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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **REGINALD WYATT,** **Defendant and Appellant.**	Case No.

First Appellate District, Division Two, Case No. A114612
Alameda County Superior Court, Case No. C147107
The Honorable Jon Rolefson, Judge

PETITION FOR REVIEW

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Respondent respectfully petitions for review of the unpublished decision of the Court of Appeal for the First Appellate District, Division Two. The decision, attached as Exhibit A, was filed on December 9, 2010. Respondent filed a petition for rehearing on December 23, 2010. The Court of Appeal denied rehearing on January 6, 2011. This petition is timely. (Cal. Rules of Court, rule 8.500(e).)

ISSUES PRESENTED

1. Whether the trial court erred when it failed to instruct, sua sponte, on simple assault as a necessarily included offense of assault on a child causing death where a reasonable person would realize the force used on the child was likely to result in great bodily injury, but the defendant denies any assault and claims the death was an accident.

2. Whether the failure to instruct on simple assault under a charge of child abuse homicide is harmless where the jury was not limited to an "all or nothing" choice of conviction on the charge or else acquittal, and a guilty verdict of involuntary manslaughter under another count shows the jury resolved the issue against the defendant in another context.

STATEMENT

On March 6, 2002, Charrikka Harris gave birth to a baby boy she named Reginald. (1 RT 127-128.) Appellant denied he was the father. (1 RT 130.) Ms. Harris and appellant later appeared on a television program named the Maury Povich Show, where the host revealed results from a paternity test showing appellant was the father of Reginald. (1 RT 136, 167; People's Exh. 6.) After that, appellant acknowledged paternity but only sporadically saw his son. (1 RT 140, 151.) Appellant did not get along with Ms. Harris. (1 RT 148-150.)

Appellant began taking Reginald for overnight visits after his first birthday. (1 RT 152.) Appellant lived with his girlfriend, Tiffany Blake,

and their infant daughter, Valerie, in an apartment in Oakland. (3 RT 453, 460.) Appellant and Ms. Blake were seeking custody of Reginald from Ms. Harris. (Exh. 36 at 8.) On Saturday, May 17, 2003, appellant arranged to take Reginald for the weekend. (1 RT 157-158.) The next morning, Ms. Blake went to work, leaving appellant in charge of Reginald and Valerie. (3 RT 468.) Around 10:45 a.m., appellant asked a neighbor to call 911 because Reginald was not breathing. (2 RT 266-267.) Appellant told responding officers that he played with Reginald, gave him a cup of milk, put him down to rest, and later discovered Reginald was not breathing and had fluid coming from his nose. (4 RT 591.) Reginald was taken to the hospital and pronounced dead. (4 RT 701, 704.)

The autopsy showed that Reginald, 31 inches tall and 26 pounds, died of blunt trauma to the chest and abdomen. (2 RT 371, 373.) He bled from the heart and left lung, and he had four lacerations to his liver, which caused internal bleeding. (2 RT 379-380, 385-386.) He had bleeding in the tissue behind the abdominal cavity and in the mesentery of the small and large intestines. (2 RT 390-391.) Reginald had acute fractures of the back fifth and sixth ribs on both the left and right sides. (2 RT 392, 395.) He had mild cerebral swelling. (2 RT 394.) His injuries were "basically at the end of the bell curve" and are seen only in "the most serious events" such as "car crashes, individuals who are hit by motor vehicles, things of that nature." (3 RT 498.) The force that caused Reginald's four broken ribs would have been "quite violent, quite out of the ordinary." (3 RT 505.)

On May 19, 2003, appellant learned of the autopsy results at Ms. Harris's house when she received a phone call from the coroner's office. (1 RT 174, 4 RT 613.) The caller said, "They were en route to pick up" appellant. (1 RT 177.)

Appellant went to the police department, accompanied by his brother, Oakland Police Officer Anthony Caldwell. (4 RT 645, 647, 654.) In a

tape-recorded statement, appellant told police officers that on the morning in question, he wrestled and played with Reginald. (2 CT 239, 240-241, 251.) Appellant accidentally fell on top of Reginald on the bed while attempting a wrestling move. (2 CT 241-243.) Before leaving for work, Ms. Blake warned appellant that he was playing too rough with Reginald and could hurt him. (2 CT 241, 244.) After Ms. Blake left, appellant continued to wrestle Reginald for another 20 to 30 minutes. (2 CT 245-247, 252.) Appellant body slammed Reginald 4 times, hit him in the chest with his fist 10 or 11 times, and did an "atomic elbow" to Reginald's head. (2 CT 247-248.) Appellant hit Reginald in his upper chest with his forearm about three times. (2 CT 248.) Appellant may have suspended the child in midair by holding him by his neck. (2 CT 248-249; 4 RT 711.) Appellant grabbed Reginald between his legs and squeezed. (2 CT 249.) Appellant's knee went down on Reginald's back twice, a maneuver appellant called "the knee drop." (2 CT 249-250.) Appellant told the officers that he did not disclose this information earlier because he did not make a connection between what he did to Reginald and Reginald's death. (2 CT 259-260.) Appellant wanted Reginald to be more active and was trying to "toughen him up." (2 CT 267.) Appellant said, "I didn't notice and I wasn't thinkin' . . . that I can hurt him. I wasn't thinkin.'" (2 CT 272.) Appellant admitted, "I was hittin' him pretty hard." (2 CT 273.)

Appellant testified at trial. He admitted prior convictions of battery on a police officer, possession of a weapon, and possession with intent to distribute cocaine. (5 RT 1009-1011.) He testified that he used only "make-believe wrestling moves" on Reginald and denied hitting him even once. (5 RT 1043, 1045, 1048, 1114.) Appellant said he accidentally came down on Reginald's back. (5 RT 1039-1041, 1047, 1053.) Reginald seemed normal after the accident. (5 RT 1054.) He had some milk and lay down. (5 RT 1054.) Appellant later found Reginald unresponsive. (5 RT

1056.) Appellant did not know what caused Reginald's death. He learned at trial that falling on Reginald could have caused his substantial injuries. (5 RT 1081.) As for his incriminating statements to the officers, appellant testified that he was persuaded to think that he hit Reginald harder than he believed, began "second-guessing" himself, and thought he may have caused Reginald's death by wrestling too hard with him. (5 RT 1103, 1106, 1119-1120, 1140.)

Several defense witnesses testified appellant was happy when he found out that Reginald was his son and that he loved the child. (5 RT 922, 984, 998.) A defense expert testified it was possible Reginald's injuries resulted from a single sharp blow to the back, such as a 170-pound man falling on him, but that would be unlikely if the child were lying on a bed at the time. (7 RT 1316, 1336.) The defense expert observed, "The liver has been forcibly squeezed to the point that it's just ruptured in various places" and the chest was squeezed "to the point that the ribs are broken on both sides . . . ." (7 RT 1337-1338.)

The trial court instructed the jury on second degree murder in count one and the lesser included offense of involuntary manslaughter. (8 RT 1514-1515.) The court instructed on child abuse homicide in count two. (8 RT 1516-1518.) The jury also was instructed on accident or misfortune. (8 RT 1513-1514, 1518.)

The jury convicted appellant of the lesser included offense of involuntary manslaughter in count one (Pen. Code, § 192, subd. (b))[1/] and assault on a child causing death—sometimes referred to as child abuse homicide—in count two (§ 273ab). (2 CT 327(8 RT 1624-1625.).) The trial court sentenced appellant to 25 years to life for child abuse homicide

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1. Further statutory references are to the Penal Code.

and stayed sentence under section 654 for involuntary manslaughter. (2 CT 360.)

On appeal, appellant claimed the evidence was insufficient to support his conviction for child abuse homicide. In an unpublished opinion filed on January 31, 2008, the First Appellate District, Division Two, agreed. The Court of Appeal reversed that conviction, having "concluded the evidence was insufficient to prove the requisite mens rea for child abuse homicide, because it failed to show defendant had '*actual* knowledge' he was 'wrestling far too hard with his young son.'" (*People v. Wyatt* (2010) 48 Cal.4th 776, 779.)

On May 14, 2008, this Court granted the People's petition for review. The Court limited briefing and argument to the following issue: "Did substantial evidence support defendant's conviction for a caregiver's assault on a child by means of force likely to produce great bodily injury causing death (Pen. Code, § 273ab)? Specifically, was there evidence that defendant was 'aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct' (*People v. Williams* (2001) 26 Cal.4th 779, 788)[?]"

In an opinion filed on May 10, 2010, this Court concluded: "[S]ubstantial evidence established that defendant knew he was striking his young son with his fist, forearm, knee, and elbow, and that he used an amount of force a reasonable person would realize was likely to result in great bodily injury." (*People v. Wyatt, supra*, 48 Cal.4th at p. 779.) Holding, as a result, that the evidence supported the jury's verdict of child abuse homicide under section 273ab, this Court reversed the judgment of the Court of Appeal and remanded for further proceedings consistent with that opinion. (*People v. Wyatt, supra,* 48 Cal.4th at p. 786.)

