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Court of Appeal, First District, Division 1, California.

The PEOPLE, Plaintiff and Respondent,
v.
Lashaun HARRIS, Defendant and Appellant.

No. A116841.
(San Francisco County Super. Ct. No. 198871).
June 30, 2010.

Office of the Attorney General, San Francisco, CA, for Plaintiff and Respondent.

First District Appellate Project, San Francisco, CA, Neoma Doris Kenwood, Berkeley, CA, for Defendant and Appellant.

MARGULIES, J.

*1 Defendant LaShaun Harris, a diagnosed schizophrenic, threw her three children into the San Francisco Bay where they drowned. She was charged with three counts of murder and three counts of assault resulting in the death of a child under age eight. Defendant pleaded not guilty and not guilty by reason of insanity to all counts. In the guilt phase of her bifurcated trial, the jury found her guilty of three counts of second degree murder and other charges. The sanity phase was tried to the court, which found defendant not guilty by reason of insanity, sentenced her to concurrent terms of 25 years to life on the murder convictions, and ordered her committed to Napa State Hospital to serve her terms.

Defendant appeals from her guilt phase convictions, contending the trial court erred in (1) admitting defendant's statements to police on the day of the drowning, and (2) allowing two prosecution psychiatric experts to interview her and testify after she offered psychiatric testimony from her own experts negating her intent to kill her children. Based on the California Supreme Court's holding in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096 (*Verdin*), we find merit in the latter contention, but we nonetheless affirm the judgment because defendant fails to establish the *Verdin* error was prejudicial.

I. BACKGROUND

A. *Trial Court Proceedings*

Defendant was charged by information with three counts of murder (Pen.Code, § 187) and three counts of assault resulting in the death of a child under age eight (Pen.Code, § 273ab). The information further alleged as to the murder counts that, as a special circumstance under Penal Code section 190.2, subdivision (a)(3), defendant committed more than one offense of first or second degree murder.

Defendant initially pled not guilty to all charges and denied the special circumstances allegation. She later entered additional pleas of not guilty on all charges by reason of insanity. In the first phase of a bifurcated trial on guilt and sanity, the jury acquitted defendant of first degree murder, but found her guilty of three counts of second degree murder and three counts of assault resulting in the death of a child under age eight. After defendant waived a jury trial for the sanity phase, the court found her not guilty by reason of insanity.

The trial court sentenced defendant to three concurrent 25-years-to-life terms on the murder convictions, and three concurrent 15-years-to-life terms on the convictions for assault resulting in the death of a child under age eight. The court further ordered defendant committed to the Department of Mental Health at Napa State Hospital to serve these terms.

Defendant timely appealed from the guilt phase verdicts only.

B. *Prosecution Guilt Phase Case*

On October 19, 2005, defendant threw her three young children-Trayshawn (age six), Taronta (age two), and Joshua (age one)-into the San Francisco Bay from Pier 7, causing them to drown. Defendant, who had previously been hospitalized and treated for mental illness, later told police she heard "voices," beginning the night before, telling her to drown her children at the pier in order to send them to God as a "living sacrifice." The Coast Guard found Taronta's body later that evening on the shoreline near the entrance to the Golden Gate Yacht Club. An autopsy revealed Taronta had drowned. Despite a two-week search, the bodies of the other children were never found.

1. *Eyewitness Testimony*

*2 Yashpal Singh was sitting with his two young sons on a bench near the end of Pier 7 in San Francisco at approximately 5:15 p.m. on October 19, 2005. When he arrived at the end of Pier 7, he saw defendant and her three children. Defendant was chasing the oldest child and taking off his clothes; he was shouting, "[N]o mommy, no mommy." Another child was sitting on a bench and a third child was either in the stroller or on the bench. Defendant caught up with the oldest child, Trayshawn, and brought him back to the bench where she removed all of his clothing. Standing one or two feet from the railing, defendant picked Trayshawn up by one arm and one leg and swung him three or four times before letting him go over the railing into the water. He was shouting "no mommy, no mommy," continuously as defendant was swinging him.

As soon as Trayshawn went over the railing, Singh grabbed his children and started to walk away back toward the shore. He continued to look back as he was walking, seeing defendant removing the clothing from her second oldest child and starting to swing him over the railing. Singh did not see Taronta go over the railing because he was using his cell phone to call 911.

San Francisco Police Officers Michael White and Tom Johnson arrived at Pier 7 at about 5:30 p.m. Singh joined them in their patrol car and they started to drive toward the end of the pier. About a quarter or a third of the way down the pier, they encountered defendant pushing a baby stroller. She was walking, looking straight ahead. She appeared calm and emotionless, and made no attempt to flee. The stroller contained children's clothing, shoes, and diapers, but no children. Officer Johnson asked defendant where her babies were. When he asked her a second time where she had put her babies, she responded that "they were with their father" and "they are OK." Officer Johnson asked her if she threw her children into the water and she said she did. The officers placed her under arrest and handcuffed her. Other officers, including a marine unit, arrived to search for the children.

2. *Defendant's Statement to Police*

Videotapes of defendant's interview by homicide inspectors Dan Everson and Dennis Maffei were played for the jury, and jurors were provided a transcript of the interview as a guide to what was being said on the videotapes.

When asked at the start of the interview, "[H]ow [did] your day start[ ] out this morning?," defendant responded, "I heard voices in my head." She explained that beginning on the evening of October 18, 2005, she heard voices telling her to "[g]ive Jesus my baby, I don't know. [¶] ... [¶] ... It was like a spiritual warfare I guess." Defendant stated it was either her life or her kids' lives, and the voices told her to "give [her] kids as a living sacrifice." Defendant recalled when she awoke that morning the voices told her to get dressed and take her children to the pier. Before leaving for San Francisco,[FN1] defendant went to her cousin Twanda's house in Oakland and told Twanda she was "going to throw my kids in the lake." When Maffei asked defendant why she told her cousin about this, defendant said, "I don't know. I heard a spiritual warfare I guess. I don't know voices-confused mind." Defendant recalled Twanda told her not to do it, it was wrong, and she was going to call the police.

FN1. Defendant was living with her sons at the Salvation Army shelter in Oakland. She received $687 per month in public assistance.

*3 When asked if this was the first time she heard voices, defendant responded: "No, it's not-I was-I went to the hospital two times before that, but the spiritual warfare, voices and stuff and I did used to take some Haldol and stuff like that." Defendant later told the officers she had been hospitalized in Florida the previous summer, had been to the John George Psychiatric Pavilion in San Leandro three times, and was last seen at John George in July 2005 because she "heard voices again."

