

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellant,
v.
MARJORIE F. KNOLLER,
Defendant and Respondent.

A099366

(Related Case Nos.
A099250 & A099499)

San Francisco County Superior Court No. 18181301
The Honorable James L. Warren, Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

After a lengthy trial, a jury unanimously found defendant¹ Marjorie Knoller guilty of the second-degree murder of Diane Whipple, who was mauled to death by the defendant's two Presa Canario dogs. On June 17, 2002, the trial court granted Knoller's motion for a new trial as to the second-degree murder conviction, finding the evidence of implied malice insufficient "as a subjective matter and as a matter of law . . ." (RT 5580-5581.) The trial court denied a new trial motion as to the lesser offenses of involuntary manslaughter and ownership of a mischievous animal causing death, finding that those verdicts were supported by "overwhelming" evidence. (RT 5582.) This appeal followed.

In assigning error to the trial court's ruling, the People first undertake to ascertain the precise legal effect of that ruling. The trial court clearly purported to exercise its duty under Penal Code section 1181 to independently review the weight of the evidence in support of the verdict. Based upon this independent assessment, the trial court then purported to find the evidence insufficient "as a matter of law." A finding of legal insufficiency, however, requires the trial court to defer to the factual findings made by the jury, and is inherently inconsistent with the trial

¹Due to the separate defendants' appeals which are consolidated with this action for purposes of decision, Marjorie Knoller and Robert Noel will be hereinafter referred to as the defendants rather than appellants or respondents.

court's independent reviewing function under Penal Code section 1181. Applying legal criteria set forth by the California Supreme Court, we submit that, despite its use of the phrase "as a matter of law," the trial court in fact did not conduct a legal sufficiency of the evidence review. Rather, the court independently reviewed the record and reassessed the credibility of the witnesses to find the verdict contrary to the evidence, as authorized under Penal Code section 1181, subdivision (6). A contrary conclusion would necessarily establish that the trial court applied an erroneous legal standard in ruling on the new trial motion, requiring a remand for a new hearing.

Following from the conclusion that the trial court conducted an independent review of the evidence, the People set forth three claims of error. First, the trial court applied a legally incorrect definition of implied malice in finding the second-degree murder verdict contrary to the evidence. The trial court specifically found that Knoller's dogs posed a near certain risk of serious injury and that Knoller was aware of, and consciously disregarded, that risk. However, the trial court concluded that such awareness was insufficient to establish implied malice, which the court defined as a "a high probability" of death. (RT 5580-5581.) The trial court's ruling was incorrect. The definition of implied malice set forth by the California Supreme Court includes a conscious disregard of a risk of death *or serious bodily injury*. Because the trial court's factual findings necessarily establish implied malice under the correct legal definition, the second-degree murder conviction must be reinstated.

Second, the trial court committed a manifest abuse of discretion in reassessing Knoller's credibility on the key issue of subjective knowledge. The facts overwhelmingly supported the jury's finding that Knoller subjectively appreciated the risk of death her dogs posed to people they encountered in and around the defendants' residence. The trial court's conclusion to the contrary was inherently incredible in light of the overwhelming evidence of subjective knowledge, combined with Knoller's repeated lies under oath. In so concluding, the trial court overstepped the bounds of independent review, and arbitrarily and capriciously set aside the jury's verdict.

Third, the trial court expressly relied upon its assessment of the relative culpability of defendants Knoller and Noel in setting aside the second-degree murder conviction. Such an assessment was legally impermissible, and, because it was an integral component of the trial

court's ruling, it requires that the verdict be reinstated.

STATEMENT OF APPEALABILITY

This appeal is from an order granting defendant Knoller's motion for a new trial as to her second-degree murder conviction. The appeal is authorized by Penal Code section 1238, subdivision (a)(3).

STATEMENT OF THE CASE

On March 27, 2001, the San Francisco grand jury returned an indictment charging defendant Marjorie Knoller in count 1 with murder (Pen. Code, § 187), in count 2 with involuntary manslaughter (Pen. Code, § 192, subd. (b)), and in count 3 with ownership of a mischievous animal causing death (Pen. Code, § 399). The indictment charged codefendant Robert Noel with involuntary manslaughter and ownership of a mischievous animal causing death. (CT 1043-1044.) On May 29, 2001, the defendants pleaded not guilty to the charges. (CT 1472-1473.)

On September 14, 2001, and October 12, 2001, the trial court granted defendants' motion for change of venue and ordered the trial to be held in Los Angeles County. (CT 3626, 3690.) On January 15, 2002, the trial court denied defendants' severance motion. (CT 4230.)

On February 15, 2002, the court swore a jury to try the case. (CT 4391.) On March 21, 2002, after just over two days of deliberation, the jury found the defendants guilty on all counts. (CT 4501-4502, 4601-4602, 4683.)

In May 2002, Knoller and Noel filed motions for a new trial and the prosecution filed a response. (CT 4752, 4774, 4864, 5037.) On June 17, 2002, the trial court granted Knoller's motion for a new trial on the second-degree murder conviction. The court denied the new trial motion as to the remaining counts for both defendants. (CT 5103.)

On June 17, 2002, the trial court sentenced Noel to serve four years in state prison for involuntary manslaughter. (CT 5104.) On June 18, 2002, Noel filed a notice of appeal. (CT 5108.)

On July 3, 2002, the People filed a notice of appeal from the granting of the new trial motion as to defendant Knoller. (CT 5114.)

On July 15, 2002, the trial court found that it retained jurisdiction

to sentence Knoller on the remaining counts, and sentenced her to four years in state prison for involuntary manslaughter. (CT 5141.) That same day Knoller filed a notice of appeal. (CT 5146.)

STATEMENT OF FACTS

Introduction¹

The victim, Diane Whipple, lived with her life partner, Sharon Smith, at 2398 Pacific Avenue, Apartment 606, in San Francisco. (RT 3874-3875.) Marjorie Knoller and Robert Noel lived down the hallway in apartment 604. (RT 2890-2891, 3597, 4619.) The defendants were attorneys and operated a law practice out of their apartment. (RT 4578-4580, 4587, 4603, 4607-4608.) In the summer and fall of 2000, Knoller and Noel assumed ownership and control of two Presa Canario dogs on behalf of Paul Schneider, a life inmate in Pelican Bay State Prison. Over the next several months, on at least 30 occasions, these dogs, each weighing over 100 pounds, exhibited hostile and violent behavior against people and other dogs in the presence of one or both of the defendants. Many of the targets of the dogs' aggression were residents of 2398 Pacific Avenue, including Diane Whipple herself. On January 26, 2001, these acts of aggression culminated with tragic result when the dogs attacked and mauled Diane Whipple to death in the hallway of her building.

Bane And Hera

The story of Bane and Hera, the two Presa Canario dogs ("Presas"), began in Pelican Bay State Prison. Paul "Cornfed" Schneider, an inmate serving a life sentence in the secured housing unit and a member of the Aryan Brotherhood prison gang, devised a plan to breed and sell Presas as guard dogs with the help of various individuals outside the prison. (RT 2908-2913, 2933-2934, 2936-2947, 2990, 2992-2993, 3020-3021.) He approached Janet Coumbs, a woman who lived in Northern California and had been visiting Schneider since January 1998. (RT 2685-2686.) Coumbs, unaware of Schneider's prison gang affiliations, agreed to purchase, raise, and breed Presa Canario dogs on her farm in Hayfork using money provided by Schneider. (RT 2686-2687, 2786-2787, 2789-2790, 2815-2816, 2933-2935.)

Coumbs, with the assistance of another of Schneider's contacts, Brenda Storey, purchased two Presa dogs, Bane, a male, and Isis, a female, in June 1998. (RT 2687-2688, 2777, 2781-2782, 2790-2791.) In January

²Portions of the introduction and background are taken from testimony introduced in the defense case.

1999, Coumbs purchased two additional female dogs, Hera and Fury. (RT 2688, 2790-2791.) In May 1999, Isis gave birth to ten puppies, four of which survived. (RT 2736-2738.)

Coumbs had no experience training dogs and kept several of the dogs on chains around her property. (RT 2740, 2748, 2751-2752, 2797-2800.) Schneider instructed Coumbs not to socialize the dogs with people. (RT 2800, 2814-2815.) Coumbs trained Bane and Hera to sit and heel, but could not teach either dog to stay. (RT 2763-2766.) She loved Bane and considered him part of her family. (RT 2757-2758, 2688-2689.) She was not fond of Hera, however, and described her as “very, very aggressive.” (RT 2693.) Hera often barked and growled and lunged at visitors from behind her fence. She also broke loose several times and killed farm animals, including a sheep, a cat, and some chickens. (RT 2689-2693, 2706, 2764, 2801-2802.)

Beginning in April 1999, Schneider and Coumbs had a falling out over the dogs. Schneider was displeased that Bane was friendly with cats, and directed Coumbs not to make “wusses” out of the dogs. (RT 2695, 2814-2815.) He instructed Coumbs to buy several expensive pieces of equipment, including a walking machine for the dogs and a “grab pole.” He complained that Coumbs did not send enough pictures of the dogs, and that the pictures she did send were of poor quality. (RT 2696-2697, 2754, 2804-2806.)

Knoller and Noel met Schneider in January 1999, in connection with a lawsuit they filed on behalf of a correctional officer at Pelican Bay State Prison. (RT 4631.) In October 1999, Knoller and Noel filed a lawsuit against Coumbs on behalf of Brenda Storey to obtain custody of the Presa Canario dogs. (RT 2700-2701, 2754-2756.) After several discussions with Knoller, Coumbs agreed to give the dogs to her. (RT 2701-2705, 2708-2709.) Knoller contacted a veterinarian and a dog handler to arrange examinations for the dogs and transportation from Coumbs’s property. (RT 2833-2834, 4308-4309.)

On March 16, 2000, Dr. Donald Martin, a veterinarian for 49 years, examined and vaccinated the Presas at Knoller’s request. (RT 2831-2834, 2852.) When he arrived at Coumbs’s property, he noted that the dogs were very large, excitable, and “reacting quite violently” to his presence. (RT 2837.) The doctor observed that the dogs had no training or control,

and appeared dangerous. Bane, in particular, was an aggressive alpha male. (RT 2837-2839, 2852-2854.) Hera was more of a “fear biter” who would be prone to attack when the victim’s back was turned. (RT 2841-2843.) Dr. Martin was able to vaccinate the dogs with Janet Coumbs’s assistance. (RT 2838-2839, 2862.) Dr. Martin was so concerned about the temperament of the dogs that he wrote a letter to Knoller, which stated:

I would be professionally amiss if I did not mention the following so that you can be prepared. These dogs are huge, approximately weighing in the neighborhood of a hundred pounds each. They have had no training or discipline of any sort. They were a problem to even get to, let alone to vaccinate. You mentioned having a professional hauler gather them up and taking them to La Puente. Usually this would be done in crates but I doubt one could get them into anything short of a livestock trailer and, if let loose, they would have a battle.

To add to this, these animals would be a liability in any household, reminding me of a recent attack in Tehama County to a boy by large dogs. He lost his arm and disfigured his face. The historic romance of the warrior dog, the personal guard dog, the gaming dog, et cetera, may sound good but hardly fits into life today.

In any event, you’ll do as you wish, but at least I have given you my opinions.

(RT 2847-2848; People’s Exhibit 1A.)

Dr. Martin, in his entire career, had never before written such a letter. He explained, “I just felt so convinced that the potential was so great that I wanted to – to let Marjorie Knoller know in case she wasn’t aware of the seriousness of it.” (RT 2846.) On March 29, 2000, Dr. Martin received a letter from Knoller acknowledging receipt of his letter. (RT 2848, 2850.)

On April 1, 2000, Knoller, Noel, and a professional dog handler, James O’Brien, took custody of the Presa Canarios from Janet Coumbs. (RT 2704-2705, 2708-2709, 2809-2810, 4308-4313.) At the time, Bane was one year and eleven months old, and Hera was one year and nine months old. (RT 2795-2796.) Coumbs estimated Bane’s weight at 150 pounds and Hera’s weight at 130 pounds. (RT 2698.) On his hind legs, Bane stood over five feet tall. (RT 2770-2772.)

In her telephone conversations with Knoller, Coumbs told her that she had trouble with Hera killing her farm animals. She also told Knoller

that Presas bonded with people as puppies, and did not accept strangers. (RT 2704-2708.) When Knoller and Noel came to retrieve the dogs, Coumbs warned them about Hera's dangerous propensities. She explained that the dogs had bonded to her, and stated "emphatically" that Hera and Fury should be shot rather than taken from her property. (RT 2710-2711, 2810.)

The Defendants Bring Bane And Hera To 2398 Pacific Avenue

Bane, Isis, and the four puppies were initially transported to La Puente, in Southern California, and Hera and Fury were transported to Peninsula Pet Resort in San Carlos. (RT 4239-4241, 4308-4312, 4316-4317, 4321-4322, 4329, 4642.) On April 30, 2000, Hera was diagnosed with a heart murmur, and Knoller and Noel brought her to live at 2398 Pacific Avenue while she was examined by a San Francisco veterinarian. (RT 4648-4649.) In September 2000, the defendants received a report that Bane was sickly and in "bad shape" in Southern California. (RT 4666.) They retrieved the dog and brought him to their apartment. (RT 4666-4667.) On January 3, 2001, Robert Noel purchased licenses for both dogs, registering himself and Knoller as owners, and listing the registered address as 2398 Pacific Street, Apartment 604. (RT 2869-2878.) Knoller and Noel purchased muzzles for both dogs. (RT 3525-3526, 4679-4680, 4943.)

In the months following their acquisition of the dogs, the defendants sent frequent letters to Paul Schneider and his cell mate, Dale Bretches, who was also a member of the Aryan Brotherhood prison gang. The correspondence, which was on Noel and Knoller's legal letterhead and marked "Confidential Legal Mail," discussed various matters concerning the dogs and the breeding operation. (CT 4702, 4707; RT 2892-2897; People's Exhibits 9, 10, 11, 12, 13, 34C-1, 107, 108, 109, 110.)³ A 1999 and 2000 calendar found in Schneider and Bretches's prison cell chronicled over one hundred letters sent to, and received from, the defendants between March and December 2000. (People's Exhibit 19; RT 2566-2567, 2896, 2941-2942.)

³The trial court admitted these letters against both defendants, whether authored by Noel or Knoller, under the theories of conspiracy and authorized admissions. (See RT 950-957, 2483-2484, 2486-2487, 2956-2957, 2961, 3123-3124.)

In a letter to Paul Schneider dated September 26, 2000, Knoller discussed potential names for the Presa breeding operation:

I liked the discussion in your letter of the 19th wherein you mentioned combining of the kennels. I am partial, as is Robert, to Dog-O-War, or as you had mentioned in naming the pups -“Wardog”. The potential problem with “Warhouse” is that many people, including Robert and myself, initially read it as “Warhorse”, a montegreen waiting to happen - as in the line from the old Creedence song - “There’s a bathroom on the right”, instead of “There’s a bad moon on the rise”, people will constantly be making the same mistake Robert and I did and refer to [it] as “Warhorse”. What about something not in English-as in GuerraHund Kennels or GuerraHunde Kennels, the Spanish word for war-Guerra, and the German word for dog-Hund (masculine), hunde (feminine). The feminine foe [sic] dog in German goes along with the feminine for war in Spanish, but I think it looks better with the male version of the word dog in German. Just a thought.

(People’s Exhibits 34C-1 & 117; RT 4691-4692; 4819-4821.)⁴

In another letter from Noel to Dale Bretches dated August 5, 2000, Noel discussed his contact with a kennel regarding purchasing dogs. The letter detailed the prices and ages of puppies available for sale. (RT 2943-2944; People’s Exhibit 88.)