On remand, in another unpublished decision, the First Appellate District, Division Two, again reversed the conviction of child abuse

homicide and affirmed the judgment in other respects. The basis for the reversal was the appellate court's finding of prejudicial error in the trial court's failure to instruct sua sponte on simple assault as a lesser included offense of child abuse homicide.

The Court of Appeal held that substantial evidence supported a simple assault instruction as a lesser included offense to the charge of child abuse homicide based on the testimony of appellant and of his medical expert, Dr. Herrmann. (Typed opn. at p. 21.) The court described appellant's testimony, as follows:

> Appellant never did any wrestling moves on his son. When he described to the police the wrestling moves he did on Reginald, it was all pretend wrestling he was talking about. He never struck Reginald hard, only pushed him while playing with him and doing "make-believe wrestling moves," such as off-the-top-rope, head butt, supplex, and an atomic elbow to the head. At one point, an accident occurred. Appellant had jumped in the air and was coming down on the bed to make it shake, when Reginald rolled toward him and appellant fell on Reginald, hitting Reginald in the back with his hip. It seemed like Reginald had the wind knocked out of him, like he could not get his breath. Then he started breathing again and appellant thought he was all right. Reginald did not cry. Other than falling on Reginald, appellant did not strike him with force or do anything harmful to him.

(Typed opn. at p. 13.)

The appellate court also recounted the testimony of the defense expert, Dr. Paul Herrmann. Dr. Hermann had reviewed Reginald's autopsy records and testified as an expert in the field of pathology. (Typed opn. at p. 17.) On direct examination, Dr. Hermann said that Reginald's injuries could have resulted from a single sharp blow to the back right side, like the weight of a 170-pound man falling on him. (*Ibid.*) Dr. Herrmann qualified his testimony on cross-examination.

> On cross-examination, Dr. Herrmann said he believed the chances of Reginald being injured by a person falling on him on

> a bed would be much less than if the child were on the floor. It would be much less common for such extreme injuries to occur if the child was on a bed when someone fell on him. However, "it's still a likelihood or a possibility." The injuries here would be excessive to what Dr. Herrmann would expect if someone fell sideways onto the child on a bed, as compared to someone "falling free" onto the child. He did not have an opinion as to whether Reginald was physically abused.

(Typed opn. at p. 18.)

The Court of Appeal said: "This testimony, which we consider without evaluating the credibility of either appellant or Dr. Herrmann, is substantial enough to support a jury finding that appellant's actions fell short of those which a reasonable person might believe would lead to the application of force likely to "produce great bodily injury. The evidence is, however, enough to support a conviction under section 240." (Typed opn. at p. 23.) Explaining that it construed that testimony in the manner most favorable to appellant and only for "bare legal sufficiency" rather than for its weight, the Court of Appeal held that a jury might find from this testimony that the baby's death was caused by the baby rolling under appellant when the latter said he jumped on the bed and further find that this act amounted to simple assault.[1] (Typed opn. at pp. 23-24.)

Without conceding any error, the People sought rehearing of the Court of Appeal's further one-line conclusion that the trial court's failure to

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[1] The Court of Appeal concluded that there was no sua sponte duty to instruct on aggravated assault under section 245, because "[a]s the People correctly point out, if the jury found that appellant committed an aggravated assault it would also, necessarily, find appellant guilty of child abuse homicide under section 273ab given that both offenses involve the same conduct: force likely to produce 'great bodily injury.' Thus, if the jury found that appellant had used such force, it would have also found that such force led to Reginald's death and would have convicted appellant under section 273ab rather than section 245." (Typed opn. at pp. 24-25, fn, omitted.)

instruct sua sponte on simple assault was prejudicial under *People v. Watson* (1956) 46 Cal.2d 818. (Typed opn. at p. 24.) The rehearing petition argued that the involuntary manslaughter charge meant the jury was not faced with an all-or-nothing choice on the charge of child abuse homicide and that the conviction on the former charge resolved in another context the issue posed by the omitted simple assault instruction—whether or not appellant's assault involved conduct a reasonable person would have known created a high risk of death or great bodily injury. (Petn. for Rehg., pp. 1-4.) The Court of Appeal denied rehearing without comment. (Ct.App. Order, Jan. 6, 2011 [unpublished].)

ARGUMENT

I. REVIEW IS REQUIRED BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT A SIMPLE ASSAULT INSTRUCTION IN A CHILD ABUSE HOMICIDE WHEN THE EVIDENCE REFLECTS EITHER AN ACCIDENT OR AN AGGRAVATED ASSAULT CAUSING DEATH WITH NO MIDDLE GROUND

For the second time in this case, we take the somewhat unusual step of seeking review of the unpublished opinion of the Court of Appeal. We acknowledge that unpublished opinions do not fit easily within the criteria for review in rule 8.500(b) of the California Rules of Court. Nonetheless, review is required in this case because the Court of Appeal has, once more, reached an erroneous result through an egregious misapplication of this Court's precedent.

This Court's lesser-included-offense jurisprudence is quite unsupportive of the Court of Appeal's holding that "bare legally sufficien[t]" evidence of simple assault gave rise to a sua sponte duty on the trial court to instruct on that offense in this child abuse homicide case. (Typed opn. at pp. 23-24.)

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence.

On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*Ibid.*) An instruction on a lesser included offense is required sua sponte whenever a jury composed of reasonable persons could conclude that the lesser, but not the greater, offense was committed. (*Id.* at pp. 162, 177.)

The crime of simple assault is defined in section 240 as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Although assault does not require a specific intent to injure the victim, "a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*People v. Williams*, *supra*, 26 Cal.4th at p. 788; see *People v. Wyatt*, *supra*, 48 Cal.4th at p. 780.) A battery is "any willful and unlawful use of force or violence upon the person of another." (§ 242.)

Contrary to the Court of Appeal's decision, no reduced offense of simple assault can be teased from the defense in this case. That defense was straightforward. Appellant denied ever doing wrestling moves on his son, he denied hitting him, and he denied doing anything harmful to him. Appellant claimed he accidentally fell on Reginald. (Typed opn. at p. 13.) His expert thought the baby's injuries from an accident possible, if unlikely. (Typed opn. at p. 18.) That evidence presented the jury with two choices on the charge of child abuse homicide. The jury either had to conclude that appellant committed an aggravated assault on Reginald which caused his death or else it had to conclude that Reginald died as a result of an unfortunate accident, whether from a fall or something else.

There was no basis for the jury to find from the evidence that appellant attempted to commit a violent injury on Reginald, while aware of facts that would lead a reasonable person to realize that a battery would probably result from his conduct, but did not do so "by means of force that to a reasonable person would be likely to produce great bodily injury . . . resulting in the child's death." (See *People v. Wyatt*, *supra*, 48 Cal.4th at p. 780.) A parent who is playing with his child when an accident ensues does not engage in an unlawful attempt to commit a violent injury on the child. Nor does a reasonable person realize a battery will ensue from his own conduct in that circumstance, since the act causing injury, by definition, occurs accidentally.

Even if that defense evidence, in isolation, amounted to barely legally sufficient evidence of simple assault, as held by the Court of Appeal, that would not give rise to a sua sponte duty to instruct on that offense. The evidence in its totality has to be considered. Reginald's injuries were not just serious. They were "basically at the end of the bell curve." (3 RT 498.) Those injuries could only support a finding of aggravated assault and not simple assault. (See *People v. Wyatt*, *supra,* 48 Cal.4th at p. 785 ["the nature and extensiveness of [Reginald's] internal injuries provided sufficient evidence that defendant used an amount of force a reasonable person would believe was likely to result in great bodily injury on a young child"].) A jury composed of reasonable persons could not conclude that appellant committed simple assault on Reginald but not child abuse homicide. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) Consequently, the Court of Appeal erroneously concluded that the evidence was "enough to support a conviction under section 240." (Typed opn. at p. 23.) In these circumstances, a sua sponte instruction on simple assault was not required.

II. REVIEW IS REQUIRED BECAUSE THE OMISSION OF A LESSER INCLUDED OFFENSE INSTRUCTION WAS HARMLESS WHERE THE JURY WAS NOT GIVEN AN "ALL OR NOTHING" CHOICE AND THE FACTUAL QUESTION WAS RESOLVED UNDER OTHER PROPERLY GIVEN INSTRUCTIONS

The Court of Appeal's harmless error analysis is no less defective under this Court's precedent and requires review.

Error in failing to instruct on a lesser included offense supported by the evidence is reviewed for prejudice under *People v. Watson*, *supra*, 46 Cal.2d at p. 836. (*People v. Breverman, supra,* 19 Cal.4th at p. 178.) A conviction may be reversed for failure to give a lesser included instruction only if it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*Ibid.*) "Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions. (*People v. Sedeno* (1974) 10 Cal.3d 703, 721 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on another ground in *People v. Breverman*, *supra*, 19, Cal.4th 142.)" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085; see *People v. Elliot* (2005) 37 Cal.4th 453, 475.)

