S257631

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

HEATHER ROSE BROWN,

Defendant and Appellant.

S_____

Third Appellate District No. C085998
Shasta County Superior Court No. 15F2440
The Honorable Stephen H. Baker, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

ISSUES PRESENTED 5

STATEMENT REGARDING NECESSITY FOR REVIEW 6

STATEMENT OF THE CASE 7

STATEMENT OF FACTS 8

ARGUMENT 9

I. The prosecution presented insufficient evidence that D.R.'s exposure to drugs caused her death 9

A. Standard of Review 10

B. Causation and Murder 10

C. Sufficiency of Expert Opinions 11

D. Insufficient Evidence 12

II. The prosecution presented insufficient evidence that Ms. Brown willfully, deliberately and with premeditation administered "poison" to her daughter for purposes of first degree murder by poison 20

A. Analysis of Section 189 20

B. Insufficient Evidence 28

III. The trial court prejudicially erred by failing to instruct the jury sua sponte that first degree murder by poison requires proof that the defendant willfully, deliberately and with premeditation administered poison to the victim 30

CONCLUSION 33

CERTIFICATE OF WORD COUNT 34

APPENDIX A: Modified unpublished opinion of the Court of Appeal 35

PROOF OF SERVICE 36

TABLE OF AUTHORITIES

CASES

Chapman v. California (1967) 386 U.S. 18 31
Harness v. Pacific Curtainwall Co. (1965) 235 Cal.App.2d 485 14
Jackson v. Virginia (1979) 443 U.S. 307 10
Neder v. United States (1999) 527 U.S. 1 31
People v. Canizalez (2011) 197 Cal.App.4th 832 11
People v. Catlin (2001) 26 Cal.4th 81 11
People v. Cole (2004) 33 Cal.4th 1158 31
People v. Concha (2009) 47 Cal.4th 653 11
People v. Cook (2006) 39 Cal.4th 566 22
People v. Cummings (1993) 4 Cal.4th 1233 30
People v. Davenport (1985) 41 Cal.3d 247 22
People v. Dominguez (2006) 39 Cal.4th 1141 10
People v. Ervin (2000) 22 Cal.4th 48 30
People v. Flood (1998) 18 Cal.4th 470 10
People v. Harris (1994) 9 Cal.4th 407 31
People v. Jennings (2010) 50 Cal.4th 616 ..... 23, 25
People v. Johnson (1980) 26 Cal.3d 557 10
People v. Jones (2012) 54 Cal.4th 1 14
People v. Laws (1993) 12 Cal.App.4th 786 ..... 26, 27
People v. Leiva (2013) 56 Cal.4th 498 21
People v. Marshall (1997) 15 Cal.4th 1 10
People v. Rios (2013) 222 Cal.App.4th 542 13
People v. Sanchez (2016) 63 Cal.4th 665 13
People v. Scola (1976) 56 Cal.App.3d 723 11
People v. Steger (1976) 16 Cal.3d 539 ..... 21, 22, 23
People v. Talamantez (1985) 169 Cal.App.3d 443 24
People v. Whisenhunt (2008) 44 Cal.4th 174 31
People v. Wiley (1976) 18 Cal.3d 162 ..... 22, 23
People v. Wright (2016) 4 Cal.App.5th 537 11
Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal.4th 747 12
Sullivan v. Louisiana (1993) 508 U.S. 275 10
Wise v. DLA Piper LLP (US) (2013) 220 Cal.App.4th 1180 11
Worley v. Spreckels Bros. Commercial Co. (1912) 163 Cal. 60 15

STATUTES

Evid. Code, § 720 14
Pen. Code, § 189 ..... 20, 23
Pen. Code, § 12022.95 ..... 7, 18

OTHER AUTHORITIES

CALCRIM 521 22

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **HEATHER ROSE BROWN,** Defendant and Appellant.	S_____

TO THE CALIFORNIA SUPREME COURT, defendant and appellant **HEATHER ROSE BROWN** hereby petitions this court for review of the unpublished decision of the California Court of Appeal, Third Appellate District, filed on July 16, 2019. A copy of the Court of Appeal's opinion is attached as Appendix A.

ISSUES PRESENTED

1. Whether the prosecution presented insufficient evidence that D.R.'s exposure to drugs caused her death.

2. Whether the prosecution presented insufficient evidence that Ms. Brown willfully, deliberately and with premeditation administered "poison" to her daughter for purposes of first degree murder by poison.

3. Whether the trial court prejudicially erred by failing to instruct the jury *sua sponte* that first degree murder by poison requires proof that the

defendant willfully, deliberately and with premeditation administered poison to the victim.

STATEMENT REGARDING NECESSITY FOR REVIEW

In the instant case, Ms. Brown consumed methamphetamine and heroin while pregnant and continued using drugs after the birth of her child, D.R. She also fed her newborn breast milk that contained remnants of the drugs she herself had ingested. Five days after D.R.'s birth, the baby died. Ms. Brown was convicted of first degree murder based on the theory that she administered the drugs (i.e., poison) to the child. Ms. Brown advances three challenges to her murder conviction.

First, Ms. Brown claims there was insufficient evidence that drug-exposure caused D.R.'s death. Only one expert opined that drugs were the cause of death, and he merely explained that drug exposure was *capable* of killing the child and ruled out other potential causes simply because drugs were found in the baby's system. Ms. Brown contends the expert's opinion as to causation was speculative. The Court of Appeal disagreed.

As the basis for her next two arguments, Ms. Brown contends that first degree poison-murder requires proof that the defendant willfully, deliberately and with premeditation administered poison to another. To be clear, she does not argue that the intent to kill or injure or bring about a particular result is required but only that the defendant must have

purposefully as opposed to negligently or recklessly introduced poison into another's system to elevate the conduct to first degree murder. In her arguments, she contends that the trial court prejudicially erred by failing to so instruct the jury and that there was insufficient evidence of that element. The Court of Appeal held the willful, deliberate and premeditated administration of poison to another is not an element of the offense. This appears to be an issue of first impression in California.

Accordingly, review is necessary to secure uniformity of decision and settle these important questions within the meaning of California Rules of Court, rule 8.500(b).

STATEMENT OF THE CASE

A jury found Ms. Brown guilty of first-degree murder by poison (Pen. Code,[1] § 187, subd. (a); count one), child abuse (§ 273a, subd. (a); count two), possession of heroin for sale (Health & Saf. Code, § 11351; count three), and possession of marijuana for sale (Health & Saf. Code, § 11359, subd. (b); count four). It also found, for purposes of count two, that Ms. Brown inflicted unjustifiable physical pain and injury resulting in a child's death (§ 12022.95). (2CT 317-319; 3CT 686-692; 2RT 1039-1041.)

[1] Hereafter, all statutory references are to the Penal Code unless otherwise indicated.

The trial court sentenced Ms. Brown to state prison for a determinate term of 3 years in count three plus an indeterminate term of 25 years to life in count one. It also imposed a concurrent term of 180 days in count four and stayed imposition of sentence in count two pursuant to section 654. (3CT 747-750; 2RT 1061, 1068.)

Ms. Brown appealed raising the same issues presented herein. The Court of Appeal rejected them all and affirmed the judgment. Ms. Brown subsequently filed a petition for rehearing, contending, *inter alia*, that the Court of Appeal misconstrued her arguments with respect to the elements of first degree murder by poison. (App. A [Opn., at p. 2].) The court granted her petition, vacated the original opinion, and prepared and issued a new opinion that reached the same conclusion. (App. A [Opn., at p. 2].)

STATEMENT OF FACTS

Ms. Brown incorporates by reference the statement of facts contained in the Court of Appeal's opinion. (App. A [Opn., at pp. 2-3].) Ms. Brown presents specific facts *post* to the extent relevant to support each claim for relief.

ARGUMENT

I.

THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE THAT D.R.'S EXPOSURE TO DRUGS CAUSED HER DEATH

The jury found Ms. Brown guilty of first degree murder in count one. The prosecution's sole theory was that Ms. Brown committed implied malice murder by means of "poison," i.e., by exposing D.R. to illicit drugs. (2RT 992.) Admittedly, morphine (a heroin byproduct) and methamphetamine were found in the child's system. (1RT 658-661.) Moreover, the only evidence of the means of their delivery was their presence in Ms. Brown's breast milk and her admission that she fed her baby breast milk. (1RT 559-560, 589-592; 2CT 383, 396, 400, 425-426, 505.) That is not enough, however.