After leaving Twanda's house, defendant took her children to San Francisco on BART, arriving in San Francisco about 9:00 a.m. They walked from BART to Pier 7. Defendant remembered this pier from a visit "[a] long time ago." Defendant told the inspectors she took the children to Pier 39 about 3:00 p.m., and bought them hot dogs from a street vendor. They returned to Pier 7, where they walked around and her children played and watched people fishing. While at Pier 7, defendant was hearing the voices in her head telling her to "throw them in." Defendant said she had also thought of offering herself as a living sacrifice, and she "Could've" and "Should've" but did not know why she did not.

Defendant recalled when she began throwing her kids in the water, she started with the oldest and ended with the youngest. She took their clothing off because that was what the voices told her to do. When she attempted to take off Trayshawn's clothing, he said, "No, what are you doing? No, mama, no." When defendant tried to pick him up, he tried to hit her and again said, "No, mom," which she understood to mean he was frightened. Defendant also heard Joshua crying and Taronta saying, "Mama, no." She then threw Trayshawn into the water. He was screaming, "No," before he went into the water. Defendant saw him hit the water and thought she should not have done it.

Taronta also cried out, "No, Mama, no," and tried to fight back as she undressed him. Asked whether Joshua said anything while she was undressing Taronta, defendant responded, "No, he's the little baby. He probably didn't know any better." Defendant thought she might be doing the wrong thing, but did it "[f]or Jesus, I guess. I don't know." When asked why Jesus would want her to put Taronta in the water, she said, "You never know how he [is] going to call who he want." It made her mad Taronta struggled with her and made her think what she was doing was wrong. After throwing Taronta in the water, defendant undressed Joshua and threw him in too. He laughed while being undressed and tried to hold on to her. This made her think it might be wrong to throw him into the water, but she did it because of "the voices." Joshua cried out, "Mommy," as he was going down into the water. Defendant saw him floating momentarily in the water and thought, "My baby," and also thought what she had done was wrong.

After throwing her children in the water, defendant walked around the pier crying because "they my kids. I love my kids. [¶] ... [¶] But if I wasn't called to send my kids I wouldn't have sent them." When asked if she was crying because she believed she had done something wrong, defendant replied: "It was like a spiritual warfare. If I believe in God enough you know [unintelligible] [,] but if he call me to do something that he wanted to, I'm a do it." When asked a second time if she thought she had done something wrong, defendant responded: "I answered that. I don't know. I'm religious."

*4 Defendant admitted she assumed the children would drown when she threw them in the water. She knew none of them could swim. When asked how she felt when the kids went into the water, defendant said: "One minute I think I did what I was told to do and God ordered my steps. I tried to follow them if he did, then it was my [unintelligible] you know [unintelligible]. [¶] ... [¶] And the next minute it was like my kids, man, I love my kids." She said her kids were "gone, but they'll live in my heart."

Near the end of the interview, defendant asked the inspectors if they were going to kill her. Asked why she would say that, she replied: " 'Cause it's murder. [¶] ... [¶][t]hrowing my baby over there." But when Everson asked defendant whether she thought she had murdered her children, she responded: "I don't know. I didn't murder them."

C. *Defense Guilt Phase Case*

1. *Lay Testimony*

Family members recalled defendant was a sweet, happy, and fun-loving child who had good relationships with her family members and friends. Defendant became actively religious around the age of 15, attending church and bible study on a regular basis.

Defendant became pregnant with Trayshawn when she was 15. Although her mother was very upset about the pregnancy, defendant was happy about it and wanted the baby. Defendant's witnesses consistently described her as a good mother who was very attached to and protective of her children.[FN2] From February 2003 until April 2004, defendant lived with her children in an apartment managed by the Oakland Housing Authority (OHA). According to the OHA manager, defendant kept her apartment extremely clean and her children were clean and well-behaved. She was gentle and attentive toward her children. The children's paternal grandmother testified defendant was like a daughter to her, and she was a beautiful mother who maintained a loving relationship with her children.

FN2. According to defendant's cousin, the father of defendant's children was rarely present and would be abusive toward defendant and the kids when he was around.

Defendant's mother first noticed changes in defendant's behavior and appearance in December 2003. Her appearance was unkempt, she seemed withdrawn, she would sometimes pace the floor, and she began to make unintelligible references to "spiritual warfare" and other religious subjects, and was reporting hearing God's voice. She was hospitalized after trying to go out an upstairs window in her aunt's home. Defendant's mother was scared at her behavior and had her hospitalized three times by the end of March 2004. The doctors told Mrs. Harris defendant had schizophrenia but no one explained the diagnosis to her. Several relatives testified as to defendant's strange behaviors during 2004.

In May 2005, defendant and her children went to Florida to live with one of defendant's sisters. In June, defendant was hospitalized in Florida where she was prescribed an antipsychotic medication. Believing her illness had gotten worse, defendant's mother went to Florida in July to bring her and her children back to California. She was hospitalized again in July after her return to California. At the hospital, she was diagnosed with a psychotic disorder not otherwise specified. She was released with instructions to discontinue the antipsychotic medication. Defendant's last psychiatric intervention occurred on August 11, 2005. Concerned by defendant's behavior, her mother called the Alameda County Mobile Crisis Unit and requested she be examined. They determined she was not imminently suicidal or a danger to others, and could not be involuntarily committed.

*5 Defendant and her children went to live at the Salvation Army family shelter in August 2005. The social services manager at the shelter testified defendant was more responsible than many of the parents staying at the shelter. She brought her children to breakfast and dinner on time every day. She took Trayshawn to school every day and made sure he attended the shelter's homework club every night. Defendant took good care of the children and the children were well-behaved and seemed happy.

2. *Defense Expert Testimony*

Dr. Paul Good, a clinical and forensic psychologist, was retained by the defense to interview and evaluate defendant. He conducted 13 hours of interviews with her, and performed a standard battery of psychological and intelligence tests. Dr. Good concluded defendant suffers from paranoid schizophrenia. Her I.Q. tested at 70-at the bottom of the borderline range, one point above the mildly retarded range.

According to Dr. Good, defendant's schizophrenia manifested itself in her delusional belief she had a special relationship with God, and in auditory hallucinations God was speaking to her. Dr. Good testified hallucinations in a schizophrenic may be "command auditory hallucinations," a voice commanding or directing a person to do something that often makes the person feel helpless and dependent on the voice. In Dr. Good's opinion, defendant suffered from the command auditory hallucination that God told her he wanted her children, which she experienced as an order from God, and she felt "called by this command."

