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.

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

OPENING BRIEF ON THE MERITS

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HEATHER ROSE BROWN by
appointment of the California
Supreme Court

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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

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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

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[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.

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[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,

> That is, the killer is not satisfied with killing alone. He wishes to punish, execute vengeance on, or extort something from his victim, and in the course, or as the result of inflicting pain and suffering, the victim dies. That intent may be manifested by the nature of the acts and circumstances surrounding the homicide.

(*Ibid.*) It held further that the infliction of severe pain is not enough because otherwise "practically every murder would be of the first degree inasmuch as in most instances some severe pain would precede the death." (*Ibid.*) It did not believe "the Legislature used the word 'torture' in such a broad sense." (*Ibid.*)

Four years later, the court reaffirmed its prior holdings in *People v. Tubby* (1949) 34 Cal.2d 72. Focusing on the defendant's intent, the court wrote,

> In determining whether the murder was perpetrated by means of torture the solution must rest upon whether the assailant's intent was to cause cruel suffering on the part of the object of the attack, either for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity. The test cannot be whether the victim merely suffered severe pain since presumably in most murders severe pain precedes death.

(*Id.* at p. 77.)

Then, in 1976, the court provided its most comprehensive analysis of torture-murder under section 189. In *Steger, supra,* 16 Cal.3d 539, the court examined section 189's use of language to ascertain the Legislature's intent. It observed that delineating separate degrees of murder and maintaining that distinction serves two functions. (*Id.* at p. 544.) First, calculated murders,

rather than those triggered by, for example, rage, are more susceptible to the deterrent effect of severe penalties. (*Id.* at p. 545.) Second, society makes a moral distinction between types of murders, with some being seen as "more deplorable than others." (*Ibid.*)

The court noted that section 189 defines first degree murder as "primarily willful, deliberate, and premeditated murder." (*Steger, supra,* 16 Cal.3d at p. 545.) It then 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.)

As prior authorities had indicated, the defendant's state of mind was paramount in determining whether she tortured within the meaning of section 189:

> The element of calculated deliberation is required for a torture murder conviction for the same reasons that it is required for most other kinds of first degree murder. It is not the amount of pain inflicted which distinguishes a torturer from another murderer, as most killings involve significant pain. [Citation.] Rather, it is the state of mind of the torturer—the cold-blooded intent to inflict pain for personal 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.

(*Steger, supra,* 16 Cal.3d at p. 546; see also *Wiley, supra,* 18 Cal.3d at pp. 168-169 [torture included in section 189 not only because of the "great pain and suffering" inflicted upon the victim but because "the calculated nature of the acts causing death" make torture "among the most reprehensible types of murder"].)

Therefore, *Steger* held that torture-murder is "murder committed with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain." (*Steger, supra,* 16 Cal.3d at p. 546.) Proof of the intent to kill is not required but a "defined intent to inflict pain" is. (*Id.* at p. 546.) The court held that, in the case before it, the prosecutor failed to prove the requisite mental state and reduced the defendant's conviction from first to second degree murder. (*Id.* at pp. 549, 553.)

The evidence showed the defendant beat her three-year-old stepdaughter daily out of frustration and to discipline her, resulting in the infliction of cuts and bruises covering her body and culminating in a severe head injury that caused her death. (*Steger, supra,* 16 Cal.3d at p. 543.) The court found "there is not one shred of evidence to support a finding that she did so with cold-blooded intent to inflict extreme and prolonged pain." (*Id.* at p. 548.) Instead, the evidence showed she was a "tormented" and "frustrated" woman whose conduct was "misguided" and "irrational" but "but not in a criminal sense wilful, deliberate, or premeditated." (*Ibid.*) The court explained further,

> Child-battering is a crime universally abhorred by civilized societies, particularly when it results in

> death. Yet our revulsion is based not so much on the means of killing, as on the realization that a defenseless, innocent life has been destroyed. If defendant, instead of repeatedly beating her stepchild, had fatally shot her once in the head, it could not be claimed seriously that the shooting would be any less subject to deterrence or any less morally offensive than the beating in the present case. Yet the shooting could not be categorized as murder by means of torture. Nor can defendant's conduct here, however deplorable it appears to be.