The jury found appellant guilty not only of child abuse homicide but also of involuntary manslaughter. The second verdict demonstrates it necessarily determined that appellant acted in a way that caused a high risk of death or great bodily injury and that a reasonable person would have known acting in that way would create such a risk. Thus, even if the jury had been instructed on simple assault as a lesser included offense to assault on a child causing death, there is no reasonable probability that appellant would have obtained a more favorable outcome. (See *People v. Koontz*, *supra*, 27 Cal.4th at p. 1087 [any error in failing to instruct on unreasonable self-defense was harmless because the jury necessarily rejected the

unreasonable self-defense theory in returning a true finding on the robbery special-circumstance allegation].)

Moreover, because the jury had the alternative of convicting appellant of involuntary manslaughter, as a lesser offense of the murder charged in count one, the jury was not forced to choose only between convicting appellant of assault on a child causing death or else acquitting him altogether. (*People v. Lipscomb* (1993) 17 Cal.App.4th 564, 571 [jury was not forced into an all-or-nothing" choice because it had the option of other charges and enhancements]; see *People v. Hughes* (2002) 27 Cal.4th 287, 365 ["instructing on lesser included offenses shown by the evidence avoids forcing the jury into an 'unwarranted all-or-nothing choice.'"].)

We urge the Court to grant review to correct the Court of Appeal's misapplication of the Court's precedent by concluding that the trial court did not reversibly err in failing to instruct sua sponte on simple assault as a lesser included offense of child abuse homicide. Nine years after the event, retrial almost certainly poses significant, possibly insurmountable, hurdles. The possibility that an actual jury would find Reginald's death represented simple assault and not child abuse appears vanishingly remote. A jury of reasonable individuals fairly concluded already that the assault was both a child abuse homicide and an involuntary manslaughter of appellant's baby.

CONCLUSION

Accordingly, respondent respectfully requests that the petition for review be granted.

Dated: January 13, 2011

Respectfully submitted,

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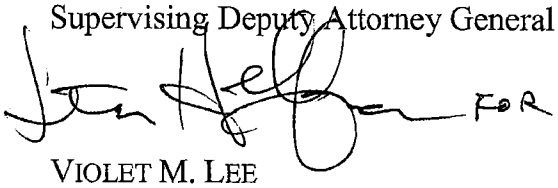

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3, 743 words.

Dated: January 13, 2011

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FOR

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Filed 12/9/10 P. v. Wyatt CA1/2
Following remand from the Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. REGINALD WYATT, Defendant and Appellant.	A114612 (Alameda County Super. Ct. No. C147107)

I. INTRODUCTION

After a jury trial, Reginald Wyatt (appellant) was convicted of involuntary manslaughter and assault on a child causing death. On appeal, he contends (1) the trial court improperly limited his cross-examination of a police officer during a hearing on the voluntariness of appellant's statements to officers; (2) the trial court failed to instruct sua sponte on the requirement of jury unanimity as to both counts; (3) the trial court omitted an essential element of the offense in its instruction on assault on a child causing death; (4) the trial court failed to instruct sua sponte on assault as a necessarily included offense of assault on a child causing death; (5) the trial court failed to instruct sua sponte on involuntary manslaughter as a necessarily included offense of assault on a child causing death; (6) the trial court failed to instruct the jury that criminal negligence could never support an assault conviction and that injury alone is not sufficient to establish an assault; (7) the evidence was insufficient to support the conviction for assault on a child causing death; (8) the evidence was insufficient to establish the corpus delicti for either offense;

(9) California's corpus delicti rule violates due process; (10) the jury instructions directed guilty verdicts; (11) appellant was denied his right to effective assistance of counsel; and (12) the sentence of 25 years to life constitutes cruel and/or unusual punishment.

We earlier found that the evidence was insufficient to support the conviction for assault on a child causing death, and reversed that conviction. We also rejected defendant's contentions that the trial court erred in limiting cross-examination of police officers during a *Miranda*[1] hearing, that the court failed to, sua sponte, instruct the jury on the need for unanimity with regard to the both the charged offenses, that the evidence was insufficient to establish the corpus delicti for either offense, that California's corpus delicti rule violates due process, and that the jury instructions in this case directed guilty verdicts. In *People v. Wyatt* (2010) 48 Cal.4th 776, 780, 786 (*Wyatt*), the California Supreme Court reversed our judgment to the extent that we found insufficient evidence to support defendant's conviction for assault on a child causing death and remanded the matter to us.

We now address the remaining issues on appeal. Because we conclude that the trial court erred when it failed to instruct, sua sponte, on assault as a necessarily included offense of assault on a child causing death, we address only those issues germane to a possible retrial, namely, that the trial court omitted an essential element of the offense in its instruction on assault on a child causing death; that the trial court failed to instruct sua sponte on involuntary manslaughter as a necessarily included offense of assault on a child causing death; and that the trial court failed to instruct the jury that criminal negligence could never support an assault conviction and that injury alone is not sufficient to establish an assault. We also consider and reject defendant's contention that the sentence of 25 years to life constitutes cruel and/or unusual punishment.

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[1] *Miranda v. Arizona* (1966) 384 U.S.. 436 (*Miranda*).

II. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged by information with murder (Pen. Code, § 187, subd. (a), count 1),[2] and assault on a child causing death (§ 273ab, count 2). The information further alleged, as to both counts, that appellant had personally inflicted great bodily injury on the victim, within the meaning of section 1203.075. The information also alleged that appellant had suffered a prior felony conviction.

During trial, the court granted appellant's motion, under section 1118.1, for judgment of acquittal as to first degree murder in count 1. With respect to count 1, the jury found appellant guilty of the lesser included offense of involuntary manslaughter. With respect to count 2, the jury found appellant guilty of the charged offense of assault on a child causing death. On its own motion, the trial court struck the great bodily injury and prior conviction allegations, pursuant to section 1385.

On July 6, 2006, the trial court sentenced appellant to 25 years to life on count 2 and to the middle term of three years on count 1, stayed pursuant to section 654.

On July 20, 2006, appellant filed a notice of appeal.

Prosecution Case

Charrikka Harris, mother of Reginald Wyatt Jr. (Reginald), met appellant in March 2001. They began a physical relationship, although Harris already had a boyfriend. Harris found out she was pregnant in July 2001, by which time appellant had another girlfriend. At first appellant seemed all right with the pregnancy, but shortly before Reginald was born, he said he did not think the baby was his and would not assume responsibility until he found out that it was his baby. After Reginald was born, appellant refused to sign his birth certificate because "it wasn't his baby." He also refused to take a paternity test or to provide any financial support.

Subsequently, appellant and Harris agreed to go on the Maury Povich Show, which was doing a show about paternity. Appellant took a paternity test before being flown to New York for the show; he and Harris were also given spending money. Povich

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

announced on the show that the paternity testing showed that appellant was Reginald's father. After they returned to Oakland, appellant's attitude changed. For about two weeks, he would come to Harris's house to feed and play with Reginald. Then, he and Harris got into an argument about appellant's girlfriend and he stopped coming over.

Appellant still refused to contribute financially, and Harris went to court to try to get appellant to help support Reginald and spend time with him. Appellant then sought a restraining order against Harris. The court referred them to a mediator. The court eventually ordered visitation for appellant for five hours every Saturday. Appellant was inconsistent in his visits. Appellant was also ordered to pay $50 per week in child support, which he did.

After Reginald's first birthday, Harris agreed to let appellant take Reginald for overnight visits. After the first overnight visit, Harris smelled marijuana on Reginald's sweater and also saw what appeared to be a burn on the back of his neck. She called the police. A paramedic looked at the mark and said it was " 'an old scratch.' " Another time, she found a lump with a scab on it on Reginald's chest. She took him to the hospital.

On Saturday, May 17, 2003, after agreeing that appellant could take Reginald for the weekend, Harris met appellant and he took Reginald with the plan that Harris would pick Reginald up the next day. Appellant had asked a few days earlier if he could take custody of Reginald and whether Harris would let Reginald move in with appellant and his girlfriend. Harris said she would think about it. Reginald was then 14 months old.

Tiffany Blake was appellant's girlfriend. They lived together in Oakland and had been together since 2002. Their daughter, Valerie, was born in February 2003. On Saturday, May 17, 2003, Reginald came to spend the night with appellant, Blake, and Valerie in their apartment. It was about the third time he had spent the night with them. Reginald slept on a pallet—a makeshift bed on the floor with a comforter, blankets, and a pillow—at the side of the bed. On Sunday morning, May 18, Blake got up at around 7:00 a.m. to get ready to go to work. It was her first day back at her job after a maternity leave and she had to be at work by 10:00 a.m.

Blake left the apartment at about 9:00 a.m. to catch the bus to work. Before that, she saw appellant playing with Reginald. He was lifting Reginald up in the air over his head, spinning him around, and bouncing him down onto the bed. Reginald had a blank look on his face and Blake said to appellant, "Maybe you shouldn't do that. Maybe he doesn't like it. Maybe he's not having fun." After that, she saw Reginald sitting and watching television until she left for work.

