, his trial attorney's failure to object on *Kelly* grounds constituted ineffective assistance of counsel. But appellant's ineffective assistance claim necessarily fails because, as set forth above, a *Kelly* objection would have been meritless. (*People v. Garlinger* (2016) 247 Cal.App.4th 1185, 1188; *People v. Bradley* (2012) 208 Cal.App.4th 64, 90 ["Failure to raise a meritless objection is not ineffective assistance of counsel"].)

sua sponte]; *People v. Coleman* (1988) 46 Cal.3d 749, 777 [failure to object to scientific evidence "fatal" to defendant's contention].)

Even on the merits, appellant is not entitled to relief. *People v. Kelly, supra*, 17 Cal.3d 24, at page 30, held the admissibility of evidence produced by a new scientific technique requires a preliminary showing that the technique is generally accepted in the relevant scientific community, the testifying witness is properly qualified, and correct scientific procedures were followed. (*See also People v. Lucas* (2014) 60 Cal.4th 153, 224, fn. 31, disapproved on another point in *People v. Romero & Self* (2015) 62 Cal.4th 1, 53.) *Frye v. United States, supra*, 293 F. at page 1014, held that reliability is indicated by the technique's general acceptance within the relevant scientific community. The Supreme Court concluded *Frye* was superseded by the adoption of the Federal Rules of Evidence, and that a different standard applies, namely that the evidence must be reliable and relevant. General acceptance in the scientific community is not required, but may be considered. (*Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 586, fn. 4, 592-595.) However, our Supreme Court declined to adopt the *Daubert* standard, finding *Kelly* and *Frye* survived *Daubert* in California jurisprudence. (*People v. Leahy* (1994) 8 Cal.4th 587, 604-605.)

The evidence was the testimony of canine handler Peck who searched appellant's home for the scent of decaying flesh. (11RT 2120.) The canine, Indiana Bones, alerted strongly to the shower pan in a bathroom attached to a master bedroom. (9RT 1632-1633, 1638; 11RT 2123.) Evidence of dog tracking or trailing by scent (e.g., where a dog smells a crime scene and follows the path of the suspects) is not subject to a *Kelly* hearing. (*See, e.g.*, *People v. Craig* (1978) 86 Cal.App.3d 905.) Those tracking or trailing cases

are distinguishable from cases involving "scent identification lineups" where scents are transferred to pads so that the dog can discriminate between them. (*People v. Mitchell* (2003) 110 Cal.App.4th 772, 787-788.)

The search conducted in appellant's case was very much like the tracking or trailing searches which are not subject to a *Kelly* hearing and unlike the scent identification lineups. There was no scent lineup in this case. Rather, there was a search throughout appellant's house for the scent of decaying flesh.

> Scent trailing evidence is not so foreign to everyday experience that it would be unusually difficult for jurors to evaluate. Jurors are capable of understanding and evaluating testimony about a particular dog's sensory perceptions, its training, its reliability, the experience and technique of its handler, and its performance in scent trailing, such as performed in this case.

(*People v. Jackson* (2016) 1 Cal.5th 269, 317, citation omitted.)

Under *People v. Watson*, *supra*, 46 Cal.2d 818, it is not reasonably probable appellant would have been acquitted of murder absent admission of the scent identification evidence. (*People v. Mitchell*, *supra*, 110 Cal.App.4th at p. 795 [applying *Watson* standard of review]; Willis, *supra*, 115 Cal.App.4th at p. 388 [same].) There was overwhelming evidence of Smith's guilt, even in the absence of the canine identification evidence, namely the undeniable evidence that appellant brought Cora to the hospital after rigor mortis had already set in and with pressure sores so severe that her bone was exposed and gangrene had set in.