To establish first degree murder by poison, the prosecution bore the burden of proving beyond a reasonable doubt that the drug exposure was the cause of D.R.'s death. To satisfy that burden, the prosecution offered the expert testimony of Dr. Ogan and Dr. Crawford-Jakubiak. Ms. Brown submits their testimony did not permit an inference that the drugs caused the child's death.

A. Standard of Review

It is well settled that the prosecution must prove all elements of the charged offense and all "facts necessary to establish each of those elements" beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [113 S.Ct. 2078, 124 L.Ed.2d 182], internal citations omitted; accord, *People v. Flood* (1998) 18 Cal.4th 470, 524.) A reviewing court must conclude the prosecution failed to satisfy its burden if, viewing the record in the light most favorable to the judgment, a rational trier of fact could not have found all the elements of the offense beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) Importantly, viewing the evidence in the light most favorable to the verdict is not synonymous with focusing on isolated pieces of evidence favorable to the prosecution. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1153; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) Instead, the reviewing court must view the whole record before the jury. (*Dominguez*, at p. 1153; *Johnson*, at pp. 576-577.)

B. Causation and Murder

Section 189 elevates any murder "perpetrated by means of . . . poison" to "murder of the first degree." To be liable for murder, a defendant "must proximately cause an unlawful death." (*People v. Concha* (2009) 47

Cal.4th 653, 663.) Thus, under a murder by poison theory, the prosecution bears the burden of proving that poison was the proximate cause of the victim's death. (See *People v. Catlin* (2001) 26 Cal.4th 81, 140 [sufficient evidence that "defendant perpetrated an unlawful killing with malice aforethought, and that he did so by means of poison"]; see also *Catlin*, at p. 146 [that the cause of the victim's death was poisoning rather than a natural event was a material issue in case alleging first degree murder by means of poison].) The prosecution does not have to prove "to a mathematical certainty" that but for the poison the death "would not have occurred." (See *People v. Canizalez* (2011) 197 Cal.App.4th 832, 845; *People v. Scola* (1976) 56 Cal.App.3d 723, 726-727.) However, the prosecution must prove beyond a reasonable doubt that the poisoning was "a substantial factor in producing" the death. (See *Canizalez*, at p. 845; *Scola*, at p. 726.)

C. Sufficiency of Expert Opinions

As noted above, the prosecution relied upon the testimony of experts to establish "poison"—or drug exposure—was the cause of the baby's death. The testimony of a single witness, including that of an expert, may constitute substantial evidence of an element of a crime or of a material fact. (*People v. Wright* (2016) 4 Cal.App.5th 537, 545; *Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1191.) However, when an expert's opinion is based on speculation, conjecture or unsubstantiated assumptions,

it "'cannot rise to the dignity of substantial evidence' and a judgment based solely on that opinion 'must be reversed for lack of substantial evidence.'" (*Wise,* at pp. 1191-1192; accord, *Wright*, at p. 545; see *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770 ["an expert opinion based on speculation or conjecture is inadmissible"].)

D. Insufficient Evidence

The only expert to opine affirmatively that drug exposure—namely, the exposure to heroin and methamphetamine—caused D.R.'s death was Dr. Ogan. (1RT 404.) However, his opinion in that regard was based on speculation.

In explaining the effects of the drugs, Dr. Ogan never testified that the drugs were necessarily fatal to an infant or even that there was a high probability that her degree of exposure was fatal. He merely testified the drugs were capable of killing and potentially fatal. Dr. Ogan explained, "[B]oth of these drugs used in the wrong context and wrong doses *can* lead to death, especially in the pediatric population." (1RT 407, emphasis added.) Dr. Ogan noted that children are more sensitive to the effects of these drugs than are adults. (1RT 407.) He also testified that each drug alone "could" kill someone. (1RT 407.)

More specifically, he explained that methamphetamine can kill by causing a cardiac arrest while heroin can kill by causing respiratory arrest.

(1RT 419-421.) However, he admitted there was no evidence that the drugs did either one, other than the fact "we know that her heart stopped and she died." (1RT 420-422.) Of course, the cessation of the heart is something that is present in every death and says nothing about the cause of death. In other words, Dr. Ogan testified about the mere possibility of a causal link between drug exposure and D.R.'s death, which is necessarily speculation and does not constitute substantial evidence. (See *People v. Rios* (2013) 222 Cal.App.4th 542, 567.)

The Court of Appeal did not find his testimony speculative. First, it wrote that it does not matter that Dr. Ogan "found no conclusive objective sign to prove which drug or drugs caused death." (App. A [Opn., at p. 10].) However, the issue is not that Dr. Ogan found no proof *which* drug caused death. It is that he did not identify any evidence that *either* drug caused death.

The court also found his testimony sufficient because he "had the training and experience to determine the cause of death and performed a thorough autopsy." (App. A [Opn., at p. 10].) The fact that Dr. Ogan had the credentials to be designated an expert does not automatically render his opinion substantial. Every expert has training and experience in his field that sets him apart from laypersons. (See *People v. Sanchez* (2016) 63 Cal.4th 665, 675 ["'A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to

qualify him as an expert on the subject to which his testimony relates'"]; Evid. Code, § 720, subd. (a) [same].) Similarly, the performance of a "thorough autopsy" does not make his opinion substantial. Dr. Ogan was a forensic pathologist. (1RT 384.) It is a forensic pathologist's duty to perform autopsies and determine causes of death. (1RT 387; see *People v. Jones* (2012) 54 Cal.4th 1, 56 [one of a forensic pathologist's responsibilities is "to express an opinion on the cause of death"].) To hold that a forensic pathologist's conclusion about the cause of death is necessarily substantial because he is a forensic pathologist and performed his normal duties as one is to ignore the significance of the reasons for and evidence supporting that conclusion. Such a holding discounts the authority the Court of Appeal itself cited that even an expert's opinion can be legally insufficient to establish causation if "based on speculation or unsupported assumptions." (App. A [Opn., at p. 9.])

The Court of Appeal also relied on Dr. Ogan's testimony that there was "no safe amount" of the drugs "for an infant." (App. A [Opn., at p. 10]; 1RT 408-409.) Again, the court's reasoning is flawed. The fact that a condition is unsafe does not mean it is the proximate cause of injury. (See *Harness v. Pacific Curtainwall Co.* (1965) 235 Cal.App.2d 485, 490 [instruction correct that unsafe working condition not sufficient for jury to conclude employer negligent unless "unsafe place was a concurrent proximate cause of plaintiff's injuries"]; *Worley v. Spreckels Bros.*

Commercial Co. (1912) 163 Cal. 60, 65 ["there can be no recovery on account of . . . unsafe place in which to work, unless the same . . . was a proximate cause of the injury"].) As the Court of Appeal even stated, an act is the proximate cause of a harm if the harm—in this case, death—"'would not have occurred when it did'" without the act. (App. A [Opn., at p. 8].) Here, again, there was an absence of evidence that D.R.'s death would not have occurred without her drug exposure, even if her drug exposure was unsafe, and the Court of Appeal did not identify any.

The court relied on the fact that Dr. Ogan ruled out other causes of death as support for his conclusion that drug exposure was the cause of death. (App. A [Opn., at p. 10].) Like Dr. Ogan's testimony that drugs were the cause, ruling out other causes is simply another form of conclusion—i.e., that X *did not* cause the victim's death as opposed to that X *caused* the victim's death. Both conclusions are meaningless without examining the reasons underlying them.

In this case, the basis for Dr. Ogan ruling out many of the other causes was the presence of drugs in the baby's system. For example, Dr. Ogan was asked about Sudden Infant Death Syndrome (or SIDS). He ruled it out noting it is a diagnosis of exclusion, one given only when nothing else could cause an infant's death and concluded it does not apply because something else could have caused D.R.'s death. (1RT 407-408.) He

testified he would always rule out SIDS as long as there was evidence of some other possible cause, including "chemical poisoning." (1RT 422.)