Inmates Schneider and Bretches drafted a meticulous, 36 page, handwritten set of notes detailing a website for a Presa Canario dog breeding business under the name “Dog-O-War.” (RT 2899-2900, 2936; People’s Exhibit 8A.) In that document was a hand-drawn picture of Bane with the title, “Wardog Bane,” “Bringer of Death: Ruin: Destruction.” (RT 2936-2937; People’s Exhibit 8A.) Copies of portions of that document were located in the defendants’ residence. (RT 2899-2900.) The defendants also had 39 copies of a three-page, typed document, entitled “Dog O War, Presas,” with a logo at the top, a description of the breeding

⁴Where the People were able to obtain copies of the exhibits, we quote verbatim from the exhibits to the extent they vary from the reporter’s transcript, with the primary citation to the exhibit number. Where we did not obtain copies of the exhibits, we quote from the reporter’s transcript with the primary citation to the RT.

operation, and contact information for Caroline Murphy. (RT 2897-2898, 4017-4018; People's 33.) Bretches ordered several books on guard dogs, including "Gladiator Dogs," "The Eyewitness Handbook for Dogs," and "Manstopper! Training a K-9 Guardian." (RT 2900; People's Exhibit 8B.) Bretches mailed the "Manstopper" book and other dog literature to the defendants. (RT 4009, 4018-4019, 4824-4827; People's Exhibit 66.) A chapter from one book found at the defendants' residence emphasized that "Responsibility for the dog's behavior rests squarely on the shoulders of the dog's master. A responsible adult doesn't leave a loaded gun lying around the house." (RT 4018-4019; People's Exhibit 66.)

Based upon this and other information, Devan Hawkes, a Special Agent for the Department of Corrections assigned to gang intelligence operations, opined at trial that the defendants were actively involved in raising, breeding, and training dogs for the Aryan Brotherhood enterprise formed by Schneider and Bretches. (RT 2908, 2945-2954.)⁵

Knoller and Noel also had a copy of a "Dog World" Magazine with an article entitled, "The Mastiff, a Gentle Giant." (RT 4675; CT 4697; Knoller's Exhibit 637.)⁶ The article contained a history of the dogs, which explained that they were developed to hunt ferocious game and to fight lions and tigers in sport arenas. (Knoller's Exhibit 637 at p. 18.) According to the article, the Mastiff is fiercely protective of its owners. As one owner recounted, "I've had dogs I know would stand between me and a train if my foot was caught in a track. . . . And there are documented cases of Mastiffs guarding their owners after automobile accidents and not letting ambulance crews get to them." (*Id.* at p. 17.) With respect to training, the article warned that early training is "essential." "Those who foolishly wait until their Mastiff is full grown or even an adolescent to begin will find they are fighting a no-win battle." (*Id.* at p. 18.) Without necessary training, "You'll be dragged down the street well before they're full

⁵In addition to letters about the dogs and dog breeding, Hawkes relied on letters from Noel to Schneider discussing such things as Noel's approval of Schneider stabbing his attorney, Noel's promise that he would not intervene if Schneider attempted to escape, and Noel's disclosure of the locations of certain of Schneider's enemies in the prison system. (RT 2954-2967.)

⁶The magazine was introduced in Knoller's defense case. She admitted at trial that she read the article "with avid interest." (RT 4675; CT 4697.)

grown.” (*Id.*, at p. 18.) The article particularly warned about “fear biter” dogs. “If a dog grows up to be afraid of youngsters, he can be a fear biter. That’s a real concern because a Mastiff’s bite is so terrific.” (*Id.* at p. 19.) The article further warned about using Mastiffs as guard dogs. “Given the Mastiff’s inherent guard dog tendencies, its powerful bite and massive size, Gensburg stresses that members of the breed should not be trained as attack dogs, especially by those not experienced in such training, for safety reasons.” (*Id.* at p. 18.)

The defendants frequently wrote to Schneider and Bretches with detailed descriptions of Bane and Hera. Several of the letters provided an uncanny prediction of the tragedy to come. On October 3, 2000, Noel wrote in a letter addressed to “Dale and Paul” a narration of the dogs running free in the sixth floor hallway of 2398 Pacific:

When I got back from S.F. General, I was greeted at the door by Marjorie, Hera and Bane, with Marjorie reporting that she had worked all morning with them and they were playing and co-existing just fine. They certainly appeared as reported. As I started to come in the door, H and B began competing for my attention, getting more excited with each move by the other. Marjorie, who was holding each by the harness suddenly shot past me and disappeared down the hall, being propelled forward in the wake of a two Presa team. She let go to keep her footing and the two ran to the end of the hall, turned in unison, each with a look of “We’re so fucking cute!!”

(People’s Exhibit 110; RT 4026-4027.)

In a letter dated October 6, 2000, addressed to “Dale and Paul,” Noel again described the dogs breaking loose and running unchecked down the sixth floor hallway:

When I got back from the hospital this a.m. I was met at the apt. door by B and H. Each acted as if they had not seen me for years instead of the 4 hours it took to go to and return. When I opened the door, 2 Presa faces were immediately pressed into the gap side by side. Before I could get my body in the doorway to block them, they pushed forward into the hall and took off side by side down the hall toward the elevator in a celebratory stampede!! 240 lbs. of Presa wall to wall moving at top speed!!! Up against the wall at the end of the hall, bouncing off, turning

and running back the other way bouncing off me and heading to the wall at the other end. Turning again, running back, M snagging H, B taking off up the stairs to the roof door and down and back into the apt.

(People's Exhibit 107; RT 4025.)

In a letter dated October 8, 2000, addressed to "Paul," Knoller expressed her own reservations about her physical inability to control Bane:

"Hera Happenings" – Other that [sic] the bonehead move on Thursday about the food, she is having a good time with Banester. We do take them out separately for walks most of the time as we trained the Pupness to walk off lead most of the time and she is a pain in the butt when you keep her on lead for her whole walk. I take Pupness and Robert takes Banester. Although I have a decent amount of upper body strength, if he really wanted to go after another dog, I don't have the body weight or leverage straddling him as Robert does. Even one handed, he is eleven inches (11") taller than I am and at least a good 135 lbs. heavier than I am. Makes a big difference! But as I said before, I had walked him when Robert was not here and I walk him when we go out together, he is excellent on lead.

(People's Exhibit 109; RT 4028-4029.)

On January 11, 2001, Noel wrote to Schneider about an encounter between the dogs and Diane Whipple:

This morning's was an interesting walk - getting used to the "jail break" approach the kids have, break from the door like horses out of the starting gate, stand next to the elevator shifting from one leg to the other to the other etc., the ferocity of the panting directly proportional to how badly the mutt feels he or she needs to go at that point, elevator comes - hopefully with no one in, otherwise they will knock 'em down rushing in. Once in they know the drill and they have the length of the ride timed - don't starting getting agitated for the exit until the elevator passes the 2nd floor. As the elevator comes to a halt and the gate slides back, the two of them hit the door with their snouts, pushing it open as if a small charge of C4 has just gone off and blown the hatch and they are making to the front door, sliding on the marble floor of the entry way to slide up to

the glass. One or the other will then take a paw and hit the door to signal that it needs to be opened. Once the door is opened they hit the sidewalk, turn right and head off.

This morning was one of those days - we get the elevator after one of our neighbors had been dicking around with it - about a 5 minute wait for the kids. We get on, the panting is now anxious. As we reach the 1st floor I see someone standing by the door through the small view hole and tell them to step back. Just at that point the kids hit the door with their snouts, the door blows open, and they are nose to nose with the little sheltie Collie and obnoxious little white piece of shit that one of our neighbors on 4 has. B'ster and H are into defend mode and I get them back in and we ride back up to 6, send the elevator back down so the dog walker can get the other mutts out of the lobby and home. As soon as the door opens at 6, one of our newer female neighbors, a timorous little mousy blond, who weighs less than Hera is met by the dynamic duo exiting and all most [sic] has a coronary – the mutts show only a passing interest as she gets in and goes down.

(People's Exhibit 10; RT 4031-4032, 4034-4036.)⁷

Outside of the defendants' apartment door was a doormat which read, "Ask not for whom the dog barks. It barks for thee." (RT 3855.)

Bane's And Hera's Prior Incidents Of Aggression

In the months following Bane's and Hera's arrival at 2398 Pacific Avenue, the dogs repeatedly exhibited hostile and violent behavior against people and other dogs in the presence of one or both of the defendants.⁸

In June 2000, David Moser, a resident of 2398 Pacific Avenue,

⁷Noel testified at the grand jury that the "timorous little mousy blond" was Diane Whipple. (RT 4036-4037.)

⁸The trial court admitted evidence of these incidents against both defendants, whether or not they were both present, under the theory the jury could infer, due to the defendants' close relationship, that they communicated these incidents to each other. (RT 3122-3129, 3566-3570.) The trial court, however, limited the admissibility of verbal statements made by one or the other defendant during the incidents to that defendant only. (RT 3567-3568.)

was exiting the elevator in the lobby when he encountered Knoller and Noel with Hera. The defendants were crowding the doorway to the elevator and Moser turned to the side to slip by them. As he did so, Hera bit him on his rear end. Startled, Moser jumped away and exclaimed, "Your dog just bit me." (RT 3035.) Noel looked and replied, "um, interesting" and then the defendants got on the elevator. Neither defendant apologized or reprimanded the dog. The bite hurt "a lot" and left a welt on Moser's rear end. (RT 3035.) Moser told his wife about the incident but did not bother to report it because he was moving out of the building. (RT 3029-3040, 3046.)

In July 2000, Kelie Harris and her husband were walking two Labrador puppies when they encountered Knoller and Noel with a Presa Canario. Harris's dogs were off leash and approached the Presa with playful interest. (RT 3348-3352, 3354.) In a fearful and insistent tone, Knoller told Harris, "Please leash your dogs. You don't know how serious this is. This dog has been abused. He will kill your dogs." (RT 3352-3353.) Harris called to her dogs and continued down the trail without incident. (RT 3351-3353, 3355-3358.)

Stephen and Aimee West, residents of 2360 Pacific Avenue, recounted two incidents of dog aggression by Hera and Bane in August or September 2000. On one occasion, the Wests were at Alta Plaza Park with their Burmese Mountain dog, Buster. Noel was also at the park with Hera. A dog named Bacas jumped on Hera, and she turned and latched onto Bacas's snout. Noel tried to separate the dogs without success. Aimee West threw her keys at Hera, which startled the dog and caused her to release her grip. (RT 3052-3058, 3063-3065, 3071-3074, 3085.) On another occasion, Stephen West was walking Buster when he encountered Noel and Bane. Both dogs reacted aggressively to one another. West grabbed his dog and fell backwards as Bane lunged forward, barking and snarling. Noel pulled Bane back before he made contact with West or Buster. (RT 3058-3060, 3066-3067.)

In September 2000, Jill Cowan Davis, a resident of 2398 Pacific Avenue, encountered Noel and Knoller with one of the Presa dogs in the lobby of the building. Davis was eight months pregnant at the time. As she passed within two feet of the dog, it suddenly let out a growl and lunged towards her stomach, mouth open, teeth bared. Davis jumped back, startled, as the dog's teeth snapped closed. Noel jerked the dog by the leash

and commanded it to “come on.” He did not apologize. (RT 3909-3913.)

Neil Bardack recounted an incident of dog aggression that had occurred on September 11, 2000, involving Knoller and one of the Presas. Bardack was walking his Sheltie, Meryl, who was 12 years old, 35 pounds, and had one leg amputated. (RT 3104-3106.) Bardack encountered Knoller walking one of the Presa Canario dogs on leash. (RT 3105-3106, 3109-3110, 3119.) The Presa lunged forward, pulling Knoller to the ground, and latched onto the Sheltie’s back. Bardack “could see that [his] dog was going to get killed” and yelled at Knoller to get control of her dog. (RT 3106-3107.) Knoller called to the Presa but Bardack “saw that she couldn’t do anything with the animal.” (RT 3106-3107.) Bardack stood over Knoller’s dog and grabbed it by the head, causing it to release the Sheltie, which scampered away. (RT 3107.) Bardack helped Knoller to her feet and asked her if she was okay. Knoller appeared “shaken” and “contrite.” (RT 3107-3108.) Bardack took his Sheltie to the veterinarian the next day for treatment of a puncture wound. (RT 3111-3112, 3121.)

Lynn Gaines, a dog walker for the Wests and several other clients, witnessed two incidents of dog aggression. In October or November 2000, Gaines was walking two small dogs when she encountered Noel and Knoller with Bane and Hera. The defendants’ dogs began barking and lunging towards Gaines’s dogs. On another occasion, Gaines was walking Buster when she encountered Noel and Bane. Bane barked and lunged at Buster, as Noel controlled him “with great difficulty.” (RT 3087-3094.)

Also in the fall of 2000, Ron Bosia, a dog walker, was in Alta Plaza Park with a Standard Poodle named Bogie when he encountered Knoller, Noel, and Hera. Bosia and the defendants decided to let the dogs play together off leash. Bogie approached Hera from behind and sniffed and pawed her. Hera turned and latched onto Bogie behind the ear and shook her head violently. Noel grabbed Hera but she would not release. Knoller stood by and did not intervene. Bosia grabbed Hera in a headlock and applied pressure to her jaw muscles, causing her to release. (RT 3334-3345.)

In August or September 2000, Cathy Brooks was walking her terrier when she encountered Knoller and Hera. A dog aficionado, Brooks struck up a conversation with Knoller about the Presa. Knoller told her about the breed, and specifically that it was bred as a guard or attack dog. When Brooks asked if Hera was friendly, Knoller responded

noncommittally that she was “questionable,” sometimes good with people and dogs and sometimes not. (RT 3387-3390.) Brooks asked permission to pet Hera, knelt down, and offered the dog her hand. Hera sniffed Brooks and then squared her chest in an aggressive stance with hackles raised. Brooks slowly backed away, commenting that the dog did not seem to like her much. Knoller rolled her eyes and shrugged. (RT 3390-3392, 3404.)

In October 2000, Diana Curtiss, a resident of 2398 Pacific Aveune, was walking her 16-year-old German Shepard and her 10-year-old Toy Poodle. She called the elevator to the building, and, when she opened the door, discovered Noel and Hera inside. Hera lunged forward “growling ferociously” and tried to attack Curtiss’s dogs. (RT 3360-3364.) Noel pulled the dog back into the elevator. (RT 3361-3362.) A few weeks later, Curtiss and her dogs again encountered Noel and Hera. When Hera saw Curtiss’s dogs she went “kind of wild” growling, snarling, and lunging at them. (RT 3364-3365.) Again, Noel restrained the animal. Curtiss recounted that, on both occasions, Noel physically struggled to get the dog under control. (RT 3365.) Several months later, Curtiss, this time without her dogs, encountered Noel with Bane. Bane jumped up at Curtiss, coming within a foot of her face. Noel said, “Whoa, big fella” in an amused way and pulled the dog back. (RT 3368-3369.) Curtiss was very startled and unsure whether Bane’s actions were threatening or friendly. (RT 3369.)

Skip and Andrea Cooley lived next door to the defendants in apartment 603. When Hera first arrived in August 2000, the Cooleys complained to Knoller and Noel, and building management, regarding the noise Hera was making in the apartment. The Cooleys and the defendants exchanged a series of letters, and ultimately agreed to try to resolve the issue in a “neighborly fashion.” (RT 3161-3167.) In December 2000, Skip Cooley and his wife were on the sixth floor waiting for the elevator. When Skip opened the door, he encountered Noel with Bane and Hera. (RT 3169-3172.) One of the dogs immediately lunged at him with teeth bared, coming within approximately a foot of his face. Cooley quickly slammed the door, exclaiming “Jesus Christ, what the hell.” (RT 3173-3175.) Noel apologized from inside of the elevator and directed the Cooleys to move to the end of the hallway. They retreated to Diane Whipple’s apartment doorway and watched for one to two minutes as Noel wrestled the dogs to his apartment. (RT 3176-3178, 3195.) One of the dogs was “clammering” to get at the Cooleys and “it took all of Bob’s might to get them down that

hall.” (RT 3177.)