At about 10:00 a.m., appellant called Harris and left a message that Reginald had had an asthma attack and needed his asthma machine. He sounded nervous. When appellant called back, Harris answered the phone. Appellant said Reginald could not breathe; he also said an ambulance and the police were there. Harris hung up the phone and rushed to Children's Hospital in Oakland, where she assumed Reginald would be taken. Appellant also called Blake at work between 11:00 a.m. and 12:00 p.m. Appellant told her that Reginald was not breathing and he was waiting for an ambulance. He called her back 20 to 30 minutes later on her cell phone. He was crying and said Reginald had died.[3]

At about 10:45 a.m., Douglas Curtis, who lived in appellant's apartment building, heard a knock at his door and saw a person there holding a baby in his arms. Another baby was sitting on the floor outside. The man said, " 'Would you please dial 911? My baby is not breathing.' " The man, who looked scared, said the baby had asthma and that he had tried to call 911 but could not get through. So Curtis called 911 and, in about five or ten minutes, an ambulance and paramedics arrived.

When paramedics arrived, Reginald was lying on the sidewalk and a firefighter was administering C.P.R. Reginald was not breathing and there was no pulse. An endotracheal tube was placed in his mouth and other efforts to revive him were made, but the efforts were not successful. The paramedics then transported him to the hospital.

Oakland Police Officer Kaizer Albino obtained a statement from appellant while paramedics were still treating Reginald on the sidewalk. Appellant "was quite emotional.

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[3] Blake testified that she still visited appellant at jail and still loved him.

He was upset. His attention was focused on his son. He was not all there, so he wasn't responding to my questions." Therefore, Albino suggested they go up to appellant's apartment, which they did. In the statement obtained from appellant, appellant said he was playing with his two children that morning, after which he gave his son a cup of milk and put him down on the floor. Appellant then lay on the bed with his daughter and fell asleep. When he woke up, appellant noticed that Reginald was not breathing and had green fluid coming from his nose.

At the hospital, when doctors could not revive him, Reginald was pronounced dead. Other than a little scratch on his chin, the treating doctor saw no signs of injury or trauma on Reginald's body. Sergeant James Rullamas initially believed it was a SIDS death and asked appellant to fill out a form for the coroner's office. The form contained a question about a history of fall or accident, and appellant said Reginald fell out of his arms as he was trying to get out the door to get help. Appellant said there were no other falls or accidents.

The next day, Monday, May 19, 2003, appellant, his brother Anthony, Harris's sister, and a friend were at Harris's house when the coroner called and told Harris that the autopsy results were in and that Reginald had broken ribs, a severed liver and spleen, and had died from blunt trauma. He also said officers were en route to "pick up" appellant. Harris hung up the phone and said to appellant, "[t]hey're going to arrest you." Appellant and his brother then drove to the Oakland Police Department.[4]

On that Monday morning, after he learned the results of the autopsy, Sergeant Rullamas asked officers to prepare an arrest warrant and to arrest appellant for murder. Before any arrest was made, Rullamas learned that appellant had come to the police station with his brother, Oakland Police Officer Anthony Caldwell. Sergeants Rullamas and Nolan interviewed appellant after reading him his *Miranda* rights. In accordance with normal procedures, they interviewed appellant before taking a tape-recorded

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[4] After appellant was arrested, Harris visited him three days a week in jail for some time. Her family stopped speaking to her because she was in contact with him. She did not believe appellant killed Reginald "on purpose."

statement. Rullamas acknowledged that it was a difficult interview because appellant's brother was an Oakland police officer whose work Rullamas respected. However, harsh tactics were not necessary with appellant. It was "a very, very soft interview" since appellant "responded to kindness," which is "fairly unique."

Two tape-recorded interviews were made and were played for the jury during trial. In the first tape-recorded interview, which began at 6:14 p.m., appellant said that, after he got up on Sunday morning, he was wrestling and playing with Reginald. He was lifting him up and dropping him on the bed. Appellant described an accident that occurred while Blake was still home. Appellant was doing a move called "comin' off the top rope." As he jumped on the bed, Reginald rolled unexpectedly and appellant's hip came down on his stomach with most or all of appellant's body weight of 170 pounds. Reginald grunted like the wind had been knocked out of him. Blake then said he was playing too rough with Reginald and could hurt him, so he stopped. Reginald did not cry during any of this. He was laughing and then, after appellant fell on him, he still had a smile on his face.

After Blake left for work, appellant began playing with Reginald again. They played for 20 or 30 more minutes. He might have hit Reginald harder at that point in their play, since Blake was gone. He continued wrestling with Reginald, except he did not "come off the top rope" since he had jumped on him earlier. Appellant body slammed Reginald about four times, hit Reginald in the chest with his fist about 10 or 11 times, did the "atomic elbow" to his head, hit him in the upper chest with his forearm about three times, and then hit him in the back. Appellant also held Reginald around his neck while he had him up in the air, squeezed him between his legs, hit Reginald in the back twice with his knee (the knee drop), and did the body slam and pretend head butts. He boxed with Reginald and did the supplex many times, which involved flipping Reginald over his body onto the bed; that move made Reginald laugh every time. Appellant did not think he was hurting Reginald because he was playing with him.

When Rullamas had asked appellant at the hospital the previous day if there was any history of fall or accident, appellant did not tell him about the wrestling or falling on

Reginald because he was just playing with him and "didn't think that had anything to do with anything." He was not trying to hide anything; he just did not think that was the cause.

Sergeant Nolan noted that Sergeant Rullamas had earlier talked about every man wanting his son to be kind of tough, to be able to take it and be a man, to which appellant responded, "[H]ere my son . . . he's not movin' around. I just wanted him to move around . . . and be active . . . . [¶] All I was tryin' to . . . just kinda toughen him up. Because this . . . it's hard out here. Y'all know how many people get killed out here, too . . . ."

When Nolan asked if he or Rullamas had made any threats or promises to appellant, appellant responded in the negative. When Nolan asked, "We treated you pretty nice?" appellant responded, "Extremely."

The interview concluded at 7:16 p.m. Rullamas and Nolan left the interview room and went over appellant's statement. Much of what appellant said did not make sense to Rullamas and he thought "there had to be some kind of anger in there, some kind of punishment, or something in there, in my mind, and I wanted to ask him about that." At 8:00 p.m., they returned to the room to discuss this with appellant. Appellant said "he was trying to toughen [Reginald] up a little bit, but that none of it was out of anger." Appellant also said that it was not an attempt to discipline his son, and that his form of discipline was just to take toys away from him. Nor did it have anything to do with any frustration he was feeling.

The officers then left the room again and called the district attorney's "call-out team." A representative from the district attorney's office came to the police station, along with her inspector, after 9:00 p.m. After Rullamas briefed them on the case and they listened to the tape recorded statement, the team wanted the officers to attempt to obtain additional information in three areas: (1) why was the child with appellant outside of the hours prescribed by the court order; (2) how many times in the past had Reginald been at appellant's apartment; and (3) what was Tiffany Blake's role in raising the child.

Therefore, the officers returned to the interview room and asked appellant additional questions. Regarding the court order for visitation, appellant said he and Harris had made plans for Reginald to start spending more time with him and he wanted Reginald to get used to living with him. He also said that Reginald had spent the night at his apartment six or seven times and that Blake helped with Reginald's care.

At 11:23 p.m., Rullamas and Nolan began a second taped interview with appellant. Appellant said he was not really thinking about anything when he was wrestling with Reginald; his mind was going blank. It was "[l]ike I just had a one-track mind. I was just stuck on toughening him up, playin' with Reggie, beatin' up Reggie," by which he meant "play fighting with him." When appellant said his mind went blank, he meant that "my mind musta went blank, though, for me to really . . . hit him hard enough . . . to hurt him, and I not notice it. I wasn't payin' attention, and I wasn't thinkin' . . . . [¶] . . . But then . . . came to a point where it got more serious than that, and I didn't notice and I wasn't thinkin' . . . that I can hurt him. I wasn't thinkin'. [¶] . . . [¶] [It got more serious] because he was hit too hard. He was hit too hard, and I wasn't . . . doin' nothin' to, you know, not hit him no harder." When asked how hard he was hitting Reginald, appellant said, "I was hittin' him pretty hard."

Appellant said he did not listen when Blake told him to stop being so rough because he was "[h]ard-headed. Stubborn. Stuck in my ways. Didn't want a woman to be tellin' me how to raise my son." Appellant said he had wrestled with Reginald before, but this was the first time he wrestled with him "like this," "[t]o this point . . . where I was outta control." Appellant thought he lost control at the time he started slamming Reginald on the bed. He said, "14 months old. Just a little baby. Shouldn'ta been playin' wit' 'im like that." When asked what made it turn from play wrestling to real wrestling, appellant said, "Just wasn't thinkin' at all. Just wasn't thinkin'."