VIII. THE TRIAL COURT PROPERLY DETERMINED APPELLANT'S STATEMENTS TO THE OFFICERS WERE ADMISSIBLE

Appellant contends the trial court erred in failing to suppress her statements to the officers. (AOB 85-105.) Specifically, she claims: (1) her statements should have been suppressed because she was detained without reasonable suspicion (AOB 89-93); (2) the seizure of her driver's license constituted an unlawful detention (AOB 93-95); (3) even if the initial detention was lawful, the detention was unlawfully prolonged and amounted to an unlawful de facto arrest unsupported by probable cause (AOB 95-98); (4) any consent by appellant was not freely and voluntarily given (AOB 98-100); (5) she was not given *Miranda* warnings[7] despite being subjected to a custodial interrogation (AOB 100-104); and (6) law enforcement officers failed to cease questioning appellant after she requested the Yellow Pages to contact an attorney (AOB 104-105). This court should reject appellant's claims. Since she was not in custody during her interview, the detectives were not required to give appellant the *Miranda* admonitions. Appellant made all of her statements voluntarily, and so they were properly admitted.

A. Proceedings in the Trial Court

On January 20, 2015, appellant filed a motion to exclude her statements. (1CT 261.) Appellant argued a police officer insisted she accompany him back to the police station and she complied, that she was forced to wait an extended period of time for the arrival of the sheriff's detectives, and that she was then placed in an interview and questioned without being read her rights.

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[7] *Miranda v. Arizona* (1966) 384 U.S. 436.

Appellant argued she was effectively arrested in the hospital parking lot and unlawfully transported to the police station without probable cause. (1CT 263.)

In opposition, the prosecution argued any statements made to Officer Connor at the hospital were merely made during investigatory questioning, appellant voluntarily agreed to be transported to the police station, she was free to leave at any point during the interview, and she did actually leave of her own free will at the conclusion of the interview. (1CT 277.) Attached to the Opposition was a form where appellant signed her consent for transportation, stating she consented to this voluntarily, she understood she was not under arrest, she understood she was free to leave the station at any time she chose, and return transportation would be provided for her. On the same page appellant signed, directly above the section headed witness transportation consent was a section entitled "Miranda Warning," which listed the *Miranda* rights. Appellant did not sign this portion of the form, but could not have failed to see it. (1CT 291.)

At the suppression hearing, Officer Connors testified that, after speaking with Nurse Cardenas and Dr. Lopez, Officer Connors spoke with appellant who was not handcuffed, frisked, held at gunpoint, or restricted from movement in any manner. (2RT B2-B6.) The area where this conversation took place was a public waiting room with anywhere from twenty to forty people present. (2RT B14-B15.) Officer Connor told appellant that she was free to leave, that she did not have to talk with the officer, and that she was going to be asked some questions about her sister. (2RT B32.) Later at the police station, appellant was sitting in a room with an open door. When Officer Connors

walked by, appellant walked out of the room and approached the officer, explaining that she had a sister who had died at age 40 and that the coroner had investigated something similar to this circumstance. Officer Connors told appellant that she should wait and talk to the Sheriff's Detectives. (2RT B19.) At the conclusion of her interview with the detectives, Officer Connor escorted appellant into the police station lobby where she was free to leave. (2RT B20.) Officer Connors could not recall whether she had possession of appellant's driver's license although she would normally ask witnesses for their driver's licenses. (2RT B23.) Officer Connors did not recall appellant ever insisting on driving her own car to the police station and did not recall appellant talking to Officer Chavez about wanting to move her car out of the emergency area because she was concerned it might be towed. (2RT B25.)

Detective Sulcer testified he made contact with appellant at the police station and had been informed that appellant had voluntarily agreed to come to the Montebello Police Station to be interviewed. (2RT B40.) When a person voluntarily consents to be transported to the police station, she is placed in an area of the station where she is free to move around and she is not taken through booking or a lockup area. (2RT B43.) When Detective Sulcer first saw appellant, she was in a lounge with an open door. Inside the lounge were a couch, a recliner, a television, and a VCR. (2RT B44.) Appellant moved about in and out of that room of her own free will. Detective Sulcer did not place appellant under arrest. (2RT B45.)

