

S257631

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT

FILED

FEB 05 2020

Jorge Navarrete Clerk

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

HEATHER ROSE BROWN,

Defendant and Appellant.

Deputy
S257631

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

OPENING BRIEF ON THE MERITS

DAVID L. POLSKY
Attorney at Law
CA Bar No. 183235

P.O. Box 118
Ashford, CT 06278
Telephone: (860) 429-5556
Email: polskylaw@gmail.com

Attorney for Defendant/Appellant
HEATHER ROSE BROWN by
appointment of the California
Supreme Court



TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

ISSUES PRESENTED5

INTRODUCTION.....5

STATEMENT OF THE CASE7

STATEMENT OF FACTS8

 A. Prosecution8

 1. D.R.’s Birth and Death8

 2. D.R.’s Drug Exposure11

 3. Police Investigation12

 4. Ms. Brown’s November 3, 2014 Interview.....13

 5. Ms. Brown’s May 6, 2015 Interview16

 B. Defense.....17

ARGUMENT.....18

 I. The trial court prejudicially erred by failing to instruct the jury sua sponte that first degree murder by poison requires proof the defendant willfully, delib-erately and with premeditation administered poison to the victim18

 A. Analysis of Section 18919

 1. Torture Murder22

 2. Murder by Poison26

 B. Trial Court’s Duty36

 C. Prejudice37

CONCLUSION42

CERTIFICATE OF WORD COUNT.....43

PROOF OF SERVICE44

TABLE OF AUTHORITIES

CASES

<i>Bechtelheimer v. State</i> (1876) 54 Ind. 128	30
<i>Chapman v. California</i> (1967) 386 U.S. 18	37
<i>Ex parte Williams</i> (Cal.Ct.App. 1906) 87 P. 565	31
<i>Neder v. United States</i> (1999) 527 U.S. 1	37
<i>People v. Albertson</i> (1944) 23 Cal.2d 550	31
<i>People v. Bealoba</i> (1861) 7 Cal. 389	20
<i>People v. Bender</i> (1945) 27 Cal.2d 164	22
<i>People v. Bipialaka</i> (2019) 34 Cal.App.5th 455	27
<i>People v. Botkin</i> (1908) 9 Cal.App. 244	31
<i>People v. Cole</i> (2004) 33 Cal.4th 1158	37
<i>People v. Cook</i> (2006) 39 Cal.4th 566	26, 36
<i>People v. Cummings</i> (1993) 4 Cal.4th 1233	36
<i>People v. Edwards</i> (2013) 57 Cal.4th 658	26
<i>People v. Ervin</i> (2000) 22 Cal.4th 48	36
<i>People v. Golde</i> (2008) 163 Cal.App.4th 101	27
<i>People v. Harris</i> (1994) 9 Cal.4th 407	37
<i>People v. Heslen</i> (Cal. 1945) 163 P.2d 21	22
<i>People v. Lasko</i> (2000) 23 Cal.4th 101	28
<i>People v. Leiva</i> (2013) 56 Cal.4th 498	19
<i>People v. Mattison</i> (1971) 4 Cal.3d 177	5, 33, 34, 35
<i>People v. Milton</i> (1904) 145 Cal. 169	29, 30, 31
<i>People v. Perez</i> (1992) 2 Cal.4th 1117	39
<i>People v. Potigian</i> (1924) 69 Cal.App. 257	31
<i>People v. Powell</i> (2018) 5 Cal.5th 921	26
<i>People v. Sanchez</i> (1864) 24 Cal. 17	21
<i>People v. Steger</i> (1976) 16 Cal.3d 539	5, 23-29, 35, 36, 40
<i>People v. Taylor</i> (1970) 11 Cal.App.3d 57	34
<i>People v. Thomas</i> (1953) 41 Cal.2d 470	32
<i>People v. Tubby</i> (1949) 34 Cal.2d 72	23
<i>People v. Valentine</i> (1946) 28 Cal.2d 121	31, 33
<i>People v. Van Deleer</i> (1878) 53 Cal. 147	27
<i>People v. Watson</i> (1981) 30 Cal.3d 290	27
<i>People v. Whisenhunt</i> (2008) 44 Cal.4th 174	37
<i>People v. Wiley</i> (1976) 18 Cal.3d 162	20, 21, 25, 27, 29, 36

