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Court of Appeal, Fifth District, California.

The PEOPLE, Plaintiff and Respondent,

v.

Felix Gonzalez MADRIGAL, Defendant and Appellant.

No. F051127.

(Super.Ct.No. VCF054289B).

Jan. 24, 2008.

APPEAL from a judgment of the Superior Court of Tulare County. [Joseph A. Kalashian](#), Judge.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, [Dane R. Gillette](#), Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, [Brian Alvarez](#) and [Kathleen A. McKenna](#), Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

[CORNELL](#), J.

*1 A jury convicted Felix Gonzalez Madrigal of second degree murder ([Pen.Code, § 187](#)),^{[FN1](#)} assault resulting in the death of a child (§ 273ab), and inflicting corporal injury on a child (§ 273d, subd. (a)). He was sentenced to an indeterminate prison term of 25 years to life.

[FN1](#). All further statutory references are to the Penal Code unless otherwise stated.

Madrigal argues his conviction must be overturned because of numerous errors committed in the trial court. These errors include (1) failure to exclude his incriminating statements to the police; (2) improper use of peremptory challenges by the prosecutor; (3) lack of substantial evidence to support the murder and assault counts; and (4) exclusion

of some of the evidence he offered. We conclude there was no error and affirm the judgment.

FACTUAL SUMMARY

On February 15, 2000, Brett Philpott, an emergency medical technician with the Dinuba Fire Department, responded to a report of a child not breathing. He arrived at the scene at 8:28 a.m. and discovered that nine-month-old S.R. had died. Only the mother, Lucinda Chavez, who was crying and very upset, was present at the time.

The expert witnesses at trial agreed that S.R.'s death was caused by a trauma to the side of S.R.'s head, resulting in bilateral [subdural hematomas](#) and [swelling of the brain](#). As we will explain, the experts disagreed as to the type of trauma that caused the injuries.

The evidence pointing towards Madrigal's guilt came from two sources—Madrigal and Chavez. Madrigal had three interviews with the police shortly after he was arrested and he testified at trial. Chavez also testified at trial. In addition, Madrigal made several phone calls to Chavez between interviews with the police.

Chavez's Testimony

Chavez testified that S.R. was born May 16, 1999. Chavez met Madrigal in September 1999. The two began a romantic relationship shortly thereafter. At the time, Chavez was living in an apartment in Dinuba. Chavez left the apartment one day after arguing with Madrigal. When Chavez returned, Madrigal had moved some of her belongings into a house on his parents' property in London, Tulare County. The two moved into that house, together with her children, A.R. and S.R.

Madrigal initially treated Chavez's children well. [FN2](#) Madrigal's behavior changed when they moved into the London house. On one occasion, Madrigal became upset and took S.R. into a bedroom and closed the door. Chavez heard Madrigal spanking S.R. Madrigal also had held S.R. up in the air by one arm and spanked her. There were other occasions when Chavez could hear Madrigal spanking S.R., but Chavez could not go to S.R. because Madrigal would close the bedroom door. Chavez did not see Madrigal hit S.R. in the head.

[FN2](#). Chavez also had two other children who resided with their biological father, Chavez's former husband.

On February 13, 2000, two days before S.R. was found dead, Chavez and Madrigal had an argument. Chavez and her children walked to a local grocery store to call a relative to pick them up. Madrigal found Chavez at the store and told her to get into the car with the children. Chavez went with him because she did not feel she had any choice. Madrigal told Chavez that if she wanted to leave, he would take her to her grandmother's house, but he never did. At the time, S.R. looked like she did not feel well and was lethargic.

*2 The following day, February 14, Chavez had a 3:00 p.m. appointment at the AFDC office. She took a shower with both children because she intended to take them with her to the AFDC office. When Chavez was ready to go, Madrigal told her to leave one of the children with him so she would have to return. S.R. was sleeping on the couch, so Chavez left her with Madrigal. S.R. did not appear to be feeling well, but she had not yet vomited that day. When Chavez returned, S.R. had been moved to the other side of the couch and it appeared she had been crying.

S.R. vomited later that day while sitting on the couch. Chavez gave her a bath in the sink and changed her clothes. While bathing S.R., Chavez noticed that S.R. had bite marks on her back. It also appeared that S.R. did not have much energy. Chavez asked Madrigal why he had bitten S.R. Madrigal said he was playing with her. Madrigal got mad and went to bed when Chavez did not believe the bites were the result of playing. Chavez put S.R. to bed. She looked in on S.R. twice that night and everything appeared to be fine.

When Chavez awoke the next morning, S.R. appeared to be sleeping, which was unusual. Madrigal went to get S.R. and immediately called Chavez. Madrigal brought S.R. to the bedroom that he and Chavez shared. S.R. was cold and stiff and did not appear to be breathing. Chavez began performing CPR, but S.R. did not respond. Madrigal went to get his mother and Chavez followed to call emergency services. No one at the house offered to help in any manner.

Chavez and Madrigal returned to their house. Chavez performed more CPR on S.R.; Madrigal began removing his clothing from the house. Madrigal stated that he could not be in contact with the police or he would be returned to prison. He told Chavez to tell everyone that she lived alone with her children. Madrigal told Chavez that if she did not repeat the story as directed, he would kill her children. Chavez complied when she spoke with authorities. Madrigal went to another small house behind his parents' house.

After the coroner left with S.R.'s body, Chavez looked for Madrigal. She told him she repeated his story about living alone as instructed. Madrigal's mother eventually convinced Madrigal to allow her to take Chavez to Chavez's grandmother's house so she could be with her family. Madrigal called her later that night and told her he was going to pick her up so they could return to the house they shared. Chavez said she did not want to go, but eventually agreed to avoid a confrontation. When they returned to the house, Chavez began to cry because being in the house reminded her of S.R. Madrigal became upset, but eventually he and Chavez agreed to spend the night at Madrigal's sister's house. The next day Chavez returned to her grandmother's house.

Chavez testified that Madrigal had bitten her on the side of the face, leaving a bruise. The bite was painful. Madrigal also had pulled Chavez's hair and had struck her. At times, when Madrigal became upset, he would put his gun to her head. Madrigal also threatened to kill both Chavez and her family.

*3 Counsel for Madrigal focused on exposing inconsistencies between Chavez's testimony and things she said to the police and Madrigal's mother. He also pointed out

the numerous instances where S.R. was injured by falling. For example, Chavez initially told the investigating detectives that she did not notice any bruises or marks on S.R. before her death. When confronted with evidence of the bruising, however, she claimed she saw the bruises and that Madrigal had inflicted them on S.R. Chavez testified that Madrigal admitted biting S.R., but Madrigal claimed he was playing with her.

Chavez denied ever biting S.R. or hitting her in the head. Nor did she know of anyone else hitting S.R. in the relevant time frame.

Madrigal's Actions After Arrest

Madrigal's first interview occurred on February 17, 2000, at 6:35 p.m., shortly after he was arrested. The autopsy had not been performed on S.R., so the interviewing officer did not know the cause of death. The bite marks on S.R.'s body had been discovered, and the interviewing detective had viewed the body. The purpose of the interview appeared to be to determine who was responsible for biting S.R.

Madrigal waived his right to remain silent and was informed of the purpose of the interview. During this interview Madrigal appeared visibly upset and explained he was not S.R.'s biological father, but that he and Chavez had lived together for about four months. He tried to provide for both of Chavez's children. It appeared to Madrigal that Chavez's two-year-old son A.R. mistreated S.R. Madrigal claimed S.R. became ill three to four days before she died. Madrigal apparently believed S.R.'s illness could have been attributed to some food Chavez had fed S.R.

Madrigal admitted being with S.R. the day before she died but claimed S.R. slept the entire time. He also admitted biting the baby while playing with her but claimed he limited his bites to gentle nibbles on the child's hand or arm. He denied biting the child hard enough to leave a bruise or bite mark and denied that he bit the child on the back or buttocks. He attributed the bite marks to either Chavez or A.R.