Derek Brown and his wife, Violetta Pristel, also residents of 2398 Pacific Avenue, had several encounters with Noel and the dogs in the building between November 2000, and January 2001. On one occasion, Brown and Pristel encountered Noel with both dogs in the lobby. The dogs began barking and lunging at the two, baring their teeth and literally “go[ing] beserk.” (RT 3420, 3449-3451.) Brown and Pristel retreated to the far end of the lobby, approximately four to five feet from the dogs. (RT 3419-3422, 3428, 3439-3440, 3459.) Noel did not verbally correct the dogs or apologize. (RT 3423-3424, 3451-3452.) Pristel and Brown encountered Noel and the dogs in the lobby of the building on several other occasions, both alone and together. Brown recounted that on at least two other occasions, the dogs exhibited similar behavior, barking, growling, and lunging at Brown. (RT 3423-3425, 3433-3434, 3436.) Pristel recalled at least five encounters with Noel and the dogs when she was alone. On some but not all of those occasions, the dogs reared up, barked, and lunged at her. (RT 3452-3453, 3468-3469.)

Esther Birkmaier lived at 2398 Pacific Avenue, Apartment 607, directly across from Diane Whipple and Sharon Smith. (RT 3572, 3574, 3594.) In approximately October 2000, Birkmaier encountered Hera, unattended, in the sixth floor hallway. Birkmaier was waiting for the elevator when Hera approached at a fast trot and sniffed Birkmaier’s pants leg. Terrified, Birkmaier stood perfectly still. Hera was unleashed and unattended by Knoller, who was down the hallway locking her apartment door. (RT 3590-3592.) On a second occasion, Birkmaier was outside her apartment door when she heard the dogs barking. The defendants’ apartment door opened and the two Presas came out. Birkmaier immediately went back into her apartment and closed the door. She did not see if the dogs were leashed. (RT 3592-3593.)

On September 10, 2000, Noel suffered a severe injury to his finger while breaking up a dog fight between Bane and a Malinois. Knoller was present and witnessed the incident. (RT 4022, 4667-4670, 4920, 4962; People’s Exhibit 36A.) Noel was hospitalized for four days and had two steel pins placed in his hand. (RT 4670-4671, 4802-4803.) Noel told several people, including Stephen and Aimee West and Lynn Gaines, that Bane had bitten him when he reached in to break up the fight. (RT 3060-3061, 3074-3075, 3088; see also 4009-4011.)

Noel later wrote of the injury in a letter to Dale Bretches dated October 17, 2000.

Started reading Manstopper last night. Got as far as page 20. Found the notation about Robert by the passage on losing a finger and having it swallowed. M asked why I was laughing so hard and all I could do was show her the page. She thought it was a stitch as well.

(RT 4029-4031; People's Exhibit 108.)⁹

After Noel's injury, Edward Nahigian, a proprietor of a shoe repair shop on Fillmore Street, noted that Noel frequently muzzled Bane during his regular afternoon walks in the neighborhood. (RT 3528-3529, 3531-3533.)

In October or November 2000, Mary Willard, a former resident of 2398 Pacific Avenue, saw Noel walking one of the Presas near the Mayflower Grocery store. Noel had a bandaged arm. The Presa became excited and started running. The dog pulled Noel to his knees and then to the ground, dragging him across the street. Noel managed to regain his footing. He appeared angry and upset with the dog. (RT 3324-3328.)

In December 2000, John O'Connell was walking to school with his six-year-old son, TMO, when he encountered Noel with two Presa dogs. As O'Connell and his son approached, one of the dogs lunged at TMO with teeth bared, barking and growling. The dog was "definitely . . . in attack mode" and came within six inches of TMO's face. (RT 3478-3479.) Noel yelled at the dog and yanked it away. TMO jumped back, terrified, and he and O'Connell hurried on. (RT 3474-3481.)

In November 2000 through January 2001, Diana Curtiss noticed that Knoller was walking Bane and Hera more often. On three or four occasions, Curtiss saw Knoller on the street, alone, with both dogs. The dogs pulled her in different directions, as she struggled to maintain control. (RT 3370-3371.)

Several witnesses recounted incidents involving the dogs in January 2001, within a month of the attack on Diane Whipple.

Skip and Andrea Cooley were in the parking garage when they saw Knoller and Noel run quickly by them. They heard the two defendants yelling "Bane" and "Hera" and heard a small dog barking. (RT 3181-

⁹Knoller admitted that Noel had read this portion of the Manstopper book to her and that she thought it was funny. (RT 4825-4826.)

3184.)

John Watanabe, a postal carrier, was delivering mail on Fillmore Street when he was accosted by Bane and Hera. He heard snarling, turned, and saw both dogs running towards him “very fast.” (RT 3134-3136.) He put his cart in between himself and the dogs, and blocked them for ten to twenty seconds. The dogs were in a “snarling frenzy” and Watanabe was “terrified for [his] life.” (RT 3136-3137.) Suddenly, the dogs stopped and returned to Knoller and Noel, who were standing up the block. (RT 3137-3139.)

Jane Lu, another postal carrier, was delivering mail on Pacific Avenue. She saw Knoller park on the street approximately eight feet away. Knoller opened the car door and a dog jumped out, unleashed. As Lu continued delivering mail, she heard a low, guttural snarling sound from behind her. When she turned, she saw the dog approaching. Lu screamed loudly and reached for her mace. The dog stopped and looked at her, still growling. Knoller called to the dog and it returned to her. (RT 3509-3515, 3520.) Knoller called out to Lu, insisting, “[m]y dog is fine.” (RT 3515-3516, 3524.)

Abraham Taylor, a dog walker, encountered Knoller and Noel on the street with Bane and Hera. The dogs began barking at Taylor’s dog, a Belgian Shepard. Hera broke free from Knoller and charged Taylor and his dog. Hera tried to bite the Shepard, but Taylor was able to grab Hera by the harness and force her to the ground. The defendants retrieved Hera. (RT 3247-3253.)

Jason Edelman, a resident of 2398 Pacific Avenue, encountered Knoller with one of the Presas in the lobby of the building. The dog jumped up on Edelman’s chest and Edelman had to push it down. Although the dog did not snap or bite at him, Edelman did not believe that the dog’s behavior was “friendly.” (RT 3489-3491.) Knoller did not pull the dog back or apologize to Edelman. (RT 3491-3492.) A few weeks later, Edelman again encountered Knoller in the lobby with one of the Presas. This time, the dog jumped up on the chest of an elderly woman who was in the lobby. The woman, who was in her 70’s or 80’s, screamed, pushed at the dog, and nearly lost her balance. After a few seconds, Knoller pulled the dog away. She did not command the dog or apologize for its conduct. (RT 3492-3494.)

Two to three weeks before the victim’s death, Mario Montepeque, a dog trainer, encountered Noel and Knoller in Alta Plaza Park with Hera.

Hera approached and put her chin on Montepeque's dog in a sign of domination. Montepeque had earlier discussed the defendants' dogs with Aimee and Steve West, and inquired of Noel, in Knoller's presence, about their training. Montepeque told Noel that Hera displayed signs of dominance with other dogs and needed training. He suggested that Noel use a choke collar rather than a harness to maintain better control over the animal. He also offered to help train the dogs, and gave Noel a business card. (RT 3278-3287.)

Approximately one week before the victim's death, Violetta Pristel was in the lobby waiting for the elevator. When she opened the door, she encountered Knoller with both dogs. The dogs reared up on their hind legs, barked, and lunged at her. Knoller "seemed to be struggling to hold [the dogs]." (RT 3462.) Pristel stepped back and closed the elevator door. (RT 3454-3456, 3461-3464.) Pristel was frightened by the incident and, after consulting her husband, decided to complain to the building manager. Pristel left town on vacation, however, before she was able to lodge a complaint. (RT 3457, 3465-3466.)

Also in the week prior to the victim's death, Henry Putek, a resident of 2398 Pacific Avenue, encountered one of the Presas unattended on the sixth floor. Putek had just emerged from the elevator and was standing at the door to his apartment. Suddenly, the defendants' apartment door opened and a Presa came charging down the hallway, running fast. The dog, which Putek believed to be Bane, stopped right at Putek's feet. It was unleashed and unattended. Scared, Putek froze and did not make eye contact. Approximately fifteen seconds later, Noel exited his apartment with the second Presa. The first dog joined Noel as he entered the elevator. Putek recalled that on at least two or three prior occasions, he had heard one or more dogs running up and down the sixth floor hallway. (RT 3299-3307.)

On January 24, 2001, two days before the victim's death, Rhea Wertman-Tallent was walking to her office in Pacific Heights when she saw Noel and Knoller with Bane and Hera. The defendants' dogs were barking at another dog and straining at their leashes. Bane reared up on his hind legs and lunged, as Noel struggled to hold the leash. (RT 3209, 3214-3223.)

Diane Whipple's Prior Encounters With The Dogs

Diane Whipple and Sharon Smith encountered the dogs in the building as often as once a week. Whipple referred to Bane and Hera as “those dogs” and to the defendants as “those people.” (RT 3875-3878, 3880, 3896.) In early December 2000, Whipple called Smith at work. In a panicked voice, Whipple told Smith, “That dog just bit me.” (RT 3881-3882.) Whipple assured Smith that she was okay and did not need stitches. When Smith arrived home that evening, Whipple told her that she had encountered Noel in the lobby with one of the dogs, and that the dog lunged at her and bit her hand. (RT 3882-3883.) Smith examined Whipple's hand and saw a few very deep, red indentations in the webbing between her fingers. (RT 3883-3884, 3892.) Whipple was still emotionally upset and scared from the incident, which was unusual for her. (RT 3883.) She did not seek medical treatment for the bite injury. (RT 3898.)

In the weeks following the bite incident, Whipple and Smith discussed the dogs several times. Smith recounted that Whipple “was very scared of those dogs, terrified,” and made every attempt to avoid them. (RT 3884-3885) When she left her apartment, she would first check the hallway to see if the dogs were there. She became anxious waiting for the elevator, fearful that the dogs might be inside. She frequently scolded Smith for opening the elevator door without first trying to determine whether the elevator was occupied. When Whipple encountered the dogs in the lobby of the building, she would back to the wall and stand behind Smith. (RT 3885-3889.) She did “everything she could to get as far away as possible from the dogs.” (RT 3886.)

Whipple and Smith did not complain to the building management about the dogs. Instead, they decided simply to avoid them. (RT 3898-3899.) As for Knoller and Noel, Smith did not approach them about her concerns, explaining that “I wanted nothing to do with them.” (RT 3898, 3901-3902.)

January 26, 2001 – Diane Whipple Is Mauled To Death

On January 26, 2001, Whipple called Smith at work around noon. She told Smith that she planned to go home early, do some grocery shopping, cook dinner, and see a movie. She asked Smith to leave work early if possible. (RT 3889-3890.)

At approximately 4:00 p.m., Esther Birkmaier, a resident of 2398 Pacific Avenue, was at home in apartment 607, directly across the hall from Whipple's and Smith's apartment. (RT 3571-3574, 3594.) Suddenly she heard dogs barking in the hallway. The barking was loud and rapidly approaching her end of the hallway. (RT 3575-3576, 3600-3601.) Birkmaier heard a woman yell out, "help me, help me" in a "panic-stricken" voice. (RT 3577-3578.)

Birkmaier approached her front door and looked through the peephole. She saw a body, later identified as Diane Whipple, lying face down on the floor just over the threshold to apartment 606. Whipple's apartment door was open and her body was partially inside and partially outside the apartment. A dark object, that looked to Birkmaier like a dog, was on top of Whipple's body. (RT 3578-3581, 3602-3604, 3606, 3608-3609, 3623-3626, 3631.) The object was still and did not move. (RT 3603.) Birkmaier did not see any other people in the hallway and did not hear any other human voices. (RT 3580-3581, 3599-3600.) The barking, which sounded as if it came from two dogs, continued. (RT 3580.)

Not daring to open her door, Birkmaier stood "mortified" for a few moments as she collected herself. She then called 911. (RT 3581-3582, 3584, 3609.) While she was on the phone, Birkmaier heard Knoller's voice yelling, "no, no, no," and "get off." (RT 3582-3585, 3610.) Birkmaier estimated that two minutes elapsed between the time she first heard the dogs to the time she heard Knoller's voice. (RT 3584.)

The barking continued while Birkmaier spoke with a 911 operator. As Birkmaier approached her door a second time, something began banging against it with great force. Birkmaier could hear barking and growling, which sounded as if it were directly outside her door, and Knoller's voice from further away yelling, "get off, get off, no, no, stop, stop." (RT 3585-3588, 3611-3613.)

Terrified, Birkmaier put the chain lock in place. She again looked through the peephole. Whipple's body was gone and groceries were strewn about the hallway. (RT 3586, 3612.) Knoller's voice continued to give commands and eventually the barking stopped. (RT 3588.) Birkmaier called 911 a second time and stood by her window, waiting for police to arrive. (RT 3588-3589.)

At approximately 4:12 p.m., six minutes after the 911 dispatch, Officers Leslie Forrestal and Sidney Laws arrived at 2398 Pacific Avenue

to execute a “well-being check.” (RT 3632-3633, 3666-3667, 3672, 3684.) The officers spoke briefly to a man in the lobby. Forrestal took the elevator to the sixth floor; Laws took the stairs. (RT 3634, 3667-3668, 3685.) As Laws reached the landing just below the sixth floor, she saw a dog run by, unattended, in the direction of Knoller’s apartment. She yelled to Forrestal, who had just arrived in the elevator, to look out. (RT 3645-3646, 3650-3651, 3668, 3670, 3685-3687, 3695, 3703.)

When Forrestal stepped off the elevator, she saw Diane Whipple lying face down in the hallway. (RT 3634-3635.) She was stripped naked and “riddled with wounds” all over her body. Forrestal saw that Whipple had a severe neck wound that was bleeding profusely. (RT 3638-3639, 3672, 3687, 3689.) Whipple attempted to crawl towards her apartment. (RT 3647-3648, 3650, 3654, 3688.) Forrestal knelt down next to her and told her to lie still, that an ambulance was on the way. Whipple’s body relaxed. (RT 3648-3649.)

Forrestal and Laws stood guard over Whipple with weapons drawn for approximately two to four minutes until the SWAT team arrived and secured the scene. (RT 3649-3652, 3658, 3673-3674, 3677, 3688-3689.) At the same time, Knoller emerged from her apartment. Officer Forrestal asked Knoller where the dogs were. Knoller replied that they were inside her apartment. (RT 3657-3660, 3676, 3680, 3689-3690, 3701.)

SWAT team officer Alec Cardenas, a trained EMT, administered first aid to Whipple. (RT 3675, 3698, 3759-3760.) Whipple had a large wound to her neck which was bleeding profusely. She was alive but had lost a lot of blood. Cardenas put his fingers directly on the wound, but it was so massive that he was unable to stop the bleeding. (RT 3761-3765, 3769-3770, 3772.) He monitored Whipple’s pulse and breathing, which stopped as paramedics arrived. The paramedics administered CPR and transported Whipple to the hospital. Later, Diane Whipple died. (RT 3765-3767.)

Personnel responding to the scene described it as “horrific” and “devastating.” (RT 3719, 3738-3739.) The hallway carpet was soaked in blood, and there were streaks of blood on the walls. Groceries and pieces of Whipple’s clothing littered the hallway. (RT 3653, 3655-3657, 3664, 3691-3692, 3738-3739, 3849-3852, 3873.) Whipple’s pants were split down the middle and completely ripped from her body. (RT 3857-3860.) The clothing was literally “shredded” and “ripped to pieces.” (RT 3851-

3852, 3857-3858.) Diane Whipple's door stood open with the keys in the lock. (RT 3662, 3691.) Officer Forrestal, Officer Cardenas, and emergency medical technician Paula Gamick examined Knoller at the scene. She had blood on her face and in her hair. Her sweatshirt and sweat pants were stained with blood, and there was a two to three inch tear to her right sleeve. (RT 3661-3662, 3694, 3697, 3706-3707, 3774.) She suffered a one-inch, clean gash to her right thumb, and a small cut to her right index finger. Gamick also noted a bruise developing around Knoller's right eye. (RT 3703-3708, 3712-3713, 3775-3776, 3778.) Officer Cardenas examined Knoller under her clothing and did not note any injuries to her torso or legs. (RT 3774-3775, 3778.) Knoller did not complain of any other injuries and did not appear to be in shock. (RT 3709, 3711, 3715-3716.) She commented to Gamick that she was an EMT and had "seen this sort of thing before." (RT 3711-3712.) She did not inquire about the victim's welfare. (RT 3712, 3780.)