Dr. Good interviewed defendant at length about the events of October 19, 2005. Defendant told him she heard God's voice the night before the event and when she awoke at 6:00 a.m., telling her he needed the children. God told her to take them to her cousin Twanda's house. God told her to go to the pier, undress the children, and throw them in the bay at 5:00 p.m. Defendant told Good that God wanted her to bring the children "fleshly," a seldom-used word meaning "in the flesh." Dr. Good found defendant's use of the word significant because it showed her behavior in undressing the children was consistent with her delusion about what God wanted her to do. He also thought it was significant defendant was so divorced from reality when she was at the pier she was unaware people were nearby and watching her. Her statement to police explaining her children were okay and were with their father was also consistent with her delusion. In Dr. Good's opinion, defendant's behavior was compelled by her delusion.

In Dr. Good's view, defendant understood in only a very limited sense that God was asking her to kill her children. Someone who is not delusional would define death as the cessation of life. But for defendant, death was simply a way of conveyance to heaven, which she believed was a real place in which her children would still be alive. She told Dr. Good she believed they were chasing dogs, going to school, living in a house, and possibly being taken care of by their great-grandmother or by God. She spoke of heaven as a real, concrete place. Good testified defendant never used the word "kill" during her interviews with him or when interrogated by the police. She would consistently say she was sending her children to God.

3. *Treating Psychiatrist*

*6 The defense called as a witness Dr. Gilbert Villela, who treated defendant at San Francisco General Hospital following her arrest. Dr. Villela diagnosed defendant as a paranoid schizophrenic. He reported she was experiencing visual as well as auditory hallucinations. She saw the Virgin Mary at a hospital in Florida and saw Jesus and Jehovah on a bus during her return trip from Florida. Dr. Villela testified defendant spoke of heaven as being an actual place; it had cars, and reverends and priests could take a plane to visit heaven. During her hospitalization, defendant wrote a card to God which she asked hospital staff to deliver to heaven. Based on his assessment, interviews of defendant, and the letter, Dr. Villela opined that defendant believed putting her children in the bay was the mode of transportation to heaven, a place that was "as real [to her] as New York [City] is to you, me, and the jury."

During one of her interviews with Dr. Villella, defendant recounted that sometime before the events of October 19, God had told her to jump out of a window, but she did not jump because she did not want her children to be without her. Villela testified that after a few weeks of taking antipsychotic medications at San Francisco General Hospital, defendant reported the voices in her head were going away, and she began to question God and whether she should have followed his commands regarding her children. This caused her to become very depressed about what she had done. She expressed a wish that she could die and go to heaven with her children.

D. *Prosecution Rebuttal*

Psychologist Dr. Ronald Roberts and psychiatrist Dr. Jose Maldonado testified as experts for the prosecution in rebuttal.

Dr. Roberts reviewed defendant's medical records, and the reports and trial testimony of her expert witnesses, as well as her police interview. Dr. Roberts also conducted his own three-hour interview of defendant, portions of which were shown to the jury on DVD clips during his testimony.

Dr. Roberts opined that defendant "understand[s] very well that when one died they left this world as we knew it and would go to Heaven," and that dying was the only way to get to heaven. On cross-examination, defense counsel played part of Roberts's interview of defendant in which she told him she knew you had to die to get to heaven, but added she used to think a person could get to heaven by plane.

Regarding the killing of her children, defendant told Dr. Roberts she recalled hearing voices telling her to "throw her children to the sharks because God had told her to sacrifice either her children or herself." She chose to sacrifice the children because if she had sacrificed herself, she would not have been able to take care of the children. When Dr. Roberts asked defendant if she knew her children were going to die when she threw them in the water, she responded, "Well, I knew they would drown because they ain't swim. They could not swim. My oldest son he probably tried to swim, but I knew he wouldn't make it."

*7 When Dr. Roberts asked defendant if she thought there was something wrong with "[k]illing [her] children," defendant responded, "Yes." Defendant further stated, "[I]t was odd that God would be telling me to do it. But I wasn't thinking this. I'm just saying it now. [¶] ... [¶] It's odd that God was telling me to, to kill my children because in the Bible it says thou shalt not kill." Defendant told Dr. Roberts she believed God wanted her children because she was "loving them more than him because [she took] them to church and [she] couldn't finish the church service because [her] kids would be crying or running around."

Dr. Maldonado also interviewed defendant for three hours, in addition to reviewing the available interviews, reports, records, and testimony concerning defendant. He testified that when defendant threw her children into the bay she did so "knowing ... they [would] drown and die," and this was part of her plan to sacrifice her children's lives so they would go to heaven. Dr. Maldonado opined that defendant understood death meant the cessation of life, and noted she referred to herself as a murderer during the interview and stated she had "murdered my children." He testified that even if defendant sometimes referred to the incident as delivering her children to God, she understood it meant killing them. Dr. Maldonado believed defendant has a "clear understanding of the permanence of death." When he asked her whether it was hard to make the choice to kill her children, she responded, "It was very hard because ... I will lose them forever."

Dr. Maldonado further opined he saw no contradiction between defendant knowing her children were going to die a permanent death in the bay yet believing they would be alive in heaven. He did not dispute that defendant believed her children went to heaven after their deaths, but found it unclear whether that belief was a product of her delusions or merely part of her Christian beliefs regarding heaven: "[I]f she wants to believe that her children are in Heaven and that they are playing and that they are safe, that could be the reaction information which is things we invent in our head ... to make us feel better about what's going on, it could be part of the delusion, or it could be just her religious beliefs." According to Dr. Maldonado, many nondelusional, nonpsychotic people hold idiosyncratic beliefs about heaven, including "there are streets and light poles and dogs and people married."

Dr. Maldonado also rejected the notion defendant lived in a "bubble" or was "divorced from reality," at the time of the incident. He testified defendant's actions on that day, including taking BART, buying food, and interacting with other people showed she was not acting as an "automaton." She knew the children would drown and die if she threw them in the bay, as shown by how conflicted she was before the act and how sorry and sad she felt afterward. Defendant's delusion about her special relationship with God might have motivated her to act, but it did not excuse or modify the act itself.

E. *Defense Surrebuttal*

*8 Dr. Roland Levy, who was originally appointed by the court to conduct an evaluation of defendant, testified for the defense during surrebuttal. Dr. Levy had evaluated four other mothers who killed their

children in a state of severe, suicidal depression who did not want their children to survive them. Defendant's case was unique in that she carried out an elaborate plan to travel to San Francisco, go to a specific pier, wait until a specific time, and disrobe her children before throwing them in the water. Dr. Levy found these facts to be indicative that she acted out of a delusion and in response to a hallucination. Although acknowledging no one could be sure what defendant was thinking when she put her children into the bay, it appeared to Dr. Levy she believed they would be taken to heaven, and she had no concept of death at that moment. Unlike the other psychiatrists who had offered diagnoses, Dr. Levy classified defendant's disorder as "schizoid paranoid affective schizophrenia" rather than paranoid schizophrenia, because he did not think the paranoid features of her condition were that prominent.