(*Id.* at p. 549.)

As *Steger* shows, for one of the "means" enumerated in section 189 to elevate the degree of a murder, the focus must be on the intent of the defendant. The defendant's state of mind must reflect a calculated deliberation with respect not to the result or ultimate outcome but to the "means" itself so as to make the crime more susceptible to the deterrent effect of the enhanced penalty and to render the crime more deplorable than a lesser degree of murder. This court has repeatedly identified the *Steger* definition of torture-murder as an element the prosecutor must prove under section 189 (see, e.g., *People v. Powell* (2018) 5 Cal.5th 921, 944; *People v. Edwards* (2013) 57 Cal.4th 658, 715-716; *People v. Cook* (2006) 39 Cal.4th 566, 602), and that definition is incorporated into the standard instruction on first degree murder by torture (CALCRIM 521).

2. Murder by Poison

Historically, murder by poison has not been as clearly defined as murder by torture and has experienced some conflicting interpretations, as will be shown. Ms. Brown submits,

as one of the "means" of committing first degree murder in section 189 along with torture, the analysis in *Steger* should logically extend to poison-murder as well.

Jurors are currently instructed that a murder committed by the mere "us[e]" of "a substance . . . that can kill by its own inherent qualities" makes the crime first degree murder. (CALCRIM 521; see *People v. Van Deleer* (1878) 53 Cal. 147, 149 [defining poison, as adopted by CALCRIM 521, as any substance that "'by its own inherent qualities, is capable of destroying life'"].) However, that definition of poison-murder does not reflect the "calculated deliberation" or "cold-blooded intent" required for first degree murder. (See *Steger, supra,* 16 Cal.3d at p. 546.) In fact, the instruction requires no more than the mere use of the substance without describing the nature of that use or the defendant's purpose in using it.

Moreover, the conduct as defined by CALCRIM 521 is not more deplorable than other forms of murder. The instruction says nothing about the degree of danger posed by such a substance but merely makes any use of any substance with the mere capability of causing death first degree murder. Depending upon how it is used, a car is capable of causing death as well. (See *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 458; *People v. Golde* (2008) 163 Cal.App.4th 101, 116-117.) Vehicular homicide with implied malice is second degree murder. (*People v. Watson* (1981) 30 Cal.3d 290, 296-297.) What makes the mere use of a substance capable of causing death with implied malice more reprehensible than that vehicular homicide? (See *Wiley, supra,* 18 Cal.3d at pp.

168 [for first degree murder, "calculated nature of the acts causing death" makes the means used "among the most reprehensible types of murder"].) Ms. Brown submits it is not.

As instructed, poison-murder makes one who exposed another to a poisonous substance without any desire to harm, and possibly even with the misguided hope of doing good, guilty of first degree murder. Admittedly, a finding of implied malice is a prerequisite to finding first degree murder by poison. However, that simply denotes the defendant performed an act with knowledge that the act was potentially dangerous and with the conscious disregard for that danger. (*People v. Lasko* (2000) 23 Cal.4th 101, 107.) Nothing in that definition suggests an intent to harm. Thus, it is not the type of conduct, like a calculated murder, that is susceptible to the deterrent effect of a first degree murder penalty. (See *Steger, supra,* 16 Cal.3d at p. 545.)

Thus, more than what CALCRIM 521 requires must define poison-murder. Applying settled principles of statutory construction and extending the analysis in *Steger* to poison-murder reveals what is required. Section 189 defines both murder by torture and murder by poison in like fashion. 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" of killing 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.) Proof of the intent to kill is not required but "defined intent" to poison another is. (See *ibid.*)

In arriving at this conclusion, early cases interpreting poison-murder are only slightly helpful. What help they do provide is in holding that the defendant's state of mind is a key determinant in deciding whether a murder committed using poison rises to the level of first degree murder.