Animal Control Officer Andrea Runge spoke with Knoller about the dogs. Knoller identified them as hers. (RT 3735-3737.) She was "oddly calm, almost cold." (RT 3739.) Runge asked Knoller to sign over custody of the dogs for euthanasia. Knoller agreed to sign over Bane, but not Hera. (RT 3740-3743.) Runge asked Knoller to assist her with the animals. She refused, stating that she was "unable to handle the dogs." (RT 3744.)

Animal Control Officer Michael Scott located Bane in the bathroom of Knoller's and Noel's apartment. The dog was "massive," and paced back and forth in the small room. (RT 3718-3720.) Bane wore a harness and a leash. He was covered in blood, and had defecated in the room. (RT 3720, 3724, 3731-3733, 3746, 3752.) Scott opened the door slightly and shot Bane with three tranquilizer darts. The darts malfunctioned and had no effect on the animal. Scott and another officer carefully slipped two "come-along" poles over Bane's head from behind the door and led him from the apartment without incident. (RT 3720-3725, 3732.) Bane was euthanized shortly thereafter with Knoller's consent. (RT 3731.) At the time of the attack, Bane weighed approximately 140 pounds. (See RT 4575.)

Scott located Hera in the master bedroom of the defendants' apartment. She was barking and growling and crashing against the door. (RT 3727-3729.) She had some blood on her chest near her right shoulder.

(RT 3731, 3747.) She was not wearing a harness. (RT 3703, 3733, 3747.) When Scott entered, Hera backed away, growling, with hackles raised. (RT 3729-3730.) Scott and a second officer secured Hera with the “come-along” poles and removed her from the building. (RT 3730.) At the time of the attack, Hera weighed approximately 100 pounds. (See RT 4215-4216.)

On January 27, 2001, the coroner’s office performed an autopsy on Diane Whipple’s body. (RT 3934.) Whipple died of multiple traumatic injuries and extensive blunt force trauma resulting in a loss of one third of her blood. (RT 3937, 3976.) The Chief Medical Examiner, Boyd Stephens, identified a total of 77 discrete areas of injury which covered Whipple’s body “from head to toe.” (RT 3943, 3947, 3953, 3969.)

The most significant injuries were to Whipple’s neck. She suffered three deep lacerations which penetrated into the tissue and muscle, damaging her external jugular vein and her carotid artery, and crushing her larynx. (RT 3951, 3955, 3962-3963, 3966-3968, 3972-3975.) The injuries were typical of a predatory animal which mauls the neck of its prey to cut off the air supply. (RT 3968-3969.) Whipple suffered several other deep, penetrating wounds to her head and face, including a large laceration to the back of her head, penetrating injuries around her mouth, lacerations to her forehead and left temple, and two large, through-and-through lacerations to her ears. (RT 3960-3963.)

Whipple also suffered a large laceration to her right shoulder, a large pattern injury on her inside left thigh, a large contusion on her interior right buttock and upper thigh area, a large contusion to her right breast, a large, penetrating laceration to her elbow, and a large laceration to her biceps. (RT 3947-3949, 3954-3955, 3957-3958.) She suffered several other pattern injuries, abrasions and lacerations, too numerous to describe, on every part of her body, including both legs, her upper torso, front and back, and both arms. (RT 3945-3947, 3950-3951, 3953-3956.)

Dr. Stephens opined that the vast majority of injuries were caused by dog bites. (RT 3975.) The victim was in excellent health and tested negative for drugs. She was not menstruating at the time of the attack. (RT 3976.) Although earlier medical attention would have increased Whipple’s chances of survival, Stephens did not believe that it would have ultimately saved her life. (RT 3976, 3984-3985.)

Dr. Stephens also examined photographs of Knoller following the

attack. He opined that Knoller's injury to her thumb could have been caused by a dog bite, although it did not have the typical features of a bite. He observed that such injury could also have been caused by the leash Bane was wearing, which was made of a rigid nylon capable of cutting the skin. (RT 3989, 3997-3999, 4000-4001.) He observed that the blood transfer on Knoller's clothing could have come from lying on top of the victim or from handling Bane. (RT 3992, 3996-3997, 4001.) He emphasized that Knoller suffered minor injuries compared to Whipple, at a ratio of seventy-seven to three. (RT 3999-4000.)

Crime scene investigator Gregory Mar compared plaster molds of Bane's and Hera's teeth to the injuries on Diane Whipple. The injuries to Whipple's neck were very consistent with Bane's teeth. As to the remainder of the injuries, Mar could not make a comparison to either dog. (RT 3797-3799, 3820-3821, 3825-3828, 3835-3836.)

Following Diane Whipple's death, Noel wrote a letter to Schneider, which stated:

There is no way to ease into this. Bane is dead, as is one of our neighbors. Marjorie, while bruised, cut and battered, is alive and more or less okay. I am certain you have seen the news of the killing on either channel 2 or 4 TV news, or picked it up on one of the radio stations. One report indicated that a decision would probably be made to put down Hera. That will not happen and we will not permit it.

I was in Sacramento in the morning for hearings and in Martinez at 1:30 p.m. for Russ' arraignment. He was moved to Contra Costa jail on the 24th. On the way home, the tire on Marjorie's Cougar blew and I had to get it fixed. What follows is her account that I have gotten over the course of the last six hours. It is now 11:40 p.m.
[Redacted.]

We have a meeting with the assistant director of Animal Control on Sunday at 1:00 p.m. to discuss Hera. The A.D. opined that Hera should be put down as she is very dangerous. What BS. They move on Hera and they will have the fight of their lives on their hands. Neighbors be damned. Hera did nothing and has not acted in a dangerous manner toward anyone. If they don't like living in the same building with her, they can move. If Hank or his wife

have a problem, they can find someplace to park other than our driveway.

Because of the injuries inflicted, there was no way to avoid going [along] with the decision to put [Bane] down.

As far as my feelings about Presas, they are unchanged. Monday is coming and we are both looking forward to the hearing. Think of us and we of you at 8:45 a.m.

(RT 5209-5211; RT 2894; People's Exhibit 17.)

On February 8, 2001, Noel and Knoller appeared on *Good Morning America*. (RT 4033-4034, 4957; People's Exhibit 7 & 7A.)¹⁰ During the interview, Knoller maintained that the dogs were "absolutely not" bred and trained to attack or kill. (People's Exhibit 7A at p. 4.) When asked about the witnesses who had come forward recounting acts of aggression by the dogs, Knoller replied that the stories were "[t]otal fabrication. I, I know that a lot of people like their 15 minutes of fame, and come forward with outrageous stories. [¶] Hera was a dog who I had trained to walk off lead. She never had any problem with people at all." (People's Exhibit 7A at p. 6.) As to the attack, Knoller recounted that she was coming down from the roof with Bane when she heard the elevator bay working. She encountered Whipple in the sixth floor hallway. (People's Exhibit 7A at p. 7.) According to Knoller,

He didn't lunge towards Ms. Whipple at that time. What happened was, is that we – he noticed her, I noticed her standing by her doorway with two packages on the floor behind her. Her door was open and she was watching me with Bane walk towards my apartment door, which, which is about 50 feet away from where Ms. Whipple was standing near her open doorway apartment.

...
Okay, basically Bane became interested in Ms. Whipple standing down at the end of the hallway. He wasn't making aggressive moves, he was just becoming

¹⁰The prosecution prepared a transcript of the videotaped interview, marked as People's Exhibit 7A. However, that transcript was not made a part of the record as required under California Rules of Court, rule 203.5. We have filed in conjunction with our brief a motion to augment the record with the transcript.

increasingly interested in her presence, and I was trying to get him back into, into the apartment and was pulling on him.

And he wasn't doing any aggressive moves, he was just really really interested. So I wasn't sure whether he had smelled something in the bags that he had wanted to check out, you know, I didn't know, I didn't know what were in the grocery bags, or if there was something about Ms. Whipple herself that was attracting him.

...

I – when, when he became more and more interested, he pulled me basically off my feet, but he didn't attack her. What he did was unusual behavior, he'd never done it before. He jumped up and put both paws on each side of her as she was standing by the wall near her apartment door, and then he jumped down.

And I'm on my knees, I grab him, I get up and I push Ms. Whipple into her open apartment hallway, and we both – you know, I tripped – we both fall down. I'm now on top of her. Bane is – I'm – he's still on my left-hand lead. I restrained Bane with my right hand and I started pulling him out of the apartment and she hadn't been injured at this point obviously, you know, she probably was somewhat frightened by what was happening.

And I'm, I'm pulling – on my knees, I'm pulling Bane out into the hallway and I had told Ms. Whipple just to stay down, don't move. And as I'm pulling him out and moving myself out of her apartment, she starts to move towards me. At this point she's still uninjured. He had, you know, he, he seemed to be just really interested in her.

If you have a dog, there's a difference between an aggressive nature and just definite interest. He was trying to get at, get at her, but it didn't seem to me as if it was an aggressive move.

(People's Exhibit 7A at pp. 7-10.)

When asked what prompted the mauling, Knoller maintained:
Okay, what happened was, is that she came out into the

hallway, which I didn't understand, I thought she was just going to slam her door shut. And when she does that, Bane starts to get interested in her again and go for her, and I get on top of her again and tell her, "Don't move, I think he's trying to protect me."

And I then start to pull him off her again, and as that's happening, she starts to move and he goes for her.

Again, I get on top of her and I say, "Don't move. He's trying to protect me," and she, as I'm pulling him off her again, she does move again, and I'm not sure if it was the second or third time that it – that I – that was happening with her, but she did strike me with her, her fist, and in my right eye, and that's when it changed from overly, overly interested in her to he started wanting to bite her.

(People's Exhibit 7A at p. 11.)

When asked if she believed she bore any responsibility for the attack, Knoller replied, "Not at all." (People's Exhibit 7A at p. 12.) "I wouldn't say that I was unable to control [the dogs.]" "I wouldn't say that it was an attack, and I did everything that was humanly possible to avoid the incident. [¶] Ms. Whipple had ample opportunity to, to move into her apartment. It took me over a minute to – it took me over a minute restraining him from my apartment down to the time that he jumped up and put paws on either side of her. [¶] She was in her apartment. She could have just slammed the door shut. I would've." (People's Exhibit 7A at p. 12.)

Knoller also maintained that she effectively protected Whipple during the several minute attack. "As long as Ms. Whipple was underneath me, he would not bite down. . . . I don't have any puncture wounds, but I was protecting Ms. Whipple. As long as she was underneath me, the dog would not bite down, and that was part of what was happening here. . . . As long as she was underneath me and had my scent around her, he would not bite down. He was trying to get to her every time that she would move out from underneath me." (People's Exhibit 7A at p. 13.)

On March 23 and 27, 2000, Knoller testified before the grand jury. (CT 560, 819, 870, 875.) She denied that Bane or Hera ever gave her any indication that they would pose a danger to any person. She denied ever

seeing Bane or Hera bite, lunge, or act aggressively towards any person. She maintained that she never lost control of Bane prior to Whipple's death, and never saw her husband lose control of Bane. (RT 3557-3562.) At the time of Whipple's death, Knoller estimated Bane's weight at 122 pounds, and her own weight at 135 to 140 pounds. (RT 3561-3562.)

Defense Case – Robert Noel

Robert Noel called numerous witnesses who testified regarding their interactions with Bane and Hera.

James O'Brien, a dog handler, transported a total of eight dogs from Janet Coumbs's property on April 1, 2000. (RT 4308-4309, 4316-4317, 4321-4322, 4329.) When he arrived, Hera, Bane, and Fury were chained in the front yard. They barked and lunged aggressively. Once the dogs were removed from the chains, however, they became submissive and manageable. (RT 4315-4318, 4321, 4325, 4340-4341, 4351-4352.) Coumbs spoke to the dogs in soothing tones and appeared sad to see them go. O'Brien did not recall Coumbs commenting that any of the dogs should be shot. (RT 4320, 4326-4327.) However, he was not privy to the conversations between Coumbs and Knoller. (RT 4343.) Knoller scheduled the transport and paid O'Brien for his services. (RT 4308-4309, 4340, 4359.)

Dr. Stephanie Flowers, a veterinarian, treated Hera on April 29, 2000. Hera weighed only 69 pounds, rather than a normal weight of 100 pounds. Flowers removed a foxtail from Hera's ear. Although the procedure was painful, Hera remained calm and tolerant and did not exhibit signs of aggression. Flowers told Knoller she was impressed with Hera's behavior during the examination. (RT 4055-4063, 4071-4072, 4075-4081.) Flowers acknowledged that a dog's behavior can change over time in response to its environment and training, and that a dog may behave differently at home than in a veterinarian's office. She also acknowledged that a dog's territorial aggressiveness can increase as a dog bonds with its owner. (RT 4084-4087.) Flowers agreed that Hera at her full weight of 100 pounds would be a strong, dangerous dog, who could seriously injure or kill a person. She further agreed that if Hera or Bane repeatedly lunged, growled, and snarled at people unprovoked, such behavior would evidence potential harm to human life. (RT 4089-4094, 4097-4098.)

Dr. Sheila Segurson, a veterinarian, examined Hera on April 30, 2000, for a heart murmur. She described the dog as quiet and shy and somewhat fearful. Hera did not exhibit any signs of aggression during the exam. (RT 4203-4213.) Hera returned for a second visit a few months later. At that time she weighed 95 pounds. (RT 4215-4216.) Segurson acknowledged that Hera could hurt someone in an attack, and agreed that lunging and snarling was “very aggressive” and “definitely” a warning sign. (RT 4217-4220.) If a dog lunged after people repeatedly with teeth bared, Segurson opined that “those are signs that I need to do something with my dog.” (RT 4222-4223.)

Seven witnesses who owned or worked in business establishments in the defendants’ neighborhood testified to frequent interactions with the dogs. Some of the witnesses petted the dogs and fed them scraps. None saw the dogs exhibit aggressive behavior towards people. (RT 4101-4110, 4127-4137, 4142-4153, 4267-4278, 4299-4304, 4486-4499.) The witnesses, however, were unaware how the dogs behaved at 2398 Pacific Avenue. (RT 4112, 4153, 4280, 4499.)

In the summer of 2000, Bonnie Seats, a friend of Knoller’s and Noel’s, encountered the defendants and Hera on the front steps of 2398 Pacific Avenue. Seats and her 26-year-old niece petted Hera without incident. (RT 4113-4124.) In July 2000, Knoller and Noel brought Hera to the home of their client, Kim Boyd. Boyd’s friend, Julianna Jette, and Boyd’s seven-year-old daughter, Crystal, played with Hera at the apartment. The dog seemed to enjoy the attention and showed no signs of aggression. (RT 4417-4424, 4428-4433, 4441, 4444-4449, 4465.) In October 2000, Knoller, Noel, and Hera visited their friend, Hesch Stark, at her apartment in North Beach. Hera was calm during the visit. (RT 4282-4283, 4286, 4290-4298.) In December 2000, or January 2001, Jean Wright encountered Noel walking Bane. She petted the dog, who was very friendly and wagged his tail. (RT 5024-5029.)

On three occasions in the fall and winter of 2000, Kim Boyd went to Noel and Knoller’s apartment to conduct legal business. When Boyd knocked at the door, she heard Hera and Bane barking, and Knoller had to pull the dogs away to allow Boyd to enter. Once inside, the dogs sniffed Boyd and allowed her to pet them, and then laid down on Knoller’s command. (RT 4433-4456, 4461-4463.) During one visit, Boyd rode in the elevator with Noel and Hera. Hera encountered a tenant in the lobby

and did not respond to her. (RT 4464-4465, 4467-4470.)

Another client, Darrel Sichel, also visited Noel's and Knoller's apartment three times on business, with the last occasion in September 2000. Sichel interacted with the dogs and described them as friendly. Sichel did not observe the dogs outside of the apartment or in proximity to other residents of the building. (RT 4578-4593.)

In November 2000, Bane was diagnosed with a cranial rupture in his left knee. He underwent surgery on December 6, 2000, and was put on a limited exercise routine for the next six weeks. (RT 4172-4182, 4566-4567, 4571.) Bane did not exhibit aggression during his exams. The operating veterinarian, Andrew Sams, opined that Bane's behavior at the office was not indicative of his behavior at home. (RT 4186, 4198-4199, 4568, 4576-4577.)