There was also evidence that Ms. Brown had been co-sleeping (or sharing the bed) with D.R. in the moments leading up to the child's death, and Dr. Ogan testified that co-sleeping can cause an infant's death as a result of such events as the parent rolling over the infant and causing it to suffocate. (1RT 408; 2RT 469; 2CT 391, 400, 440.) Dr. Ogan testified suffocating "might" cause injuries to the baby's face and admitted observing abrasions and scrapes on D.R.'s temples and cheeks and a half-inch bruise on the left front of her head. (1RT 396, 400, 408.) Nevertheless, he ruled out co-sleeping as the cause of death because he "couldn't find signs" of it. (1RT 408.) When questioned about the presence of facial injuries, Dr. Ogan relied on the presence of drugs, responding, "Sir, I am not quite sure about what you want me to answer. But what I do have here is a child who had significant levels of two very toxic drugs. I could not ignore those drugs." (1RT 424.)

Notably, like drug exposure, Dr. Ogan testified that co-sleeping can also cause death. (1RT 408.) Thus, like drug exposure, it was also necessarily unsafe. However, the doctor ruled out co-sleeping as a potential cause of death because he claimed not to see physical signs of it as a cause (1RT 408) while concluding drugs were the cause despite admitting that there were no physical signs they were (1RT 419-421). This double

standard is a clear indication that the mere presence of drugs in the baby's system rather than evidence of actual causation was the basis on which he reached his conclusion.

Notably, Dr. Ogan made a finding that pointed to another cause of death and which he did not rule out. Dr. Ogan testified that the pooling of blood in the child's body indicated D.R. was lying face down in bed when discovered. (1RT 398.) In fact, he concluded that, from the nature of the lividity, D.R. was face down when she died and remained face down for a period of time thereafter. (1RT 417-418.) Dr. Crawford-Jakubiak concluded likewise. (2RT 801.) He characterized that position in an infant as "very dangerous" because babies cannot lift their heads to breathe and cannot push themselves out of that situation if their airways become blocked. (2RT 801.) He identified it as one of three possible causes of D.R.'s death, along with exposure to heroin and co-sleeping. (2RT 801-802.)

The Court of Appeal contended that, by citing drug exposure as a possible cause of death, Dr. Crawford-Jakubiak's testimony corroborated Dr. Ogan's ultimate conclusion that it was. (App. A [Opn., at p. 10].) However, Dr. Crawford-Jakubiak testified that those three events, "either individually or in concert," were merely "capable" of causing the baby's death. (2RT 800.) The most that one can say about Dr. Crawford-Jakubiak's testimony is that he believed Dr. Ogan *might be right but also might be wrong*. It is illogical to find such an opinion corroborative of Dr.

Ogan's conclusion. In fact, Dr. Crawford-Jakubiak's testimony more forcefully contradicted Dr. Ogan's conclusion as two of the three likely causes of death, in his opinion, were *not* drug exposure.

It is undeniable that D.R. was exposed to heroin and methamphetamine during her short life. However, with respect to whether Ms. Brown was liable for first degree murder by means of poison, evidence of mere exposure is not enough. There must be evidence from which the jury could rationally conclude the drugs were a substantial factor in her death. At best, the two experts called by the prosecution to establish the element of causation established only that it was a possibility. Moreover, it was a possibility among several possibilities unrelated to drugs. Given the myriad of circumstances that could have caused D.R.'s death, absent evidence that the drug exposure was necessarily fatal, of which there was none, there was no basis for jurors to conclude drugs were a proximate cause. Accordingly, the prosecutor failed to present sufficient evidence that drug exposure caused D.R.'s death. Therefore, Ms. Brown's conviction of first degree murder must be reversed.

For sentencing purposes, the information also alleged, and the jury found true, that Ms. Brown was responsible for D.R. being injured or suffering harm and that such injury or harm resulted in D.R.'s death. (§ 12022.95; 3CT 640.) The finding carries a four-year sentence enhancement. (§ 12022.95.) As with the murder finding, absent proof that

drug exposure caused D.R.'s death, there was no support for this finding either.

II.

THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE THAT MS. BROWN WILLFULLY, DELIBERATELY AND WITH PREMEDITATION ADMINISTERED "POISON" TO HER DAUGHTER FOR PURPOSES OF FIRST DEGREE MURDER BY POISON

In addition to the causation evidence challenge presented above (see Argument I, *ante*), Ms. Brown's conviction of first degree murder must be reversed because the prosecutor failed to present sufficient evidence that she willfully, deliberately and with premeditation administered "poison" to her daughter. To be clear, Ms. Brown is not arguing that murder by poison requires proof that *the murder or killing* was willful, deliberate and premeditated but rather only that the administration of the poison—the transfer of the drugs to the baby—was. Whether the prosecution must prove the willful, deliberate and premeditated administration of poison beyond a reasonable doubt appears to be an issue of first impression.

A. Analysis of Section 189

The evidentiary requirements for proving first degree murder are detailed in section 189, which provides in relevant part as follows:

> All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, *poison*, lying in wait, torture, *or by any other kind of*

> *willful, deliberate, and premeditated killing*, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, . . . is murder of the first degree.

(Emphasis added.) Consequently, the precise requirements for proving murder *by means of poison* is an issue of statutory construction.

In construing a statute, the goal is to ascertain the intent of the Legislature and to interpret it in a way that best serves its purpose. (*People v. Leiva* (2013) 56 Cal.4th 498, 506.)

> "When interpreting statutes, we begin with the plain, commonsense meaning of the language used by the Legislature. [Citation.] If the language is unambiguous, the plain meaning controls." [Citation.] We consider first the words of the statute because """the statutory language is generally the most reliable indicator of legislative intent."""" [Citation.] "[W]henever possible, significance must be given to every word [in a statute] in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage." [Citation.]

(*Ibid.)*

In *People v. Steger* (1976) 16 Cal.3d 539, this court examined section 189's use of language to ascertain what the Legislature intended as evidentiary proof of first degree murder by torture. The court noted that torture was described by the statute as a kind of willful, deliberate and premeditated killing:

> In this perspective the phrasing of section 189 becomes clearer: "All murder which is perpetrated by means of . . . torture, or by *any other kind* of willful, deliberate, and

> premeditated killing . . . is murder of the first degree . . . .” In labeling torture as a “kind” of premeditated killing, the Legislature requires the same proof of deliberation and premeditation for first degree torture murder that it does for other types of first degree murder.

(*Id.* at pp. 545-546, emphasis in original.) The court noted that an intent to kill was not required. (*Id.* at p. 546.) However, based on the statutory phrasing, the court held “that murder by means of torture under section 189 is murder committed with a wilful, deliberate, and premeditated intent to inflict extreme and prolonged pain.” (*Ibid*.) This court later explained the *Steger* holding as follows:

> The history of section 189 and our construction of its language establish that this type of murder was categorized as first degree murder because the Legislature intended that the *means* by which the killing was accomplished be equated to the premeditation and deliberation which render other murders sufficiently reprehensible to constitute first degree murder.

(*People v. Wiley* (1976) 18 Cal.3d 162, 168, emphasis in original; accord, *People v. Davenport* (1985) 41 Cal.3d 247, 267.) The *Steger* holding has been repeated by this court (see, e.g., *People v. Cook* (2006) 39 Cal.4th 566, 602) and is incorporated into the standard instruction on first degree murder by torture (CALCRIM 521).

Ms. Brown submits the same interpretation of section 189 applies to murder by poison. “Poison” is listed along with “torture” as one of the means by which murder in the first degree may be committed. It defines first degree murder as “[a]ll murder which is perpetrated by means of . . .

poison, . . . torture, or by any other kind of willful, deliberate, and premeditated killing." (§ 189.) In other words, like murder by torture, murder by poison is a "kind" of willful, deliberate and premeditated killing. Based on its place among the statute's list of "means" along with torture, the Legislature necessarily intended poison also to "be equated to the premeditation and deliberation which render other murders sufficiently reprehensible to constitute first degree murder." (See *Wiley, supra,* 18 Cal.3d at p. 168.) Paraphrasing *Steger*, "In labeling [poison] as a 'kind' of premeditated killing, the Legislature requires the same proof of deliberation and premeditation for first degree [poison] murder that it does for other types of first degree murder." (*Steger, supra,* 16 Cal.3d at pp. 545-546.) Accordingly, like murder by torture, murder by poison under section 189 requires proof of "a wilful, deliberate, and premeditated intent" to administer poison to the victim. (See *id*. at p. 546.)