Dr. Paul Good also testified in surrebuttal, rejecting Dr. Maldonado's distinction between motivation and conduct. In Dr. Good's view, defendant's acts came from her delusion. He also distinguished religious belief from religious delusion, opining that defendant's schizophrenia twisted and distorted her religious beliefs into an extreme and dangerous delusion, manifested in her beliefs about the concreteness of heaven and about her relationships with God and Jesus. According to Dr. Good, defendant is different from others who may hold similar beliefs because her beliefs are accompanied by other symptoms of a mental disorder and at times, such as October 19, came to be "the entirety of her world."

F. *Relevant Instructions and Closing Argument*

The jury received the following instructions relevant to the murder counts, based, respectively, on CALCRIM Nos. 520 and 3428:

"There are two kinds of malice aforethought[:] Express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if she unlawfully intended to kill. [¶] The defendant acted with implied malice if she intentionally committed an act, the natural consequences of the act were dangerous to human life, at the time she acted she knew her act was dangerous to human life, and she deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will towards the victim."

"You have heard evidence that the defendant may have suffered from a mental disease[,] defect[,] or disorder. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime or crimes [,] the defendant acted with the intent or mental state required for that crime. The People have the burden of proving beyond a reasonable doubt that the defendant acted with the required intent or mental state. The required intent or mental state [for] the charged crime of first degree murder is premeditation [,] deliberation[,] and malice aforethought. The required intent or mental state for second degree murder is malice aforethought. If the People have not met this burden, you must find the defendant is not guilty of second degree murder."

*9 Using CALCRIM No. 580, the jury was further instructed it could find defendant guilty of the lesser included offense of involuntary manslaughter if it determined she had committed an unlawful killing but did not intend to kill or act with a conscious disregard of the risk to human life.

The prosecution argued to the jury defendant knew her children were going to drown and die when she threw them in the water, even if she believed she was sending them to heaven. By her own admissions, she knew the children would not be magically transported to heaven, but would have to die in order to get there. She therefore intended to kill them. The prosecutor pointed out defendant's mental state did not prevent her from carrying out an elaborate series of planned, intentional acts on October 19, 2005, and the killing of her children was no less intentional than the acts leading up to it.

The defense argued defendant's mental illness negated the mental state required for conviction of the murder or assault counts. Her intent, according to the defense, was to send her children to heaven, which she understood was a real, concrete place. She did not understand her children would die in the same sense a nondelusional person would understand it. Further, she lacked implied malice because her belief she was sending her children to a life in heaven negated any consciousness of the danger to their lives in what she did. Defense counsel asked the jury to find the defendant not guilty of any crime, but reminded jurors of

their option to return a verdict of involuntary manslaughter if her mental condition negated a finding of malice.

II. DISCUSSION

Defendant argues her convictions resulted from two prejudicial errors by the trial court. First, the court erred in admitting her statements to police after her arrest because her *Miranda*[FN3] waiver was neither knowing nor intelligent. Second, under *Verdin, supra,* 43 Cal.4th 1096, the court erred in ordering defendant to submit to psychiatric examinations by prosecution experts and allowing these experts to testify against her in rebuttal. Although we agree the court erred under *Verdin,* we do not find the error was prejudicial.

FN3. *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

A. Miranda *Waiver*

Defendant contends her waiver of her Fifth Amendment right to decline to speak to the police following her arrest was not knowingly or intelligently made under the principles established in *Miranda, supra,* 384 U.S. 436.

According to defendant, multiple factors-her youth, subnormal intelligence, inexperience with the criminal justice system, and lack of education-combined with the stressful events preceding her waiver-hearing voices all day and obeying an overwhelming command from God to throw her children in the bay, followed by three hours of police detention and confinement to a small windowless interrogation room-all weighed against a knowing and intelligent waiver of her *Miranda* rights. Further, defendant's mental illness and demeanor during the interrogation show she was psychotic and detached from reality when she waived her *Miranda* rights.

1. *Legal Principles*

*10 "In order to assure protection of the Fifth Amendment right against self-incrimination under 'inherently coercive' circumstances, a suspect may not be subjected to an interrogation in official 'custody' unless he has previously been advised of, and has knowingly and intelligently waived, his rights to silence, to the presence of an attorney, and to appointed counsel if he is indigent.... Statements obtained in violation of *Miranda* are not admissible to establish his guilt." (*People v. Boyer* (1989) 48 Cal.3d 247, 271, overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) A waiver is not knowingly and intelligently made unless the defendant was capable of freely and rationally choosing to waive his or her rights and speak with the officers. (*People v. Frye* (1998) 18 Cal.4th 894, 988, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The defendant must have a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. (*Moran v. Burbine* (1986) 475 U.S. 412, 421.)

Whether a waiver was knowingly and intelligently made depends on the totality of circumstances surrounding the interrogation. (*Moran v. Burbine, supra,* 475 U.S. at p. 421.) Factors to be considered include (1) the defendant's mental capacity; (2) the defendant's age and education; (3) whether the defendant had prior experience with the criminal justice system; (4) whether the defendant's rights were individually and repeatedly explained to him or her; and (5) whether the defendant appeared to understand his or her rights. (See *Fare v. Michael C.* (1979) 442 U.S. 707, 725; *U.S. v. Crews* (9th Cir.2007) 502 F.3d 1130, 1140.)

On appeal, we review independently the trial court's legal determination of whether a defendant's *Miranda* waiver was knowingly, intelligently, and voluntarily made. (*People v. Mayfield* (1993) 5 Cal.4th 142, 172.) We accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1092-1093, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

2. *Trial Court Ruling*

The trial court reviewed defendant's statement to the police and observed, "[T]he *Miranda* warning was probably the best one in the ten years that I have sat on this bench and watched." The court highlighted an exchange that took place after Inspector Everson explained defendant's *Miranda* rights to her, and she affirmed she understood them. Everson then asked defendant whether she would like to speak to them about her day. When defendant followed up by asking the inspectors if she *had* to speak to them, Inspector Everson responded: "You don't have to, but you can if you would like to." Defendant responded: "It's fine." The court found this exchange probative that defendant's ensuing statements to police were "certainly voluntary," and further found that her pertinent, contextually appropriate question in response to the reading of her rights showed defendant understood those rights. The court viewed defendant's correction of Everson's misstatement of her father's name during the interview, and ability to provide the names, ages, and correct birth dates and years for each of her three children as further evidence of her ability to comprehend what was happening.