People v. Milton (1904) 145 Cal. 169 was one of the earliest cases to interpret murder by poison. In that case, the court rejected the idea that "every crime of murder in the first degree" required proof that *the killing* was willful, deliberate and premeditated. (*Id.* at p. 170.) With respect to murder by poison, it noted that "the means adopted for the unlawful killing furnish evidence of willfulness, deliberation, and premeditation." (*Ibid.*) However, it also held that proof of the means was not alone sufficient. Relying on authority out of Indiana interpreting its

own murder statute, *Milton* held, "[I]t was necessary to establish the unlawful intent or purpose in the administration of the poison." (*Id.* at pp. 170-171, citing *Bechtelheimer v. State* (1876) 54 Ind. 128.)

At the time, the Indiana murder statute provided, in relevant part, as follows:

> If any person of sound mind shall purposely and with premeditated malice, . . . or by administering poison, . . . kill any human being, such person shall be deemed guilty of murder in the first degree.

(*Bechtelheimer, supra,* 54 Ind. at p. 132.) The Indiana Supreme Court held that "where the killing is effected by administering poison," "a purpose to kill" is an essential element of the offense. (*Id.* at p. 136.) It found proof of such a purpose necessary not from the statutory language but "from the results that would flow from a different construction." (*Ibid.*)

> If no purpose to kill is necessary to constitute murder, where the killing is brought about by administering poison, then the most innocent act of one's life may turn out to be a murder, and that too in the first degree, subjecting him to the gallows or imprisonment for life. If a purpose to kill is not necessary, then the man is a murderer, who innocently administers what he supposes to be a proper dose of medicine, but which turns out to be a poison which kills the party taking it.

(*Ibid.*, accord, *Milton, supra,* 145 Cal. at p. 171.) However, the court also held that proof of "premeditated malice" was not required because a "purposed killing by poison, carries with it conclusive evidence" of that element. (*Id.* at p. 137.)

In the four decades that followed *Milton*, little attention was devoted to the elements of murder by poison. The cases that did address the issue suggested that proof of an intent or purpose to kill was required to establish the crime. (See, e.g., *People v. Albertson* (1944) 23 Cal.2d 550, 566-568 [where victim died from poisoned vitamin capsules, court analyzed sufficiency of the evidence to prove the defendant "poisoned the capsules with intent to murder"]; *People v. Potigian* (1924) 69 Cal.App. 257, 263-264 [evidence sufficient to support jury's finding of "poisoning administered with intent to bring about [victim's] death"]; *People v. Botkin* (1908) 9 Cal.App. 244, 249, 257 [defendant convicted of mailing poisoned candy to victim "with intent that [she] should eat thereof and be killed thereby" but proper to instruct that "'intent is conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another'"]; *Ex parte Williams* (Cal.Ct.App. 1906) 87 P. 565, 567 ["One who administers poison to another with intent to kill, and death results therefrom, is at once guilty of murder in the first degree"].)

Then, in *People v. Valentine* (1946) 28 Cal.2d 121, this court addressed the issue more comprehensively although in a tangentially-related context. In that case, the defendant shot the victim, killing him, and challenged instructions distinguishing between the degrees and classes of homicide. The court reviewed the different types of murder and, equating murder by poison with murder by torture, appeared to indicate that intent to kill is

not an element that must be proven although the defendant must still intend some harm:

> [*T*]*he murderer who kills by torture or poison may intend only to inflict suffering, not death.* Evidence of the means used might support an inference that the killing was willful, deliberate, and premeditated, but where the jury has found that the killing was by poison, lying in wait, or torture it is not their function to go farther and draw inferences as to the manner of the formation and carrying out of an intention to kill.

(*Id.* at p. 136.)