The interviewing detective also expressed concern during the interview that S.R. had been sexually abused. Madrigal denied abusing the child. Biological samples were taken from Madrigal.

The first interview ended at approximately 7:50 p.m. Madrigal was returned to jail and placed in a cell with a phone. Madrigal made at least 11 phone calls before the second interview.^{FN3} The first three phone calls were to Chavez beginning at approximately 10:00 p.m. These conversations corroborate Chavez's testimony that after S.R. was found dead, Madrigal asked her to tell the police she lived alone. Madrigal, however, told Chavez to admit to the police that he also lived there. It also appears that Madrigal was attempting to coach Chavez to state that she and Madrigal had bitten S.R. in a playful manner. Chavez's response indicated that she believed Madrigal was responsible for biting S.R. Madrigal also told Chavez he was going to be charged with murder, even though the cause of death had not yet been determined. Madrigal expressed his love for Chavez and attempted to convince her to keep a unified front with the police.

[FN3](#). We discuss only the phone calls that are documented in the record as exhibits at trial. Madrigal made other phone calls that were not introduced at trial.

*4 The following morning, on February 18, Madrigal's first two phone calls were to his mother. These calls can be summarized as attempts by Madrigal to convince his mother to contact Chavez. The purpose of contacting Chavez was to convince Chavez to tell the police that everyone bit S.R. when they played with her, not just Madrigal. Madrigal also had his mother make a three-way phone call in an attempt to contact Chavez. Chavez was not home when the phone call was made.

At 10:49 a.m. Madrigal made his third call of the morning directly to the house at which Chavez was staying. Chavez was not home. Madrigal spoke with one of Chavez's relatives and urged him to have Chavez pick up one of Madrigal's vehicles for her use.

An hour later Madrigal called the same number and spoke with the same relative. Chavez still had not returned home. Madrigal told the relative he urgently needed to speak with Chavez.

Madrigal called back approximately one hour later after Chavez had returned home, which began a series of three phone calls. [FN4](#) Madrigal attempted to enlist Chavez as an ally by telling her he loved her and by asking Chavez if she loved him. Chavez said she did but told Madrigal she wanted to know why he had bitten S.R. Madrigal insisted the bites occurred while he was playing with S.R. and told Chavez she had to tell the police that she also had bitten S.R. Chavez denied ever biting S.R. She also admitted she told the police that Madrigal bit S.R. Madrigal denied hurting S.R. at any time.

[FN4](#). It appears that immediate callbacks were caused by the 15-minute time limit that is placed on all phone calls by the jail.

Madrigal made it clear to Chavez in this phone call that he suspected the calls were recorded. Many of his comments appear to be couched in such a way as to try and convey a hidden meaning to Chavez. It appears that Chavez was instructed by the investigating officers to ask many of the questions she posed to Madrigal.

The remainder of the phone calls appears to be an attempt by Madrigal to conform Chavez's testimony to his testimony. He stated he did not sexually abuse S.R. and that the tests would confirm his innocence. He stated he would never forgive Chavez for not believing him. Madrigal then presented Chavez with his version of the events leading up to S.R.'s death. He repeatedly threatened to end his relationship with Chavez if she did not testify in a manner that was helpful to him.

Madrigal's next phone call was one and one-half hours later to his mother to see if she had spoken with Chavez. When his mother told him she had not spoken with Chavez, Madrigal convinced her to make a three-way phone call so he could talk directly to Chavez. Chavez was not at the house. Madrigal emphasized to his mother that he needed to know what Chavez was telling the police. That was the last phone call for February 18.

At 1:17 a.m. on February 19, Madrigal was interviewed by the investigating detectives for the second time. The detectives learned the cause of death prior to this interview. Although Madrigal was aggressively interrogated, he continued to claim he bit S.R. only in a playful manner. He denied having slapped S.R. in the face or hurting her in any manner. Madrigal admitted, however, that after he discovered S.R.'s lifeless body, he and Chavez packed his clothes and belongings and he left the house. Madrigal claimed that Chavez told him to leave because she was violating AFDC rules by living with him. The interview ended at approximately 3:42 a.m.

*5 After the second interview, Madrigal informed the detectives that he wanted to speak with them again. The third interview occurred at 1:19 p.m. that same day. Madrigal again was informed of his constitutional rights and agreed to speak with the detectives. Madrigal stated he was not truthful in the last interview and wanted to provide additional information about S.R.'s death.

Madrigal claimed that Chavez wanted to give up the children, apparently because the children were out of control. He claimed he had almost nothing to do with any of the children because he kept himself busy. When S.R. hurt her head, Madrigal stated he wanted to take her to the doctor, but Chavez refused to do so. Madrigal also stated he had observed bruises on S.R. for the last several months. Madrigal claimed he did not know how S.R. was bruised but claimed that Chavez was with her all of the time so she would know. He claimed that when Chavez would get mad, she would pick up S.R. by the hair and throw her into her room. Chavez stated she was tired of the children. Madrigal claimed Chavez neglected the children. He also admitted that he spanked the children on the buttocks, but that was the only place he hit them.

Madrigal eventually admitted to biting S.R., but he claimed Chavez and A.R. also bit S.R. He continued to claim the bites were done in a playful manner. Madrigal stated S.R. was with her mother exclusively during the days before her death. On the day before her death, S.R. threw up in the morning. Chavez then gave her a bath and took a short trip. Madrigal claimed he was outside the entire time while S.R. slept on the couch. He claimed he did not see S.R. again until that night. He also claimed that he and Chavez left the house for a short period, leaving S.R. at the house alone.

Madrigal saw marks on S.R.'s forehead, apparently caused by Chavez. He also described numerous incidents where S.R. was accidentally injured, including [head injuries](#). Chavez would laugh when S.R. hit her head.

Madrigal repeatedly denied hitting S.R. in the head or injuring her in any manner. He eventually claimed that Chavez beat S.R. about the head the day before she was found dead. This portion of the interview concluded at 4:22 p.m.

A short break was taken. Madrigal was provided with food and permitted to take a restroom and cigarette break. During the break, Madrigal apparently told the detectives he had more to say and that he wanted to tell the truth.

Madrigal was alone in the interview room for a period of time. The preceding interviews were recorded on a portable recording device using a microphone attached to Madrigal's clothes. During the time Madrigal was alone in the interview room, he managed to remove the battery from the microphone so it no longer operated. Therefore, the next statement was not recorded on the portable recording device. Unbeknownst to Madrigal, however, the interview room also had a hidden video recorder that recorded the entire proceedings.

*6 When the interview resumed at 5:20 p.m., Madrigal stated that both he and Chavez would hit the baby to make her shut up. The blows were made to her buttocks, back and head. Madrigal stated he hit S.R. on the front and side of the head many times. Madrigal admitted he struck S.R. hard enough to cause some damage. "I slapped her enough to where she ... I just got tired of hitting and just left." The interview concluded at 5:26 p.m.

Madrigal's Testimony

Madrigal also testified at trial, against the advice of counsel. For the most part, Madrigal's trial testimony was consistent with his initial statements made to the detectives. We will limit our review to new or significant portions of his testimony.

Madrigal began by explaining that from the time he was arrested on the afternoon of February 17 until his interviews ended at approximately 5:30 p.m. on February 19, he had not had any sleep. He also explained that before his last interview, he was taken outside to smoke two cigarettes. While he was out there, Tulare County Sheriff's Department Lieutenant Scott C. Logue, one of the persons interviewing Madrigal, stated, "If you want to go and get your rest, just tell him what he wants to hear and he'll let you go." In addition, Madrigal was very upset because initially he was told that S.R. had been molested. These factors caused Madrigal to become very confused.