Stephen and Galene Tornay ran a boarding kennel in northern California near Pelican Bay State Prison. (RT 4377-4378, 4472.) Knoller and Noel boarded Bane and Hera at their kennel on January 15, 16, 20, and 21, 2001. Both Stephen and Galene, and their 21-year-old son, interacted with the dogs during their stay. (RT 4378-4383, 4403-4407, 4476-4478.) Stephen described the dogs as "walking muscle," massive, strong, and confident. (RT 4393, 4411.) Hera was a little "standoffish," and followed Bane's lead. (RT 4394-4395.) Neither of the dogs showed signs of aggression towards the Tornays or other dogs in the kennel. (RT 4388-4390, 4398, 4407, 4410, 4412, 4478, 4480.) However, Galene Tornay explained that a kennel is "neutral territory" where the dogs are not inclined to defend anything. (RT 4480.) Stephen and Galene Tornay were unaware of how the dogs behaved at home in San Francisco. (RT 4412, 4485.)

On January 26, 2001, around 3:50 p.m., David Kuenzi entered 2398 Pacific Avenue to visit a friend on the third or fourth floor. As he was standing outside of the apartment, he heard a young woman scream loudly and "in agony." (RT 4507-4511, 4522.) The "voice was wild. . . she was screaming for her life." (RT 4539.) Concerned, Kuenzi went up the stairs to investigate what he presumed to be a domestic violence incident. As he approached, he could hear a large dog barking. The screaming continued for some time, and then turned to a quiet whimper. (RT 4512-4513, 4515, 4529-4532.)

Afraid of what he might encounter, Kuenzi stopped shy of the sixth floor landing. He decided instead to call 911 on his cellular phone.

He retreated to the lobby, called police, and then, a few minutes later, ran back up the stairs. The screaming had ceased but the barking continued. (RT 4512-4515, 4521, 4529.) Kuenzi also heard for the first time a woman's voice saying, "stop, please stop." (RT 4516-4519, 4521-4522.) The tone of voice was "distinctly" different from the earlier screaming; in Kuenzi's words, "undistressed" and "resigned." (RT 4531, 4533.) Kuenzi recounted that "it was really truly terrifying," and he decided not to "barge in on it." (RT 4519.) Kuenzi decided that it was best to wait in the lobby to direct the police. (RT 4519-4520, 4525-4527.) He estimated that the entire encounter lasted approximately 10 minutes. The dog barking continued the entire time. (RT 4516, 4523, 4534-4536.)

Defense Case – Marjorie Knoller

Marjorie Knoller testified on her own behalf. (RT 4596.) She admitted that she had developed a personal relationship with Paul Schneider that went beyond an attorney client relationship, and that she and Noel referred to the three of them as "the triad." (RT 4807-4808, 4810-4812.) She also admitted that Hera became a focal point of her relationship with Schneider, and that she and Noel wrote several letters to Schneider about the dogs. (RT 4813-4815.) Knoller knew that Schneider was a member of the Aryan Brotherhood, but denied that she had any affiliation with the group. (RT 4633, 4813, 4872-4873.) She also denied any involvement in the Dog O' War breeding operation. (RT 4815, 4820-4824.)

Knoller and Noel brought Hera to 2398 Pacific Avenue in May 2000, and Bane followed in September, 2000. (RT 4610.) After acquiring Hera, Knoller and Noel did research on the Mastiff breed. The literature Knoller read described the dogs as good family pets, loyal, quiet, gentle and sensitive to their owner's tone. (RT 4816, 4618.) She acknowledged that the dogs were known to be protective of their owners and wary of strangers. (RT 4622-4623.) When asked if she knew Presas were a dangerous, aggressive, and violent breed, Knoller acknowledged that Presas "have a history of being a war dog and a fighting dog." (RT 4828, 4938.) Knoller was aware that Schneider and Bretches sent Noel a copy of a book called Manstopper, and a newsletter called "Gripper." (RT 4824-4827.) The "Gripper" newsletter discussed the police department's use of Presa Canarios to disable pit bulls. (RT 4827.)

Knoller did not consult a professional trainer with respect to either

Bane or Hera. She “didn’t think they had any personality problems that would necessitate a personal trainer or a behaviorist to deal with them.” (RT 4676.) Knoller denied any intent to train either dog as a guard dog, or that Schneider gave her any such directive. (RT 4692-4693, 4844-4847.)

Knoller walked Hera one to three times daily, and taught her several basic commands, including “sit,” “wait,” “no,” “stop,” “slow,” and “paw.” (RT 4654, 4657, 4677-4678.) Knoller opined that “Hera had bonded really strongly with me. . . . I was the one taking her out more often than not during the day, and she just seemed to be more responsive to me and I considered her my dog. She was my primary responsibility.” (RT 4676.)

According to Knoller, Bane was primarily Noel’s responsibility. “Bane was Robert’s primary responsibility in terms of taking him for walks and how he was behaving on lead. We wanted Bane to – we wanted Bane to bond with Robert rather than with me, because Hera had already bonded with me. And Robert’s primary responsibility would have been Bane, walking him and training him.” (RT 4677-4678.) Knoller admitted that she walked Bane in excess of ten times when Noel was unavailable. (RT 4678, 4892-4894.) She maintained that Bane was a “really calm, cooperative dog on lead.” (RT 4678.) As to her ability to control the dogs, Knoller testified that she had “voice control” over Hera. (RT 4883.) Knoller denied that Hera ever physically pulled her off her feet. She also denied that she ever walked both dogs by herself. She acknowledged that she would not be able to control both dogs at the same time. (RT 4678-4679, 4856-4858, 4861, 4887.) When confronted with Noel’s letter to Bretches describing the dogs’ “jailbreak” down the hallway, Knoller replied, “I don’t believe it happened, no.” She speculated that Noel may have exaggerated the incident. (RT 4884-4887.)

Knoller admitted that she had written in a letter to Paul Schneider that she did not have sufficient body strength to restrain Bane. (RT 4889-4891.) She acknowledged that, at the time she wrote the letter, October 8, 2000, she had questions about whether she could control the animal. (RT 4892.) She maintained, however, that as of January 26, she was more confident because Bane had been with her longer and was physically recovering from surgery. (RT 4892-4894.) Knoller acknowledged that there was always a concern about Bane getting loose. (RT 4893.)

As to Bane and Hera’s propensity for violence, Knoller denied

that Janet Coumbs warned her about Hera's violent behavior, stating that her trial testimony was "all lies." (RT 4621-4622, 4829, 4832.) She acknowledged receiving and reading the letter from Dr. Martin warning her of the dogs' temperament and lack of training. (RT 4651, 4833-4836.) However, she did not interpret the letter as a warning that Bane and Hera would pose a danger if brought to San Francisco. (RT 4836.) Knoller acknowledged that Dr. Martin had cautioned that "these animals would be a liability in any household" and had recounted that a young boy was mauled in Tehama County by large dogs. She discounted this information, however, explaining that she had "no context" for Dr. Martin's comments. (RT 4836-4838.)

Knoller also denied ever seeing Bane or Hera bite, lunge, or act aggressively towards any person. She did acknowledge that Hera would bark at a person who crowded Knoller. (RT 4854-4856, 4875, 5004.) She also admitted that Hera broke loose and attacked Abe Taylor's dog. She blamed herself for the incident because she was not holding the lead properly. (RT 4876-4880.) "I was being careless and inattentive." (RT 4879.) As to the other prior incidents, Knoller maintained that many of the prosecution witnesses lied in their trial testimony, including Neil Bardack, Violetta Pristel, Jason Edelman, Jane Lu, Kelie Harris, David Moser, Jill Davis, Rea Wertman Tallent, and Skip Cooley. (RT 4856-4868, 4873-4875, 4881-4882, 4884, 4994-4996.)

When asked if she knew that Bane and Hera were physically capable of mauling or killing a person, Knoller replied that "any dog at any given time can do something like that." (RT 4839.) She maintained that even a Chihuahua can be dangerous to an infant or small child. (RT 4839-4840.) She did concede that "[i]n terms of the damage that can be inflicted by a larger dog, a larger dog is always more dangerous." (RT 4839-4840.)

As to the events of January 26, 2001, Knoller testified that Bane had "severe" diarrhea that day. About 3:45 p.m., she took Bane up to the roof to relieve himself for 10 to 15 minutes. (RT 4694-4695.) Knoller did not muzzle Bane, although she had muzzles for both dogs in the apartment. (RT 4943, 4960, 4990-4991.)

Knoller returned with Bane to the sixth floor and disposed of the waste in the trash chute in the hallway. She noticed that Diane Whipple was standing at her open doorway at the other end of the hall with grocery bags on the floor. (RT 4696-4699, 4701.) Knoller opened her apartment

door and she and Bane entered. (RT 4702-4703.) Hera, who was inside the apartment, stuck her head into the hallway and “woofed.” (RT 4702-4703.) Bane then backed out of the apartment and began moving towards Whipple. (RT 4703-4704.)

According to Knoller, she and Bane engaged in a prolonged tug of war in the hallway which lasted over a minute. (RT 4703-4705, 4772-4773.) Bane pulled her down the hallway a few feet at a time, stopping periodically when Knoller ordered him to “come” and then resuming again. Knoller was exerting “[a]s much force as I could possibly muster. I was using all my strength in my body to get him to respond to my command and come back with me to the apartment.” (RT 4704-4705.)

Knoller maintained that Whipple stood at the open doorway to her apartment for over a minute watching Knoller struggle with Bane, who was slowly progressing in Whipple’s direction. (RT 4901-4902, 4905-4907.) Eventually, Bane pulled Knoller off her feet and drug her down the hallway to where Whipple stood. Hera followed, barking. (RT 4706-4707.) Bane jumped up and put his paws on either side of Whipple. Knoller tugged him back down. (RT 4707.) Whipple exclaimed, “your dog jumped me.” (RT 4707, 4912.) Knoller maintained that she was shocked by Bane’s behavior, and that she had never seen him disobey her commands or jump up on someone before. (RT 4707.) She claimed that she was still in “control” of Bane at that point. (RT 4903-4904, 4907.)

Knoller testified that she pulled Bane back with her left hand and pushed Whipple into the apartment with her right. Whipple fell face first into her apartment, and Knoller fell down on top of her. Knoller told Whipple, “Stay down. Don’t move.” (RT 4708.) Knoller got to her knees and crawled out of the apartment, pulling Bane with her. (RT 4709-4711.) Hera continued barking hysterically. (RT 4711.)

According to Knoller, Whipple, rather than shut her door, came back into the hallway, whereupon Bane lunged at her and tore her sweater. Again, Knoller threw her body on top of Whipple’s and told her, “Stay down. Don’t move.” (RT 4712.) Bane seemed to calm down when Knoller placed her body between him and Whipple, but resumed the assault when Knoller moved away. (RT 4713-4714.) Knoller was unsure at that point whether Bane had actually bitten Whipple. (RT 4712.)

According to Knoller, Whipple flailed her arms from underneath Knoller and struck her in the eye. At that point, Bane bit Whipple in the

neck. Knoller immediately threw herself back on top of Whipple and said, "Please stay down. Don't move. He's trying to protect me." (RT 4715-4716, 4914-4916.) Meantime, Knoller repeatedly ordered Bane to stop and to get off. Oblivious to her commands, Bane only increased his attack on Whipple. (RT 4716.) Knoller admitted that she was completely unable to control Bane at that point. (RT 4894-4895.)

Knoller tried to maneuver Whipple towards the elevator, and the two women "shimm[ied] down the hallway." (RT 4716-4717.) Bane kept circling and biting Whipple's body. (RT 4717-4720.) "I hit him in the face to get him away from her. I put my hands in his mouth to get him away from her. I was pushing him and beating him and he wasn't feeling it. None of that anger was being redirected at me, it was all being directed at her, and it was getting worse and worse." (RT 4718-4719.) Knoller claimed that Bane bit her several times on her arm, shoulder, back, and chest, but stopped short of breaking the skin. (RT 4719.)

Eventually, Knoller was able to pull Bane off of Whipple. She could see that Whipple was in "grave" condition and bleeding profusely. (RT 4720, 4775.) Knoller pulled Bane down the hallway and into her apartment; Hera followed. Knoller estimated that the attack lasted from ten to twenty minutes. (RT 4773-4780, 4965.) She did not believe that Hera participated in the attack. (RT 4877-4878.)

Knoller secured both dogs in her apartment and then got back into the hallway "as fast as [she] could." She intended to render first aid to Whipple. (RT 4780-4781.) She admitted, however, that she left Whipple alone in the hallway, bleeding, and that she did not call 911. (RT 4962.)

Knoller testified that she suffered a gash to her thumb when she put her hand inside of Bane's mouth. She had "mottling" on her legs from being dragged down the hallway, and various bruises, including a black eye. (RT 4788-4789, 4794-4797.)

Knoller denied having knowledge that Bane could do such a thing, describing it as a "totally bizarre" and "unexpected" event. (RT 4800-4801, 4990, 4999-5000.) However, on cross examination, she admitted being aware of the danger of death or serious bodily injury Bane posed:

Q. You knew what could happen if you put your hand in his [Bane's] mouth, didn't you?

A. Yes.

Q. You knew that before January 26th?

A. If you put your hand in a dog's mouth, the odds are that

if he bites down, you might lose your hand.

Q. But with a big dog like this, a huge dog like this, you might die if you really got in the way. You knew that, didn't you?

A. Yes, I did know that.

Q. You knew that before January 26th? . . . I'm talking about these dogs, no other dogs?

A. Not these dogs.

. . .

Q. Did you know before January 26th what could happen if you put your hand in Bane's mouth and only Bane's mouth? Yes or no.

A. Anything could happen.

Q. You could have been mauled, correct?

A. Of course.

Q. You could have been killed, correct?

A. Not if I put my hand in his mouth.

Q. How about if you really got in the way, really in the middle of this feeding frenzy, you could have been killed?

A. Yes.

Q. In fact, you knew with your own eyes what Bane's teeth could do because you saw your husband's own finger almost severed by Bane four or five months before Diane Whipple got killed, correct?

A. What my husband related to me, he said that Bane had done that.

Q. And you've seen the picture here in court, haven't you?

A. I saw – I was the one who saw it on the beach.

Q. Showing you People's 36A, the picture of his almost-severed finger, that's what you saw, isn't it?

A. This is a picture of his hand after the surgery.

Q. He spent three days in the hospital, right?

A. Yes.

(RT 4919-4920.)

Knoller also grudgingly admitted knowing that she was physically unable to control Bane.

Q. You knew you couldn't control the dogs on January 26th, correct? A. That's not true.

Q. You had lost control several times before January 26th?

A. It depends on what you mean.

Q. You knew you weren't strong enough to control Bane, correct?

A. I knew he was more – he was powerful.

(RT 4961.)

Knoller admitted that she did not tell Officer Forrestal several details about the attack, including that she and Bane engaged in a one minute struggle as Whipple looked on, or that Whipple inadvertently struck her in the face, causing Bane to attack. (RT 4949.) Knoller admitted that she spoke with Noel about the incident, but denied that the two fabricated a story. (RT 4949-4950.)

Knoller maintained that she cared about her neighbors' welfare and that she never blamed Diane Whipple for her own death. However, she admitted that she fought to keep Hera alive after the attack, even in the face of testimony by her neighbor, David Moser, about his fear of the dog. (RT 5003, 5014-5015.)

Dr. David Barcay, a doctor in internal and emergency medicine, examined photographs of Marjorie Knoller's injuries. (RT 4723-4729.) He opined that the bruises, abrasions, and lacerations on Knoller's body were consistent with dog bites. (RT 4731-4736, 4757-4759.) He also identified bruises on Diane Whipple's body that appeared similar to ones on Knoller's body. (RT 4739.) He acknowledged that Whipple was covered from head to foot with dog bites, while Knoller only sustained one significant injury to her thumb. (RT 4747-4748, 4750.) He also acknowledged that Bane's nylon leash could have caused the cut to Knoller's thumb. (RT 4752-4753, 4758.)