STATUTES

Health & Saf. Code, § 113517
Health & Saf. Code, § 113597
Pen. Code, § 1877
Pen. Code, § 18919, 21, 25, 28, 33, 35
Pen. Code, § 273a7
Pen. Code, § 12022.957

OTHER AUTHORITIES

CALCRIM 5206
CALCRIM 5216, 18, 26, 27, 28, 37

RULES

California Rules of Court, rule 8.905

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

S257631

v.

HEATHER ROSE BROWN,

Defendant and Appellant.

OPENING BRIEF ON THE MERITS

ISSUES PRESENTED

Pursuant to this court's order of November 13, 2019, the issues to be "briefed and argued" are as follows:

1. Did the trial court err in instructing the jury on the elements of first degree murder by poison (see *People v. Steger* (1976) 16 Cal.3d 539, 544-546; *People v. Mattison* (1971) 4 Cal.3d 177, 183-184, 186)?
2. Was any such instructional error prejudicial?

INTRODUCTION

In the instant case, Ms. Brown consumed methamphetamine and heroin while pregnant and continued using drugs after the birth of her child, D.R.¹ She also fed her

¹ California Rules of Court, rule 8.90(b) expresses a preference for reviewing courts to refer to victims by first name

newborn breast milk that contained remnants of the drugs she herself had ingested. Four days after D.R.'s birth, the baby died. According to a medical expert, D.R. died as a result of drug exposure.

The trial court provided the jury the standard instruction on murder (CALCRIM 520), explaining the difference between express and implied malice and directing the jury that, if malice had been proven, the crime is second degree murder unless the People proved the elements of first degree murder. The court then instructed the jury, pursuant to CALCRIM 521, that Ms. Brown was guilty of first degree murder if the People proved she "murdered by using poison," "a substance . . . that can kill by its own inherent qualities." Ms. Brown was convicted of first degree murder.

This court granted Ms. Brown's petition for review to decide whether the trial court erred in instructing the jury on the elements of first degree murder by poison and, if so, whether the error was prejudicial. Ms. Brown submits the trial court prejudicially erred. Under established principles of statutory construction, first degree poison-murder requires proof that the defendant willfully, deliberately and with premeditation administered poison to another. To be clear, Ms. Brown does not argue that the intent to kill is required but only that the defendant must have purposefully as opposed to negligently or even recklessly introduced poison into another's system to elevate

and last initial or initials only. Consistent with that preference, appellant refers to the victim by her initials.

a murder from second to first degree. The error was prejudicial because there was no evidence from which a reasonable juror could infer Ms. Brown willfully, deliberately and with premeditation introduced the drugs into her daughter's system.

STATEMENT OF THE CASE

A jury found Ms. Brown guilty of first degree murder by poison (Pen. Code,² § 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.)

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, *inter alia*, the same issues presented herein. The Court of Appeal rejected them and affirmed the judgment. Ms. Brown subsequently filed a petition for rehearing, contending that the Court of Appeal misconstrued her arguments with respect to the elements of first degree

² Hereafter, all statutory references are to the Penal Code unless otherwise indicated.

murder by poison. The court granted her petition, vacated the original opinion, and prepared and issued a new opinion that reached the same conclusion.

Thereafter, Ms. Brown prepared a petition for review. After requesting and receiving an answer from the People and receiving a reply to the People's answer from Ms. Brown, this court granted review.