3. *Analysis*

*11 In our view, the trial court correctly determined defendant's waiver was knowing and intelligent.

First, the inspectors did an exemplary job of explaining defendant's *Miranda* rights to her. Inspector Everson first asked defendant to listen very carefully to what he was about to tell her. He stated each right individually in clear, concise language, and paused after each statement to ask defendant whether she understood each right. She answered in the affirmative each time. Everson then asked defendant whether she understood everything he had just said to her, and she responded, "Yes." He next said, "And having these rights in mind, having what I just told you in mind, would you like to speak with us about your day today?" As discussed above, defendant responded by asking whether she was required to speak to the inspectors, and Everson told her she did not have to, but could do so if she would like to. She said, "It's fine." The inspectors did not push, pressure, or trick defendant into speaking to them in any way. Defendant's demeanor and responses during the interview did not show any resistance, ambivalence, or regret about agreeing to cooperate.

Second, defendant's age, education, and I.Q. fail to show defendant lacked the capacity to understand or knowingly waive her *Miranda* rights. Waivers have frequently been upheld for much younger defendants with subnormal I.Q.'s comparable to or lower than defendant's. (See *People v. Lewis* (2001) 26 Cal.4th 334, 384 [valid waiver by 13-year-old boy later diagnosed as paranoid schizophrenic]; *In re Norman H.* (1976) 64 Cal.App.3d 997, 1002 [valid waiver by 15-year-old boy with intelligence quotient of a 7- or 8-year-old, I.Q. 47]; *In re Brian W.* (1981) 125 Cal.App.3d 590, 602-603, and cases cited therein [valid waiver by 15-year-old defendant with an I.Q. of 81 and the mental age of an 11- or 12-year-old].) Defendant was a 24-year-old adult at the time of the interview. She attended school until she voluntarily dropped out in the 11th grade. Afterwards, she took a course and passed an American Red Cross certification exam to become a certified nursing assistant, and performed successfully in that capacity. In our view, defendant's age, education, and I.Q. do not negate the inference, supported by the record, that she understood the *Miranda* rights explained clearly to her before she agreed to speak which she indicated without equivocation she did understand.

Third, schizophrenia does not render a defendant incapable of effectively waiving his or her rights. (*In re Walker* (1974) 10 Cal.3d 764, 779-780; *People v. Watson* (1977) 75 Cal.App.3d 384, 397.) Although there is no dispute defendant had a serious mental illness, and held delusional beliefs pertaining to religion and her relationship with God, there is also no dispute she was able to take in information and make reasoned decisions in most areas of her daily life. Furthermore, reviewing the content of defendant's responses during the interview, we find no indication she was so disturbed or psychotic at the time that she was incapable of understanding her rights or the consequences of waiving them. She appeared to understand and provide responsive answers to almost all of the substantive questions asked of her. There is no reason to believe that due to her mental condition she was unable to understand the *Miranda* warnings or that she told the inspectors she did understand them when in reality she did not.

*12 Finally, although defendant's inexperience with the criminal justice system weighs against the validity of her waiver, we do not find it outweighs the evidence that she did in fact subjectively understand her rights even though she was hearing them explained for the first time, and that she knowingly waived them. Criminal suspects do not get one free pass to revoke their *Miranda* waivers merely because they have never been arrested before.

Based on the totality of the circumstances, we find defendant's waiver was knowing and intelligent, and evidence of her statements to police were admissible at trial.

B. *Prosecution Rebuttal Experts*

Defendant maintains the trial court's order requiring her to submit to examinations and interviews by Drs. Roberts and Maldonado, and the admission of their testimony during the rebuttal stage of the trial violated (1) state law as construed in *Verdin,* and (2) her rights under the Fifth, Sixth, and Fourteenth Amendments of the federal Constitution.

1. *Trial Court Proceedings*

On the first day of trial, the prosecution filed a motion pursuant to *People v. Danis* (1973) 31 Cal.App.3d 782 (*Danis*), for an order directing defendant to submit to a psychiatric and psychological evaluation by prosecution experts.[FN4] The prosecution advised the court it had recently learned the defense would call expert witnesses to testify during the guilt phase of the trial regarding defendant's mental state at the time of the October 19 incident.[FN5] The prosecution sought to have its own experts evaluate defendant so they could testify in rebuttal to the defense's anticipated testimony.

FN4. As discussed below, *Danis* was later held to have been superseded by statute on this point in *Verdin, supra*, 43 Cal.4th 1096, 1106.

FN5. Although the prosecution motion states the prosecution had learned this from defense counsel on October 27, 2005, it appears from reviewing other parts of the record that this was a typographical error and that the prosecution was asserting it had only learned of the defense's planned mental state defense on October 27, 2006.

In a document captioned “Reply to Government's *Danis* Motion,” the defendant opposed the prosecution's motion on the sole ground it was made too late: “The issue here is not *whether* the court is empowered to make this order, but *when* the government may request the order. Here, the evaluations would be so late that they would be impossible to prepare for or defend against, contravening [defendant's] rights to fundamental fairness and due process of law.” Defendant argued the request should be denied because “the government [had] been ‘on notice’ for *at least five months* that the primary issue at the guilt phase would be [defendant's] mental state, and the defense would call experts to testify on that issue,” yet “they provide no reason whatever for their delay in requesting examinations by their own experts.”

In a follow-up points and authorities in opposition to the prosecution's motion filed a week later, the defense made three additional arguments: (1) compelling the defendant to submit to a psychiatric examination *before the defense presented expert testimony putting defendant's mental condition at issue* would violate defendant's Fifth Amendment right against self-incrimination; (2) a court-ordered psychological examination by the prosecution's expert *at this stage of the litigation* would violate defendant's Fourth Amendment right to privacy; and (3) the defense should be allowed to voir dire the prosecution's expert before any examination was ordered to determine the expert's qualifications and exposure to pretrial publicity. The defense reiterated its position that the issue was timing, not the prosecution's right to a psychiatric examination: “The issue in the instant case is whether the state can order the psychiatric examination before the defendant places [her] mental state at issue. *The issue is the premature ordering of the examination, not its eventual use at trial*.” (Italics added.)