The Court of Appeal disagreed. It relied on *People v. Jennings* (2010) 50 Cal.4th 616, 639, in which this court held first degree poison-murder does not require intent to kill but rather only implied malice. (App. A [Opn., at pp. 13-14].) However, that holding is not incompatible with Ms. Brown's position. She did not argue below and does not argue now that intent to kill is required. Moreover, that implied malice is required does not also mean that the willful, deliberate and premeditated administration of

poison to another is not required as well. Again, the torture-murder context provides guidance.

As noted, section 189 provides that all "murder which is perpetrated by . . . torture . . . is murder of the first degree." Thus, "[a] determination that torture was involved establishes the degree of the murder." (*People v. Talamantez* (1985) 169 Cal.App.3d 443, 453.) It does not determine whether a murder occurred, however. Before a jury can reach a determination as to whether the murder is in the first degree due to the use of torture, it must first determine a murder occurred, which requires proof of malice, either express or implied. (*Ibid*.) If the jury concludes the defendant acted with malice, it can then find the murder to be in the first degree under a torture theory only if it also finds he intended "to inflict extreme and prolonged pain for the purposes of revenge, extortion, persuasion or for any sadistic purpose." (*Id.* at pp. 453-454.)

The same logic applies to first degree poison-murder. The administration of poison merely sets the degree of murder. As a pre-requisite to finding first degree poison-murder, a murder must have occurred, which requires proof of at least implied malice. That does not end the inquiry, however. Just as torture-murder requires the additional element of the premeditated and deliberate intent to torture—"to inflict extreme and prolonged pain"—Ms. Brown contends poison-murder requires, in addition to proof of at least implied malice, the premeditated and deliberate intent to

deliver poison to another. Thus, that poison-murder requires proof of malice, as this court held in *Jennings*, does not undermine her claim.

The Court of Appeal believed the "factual similarities" between *Jennings* and this case undermine her claim, though. (App. A [Opn., at p. 16].) The Court of Appeal was incorrect. As the court described the facts in *Jennings*, "the parents gave their five-year-old child over-the-counter sleeping pills . . . and gave him Vicodin and Valium." (App. A [Opn., at p. 16]; *Jennings, supra,* 50 Cal.4th at pp. 631, 633-634, 640-641.) However, that conduct is a far cry from the evidence in this case. Here, Ms. Brown intended to feed her baby breast milk. Her delivery of drugs was indirect; the breast milk was tainted with the drugs she herself had ingested. Feeding a baby drug-tainted breast milk does not mean it was done for the purpose of transferring the drugs to the child as opposed to the purpose of providing the child nourishment. The parents in *Jennings* necessarily intended for their child to consume the sleeping pills and drugs they directly administered.

Notably, the ultimate holding in *Jennings* supports and does not defeat Ms. Brown's claim. According to this court, as the Court of Appeal even quoted, to find the defendant guilty of poison-murder, the jury was required to find he "*deliberately administered* the poison with conscious disregard for" the life of the child. (*Jennings*, at p. 640; App. A [Opn., at p.

16].) Thus, even *Jennings* provides that first degree poison-murder requires at least the deliberate administration of poison.

Next, the Court of Appeal relied upon its own decision in *People v. Laws* (1993) 12 Cal.App.4th 786 interpreting first degree murder by lying in wait. At issue in *Laws* was whether the trial court erred by failing to instruct the jury that first degree lying-in-wait murder requires the intent to kill or physically injure the victim. (*Id.* at p. 792.) The court held it does not. It reasoned as follows:

> The Legislature could have concluded that an unlawful killing of a human being with implied malice aforethought (i.e., an unintended killing which results from an intentional act inherently dangerous to human life committed with knowledge of the danger to, and with conscious disregard for, human life [citation] is more deplorable than second degree murder when it is perpetrated by means of lying in wait. The act of lying in wait with secret purpose in order to gain advantage and take a victim unawares is particularly repugnant and of aggravated character so as to justify harsher punishment when the lying in wait results in murder, even if the waiting and watching were not done with the intent to kill or injure.

(*Laws*, at p. 793.) The court continued,

> [M]urder perpetrated by means of lying in wait is not the definitional equivalent of premeditated murder. An accused who committed murder perpetrated by means of lying in wait is guilty of first degree murder even if the accused did not have a premeditated intent to kill the victim.

(*Ibid*.)

Laws is inapposite. The Court of Appeal contended Ms. Brown's claim is like the defendant's claim in that case. It writes, "Adding a willful,

deliberate, and premeditated requirement to the administration of poison is equivalent to adding an intent to injure element to lying-in-wait murder." (App. A [Opn., at p. 16].) That is not so. The former is an intent to commit the act that is listed as the means by which poison-murder liability is triggered. The latter is an intent to bring about a particular result. Ms. Brown does not argue that poison-murder requires proof that the defendant intended to bring about a particular result, such as death or injury.

Ms. Brown agrees with the Court of Appeal that, according to the Legislature, an unlawful killing by lying in wait with malice is first degree murder because it is more deplorable than an ordinary second degree murder. However, as *Laws* wrote about lying-in-wait murder, what makes it more deplorable is the purpose, or intent, of the perpetrator beyond merely harboring malice. It is the "secret purpose . . . to gain advantage and take a victim unawares" that "is particularly repugnant and of aggravated character." (*Laws, supra,* 12 Cal.App.4th at p. 793.)

Ms. Brown also agrees with the Court of Appeal that "the Legislature could have concluded that an unlawful killing of a human being by poison, with malice aforethought, was more deplorable than second degree murder." (App. A [Opn., at p. 16].) However, it is only more deplorable if the defendant meant to administer poison to another. The merely reckless exposure of another to a poison is no more deplorable than any other reckless behavior that causes another's death. It is the purposeful

introduction of the poison into the other's system that makes the conduct worse than other second degree murders.

B. Insufficient Evidence

There was insufficient evidence Ms. Brown willfully, deliberately and with premeditation administered heroin and methamphetamine to D.R., and the Court of Appeal did not hold or argue otherwise. The evidence showed that the drugs passed to the child through Ms. Brown's breast milk, either from breastfeeding or pumping breast milk (or both), which she fed to her through a bottle. However, there was no evidence Ms. Brown did so for the purpose of transferring the drugs from her system to the baby's system.

Ms. Brown told Officer Cole during her interview that she began breastfeeding because her mother told her it was important for mother-child bonding. (2CT 505.) She also said that she did not give D.R. breast milk every day, predominantly relying on formula, and pumped her breast milk because her breasts would get engorged if she did not. (2CT 441-442, 507, 517.) She also said that she did not think the amount of drugs that would flow to the baby under the circumstances would cause, for instance, an overdose because she was not "smoking that much." (2CT 530.)

The evidence did not prove that the introduction of the drugs into D.R.'s system was willful, deliberate and premeditated as opposed to a

byproduct of negligent or reckless behavior. Mere negligence or recklessness is not sufficient to make Ms. Brown's conduct first degree poison-murder. Accordingly, her murder conviction must be reversed for that reason as well.

III.

THE TRIAL COURT PREJUDICIALLY ERRED BY FAILING TO INSTRUCT THE JURY SUA SPONTE THAT FIRST DEGREE MURDER BY POISON REQUIRES PROOF THAT THE DEFENDANT WILLFULLY, DELIBERATELY AND WITH PREMEDITATION ADMINISTERED POISON TO THE VICTIM

The trial court instructed the jury that Ms. Brown was guilty of first degree murder by poison "if the People have proved that the defendant murdered by using poison." (3CT 621.) In other words, as long as the jury believed Ms. Brown's exposure of D.R. to drugs was done with implied malice and that exposure killed the baby, it could find Ms. Brown guilty of the greatest degree of murder. However, as discussed above (Argument II, *ante*), the prosecutor bore the burden of proving that Ms. Brown willfully, deliberately and with premeditation administered the drugs to D.R. The jury was not so instructed.