Madrigal denied ever biting S.R. He told the officers he bit S.R. because he was confused and he believed the truth eventually would come out. Madrigal also denied hitting S.R. or hurting her in any way. He admitted pulling the battery out of the microphone because he was going to tell the detectives what they wanted to hear, even if it was not the truth, and he did not want it recorded.

Madrigal did not see anyone intentionally injure S.R. He, however, did attempt to place the blame for S.R.'s injuries on a third person. Madrigal stated that when he and Chavez left the house to go to a friend's house, S.R. was left alone. When Madrigal realized that S.R. was at home alone, he called his mother's house and spoke with a cousin, Luis Madrigal. When he and Chavez returned from the friend's house, Luis was sitting by the door.

Later that day Madrigal left and spent the night with his friends Robert Ramos and Lilly Moreno. He returned in the early morning hours. Later he found S.R. on the bed. He tried to perform CPR, but S.R. was dead. Chavez told him he had to leave before anyone arrived. Madrigal gathered his things and left.

Madrigal remained in the area for the next two days. He was arrested on February 17. He was at his mother's house when he heard the police arrive with guns drawn. Madrigal became scared and hid in the closet, where eventually he was discovered.

The prosecutor cross-examined Madrigal on his numerous encounters with the police, including several in which he refused to give the police a statement.

Other Witnesses

*7 Logue testified that he participated in the interviews of Madrigal on February 19. After the completion of the early morning interview, Logue transported Madrigal to the jail. During the trip, Madrigal told Logue he wanted to speak with the detectives again later in the day. Logue did not threaten Madrigal in any way during the break before Madrigal's final statement.

Linda Munoz, who was employed by the Tulare County AFDC office in Dinuba, confirmed that Chavez visited the AFDC office on February 14, 2000, at 2:35 p.m. She was accompanied by a boy the age of a toddler. No other child was present.

Joseph Garza is Chavez's cousin. He had observed Chavez, Madrigal, and S.R. On one occasion, Garza observed Madrigal rapidly shake S.R. while she was in her car seat. S.R.'s eyes began to twitch or blink and she began to cry. Chavez and Madrigal got into an argument. It appeared that Madrigal was trying to play with S.R.

On another occasion, Garza observed Madrigal hitting the bed while S.R. lay on it so that S.R. would bounce up off the bed. S.R. began to cry. Garza also observed Madrigal with at least two handguns.

Roberto Ramos is a long-time friend of Madrigal's. He testified that he spent most of the morning of February 14, 2000, with Madrigal. He also spent approximately one hour with Madrigal on that afternoon. Madrigal spent the entire night at Ramos's apartment or with Ramos. Madrigal dropped Ramos off at Ramos's apartment at approximately 5:00 a.m. the morning of February 15.

Jose Antonio Ramos, Robert Ramos's father, also testified. Jose Ramos testified that the day Robert Ramos was referring to was in June or July, not February.

Lilly Moreno testified that on the evening of February 14, 2000, she had dinner with Madrigal in Fresno. She was dating Madrigal at the time.

Elijio Lara is a detective with the Santa Maria Police Department. Previously, Lara had worked for the Tulare County Sheriff's Department. On February 18, 2000, while working in Tulare, he received an anonymous phone call stating that S.R.'s mother, Chavez, possibly was leaving for Mexico.

Erika Gonzalez, Madrigal's sister, testified that in the days preceding S.R.'s death, she had observed S.R. with a significant bruise on the right side of her face. Chavez told her that A.R. had pushed S.R. off the sofa and she had fallen on a hair clip. Chavez refused to

take S.R. to the doctor because she was afraid S.R. would be taken from her care. The fall may have occurred in the time period of one week to one month before S.R.'s death. Erika [FNS](#) observed another occasion where A.R. would hit S.R. while they were playing. Erika never saw Madrigal hit S.R. S.R. always appeared excited to see Madrigal.

[FNS](#). We will refer to Madrigal's family members by their first names, not out of disrespect but to ease the reader's task.

Corrina Gonzalez, Madrigal's sister, had observed that S.R. was attached to Madrigal. Corrina also observed a bruise on S.R.'s forehead and on the right side of her face on one occasion. Chavez told her that A.R. had pushed S.R. off the couch. Chavez also said S.R. did not need medical attention. Corrina estimated the injury occurred two weeks before S.R.'s death. Chavez also told Corrina that S.R. constantly had bite marks.

*8 Yolanda Gonzalez, Madrigal's sister, was staying with her parents during the first two weeks of February 2000. During this time she saw several small bites, bruises, and scratches on S.R. She also observed a big bruise on the side of S.R.'s face that occurred sometime in January. Chavez said the injury occurred when S.R. fell on a hair clip. Chavez also told Yolanda she was afraid to take S.R. to the doctor because her children might be taken from her. Yolanda observed bite marks and bruises on S.R. Yolanda felt that Chavez was having a difficult time caring for S.R., so she offered to assume custody of S.R. Chavez agreed, but Yolanda changed her mind after talking with her husband. Yolanda also observed S.R. get excited whenever Madrigal was with her.

Bertha Gonzalez, Madrigal's mother, also had observed the large bruise on the side of S.R.'s face. Bertha did not see any other bruises on S.R. because she hardly ever saw her. Bertha recalled a time when Chavez said she wanted to kill herself because she could not stand being with the children any longer.

Expert Testimony

1. Cause of death

Dr. Maurice M. Verity examined S.R.'s brain and its coverings at the request of the Tulare County coroner. He described the brain as normal in size, with some swelling and with [subdural hemorrhages](#) underneath the dura (the firm fibrous covering of the brain) on both sides of the brain. The [injuries to the brain](#) all appeared to have occurred at around the same time. The [subdural hemorrhages](#) were severe. The combination of the brain swelling and the [subdural hemorrhages](#) was a major contributor to S.R.'s death.

[Subdural hemorrhages](#) in young children are commonly caused by trauma. An adult male repeatedly slapping a child in the head could cause this type of injury. The injuries would not have been caused by a series of falls, unless the falls occurred over a very short period of time. The trauma that led to the injuries to S.R.'s brain would have occurred between a few hours before her death to two to three days before her death.

Once the brain begins to swell, the [intracranial pressure increases](#) because the dura cannot expand to accommodate the increasing size of the brain. In a child, this [increased intracranial pressure](#) is associated with vomiting, fussiness, headaches, swelling of the eyes, sleepiness, and lethargy.

Dr. Gary A. Walter owns a company that provides autopsy services for Tulare, Kings, and San Luis Obispo Counties. Walter originally joined the company when Dr. Leonard Miller was part of the practice. Miller, who died in 2003, performed the autopsy on S.R. Walter reviewed S.R.'s autopsy file and concluded that S.R.'s death was caused by cranial [cerebral trauma](#) or blunt force trauma to the right side of S.R.'s head. A fresh lesion was noted on the right temporal (side) scalp. The injury occurred within 12 to 24 hours of S.R.'s death. Specifically, S.R. died because of at least one blunt force trauma to the right side of her head. The trauma caused a deformation of S.R.'s soft skull, which caused a rupture of some of the blood vessels within the head. The subsequent leakage of blood (the [subdural hematomas](#)) on both the right and left sides of her head, along with the [swelling of the brain](#) caused by the trauma, compromised the respiratory center of the brain stem, resulting in her death. The injuries could have been caused by a slap or a punch by an adult the size of Madrigal.

*9 Dr. John J. Plunkett, a pathologist, was retained by Madrigal. Plunkett had conducted a study of 18 fatalities involving children over an 11-year period. From this study, he concluded the surface on which a child falls makes little difference in the severity of the injury. He also concluded that short distance falls can kill a child.

Plunkett reviewed the various reports related to S.R.'s death, including portions of Chavez's testimony. He did not find any fractures on S.R.'s skull. He concluded that S.R.'s death was caused by [swelling of the brain](#). The brain was damaged by an impact trauma that most likely occurred within three to four days of her death. Plunkett could not say if the injury had occurred within two hours or two days before death.