Appellant said after he landed on Reginald, Reginald lay down and appellant said, " 'Nah, it ain't time to go to sleep. Come on.' And we just kep' on playin'." Appellant also acknowledged that he felt pressures related to money, getting his barber's license,

"[j]ust the every day hustle and bustle . . . just tryin' to make it. Tryin' to stay out the way." This interview ended at 11:39 p.m. and appellant was taken to jail.

Rullamas interviewed Tiffany Blake on May 21, 2003. The jury listened to Blake's tape-recorded interview during trial. During the interview, Blake said appellant started playing with Reginald on the Sunday morning. He would lift Reginald up in the air, swing him around, and put him on the bed. Reginald was crying and so Blake told appellant not to play with him like that, that she thought he was playing too rough. She thought maybe it scared Reginald to be up in the air.

Blake said appellant had never done anything that caused her concern regarding his ability to care for his son or their daughter. He had never done anything reckless or dangerous and was a good father. They were trying to get custody of Reginald and were working on getting themselves together so they could have both children and support them financially. They were having Reginald stay over on the weekends so he could get used to living with them.

Dr. David Levin, a pathologist, performed an autopsy on Reginald's body on May 19, 2003. Reginald, who was 31 inches tall and weighed 26 pounds, died of shock and hemorrhage due to blunt force trauma to the chest and abdomen. During an external examination of the body, Dr. Levin found an abrasion on the chin and two abrasions on the neck. There was a laceration of the frenulum of the upper lip and a contusion on the chest.

Internally, Dr. Levin found an internal contusion to the forehead, hemorrhage on the surface of the heart, on the tissue behind the heart, and at the hilus of the left lung. There were multiple lacerations to the liver, which caused internal bleeding of 200 milliliters of blood into the abdominal cavity. There was also hemorrhage behind the abdominal cavity and hemorrhage in the mesentery of the small and large intestines. There were acute fractures of the fifth and sixth ribs on both the right and left side of the back of the body. There was also mild cerebral swelling.

Reginald's injuries were consistent with blunt force trauma to his back, abdomen, chest, and head. Some of the injuries could have been caused by a person who weighed

170 pounds jumping up and landing with his hip onto the midsection of the child. They also could have been caused by multiple instances of blunt force trauma. There would not necessarily be bruising, especially in softer areas like the abdomen. The laceration to the frenulum could have been caused by blunt force to the face or something being jammed into the mouth. The cerebral swelling could have been caused by blunt force trauma to the head, by changes occurring during the dying process, or by administration of a large amount of fluids by medical personnel in an attempt to regain blood pressure. The contusion on the chest could have been caused by someone attempting to administer CPR, but CPR would not have caused the fractured ribs in the back of the body.

A child who suffered these injuries would not die instantaneously and Dr. Levin would expect that the child would cry. Death could occur in less than an hour up to many hours.

Dr. James Crawford, medical director of the Center for Child Protection at Children's Hospital in Oakland, testified as an expert in pediatrics, in the medical evaluation of child abuse. Dr. Crawford reviewed Reginald's autopsy protocol. Reginald's injuries were "at the end of the bell curve," that is, at a level of injury that is uncommon in a one-year old. The types of injuries he suffered, including the multiple lacerations to the liver and the multiple sites of internal bleeding, "are seen only in the most serious events," such as children who are in car crashes or hit by motor vehicles.

The likelihood that Reginald's ribs were broken during CPR was "extraordinarily small." The fractures could conceivably have been caused by blunt force trauma to the child's back, but would have to have been "something that would have been quite violent, quite out of the ordinary," given how uncommon rib fractures are in children. Unless he was unconscious or had a profound neurological condition, a child would be expected to react to the types of injuries shown to have occurred here by crying and clearly demonstrating that he was in distress.

As to his opinion regarding how many times Reginald must have been hit in order to receive these injuries, Dr. Crawford believed there had to have been "at least multiple, and potentially many impacts." It is remotely possible that one extremely violent lateral

compression could have caused all of the significant injuries. However, it is more likely that the injuries were caused by more than one blow. Dr. Crawford explained, "[T]he fewer number of impacts that one is invoking, to explain it, the more violent those impacts have to be. So a single event would—it was, you know, to crush the child's body this way would have been an extraordinarily violent act, in order to cause all these injuries at the same time, as opposed to multiple lessers, but still dangerously violent acts, to different parts of the body." The level of violence would be equivalent to getting hit by a motor vehicle or being a passenger in a car crash.

Defense Case

Appellant, who was 31 years old at the time of trial, testified on his own behalf. He lived in Winfield, Louisiana until he was 28 years old, at which time he moved to California. He initially lived with his brother and his stepmother in Oakland. His jobs in California included working at a bar, working at Kmart, and working at a mattress warehouse. He had prior convictions in Louisiana for battery on a police officer, possession of a weapon, and possession with intent to distribute cocaine.

When appellant met Charrikka Harris, he thought he was sterile because he had "slept with a lot of girls" and none of them got pregnant. When Harris got pregnant, he did not think the baby was his. Reginald was born on March 6, 2002. He went on the Maury Povich Show to find out if Reginald was his baby. Once he learned Reginald was his baby, he wanted to be with him. He saw Reginald almost daily for a couple of weeks, but then stopped coming by Harris's home very much and seldom saw his son, partly because he and Harris would always argue.

After appellant and Harris went to a mediator, he saw Reginald more often. When he and his girlfriend, Tiffany Blake, moved to Walnut Street in Oakland, in February 2003, he saw Reginald even more regularly because he now had a more stable residence. Reginald spent the weekend with appellant five or six times before Reginald's death. Appellant never struck Reginald except for one time when he slapped Reginald on the hand for playing with the steering wheel in the car. Appellant never had to discipline Reginald because he was a good baby and easy to care for.

On Saturday, May 17, 2003, Harris brought Reginald to appellant for a weekend visit. On Sunday morning, while Blake was getting dressed for work, appellant started playing with Reginald, swinging him up in the air and putting him on the bed. Blake told him he was playing too rough with Reginald, who was whining. After Blake left the apartment, appellant began playing with Reginald again, picking him up and tossing him on the bed. Reginald laughed while appellant did this. Appellant also put Reginald on the bed and jumped on it to make it shake, which he had done in the past.

Appellant never did any wrestling moves on his son. When he described to the police the wrestling moves he did on Reginald, it was all pretend wrestling he was talking about. He never struck Reginald hard, only pushed him while playing with him and doing "make-believe wrestling moves," such as off-the-top-rope, head butt, supplex, and an atomic elbow to the head. At one point, an accident occurred. Appellant had jumped in the air and was coming down on the bed to make it shake, when Reginald rolled toward him and appellant fell on Reginald, hitting Reginald in the back with his hip. It seemed like Reginald had the wind knocked out of him, like he could not get his breath. Then he started breathing again and appellant thought he was all right. Reginald did not cry. Other than falling on Reginald, appellant did not strike him with force or do anything harmful to him.

Appellant stopped playing after he fell on Reginald. He got Reginald some milk and sat him down on the floor on his pallet. Reginald took his milk, looked at the television, and then lay down. Appellant lay down on the bed with his daughter, Valerie, and drifted off to sleep. It was about 10:00 a.m. at that point.

When appellant woke up, he saw that Reginald was not on his pallet; he was on the floor. He tried to wake Reginald up, but he was not responsive. He was breathing faintly and appellant hit him on the back and opened his mouth in case something got stuck in there, and then tried to do CPR on him. He also called his stepmother and Harris, but neither one answered the phone. At first, he did not think to call 911 because in his hometown there was no 911. Then he tried to call 911, but could not get through. As he did CPR, some green matter came out of Reginald's nose and appellant panicked.

He picked up Reginald in one hand and Valerie in the other and started to leave the apartment, but stumbled over a diaper pail and dropped both children. Reginald's head hit the floor. He picked up both children and went to a neighbor's door, where he told the neighbor that his son was not breathing. The man said he would call 911, and the person on the line talked to appellant as he tried to do CPR again until the ambulance came.

While the paramedics were working on Reginald, a police officer asked appellant questions. Appellant did not tell the officer that he had been playing with Reginald and had fallen on top of him because appellant was focused on what was happening to his son and he also did not make a connection between falling on Reginald and his condition. While riding to the hospital, appellant learned that Reginald was dead.

Appellant spent the night at the home of his brother, Anthony Caldwell, where he only got a little bit of sleep. The next afternoon, appellant's brother drove them to Harris's house. Harris was there with her sister and one or two other people. The coroner's office called while appellant was there. Harris answered the phone; a short time later she said, "blunt trauma," and dropped the phone. She was crying and in a state of shock. As appellant tried to comfort her, Harris's sister came in and said someone had hit Reginald in the chest hard. No one accused appellant of killing Reginald, and appellant did not know what had caused Reginald's death. Appellant first learned during trial that his act of falling on Reginald could have caused his son's substantial injuries.

Caldwell suggested going to the police station because the police wanted to talk to appellant. They went to the police station and Caldwell spoke with Nolan and Rullamas who said that they were just going to ask appellant a few questions and would be through in a few hours. The officers told appellant, " 'We'll take care of you,' " and also said after he answered the questions, they would let him go back home to his family. Caldwell told appellant to "cooperate with them in every way, that they [are] going to take care of you, that these [are] some good guys." Appellant did not think he needed a lawyer because the officers just wanted to talk to him. He did not realize they had already issued a warrant.