The trial court's omission was error. A trial court has a *sua sponte* duty to instruct on all general principles of law that are closely and openly connected with the facts of the case. (*People v. Ervin* (2000) 22 Cal.4th 48, 90.) In a criminal case, the general principles of the law include all the elements of the charged offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) The willful, deliberate and premeditated intent element of murder by poison is one on which the trial court must instruct the jury. (See

People v. Whisenhunt (2008) 44 Cal.4th 174, 219-220 [discussing intent element of murder by torture].)

The error was prejudicial. "[A] trial court's failure to instruct on an element of a crime is federal constitutional error that requires reversal of the conviction unless it can be shown beyond a reasonable doubt that the error did not contribute to the jury's verdict." (*People v. Cole* (2004) 33 Cal.4th 1158, 1208-1209; see also *Neder v. United States* (1999) 527 U.S. 1, 8-16 [144 L. Ed. 2d 35, 119 S. Ct. 1827]; *Chapman v. California* (1967) 386 U.S. 18, 24.) "'To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" (*People v. Harris* (1994) 9 Cal.4th 407, 440.) It cannot be said that the omission was unimportant in this case.

For the same reasons presented above to challenge the sufficiency of the evidence of this element (see Argument II, *ante*), there was a dearth of evidence presented to establish that Ms. Brown provided her child with breast milk for the purpose of administering the drugs to her. Moreover, there was ample evidence that that was not her intent, as discussed above. If Ms. Brown lacked that purpose then she did not willfully, deliberately and with premeditation poison D.R. Had the jury been instructed that the prosecution had to prove that mental state beyond a reasonable doubt, there is a significant chance it would have found her not guilty of first degree

murder. Accordingly, reversal of Ms. Brown's first degree murder conviction is required.

CONCLUSION

For the reasons stated above, Ms. Brown asks this court to review the decision of the Court of Appeal and reverse the judgment.

Dated: August 26, 2019.

Respectfully submitted,

/s/ DAVID L. POLSKY
David L. Polsky
Attorney for Heather Rose Brown

CERTIFICATE OF WORD COUNT

I, David L. Polsky, counsel for appellant, hereby certify pursuant to rule 8.504 of the California Rules of Court that appellant's petition for review in the above-referenced case consists of 6,006 words, excluding tables, as indicated by the software program used to prepare the document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 26, 2019, at Ashford, Connecticut.

/s/ DAVID L. POLSKY
David L. Polsky

APPENDIX A:

MODIFIED UNPUBLISHED OPINION OF

THE COURT OF APPEAL

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. HEATHER ROSE BROWN, Defendant and Appellant.	C085998 (Super. Ct. No. 15F2440) OPINION ON REHEARING

This is our second opinion deciding defendant Heather Rose Brown's direct appeal of her murder conviction in this case. During her pregnancy, and then while she fed breast milk to her baby, defendant used heroin, methamphetamine, and marijuana. She chose to give birth in a hotel because she knew that if she had the baby in a hospital, authorities would take the baby from her. She ignored warnings from her midwife and others to get help for the baby girl, who died five days after her birth.

The jury found defendant guilty of first degree murder by poison, child abuse, and possession of heroin and marijuana for sale, and found true an allegation the child abuse involved the infliction of injury resulting in death. (Pen. Code, §§ 187, 273a, subd. (a), 12022.95; Health & Saf. Code, §§ 11351, 11359, subd. (b).[1]) The trial court sentenced defendant to a total unstayed determinate term of three years in prison, followed by an indeterminate term of 25 years to life. Defendant timely filed this appeal.

On appeal, defendant contends: (1) no substantial evidence supports causation, i.e., that poison was a contributing cause of death; (2) in a murder by poison case, the jury must be instructed on and the People must present substantial evidence of willfulness, premeditation, and deliberation in administering the poison; (3) the abstract of judgment and sentencing minutes conflict with the reporter's transcript regarding some fines; and (4) she is entitled to a remand for a hearing at which she can present evidence relevant to a future youthful offender parole hearing.

Our original opinion affirmed the judgment in a manner that defendant claimed in her petition for rehearing misconstrued her arguments related to the elements of first degree murder by poison. We granted her petition and vacated our original opinion. We now issue a new opinion but reach the same conclusion as we did in the original, for reasons we explain in our Discussion, *post*. Accordingly, we affirm the judgment.

BACKGROUND

Because of the issues raised it is not necessary to detail all the trial evidence; evidence relating to causation will be described in the relevant part of the Discussion.

Trial Evidence

The parties agree in their briefs as to the basic evidence. Defendant used heroin, methamphetamine, and marijuana while pregnant. She knew her sister-in-law's baby was

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

taken away by the authorities for drug use and had her baby in a hotel to avoid a similar scenario. After her baby was born, defendant fed it breast milk, knowing she was passing heroin into the baby's system; she researched the Internet for remedies for addicted babies. Her midwife, relatives, and at least one of her friends, all told her to get medical help for the baby, but she did not do so. The baby died five days after its birth, on November 3, 2014. Under interrogation defendant said she thought the baby suffocated due to co-sleeping between herself and the baby's father (Daylon Michael Reed),[2] and the baby may have been turned towards a pillow. But she also said she was afraid the baby would be taken away if she sought help; by the time Reed made a 911 call, it was too late.

The defense rested without presenting further evidence.

Closing Arguments

The People argued that during the victim's life, defendant consciously disregarded the harm she caused her baby. The midwife, defendant's mother, and others told her to take the baby to get medical attention. She admitted feeding the baby breast milk while using heroin. She knew if she sought help she would lose both access to heroin and to her baby, and she instead did online research about home remedies for newborn withdrawal from opiates. The baby died from multiple drugs, including heroin and methamphetamine. Baby bottles were contaminated with those drugs. Heroin (converted to morphine by the body) can suppress breathing, and the cause of death was most likely a combination of co-sleeping, heroin, and face-down positioning. Death was no accident because defendant did not act with due caution. Implied malice was shown by her knowledge of the dangers of her actions and failure to take steps to help her baby. The murder was of the first degree because she used heroin and methamphetamine; both were

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[2] Reed reached a bargain on lesser charges before trial.

poisons as they each could kill. The fact other causes may have combined to produce death did not change the fact that the poisoning was a contributing factor.

Defense counsel conceded defendant was guilty of child abuse "by failing to take her to medical care and for passing along controlled substances through her body." Causation was not proven because of the confusing nature of the evidence of what *did* cause death, including the lack of marijuana found in the baby's system. Because many people use heroin and methamphetamine recreationally without dying, they are not poisons. Defendant did not understand the risk of her behavior, and when she saw the baby was not breathing, she promptly summoned aid, but it came too late.

In rebuttal, the People argued defendant didn't even bother to ask law enforcement about the cause of her baby's death, because she *knew*. Any lack of urgency on the part of the people who told defendant to take her baby in for medical care was because they did not know the baby had ingested drugs. Any lack of marijuana in the baby's system was a "red herring" because that was not a contributing cause of her death. Heroin and methamphetamine were most certainly poisons; there was no safe level of heroin for a baby.

The jury convicted defendant as charged, except for an acquittal on a charge of possessing methamphetamine (count 5).

DISCUSSION

I

Contributing Cause of Death

Defendant contends no substantial evidence shows that exposure to drugs caused her baby's death. Although there may have been some ambiguities or even conflicts in the expert testimony, defendant's contention is not persuasive given our standard of review.

A. *Expert Testimony*

Apart from non-expert testimony about the circumstances of the pregnancy, the birth, and defendant's actions after birth, three relevant experts testified.

Ayako Chan-Hosokawa, a forensic toxicologist, testified the baby's system contained Naloxone (Narcan), methamphetamine and amphetamine, morphine (the "breakdown of heroin"), and acetaminophen. There are no clear toxicity levels for babies. Because morphine breaks down in less than a day, heroin was necessarily given to the baby after birth. Methamphetamine breaks down into amphetamine and is detectable for one to three days, so it, too, was introduced post-birth. Both heroin and methamphetamine can be found in breast milk, as can marijuana. Marijuana was not detected, but the active ingredient (THC) can dissipate quickly. The toxicologist did not find the "marker" for heroin-derived morphine and therefore could only say that morphine was found.