The [subdural hematomas](#) were caused by the same impact trauma. The impact trauma occurred on the right front temporal scalp (above and in front of the right ear and above the right eye). Plunkett testified the injury was a low-velocity impact. It could have been caused either intentionally or accidentally. He felt that either being pushed off a couch while standing and hitting her head on the floor, or a hard fall off of a step, would be consistent with S.R.'s injury. The location of the injury, however, was more consistent with an accidental injury. He does not believe the injuries could have been caused by someone slapping S.R. in the head. Plunkett testified that Madrigal's statement was inconsistent with the physical evidence in the case, although he was uncertain at the time of trial why he came to that conclusion.

2. Bite marks

Dr. Norman D. Sperber is a forensic odontologist. Sperber viewed photographs of the marks on S.R. Those marks were bite marks. It is unlikely that S.R. would have laughed when she was bitten.

Sperber was sent models of the teeth of both Madrigal and Chavez. He compared the models to the pictures of S.R. It was very difficult to compare the models with the pictures because there were no bite marks, only bruises. His initial opinion, however, was that the bite marks on S.R. more likely were caused by Chavez. Sperber later met with Dr. Richard W. Barnes about the case. At the end of the meeting, Sperber was not comfortable rendering any opinion about who may have caused the bite marks because the bruises were too diffuse. He wrote another report reflecting this conclusion.

Barnes is a general dentist with a practice in Visalia. He also is employed as the forensic dentist for Tulare County. He took impressions of Chavez and Madrigal. He did not have any problems with Chavez, but Madrigal was not a good patient. Barnes felt Madrigal may have been trying to distort the impressions.

Barnes also viewed S.R.'s body at the morgue. There appeared to be two different size bite marks on S.R.'s body. Barnes focused on two bite marks. He was able to line up the models he made from Madrigal with the two bite marks on S.R.'s body. He opined that the bite marks more likely than not were caused by Madrigal, not Chavez. Madrigal's counsel focused on Barnes's limited experience in bite mark cases and on what he believed to be Barnes's inappropriate methodology.

*10 Dr. Charles M. Bowers is a licensed dentist and lawyer who was retained by Madrigal. Bowers concluded the bite marks could not have been made by Madrigal, but could have been made by Chavez.

Dr. Gregory S. Golden is a full-time general dentist and a part-time forensic dentist. He did his own analysis and reviewed the work of Bowers. Golden concluded the evidence was inconclusive, that is, he could not tell whether Madrigal or Chavez was responsible for the bite marks on S.R.

3. Interrogation

Richard A. Leo, Ph.D. is an expert in police interrogations and interviews. He was retained by Madrigal. Since the 1930's police have developed programs on psychological techniques to elicit confessions from criminal suspects. The psychological techniques are essentially methods of persuasion. Ideally, the goal of interrogation is to ascertain the truth, but sometimes ascertaining the truth can become secondary to obtaining incriminating statements.

Suspect interrogation usually involves a two-step process. The first step is to convince the suspect that he has been caught and there is no way he or she is going to escape punishment for the crime. The second step is to offer an inducement to the suspect to confess. There are many different methods that can be used in each step, but this two-step process is generally followed. The goal is to convince the suspect that it is in his or her best interest to confess to the crime.

False confessions occur. Leo does not believe the police intentionally seek to elicit a false confession. Rather, the false confession is the result of mistakes that have been

made by the police. One way to determine if a confession is false is to determine whether the suspect can provide details about the crime that generally are not known. Another method is to determine if the physical evidence from the crime fits the confession. Generally, juveniles under the age of 16 and mentally handicapped individuals are more likely to give false confessions.

PROCEDURAL SUMMARY

Madrigal was charged in count 1 of the information with first degree murder of S.R. (§§ 187, subd. (a), 189.) The information also alleged the murder of S.R. involved the infliction of torture, a special circumstance within the meaning of section 190.2, subdivision (a)(18). Count 2 of the information charged Madrigal with assault on a child causing death in violation of section 273ab. Count 3 charged Madrigal with inflicting corporal injury on a child in violation of section 273d, subdivision (a). Each count also alleged that Madrigal was ineligible for probation because he had two prior convictions within the meaning of section 1203, subdivision (e)(4) and that he had served a prior prison term within the meaning of section 667.5, subdivision (b). Finally, count 3 also alleged that Madrigal inflicted great bodily injury to S.R. within the meaning of section 12022.95. The district attorney's office elected to seek the death penalty.

*11 The jury found Madrigal not guilty of first degree murder but guilty of second degree murder, assault on a child causing death, and inflicting corporal injury on a child. The jury also found true the allegation that Madrigal caused S.R. great bodily injury within the meaning of section 12022.95. Madrigal waived his right to a jury trial on the prior conviction allegations and admitted his prior convictions.

The trial court sentenced Madrigal to an indeterminate term of 25 years to life on count 2. An indeterminate term of 15 years to life was imposed on count 1 and then stayed pursuant to section 654. A determinate term of four years (the midterm) was imposed concurrently on count 3.

DISCUSSION

I. The Statement

Madrigal moved in the trial court to suppress his statements to the police because they were coerced through “techniques” used by the police. These techniques included isolation in a windowless room, police control of food, water, “and the outside world,” and sleep deprivation. He renewed his objection to admission of these statements in his motion for a new trial and again does so here.

Detective Frank Arnold was the primary investigating officer in the matter of S.R.'s death. He testified that Madrigal was arrested on February 17, 2000, at 4:30 p.m., and taken to the violent crimes office. Arnold arrived at approximately 6:30 p.m. and conducted the first interview. After the interview, Madrigal was booked into the pretrial

facility and placed in a holding cell. There were chairs in the holding cell on which one could sleep, but there were no beds. Madrigal was moved to the main jail at approximately 3:00 p.m. on February 18. He was assigned to a 16-man cell at 4:10 p.m. and then moved to a single cell two hours later, where he remained until he was picked up for the second interview in the early morning hours of February 19.

The second interview was conducted at 1:17 a.m. on February 19 after the detectives interviewed Chavez and completed a search of the house where Madrigal and Chavez lived. The interview lasted 142 minutes. Madrigal was returned to the main jail at approximately 4:00 a.m.

Madrigal was interviewed again at 1:19 that afternoon for 92 minutes and then a 20-minute break was taken. The next portion of the interview lasted 28 minutes, then a 25-minute break was taken. The interview resumed for approximately 30 minutes and then a 58-minute break was taken, during which time Madrigal was provided food. The final part of the interview lasted six minutes. Over the three-day period, Madrigal was interviewed for a total of 407 minutes. Madrigal did not complain that he was tired during the interview. [FN6](#)

[FN6](#). Madrigal testified at trial about the conditions of his confinement during this period of time. His testimony essentially was consistent with Arnold's testimony. Madrigal added, however, that he was unable to sleep from the time he was incarcerated to the time he gave his final statement. He blamed the lack of sleep on his constant movement within the jail and his emotional state after he was arrested.

Arnold again met with Madrigal five days later. At that time, Madrigal told Arnold that everything he told the detectives was a lie. Madrigal stated that neither he nor Chavez ever hurt S.R.

Madrigal argues the combination of sleep deprivation and the psychological coercion used by Logue resulted in a confession that was coerced. The two detectives began the interrogation at 1:17 a.m. “for no sound reason,” knowing that by the time Madrigal was returned to his cell it would be too noisy for him to get any sleep. According to Madrigal, the two planned to return on the afternoon of that day to psychologically assault Madrigal until he confessed.

*12 Arnold explained that Madrigal was interviewed at 1:17 a.m. because that was when the officers returned to the department after finishing the search of Madrigal's residence, the scene of a murder. We disagree with Madrigal's claim that this did not constitute a sound reason. The investigating officers were proceeding in an orderly and expeditious fashion.