Officer Oscar Chavez testified that, when he first approached appellant, he asked for her name, whether she was related, and how she knew the person had died. Prior to asking

those questions, Officer Chavez did not restrict her movement or tell her that she was not free to leave. (2RT B66-B68.) After Officer Connors was done completing her investigation, appellant indicated she was willing to be transported to the police station for an interview with the detectives and Officer Chavez had her sign a consent form for transportation. (2RT B71.) Appellant did not indicate to Officer Chavez that she would prefer to driver her own car to the station. (2RT B74.) At the police station, Officer Chavez took appellant to Room 271, the witness room, where witnesses were free to stay while waiting to be interviewed. The door to Room 271 is kept unlocked. (2RT B76.) Appellant never said anything about wanting to leave. (2RT B78.) Prior to transporting appellant, Officer Chavez did not search her or pat her down. (2RT B91.)

Lieutenant Michael Flores testified that, at the police station, he offered to get some food for appellant while she was waiting. Appellant never said that she wanted to leave the police station to get some food. Appellant was not under arrest and was free to leave the police station prior to the detectives arriving to interview her. (2RT B97-B98.)

Detective Jose Espino testified that, prior to beginning the interview, he did not ever tell appellant (2RT B109.) He never told appellant that she was under arrest and never handcuffed her. Appellant was free to leave the interview room at any point, but never said she wanted to leave. Appellant was nearest to the door and it was not locked. (2RT B114-B115.) Throughout the interview, neither Detective Espino nor his partner ever raised their voices to appellant and never accused appellant of neglecting her sister. At the conclusion of the interview, appellant was free to leave. (2RT B118.) During the interview,

Detective Kenney asked appellant, "You're here of your own free will" and appellant responded by saying, "I know" or "Yes, I am." (2RT B119.) Detective Espino did not read appellant her *Miranda* rights because she was not in custody, she was not in a custodial setting, and there was nothing that would have given her the impression that she was being held against her will. (2RT B120.) At one point, appellant said that it was 5:00, but also said that she was willing to spend more time with the detectives if they needed her to do so. She said she could wait. (2RT B121-B122.) In Detective Espino's mind, this was an interview, not an interrogation because he was trying to ascertain whether there is even a crime, not to build a case. (2RT B128.)

Diane Marquez, the communications supervisor for the Montebello Police Department, testified that the call records showed that a male suspect was transported at 10:43 a.m. on October 10, 2011 by Officer Adams and that a woman was transported at 12:24 p.m. by Officer Chavez. (3RT C6-C8.)

Appellant testified she arrived at the hospital at about 8:30 a.m., she first saw a Montebello Police Officer at about 10 a.m., the officer took her driver's license and failed to return it, she felt uncomfortable when the female police officer knocked on the bathroom door and asked if she was okay, Officer Chavez said he had to transport her to the police station, that she did not want her car to be towed, she did not feel that she was free to go, she told the officers she did not want to go to the police station, and she thought she would get in trouble if she did not get into the police car. (3RT C12-C24.) Appellant explained she did not object to signing the consent to transportation form because Officer Chavez did in fact transport her. (3RT C28.) Appellant

testified that, at one point, she asked for the Yellow Pages so that she could call an attorney for help, but was never given a phone book. (3RT C29, C32.) When appellant told the police that she was hungry, they offered her a sandwich from Subway, which she accepted because she felt that she had no other choice. (3RT C32-C33.) Appellant did not believe she had the right to leave because she was told that she was not supposed to leave before being interviewed by the detectives. (3RT C35-C36.)

On cross-examination, appellant agreed Officer Connors was not hostile to her at the hospital and was actually polite and courteous, Officer Chavez never raised his voice to her, she was never handcuffed, that no guns were drawn, she was never verbally told that she had to remain at the hospital (3RT C38-C39), Detective Keeney told her that, if she had any anxiety, the door was right there (3RT C49), she was told she was not under arrest and was free to leave at the end of the interview (3RT C57), and she was free to walk around the station while her husband was being interviewed (3RT C63).

Trial counsel argued the police used "every mechanism that they could to lead [appellant] to believe, without using formal words 'You're under arrest,' without using handcuffs, and without booking her, taking her photograph and fingerprinting her – they lulled her into a false sense of security, that, well, this is all okay." (3RT C82.) Counsel argued appellant was under "de facto arrest" by having to wait several hours to be interviewed. (3RT C83.)