An even more thorough analysis of poison-murder occurred seven years later. In his concurring opinion *People v. Thomas* (1953) 41 Cal.2d 470, Justice Traynor addressed the enumerated "means" of committing first degree murder. He rejected the idea that first degree murder by poison could be proven simply by evidence that "a poison was administered and . . . a death resulted." (*Id.* at p. 478.) For all the "means," he wrote, it first must be established that the killing was done with malice such that it constitutes murder but that an intent to kill is not required. (*Ibid.*) Consistent with the authorities on torture-murder above, he wrote,

> [I]n the case of a killing by torture, it is not enough to show that the killing was by a means that incidentally caused pain and suffering to the victim. [Citation.] It must be established that the defendant intended to "cause cruel suffering on the part of the object of the attack, either for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity."

(*Ibid.*) Regarding poison-murder, he wrote,

> If the poison was innocently given under the belief that it was a harmless drug and that no serious results would follow, there would be no malice, express or implied, and any resulting death would not be murder. [Citation.] If, however, the defendant administered poison to his victim for an evil purpose, so that malice aforethought is shown, it is no defense that he did not intend or expect the death of his victim.

(*Ibid.*) Like in *Valentine*, Justice Traynor rejected the idea that an intent to kill was required but believed as to murder by both torture and poison that an "evil purpose" was required, although he viewed that purpose as simply a byproduct of malice rather than a distinct requirement.

This court followed Justice Traynor's lead almost two decades later. In *Mattison, supra,* 4 Cal.3d at pp. 182-183, it again addressed the requirements to elevate the degree of a murder based on the use of torture and poison. In neither situation was the mere act of torture or mere use of poison sufficient. Both required an evil purpose. Like Justice Traynor, *Mattison* treated that purpose as a byproduct of establishing malice rather than constituting a separate element, but the court nevertheless made clear more than mere engagement in the "means" enumerated in section 189 was required.

Mattison held that "murder may be committed without express malice, i.e., without a specific intent to take human life," but that "all murders, other than felony murders" require at least implied malice, even those "committed by one of the means enumerated in [Penal Code] section 189," such as torture and poison. Like Justice Traynor, *Mattison* held that torture-murder

required an intent to "'cause cruel suffering . . . for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity.'" (*Mattison, supra,* 4 Cal.3d at p. 183.)

With respect to first degree murder by poison, *Mattison* did not clearly establish what is required, at least not as clearly as it and other authorities had with respect to torture-murder, but it gave hints. Regarding poison-murder, again relying on Justice Traynor's opinion, it held that the defendant must "deliberately administer[] the poison" for "an evil purpose" and that giving a poisonous substance to another believing that "no serious results would follow" was not enough. (*Ibid.*)

Mattison also noted that administering a substance to another with the intent to make him ill or intoxicated is not enough, as reflected by its effort to distinguish first degree murder by poison from second degree felony murder by poison. It held that a killing during the commission of the inherently dangerous felony of willfully mingling a poison with any food, drink or medicine with the intent to injure another person in violation of Penal Code section 347 would constitute no more than second degree felony murder. (*Mattison, supra,* 4 Cal.3d at p. 184; see also *People v. Taylor* (1970) 11 Cal.App.3d 57, 63 [death as a result of an overdose of heroin which had been furnished to the victim by the defendant is second degree felony murder].) The court reasoned that "a defendant who administer[s] poison to another not with conscious disregard for life, but only for the purpose of making the other mildly ill or intoxicated" is not liable for first degree murder if a death results.

(*Id.* at p. 186.) It noted that, in such a case, "the use of poison" would supply "the implied malice of murder." (*Ibid.*) It could not also "serve double duty" to elevate the crime to first degree murder without resulting in "criminal liability out of all proportion to the '*turpitude of the offender.*'" (*Ibid.*)

Nothing significant has emerged since *Mattison* with respect to what constitutes first degree murder by poison. As the above survey of the legal landscape shows, the interpretations of murder by torture and by poison have not evolved at the same pace. Torture-murder has benefited from more detailed scrutiny than poison-murder, culminating in the *Steger* decision, in which this court held that, in addition to proof of malice, torture-murder requires the additional element of a "willful, deliberate, and premeditated intent to inflict extreme and prolonged pain." (*Steger, supra,* 16 Cal.3d at p. 546.) It makes sense for poison-murder to take that next step as well.