Nor is there any evidence of a plan to assault Madrigal psychologically. While it is true the second interview began at 1:17 a.m., the reasons for the timing of the interview were explained. Madrigal's argument that the detectives planned a strategy to break down Madrigal's resistance is not supported by the record. It was Madrigal who requested the interview that began in the early afternoon of February 19. There could not be a plan if

Madrigal was controlling the occurrences of the interviews. Perhaps more importantly, at no time during the interview did Madrigal request the interview be stopped or state that he was too tired to continue. Having made these factual observations, we now proceed to our review of the issues raised by Madrigal.

There is no constitutional impediment to admission of a voluntary confession or statement at trial. “The business of police detectives is investigation, and they may elicit incriminating information from a suspect by any legal means. ‘[A]lthough adversarial balance, or rough equality, may be the norm that dictates trial procedures, it has never been the norm that dictates the rules of investigation and the gathering of proof.’ [Citation.]” ([People v. Jones \(1998\) 17 Cal.4th 279, 297.](#))

A voluntary confession or statement is one that is the product of the confessor's free will and rational intellect. ([People v. Memro \(1995\) 11 Cal.4th 786, 827](#); [People v. Hinds \(1984\) 154 Cal.App.3d 222, 237](#), disapproved on other grounds in [People v. Crittenden \(1994\) 9 Cal.4th 83, 129-131.](#)) In other words, an admissible confession is one that is the result of an essentially free and unconstrained choice to confess. ([Schneckloth v. Bustamonte \(1973\) 412 U.S. 218, 225.](#))

The Fifth and Fourteenth Amendments to the United States Constitution preclude admission of a confession or statement that is involuntary or coerced. ([People v. Boyette \(2002\) 29 Cal.4th 381, 411](#); [People v. Douglas \(1990\) 50 Cal.3d 468, 499](#), overruled on other grounds in [People v. Marshall \(1990\) 50 Cal.3d 907, 933, fn. 4.](#)) This is so for at least two reasons: (1) such confessions are not reliable, and (2) courts have concluded that public policy will not countenance the use of a coerced confession. ([Jackson v. Denno \(1964\) 378 U.S. 368, 385-386](#); [Marcus W. v. Superior Court \(2002\) 98 Cal.App.4th 36, 45.](#)) “[T]he Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,[citation], and because of ‘the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.’[Citation.]” ([Jackson v. Denno, supra](#), at pp. 385-386.)

*13 The most frequent formulation of the test used to determine whether a confession was involuntary is whether the confessor's will was overcome by police conduct at the time he or she confessed. ([People v. Maury \(2003\) 30 Cal.4th 342, 404.](#)) “The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of ‘mental freedom’ to confess to or deny a suspected participation in a crime. [Citations.]” ([Lyons v. Oklahoma \(1944\) 322 U.S. 596, 602.](#))

“A confession is involuntary whether coerced by physical intimidation or psychological pressure. [Citation.] Law enforcement conduct which renders a confession involuntary does not consist only of express threats so direct as to bludgeon a defendant into failure

of the will. Subtle psychological coercion suffices as well, and at times more effectively, to overbear ‘a rational intellect and a free will.’ “ ([United States v. Tingle \(9th Cir. 1981\) 658 F.2d 1332, 1335.](#))

In cases of psychological coercion, the question is “ “whether the influences brought to bear upon the accused were ‘such as to overbear [the accused's] will to resist and bring about confessions not freely self-determined.’ [Citation.]” [Citation.]” “ ([People v. Maury, supra, 30 Cal.4th at p. 404.](#)) Psychological ploys are precluded only if they produce a statement that “is both involuntary and unreliable.” [People v. Ray \(1996\) 13 Cal.4th 313, 340.](#)

One form of psychological coercion that is prohibited is a promise of benefit or leniency, whether express or implied. ([People v. Cahill \(1994\) 22 Cal.App.4th 296, 311.](#)) Threats of harsh penalties often include the implied promise that if the defendant confesses, he or she will receive lenient treatment and therefore are treated as promises of leniency. (*Ibid.*)

We review the trial court's determination on the issue of coercion independently, utilizing the entire record. ([People v. Memro, supra, 11 Cal.4th at p. 826.](#)) Our independent review includes the issues of whether there was coercive police conduct and whether there was a causal connection between the coercive police conduct and the confession. (*Ibid.*) We review the trial court's findings concerning the circumstances surrounding the confession to determine if they are supported by substantial evidence. (*Ibid.*)

A review of some cases involving coerced witness statements will aid our analysis. In [People v. Underwood \(1964\) 61 Cal.2d 113](#) the defendant was convicted of rape, robbery, and kidnapping involving the abduction of a woman. The defendant and Marshall Wisdom were in a car when they picked up the victim. The defendant claimed the encounter was consensual. Wisdom testified that although he was present, he did not remember anything untoward occurring in the car. The prosecution impeached Wisdom with statements he made to the police during the investigation.

*14 Wisdom testified his statements to the police were not true and were the product of police threats. Wisdom stated he was intoxicated when interrogated, and the officers threatened him two or three times with a sentence in excess of 20 years or a death sentence. ([People v. Underwood, supra, 61 Cal.2d at p. 124.](#))

The Supreme Court noted that Wisdom was young (17 years old), probably susceptible to pressure by the police, and that his testimony about the threats was not contradicted. ([People v. Underwood, supra, 61 Cal.2d at pp. 124-125.](#)) The Supreme Court also noted the trial court did not instruct the jury that the question of voluntariness could affect the consideration of the prior statement, but instead instructed the jury the prior statements could be used without qualification, an error under the facts of the case. ([Id. at p. 125.](#)) The Supreme Court concluded that because the evidence of guilt was sharply conflicting, the admission of the prior statements of both Wisdom and the defendant resulted in a miscarriage of justice. (*Ibid.*)

In [People v. Lee \(2002\) 95 Cal.App.4th 772](#), the defendant was convicted of murder. At trial Reynard Saxon testified that, although he was present at the scene of the shooting, he did not see who shot the victim. The prosecution introduced a tape recording of a statement Saxon gave to the police identifying the defendant as the murderer. Saxon testified his tape-recorded statements were false and he made them only because he was pressured by an officer to implicate the defendant. ([Id. at p. 781.](#))

The appellate court reversed the conviction, finding the tape-recorded statements were coerced. The court observed that the police told Saxon he was subject to a lie detector test that was infallible. The machine had determined there was a 97 percent probability that Saxon was the murderer and the only way to avoid being prosecuted for murder was to identify the defendant as the shooter. ([People v. Lee, supra, 95 Cal.App.4th at p. 783.](#)) “[The officer] in essence told Saxon: We will prosecute you for first degree murder unless you name [the defendant] as the killer.” ([Id. at p. 785.](#)) “Saxon could reasonably conclude from [the officer's] statements the only way to prevent [the officer] from giving the investigating officers the polygraph results which branded him the killer to a '97 percent' certainty was to give [the officer] the ‘truth’ he wanted to hear: that defendant was the killer.” ([Id. at p. 786.](#)) “In the present case ... the interrogation of Saxon was not designed to produce the truth as Saxon knew it but to produce evidence to support a version of events the police had already decided upon. In this respect, the police crossed the line between legitimate interrogation and the use of threats to establish a predetermined set of facts. The trial court erred in not excluding Saxon's statements.” (*Ibid.*, fn. omitted.)