The prosecutor argued the testimony showed appellant signed the consent form to be transported from the hospital, that any conversations she had with the officers at the hospital were clearly investigatory, not accusatory, that she was told that she

was there freely and voluntarily and she agreed, that she was assured she was not going to jail that night and would be leaving through the same door she came in, that she was free to leave at any time, and that she never said she wanted to leave or that she was done with the interview. Looking at the totality of the circumstances, the prosecutor argued, a reasonable person would not have believed that she was under arrest or not free to leave and what appellant subjectively believed was irrelevant. (3RT C83-C85.)

The court found that, at the hospital, the police were simply conducting an investigatory interview and obtaining background information. That was, the court explained, simply a consensual encounter and, as appellant was not in custody, no *Miranda* warnings were necessary. (3RT C87-C88.) As to the transportation to the police station, the court found that appellant was not in custody and consented to being transported to the police station to be interviewed. The court noted the form appellant signed reflected that the signer freely consented to be transported and that she was not under arrest. The court noted that, even if appellant felt compelled by the surrounding circumstances, that would not support the objective standard of what a reasonable person under the same circumstances would have felt. (3RT C88-C89.) With regard to the actual interview at the police station, appellant was advised that she was not under arrest and was free to leave and, in fact, did leave at the conclusion of the interview. The fact that she may have waited several hours to be interviewed, the court explained, (3RT C89-C90.) The court had reviewed the DVD of the interview and determined there was no evidence of police coercion, there were no overbearing conduct or tactics, that the officers spoke softly to

her, appellant appeared to be engaging in conversation freely and voluntarily for two hours, appellant never expressed a desire to leave, and appellant seemed anxious to tell her side of the story to the police. (3RT C90-C91.) The court explained the fact appellant might have subjectively believed she had no other choice was irrelevant because, under *Miranda*, the question is what a reasonable person would believe. The court concluded that, considering the totality of the circumstances, a reasonable person would not have believed that she was in custody at any time that these events occurred. (3RT C91.) The court denied the section 1538.5 motion. (3RT C92.)

B. *Miranda* and Custodial Interrogations

The Fifth Amendment states: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." (U.S. Const., 5th Amend.)

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized.

(*Miranda, supra*, 384 U.S. at p. 478.) Once in custody, the suspect "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Id.* at p. 479.)

However, "police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the

questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495.)

The test is objective, and the question is whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) To answer that question, this court must determine whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. (*Id.* at pp. 401-402.)

To determine whether a person is "in custody," courts consider a variety of factors, with no one factor being dispositive. (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.) The factors a reviewing court considers include:

> [W]hether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational,

> and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation. [Citations.]

(*Ibid.*)

In *People v. Mosley* (1999) 73 Cal.App.4th 1081, the defendant sought to exclude his pre-*Miranda* statements to law enforcement made while being treated in an ambulance for a gunshot wound. (*Id.* at pp. 1088-1091.) As the paramedics attended to the defendant, the investigating officer asked him about the circumstances surrounding his injury and the defendant's answers incriminated him in the shooting. (*Id.* at pp. 1085-1086.) The Court of Appeal held that the officer's questioning of the defendant in the ambulance was not a custodial interrogation requiring the advisement of *Miranda* rights. (*Id.* at pp. 1090-1091.) The court noted the defendant had not been placed under arrest because the police did not know what had happened that caused him to be shot. (*Id.* at p. 1091.) The interview was in the presence of medical personnel and the questioning was not accusatory or threatening. (*Ibid.*) Additionally, the defendant was not handcuffed, no guns were drawn, and the defendant was about to be transported to a hospital and not to a police station or jail. (*Ibid.*) The court thus concluded that, based on the totality of the circumstances, a reasonable person in the defendant's position would not have believed he or she was in custody. (*Ibid.*)