STATEMENT OF FACTS

A. Prosecution

In 2013 and 2014, Ms. Brown and Daylon Reed were romantically-involved drug users who frequently stayed at Redding hotels known to be inhabited by other drug users. (1RT 299-300, 628-632, 637, 639, 689.) Mr. Reed was also a drug dealer. (1RT 634.) In February 2014, Ms. Brown learned she was pregnant with Mr. Reed's child. (1RT 629; 2CT 372, 417-418.) Ms. Brown continued to ingest heroin and methamphetamine during her pregnancy and after the birth of her baby girl, D.R., on October 30, 2014. (1RT 634, 738, 746, 753; 2CT 408-412, 420-423, 479, 481, 488, 504.) She also fed D.R. breast milk. (2CT 383, 396, 400, 425-426, 431, 505-506.) Ms. Brown's daughter died four days after birth from drug exposure. (1RT 401, 404, 414, 418-419, 661, 665-666; 2RT 800-802, 811, 885.)

1. D.R.'s Birth and Death

A year before D.R.'s birth, Mr. Reed's sister, Michelle Reed, who was also a drug user, gave birth to a baby, and Child and Family Services forced her to relinquish custody of the child.

(1RT 627, 631, 638-640.) Ms. Brown was aware of that event and insisted upon giving birth to her daughter in a hotel room rather than a hospital. (1RT 451, 631, 690-691, 742.) With the assistance of an uncertified midwife, Ms. Brown delivered D.R. at about 8:00 a.m. at the Hampton Inn and Suites on Larkspur Lane in Redding. (1RT 336-337, 356-361, 430, 433, 697; 2CT 377.) Later the next morning, she and Mr. Reed were ordered to leave after an employee smelled marijuana coming from the room. (1RT 444-445.)

The couple then checked into the Hilltop Lodge on Hilltop Drive in Redding. (1RT 486, 700.) Ms. Brown continued to use drugs. (1RT 746; 2CT 414, 420-423, 479, 481, 488, 504.) She also fed D.R. a combination of formula and breast milk. (1RT 519, 559, 702, 746; 2CT 383-384, 396, 400, 425-426, 431, 441-442, 479, 481, 488, 505-506.) Ms. Brown's mother visited the day after the birth and believed D.R. was healthy but a bit fussy. (1RT 700, 704.)

At some point shortly after the birth, Ms. Brown commented that D.R. was having trouble sleeping and seemed restless, and she wondered if the baby was suffering from withdrawals but then dismissed the notion. (1RT 754; 2CT 422-424.) Ms. Brown's cell phone indicated that, on November 1, she researched on the Internet websites about assisting newborns suffering from opiate withdrawals. (2RT 865-867.) She also visited a website about pumping and storing breast milk. (2RT 865.)

On November 2, 2014, Ms. Brown and Mr. Reed visited Ms. Brown's father in Sonora with the baby. (1RT 449, 451, 468-469.)

D.R. was suffering from a stuffy nose and a slight wheeze and cough and was shivering but otherwise seemed fine to her grandfather. (1RT 452, 454, 459, 469-470.) At about 9:00 or 10:00 p.m., Ms. Brown, Mr. Reed, and D.R. left to return to Redding. (1RT 455, 459, 471.) Redding was about a five-hour drive away. (1RT 455.)

On November 3, 2014, at about noon, a housekeeper at the Hilltop Lodge went to Ms. Brown and Mr. Reed's room. (1RT 312-313.) She repeatedly knocked on the door, but nobody answered. She then used her passkey to open the door. The safety latch was on it, so she could not open it all the way. (1RT 315.) She heard Mr. Reed and Ms. Brown talking in a tone that suggested they just woke up. (1RT 316.) Mr. Reed got out of the bed and came to the door. (1RT 315.) The housekeeper asked if they intended to stay another night and informed them that, if they did, they needed to pay. Mr. Reed said he would go do that. (1RT 316-317.) The housekeeper left; she never heard the sound of a child coming from the room. (1RT 316-317.)