Dr. Ikechi Ogan, who performed the autopsy, testified he had done some 6,000 autopsies, about 300 on infants, and had been working in pathology since 1991. Collecting information from law enforcement and others is part of the autopsy process, and he did so in this case, learning that the baby was found dead in a hotel room with the parents, who were drug users. The victim was unclean, jaundiced, dehydrated, had a vaginal fungal infection (candida), and had such a severe diaper rash that medical attention should have been sought. She had blood pooling (lividity) indicating she had been in a face-down position at some point after death. A preliminary urine screening test he performed was positive for opiates.

In Dr. Ogan's opinion the cause of death was polypharmacy, meaning abuse by multiple classes of drugs, in this case morphine (derived in the body from heroin) and methamphetamine. Based on what he learned from law enforcement he added to his report that the polypharmacy was due to "maternal polysubstance abuse during pregnancy." Methamphetamine can cause seizures and cardiac arrest; heroin can slow

breathing potentially to the stopping point, and it "can cause you to die when you have an overdose from breathing problems. So both of these drugs used in the wrong context and wrong doses can lead to death, especially in the pediatric population," which is more sensitive. Each drug on its own can kill someone, and there is no safe amount of either drug for infants. This was not a case of SIDS (Sudden Infant Death Syndrome), which is a diagnosis indicating no other cause can be found. Dr. Ogan agreed that co-sleeping can kill, but he found no indications of co-sleeping death, and ruled it out as a cause of death, in part because he did not see marks in the eyes or on the face typically found in such cases. He conceded there were some marks on the baby's cheek and temple, but he found no injuries around the nostrils, gums, or lips. Nor was jaundice a contributing factor in the baby's death.

Dr. James Crawford-Jakubiak is a pediatrician and professor and has worked at the UCSF Children's Hospital in Oakland (as the medical director for the Center for Child Protection) for over 20 years. He is board certified in both general pediatrics and in a sub-specialty known as child abuse pediatrics. He has testified hundreds of times. Heroin "makes people basically stop breathing" and can kill. Infants exposed to heroin *in utero* can experience "neonatal abstinence syndrome," which can cause vomiting, diarrhea, seizures, and difficulty feeding and sleeping. Although morphine may be given to a baby, there is no therapeutic level of heroin. Heroin is a poison because there is no "upside" to it and it can hurt or kill people. A baby going through withdrawal requires hospitalization and might need small amounts of morphine to wean off the opiate addiction. Methamphetamine makes the heart race, increases blood pressure, and can also cause seizures. There is no therapeutic dosage of methamphetamine, but one byproduct of it, amphetamine, can be prescribed for certain conditions, such as attention deficit disorder. Methamphetamine is a poison because "it can hurt or kill someone without a therapeutic purpose."

Dr. Crawford-Jakubiak reviewed the records in this case, showing that other than a prenatal visit in February, there was no other prenatal care; the baby died on the fifth day of life. The baby had a diaper rash that usually occurs in older babies; he had not seen one in a baby this age in his 25 years as a physician, and thought it was caused by using Clorox bleach wipes of the kind that he saw in photographs of the hotel room. These wipes were not designed for cleaning skin.

In Dr. Crawford-Jakubiak's view, the baby died from respiratory failure. Lividity showed she had been face down after death; a face-down position is dangerous at that age, as is co-sleeping. Morphine in her system could have been "enough to knock her over the edge." Other factors could be seizures from heroin withdrawal, or a very high bilirubin level (from jaundice), or an infection (possibly from a non-sterile Buck knife used to cut the umbilical cord), possible hypothermia, and hypoglycemia from feeding problems associated with heroin withdrawal. He understood the baby tested positive for opiates and marijuana, with the opiate use continuing through pregnancy and after birth. On cross-examination he explained that he thought the baby had withdrawal in part based on what he was told, that the mother used heroin and methamphetamine before and after birth of the baby. SIDS was not an answer here, as that is a term for the unexplained death of a baby who is otherwise healthy and normal.

When asked what most likely contributed to death, Dr. Crawford-Jakubiak answered: "To me, the most likely explanation is something that caused respiratory arrest. Again, the three things that are most problematic are the face down position, the presence of the morphine in her body and the co-sleeping." The baby had been born close to term and "died five days later face down with morphine onboard, sleeping with an adult." On cross-examination he testified that any one of those three factors alone could have killed the baby.

B. *Burden and Standard of Review*

"When there are multiple concurrent causes of death, the jury need not decide whether the defendant's conduct was the primary cause of death, but need only decide whether the defendant's conduct was a substantial factor in causing the death. [Citations.] [¶] Further, proximate causation requires that the death was a reasonably foreseeable, natural and probable consequence of the defendant's act, rather than a remote consequence that is so insignificant or theoretical that it cannot properly be regarded as a substantial factor in bringing about the death." (*People v. Butler* (2010) 187 Cal.App.4th 998, 1009-1010.) But-for causation is not required and as " '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.' [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 643-644 (*Jennings*); see *People v. Catlin* (2001) 26 Cal.4th 81, 155.)[3]

" 'On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 504.) Sufficient evidence " ' "reasonably inspires confidence" ' . . . and is 'credible and of solid value.' [Citations.]" (*People v. Raley* (1992) 2 Cal.4th 870,

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[3] The jury was instructed with CALCRIM No. 240 as follows: "An act or omission causes injury or death if the injury or death is the direct, natural, and probable consequence of the act or omission and the injury or death would not have happened without the act or omission. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence. [¶] There may be more than one cause of injury or death. An act or omission causes injury or death, only if it is a substantial factor in causing the injury or death. A substantial factor is more than a trivial or remote factor. However, it does not have to be the only factor that causes the injury or death."

891.) Generally, as defendant concedes, the testimony of a single witness is sufficient to prove any fact. (See *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) But an expert opinion based on speculation or unsupported assumptions cannot provide substantial evidence. (See *People v. Wright* (2016) 4 Cal.App.5th 537, 545-546; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1134-1136.)

C. *Analysis*

Defendant points to ambiguities and inconsistencies in the testimony of the three experts whose testimony we have summarized, *ante*. The toxicologist (Chan-Hosokawa) testified no marijuana was detected, while Dr. Crawford-Jakubiak understood marijuana had been detected. Although Crawford-Jakubiak listed three factors causing death, including morphine in the baby's system, he then testified that any one of those factors could alone have caused death, including co-sleeping and the position of the baby. Dr. Ogan testified that the cause of death was polypharmacy by morphine (derived from heroin) and methamphetamines. Although he mentioned the face-down position, he did not include that as a likely cause of death, and he found no obvious signs of co-sleeping.

Defendant contends that no medical expert clearly testified that death was caused by drugs. Defendant discounts Dr. Crawford-Jakubiak's testimony because he admitted that any of three things could alone have killed the baby, co-sleeping, position, or morphine in the system, and had also indicated there were other possibilities, including jaundice, infection, hypothermia, hypoglycemia, and low blood pressure. Defendant contends Dr. Ogan's opinion was speculative because he testified either drug could kill, not that either drug would kill, or did kill, and he did not clearly rule out co-sleeping that might not leave marks, did not clearly explain why he rejected dehydration as a cause, and did not credibly rule out SIDS.

But we must look to *all* the evidence, including the non-expert evidence, and draw all reasonable inferences therefrom in the light most favorable to the verdict to determine whether there is substantial evidence of causation. There is no requirement that causation

be proven conclusively by any one witness or by expert testimony. Although Dr. Crawford-Jakubiak listed several *possible* factors, when asked what *most likely* killed the baby, he answered "the three things that are most problematic are the face down position, the presence of the morphine in her body and the co-sleeping." Although he conceded any one of those could kill, his testimony corroborates Dr. Ogan's opinion that the cause of death was drugs. His testimony was also sufficient to exclude various other theoretical contributory causes of death (jaundice, dehydration, etc.).