In [Wilcox v. Ford \(11th Cir.1987\) 813 F.2d 1140](#), the defendant was convicted of murder. Ed Wrentz testified that he helped the defendant dispose of the victim's body. The defendant presented alibi testimony. On appeal the defendant argued that Wrentz's testimony was the result of coercion. The transcript of the interview indicated the officers threatened to charge Wrentz, a “very old, illiterate black man,” with murder, threatened to “lynch him, put words in his mouth, and told him he was headed for eternal damnation.” ([Id. at p. 1147.](#))

*15 Lorenzo Marshall received treatment similar to Wrentz from the police. ([Wilcox v. Ford, supra, 813 F.2d at p. 1147.](#)) Marshall, also an elderly, illiterate Black man, signed a statement incriminating the defendant, despite initially telling the officers that he was in another city at the time of the murder. (*Ibid.*) Marshall later recanted the statement and claimed he made it only because he was afraid and wanted to go home. (*Ibid.*)

The appellate court rejected the defendant's claim that the testimony was the result of coercion. It noted that only Marshall's statement was introduced at trial. ([Wilcox v. Ford, supra, 813 F.2d at p. 1149.](#)) It also found the defendant had adequate tools to challenge Wrentz's and Marshall's testimony since the defense was aware of the circumstances of the interrogations, had access to the tapes and transcripts of the interrogations, and had a full opportunity to utilize this information to discredit the witnesses at trial. (*Ibid.*) These circumstances convinced the appellate court the defendant received a “fundamentally fair trial in spite of any government misconduct that might have occurred.” (*Ibid.*)

Our review of the entire case convinces us that there was no error in the admission of Madrigal's statements to the investigating officers. We emphasize that we have reviewed the entire record, including the videotapes of the interviews on the afternoon of February 19. (Exhibits 53, 54, and 124.) We have confirmed the accuracy of the transcripts. We observed that Logue was, at times, aggressive in his questioning of Madrigal. At no time, however, did Logue threaten Madrigal in any manner. Instead, Logue's approach was to attempt to persuade Madrigal to admit to the crimes Logue was convinced Madrigal had committed. At no time was Madrigal refused anything that he requested. When he asked for food, some was provided. When he asked for water, some was provided. He never requested, on the videotapes, to use the restroom, yet he was provided the opportunity to do so.

Madrigal did yawn a few times on the videotapes, but he did not request the interviews be terminated. The record also reflects that this was not Madrigal's first contact with the police. He had, in the past, refused to speak with the police. Therefore, he knew he had that right. Madrigal also was informed of his [Miranda](#)^{FN7} rights several times and signed forms acknowledging and waiving those rights.

[FN7. *Miranda v. Arizona* \(1966\) 384 U.S. 436.](#)

There also is credible evidence that Madrigal's lack of sleep was the product of his own desire to determine what was happening in the investigation and to try to influence what Chavez would tell the police. Between interviews, Madrigal made 64 phone calls from his various jail cells, 16 of which were accepted by the party being called. Clearly, Madrigal was very busy while in custody, perhaps too busy to sleep.

The cases cited above all involve facts distinct from those presented in this case. The relevant cases cited by Madrigal are similarly distinct. In [*Ashcraft v. Tennessee* \(1944\) 322 U.S. 143, 153-154](#), the Supreme Court found a confession was coerced where the defendant was questioned relentlessly for a period of 36 hours, without any break, by a tag team of officers and lawyers.

*16 In [*Chambers v. Florida* \(1940\) 309 U.S. 227, 238-240](#), the Supreme Court held that a confession was coerced where the Black defendant was arrested and held for five days without any charges being brought, was questioned in a small room with numerous officers present, as well as White citizens from the community, and where the confession resulted after an all-night session in which the defendant was deprived of sleep.

[*Culombe v. Connecticut* \(1961\) 367 U.S. 568](#) involved a mentally handicapped defendant who (1) was detained illegally for a four-day period; (2) was questioned periodically while he was detained; and (3) never was advised of his right to counsel but who, nevertheless, requested counsel and was ignored.

Finally, in [*Reck v. Pate* \(1961\) 367 U.S. 433](#), the mentally handicapped defendant (1) had no prior involvement with the police; (2) was held for eight days without charges being brought; (3) was questioned repeatedly despite being physically ill and hospitalized

on at least two occasions; (4) was put on display at the police station; and (5) was denied proper food, clothing, counsel, or any contact with friends or family.

The facts in each of these cases render them inapposite. Madrigal is not mentally handicapped, was not detained illegally, was advised repeatedly of his right to remain silent and his right to counsel, was experienced in dealing with the police, was not questioned for extended periods of time without a break, was not deprived intentionally of sleep, and never requested counsel. Madrigal's statements were admissible.

II. Batson/Wheeler^{FN8}

FN8. *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

Batson and *Wheeler* prohibit a prosecutor from using peremptory challenges to exclude potential jurors on the basis of group bias. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1104.) Madrigal contends the prosecutor impermissibly used her peremptory challenges in a prohibited manner to dismiss two Black potential jurors, Ms. D. and Mr. B.

“The applicable law is well settled. ‘[Under *Wheeler*,] [a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against “members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds”—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. [Citations.] [Under *Batson*,] [s]uch a practice also violates the defendant's right to equal protection under the Fourteenth Amendment. [Citations.]

“ ‘The United States Supreme Court has recently reaffirmed that *Batson* states the procedure and standard trial courts should use when handling motions challenging peremptory strikes. “First, the defendant must make out a prima facie case ‘by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.’ [Citations.] Second, once the defendant has made out a prima facie case, the ‘burden shifts to the State to explain adequately the racial exclusion’ by offering permissible race-neutral justifications for the strikes. [Citations.] Third, ‘[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.’ [Citation.]” ‘ [Citations.]

*17 “ ‘We review the trial court's ruling on purposeful racial discrimination for substantial evidence. [Citation.] It is presumed that the prosecutor uses peremptory challenges in a constitutional manner. We defer to the court's ability to distinguish “bona fide reasons from sham excuses.” [Citation.] As long as the court makes “a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.” ‘ [Citation.]” (*People v. Zambrano, supra*, 41 Cal.4th at p. 1104.)

Madrigal's motion in the trial court was made during the selection of alternate jurors. When counsel made the motion, he stated that Mr. B. and Ms. D. were the only two Black potential jurors. The trial court conceded that the prosecution utilized peremptory

challenges on both Black potential jurors. Recognizing the recent cases lowering the threshold for proving a prima facie case, the trial court asked the prosecutor to state the reasons for dismissing Mr. B. and Ms. D.

The prosecutor stated that her concerns regarding Mr. B. stemmed from his prior jury service. In his jury questionnaire, Mr. B. stated that the prosecutor had not done a sufficient job of putting on the evidence. When she questioned Mr. B. during voir dire, he was unable to explain what more the prosecutor in the prior case could have done to convince Mr. B. of the defendant's guilt. This caused the prosecutor to be concerned that Mr. B. would require proof beyond any recognizable standard before he would find a defendant guilty.

Similarly, the prosecutor pointed out that Ms. D. stated in her questionnaire at least three times in response to questions requiring a direct answer that she would require proof beyond a reasonable doubt. In the questionnaire, Ms. D. also stated that she frequently felt the whole truth did not come out. These answers again caused the prosecutor to be concerned that Ms. D. would impose on the prosecution a standard of proof not required by the law.

The trial court confirmed the prosecutor's recollection of the facts and found her reasons for exercising the peremptory challenges to be justified, that is, race neutral. Madrigal's counsel did not dispute any of the facts relied on by the prosecutor.

The record supports the trial court's findings. While we do not have the juror questionnaires, the lack of objection to the representations made by the prosecutor leads us to conclude the representations were accurate. When questioned by the prosecutor, Mr. B. confirmed he previously had served on a jury, and that he felt the prosecutor did not ask the right questions to "convince [the jury] that the person was guilty." When asked to explain his answer, Mr. B. merely stated that the prosecutor did not ask the right questions to convince the jury that the defendant was guilty, even though Mr. B. "felt that [the defendant] was guilty." When asked to expand on his answer again, Mr. B. stated, "He just wasn't convincing enough. I didn't feel he asked the right questions. In fact, I sent a couple [of] questions in the things that were in my mind what could prove or disprove, but he just didn't seem like he was asking the right questions." When the prosecutor asked what questions the prosecutor should have asked, Mr. B. responded that he could not think of any.