*13 In arguing her opposition to the motion in court, defense counsel stressed that due to the prosecution's delay in bringing the motion, "the circumstances surrounding this case ... are different from the ordinary cases in which *Dannis* [*sic*] motions are granted ." The prosecutor told the court defense counsel's claim was fallacious because it assumed defendant's not-guilty-by-reason-of-insanity plea put the prosecution on notice her mental state would be in issue during the guilt phase of the trial. The prosecutor denied defendant put her on notice of defendant's plan to call psychiatric experts during the guilt phase on the issue of her intent until shortly before the prosecution brought its motion.

The trial court indicated once the defense provided a list of its experts to be offered at trial, the prosecution did have a right to conduct its own evaluations of defendant. At defense counsel's insistence, the court agreed the evaluations could be postponed until after the defense mental health experts had testified. No court order allowing the evaluation was entered, but the parties thereafter negotiated an agreement under which the evaluations went forward after the defense case was concluded.

2. *The* Verdin *Case*

Defendant claims the trial court erred under *Verdin,* by allowing the prosecution mental health experts to evaluate defendant and testify at trial. We agree. *Verdin* held that requiring defendants who place their mental state in issue to submit to a prosecution mental evaluation constituted a form of criminal discovery unauthorized by state statutory or federal constitutional law, as required by Penal Code section 1054, subdivision (e).[FN6] Although the trial in this case took place before *Verdin* was decided, the Supreme Court has applied *Verdin* retroactively, and we must do the same. (See *People v. Wallace* (2008) 44 Cal.4th 1032, 1087.)

FN6. Enacted in June 1990 as part of Proposition 115, Penal Code section 1054, subdivision (e) provides in relevant part that "no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States."

The court acknowledged in *Verdin* it had in the past "found merit" in the *Danis* rule authorizing prosecution experts to examine a defendant who places his or her mental state in issue. (*Verdin, supra,* 43 Cal.4th at p. 1116.) [FN7] (See *People v. McPeters* (1992) 2 Cal.4th 1148 (*McPeters*); *People v. Carpenter* (1997) 15 Cal.4th 312 (*Carpenter*).) [FN8] Nonetheless, the court concluded, "[F]ollowing Proposition 115 and the enactment of the exclusivity guidelines in [Penal Code] section 1054, subdivision (e), we are no longer free to create such a rule of criminal procedure, untethered to a statutory or constitutional base." (*Verdin,* at p. 1116.) The court added, "The Legislature remains free, of course, to establish such a rule within constitutional limits." (*Id.* at p. 1116, fn. 9.) [FN9]

FN7. *Danis* justified the rule as a matter of procedural fairness because it would " 'violate judicial common sense to permit a defendant to invoke the defense of insanity [or diminished capacity] and foreclose the Government from the benefit of a mental examination to meet this issue.' " (*Danis, supra,* 31 Cal.App.3d at p. 787, quoting *Alexander v. United States* (8th Cir.1967) 380 F.2d 33, 39.)

FN8. *McPeters* and *Carpenter* involved claims that the prosecution's psychiatrist should not have been allowed to testify during the penalty phase of the defendant's capital murder trial that the defendant refused to cooperate in court-ordered examinations. Both opinions followed the same rationale as *Danis's:* "By tendering his mental condition as an issue in the penalty phase, defendant waived his Fifth and Sixth Amendment rights to the extent necessary to permit a proper examination of that condition. Therefore, those rights were not violated when the examining psychiatrist testified to defendant's refusal to cooperate. [Citations.] Any other result would give an unfair tactical advantage to defendants, who could, with impunity, present mental defenses at the penalty phase, secure in the assurance they could not be rebutted by expert testimony based on an actual psychiatric examination." (*McPeters, supra,* 2 Cal.4th at p. 1190; see *Carpenter, supra,* 15 Cal.4th at p. 412.)

FN9. In response to the *Verdin* decision, the Legislature amended Penal Code section 1054.3 in 2009, to provide statutory authorization for the discovery procedure at issue in this case and in *Verdin*. (See Pen.Code, § 1054.3, subd. (b)(2).) The new statute is not retroactive.

The prosecution in this case was certainly entitled to call experts to rebut the defense experts. But applying *Verdin* retroactively compels us to conclude the trial court erred by allowing prosecution experts, Drs. Roberts and Maldonado, to personally examine and interview defendant without statutory authorization for such a discovery procedure, and in allowing the prosecution experts to testify based in part on their examinations of defendant. The erroneous admission of evidence does not require reversal except where the error causes a miscarriage of justice. (See Cal. Const., art. VI, § 13.) " 'A "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.) Based on our review of the record, we conclude the *Verdin* error was harmless in this case because, for the reasons discussed *post,* it is not reasonably probable the jury would have returned verdicts more favorable to defendant had the prosecution's rebuttal experts not been permitted to examine her.

3. *Harmless Error Analysis*

*14 As an initial matter, we reject defendant's contention reversal is required unless the trial court's error was "harmless beyond a reasonable doubt" under *Chapman v. California* (1967) 386 U.S. 18. *Verdin* error involves an issue of state statutory law-the use of discovery procedures not authorized by state law at the time of trial. Although defendant's opening brief contains a one-sentence, conclusory assertion that the procedures followed in the trial court also violated her Fifth, Sixth, and Fourteenth Amendment rights, she has forfeited any such claims by her failure to assert them in the trial court. In any event, the sole case she cites in support of this belated assertion, *Estelle v. Smith* (1981) 451 U.S. 454, is inapposite.

As discussed earlier, defendant objected to the prosecution's *Danis* motion initially on the sole ground the request was made too late. Defendant conceded the court was empowered to allow prosecution experts to examine her in response to a timely prosecution motion. Defendant later took the position that compelling her to submit to a psychiatric examination *before she put her mental state in issue* by having her own expert witnesses testify would violate her Fifth Amendment right against self-incrimination and Fourth Amendment right to privacy. In our view, these objections failed to preserve the federal constitutional objections she is now making, based on a United States Supreme Court case decided in 1981. Defendant at no time raised *Estelle v. Smith,* or the constitutional principles it relied upon, as an obstacle to allowing the prosecution experts to examine her and provide rebuttal testimony once her own expert witnesses had testified. To the contrary, she stipulated to allowing those examinations to take place once the defense case was concluded.

In any event, *Estelle v. Smith* is inapposite because the defendant in that case had introduced no psychiatric testimony of his own. (*Estelle v. Smith, supra,* 454 U.S. at p. 466.) Instead, the prosecution had improperly used evidence obtained from a court-ordered competency examination to prove defendant's guilt. (*Ibid.*) The Supreme Court impliedly expressed its approval of lower court holdings that defendants who introduce their own psychiatric testimony may be required to submit to examination by psychiatrists chosen by the state: "When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. [Citations.]" (*Id.* at pp. 465-466.) As discussed *ante,* our Supreme Court embraced this principle in the *McPeters* and *Carpenter* cases. Defendant fails to cite any authority for the proposition that the trial court violated her Fifth, Sixth, or Fourteenth Amendment rights by authorizing the prosecution's experts to examine her after her own experts had testified as to her mental condition as part of the defense case.