With respect to poison-murder, *Mattison* showed that more than the mere use of the "means" enumerated in section 189 is necessary to elevate the degree of murder and that, as with torture-murder, a mental component is required as well. *Steger* made clear that, for torture-murder, a mere conscious disregard of the danger to life posed by the act of torture is not enough to trigger the more severe penalty associated with first degree murder. The state of mind of the torturer is a determining factor. Likewise, it is the state of mind of the poisoner and not merely the use of a substance that "may cause death" and a conscious disregard of that potential danger that should determine if the

defendant has committed one of the most reprehensible forms of murder.

Steger's holding was based on settled principles of statutory construction. There is no logical reason to interpret a "murder that is perpetrated by means of . . . poison" differently than one "perpetrated by means of . . . torture" when the Legislature treated them the same in enacting section 189. Accordingly, murder by poison, like murder by torture, must require the willful, deliberate and premeditated intent to inflict a particular harm—in the case at bar, to poison the victim. Only then would a defendant's use of a poisonous substance, like one's use of torture, reflect the "calculated deliberation" and "cold-blooded intent" section 189 was targeting and render the murder "more deplorable" than lesser murders and among the "most reprehensible" of them. (See *Wiley, supra,* 18 Cal.3d at pp. 168; *Steger, supra,* 16 Cal.3d at p. 546.)

B. Trial Court's Duty

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 law include all the elements of the charged offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) Just as "a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose" is an element of murder by torture (*Cook, supra,* 39

Cal.4th at p. 602) and included in the instruction on that theory of first degree murder (CALCRIM 521), a willful, deliberate and premeditated intent to poison is a necessary element of murder by poison on which jury's must be instructed as well. (See *People v. Whisenhunt* (2008) 44 Cal.4th 174, 219-220 [discussing need to instruct on "willful, deliberate, and premeditated intent element" of murder by torture].) The trial court erred in this case by failing to do so.

C. Prejudice

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 instructional omission was unimportant in this case.

Any evidence that Ms. Brown willfully, deliberately and with premeditation administered heroin and methamphetamine to D.R. was weak, to the extent it existed at all. The drugs passed to the child through Ms. Brown's breast milk, either from

breastfeeding or through a bottle containing pumped breast milk (or both). Admittedly, Ms. Brown made statements to police indicating that she was aware the drugs she ingested could taint her breast milk, which could then pass to the baby, and recognized it was a mistake to feed D.R. breast milk under the circumstances. (2CT 422, 429, 499-500.) However, there was no evidence she fed D.R. breast milk for the purpose of transferring the drugs from her system to the baby's system.

Ms. Brown admitted to police that she took drugs because she was an addict and relied on heroin in particular to deal with the stresses in her life. (2CT 409, 411, 415-416.) She claimed to have tried to quit more than once but relapsed each time. (2CT 406-407, 409, 411.) Ms. Brown said she was the only one caring for D.R. and would, at times, feel overwhelmed. (2CT 401-402.) She also said she took methamphetamine so she could stay awake and care for the baby. (2CT 481, 488, 502, 514.)

The only evidence of why Ms. Brown fed her baby drug-tainted breast milk came from Ms. Brown herself. She 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 pumped her breast milk because her breasts would get engorged if she did not. (2CT 507.)

Notably, there was no motive for her to drug her child. There was evidence that Ms. Brown suspected D.R. was suffering from withdrawals. (1RT 748; 2CT 422-424, 496.) There was also evidence that, at one point, she visited Internet sites related to

newborn withdrawal, including one addressing *whether* "blowing heroin smoke in a baby's face" would alleviate the symptoms. (2RT 866.) However, no evidence showed she, in fact, blew heroin smoke in D.R.'s face. There was also no evidence that she meant to give the baby drugs to relieve symptoms of withdrawal, such as an admission to a friend or family member. Moreover, there was no evidence that any of the websites she read suggested that was a viable or recommended procedure.