Appellant was tired from lack of sleep and his mind was in a complete daze. He told the officers that he had been playing with Reginald when he accidentally fell on his son. He also explained that he was play-wrestling with Reginald. As he described the various wrestling terms, he "just kind of took on the terms," saying, " 'I body-slam him,' whatever." He thought the officers understood he was talking about play-wrestling. Then, when the officers said "it had to be [something] more [than just falling on Reginald], I feel like, well, in my mind, I start second-guessing myself, even though I knew what I was doing, I start second-guessing myself . . . so I start being like, well, maybe I did hit him harder than what I really thought I was . . . ." His mind was "just shredded" with grief and appellant felt shame and guilt about what had happened. Then, given that the officers would not take him at his word, he thought maybe he was not remembering it clearly and maybe he had hit his son hard and had not realized it. He thought the officers had the facts, so he went along with what they said.

The officers did not start tape recording appellant's statement until they got him to say that he had hit his son hard while wrestling with him. Also before taping him, Sergeant Rullamas said something about every man wanting his son to be kind of tough, but appellant had only said that Reginald was good and sat still a lot, and appellant wanted him to be more active. Then, on tape, appellant said he wanted to toughen him up, by which he only meant make him more active.

After the first tape-recorded interview, the officers left the room, then came back and said "[t]his is not adding up. Something else had to happen." They also said, "[s]ometimes people lose control, and it's all right. You know, we're all human, and we make mistakes. You know, the D.A.s are having a hard time understanding this." The officers introduced a new theme of appellant's losing control and being angry when Reginald got hurt. Later that night, the officers took a second tape-recorded statement. With both statements, it seemed like everything was scripted, with the officers and appellant "[getting] the answers down" before making the recordings. Appellant explained that when he said on the second tape that his mind went blank and he lost control, he meant he had just been playing without thinking about anything and he put his

son in jeopardy by playing with him. By the end of the second interview, appellant had been convinced that he had blacked out, struck his son too hard, and killed him. In fact, appellant did not recall blacking out or hitting Reginald too hard. He was just tired and wanted to go home, and the officers would not accept his initial answers.

Anthony Caldwell testified that he is three years older than appellant. They have the same mother, but different fathers. Caldwell became a police officer in Oakland in 1999 and was an officer at the time of appellant's arrest. He and appellant grew up in a very segregated town in Louisiana where Black people knew to "stay in your place when authorities approach you for anything." Because appellant's mother worked at the school board and his uncle and brother played football, their family got more favorable treatment than other Black people. Caldwell had seen appellant interact with children and he was always fun, loving and playful; the kids loved him. He never saw appellant get angry or frustrated with young children.

Appellant was elated when he learned that Reginald was his son, and became more focused on barber college and obtaining his license. Caldwell never saw appellant express any frustration toward Reginald.

The day after Reginald died, Caldwell took appellant to Harris's house to make funeral arrangements. While they were there, the coroner called with the autopsy results. Harris started screaming, " 'He beat my baby. He beat my baby.' " Caldwell called the police station and talked to Nolan, who said he needed to talk to appellant. Appellant told Caldwell to take him to the police station, which Caldwell did. Caldwell told appellant that he had nothing to hide and to just be truthful with the officers. Rullamas and Nolan said that they would take care of appellant and that he could call them when they finished the interview, in maybe two or three hours. When they said they would take care of appellant, Caldwell understood it to mean simply that they would treat him fairly. He believed he would be able to pick appellant up after the questioning, not because of anything the officers said, but because Reginald's death had so clearly been an accident. Appellant had told him that he had been playing with Reginald when he accidentally fell on him.

Patricia Street, appellant's mother, testified that appellant had been evaluated when he was in fourth grade and was classified as hyperactive. Appellant attended college briefly, but dropped out. Appellant was excited when he learned Reginald was his son.

Elayne Caldwell, appellant's stepmother,[5] testified that appellant lived with her for about two years starting in 2001 and sometimes took care of her granddaughter. Appellant was always a considerate, kind, loving person. She saw appellant with Reginald on numerous occasions and appellant had nothing but love for his son, and wanted to have more time with him.

Lionell Johnson, appellant's uncle, testified that he helped raise appellant. He never knew him to have a violent temper or to do any act of violence toward a child. Appellant treated Johnson's children with love and they loved and respected him.

Dr. Paul Herrmann, a pathologist, testified as an expert in the field of pathology. He had reviewed Reginald's autopsy records and believed Reginald's injuries could have resulted from a single sharp blow to the back right side, such as from the weight of a 170-pound man falling on him. The injuries were not consistent with the child being beaten with fists because there was little bruising of the body. However, other forms of abuse, such as the child's abdomen being smashed onto one's knee would probably not leave a bruise because a knee is such a large, blunt object. If a heavy weight were dropped on the child when the child was on the floor, a large blunt object would not cause bruising, but would compress the body, with the force causing the ribs to break and the liver to be lacerated. It was equally probable that Reginald's major injuries were caused by a single blow as by multiple blows. Dr. Herrmann believed the injuries to Reginald's heart were likely due to the administration of CPR. The cause of the tear to Reginald's frenulum was as consistent with an endotracheal tube being placed in his mouth as with violent force.

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[5] In fact, Ms. Caldwell was stepmother to appellant's half-brothers, but she considered appellant her stepson too.

On cross-examination, Dr. Herrmann said he believed the chances of Reginald being injured by a person falling on him on a bed would be much less than if the child were on the floor. It would be much less common for such extreme injuries to occur if the child was on a bed when someone fell on him. However, "it's still a likelihood or a possibility." The injuries here would be excessive to what Dr. Herrmann would expect if someone fell sideways onto the child on a bed, as compared to someone "falling free" onto the child. He did not have an opinion as to whether Reginald was physically abused.

After receiving these severe injuries a child might be screaming from pain or might go into shock immediately and be absolutely still. Either way, Dr. Herrmann believed a caregiver would notice a difference in the child after such injuries were sustained. Reginald's death was not immediate; he bled to death. If he went into shock, it is possible that he lay down or appeared to be going to sleep.

Rebuttal

Rullamas testified on rebuttal that neither he nor anyone in his presence ever told appellant that he would be finished in a few hours; that he could go home afterwards because he needed to be with his family; or that, after he finished answering questions, he could go home. In fact, a warrant for appellant's arrest had already been issued and he was going to be arrested regardless of whether he talked to the officers. Rullamas never brought up the idea that appellant was trying to toughen up his son. Rather, appellant mentioned that his child was acting like a baby and appellant wanted to toughen him up because of the environment in Oakland. He never told appellant that he must have lost his temper or that the district attorney was having a hard time understanding how it was he lost control and that appellant should " 'just say this so the D.A. can understand it better.' "

III. DISCUSSION

A. *Prior Appellate Proceedings*

In our original opinion in this matter, *People v. Wyatt* (Jan. 31, 2008, A114612) [nonpub. opn.], we reversed Wyatt's conviction on the ground that there was insufficient evidence to support the conviction for assault on a child causing death. In *Wyatt, supra,*

49 Cal.4th at page 778 our Supreme Court reversed concluding that we "misapplied the mens rea standard for assault."

The *Wyatt* court held that "a defendant may be guilty of an assault within the meaning of section 273ab if he acts with awareness of facts that would lead a reasonable person to realize that great bodily injury would directly, naturally, and probably result from his act. [Citation.] The defendant, however, need not know or be subjectively aware that his act is capable of causing great bodily injury. [Citation.] This means the requisite mens rea may be found even when the defendant honestly believes his act is not likely to result in such injury. [Citation.]" (*Wyatt, supra,* 48 Cal.4th at p. 781.)

The court went on to find that, based on its review of the record, "a rational jury could find beyond a reasonable doubt that Reginald [Wyatt's son], who was 14 months old, died at the hands of defendant, a caretaker who intentionally used force that a reasonable person would believe was likely to cause great bodily injury. [Citations.] First, defendant's own statements furnished substantial evidence that he intentionally acted to strike Reginald [citations]; by his own account, defendant was fully aware he was striking his son a number of times with his fist, forearm, knee, and elbow. Second, the physical evidence amply showed that Reginald suffered extensive injuries, including internal bleeding at multiple sites, multiple lacerations to the liver, acute rib fractures, and cerebral swelling. Third, expert testimony established that Reginald's injuries were likely caused by multiple impacts or instances of blunt force trauma, that blunt force trauma does not necessarily result in external bruising, especially in softer areas like the abdomen, and that Reginald's injuries were similar to the types of injuries seen only in the most serious events, such as when children are hit by cars or are in car crashes. Consequently, even though Reginald's body lacked external signs of significant trauma, the nature and extensiveness of his internal injuries provided sufficient evidence that defendant used an amount of force a reasonable person would believe was likely to result in great bodily injury on a young child. [Citations.] On this record, we have no trouble concluding that substantial evidence supports defendant's conviction of child abuse homicide." (*Wyatt, supra,* 48 Cal.4th at pp. 784-785.)