Peter Barnett, a criminalist, examined the clothing Knoller wore on the day of the attack. He located three tears to the clothing, including a large rip to the right sleeve, a small tear on the right leg, and a tear on the back of the left leg. (RT 5040-5043, 5048.) He also identified several dark blood stains which he described as "primary transfer" stains, meaning that Knoller's sweatshirt came in direct contact with a bleeding injury or a large accumulation of blood. (RT 5031-5042.) Barnett acknowledged that the scene was "incredibly bloody" and that any significant source of blood could account for the stains, including blood on the carpet or on the dog. (RT 5058-5061, 5063.)

Rebuttal Case

Officer Leslie Forrestal testified that Knoller gave the following account at the scene, shortly after Whipple's death. Knoller had just come from taking the "dogs" out for a walk. (RT 5116-5117.) Knoller was at her open apartment door when she saw Whipple come home with a bag of groceries. Bane ran down the hall towards Whipple and attacked her. Knoller followed and attempted to intercede but was unsuccessful. Hera did not initiate the attack but was pulling at Whipple's clothing. Knoller did not inquire about the victim's condition during the interview. (RT 5116-5117.) When Officer Forrestal first encountered her, Knoller appeared dazed and confused. By the time she conducted the interview some fifteen minutes later, Knoller was no longer disoriented. (RT 5122-5129, 5132, 5134.)

Randall Lockwood worked for the Humane Society and had studied canine dog behavior, particularly dog attacks, since 1972. (RT 5151-5152.) He reviewed the grand jury testimony, portions of the trial testimony, the medical examiner's report, and the police reports. (RT 5176.) Lockwood explained that dogs have different types of bites, or "bite inhibition," depending on the circumstances. Dogs use their teeth to communicate and will bite to different degrees depending on whether their intent is to play, to warn, to hurt, or to kill. (RT 5174.) He observed that several breeds of dogs have been bred to be more aggressive than wild wolves. (RT 5173-5174.)

Whipple suffered very severe, deep puncture wounds. Knoller, by contrast, suffered less severe, "inhibited" bites. (RT 5178-5179, 5183, 5198-5199.) Based on the differences in injury, Lockwood opined that Knoller "was not in very close proximity" to the attack. (RT 5183-5184.) Lockwood explained that an individual who intervenes in a vicious attack is likely to suffer serious injury because the dog, in the heat of the moment, is unable to differentiate or exercise bite inhibition. (RT 5181-5182.) Noel's injury to his finger is an example of such aggression being redirected at an owner during an attack. (RT 5182.) The bites Knoller suffered, by contrast, did not break the skin, suggesting that she was at least a few feet away and that Bane gave her inhibited bites to keep her from intervening. (RT 5183.)

In describing her bite injuries to the grand jury, Knoller explained

that “[t]hey were hard bites but they didn’t break the skin because of the simple fact that Bane knew it was me. In other words, Bane – as long as Ms. Whipple was underneath me and not moving and I was on top of her, even though Bane bit, he wouldn’t – once he tasted me, he wouldn’t bite down.” (See RT 4762-4763.) Lockwood opined that Knoller’s description was inconsistent with reasonable dog behavior during a full blown attack. (RT 5177.)

Lockwood also opined that evidence introduced by the defendants of their dogs’ good behavior did not negate or undermine evidence of the dogs’ bad behavior, in terms of evaluating the dogs’ potential for aggression. (RT 5184-5185.) “[I]f a dog licks ten children in the face and then bites the finger off the 11th, those ten prior acts are irrelevant in terms of telling me what standard of care I need to exercise in supervising that dog.” (RT 5184.) Lockwood explained that the disparate behavior stems simply from a change of circumstances. Guard dogs are very attuned to the wishes of their owners. When the owner is comfortable and relaxed, the dog will be also. Conversely, when the owner is hostile or tense, the dog will exhibit similar behavior. If the dog receives no signal from its owner, it must make its own assessment of the situation. Without proper training, a guard dog may erroneously conclude that the circumstances warrant aggression. (RT 5184-5185.)

Lockwood opined that “[t]he pattern of the incidents, that seemed to me, just looking at the time line, to be of increasing frequency, indicated the dogs were clearly bonded to the owners, clearly protective of them, but also clearly increasing their instances of challenging those who they interpreted to be a risk or needing to be threatened.” (RT 5185.) Lockwood observed that “[m]any of the instances [occurred] in the immediate area that the dogs regard as their territory, in and around the building.” (RT 5186.) According to Lockwood, Bane’s and Hera’s behavior was typical of the breed. “That’s what these dogs were bred to be, very protective and territorial.” (RT 5186.) As Lockwood explained, “You don’t have to train a dog to fight. You have to train them not to, very often. Particularly a dog coming from this kind of bloodline.” (RT 5187.)

Lockwood opined that Bane’s and Hera’s prior acts of aggression evidenced “an intent to frighten, an intent to intimidate, and they certainly give notice of the dog’s capabilities.” (RT 5193.) The behavior sent “a message that greater work . . . needs to be done in disciplining the dogs, controlling the dogs, getting the dogs to sit quietly on command, all the

other things that one might do to inhibit that behavior if it was seen as undesirable.” (RT 5194.)

APPELLANT'S CONTENTIONS

The trial court erroneously granted Knoller's motion for a new trial as to the second-degree murder conviction; the conviction must be reinstated.

- A. The effect of the trial court's ruling in this case was to independently assess the evidence and find it contrary to the verdict (Pen. Code, § 1181, subd. (6)).
- B. The trial court applied a legally erroneous standard in assessing implied malice.
- C. The trial court's reassessment of Knoller's credibility on the issue of subjective knowledge was contrary to the law and evidence.
- D. The trial court erroneously relied on the relative culpability of the two defendants in setting aside Knoller's second-degree murder conviction.

ARGUMENT
THE TRIAL COURT ERRONEOUSLY GRANTED KNOLLER’S
MOTION FOR A NEW TRIAL AS TO THE SECOND-DEGREE
MURDER CONVICTION; THE CONVICTION MUST BE
REINSTATED

In an extensive, seventeen-page discussion, the trial court granted Marjorie Knoller’s motion for new trial as to the second-degree murder conviction. (RT 5566-5582.) The court began by observing that, with the exception of one witness, Rhea Wertman Tallent, “the court found every witness that testified on behalf of the People on the issue [of the defendants’ knowledge of prior incidents of dog aggression] was credible, believable and in large part corroborated.” (RT 5567.) The court recounted the dogs’ repeated and violent encounters with the defendants’ neighbors and others, observing, “[t]he testimony was filled with evidence of that nature.” (RT 5573.) The court also recounted evidence of the nature of the dogs themselves. “We have the books that were found in the defendants’ apartment Manstopper, Dogs About Kill, Attacking Animals, Presa Canarios, Dog-Of-War. The epithets were legion and consistent.” (RT 5573.) The court, “for all practical purposes,” dismissed as irrelevant the “good dog” witnesses called by the defendants. (RT 5569.)

As to Knoller’s testimony, the trial court observed that, “[w]ith very few exceptions, the Court – Ms. Knoller, I did not believe you. I did not believe a lot of what you said as to what happened.” (RT 5575.) The court found “most unbelievable” Knoller’s story that Bane was merely “interested” in Diane Whipple until Whipple hit Knoller in the eye. (RT 5577.) The court chastised Knoller’s and Noel’s statements following Diane Whipple’s death, observing that they refused to accept responsibility for the attack and blamed Diane Whipple for her own death. (RT 5575-5578.)

The court observed that by January 26, 2001, “with all of the information that had come out dealing with the dogs, the defendants were fully on notice that they had a couple of wild, uncontrollable and dangerous dogs that were likely to do something bad. [¶] Is that ‘something bad’ death? That is the ultimate question in this case.” (RT 5574.)

The court found “no question but that the something bad was going to be that somebody was going to be badly hurt. I defy either defendant to stand up and tell me they had no idea that those dogs were

going to hurt somebody one day. But can they stand up and say that they knew subjectively – not objectively and that’s an important distinction – that these dogs were going to stand up and kill somebody?” (RT 5574.) On this point, the court found Knoller’s testimony believable. “There was one time on the stand, Ms. Knoller, when I truly believed what you said. You broke down in the middle of a totally scripted answer and you actually, instead of crying, you actually got mad and you said that you had no idea that this dog could do what he did and pounded the table. I believed you. That was the only time, but I did believe you.” (RT 5580.)

Ultimately, the court concluded that it had “no choice . . . taking the legislature’s scheme, the evidence that was received, as despicable as it is, but to determine not that she is acquitted of second degree murder but to find that on the state of the evidence, I cannot say as a matter of law that she subjectively knew on January 16th that her conduct was such that a human being was likely to die.” (RT 5581.) The court also noted “a great troubling feature of this case that Mr. Noel was never charged as Ms. Knoller was. In the Court’s view, given the evidence, Mr. Noel is more culpable than she.” (RT 5581.) The court stated that this disparity in culpability between the two defendants “played a role as well” in his decision to set aside the murder verdict (RT 5582.)

There were three critical errors in the trial court’s analysis. First, the court held that a subjective appreciation of a risk of serious bodily injury is insufficient to establish implied malice. This conclusion is contrary to longstanding California law, which holds that the definition of implied malice is satisfied by a subjective appreciation of a risk of death or a risk of serious bodily injury. Second, the trial court committed a manifest abuse of discretion in reassessing Knoller’s credibility and finding that she did not subjectively appreciate the risk to life that her dogs posed. Third, the trial court relied on an impermissible factor – the relative culpability of Knoller and Noel – in setting aside the murder conviction. Judged by proper standards, it cannot be disputed that there was substantial evidence to support the jury’s verdict and that the trial court abused its discretion in granting a new trial. Consequently, the jury’s verdict must be reinstated.

A. The Effect Of The Trial Court's Ruling In This Case Was To Independently Assess The Evidence And Find It Contrary To The Verdict (Pen. Code, § 1181, subd. (6))

The People's challenge to the propriety of the trial court's ruling in this case must necessarily begin with an analysis of the precise effect of that ruling. The trial court clearly purported to act in its capacity under Penal Code section 1181 as an independent reviewer of the evidence introduced to support the second-degree murder conviction. However, in a somewhat confused and contradictory fashion, the trial court also purported to find that evidence insufficient "as a matter of law." In its initial remarks, the court observed that "it's my responsibility to review all of the evidence, *to weigh the credibility of the various witnesses*, to determine whether *as a matter of law* there is sufficient evidence to support the conviction of second degree murder." (RT 5567, emphasis added.) And, in its concluding remarks, the trial court held that, "[w]hen you take everything as a totality, the question is whether or not *as a subjective matter and as a matter of law* Ms. Knoller knew that there was a high probability [of death] that day, or on the day before or on the day after The court finds that the evidence does not support it." (RT 5580-5581, emphasis added.) "*The court has no choice . . . , taking the legislature's scheme, the evidence that was received, as despicable as it is, but to determine not that she is acquitted of second degree murder but to find that on the state of the evidence, I cannot say as a matter of law that she subjectively knew on January 26th that her conduct was such that a human being was likely to die.*" (RT 5581, emphasis added.)

Under Penal Code section 1181, subdivision 6, the trial court may grant a new trial "[w]hen the verdict or finding is contrary to the law or evidence." "In reviewing a motion for new trial, the trial court must weigh the evidence independently." (*People v. Davis* (1995) 10 Cal.4th 463, 523; accord *People v. Serrato* (1973) 9 Cal.3d 753, 761.) The trial court, however, is "guided by a presumption in favor of the correctness of the verdict and proceedings supporting it." (*People v. Davis, supra*, at p. 524; accord *People v. Martin* (1970) 2 Cal.3d 822, 832.)

It has been stated that a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on motion for a new trial. [Citations.] This does

not mean, however, that the court should disregard the verdict or that it should decide what result it would have reached if the case had been tried without a jury, but instead that it should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict. [Citations.]

(*People v. Robarge* (1953) 41 Cal.2d 628, 633.) As such, “the trial court does not supplant the jury as exclusive finder of fact, but in the exercise of its supervisory capacity insures only that the jury’s function has been performed justly and intelligently [citation].” (*People v. Watson* (1983) 150 Cal.App.3d 313, 319, disapproved on another ground in *People v. Sanchez* (2001) 24 Cal.4th 983.)

The trial court has broad discretion in ruling on a motion for new trial, and its decision will not be overturned on appeal absent a clear showing of abuse. (*People v. Robarge, supra*, 41 Cal.2d at p. 634.) However, the exercise of that discretion must not be “arbitrary, vague, or fanciful” but is “to be governed by principle and regular procedure for the accomplishment of the ends of right and justice.” (*People v. Taylor* (1993) 19 Cal.App.4th 836, 848, quoting *Estate of Bainbridge* (1915) 169 Cal. 166.)

The trial court also has the power, under Penal Code section 1385, to dismiss a charge for legal insufficiency after the case has been submitted to the jury. (*People v. Hatch* (2000) 22 Cal.4th 260, 268-271.) In making such a determination, the trial court must apply a substantial evidence standard, asking “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Id.*, at p. 272, emphasis in original, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) A trial court’s dismissal of a conviction under Penal Code section 1385 for legal insufficiency is an appealable order. (*People v. Craney* (2002) 96 Cal.App.4th 431, 439-442; *People v. Salgado* (2001) 88 Cal.App.4th 5, 11-15.) On appeal, the appellate court “engage[s] in precisely the same task as the trial court and determine[s], without reweighing the evidence, whether there was sufficient evidence to permit a rational jury to convict.” (*People v. Salgado, supra*, 88 Cal.App. 4th at p. 15; accord *People v. Hatch, supra*, 22 Cal.4th at p. 272.)

The distinction between an order granting a new trial under section 1181, because the verdict is contrary to the evidence, and a dismissal for legally insufficient evidence under section 1385, is an important one. “In reviewing a motion for new trial, the trial court must weigh the evidence independently.” (*People v. Davis, supra*, 10 Cal.4th at p. 523; *People v. Serrato, supra*, 9 Cal.3d at p. 761.) If the court disagrees with a jury’s resolution of conflicting evidence and concludes that a guilty verdict is against the weight of the evidence, the reversal or dismissal does not bar retrial. (*People v. Hatch, supra*, 22 Cal.4th at p. 272.) By contrast, where a trial court dismisses for legal insufficiency, the court must apply a substantial evidence standard, asking “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Id.* at p. 272, internal quotation omitted.) Such a ruling is the functional equivalent of an acquittal and precludes retrial. (*Id.*, at pp. 271-272; *People v. Salgado, supra*, 88 Cal.App.4th at p. 10.)

The two roles exercised by the trial court are distinct and inherently inconsistent, invoking both different standards of review and different consequences for retrial. “The granting of a motion for new trial, where the court has independently weighed the evidence, cannot be equated with the granting of a motion for judgment of acquittal, where the trial court must apply the same test applied by an appellate court in reviewing a conviction.” (*Veitch v. Superior Court* (1979) 89 Cal.App.3d 722, 731.)

Here, the trial court purported to use both standards in ruling on the motion for new trial, reviewing independently and without deference the evidence presented at trial, and then concluding “as a matter of law” that such evidence was insufficient to sustain the charge of second-degree murder. On the record as a whole, however, it is clear that the trial court merely acted in its capacity as an independent evaluator of the evidence under Penal Code section 1181, subdivision (6). As the Supreme Court explained in *Hatch*, the trial court’s order “should not be construed as an acquittal for legal insufficiency unless the record clearly indicates that the trial court applied the substantial evidence standard. Specifically, the record must show that the court viewed the evidence in the light most favorable to the prosecution and concluded that no reasonable trier of fact could find guilt beyond a reasonable doubt.” (*People v. Hatch, supra*, 22 Cal.4th at p. 273, footnote omitted; accord *People v. Salgado, supra*, 88

Cal.App.4th at p. 10.) The trial court here clearly purported at several stages to reassess the credibility of both prosecution and defense witnesses (See RT 5567-5573, 5575, 5580), and ultimately disclaimed any intent to “acquit” defendant Knoller of second-degree murder. (RT 5581.)