C. Since Appellant Was Not in Custody, No *Miranda* Admonition Was Required

Here, two detectives interviewed appellant in an unlocked interview room at the police station. (2RT B115.) Appellant was

not arrested or handcuffed during her interview. (2RT B114-B115.) There is no evidence that the detectives blocked the exit or locked the door. (2RT B115.) There is no evidence that either detective drew their weapons or otherwise employed any threatening or intimidating tactics in their questioning. (2RT B118.) Although the police had transported appellant to the police station, they did so with her consent and appellant signed a form indicating that the transportation was consensual. (2RT B71.) Instead, the detectives were cordial and sympathetic. The questioning was generally investigatory, and not coercive. (2RT B128.) Although the interview was two hours long, it was not beyond the pale. (See, e.g., *People v. Holloway* (2004) 33 Cal.4th 96, 118-121 [not in custody although over seven hours he was briefly handcuffed, transported to police station for interview, asked to take a polygraph examination, photographed, and fingerprinted].)

Based on the totality of the circumstances, a reasonable person in appellant's position would not have believed she was in custody when questioned by the detectives. Because the detectives were not required to advise appellant of his *Miranda* rights prior to interviewing her, her statements to police during her interview were admissible at trial. The trial court therefore properly denied appellant's motion to suppress her statements.

United States v. Bassignani (9th Cir. 2009) 575 F.3d 879, is instructive. In *Bassignani*, the Ninth Circuit concluded Bassignani was not in custody for purposes of *Miranda*. The court noted Bassignani was instructed to accompany officers to a conference room for questioning and the detective repeatedly interrogated Bassignani about the use of his e-mail account and specific images of child pornography associated with his account.

(*Id.* at pp. 884-885.) The court, however, found that nearly the entire interview was conducted in an open and friendly tone. (*Id.* at p. 884.) The court also relied on the fact that there was no evidence Bassignani was isolated from the outside world or prevented from contacting others. (*Ibid.*) The court determined the physical surroundings of the interrogation suggested Bassignani was not in custody. (*Id.* at p. 886.) As for the two-and-a-half-hour interview, the court concluded the interview was lengthy, but noted it was not a "'marathon session designed to force a confession.' " (*Id.* at p. 886.) Finally, the court found the detective did not pressure Bassignani to confess or stay in the conference room. (*Ibid.*) The court concluded under the totality of the circumstances, the interrogation was not custodial. (*Id.* at p. 887.)

The facts of this case are more favorable than those in *Bassignani*. While Bassignani was essentially ordered to accompany police for questioning, appellant agreed to speak to police voluntarily. Police executed a search warrant at Bassignani's work place, searched his car, and treated him as a suspect throughout the interview. (*Bassignani, supra*, 575 F.3d at pp. 881-882.) By contrast, the police here interviewed appellant without treating her as a suspect and were merely trying to investigate and determine what happened in the circumstances of a suspicious death. The detectives never confronted appellant with any specific evidence and the overall tenor of the interrogation was not coercive. In light of these circumstances, *Bassignani* supports the view that appellant was in custody.

In *People v. Aguilera*, *supra*, 51 Cal.App.4th 1151, police drove Aguilera from his home to the police station and

interviewed him in a room at the station. (*Id.* at p. 1159.) And, the court in *Aguilera* described the interrogation as "intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating." (*Id.* at p. 1165.) Most important, after Aguilera claimed he had left the scene of the crime with a female companion before the assaults were committed, the officers told Aguilera the interview would end only after they had spoken with her. (*Id.* at p. 1160 ["*We're not gonna let you leave* here until we go talk to the girl, and she's not gonna be able to confirm the story . . . ."] (emphasis in the original).) This latter factor assumed the greatest importance in the *Aguilera* court's analysis:

> Here, defendant agreed to an interview at the station, and Officer Torres initially said defendant was not in custody. However, we find it significant that Torres then explained that the interview would end and they would bring him home *after* he told them the truth. Given the officers' repeated rejection of defendant's story, a reasonable person eventually would have realized that telling the "truth" meant admitting the officers' information was correct and explaining how and why one was involved and that until this "truth" came out, he or she could not leave. The officers later expressly reinforced this implication by explicitly telling defendant he would *not* be allowed to leave if they had to go interview an alleged alibi witness.

(*Id.* at p. 1163 [emphasis in the original].)