At about 1:00 p.m., 911 was called from a cellular telephone, directing medical personnel to the Brown/Reed room. (1RT 327-329.) An ambulance arrived within four minutes of the dispatch call, and medical personnel found D.R. in cardiac arrest. (1RT 614-617.) In response to questioning, Ms. Brown said she last saw D.R. breathing about 20 to 40 minutes earlier. (1RT 617.) Medical personnel started performing cardiopulmonary resuscitation (CPR) on the child and, at 1:10 p.m., transported

her to Mercy Medical Center, where she was pronounced dead at 1:29 p.m. (1RT 618, 621; 2RT 885.)

2. D.R.'s Drug Exposure

Ayako Chan-Hosokawa, a forensic toxicologist, tested D.R.'s blood and other bodily fluids. (1RT 652-653.) She found indications of exposure to methamphetamine and heroin. (1RT 653-660.) She believed the drugs were the result of post-birth exposure and not exposure during pregnancy. (1RT 661, 665-666.) Methamphetamine is only detectable in one's system for up to three days. (1RT 661.) Morphine, which is the final stage of heroin decomposition in the body, is not detectable after 24 hours. (1RT 659-660.) 6-MAM, the intermediate byproduct of heroin, is only detectable for 2.5 to 3 hours. (1RT 659-660.) Both Morphine and 6-MAM were found in D.R.'s stomach fluids. (1RT 658.) A nursing woman who uses methamphetamine and heroin can transfer the drugs to her breast milk. (1RT 662.)

Dr. Ikechi Ogan, a forensic pathologist, performed an autopsy on D.R. (1RT 384, 389.) He also found the presence of heroin and methamphetamine in D.R.'s body. (1RT 401, 418-419.) According to the doctor, heroin is a depressant, which slows breathing and, in an overdose situation, can cause death. (1RT 407.) Methamphetamine is a stimulant, which increases the heart rate and can lead to seizures and cardiac arrest. (1RT 407, 419-420.) He believed that the exposure to those drugs, either individually or in combination, is unsafe for an infant and caused D.R.'s death. (1RT 404, 407-409.)

Dr. James Crawford-Jakubiak, the Medical Director for the Center for Child Protection at UCSF Children's Hospital, believed the most likely cause of D.R.'s death was respiratory arrest and that heroin exposure was a possible trigger of it. (2RT 769-770, 800-801, 811, 820-821.)

3. Police Investigation

In response to the 911 call, police arrived at the hotel and found drugs and drug paraphernalia in Ms. Brown's car and the room, including heroin, methamphetamine and marijuana as well as the means for consuming it. (1RT 329, 486-495, 499-500, 516-517, 520-527, 531-534, 568-569, 598-601.) Police also found Suboxone pills. (1RT 535.) Suboxone is a drug taken by opiate addicts to alleviate the symptoms of withdrawal and help them overcome their addiction. (1RT 535, 632.)

In the room, there were also baby bottles that appeared to contain breast milk or formula as well as other baby-related items. (1RT 518-519, 539-543.) One baby bottle was tested as to its contents and found to contain Ms. Brown's breast milk with potentially toxic levels of methamphetamine but no evidence of heroin. (1RT 559-563, 589-592.) Another baby bottle and a child's cup were tested as well but nothing of significance was found in them. (1RT 558-559, 562.)

Police took Mr. Reed into custody on outstanding warrants. (1RT 504-505.) At some point, police transported Ms. Brown to the Shasta Regional Medical Center for a blood draw, which was conducted at 6:34 p.m. on the night of D.R.'s death. (1RT 502-503.) Her blood contained evidence of methamphetamine, heroin and marijuana ingestion. (1RT 545, 547-554.) After the blood

draw, she was then transported to the police station for an interview. (1RT 603-604, 605.)

4. Ms. Brown's November 3, 2014 Interview

During the November 3, 2014 interview, Ms. Brown told Investigator Michael DiMatteo that she first started using heroin in October 2013. (2CT 404.) Initially, she did not use the drug regularly because she needed to work and the drug “makes you nod out.” (2CT 405.) However, over time, she began using it more. At Mr. Reed’s urging in late 2013 or the beginning of 2014, she tried to quit but relapsed. (2CT 406-407.)