Should this Court conclude otherwise and find that the trial court independently reviewed the evidence and then made a finding of legal insufficiency, the trial court erred and the case must be remanded for a new hearing on the motion for a new trial. As will be discussed in detail below, the trial court’s finding of legal insufficiency necessarily hinged on its reassessment of defendant Knoller’s credibility. Such a ruling by the trial court, finding the evidence insufficient “as a matter of law” based on its own assessment of credibility, erroneously deprived the People of the deferential standard of review which necessarily accompanies a finding of legal insufficiency. (*People v. Salgado, supra*, 88 Cal.App.4th at p. 15.) In addition a finding by the trial court of legal insufficiency is inherently inconsistent with the court’s earlier denial of defendant Knoller’s motion for judgment of acquittal under Penal Code section 1118.1, at which time the trial court observed, “I believe that the Court of Appeals could find that the jury had ample evidence to convict the defendant [Knoller] of second-degree murder.” (RT 4048-4049; see *People v. Trevino* (1985) 39 Cal.3d 667, 695 [inherent contradiction between denying an 1118.1 motion and granting a motion for new trial on the grounds of legal insufficiency “is manifest”], disapproved on another ground in *People v. Johnson* (1989) 47 Cal.3d 1194.) If the trial court’s ruling were construed as a finding of legal insufficiency, the people would be entitled to a remand with directions to the trial court to apply the proper legal standard. (See *People v. Robarge, supra*, 41 Cal.2d at p. 635 [remanding the matter to the trial court to apply the proper legal standard as set forth by the Court]; *People v. Watson, supra*, 150 Cal.App.3d at pp. 319-320 [same].)

A. The Trial Court Applied A Legally Erroneous Standard In Assessing Implied Malice

Proceeding from the conclusion that the trial court conducted an independent review of the evidence, the People set forth the first critical error in the trial court's ruling. The court, in finding the verdict contrary to the evidence, fundamentally misunderstood of the nature of proof required to establish implied malice. The court specifically found that Bane and Hera posed a near certain risk of serious bodily injury to others, and that Knoller subjectively appreciated that risk. The court concluded, however that such evidence did not satisfy implied malice. This conclusion was contrary to established law.

Second-degree implied malice murder requires "an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 104, quoting *People v. Phillips* (1966) 64 Cal.2d 574, 587; accord *People v. Dellinger* (1989) 49 Cal.3d 1212, 1218-1219, 1221-1222.) The concept of implied malice has both a physical and a mental component. (*People v. Nieto Benitez, supra*, at pp. 106-107.) The physical component is satisfied by the performance of "an act, the natural consequences of which are dangerous to life." (*Ibid.*) The mental component is satisfied by a showing that the defendant deliberately performed the act with knowledge that her conduct endangered the life of another and with conscious disregard for life. (*Id.* at p. 107.)

"[A] finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard." (*People v. Watson* (1981) 30 Cal.3d 290, 296-297, emphasis in original.) However, it is unnecessary to establish that the defendant intended his act would result in the victim's death. (*People v. Swain* (1996) 12 Cal.4th 593, 602-603; *People v. Bohana* (2000) 84 Cal.App.4th 360, 368.) "Even if the act results in a death that is *accidental*, . . . the circumstances surrounding the act may evince implied malice." (*People v. Nieto Benitez, supra*, 4 Cal.4th at p. 110, emphasis added.)

Implied malice, like all other elements of the crime, may be proven by circumstantial evidence. (*People v. Bloyd* (1987) 43 Cal.3d 333, 346-347; *People v. Klvana* (1992) 11 Cal.App.4th 1679, 1704.) "Whether a

defendant's underlying acts are inherently dangerous *in the abstract* is not dispositive in the jury's determination as to whether a defendant acted with malice." (*People v. Nieto Benitez, supra*, 4 Cal.4th at p. 107, emphasis in original; *People v. Contraras* (1994) 26 Cal.App.4th 944, 954.) "The very nature of implied malice, . . . invites consideration of the circumstances preceding the fatal act." (*People v. Nieto Benitez, supra*, 4 Cal.4th at p. 107.)

In conducting its independent review, the trial court explicitly found, with the exception of Rhea Wertman Tallent, "every witness that testified on behalf of the People on this issue [of the defendants' knowledge of prior incidents of dog aggression] was credible, believable and in large part corroborated." (RT 5567.) However, the trial court concluded that the specific warnings and prior incidents of aggression by the dogs were insufficient to establish that defendant Knoller subjectively appreciated a "high probability" of death. (RT 5580.) According to the court,

The question I should have asked [Mr. Riordan] is what would have happened had Mr. Noel's might not sufficiently pulled back Bane when he was jumping at TMO. If TMO had been hit by that dog's face, this court has no doubt that there would have been serious bodily injury, if not death. If the dog, in fact, hit Ms. Davis and bit her, the Court has no doubt that there would have been serious bodily injury, if not death, but is this an observation that I am making based upon what happened on January 26, 2001? Here is where we are really getting into trouble.

The law requires that there be a subjective understanding on the part of the person that on the day in question – and I do not read that as being January 26th, 2001 because *by this time, with all of the information that had come out dealing with the dogs, the defendants were fully on notice that they had a couple of wild, uncontrollable and dangerous dogs that were likely going to do something bad.*

Is that "something bad" death? That is the ultimate question in this case. There is no question but that the something bad was going to be that somebody was going to be badly hurt. I defy either defendant to stand up and tell me they had no idea that those dogs were going to hurt somebody one day. But can they stand up and say that they knew subjectively – not objectively and that's an important

distinction – *that these dogs were going to stand up and kill somebody?*

(RT 5573-5574, emphasis added.)

The court concluded by stating that it had “no choice . . . but to find that on the state of the evidence, I cannot say as a matter of law that she subjectively knew on January 26th that her conduct was such that a human being was likely to die.” (RT 5581.)

The trial court’s comments betray a fundamental misunderstanding of the definition of implied malice. As set forth above, in order to establish implied malice, the prosecution must show that the defendant “knows that his conduct endangers the life of another and . . . acts with conscious disregard for life.” (*People v. Nieto Benitez, supra*, 4 Cal.4th at p. 104.) This subjective appreciation of the risk has long been held to include both a risk of death *and a risk of serious bodily injury*. (See *People v. Coddington* (2000) 23 Cal.4th 529, 592 [knowledge that serious bodily injury was likely to occur permits an inference of implied malice], disapproved on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046; *People v. Poddar* (1974) 10 Cal.3d 750, 758 & fn. 11 [in order to show “wanton disregard for life” it must be shown that the accused “acted in a manner likely to cause death *or serious injury* despite such awareness”], emphasis added; *People v. Conley* (1966) 64 Cal.2d 310, 322 [“If, despite such awareness, he does an act that is *likely to cause serious injury* or death to another, he exhibits that wanton disregard for human life or antisocial motivation that constitutes malice aforethought”], emphasis added; *People v. Spring* (1984) 153 Cal.App.3d 1199, 1205 [“to constitute murder there has to be either an intent to kill or such wanton and brutal use of the hands without provocation as to indicate that they would cause death *or serious bodily injury* so as to indicate an abandoned and malignant heart”], emphasis added, quoting *People v. Teixeira* (1955) 136 Cal.App.2d 136.) As set forth in *People v. Matta* (1976) 57 Cal.App.3d 472,

malice may be implied from the doing of an act in wanton and willful disregard of an unreasonable human risk, i.e., the willful doing of an act under such circumstances that there is obviously a plain and strong likelihood that death *or great bodily injury* may result.

(*Id.* at p. 480, emphasis added; accord Perkins on Criminal Law (2d. Ed.

1969) pp. 36-37 [“the intent to do an act in wanton and wilful disregard of the obvious likelihood of causing death or great bodily injury is a malicious intent”].) Thus, courts repeatedly have upheld second-degree implied malice murder convictions where the evidence established conscious disregard of a risk of serious bodily injury to the victim, resulting in the victim’s death. (See, e.g., *People v. Dellinger*, *supra*, 49 Cal.3d at p. 1222 [sufficient evidence to support implied malice murder conviction where defendant inflicted “severe head injuries” on child and administered potentially fatal doses of cocaine]; *People v. Brown* (1995) 35 Cal.App.4th 1585, 1598-1599 [sufficient evidence to support implied malice murder conviction of fetus where defendant inflicted severe injury to mother in abdomen area]; *People v. Matta*, *supra*, 57 Cal.App.3d at pp. 480-481 [sufficient evidence to support implied malice murder conviction where defendant inflicted “severe head trauma” on victim].) Here, the trial court found that the “defendants were fully on notice that they had a couple of wild, uncontrollable and dangerous dogs that were likely going to do something bad. . . . There is no question but that the something bad was going to be that somebody was going to be badly hurt. I defy either defendant to stand up and tell me they had no idea that those dogs were going to hurt somebody one day.” (RT 5574.) The trial court further found that the defendants exhibited conscious and callous disregard for the safety of others. The court deemed the defendants’ conduct “despicable” (RT 5580-5581), observing that “you look at the entire history of these defendants’ absolute refusal to accept what was going on in their house with those two dogs. They brushed off everything, they thumbed their nose at everything.” (RT 5578-5579.)

Despite these clear findings, the trial court reversed the second-degree murder conviction, finding Knoller did not subjectively know “that these dogs were going to stand up and kill somebody,” (RT 5574), or that, as a result of her walk with Bane, “a human being was likely to die.” (RT 5581.) In so doing, the trial court legally misapplied the definition of implied malice to exclude from its scope a subjective appreciation of a risk of serious bodily injury.

The trial court further compounded its error by implicitly finding that prior *non-deadly* incidents of aggression could not convey sufficient notice of a *deadly* incident of aggression. This conclusion, too, was contrary to law. Courts repeatedly have held in the context of drunk-

driving second-degree murder cases that prior near misses or minor collisions are sufficient to place a defendant on notice that his drunk driving poses a danger to life. Thus, for example, in *People v. Olivas* (1985) 172 Cal.App.3d 984, the defendant argued that his “fender bender” collision preceding a fatal collision was insufficient to put him on notice of the danger to life. The appellate court disagreed. “[T]he preaccident collision may have been minor, but it was certainly sufficient to apprise Olivas of the risk he was creating.” (*Id.* at p. 988; accord *People v. David* (1991) 230 Cal.App.3d 1109, 1115 [defendant’s near misses with vehicles sufficient to put him on notice of danger to life]; *People v. Murray* (1990) 225 Cal.App.3d 734, 747 [same].) Similarly, Noel’s ability, in prior instances, to hold back the lunging animals with his brute force did not negate evidence of their potential for death or serious bodily injury if left unchecked.

Under the trial court’s own factual findings, the evidence established “no question” but that the dogs posed a certain risk of serious bodily injury and that defendant Knoller was subjectively aware of that risk and acted in conscious disregard of it. (RT 5574.) Such evidence is, by legal definition, sufficient to sustain a second-degree murder conviction. Where the trial court errs as a matter of law in setting aside the verdict on the basis of insufficient evidence, the remedy is to vacate the trial court’s order and reinstate the jury’s verdict. (See *People v. Salgado, supra*, 88 Cal.App.3d at pp. 15-16; *People v. Albright* (1985) 173 Cal.App.3d 883, 887-888.) Knoller’s second-degree murder conviction must be reinstated.

A. The Trial Court's Reassessment Of Knoller's Credibility On The Issue Of Subjective Knowledge Was Contrary To The Law And Evidence

In finding the verdict of second-degree murder contrary to the evidence, the trial court purported to reassess Knoller's credibility on the key issue of subjective knowledge. The court observed that, "with very few exceptions, . . . Ms. Knoller, I did not believe you. I did not believe a lot of what you said as to what happened." (RT 5575.) However, on the issue of subjective knowledge, the court stated, "there was one time on the stand, Ms. Knoller, when I truly believed what you said. You broke down in the middle of a totally scripted answer and you actually, instead of crying, you actually got mad and you said you had no idea that this dog could do what he did and pounded the table. I believed you. That was the only time but I did believe you." (RT 5580.)

The trial court's assessment of Knoller's credibility was necessarily tainted by its misunderstanding of the nature of the risk required to establish implied malice. The trial court "truly believed" Knoller's testimony that she had no idea that her dog would "do what he did," i.e., kill Diane Whipple. (RT 5580.) However, as set forth above, no such knowledge was required. A finding of implied malice may be based upon a conscious disregard of a risk of serious bodily injury, which the trial court explicitly found that Knoller appreciated. (RT 5574; *People v. Coddington, supra*, 23 Cal.4th at p. 592; *People v. Poddar, supra*, 10 Cal.3d at p. 758; *People v. Conley, supra*, 64 Cal.2d at p. 322; *People v. Spring, supra*, 153 Cal.App.3d at p. 1205; *People v. Matta, supra*, 57 Cal.App.3d at p. 480.) Thus, the trial court's finding that Knoller did not believe her dog would *kill* a person did not legally absolve her from the crime of second-degree implied malice murder.

In addition to this mistake of law, the trial court's factual finding – that Knoller did not subjectively appreciate a risk of *death* – was itself a manifest abuse of discretion. Although the trial court is entitled to "independently" weigh the evidence, it must be "guided by a presumption in favor of the correctness of the verdict and proceedings supporting it." (*People v. Davis, supra*, 10 Cal.4th at pp. 523-524; *People v. Martin, supra*, 2 Cal.3d at p. 832.) The court should not "disregard the verdict" or "decide what result it would have reached if the case had been tried without a jury." (*People v. Robarge, supra*, 41 Cal.2d at p. 633.) "The trial court does not

supplant the jury as exclusive finder of fact, but in the exercise of its supervisory capacity insures only that the jury's function has been performed justly and intelligently." (*People v. Watson, supra*, 150 Cal.App.3d at p. 319.)

As a general rule, "[i]t is for the jury to decide whether all of the circumstances preceding [the death] are sufficient to establish implied malice." (*People v. Ricardi* (1990) 221 Cal.App.3d 249, 259.) The evidence presented here overwhelmingly supported the jury's finding that Knoller subjectively appreciated a risk of death posed by her dogs, despite her self-serving statements to the contrary. There was uncontradicted, persuasive evidence that these dogs were huge, vicious, and capable of inflicting death. The Mastiff breed is known for its massive size and fighting history. (Knoller's Exhibit 637 at pp. 17-18.) As Knoller herself acknowledged, Presa Canarios are used by police units to disable pit bulls. (RT 4827.) In addition, the Mastiff breed is fiercely protective of its owners. (Knoller's Exhibit 637 at p. 17.)

Bane and Hera were certainly no exception. At the time of the attack on Diane Whipple, Bane weighed 140 pounds and Hera close to 100 pounds. (RT 4215-4216, 4575.) The dogs had no meaningful training for nearly the first two years of their lives. (RT 2837-2839, 2852-2854.) And, from the moment they arrived in San Francisco, the dogs engaged in numerous acts of aggression and violence against people and other dogs. Witnesses recounted over 30 incidents where Bane and/or Hera lunged, snapped, and growled at people, and physically attacked other dogs. (See Statement of Facts, *infra*, at pp. 15-25.) On at least five occasions, the dogs reared up on their hind legs and lunged at the faces or upper torsos of people. (See RT 3172-3175 [testimony of Skip Cooley]; RT 3420-3422, 3428 [testimony of Derek Brown]; RT 3454-3456, 3461-3462 [testimony of Violetta Pristel]; RT 3476-3479 [testimony of John O'Connell]; RT 3910-3912 [testimony of Jill Davis].)

There is no question that Knoller was aware of her dogs' sheer brute force and their violent dispositions. She admitted reading literature on the dogs fighting history and the importance of early socialization and training. (RT 4622-4623, 4827-4828, 4938; Knoller's Exhibit 637 ["Dog World" article].) One of the articles found in her home equated guard dogs to a "loaded gun." (RT 4018-4019; People's Exhibit 66.) Knoller also admitted reading the letter from Dr. Martin warning her that, "I would be

professionally amiss if I did not mention the following so that you can be prepared. These dogs are huge, approximately weighing in the neighborhood of a hundred pounds each. They have had no training or discipline of any sort. . . . To add to this, these animals would be a liability in any household, reminding me of a recent attack in Tehama County to a boy by large dogs. He lost his arm and disfigured his face. The historic romance of the warrior dog, the personal guard dog, the gaming dog, et cetera, may sound good but hardly fits into life today.” (RT 2847-2848, see also RT 4651, 4831.)