Here, by contrast, the detectives never suggested appellant's freedom of movement would be restrained in any manner until she confessed, or until the veracity of her claims had been evaluated through additional investigation. Appellant was not dependent on the detectives to release her from the interview and

take her home, like the defendant in *Aguilera*. Appellant could have easily walked out of the room if she wanted, as she was not handcuffed or pressured to stay. Further, unlike the police officers in *Aguilera*, the detectives here were not intimidating or threatening, they did not assert that they knew exactly what happened, and they did not claim to have specific evidence connecting appellant to the crimes. Instead the officers were cordial and asked investigatory questions and did not even arrest appellant at the close of the interview, allowing her to freely walk out of the police station. The circumstances of appellant's case are readily distinguishable from *Aguilera*.

Appellant nevertheless asserts she was subject to custodial interrogation because: (1) at the hospital, her driver's license and car were seized; (2) she was transported in the back of a locked police car; (3) she said she wanted to go home for lunch to get soup, but the detectives brought her a sandwich from Subway; (4) she requested the Yellow Pages to call an attorney; (5) she was told that the police would come after her if she left the police station; and (6) she was told to wait in a witness room for the detectives. (AOB 101-102.) None of these allegations support her argument.

At the hospital, appellant's driver's license was temporarily held by an officer for about 45 minutes (3RT C16), but appellant was not told she could not leave the hospital, the license was returned to her (3RT C15), and there is no evidence in the record that her car was seized that day (3RT C17). Moreover, the mere fact Officer Connors borrowed appellant's driver's license to verify her identity is not dispositive. (See *Florida v. Royer* (1983) 460 U.S. 491, 501 [asking for and examining defendant's ticket and driver's license in airport, without more, would not have been

a seizure for Fourth Amendment purposes]; *People v. Leath* (2013) 217 Cal.App.4th 344, 350; contrast *People v. Linn* (2015) 241 Cal.App.4th 46, 58 [the officer blocked defendant's egress, asked "accusatory" questions, ordered defendant to discard her cigarette and soda, and retained her driver's license while conducting a record check].)

The mere fact appellant was transported in a police car is not dispositive on the issue of custodial interrogation either. Indeed, appellant signed a consent form, stating that she voluntarily consented to be transported to the police station. (1CT 291; 2RT B40, B71.)

Appellant claims she was in custodial interrogation because, when she mentioned the possibility of returning to her home to get soup for lunch, the officers brought her a sandwich from Subway. (2RT B97-B98; 3RT C22.) But, she was not prevented from leaving or told she could not leave and Sergeant Flores testified that he was just being a "good host." (2RT B98.) Moreover, appellant later told detectives that it was nice of Sergeant Flores to get her a sandwich. (3RT C50.) Indeed, there is nothing about obtaining a sandwich for her which made her waiting in the station any different than the waiting of any other witness or crime victim at the police station.

As to the Yellow Pages, appellant cites the *Minnick* rule later in her brief, *Minnick v. Mississippi* (1990) 498 U.S. 146, 153. (AOB 104.) However, the *Minnick* rule only involves an individual subject to custodial interrogation. (*Ibid.*) The right to counsel under *Miranda* and *Edwards*[8] "applies only in the context of custodial interrogation. If the defendant is not in

[8] *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485.

custody then those decisions do not apply. . . ." (*Montejo v. Louisiana* (2009) 556 U.S. 778, 795; see also *People v. Nguyen* (2005) 132 Cal.App.4th 350, 355 [defendant who called attorney during arrest but before interrogation did not effectively assert right to counsel]; *People v. Avila* (1999) 75 Cal.App.4th 416, 422 & fn. 8 [because *Miranda* rights cannot be invoked except during custodial interrogation, accused being arraigned on one charge cannot prospectively invoke his or her *Miranda* rights to counsel as to some other unrelated charge by a written "invocation of rights" form].) Thus, the Yellow Pages request, if was actually made, is of no import. In any event, appellant was free to move about in the police station and could have used her cellular telephone, assuming she had one, to call an attorney or a payphone. No one was stopping her from doing so.