According to Ms. Brown, by the time she learned of her pregnancy, she was using heroin daily. (2CT 408.) She was also smoking marijuana and used some methamphetamine. (2CT 408.) She explained to the investigator that she was told quitting drugs “cold turkey” could result in the loss of the baby, and she had already had two miscarriages. (2CT 408, 419.) She tried taking Suboxone to get clean, and it helped her “a lot.” (2CT 408.) However, the stress of her life—fights with Mr. Reed, being around other users, living in a car—caused her to relapse again. (2CT 409.) She tried again to refrain, relying on Suboxone, but at one point, Mr. Reed and his sister were arrested and she was left homeless and alone, causing her to relapse once more, resorting to heroin to address the stress. (2CT 411.)

Ms. Brown admitted to the investigator that she knew heroin was addictive and could have an effect on her unborn child, but she also believed that the effects would not be harmful or have permanent side effects while stopping could cause the

baby to go through withdrawals. (2CT 415.) She did not seek help because she thought the Suboxone would work, she did not know where to turn, and she was embarrassed by her addiction. (2CT 416.) She also acknowledged that she believed she would lose the baby if she went to see a doctor. (2CT 420.) However, she had every intention of going to the hospital if she had any complications with the birth. (2CT 420.)

After the delivering her baby, Ms. Brown fed D.R. a combination of baby formula and breast milk, which she began pumping for use in a bottle because D.R. was having a problem latching onto her breasts. (2CT 383, 425.) Ms. Brown reluctantly admitted to the investigator that she had continued using heroin “close to every day” after D.R.’s birth. (2CT 414, 420-423.) She also admitted knowing that providing breast milk to the baby while using heroin would pass the drug along to the child and was aware that she had been exposing the baby to heroin during the child’s short life span. (2CT 422, 429.)

During the interview, Ms. Brown said that, by the second day of D.R.’s life, she began to wonder whether D.R. was going through withdrawals “a little bit.” (2CT 422, 424.) The baby was acting like a normal baby but also was restless and constantly sucking, symptoms of withdrawals. (2CT 422-424.) However, she also had doubts about withdrawals because she had used the drug only “a few times.” (2CT 422.) In addition, she told the investigator that she heard giving her breast milk to D.R. would ease the baby’s withdrawal symptoms. (2CT 430.) She also did not believe she was giving the baby “that much” of her breast

milk. (2CT 431.) In fact, she tried not to do so, prompting her to rely considerably on formula to feed the baby. (2CT 441-442.)

The night before D.R.'s death, the baby was suffering from a slight fever. (2CT 397.) Ms. Brown gave her a small dose of Tylenol for babies at about 2:00 or 3:00 a.m. (2CT 397-398) Ms. Brown told the investigator that she planned to make a doctor's appointment for D.R. after returning home from Sonora. (2CT 428.) However, she also admitted that the reason she had not done it sooner was because she "knew you guys would take my baby." (2CT 429.)

Ms. Brown believed they arrived in Redding at about 3:00 a.m. (2CT 389.) Upon arriving home, Ms. Brown used heroin to help her sleep. (2CT 421.) She also fed the baby and soothed her by playing some music. (2CT 390.) They went to sleep, but D.R. woke up her mother about 10 minutes later. (2CT 390.) Ms. Brown was the only one who cared for D.R. (2CT 401.) She occasionally felt overwhelmed, especially when D.R. would "cry and cry and cry." (2CT 402.)

At about 7:00 a.m., Ms. Brown pumped some breast milk and fed it to D.R. but gave her "a lot" of formula too. (2CT 396, 400, 426.) Ms. Brown fell asleep at about 8:00 a.m. after taking care of D.R. She then heard D.R. fuss, which woke her up. She gave the baby a bottle of formula again, which D.R. did not finish. (2CT 426.) That was the last time the baby ate that morning. (2CT 397.)