Knoller personally witnessed eleven of the incidents of aggression by Bane and/or Hera against people or other dogs. (RT 3029-3040 [testimony of David Moser]; RT 3088-3090 [testimony of Lynn Gaines]; RT 3105-3109 [testimony of Neil Bardack]; RT 3134-3139 [testimony of John Watanabe]; RT 3247-3252 [testimony of Abraham Taylor]; RT 3334-3338 [testimony of Ron Bosia]; RT 3389-3392 [testimony of Cathy Brooks]; RT 3454-3456 [testimony of Violetta Pristel]; RT 3489-3493 [testimony of Jason Edelman]; RT 3510-3516 [testimony of Jane Lu]; RT 3909-3913 [testimony of Jill Davis].) She also personally witnessed the severe injury Noel suffered when he put his hand in Bane’s mouth during a dog fight. This incident clearly placed Knoller on notice that Bane’s jaws were capable of inflicting the same damage as a large knife or other deadly weapon. (See *People v. Henderson* (1999) 76 Cal.App.4th 453, 466-470 [pit bulls may be deadly weapons as used by the defendant].) Tellingly, after Noel’s injury, a neighbor frequently saw Bane muzzled during his regular afternoon walks, evidencing an awareness by the defendants’ of the animal’s dangerous propensities. (RT 3528-3529, 3531-3533.)

Knoller’s own statements further demonstrated her subjective awareness of the risk of death that her dogs posed. She told Kelie Harris to leash her dogs, “You don’t know how serious this is. This dog has been abused. He will kill your dogs.” (RT 3352-3353.) She told Cathy Brooks that Hera was “questionable” with people, sometimes good and sometimes not. (RT 3387-3390.) Knoller admitted during her trial testimony that, with a massive dog like Bane, a person could die if he got in the middle of a “feeding frenzy.” (RT 4919-4920.) Notwithstanding this overwhelming evidence, she ultimately denied, however, that she knew prior to January 26 that her dogs were capable of behaving in such a manner. (RT 4919-4920.)

The evidence also conclusively proved that Knoller could not, and

frequently did not, control the dogs. Neil Bardack testified that one of the Presas lunged forward, pulling Knoller to the ground, and savagely attacked his dog. (RT 3105-3107.) Knoller “couldn’t do anything with the animal.” (RT 3106-3107.) Abraham Taylor recounted Hera breaking away from Knoller and charging him and his dog. (RT 3247-3253.) Esther Birkmaier recounted Knoller allowing Hera to run down the sixth floor hallway, unleashed and unattended, while Knoller locked her apartment door. (RT 3590-3592.) Jane Lu described Knoller opening a car door and allowing Hera to wander down the street, unleashed, to growl and confront Lu. (RT 3509-3515, 3520.) Jason Edelman described an encounter with Knoller and one of the Presas where the dog jumped up on Edelman’s chest. (RT 3498-3492.) Diana Curtiss saw Knoller on three or four occasions walking both dogs by herself. The dogs pulled Knoller in different directions as she struggled to maintain control. (RT 3370-3371.) One week before Diane Whipple’s death, Violetta Pristel opened the elevator door to find Knoller inside with both dogs. The dogs reared up on their hind legs, barked, and lunged at Pristel. Knoller struggled to hold the dogs as Pristel slammed the elevator door shut. (RT 3454-3456, 3461-3464.)

The defendants, by their own admissions, could not control their dogs. Noel, in a letter to Bretches and Schneider, described Bane and Hera shooting out the door of the apartment, with Knoller being “propelled forward in the wake of a two Presa team.” Noel recounted that Knoller was forced to let go of the leashes to keep her footing. (RT 4026-4027; People’s Exhibit 110.) Knoller in her testimony acknowledged that she was unable to control both dogs at the same time. (RT 4678-4679, 4856-4858, 4861, 4887.) She also admitted the incident where Hera broke loose and attacked Abe Taylor’s dog. (RT 4876-4880.) She acknowledged that she was “being careless and inattentive.” (RT 4879.)

Specifically as to Bane, Knoller wrote in a letter to Schneider dated October 8, 2000, “I take [Hera] and Robert takes Banester. Although I have a decent amount of upper body strength, if he really wanted to go after another dog, I don’t have the upper body weight or leverage straddling him as Robert does.” (People’s Exhibit 109; RT 4028-4029.) Although Knoller claimed at trial to have “voice control” over Hera, Bane was a different story. She testified that “Bane was Robert’s primary responsibility in terms of taking him for walks and how he was behaving on lead. We wanted Bane to – we wanted Bane to bond with Robert rather

than with me, because Hera had already bonded with me. And Robert's primary responsibility would have been Bane, walking him and training him." (RT 4677-4678.) Knoller acknowledged that there was always a concern about Bane getting loose. (RT 4893.)

This evidence clearly established that Knoller was subjectively aware of Bane's and Hera's physical ability to inflict deadly injury, and the dogs' propensity for violence and aggression, particularly in the vicinity of 2398 Pacific Avenue. The evidence also clearly established that Knoller was aware of her inability to control Bane alone, and the two dogs together. Such evidence satisfied the elements of implied malice.

The risk that these two animals posed at the hands of Knoller was analogous to an act of drunk driving resulting in death, which repeatedly has been held to constitute implied malice second-degree murder. (See, e.g., *People v. Watson*, *supra*, 30 Cal.3d at pp. 299-301 [upholding charge of drunk driving second-degree murder against section 995 challenge]; *People v. Talamantes* (1992) 11 Cal.App.4th 968, 972-973 [upholding conviction for drunk driving second-degree murder as supported by substantial evidence]; *People v. David*, *supra*, 230 Cal.App.3d at pp. 1114-1116 [same]; *People v. Murray*, *supra*, 225 Cal.App.3d at pp. 745-748 [same]; *People v. McCarnes* (1986) 179 Cal.App.3d 525, 533-536 [same]; *People v. Albright*, *supra*, 173 Cal.App.3d at pp. 887-888 [same]; *People v. Olivas*, *supra*, 172 Cal.App.3d at pp. 987-988 [same].)

State v. Davidson (Kansas 1999) 987 P.2d 335, is instructive. In that case, the defendant owned several Rottweiler dogs which she trained as fighting dogs. The dogs were extremely aggressive and growled and barked from behind the fence in the defendant's yard. The dogs frequently broke loose from their confinement and ran free in the neighborhood. On several occasions the dogs chased neighborhood children. A coworker of the defendant expressed concern about the dogs' behavior. The defendant responded that the dogs were only playing. (*Id.*, at pp. 336-337.) The defendant also laughed on one occasion when one of her Rottweilers nipped at a three-year-old girl's calves, making her cry. (*Id.*, at p. 336.) Three of the defendant's dogs severely mauled and killed an eleven-year-old boy as he waited for a school bus. (*Id.*, at pp. 339-340.) At the time of the attack, the dogs weighed 80 pounds, 70 pounds, and 54 pounds respectively. (*Id.*, at p. 341.)

The jury found the defendant guilty of second-degree murder, and

the Kansas Supreme Court affirmed. Kansas law defines reckless second-degree murder as “the killing of a human being committed . . . unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life.” (*State v. Davidson, supra*, 987 P.2d at pp. 341-342.) “Recklessly” is defined as “conduct done under circumstances that show a *realization of the imminence of danger* to the person of another and a conscious and unjustifiable disregard of that danger.” (*Id.* at p. 345, emphasis added.) This definition is the functional equivalent of implied malice murder under California law. (See *People v. Nieto Benitez, supra*, 4 Cal.4th at p. 104 [“an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life”].)

The Kansas Supreme Court found sufficient evidence to sustain the second-degree murder conviction.

Here, defendant argues that all she did was let the dogs into the fenced area, take a pill, and go to sleep. This argument conveniently ignores significant aspects of her conduct that contributed to the tragic death of Chris. The State presented evidence that she selected powerful dogs with a potential for aggressive behavior and that she owned a number of these dogs in which she fostered aggressive behavior by failing to properly train the dogs. She ignored the advice from experts on how to properly train her dogs and their warnings of the dire results which could occur from improper training. She was told to socialize her dogs and chose not to do so. She ignores the evidence of the dogs getting out on numerous occasions and her failure to properly secure the gate. She ignored the aggressive behavior her dogs displayed toward her neighbors and their children. The State presented evidence that she created a profound risk and ignored foreseeable consequences that her dogs could attack or injure someone. The State is not required to prove that defendant knew her dogs would attack and kill someone. It was sufficient to prove that her dogs killed Chris and that she could have reasonably foreseen that the dogs could attack or injure someone as a

result of what she did or failed to do.

(*Id.* at p. 344.)

In ruling on Knoller's motion for a new trial, the trial court acknowledged the factual similarities between the present case and *Kansas v. Davidson*. (RT 5579.) However, the trial court ultimately found the second-degree murder verdict to be against the weight of the evidence, relying on Knoller's self-serving testimony that she did not know that Bane was capable of killing a person. (RT 5580.) In addition to being legally inadequate to negate malice, as explained above, such testimony was inherently incredible and entitled to absolutely no consideration.

As detailed above, there was overwhelming evidence that Knoller subjectively appreciated the risk of death her dogs posed to others. There was also overwhelming evidence of Knoller's willingness to lie under oath to further her own defense. She denied any participation in the Dog O' War enterprise. (RT 4815.) She denied that Janet Coumbs warned her about Hera's dangerous propensities and her attack of farm animals. (RT 4829, 4832.) She denied that anyone warned her against bringing the dogs to San Francisco. (RT 4831-4833.) She repeatedly denied ever seeing Bane or Hera lunge, bite, or act aggressively towards any person. (RT 4856, 4865-4866, 4875, 5004.) She specifically denied the incidents with Neil Bardack, Violetta Pristel, Cathy Brooks, Jane Lu, Kelie Harris, David Moser, and Jill Davis. (RT 4856-4862, 4864-4867, 4874, 4883.) On all of these issues, the trial court found the prosecution witnesses credible, and Knoller not credible. (RT 5567, 5635-5636.) With respect to the attack on Diane Whipple, Knoller testified, most incredulously, that the victim stood outside her open apartment door for a full minute watching Knoller struggle with the huge dog, which was slowly making its way in Whipple's direction. (RT 4703-4705, 4772-4773.) She also testified that Bane's attack on Diane Whipple was prompted when Whipple punched Knoller in the face. (RT 4715-4716, 4914-4916.) The trial court found this testimony to be inherently unbelievable. (RT 5577; see also CT 5117-5122 [People's chronicle of 52 instances of Knoller's willfully false testimony under oath].) The trial court specifically found at the sentencing hearing that Knoller "in [her] efforts to avoid responsibility for this crime, . . . knowingly committed perjury over and over again, both in front of the Grand Jury and in the trial of this action." (RT 5635.)

The jury was properly instructed that a witness "who is willfully

false in one material part of his or her testimony is to be distrusted in others” and that the jury “may reject the whole testimony of a witness who willfully has testified falsely as to a material point” (CT 4631; CALJIC No. 2.21.2; accord *People v. Duran* (2001) 94 Cal.App.4th 923, 932-933.) The jury clearly concluded that Knoller was not credible, and it is hard to imagine a case more deserving of such a conclusion. “Here defendant did not simply deny [her] guilt; [s]he ventured upon an explanation so unusual that the triers of fact could conclude that it was an intentional fabrication indicating consciousness of guilt and the absence of any true exculpatory explanation.” (*People v. Wayne* (1953) 41 Cal.2d 814, 823.)

However, on the key issue of subjective knowledge, upon which Knoller had the greatest motive to fabricate, the trial court found her testimony believable. The trial court’s conclusion on this point was arbitrary and capricious in light of the dogs’ repeated acts of aggression prior to January 26, 2000, and Knoller’s repeated lies under oath. The jury’s rejection of Knoller’s self-serving testimony on this point was the *only* reasonable conclusion to be reached on the evidence.

In rejecting the jury’s credibility determination, the trial court did not conclude that the jury had been swayed by passion or prejudice, or that it did not justly and intelligently perform its duty. (*People v. Taylor, supra*, 19 Cal.App.4th at p. 848.) Rather, the trial court did precisely what it was not authorized to do – decide the case as if there had not been a jury at all. (*People v. Trotter* (1984) 160 Cal.App.3d 1217, 1221.) In so doing, the court overstepped the permissible bounds of independent review. (*People v. Taylor, supra*, at p. 848.)

Absent the trial court’s independent assessment of credibility, there was no ground upon which to find the second-degree murder conviction contrary to the evidence. The conviction must be reinstated. (*People v. Taylor, supra*, 19 Cal.App.4th at pp. 839, 848-849 [finding trial court abused its discretion in reassessing the verdict, and ordering the conviction reinstated].)

A. The Trial Court Erroneously Relied On The Relative Culpability Of The Two Defendants In Setting Aside Knoller's Second-Degree Murder Conviction

In addition to the above errors, which are independently sufficient to reinstate the verdict, the trial court abused its discretion by engaging in a comparative analysis of Knoller's and Noel's relative culpability in deciding whether to sustain Knoller's second-degree murder conviction. In granting the motion for new trial, the court observed:

The Court also notes a great troubling feature of this case that Mr. Noel was never charged as Ms. Knoller was. In the court's view, given the evidence, Mr. Noel is more culpable than she. Mr. Noel personally knew that she could not control those dogs. He could not control those dogs. Mr. Noel was substantially haughtier than she was. In brushing off all of the incidents that happened out in the street, Mr. Noel knew as a theological certainty that that dog, which had recently been operated on, was taking medication that had given it diarrhea, was going to go out into the hallway or out into the street possibly, at the hands of Ms. Knoller. He knew that he couldn't take of her and he left her there to do that.

To argue that he is not responsible because he wasn't there is to argue that by setting a bomb off in a locker and then getting on an airplane and going to New York City, you are not responsible for the damages caused by the bomb. And yet Mr. Noel was not charged. Equality of sentencing and the equal administration of justice is an important feature in any criminal court. That played a role as well.

(RT 5581-5582.)¹¹

It is clear from the trial court's statements that a substantial motivating factor in its decision to grant the motion for new trial was not a lack of sufficient evidence, but rather the trial court's independent

¹¹The court made a similar observation as to the relative culpability of the defendants during arguments on the new trial motion. (RT 5508-5509.)

assessment of the relative culpability of the defendants. Such assessment was clearly inappropriate. As the court observed in People v. McClellan (1980) 107 Cal.App.3d 297,

The trial court was apparently trying to do justice by being lenient to respondent because of his comparatively slight culpability. But the judge was without power to do so in the manner he chose. Once a defendant's guilt has been established by a fair trial, the trial judge's power is limited to the pronouncement of sentence. Such pronouncement is limited to the alternatives outlined by the Legislature in the sentencing statutes. (Cf. *People v. Municipal Court (Gelardi)* (1978) 84 Cal.App.3d 692, 699 []; *People v. Superior Court (Montano)* (1972) 26 Cal.App.3d 668, 671 [].)

Under the circumstances, the reduction of the crime in furtherance of justice was in excess of the trial court's authority and constituted "an unauthorized leniency." (Cf. *People v. Serrato, supra*, 9 Cal.3d at p. 762.)

(*People v. McClellan, supra*, at pp. 303-304; accord *People v. Watson, supra*, 150 Cal.App.3d at pp. 318-320 [trial court erred in reducing a verdict of second-degree murder to vehicular manslaughter based on information that was not presented to the jury].)

This case presents a clear example of the trial court misapplying the law and the facts to reach an outcome guided by inappropriate considerations of relative culpability. Such action transcends the power afforded to the trial court under Penal Code section 1181, and constitutes a manifest abuse of discretion. On this ground alone, the second-degree murder conviction, which is supported by substantial evidence, must be reinstated.

CONCLUSION

Accordingly, appellant respectfully asks that this Court reverse the trial court's order granting a new trial on the second-degree murder conviction, and order the conviction reinstated.

Dated: April 11, 2003

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