The *Wyatt* court returned this matter to us for further proceedings consistent with that opinion. We now address the remaining issues in this appeal.

B. *Sua Sponte Duty to Instruct on Lesser Included Offenses of Simple and Aggravated Assault*

Appellant argues that the trial court erred in not instructing the jury on assault (§ 240) [simple assault] and aggravated assault (§ 245, subd. (a)(1) [assault by means of force likely to cause great bodily injury]) as lesser included offenses of section 273ab. We conclude that, although the trial court was not required to instruct the jury, sua sponte, on aggravated assault as a lesser included offense of section 273ab, it was required to instruct the jury on simple assault pursuant to section 240. Its failure to do so was prejudicial.

In *People v. Basuta* (2001) 94 Cal.App.4th 370, 392, the court held that both simple and aggravated assault are lesser included offenses of section 273ab. Therefore, if the record contains substantial evidence of these crimes, the trial court was required to instruct the jury on them. (*Ibid.*; see also *People v. Birks* (1998) 19 Cal.4th 108, 118.) The principles that govern our review of this issue are well settled. "In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Instructions on lesser included offenses are required only if the evidence would justify a conviction of the lesser included offense. (*People v. Lopez* (1998) 19 Cal.4th 282, 287; *People v. Leach* (1985) 41 Cal.3d 92, 106

We consider the question of whether the record contains such evidence with regard to each of these offenses separately.

1. Simple Assault (§ 240)

Section 240 provides that "[a]n assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." CALJIC No. 9.00 sets out the elements of simple assault as follows: "In order to prove an assault, each of the following elements must be proved: [¶] 1. A person willfully [and unlawfully] committed an act which by its nature would probably and directly result in the application

of physical force on another person; [¶] 2. The person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person; and [¶] 3. At the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another." CALJIC No. 9.00 further provides that "The word 'willfully' means that the person committing the act did so intentionally. However, an assault does not require an intent to cause injury to another person, or an actual awareness of the risk that injury might occur to another person. To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted it may be considered in connection with other evidence in determining whether an assault was committed [and, if so, the nature of the assault]."

Simple assault does not, in contrast to sections 273ab and 245, involve a finding that the force involved would be likely to "produce great bodily injury." Rather, a jury could convict appellant of the lesser included offense of simple assault upon a finding that the force he inflicted on his son fell short of that which was likely to produce great bodily injury.

Appellant's own testimony and that of his medical expert, Dr. Paul Herrmann, provides substantial evidence of this lesser offense. Appellant testified that he did not perform any so-called "wrestling moves" on his son. Rather, when he described these moves to the police he was not describing actions he actually took, but "make-believe wrestling moves," such as "off-the-top-rope," "head butt," "supplex," and an "atomic elbow" to the head. Appellant denied striking his son hard. At most, he pushed him while playing with him.

Appellant testified that at one point while he was playing with his son he jumped in the air and, while he came down on the bed to make it shake, his son rolled toward him. Appellant fell on his son hard, and hit him in his back with his (appellant's) hip. It appeared to defendant that his son had the wind knocked out of him because he seemed unable to get his breath. However, when his son began breathing again, appellant

thought he had recovered. His son did not cry. Other than this, appellant testified that he did not strike his son with any force or do anything harmful to him.

Appellant testified that he stopped playing with his son after he fell on him. He got him some milk. His son took the milk, looked at the television and lay down. Appellant too fell asleep and it was not until he woke up that he realized his son was unresponsive and something was seriously wrong.

Appellant testified that the statements he made to the police regarding his conduct with his son made it clear that he was play wrestling with Reginald, not actually hurting him. At the time he made his recorded statement, he was tired from lack of sleep and in a daze. He was under the impression that the officers knew that the wrestling he was referring to was not real. However, when the officers said "it had to be [something] more [than just falling on Reginald], I feel like, well, in my mind, I start second-guessing myself, even though I knew what I was doing, I start second-guessing myself . . . so I start being like, well, maybe I did hit him harder than what I really thought I was . . . ." His mind was "just shredded" with grief and appellant felt shame and guilt about what had happened. Then, given that the officers would not take him at his word, he thought maybe he was not remembering it clearly and maybe he had hit his son hard and had not realized it. He thought the officers had the facts, so he went along with what they said.

Appellant's testimony regarding the cause of his son's injuries coming from the moment when he fell on him while trying to make the bed shake was corroborated by the testimony of Dr. Paul Herrmann, who testified as an expert in the field of pathology. Based on his review of Reginald's autopsy records, Dr. Herrmann opined Reginald's injuries could have resulted from a single sharp blow to the back right side, such as from the weight of a 170-pound man falling on him. He also testified that the injuries to Reginald were not consistent with the child being beaten with fists because there was little bruising of the body. However, other forms of abuse, such as the child's abdomen being smashed onto someone's knee would probably not leave a bruise because a knee is such a large, blunt object. If a heavy weight were dropped on the child when the child was on the floor, a large blunt object would not cause bruising, but would compress the

body, with the force causing the ribs to break and the liver to be lacerated. In sum, Dr. Herrmann testified that it was equally probable that Reginald's major injuries were caused by a single blow as by multiple blows.

With regard to Reginald's other injuries, Dr. Herrmann believed the injuries to Reginald's heart were likely due to the administration of CPR. The cause of the tear to Reginald's frenulum was as consistent with an endotracheal tube being placed in his mouth as with violent force. On cross-examination, Dr. Herrmann said he believed the chances of Reginald being injured by a person falling on him on a bed would be much less than if the child were on the floor. It would be much less common for such extreme injuries to occur if the child was on a bed when someone fell on him. However, "it's still a likelihood or a possibility." The injuries here would be excessive to what Dr. Herrmann would expect if someone fell sideways onto the child on a bed, as compared to someone "falling free" onto the child. He did not have an opinion as to whether Reginald was physically abused.

After receiving these severe injuries a child might be screaming from pain or might go into shock immediately and be absolutely still. Either way, Dr. Herrmann believed a caregiver would notice a difference in the child after such injuries were sustained. Reginald's death was not immediate; he bled to death. If he went into shock, it is possible that he lay down or appeared to be going to sleep.

This testimony, which we consider without evaluating the credibility of either appellant or Dr. Herrmann, is substantial enough to support a jury finding that appellant's actions fell short of those which a reasonable person might believe would lead to the application of force likely to "produce great bodily injury." The evidence is, however, enough to support a conviction under section 240. Appellant testified that, when he jumped on the bed to make it shake, he did not jump *on* Reginald and, therefore, did not apply force likely to produce great bodily injury. Rather, he jumped on the bed *next to* Reginald, and Reginald rolled under him as he was coming down on the bed. Dr. Herrmann's testimony provides evidence on which the jury could conclude that this act—rather than any of appellant's later actions—resulted in Reginald's death. If the jury

believed appellant, it could conclude that the actions he described were of "an act which by its nature would probably and directly result in the application of physical force on another person" and that appellant was "aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person."

The People, however, argue that the prosecution's evidence proved child abuse homicide based on the aggravated assault of Reginald and, therefore, the trial court was not required to instruct on simple assault. This argument ignores the general rule that, in determining the sufficiency of the evidence to justify the giving of an instruction under a lesser included offense, the facts must be construed in a manner that is the most favorable to appellant. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 795-796 (*Stewart*).) We look at the evidence's "bare legal sufficiency, not its weight." (*Breverman, supra,* 19 Cal.4th at p. 177.) It does not follow, as the People suggest, that a jury could not have found that appellant committed only a simple assault. And, while it is certainly the case that the appellant also argued that the jury could acquit him on the ground that his conduct was accidental and, therefore, could not constitute an assault, this does not negate the possibility that a jury would disagree with the "accident" theory, but also find that the evidence fell short of aggravated assault.

The trial court, therefore, should have instructed the jury on simple assault under section 240. Its failure to do so was prejudicial. (*People v. Watson* (1956) 46 Cal.2d 818.)

3. *Aggravated Assault*

In contrast to simple assault, the trial court was not required to instruct sua sponte on aggravated assault under section 245. As the People correctly point out, if the jury found that appellant committed an aggravated assault it would also, necessarily, find appellant guilty of child abuse homicide under section 273ab given that both offenses involve the same conduct: force likely to produce "great bodily injury." Thus, if the jury found that appellant had used such force, it would have also found that such force led to

Reginald's death and would have convicted appellant under section 273ab rather than section 245.[6]

D. ***Omission of Element of Section 273ab***

Appellant argues that the trial court erred in instructing the jury under CALCRIM No. 820 because that instruction omits an element of section 273ab, namely that the assault that leads to the child's death be by means of force "that to a reasonable person" would be likely to produce great bodily injury. Although we need not address this and the remaining issues regarding instructional error, given our conclusion that the trial court erred in failing to instruct the jury on simple assault, we do so in order to assist the parties in the event of a retrial.