Ms. Brown fell asleep again at about 10:00 a.m. (2CT 426.) She was "exhausted and beat" and "really, really tired," so she

put D.R. between her and Mr. Reed on the bed. (2CT 391, 400, 440.) The baby then woke her up again, crying. (2CT 391, 440.) Ms. Brown moved the baby to her other side and “had her under my . . . arm.” (2CT 391, 440.) She was lying right next to Ms. Brown. (2CT 440.)

Then hotel personnel woke them up. (2CT 391.) Mr. Reed answered the door, and Ms. Brown got up to get money to pay for another night. (2CT 394.) Afterwards, Ms. Brown went to check on D.R. (2CT 394.) She noticed the baby was not breathing. (2CT 391.) Ms. Brown picked her up. (2CT 394.) D.R. was still warm. (2CT 394.) Her bottom lip moved a little. (2CT 394.) She told Mr. Reed to call 911, which he did. (2CT 394.) Shortly thereafter, the medical personnel arrived and took D.R. (2CT 395.)

5. Ms. Brown’s May 6, 2015 Interview

On May 6, 2015, Redding Police Officer Brian Cole interviewed Ms. Brown. (1RT 761.) Ms. Brown admitted using drugs during the pregnancy. (2CT 477-479.) She also acknowledged feeding D.R. breast milk after birth. She initially breastfed D.R. because her mother told her it was important for mother-child bonding, but the baby did not attach well and drank better from a bottle. (2CT 505.) Ms. Brown told the investigator that she would expect a toxicology report on D.R. to show the presence of heroin, methamphetamine, and marijuana, which would have been passed to the baby through her breast milk. (2CT 498.) She acknowledged it was a mistake to breastfeed her baby when taking drugs. (2CT 499, 500.) On the other hand, she denied she did so for the purpose of helping D.R. with

withdrawals and said that thought never crossed her mind. (2CT 501.)

Regarding smoking methamphetamine while breastfeeding, Ms. Brown said, “[N]othing was really intention[al].” (2CT 513.) She said, “I kind of got outta control. I didn’t know how to control the situation.” (2CT 513.) She also told him that the only reason she took methamphetamine was to stay awake so she could care for D.R. (2CT 502, 514.)

Ms. Brown had no intention of killing her daughter. (2CT 515.) While she was aware heroin and methamphetamine were bad for children, she did not breastfeed her every day. (2CT 517.) Ms. Brown said she did not think she was smoking enough to cause D.R. to overdose but also never thought about her baby as a fraction of an adult who would be more susceptible to the effects of drugs than an adult. (2CT 530-531.) She explained it was really difficult to stay clean given her boyfriend was “one of the bigger drug dealers in Redding.” (2CT 519.) She also told the officer that it “kills” her D.R. may have died from drugs when she only wanted “to help her” baby and never intended to harm her. (2CT 520.)

B. Defense

The defense rested without presenting any evidence. (2RT 904.)

ARGUMENT

I.

THE TRIAL COURT PREJUDICIALLY ERRED BY FAILING TO INSTRUCT THE JURY SUA SPONTE THAT FIRST DEGREE MURDER BY POISON REQUIRES PROOF 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,” “a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities.”³ (3CT 621 [CALCRIM 521].) 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. Ms. Brown submits the trial court prejudicially erred. The prosecutor bore the burden of proving that Ms. Brown willfully, deliberately and with premeditation administered the drugs to D.R.—i.e., purposefully poisoned her. The jury was not so instructed, and it cannot be said the omission did not contribute to the jury’s guilty verdict.

³ Based on the evidence admitted in this case, Ms. Brown does not dispute that methamphetamine and heroin, when administered to an infant, satisfies the definition of a poison given to the jury.