As to appellant's claim that she was told the police would come after her if she left the police station, the trial court was not required to believe her statements in this regard. Indeed, given that she was voluntarily transported to the police station, not handcuffed, not placed in a locked room, and free to come and go as she pleased, the assertion that they would come after her does not appear to conform to the polite way in which the police were treating appellant. It seems more likely that she was told that, if she left, the detectives would still need to interview her.

Finally, the mere fact appellant was asked to wait in an unlocked witness room for the detectives does not mean that she was in custody. The fact that it was a witness room means that non-custody witnesses were welcome there. Indeed, there was testimony at the suppression hearing that it was a room where witnesses or crime victims wait. (2RT B80.) The door to that room was kept unlocked. (2RT B76.) In fact, the testimony

adduced at the suppression hearing was that appellant was free to leave the witness room and that appellant never said she wanted to leave. (2RT B78.)

Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" (*Oregon v. Mathiason, supra*, 429 U.S. at p. 495.) Appellant fails to demonstrate that her statements to the detectives were obtained during the course of a custodial interrogation. The court below therefore properly admitted her statements into evidence.

D. Appellant's Statements Were Voluntary

The federal and state Constitutions both require the prosecution to show the voluntariness of a confession by a preponderance of the evidence. (*Lego v. Twomey* (1972) 404 U.S. 477, 489; *People v. Markham* (1989) 49 Cal.3d 63, 71.) "In determining whether a confession was voluntary, '"[t]he question is whether defendant's choice to confess was not 'essentially free' because his [or her] will was overborne." ' [Citation.] Whether the confession was voluntary depends on the totality of the circumstances. [Citations.]" (*People v. Carrington, supra*, 47 Cal.4th at p. 169.)

The issue of voluntariness presents "'a mixed question of law and fact that is nevertheless predominantly legal . . . .' [Citation.] Hence '"[o]n appeal, the determination of a trial court as to the ultimate issue of voluntariness of a confession is reviewed independently . . . ."' (*People v. Jones* (1998) 17 Cal.4th 279, 296.) Here, the evidence showed appellant's will was not overborne during the course of the interview. The detectives were kind and sympathetic to appellant. They did not coerce her, claim to have specific evidence connecting her to the crimes, or make any

threats or promises of leniency. Nothing in their method of questioning was improper and appellant fails to point to anything improper. Since there is no evidence that appellant's statements were obtained through "official coercion," this court should find they were properly admitted into evidence.

E. There Is No Merit to Appellant's Assertion That Her Statements Should Have Been Suppressed Because She Was "Unlawfully Detained"

Appellant asserts her statements should have been suppressed because she was "unlawfully detained" when Officer Connors held her driver's license before appellant left the hospital and that the police actions toward her amounted to a "de facto arrest." (AOB 89-96.) However, appellant was not "detained" at the hospital. She was not handcuffed, arrested, told that she was not free to move about, or forced to answer questions at gunpoint. Indeed, the testimony adduced at the suppression hearing was that Officer Connors was merely investigating the situation at that time and did not even know for certain that a crime had occurred. It is significant in this regard that the hospital waiting area was a public place and that no restrictions were placed on appellant's movement. A person is detained in the constitutional sense only if he is physically seized or submits to a display of authority, which would indicate to a reasonable person that, under all the circumstances, he is not free to leave or otherwise terminate the encounter. (*California v. Hodari D.* (1991) 499 U.S. 621, 628; *Florida v. Bostick* (1991) 501 U.S. 429, 436; *People v. Rivera* (2007) 41 Cal.4th 304, 309.) Indeed,

> a consensual encounter between a police officer and individual does not implicate the Fourth Amendment. It is well established that law enforcement officers may

> approach someone on the street or in another public place and converse if the person is willing to do so. There is no Fourth Amendment violation as long as circumstances are such that a reasonable person would feel free to leave or end the encounter.

(*People v. Rivera, supra*, 41 Cal.4th at p. 309; see *California v. Hodari D., supra*, 499 U.S. at p. 628.) Such encounters require no suspicion of criminal conduct. (*Florida v. Bostick, supra*, 501 U.S. at pp. 431-436; *People v. Rivera, supra*, 41 Cal.4th at p. 309.)