The trial court instructed the jury as follows: "Now the defendant is charged in count two with killing a child under the age of eight by assaulting the child with force likely to produce great bodily injury[.] [¶] To prove that the defendant is guilty of this crime, the People must prove the following: [¶] One, that the defendant had the care or custody of the child who was under the age of eight; [¶]Two, he did an act that by its nature would directly and probably result in the application of force to the child; [¶] Three, he did that act willfully; [¶] Four, the force used was likely to produce great bodily injury; [¶] Five, when he acted, he was aware of facts that would lead a reasonable person to realize that his act, by its nature, would directly and probably result in great bodily injury to the child; [¶] And six, when he acted, he had the present ability to apply force likely to produce great bodily injury to the child; [¶] And seven, his act caused the child's death." ~(8 RT 1516-1518)~ The court then defined a number of the terms contained in this instruction. It told the jury, "Someone commits an act willfully when he does it willingly or on purpose. It's not required that he intend to break the law or hurt someone else, or gain any kind of advantage. [¶] Great bodily injury, as I said before, means significant or substantial physical injury. It's an injury that is greater than minor

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[6] For this reason, we reject defendant's contention that the trial court erred in not providing the jury with a verdict form for aggravated assault.

or moderate harm. [¶] An act causes death if:[¶] The death was the natural and probable consequence of the act; [¶] The act was a direct and substantial factor in causing the death; [¶] And the death wouldn't have happened without the act." ~(Ibid)~ Finally, the court explained that "The natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, you should consider all of the circumstances established by the evidence. [¶] And a substantial factor, as I've used that term, is more than a trivial or remote factor. However, it doesn't need to be the only factor that caused death."

Appellant's argument that the court did not instruct the jury on the necessity of finding that the force used was such that a reasonable person would find it likely to produce great bodily injury does not hold up to scrutiny. The trial court certainly explained to the jury that child abuse homicide involves force that "was likely to produce great bodily injury" and that the jury could find appellant guilty of this count if it found that he "was aware of facts that would lead a reasonable person to realize that his act, by its nature would directly and probably result in great bodily injury to the child." The court also told the jury that the child's death must be the natural and probable consequence of the appellant's act, and that a "natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes." In sum, the trial court correctly instructed the jury, under CALCRIM No. 820, that the force used must have appeared likely to a reasonable person to result in great bodily injury.

E. ***Sua Sponte Duty to Instruct on Involuntary Manslaughter as Necessarily Included Offense***

Wyatt contends that the trial court erred in failing to instruct the jury, sua sponte, on involuntary manslaughter as a lesser-included offense of section 273ab. We disagree.

The issue of whether involuntary manslaughter is a lesser included offense of section 273ab was addressed in *Orlina v. Superior Court* (1999) 73 Cal.App.4th 258 (*Orlina*). In that case, the court found that involuntary manslaughter is a lesser *related,*

rather than lesser-included, offense of section 273ab. (*Id.* at p. 262.) In reaching this conclusion, the *Orlina* court explained, "[s]ection 273ab provides: '[a]ny person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in state prison for 25 years to life. . . .' Section 192, subdivision (b) defines involuntary manslaughter as 'the unlawful killing of a human being without malice' where it occurs 'in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. . . .' [¶] One of the elements of section 273ab is an assault be committed 'by means of force that to a reasonable person would be likely to produce great bodily injury.' The corresponding element for involuntary manslaughter is that the killing occur 'in the commission of an unlawful act, not amounting to felony' or, in the alternative, 'in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.' (§ 192, subd. (b).) An assault is an unlawful act which does not amount to a felony. (§§ 241, 240, subd. (a).) Therefore, the first alternative for involuntary manslaughter under section 192, subdivision (b) corresponds to the element specified in section 273ab. [¶] However, when we compare the second alternative for involuntary manslaughter with section 273ab, we find a distinction between 'force that to a reasonable person would be likely to produce great bodily injury' and an 'act which might produce death . . . without due caution.' Section 273ab is predicated on a *probability of great bodily injury* to the victim (see *People v. Preller* (1997) 54 Cal.App.4th 93, 98), while the second definition of involuntary manslaughter is based on the *possibility of the death* of the victim. Section 273ab speaks to *reckless* conduct, ('likely to produce' injury) while the second definition of involuntary manslaughter encompasses *careless or negligent* conduct ('without due caution and circumspection'). It is therefore apparent that the elements of involuntary manslaughter are not necessarily encompassed within the elements of section 273ab. Involuntary manslaughter is a lesser-related rather than a lesser-included offense of the charged

crime." (*Orlina, supra,* 73 Cal.App.4th at pp. 261-262; see also *Stewart, supra,* 77 Cal.App.4th at p. 796.)

Finding the *Orlina* court's analysis persuasive, we reject appellant's argument and find that the trial court did not have a sua sponte duty to instruct on involuntary manslaughter as a lesser included offense of section 273ab.

F. ***Instruction on Criminal Negligence***

Appellant contends that the trial court erred because it did not sua sponte instruct the jury that criminal negligence cannot support an assault conviction. In the alternative, he argues that defense counsel was ineffective because he did not request such an instruction.

A trial court has a sua sponte duty to give amplifying or clarifying instructions " 'where the terms have a "technical meaning peculiar to the law." ' [Citations.]" (*People v. McElheny* (1982) 137 Cal.App.3d 396, 403.) In general, however, "[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Lang* (1989) 49 Cal.3d 991, 1024.)

Here, in its instructions involving involuntary manslaughter, the court instructed the jury on the meaning of criminal negligence: "[M]ore than ordinary carelessness, inattention, or mistake in judgment. The person acts with criminal negligence when: [¶] he acts in a reckless way that creates a high risk of death or great bodily injury. . . ." The court's instruction under CALCRIM No. 820 states that child abuse homicide involves force that " 'to a reasonable person would be likely to produce great bodily injury,' " a degree of force that is not the same as that involving criminal negligence. Although the trial court was not required, sua sponte to inform the jury that a violation of section 273ab cannot be based on criminal negligence, on retrial, appellant can certainly request such a clarifying instruction. Similarly, with regard to appellant's argument that the trial court should have instructed sua sponte that injury alone is not sufficient to establish an assault, although the court had no such sua sponte duty, should counsel believe such an instruction would be useful, then counsel should request it.

G. *Cruel and/or Unusual Punishment*

Appellant contends that his sentence of 25 years to life, the term prescribed under section 273ab, violates the United States Constitution as well as the California Constitution proscription against cruel and unusual punishment because the sentence for section 273ab is " 'grossly disproportionate' to the crime . . . ." (*Harmelin v. Michigan* (1991) 501 U.S. 957, 997-998, conc. opn. of Kennedy, J.].) Although we have reversed appellant's conviction under section 273ab, we note that this claim was considered and rejected in *People v. Norman* (2003) 109 Cal.App.4th 221 (*Norman*) and *People v. Lewis* (2004) 120 Cal.App.4th 837 (*Lewis*), two cases with which we agree.

With regard to appellant's claim under the federal Constitution, the *Norman* court pointed out that, because the United States Supreme Court has held that a "sentence of life without parole is not cruel and unusual for certain nonviolent offenses, then, a fortiori, a sentence of 25 years to life is not cruel and unusual for the death of a child under age eight." (*Norman, supra* 109 Cal.App.4th at p. 230.)

In *Lewis,* the court held that under the California Constitution the "imposition of a prison term of 25 years to life for the defense described in section 273ab is not in the abstract cruel and unusual." (*Lewis, supra,* 120 Cal.App.4th at p. 856.) The *Lewis* court pointed out that, "[t]he Legislature could reasonably conclude given the particular vulnerability of the victim, the relationship of the victim to the defendant, the violent and purposeful nature of the act involved and the fact a death results, the crime described in section 273ab is a very serious one and a term of 25 years to life was appropriate." (*Lewis, supra,* 120 Cal.App.4th at p. 856.) Nor was it the case that the punishment was unconstitutional as applied even to an appellant with no criminal record, given in particular, the "amount of force" necessary to cause great bodily injury to the child. (*Ibid.*)

H. *Jury Unanimity*

Given the outcome in this case, we need not revisit our earlier conclusion that the trial court was not required to instruct on jury unanimity. However, we are in agreement with Justice Kline's admonition that the trial court heed the Third District Court of

Appeals' advice in *People v. Norman* (2007) 157 Cal.App.4th 460, to the effect that "failure to give a jury unanimity instruction (now CALCRIM No. 3500) is the most common kind of instructional error in criminal cases," and its related advice that trial courts "put CALCRIM No. 3500 on your list of standard instructions to give, then ask yourself: 'Is there some reason *not* to give this instruction in this case?' " (*Id.* at p. 467).

IV. DISPOSITION

The conviction in count 2, assault on a child causing death (§ 273ab), is reversed. In all other respects, the judgment is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Wyatt**
No.: **A114612**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 14, 2011, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 14, 2011, at San Francisco, California.

B. Wong
Declarant

B. Wong
Signature

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