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.*)

The Legislature first codified an enumerated list of “means” constituting first degree murder—“by means of poison, lying in wait, torture, or other kind of willful, deliberate, and premeditated killing”—in 1856 in a statutory predecessor to section 189. (*People v. Wiley* (1976) 18 Cal.3d 162, 169; *People v. Bealoba* (1861) 7 Cal. 389, 393.) This court construed it for the first time in *Bealoba, supra*, 17 Cal. 389. The court explained that the enumerated “means” constitute first degree murder because they “carry with them conclusive evidence of premeditation, and the jury would have no option but to find the prisoner guilty in the first degree, upon proof of the crime.” (*Id.* at p. 394; accord, *Wiley*, at p. 169.) The court observed that, when murder is committed by one of the “means” listed, no proof to bring about a particular result is required:

In all these enumerated cases, the Legislature has declared the law, that the perpetrator shall be guilty of murder in the first degree *without further proof* that *the death* was the ultimate result, which the will, deliberation and premeditation of the party accused sought. And the same authority has declared the law that any other kind of killing which is sought by the will, deliberation, and premeditation of the party accused, shall also be murder in the first degree; but that as to this kind of killing, proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result which the concurring will, deliberation, and premeditation of the party accused sought.

(*Id.* at p. 397, emphasis in original.)

The court revisited the scope of first degree willful, deliberate and premeditated murder in *People v. Sanchez* (1864)

24 Cal. 17. It held the Legislature intended such murders to receive greater punishment because of their “cruel and aggravated character.” (*Id.* at p. 29.) It wrote, “In order to constitute murder of the first degree there must be something more than a malicious or intentional killing.” (*Id.* at p. 28.) In addition to felony murder, the court explained,

There must be a killing by means of poison, lying in wait, or torture, or some other kind of killing different from that of poison, lying in wait, or torture, which is wilful, deliberate, and premeditated.

(*Ibid.*) It reiterated that, “[w]here the killing is perpetrated by means of poison, etc.,” “the *means* used is held to be conclusive evidence of premeditation.” (*Id.* at p. 29, emphasis in original.) In other words, a murder by one of those means is necessarily a “willful, deliberate, and premeditated” one. (*Ibid.*)

The list of enumerated “means” was incorporated into section 189, which was adopted by the Legislature in 1872. (*Wiley, supra*, 18 Cal.3d at p. 170.) This court held the prior construction of section 189’s predecessor applied to section 189 as well. (*Id.* at p. 171.) Therefore, under section 189, any murder committed by the enumerated “means” does not require proof of an intent to bring about a particular result because it carries with it conclusive proof that the killing was willful, deliberate and premeditated. Such a crime thus constitutes more than a mere malicious killing and is the kind of cruel and aggravated killing warranting the greater punishment of first degree murder. That naturally begs the question what constitutes a killing committed by one of the enumerated “means”?

1. Torture Murder

In a series of cases, this court answered that question with respect to murder by torture. For instance, in *People v. Bender* (1945) 27 Cal.2d 164, 177, the court held that once a jury finds the defendant “acted with that ‘malice aforethought’ which constitutes the killing by murder,” “there remained for their determination the more difficult question of the class and degree of the homicide.” In that case, the defendant choked his victim to death, and the court held that mere choking does not constitute torture as a matter of law. (*Id.* at pp. 177-178.) It concluded that, to elevate the degree of murder, torture requires proof the defendant intended to cause his victim to suffer. (*Id.* at p. 177.) It explained,

The killer who, heedless of the suffering of his victim, in hot anger and with the specific intent of killing, inflicts the severe pain which may be assumed to attend strangulation, has not in contemplation of the law the same intent as one who strangles with the intention that his victim shall suffer.

(*Ibid.*) Equating torture-murder with murder by poison, the court then wrote that the “mode of killing” cannot elevate the degree of the crime “unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice.” (*Id.* at pp. 177-178.)

Later the same year, the court expanded upon the definition of torture-murder. (*People v. Heslen* (Cal. 1945) 163 P.2d 21, 27.) It held that torture for purposes of first degree murder required “an intent to cause pain and suffering in addition to death.” (*Ibid.*) It continued,