*15 Because no federal constitutional claim is properly before us, we apply the state law harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, rather than the federal standard required by *Chapman v. California*, to determine whether there is a reasonable probability the jury would have returned a verdict more favorable to defendant had the court precluded the prosecution's rebuttal experts from examining her.

There is no dispute the prosecution would have been entitled to call Drs. Roberts and Maldonado as rebuttal experts even if these experts had not been allowed to interview her. There is also no dispute Dr. Roberts and Dr. Maldonado were entitled to and did review and base their opinions in part on other materials in the record pertaining to defendant's psychological state, including the transcript and DVD of defendant's recorded interview by police, the reports and testimony of the defense experts and other trial witnesses, and defendant's psychiatric records. At oral argument, defendant's counsel conceded that the prosecution's experts would have arrived at the same conclusions they testified about had they not interviewed defendant. In evaluating the potential effect of the *Verdin* error, we must therefore try to isolate any outcome-determinative benefits the prosecution might have gained by having its expert witnesses examine the defendant.

We first consider the statements defendant made to Dr. Roberts that the prosecution elicited during its rebuttal. Dr. Roberts testified on direct about two statements defendant made to him when he interviewed her. The prosecution played DVD clips of both statements for the jury. First, defendant told Dr. Roberts she first learned about heaven when she was 15 years old. When Roberts asked her what she had learned at that age, she replied: "Well, I just know that that's a place where your soul, where god is, and that your soul, when you die, that your soul got to heaven." Second, the prosecution elicited the following exchange between Roberts and defendant: "Dr. Roberts: When you threw your sons in the water, did you know they were going to die? [¶] [Defendant]: Well, I knew they would drown because they ain't swim, they could not swim. My oldest son he probably tried to swim but I knew he wouldn't make it." At the conclusion of his brief direct testimony,[FN10] Dr. Roberts offered the following opinion based on his interview of defendant and all of the other relevant materials he had reviewed: "To the best of my understanding she did understand very well that when one died they left this world as we knew it and would go to Heaven."

FN10. Dr. Roberts's substantive testimony on direct concerning defendant's mental condition took up barely more than four pages of the transcript.

We note first neither of defendant's statements testified to by Dr. Roberts on direct was any more damaging to her mental state defense than other statements defendant made to police, her own experts, or others. Like Dr. Roberts, Dr. Good testified defendant told him she knew her children could not swim, wanted them to drown, and knew they would be dead.[FN11] She told police the same thing: She knew none of her children could swim and assumed they would drown when she threw them in the water. Dr. Good and Dr. Levy both testified that defendant admitted telling her cousin Twanda she was going to "feed [her] kids to the sharks." Dr. Good testified defendant told him she knew human beings had to die before they go to heaven, and she knew life in heaven was different from life on earth. Dr. Good also acknowledged defendant knew the children were "gone from this world." She told police immediately after the incident that her kids were "gone but they'll live in my heart." Dr. Levy testified defendant understood when she talked to him that if she threw her children in the bay, they would be "gone." Dr. Good testified defendant told him she knew she was breaking the commandment, "Thou shalt not kill," and she understood that God was asking her to "kill" her children.

FN11. Dr. Good asked defendant if she felt it was dangerous to throw her kids into the water. He testified she responded, "Yeah. I knew they couldn't swim. I wanted them to drown." Good further testified he asked her what she thought would happen when she threw them in the bay, and she responded, "[T]hey would drown." When he asked her what she meant, she said, "[T]hey would be dead."

*16 Thus, nothing testified to by Dr. Roberts on direct went beyond statements defendant had made to others. In fact, the only opinion he offered on direct-that she understood "when one died they left this world

as we knew it and would go to Heaven"-did not go beyond her own statements about death and heaven made to and elicited from defendant's own psychiatric expert, Dr. Good, when he testified.

Besides interviewing defendant, the prosecution's other rebuttal expert, Dr. Maldonado, reviewed the police interrogation video, defendant's psychiatric records, and the court testimony of the defense's experts. He explained he was able to reconstruct her state of mind on October 19, 2005, by observing her responses and demeanor on that date during the police interview, and reviewing numerous psychiatric and psychological evaluations performed from that time until trial, in addition to interviewing her. Dr. Maldonado testified on direct as to a few statements defendant made to him when he interviewed her, but as with Dr. Roberts's testimony, these essentially duplicated statements she had previously made to others.[FN12] For example, Dr. Maldonado testified defendant told him the voices demanded she either sacrifice her children's lives or her own life, and she chose to sacrifice her children because if she died "the children will be alone forever." Dr. Good testified she had told him God was going to take her life if she did not sacrifice her children and then "my kids wouldn't have had a mama or a daddy." She made essentially the same statement to Dr. Levy. According to Dr. Maldonado, defendant explained to him she had a plan to go to San Francisco, undress the children, and throw them in the water knowing they would drown and die. Dr. Good testified defendant told him God had instructed her to go to the pier, undress the children, and throw them in the bay. Consistent with what she told police, Dr. Good also testified she knew the children could not swim and told him she wanted them to drown. Dr. Maldonado testified defendant stated she had "murdered [her] children." She had made a similar statement to police before partially retracting it.

FN12. At oral argument, defendant's appellate counsel argued the prosecution interviews of defendant were important because both Dr. Maldonado and Dr. Roberts used their interviews to ask her *leading* questions based on her statements to others and used her answers at trial to support their opinion that she understood death meant the cessation of life. The record fails to support counsel's assertion. The prosecution played two portions of Roberts's interview for the jury, neither containing leading questions. It played no part of Maldonado's interview. It was the defense that introduced extended portions of the DVD's of both interviews into evidence. If the interview questions and answers were so much more supportive of the prosecution experts' opinions than other evidence in the record, the defense would not have been so anxious for the jury to see the interviews. Further, contrary to counsel's assertion, Dr. Maldonado did not testify on cross-examination he could only be confident in his opinion because he interviewed her. Instead, Dr. Maldonado emphasized the *consistencies* between what defendant told him and what she had stated in her police interview, and to her doctors and retained expert.