As discussed earlier, the mere fact that Officer Connors borrowed appellant's driver's license to verify her identity is not dispositive. (See *Florida v. Royer, supra*, 460 U.S. at p. 501; *People v. Leath, supra*, 217 Cal.App.4th at p. 350; *People v. Cartwright, supra*, 72 Cal.App.4th at p. 1370; contrast *People v. Linn, supra*, 241 Cal.App.4th at p. 58.)

Appellant relies on *People v. Valenzuela* (1994) 28 Cal.App.4th 817, for support. (AOB 93.) However, contrary to appellant's assertions, the court in *Valenzuela* did not hold that an officer's retention of a "green card" constituted a detention for Fourth Amendment purposes. Instead, it was held that the defendant there was detained when an immigration agent motioned a driver to park at the side of the road at an agricultural inspection station. (*Id.* at p. 824.) The fact the immigration agent then took the driver's green card was relevant to the driver's consent to a search of the car, not to whether he was actually detained. (*Id.* at p. 832.) Consent to search a vehicle was not at issue in this case.

Appellant also relies on *Florida v. Royer, supra*, 460 U.S. 491, for the proposition that holding an individual's property could lead a reasonable person to believe they were not free to leave. (AOB 93-94.) However, it was not the fact that narcotics

agents held the defendant's identification that meant he was detained. The court in *Royer* rather found the confinement was tantamount to an arrest because the defendant was confined to a small room, accused of transporting narcotics, and it was conceded by the prosecution that the officers would not have let him leave the room if he tried to leave. (*Id.* at p. 496.) The situation in the instant case is easily distinguishable. Officer Connors held appellant's driver's license at the hospital, but did not prevent her from going anywhere, accuse her of a crime, or restrain her in any way. She was not confined to a small room and no officer stated that appellant was not free to leave or that she would have been stopped. Before appellant was voluntarily transported to the police station, her license was returned to her.

F. In Any Event, the Admission of Appellant's Statements Was Harmless

The erroneous admission of statements obtained in violation of *Miranda* is reviewed for prejudice pursuant to *Chapman v. California* (1967) 386 U.S. 18. Under *Chapman*, reversal is required unless the People establish that the court's error was "harmless beyond a reasonable doubt." (*Id.* at p. 24.) In light of the strong evidence other than her own statements establishing appellant's guilt, any error in admitting her statements to police was harmless under *Chapman*. The evidence that appellant knew about Cora's pressure sores and state of malnutrition and failed to seek out professional medical care for Cora is overwhelming. The pressure sores, according to medical experts, had developed on Cora for a considerable period of time and, when her body was brought to the hospital, the sores had developed so much that her muscle and bone were visible and gangrene had set in. From Cora's condition and the expert

evidence from the coroner, the emergency room doctor, and Dr. Homeier, the jury could readily conclude that Cora's death was due to extreme neglect. The additional supporting facts that could be gleaned from appellant's statements to the police were merely cumulative.

IX. AS THERE WERE NO ERRORS, THERE WAS NO CUMULATIVE ERROR

Appellant contends that, even if none of the alleged errors, standing alone, warrant reversal, the cumulative effect of the alleged errors together compels reversal. (AOB 106.) However, as previously shown, either there were no errors or any error was clearly harmless. As such, singly or cumulative, appellant had not been prejudiced. Whether or not appellant received a perfect trial, she received a fair one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) This case was not closely balanced. Evidence of appellant's guilt was overwhelming, as shown above in the statement of facts. No trial errors occurred, but even if there were independent errors, "on this record, their whole did not outweigh the sum of their parts." (*People v. Roberts* (1992) 2 Cal.4th 271, 326.) This claim fails. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1009.)

CONCLUSION

Accordingly, the judgment should be affirmed.

Dated: December 21, 2017 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Century Schoolbook font and contains 25,156 words.

Dated: December 21, 2017

XAVIER BECERRA
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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Ho**
No.: **B279939**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On December 21, 2017, I electronically served the attached RESPONDENT'S BRIEF by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on December 21, 2017, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 21, 2017, at Los Angeles, California.

L. Luna	/s/ L. Luna
Declarant	Signature

DAW:ll
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