*18 Ms. D. was questioned during voir dire only by Madrigal's counsel. She confirmed that she worked for a local insurance company as an account coordinator. She worked in the background, "propping everyone else up." She also coached the junior varsity girls at a local high school. When asked if she needed to be convinced beyond a reasonable doubt, she replied, "Yes. If you sentence someone to death, they got to be like concrete." She also confirmed that she did not want any "residual doubt."

This record demonstrates that the prosecutor had legitimate concerns about the ability of both Mr. B. and Ms. D. to decide this case using the applicable legal standards. We are not saying that Mr. B. and Ms. D. would not, or could not, follow the burden of proof

instructions provided by the trial court. We are saying, however, that based on their responses, the prosecutor could entertain a reasonable question about the ability or willingness of Mr. B. and Ms. D. to do so. Peremptory challenges are not an exact science. When faced with the answers given by Mr. B. and Ms. D., it is not only understandable, it is highly probable that a competent prosecutor would be concerned about the ability of the juror to render a guilty verdict, no matter how strong the evidence presented.

Our review of the record convinces us, despite Madrigal's arguments to the contrary, that substantial evidence supports the prosecutor's explanations for her use of the peremptory challenges. The explanations were not vague or obtuse. Nor did they indicate an unwillingness to seat a jury that would apply the beyond-a-reasonable-doubt standard. Proof "like concrete" is not proof beyond a reasonable doubt. To be willing to find someone guilty only if the prosecutor asks the question the juror deems critical is not proof beyond a reasonable doubt. There was no error.

III. Substantial Evidence

Madrigal argues that the convictions for second degree murder and assault resulting in the death of a child under the age of eight are not supported by substantial evidence.

Our review of the sufficiency of the evidence is deferential. We "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, 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." [Citation.]” ([People v. Hillhouse \(2002\) 27 Cal.4th 469, 496](#); [People v. Superior Court \(Jones \) \(1998\) 18 Cal.4th 667, 681.](#)) We focus on the whole record, not isolated bits of evidence. ([People v. Slaughter \(2002\) 27 Cal.4th 1187, 1203.](#)) We presume the existence of every fact the trier of fact reasonably could deduce from the evidence that supports the judgment. ([People v. Kraft \(2000\) 23 Cal.4th 978, 1053.](#)) We will not substitute our evaluations of a witness's credibility for that of the trier of fact. ([People v. Koontz \(2002\) 27 Cal.4th 1041, 1078.](#))

*19 “The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] ‘Although it is the duty of the jury 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. “ ‘If the circumstances reasonable justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.’ “ [Citations.]’ [Citation.]’ “Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.” ‘ [Citations.]’” ([People v. Stanley \(1995\) 10 Cal.4th 764, 792-793.](#))

A. Second Degree Murder

“Murder” is defined as the “unlawful killing of a human being ... with malice aforethought.” (§ 187.) Madrigal contends that his conviction is unsupported by the record because there is no evidence that he caused S.R.'s death. He does not argue that S.R. died from anything other than the [injury to her head](#). Instead, he argues that the slapping to which he confessed was excluded by the experts as the cause of S.R.'s death.

Madrigal's argument ignores relevant portions of the record. It is true that the expert Madrigal retained, Plunkett, testified that a slap to the head could not have caused the injury to S.R.'s brain. [FN9](#)

[FN9](#). Plunkett's conclusion appears to be based on the assumption that Madrigal did not slap S.R. in a forceful manner, but instead it was a gentle slap on the cheek. Indeed, Plunkett's opinion was, in essence, that no matter how hard a grown man struck S.R. in the head, it could not have caused the brain injury suffered by S.R. This testimony defies common sense.

The People's experts, on the other hand, testified that a slap could have caused the [injury to the brain](#). Verity testified a slap by a mature male in excess of 200 pounds could have caused the [brain injury](#). He repeated his testimony a short while later when he stated that the injuries he observed on S.R. could have been caused by repeated slapping. Similarly, Walter testified that “when you have such an age [difference], a nine-month-old, a large adult, powerful adult, I assume, and this is what I'm basing my opinion on, I think virtually any kind of blunt force trauma, be it a slap or a punch, with enough force could cause the kinds of injuries that I saw on review of this case.”

This testimony, when combined with Madrigal's admission that he repeatedly slapped S.R. in the head, is more than sufficient to support the jury's conclusion that Madrigal caused S.R.'s death when he slapped her in the head.

B. Section 273ab

Section 273ab provides that when a child under the age of eight years is in the care or custody of a defendant, and the child dies as a result of an assault “by means of force that to a reasonable person would be likely to produce great bodily injury ... [the defendant] shall be punished” by a prison term of 25 years to life. Madrigal contends there was insufficient evidence that he violated this statute because he was not providing care to, or did he have custody of, S.R.

*20 Madrigal points out that he was not the biological father of S.R., and he did not have any legal obligation to provide care or support for S.R. Instead, Chavez, S.R.'s mother, had custody of, and was responsible for providing care for, S.R. Madrigal characterizes his relationship with Chavez, in essence, as a landlord-tenant relationship, with Chavez failing to pay the rent.

The parties both cite [People v. Cochran \(1998\) 62 Cal.App.4th 826](#) as supporting their arguments. Cochran was convicted of violating section 273ab. The facts are similar to this case. Cochran met the baby's mother shortly after the baby was born and eventually

invited her and the baby to move in with him. The three shared a room in defendant's grandmother's house. The baby died after suffering a traumatic [injury to her head](#).

Cochran argued he did not have care or custody of the baby because he was not the biological father of the baby. The appellate court concluded, “The terms ‘care or custody’ do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver.” ([People v. Cochran, supra, 62 Cal.App.4th at p. 832.](#)) The court then found section 273ab applied to Cochran because “the child lived in the house at the invitation of defendant. Defendant assumed a parent-like role. He was, as mother described, a surrogate father for the child. Clearly under the above test, defendant had a duty as a caretaker to this child.” (*Cochran*, at p. 833.)

Madrigal's relationship with S.R. cannot be distinguished in any meaningful manner from that described in *Cochran*. Madrigal and Chavez began cohabitating after S.R. was born. The two shared a house secured by Madrigal and owned by his parents. He claimed throughout his interviews that he was the primary provider of support for Chavez and her children. He explained how he would play with S.R. and sooth her when she became upset. He also admitted he would discipline S.R. Chavez testified that, on occasion, she left S.R. with Madrigal when she left the home. She did so on the afternoon before S.R.'s death. This is more than substantial evidence to establish that Madrigal fell within the category of individuals who supplied care or had custody of S.R.

Madrigal attempts to distinguish his case from *Cochran* because Chavez did not describe Madrigal as a “surrogate father” for S.R. The reality is, however, that Madrigal accepted responsibility for S.R., even if Chavez never described him as a surrogate father.

IV. Exclusion of Evidence

Madrigal argues the trial court erred in excluding certain evidence. We review a trial court's evidentiary rulings for an abuse of discretion. ([People v. Geier \(2007\) 41 Cal.4th 555, 586](#).) If there was error, we will reverse only if it is reasonably probable that the defendant would have obtained a better outcome had there been no error. ([People v. Fudge \(1994\) 7 Cal.4th 1075, 1102-1103](#); [People v. Watson \(1956\) 46 Cal.2d 818, 836.](#))

A. Testimony of Dr. Avak A. Howsepian

*21 A primary thrust of Madrigal's case was to discredit his admissions to the police. To do this, Madrigal presented Dr. Leo, who testified about false confessions and the police procedures that could lead to a false confession.