Dr. Ogan's opinion narrowed down to one--drugs--the three likely causes of death as described by Dr. Crawford-Jakubiak. We are not persuaded by defendant's contention, repeated in her petition for rehearing, that Ogan's opinion was speculative and therefore unworthy of credence. Ogan had the training and experience to determine the cause of death and performed a thorough autopsy, including collecting information to learn the circumstances surrounding the death. He tested the victim's urine and found it was positive for opiates. He learned the toxicology results from the samples he sent in. He knew the effects on the body of both heroin and methamphetamine; he testified each of those drugs can kill on its own, and there was no safe amount for an infant. He ruled out SIDS, co-sleeping, and jaundice. There were some marks on the baby's face and perhaps not all co-sleeping deaths leave marks, but that does not show that Ogan's opinion that co-sleeping was *not* a cause was speculative, as defendant contends. The fact that Ogan found no conclusive objective sign to prove which drug or drugs caused death does not mean he simply reasoned that the presence of drugs in the baby's system meant the drugs must have caused death, as defendant continues to contend on rehearing. As explained, he ruled out other causes. Nor does the fact that he did not testify either heroin or methamphetamine *always* kills mean his opinion was speculative. Ogan explained the effects of both drugs and testified neither was safe for administration to a baby.

Defendant argues Dr. Ogan assumed the presence of drugs meant the cause of death was drugs. She points to a passage of cross-examination where defense counsel went over the testimony about marks on the face, which Ogan conceded "sometimes" occur in co-sleeping deaths, and asked Ogan whether the baby could have been smothered by being face down on a pillow, i.e., something soft enough so that it would not leave facial marks. Then Ogan was asked:

> "Q. Would you expect to see bruising if a child was pushed into a pillow during [co-sleeping]?
>
> "A. Sir, I am not quite sure about what you want me to answer. But what I do have here is a child who had significant levels of two very toxic drugs. I could not ignore those drugs.
>
> "Q. You, sir, are not a toxicologist; is that right?
>
> "A. But I know enough of that subject to do my job competently."

Contrary to defendant's continued view, we do not interpret this passage to mean Ogan blindly reasoned that the mere *presence* of drugs meant drugs *caused* the baby's death. As we have explained, Ogan testified why he considered and rejected other possible causes. Although he may not have definitively ruled out every conceivable alternative explanation for the baby's death, his medical opinion as to the cause of death was not speculative. Its weight was for the jury to determine.[4]

Viewing all reasonable inferences in favor of the verdict, there was substantial evidence to show that drugs administered by defendant caused her baby's death.

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[4] We note the jury also heard that defendant told officers the baby had been on her *back* in the bed before defendant woke up and found her not breathing.

II

Murder by Poison

In two separate but connected arguments, defendant contends no substantial evidence shows that she willfully and deliberately administered poison to the victim in a premeditated manner, and that the trial court should have included these elements in the jury instructions. She reiterates these arguments in her petition for rehearing.

The People argue that defendant forfeited this claim by not objecting or proposing other instructions in the trial court. But *if* defendant's claim had merit, it would mean the jury had not been told it had to find all the elements of the offense. "Instructions regarding the elements of the crime affect the substantial rights of the defendant, thus requiring no objection for appellate review." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) We reach the merits, but find no error, as we explain.

A. *The Law*

"Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) Malice may be express or implied. "Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature. [¶] . . . Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188, subd. (a)(1) & (2).)

At the time of the killing in this case (November 3, 2014), the first paragraph of section 189 read as follows:

> "All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person

> outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree." (Stats. 2010, ch. 178, § 51.)[5]

People v. Rodriguez (1998) 66 Cal.App.4th 157 carefully parsed this statute and explained as follows:

> "Section 189 establishes three categories of first degree murder. . . . Section 189 . . . first establishes a category of first degree murder consisting of various types of premeditated killings, and specifies certain circumstances (use of explosives or armor-piercing ammunition, torture, etc.) *which are deemed the equivalent of premeditation*. Section 189 secondly establishes a category of first degree felony murders (murders perpetrated during felonies or attempted felonies such as arson, rape, carjacking, etc.). Finally, section 189 establishes a third category consisting of only one item, intentional murder by shooting out of a vehicle with intent to kill." (*People v. Rodriguez*, *supra*, 66 Cal.App.4th at pp. 163-164, italics added, fn. omitted.)

"Thus, if a killing is murder within the meaning of sections 187 and 188, and is by one of the means enumerated in section 189, the use of such means makes the killing first degree murder as a matter of law." (*People v. Mattison* (1971) 4 Cal.3d 177, 182.)

In *Jennings, supra,* 50 Cal.4th 616, defendant argued insufficient evidence supported his poison-murder conviction because the jury found the poison-murder special circumstance not true and because another person, who did not have intent to kill, administered the poison. (*Id.* at p. 639.) Our Supreme Court distinguished the special circumstance allegation from poison-murder because the special circumstance allegation requires intent to kill, whereas first degree poison-murder only requires implied malice. (*Ibid.*) It concluded, "even if we were to assume the jury rejected the murder-by-poison special circumstance because it was not persuaded beyond a reasonable doubt that [defendant] intended to kill [the victim] by means of the drugs, *the jury still could have reasonably found defendant guilty of first degree murder by poison if it found that either*

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[5] That paragraph was slightly rewritten and designated as subdivision (a) in the current version (Stats. 2018, ch. 1015, § 3), but those changes are not significant for this appeal.

codefendant acted with implied malice. [Citation.]" (*Id.* at pp. 639-640 (italics added).) This passage of the opinion that we have italicized requires only implied malice to prove poison-murder; it does not require that the administration of poison be undertaken as defendant argues, in a willful, deliberate, and premeditated manner.

In the similar context of lying-in-wait murder which, like poison-murder, is specifically set forth as first degree murder in section 189, we observed, "The Legislature could have concluded that an unlawful killing of a human being with implied malice aforethought (i.e., an unintended killing which results from an intentional act inherently dangerous to human life committed with knowledge of the danger to, and with conscious disregard for, human life [citation] is more deplorable than second degree murder when it is perpetrated by means of lying in wait." (*People v. Laws* (1993) 12 Cal.App.4th 786, 793.) And "as defined in section 189, murder perpetrated by means of lying in wait is not the definitional equivalent of premeditated murder. An accused who committed murder perpetrated by means of lying in wait is guilty of first degree murder even if the accused did not have a premeditated intent to kill the victim." (*Ibid.*)

Laws held that there is nothing in section 189 that requires lying in wait to have been done with the intent to injure. (*Laws, supra,* 12 Cal.App.4th at p. 794.) "To impose such a requirement would, in effect, add an additional element to the crime of first degree murder when the murder perpetrated by lying in wait is committed with implied malice. It would require that the killing result from an intentional act, the natural consequences of which are dangerous to human life, deliberately performed with knowledge of the danger to, and with conscious disregard for, human life *and* performed with the intent to kill or injure. We have no authority to add such an element; imposition of a requirement of independent proof of intent to kill or injure 'would be a matter for legislative consideration.' [Citation.] [¶] All that is required of lying in wait is that the perpetrator exhibit a state of mind equivalent to, but not identical to, premeditation and deliberation." (*Id.*, at pp. 794-795.)

B. *Analysis*

The cases discussed above reject the view that, to be guilty of first degree murder by poison, the *administration of poison* itself must be willful, deliberate, and premeditated. Rather, it appears the People need only prove that the killing was *caused* by administration of poison, and that the killing was done with malice. Such a killing is first degree murder as a matter of law.

Defendant's view to the contrary rests in part on cases involving torture-murder. In *People v. Steger* (1976) 16 Cal.3d 539, our Supreme Court discussed the justification for the rule requiring that torture be willful, deliberate, and premeditated to support first degree murder. (*Id.* at pp. 545-547.) The court observed that torture-murder is punished as aggravated murder because "it is the state of mind of the torturer -- the cold-blooded intent to inflict pain for person gain or satisfaction -- which society condemns. Such a crime is more susceptible to the deterrence of first degree murder sanctions and comparatively more deplorable than lesser categories of murder." (*Id.* at p. 546.) In *People v. Cook* (2006) 39 Cal.4th 566, our Supreme Court summarized the elements of torture-murder as follows: "The elements of torture murder are: (1) acts causing death that involve a high degree of probability of the victim's death; and (2) a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose. [Citing, inter alia, § 189.] The defendant need not have an intent to kill the victim [citation], and the victim need not be aware of the pain. [Citations.]" (*Id*. at p. 602.) Thus, we agree with defendant that in the context of *torture-murder*, the People must prove a premeditated intent to inflict extreme and prolonged pain, i.e., to prove that *torture* (as defined) was used. However, defendant points to no authority explicitly extending this intent requirement to murder by poison, and we have found none.