The opinions Dr. Maldonado offered on direct could just as easily have been derived from defendant's statements to police and the defense's experts as from his single three-hour interview of her more than a year after the deaths of her children. In his opinion, defendant understood death meant leaving this world and was the cessation of life. According to Dr. Maldonado, she had a "clear understanding of the permanence of death." For this conclusion, he relied in part on her statements and behavior during the police interview. Further, he found no contradiction between her belief death was permanent and her belief her children experienced a life in heaven, basing this conclusion on his observation that individual conceptions about heaven and the afterlife are "so idiosyncratic ... it would be difficult to [classify them] as delusional in any way." Whatever beliefs defendant held about heaven, it was Dr. Maldonado's opinion she understood you must die in order to get to heaven. Dr. Maldonado further opined defendant was not divorced from reality or acting like an automaton on the day of the incident. He based this opinion on his professional expertise about paranoid schizophrenia and the evidence concerning how defendant acted throughout the day of October 19, 2005. Finally, Dr. Maldonado rejected the defense's position that the delusional motivation for defendant's acts in any way excused or modified the wrongfulness of killing her children. Maldonado based this in part on defendant's statements, made to Dr. Good among others, that she killed her children because she believed God would kill her if she did not. He inferred from this that her motivation for the killing was to maintain the special relationship she believed she had with God. He also referred to her statements and conduct showing she felt conflicted and sorry about what she had done. But Dr. Maldonado also made it clear his opinion applied not just to defendant's delusions but to paranoid delusions generally, when they lead to wrongful acts. In that sense, Dr. Maldonado's opinion about

defendant's responsibility for her conduct was based more on his philosophical views about the moral responsibility of paranoid schizophrenics generally than about any particular facts concerning defendant's case.

*17 The jury was asked to decide in this case whether (1) for purposes of the lesser included offense of second degree murder, defendant intended to kill her children when she threw them in the water, at least to the extent of knowing her act was dangerous to human life and acting in conscious disregard for human life; and (2) for purposes of the assault counts, whether she was aware of facts that would lead a reasonable person to realize that her act, by its nature, would directly and probably result in great bodily injury to the children. As defense counsel acknowledged in her closing argument, the mental state required for both offenses was that defendant be conscious of the risks to her children, but "just not care" whether they lived or died. Given the undisputed facts about what defendant did to her children and the statements she made about it afterward to the police and others, the defense was at a distinct disadvantage in trying to create reasonable doubt on this issue. The jury heard uncontested evidence-from defendant's own statements to the police and to Dr. Good-that defendant knew the children were going to drown and die when she threw them in the water, and understood that they would be gone from this life. At the same time, there was no evidence defendant told anyone she thought the children were going to be transported directly to heaven without having to die or suffer. Thus, without even considering the prosecution's rebuttal testimony, the defense faced an uphill battle in trying to convince the jury defendant did not act in conscious disregard for the lives of her children.

The defense experts primarily relied on two facts: (1) defendant experienced auditory hallucinations in which she believed she heard the voice of God commanding her to either drown her children or sacrifice her own life, and (2) defendant believed heaven was a real place in which her children's lives would continue. The prosecution's experts conceded these facts. The only real dispute between the experts was whether defendant's mental illness and beliefs about the afterlife so dimmed her consciousness, knowledge, and awareness of the harm she was doing to her children that she could not be held criminally responsible for it. By law, neither side's experts could opine on the ultimate question of defendant's mental state at the time of the alleged crimes. (See *People v. Coddington* (2000) 23 Cal.4th 529, 582, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Although the jury was left with a question of fact about defendant's mental state, to the extent the experts differed it was not about the facts or about defendant's beliefs or statements, but about her moral responsibility for her actions. However the jury may have approached this question, we find nothing in the testimony of the experts to suggest the jury's decision could have been materially affected by whether or not the prosecution experts interviewed defendant.

*18 We note further that the prosecution barely mentioned Drs. Roberts and Maldonado in its closing argument to the jury except to point out defendant made the same statements to them as she did to the police and her doctors-God wanted her to kill her children, she was feeding them to the sharks, she knew she was violating the commandment not to kill, she knew they could not swim, she knew they would drown, she knew they would die. The prosecutor stressed the importance of defendant's undisputed statements on these subjects, and made no attempt to restate or argue the opinion testimony of its experts about her state of mind.

Defendant had the burden of establishing that, in the absence of the claimed error, it is reasonably probable a result more favorable to her would have ensued. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1549.) This she has failed to do.

For these reasons, we affirm defendant's convictions.

III. DISPOSITION

The judgment is affirmed.

I concur: BANKE, J.

MARCHIANO, P.J.

I respectfully concur and add this perspective regarding the *Danis/Verdin* issue.[FN1] A review of the entire record reveals that defendant, who has firm religious beliefs, may not have appreciated what she was told to do by God was morally wrong, but she understood the consequences of what she was doing when she undressed her children and threw them into the bay so that they would drown and go to heaven. Defendant may not have been able to distinguish right from wrong or understand the quality of her act-issues for the subsequent sanity phase-but she intended to cause her children to die so that they could leave this life to exist in heaven. She told defense expert Dr. Good that God wanted her to go to the pier to throw the kids into the bay at 5:00 p.m. God wanted the children naked-the same way they came into the world, they should come out. She undressed them, threw them into the water, turned around, and left pushing the baby stroller. During that tragic day she showed goal oriented behavior, taking BART, following a preordained time sequence, and doing exactly what she thought God had told her to do. She explained to Dr. Good that God told her that she would be dead if she did not give the children to God. She knew she was breaking the commandment: "Thou shalt not kill." She understood God was telling her to kill her children. She knew she had drowned them and they were gone from this world and alive in heaven. "I knew they couldn't swim. I wanted them to drown. [¶] ... [¶][T]hey would be dead." She added that death leads to life in heaven.

FN1. (*People v. Danis* (1973) 31 Cal.App.3d 782; *Verdin v. Superior Court* (2008) 43 Cal.4th 1096.)

Defendant essentially first told the police and then defense experts and later prosecution experts, similar versions of what happened and why she acted the way she did under divine direction. Although it was error for Dr. Roberts and Dr. Maldonado to have interviewed defendant, what they developed factually in their interviews was similar to the testimony of defense experts and other witnesses.

*19 We review for prejudicial error. "No judgment shall be set aside ... in any cause ... for any error as to any matter of procedure, unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) explained how to apply the principle of miscarriage of justice to the type of procedural/evidentiary error that occurred in this case. As I apply the *Watson* standard of miscarriage of justice to this appeal after an examination of the entire case, it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. The *Verdin* error did not result in a miscarriage of justice.

Cal.App. 1 Dist.,2010.
People v. Harris
Not Reported in Cal.Rptr.3d, 2010 WL 2625767 (Cal.App. 1 Dist.)
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

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