In addition to the testimony of Dr. Leo, Madrigal also sought to introduce the testimony of Avak A. Howsepian, M.D., Ph.D. Madrigal asserted in his memorandum of points and authorities that Howsepian had interviewed Madrigal and his family members and could present evidence about Madrigal's “psychological make-up.” Recognizing that the trial court already had ruled that Madrigal's statement to the police was voluntary, Madrigal argued in his memorandum that Howsepian's testimony was relevant because it

could assist the jury in determining whether he had the requisite mental state to be guilty of first degree murder.

The trial court initially decided to exclude Howsepian's testimony because it appeared it was directed at the issue of whether Madrigal's statement was voluntary. After hearing Madrigal's counsel's argument that the proposed testimony would address whether Madrigal would be susceptible to giving a false statement, the trial court held a hearing outside the presence of the jury to evaluate the proposed testimony. ([Evid.Code, § 402.](#))

Howsepian testified that he interviewed Madrigal for a total of 12 hours and reviewed numerous records related to Madrigal's criminal history. He also interviewed Madrigal's family. Howsepian opined that Madrigal suffered from [posttraumatic stress disorder](#), [attention deficit disorder](#) (as a child), [acute stress disorder](#), and anxiety and [depressive disorders](#). These psychological problems made Madrigal more susceptible to giving a false statement to the police. Howsepian felt that Madrigal was susceptible to giving a false confession so that the interview would come to an end.

The trial court concluded that Howsepian's testimony would not be admissible legally and therefore excluded it. As Madrigal points out, the proper analysis for admission of such testimony is found in [Crane v. Kentucky \(1986\) 476 U.S. 683](#).

Crane was 16 years old when he was arrested for an armed robbery at a gas station. During questioning, Crane admitted to various crimes, including the murder of a clerk at a liquor store during an aborted robbery. At the suppression hearing, Crane testified that he had been detained in a windowless room for a protracted period of time, that “he had been surrounded by as many as six police officers during the interrogation, that he had repeatedly requested and been denied permission to telephone his mother, and that he had been badgered into making a false confession.” ([Crane v. Kentucky, supra, 476 U.S. at p. 685.](#)) The trial court denied the motion to suppress.

At trial, Crane's counsel argued the confession was unreliable because it was inconsistent with the facts of the crime and because of the circumstances surrounding the interrogation. The trial court sustained the prosecutor's objection that the circumstances surrounding the interrogation addressed only the issue of voluntariness, an issue already decided by the trial court. The Kentucky appellate courts affirmed the ensuing conviction. The Supreme Court reversed.

*22 “The holding [of the Kentucky Supreme Court] rests on the apparent assumption that evidence bearing on the voluntariness of a confession and evidence bearing on its credibility fall in conceptually distinct and mutually exclusive categories. Once a confession has been found voluntary, the Supreme Court of Kentucky believed, the evidence that supported that finding may not be presented to the jury for any other purpose. This analysis finds no support in our cases, is premised on a misconception about the role of confessions in a criminal trial, and, under the circumstances of this case, contributed to an evidentiary ruling that deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense. [Citation.]

“It is by now well established that ‘certain interrogation techniques, either in isolation, or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.’ [Citation.] To assure that the fruits of such techniques are never used to secure a conviction, due process also requires ‘that a jury [not] hear a confession unless and until the trial judge [or some other independent decisionmaker] has determined that it was freely and voluntarily given.’ [Citations.]

“In laying down these rules the Court has never questioned that ‘evidence surrounding the making of a confession bears on its credibility’ as well as its voluntariness. [Citation.] As the Court noted in [Jackson \[v. Denno \(1964\) 378 U.S. 368, 387, fn. 13\]](#) because ‘questions of credibility, whether of a witness or of a confession, are for the jury,’ the requirement that the court make a pretrial *voluntariness* determination does not undercut the defendant's traditional prerogative to challenge the confession's *reliability* during the course of the trial. [Citation.] To the same effect was [Lego \[v. Twomey \(1972\) 404 U.S. 477\]](#), where the Court stated, ‘Nothing in *Jackson [v. Denno]* questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness.’ [Citation.] Thus, as *Lego* and *Jackson* make clear, to the extent the Court has addressed the question at all, it has expressly assumed that evidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess.

“The decisions in both *Jackson* and *Lego*, while not framed in the language of constitutional command, reflect the common-sense understanding that the circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual. The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness, a question most, but not all, States assign to the trial judge alone to resolve. [Citation.] But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be ‘insufficiently corroborated or otherwise ... unworthy of belief.’ [Citation.] Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.” ([Crane v. Kentucky, supra, 476 U.S. at pp. 687-689.](#))

*23 We are presented with a different situation than that addressed in *Crane*. Madrigal was permitted to present evidence of the circumstances surrounding his statements to the police. Indeed, the jury saw at least one videotape and heard all of the audiotapes of the interrogations. Therefore, unlike *Crane*, this is not a case in which the trial court prohibited Madrigal from addressing the circumstances surrounding his statement.

Instead, we are faced with a question of how much evidence Madrigal could present on the issue. Not only did Madrigal, Logue, and Arnold testify to events surrounding Madrigal's statements, but the trial court permitted Leo to testify about police interrogation techniques and how they can lead to false confessions.

Since the evidence presented by Madrigal thoroughly addressed the issue, the question of whether to permit Howsepian to testify was left to the discretion of the trial court. There was no abuse of discretion. As we noted, the issue of the circumstances surrounding the statements were thoroughly covered. Trial counsel also thoroughly addressed the issue during closing arguments.

Perhaps more importantly, the People were not informed until shortly before trial or at trial that Madrigal intended to present such evidence, and they were never given the opportunity to prepare to respond to the evidence. For the People to have this opportunity undoubtedly would have caused a delay in an already lengthy trial. Under the circumstances, the timing of the request provided ample justification for the trial court to exclude the evidence.

B. Testimony About Acts of Abuse by Chavez

The trial court also excluded evidence offered by Madrigal that he claims established that Chavez had a history of abusing her children. Madrigal identifies in his brief three “incidents” of child abuse by Chavez.

Two of the incidents clearly were not relevant. The first incident occurred when Chavez accidentally hit one of her children while backing up a car. Madrigal admitted the incident was an accident and he had no evidence that Chavez acted intentionally. While this accident was further evidence that could lead one to conclude that Chavez did a poor job of caring for her children, it was not evidence of abuse.

The second irrelevant incident related to allegations that one of Chavez's children was burned by cigarettes by another person. This person also apparently left cigarette butts in the child's diaper. There was no evidence that Chavez participated in this despicable conduct, or even knew it occurred until it was discovered by a third person. Nor is there any evidence that this type of conduct occurred more than once. Once again, while this incident may demonstrate that Chavez did a poor job of caring for her children, it was not relevant to the question of whether Chavez abused her children.

This leaves Madrigal with a single incident of alleged child abuse. According to trial counsel, one of Chavez's children would testify that Chavez hit him on one occasion with the buckle end of a belt, causing an injury under his armpit that resulted in a scar.^{FN10} The

trial court concluded the evidence had little probative value, and the prejudicial effect of the evidence outweighed its probative value.

[FN10](#). The People disputed whether there was any factual basis for the allegation.

*24 The trial court did not abuse its discretion. As noted by the trial court, one incident of striking a child with a belt buckle, apparently several years before S.R.'s death, is significantly different than biting a child multiple times or hitting a child hard enough to cause his or her death. Moreover, the stated purpose of the evidence, to impeach any claim by Chavez that she was a good mother, amply was covered by other testimony. Madrigal testified about Chavez's poor mothering skills, including an incident where she left S.R. at home unattended. The lack of probative value to the evidence amply justified its exclusion.

DISPOSITION

The judgment is affirmed.

WE CONCUR: [LEVY](#), Acting P.J., and [HILL](#), J.

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