We decline to extend the requirement merely because the two methods of killing--by torture and by poison--are specifically classified as first degree murder within the

same code section. First, as explained above, in *Laws* we made clear the requirement did not extend to lying in wait, which was also classified as first degree murder by the same statute. Adding a willful, deliberate, and premeditated requirement to the administration of poison is equivalent to adding an intent to injure element to lying-in-wait murder.

Second, we agree with *Laws* that the Legislature could have concluded that an unlawful killing of a human being by poison, with malice aforethought, was more deplorable than second degree murder.

Third, where a torture-murderer is subject to aggravated punishment due to her state of mind, the cold-blooded intent to inflict pain described in *Steger*, in the context of poison the defendant is subject to aggravated penalties due to only the *method* by which the implied malice murder is perpetrated. We thus conclude the court instructed the jury in a manner consistent with the law and did not commit instructional error.

As for the sufficiency of the evidence that defendant committed first degree murder as charged, *Jennings*, *supra*, 50 Cal.4th 616, bears factual similarities to this case. In *Jennings*, the parents gave their five-year-old child over-the-counter sleeping pills from a box warning that those pills were not for children under 12 and gave him Vicodin and Valium--prescription drugs not prescribed for the child. (*Id*. at pp. 631, 633-634, 640-641.) In rejecting the father's claim of insufficient evidence of first degree murder, the court explained: "Defendant does not dispute that the natural consequences of administering three powerful sedatives to a five-year-old child are dangerous to human life, or that furnishing the drugs to [the child] was a cause of his death. The only issue in terms of implied malice, therefore, is whether there was sufficient evidence for a reasonable jury to have found that defendant ' "had full knowledge that his conduct endangered the life of decedent, but that he nevertheless deliberately administered the poison with conscious disregard for that life." [Citation.]' [Citation.]" (*Id*. at p. 640, partly quoting *People v. Blair* (2005) 36 Cal.4th 686, 745, overruled on another point by *People v. Black* (2014) 58 Cal.4th 912, 919-920.) The evidence in this case is similar,

with defendant knowingly and repeatedly transmitting heroin and methamphetamine to her baby, while aware of the risk and ignoring warnings from others to seek medical attention for her baby.

Accordingly, we again reject defendant's contentions as to the adequacy of the jury instructions and proof.

III

Clerical Errors

The abstracts of judgment and the minutes of sentencing must fully and accurately capture all components of a defendant's sentence as pronounced by the trial court. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Zackery* (2007) 147 Cal.App.4th 380, 385-389.) Defendant identifies a discrepancy between the reporter's transcript and clerk's transcript regarding the parallel restitution and parole revocation restitution fines (§§ 1202.4, 1202.45), and contends the lower amount reflected by the reporter's transcript controls. Given all the circumstances, we disagree.

The probation report recommended the fines be set at the maximum, $10,000. The determinate abstract of judgment shows both fines as $10,000. The clerk's minute orders both from the original and the amended sentencing hearings each show both fines as $10,000.[6]

The reporter's transcript from the only hearing that addresses this issue shows that after the trial court imposed the prison sentence and inquired about any trailing cases, the following occurred:

> "THE COURT: [D]o Counsel waive formal reading and advisement of all code sections that go along with the fines and fees?
>
> "[Defense counsel]: So waived.

---

[6] A new sentencing order issued and signed by the trial court on January 30, 2019, also shows the fines at issue here to be $10,000.

"THE COURT: The Defendant will be ordered to pay a restitution fine in the amount of $1,000 pursuant to . . . section 1202.4.

"There is an additional parole revocation restitution fine in the same amount and that will be stayed pending service of the sentence."

It is clear there is an inconsistency as defendant contends.

But our Supreme Court rejects the view that "inconsistency must necessarily be resolved in favor of the reporter's version" (*People v. Smith* (1983) 33 Cal.3d 596, 599), and holds that "a record that is in conflict will be harmonized if possible. [Citation.] If it cannot be harmonized, whether one portion of the record should prevail as against contrary statements in another portion of the record will depend on the circumstances of each particular case. [Citation.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 226.)

Here, it is possible the trial court meant to impose and did impose a fine of $1,000 but the clerk assumed the court would impose the recommended $10,000 and inaccurately recorded the judgment multiple times. It is also possible that the court said and meant to say "$10,000" but the court reporter incorrectly transcribed what the court said. The latter possibility best harmonizes the conflict in this record.

First, although a trial court has discretion, the amount of the fines "shall be . . . commensurate with the seriousness of the offense." (§ 1202.4, subd. (b)(1) [as to restitution fine]; see § 1202.45, subd. (a)(1) [parole revocation restitution fine to be in the "same amount" as restitution fine].) Counsel does not point to any *reason* the court would have imposed less than the maximum fine for first degree murder, the most serious of offenses. Second, as the Attorney General points out, although there was a second sentencing hearing a week after this hearing, defense counsel did not claim that there was an error in the minutes from this hearing. Third, the trial judge (rather than the clerk) signed both the original and the two amended minute orders.

All of the circumstances indicate that the court reporter mistranscribed what the trial court said, and that the final minute order (one of three signed by the court) and the determinate abstract of judgment correctly reflect the fines imposed by the court.

IV

Youthful Offender Remand

Defendant contends that because of her age (21 at the time of the murder) she is entitled to a limited remand for a hearing to make a factual record that can be used at a future youth offender parole hearing pursuant to section 3051. (See *People v. Franklin* (2016) 63 Cal.4th 261, 276-284.) Defendant concedes that statute was amended to include persons of her age (at the time of the crime) and that *Franklin* was decided before the sentencing hearing, but argues that no reference to that statute was made at sentencing and that her trial counsel did not submit relevant information at sentencing. The People in part reply that evidence about defendant's difficult youth and other circumstances was presented in a detailed probation report and the interrogations introduced at trial. The People argue: "It is understandable . . . why appellant did not endeavor to expand the record. For it is hard to image what more appellant could have added to the record in this case." Defendant does not contest the People's summation of the sentencing evidence in her reply brief. We agree that much evidence about defendant's youth and circumstances is already in the record below. Defendant does not explain what more she would add.

Thus, this case is controlled by our opinion in *People v. Woods* (2018) 19 Cal.App.5th 1080. In *Woods* we declined to order a *Franklin* remand to a defendant who was sentenced after youth offender parole hearings became a part of California law. We reasoned that although Woods was sentenced before our Supreme Court decided *Franklin*, "that makes no difference given that it was not the decision in *Franklin* that gave rise to defendant's right to a youth offender parole hearing. Instead, as we have explained, it was the amendment to . . . section 3051 that took effect months before defendant's sentencing hearing that gave rise to that right, and on the record here there is

no reason to believe that defense counsel did not have every reasonable opportunity and incentive to make an adequate record for defendant's eventual youth offender parole hearing." (*Id*. at p. 1089.)

Sentencing in this case was held on November 13, 2017, both after the relevant statutory amendments expanded coverage to embrace defendant and more than a year after *Franklin* was decided. Therefore, as in *Woods*, defendant had a "sufficient opportunity to make a record of information relevant to [her] eventual youth offender parole hearing." (*People v. Franklin*, *supra*, 63 Cal.4th at p. 284.) She appears to have done just that.

Accordingly, no *Franklin* remand is required in this case.

DISPOSITION

The judgment is affirmed.

Duarte, J.

We concur:

Hull, Acting P. J.

Butz, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: The People v. Brown
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Shasta County
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PROOF OF SERVICE

I, David L. Polsky, certify:

I am an active member of the State Bar of California and am not a party to this cause. My electronic service address is polsky183235@gmail.com and my business address is P.O. Box 118, Ashford, Connecticut 06278. On August 26, 2019, I served the persons and/or entities listed below by the method checked. For those marked "Served Electronically," I transmitted a PDF version of the **Petition for Review** by TrueFiling electronic service. For those marked "Served by Mail," I deposited in a mailbox regularly maintained by the United States Postal Service at Ashford, Connecticut, a copy of the above document in a sealed envelope with postage fully prepaid, addressed as provided below.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 26, 2019, at Ashford, Connecticut.

/s/ DAVID L. POLSKY
David L. Polsky, Declarant

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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