In fact, the evidence showed Ms. Brown believed it was her breast milk, and not any drugs contained therein, that would help with possible withdrawals. She explained to police that she gave D.R. breast milk in part because she heard "[y]ou give them your breast milk" to ease symptoms of withdrawals. (2CT 430.) Significantly, when she was also asked if she intended to give D.R. drugs to help the baby "take the edge off" the withdrawals, Ms. Brown responded, "Absolutely not. I never had that thought even come across my mind." (2CT 500-501.) Thus, based on her statement, her purpose was not to pass along the drugs but rather the milk itself.

On this record, there was no evidence permitting the inference that Ms. Brown willfully, deliberately and with premeditation administered heroin and methamphetamine to her baby—i.e., that she intended to poison D.R. after careful thought and prior consideration. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123 [defining willful, deliberate and premeditated].) The instructions allowed the jury to find her guilty nonetheless. Under the instructions, as long as the jury believed she acted

with implied malice (was aware of and consciously disregarded the danger of feeding her baby drug-tainted milk), that was enough. The mere fact that Ms. Brown exposed D.R. to a substance that can kill by its own inherent qualities (3CT 621), which the drugs in this case could, was sufficient to make the crime first degree murder. Her mental state was irrelevant in elevating the crime from second to first degree murder. However, as the discussion above shows, her mental state should have been considered by the jury.

Ms. Brown's conduct was simply not the type the Legislature intended to treat as among the most reprehensible kinds of murder when it enacted section 189. As discussed above, in *Steger*, the defendant beat her three-year-old stepdaughter on a daily basis out of frustration and a misguided effort to discipline her, until she killed the child. (*Steger, supra,* 16 Cal.3d at pp. 543, 548.) This court held that conduct did not rise to the level of first degree murder. (*Steger, supra,* 16 Cal.3d at p. 548.) Ms. Brown's conduct was far less egregious. At most, the evidence showed the drugs passed to D.R. as a result of Ms. Brown giving the child her milk, an act rooted in good intentions but arguably based on naivety and carelessness as to the potential harm.

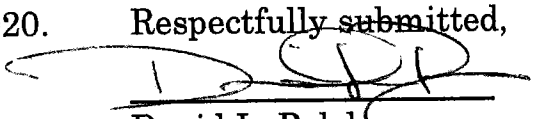
As *Steger* recognized, society abhors the killing of a child, but that feeling is based more on the destruction of "a defenseless, innocent life" than on the "means of killing." (*Steger, supra,* 16 Cal.3d at p. 549.) Here, the means of killing did not reflect the kind of calculated deliberation necessary to make the crime first degree murder. Had the jury been properly instructed

on the mental state required for first degree murder by poison, it would have found her not guilty of that offense. Accordingly, the instructional error was prejudicial.

CONCLUSION

For the reasons stated above, Ms. Brown asks this court to reverse the judgment.

Dated: February 3, 2020. Respectfully submitted,



David L. Polsky
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CERTIFICATE OF WORD COUNT

I, David L. Polsky, counsel for appellant, hereby certify pursuant to rule 8.520, subdivision (c), of the California Rules of Court that appellant's opening brief on the merits in the above-referenced case consists of 9,450 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.

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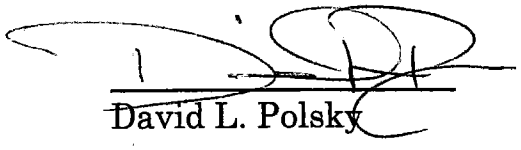

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PROOF OF SERVICE

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 February 3, 2020, I served the persons and/or entities listed below by the method checked. For those labeled "*Served electronically*," I transmitted a PDF version of the **Opening Brief on the Merits** by TrueFiling electronic service. For those labeled "*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 February 3, 2020, at Ashford, Connecticut.

David L. Polsky