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. S189786

First Appellate District, Division Two, Case No. A119501
Alameda County Superior Court, Case No. C0147107
The Honorable Jon Rolefson, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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ISSUE

Did the trial court prejudicially err by failing to instruct the jury on the court's own motion regarding simple assault (Pen. Code, § 240) as a lesser included offense of assault on a child by means likely to produce great bodily injury, resulting in death (Pen. Code, § 273ab, subd. (a))?

INTRODUCTION

Fourteen-month-old Reginald Wyatt Jr. (hereafter Reginald) died from massive blunt trauma injuries to his chest and abdomen suffered while he was in the care of appellant, his father. Appellant told the police that he hit Reginald multiple times in the chest, head, and back in order to "toughen him up." Appellant was arrested for murder. A jury convicted appellant of involuntary manslaughter and assault on a child by means likely to produce great bodily injury, resulting in death, also known as child abuse homicide.

In an unpublished opinion filed on January 31, 2008, the First Appellate District, Division Two, reversed appellant's conviction for child abuse homicide, having "concluded the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 (*Wyatt*).)

On May 14, 2008, this Court granted respondent's petition for review. In an opinion filed on May 10, 2010, this Court concluded that "substantial 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." (*Wyatt*, *supra*, at p. 779.) Holding 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 its opinion. (*Id.* at p. 786.)

On remand, in another unpublished decision, the Court of Appeal again reversed the conviction of child abuse homicide. The court found prejudicial error in the trial court's failure to instruct sua sponte on simple assault as a lesser included offense of child abuse homicide. On March 23, 2011, this Court granted respondent's petition for review.

STATEMENT OF THE CASE

Appellant lived with his girlfriend, Tiffany Blake, and their infant daughter, Valerie, in an apartment in Oakland. (3 RT 453, 460.) Appellant began taking Reginald, who was his child from another relationship, for overnight visits after Reginald's first birthday. (1 RT 152.) Appellant, who had initially denied paternity, saw Reginald only sporadically during the child's first year. (1 RT 140, 148-151.) But at the time of Reginald's death, appellant and Ms. Blake were seeking custody of him from the child's mother. (Exh. 36 at 8.)

On Saturday, May 17, 2003, appellant arranged to take Reginald for the weekend. (1 RT 157-158.) Reginald was then 14 months old. (1 RT 127-128.) 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 had a neighbor call 911 because Reginald was not breathing. (2 RT 266-267.) Appellant told officers at the scene 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.)

An 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; 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 while he was visiting at the home of Charrikka Harris, Reginald's mother, 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 investigators that on the morning in question, he wrestled and played with Reginald. (2 CT 239, 240-241, 251.) Appellant karate "chopped" Reginald on his back. (2 CT 241.) Appellant held Reginald up and pressed Reginald's stomach to appellant's head, and then flipped him a distance of about four feet onto the bed. (2 CT 242-243.) At one point, appellant accidentally fell on top of Reginald on the bed while attempting a wrestling move "like comin' off the top rope . . . ." (2 CT 241.) Appellant jumped on the bed "to make the whole bed rock" but Reginald rolled unexpectedly and appellant's hip landed with maybe all of his weight on Reginald's stomach. (2 CT 241, 243-244.) 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 four times, hit him in the chest with his fist 10 or 11 times, hit him

in his back, 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 appellant's 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 said "the favorite move" was "the supplex" where appellant grabbed Reginald and flipped him onto the bed. (2 CT 250-251.)

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 explained, "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." (2 CT 35.) Appellant recounted a story about "some kids out there messin' with some other little kids . . . slappin' one little kid upside the head" and taunting him, "'Oh, you soft. You pussy! You soft!'" (2 CT 267.) Appellant believed that one cannot be "soft" to grow up in Oakland. (2 CT 267.) Appellant "just had a one-track mind" when he was "stuck on toughening him up, playin' with Reggie, beatin' up Reggie . . . ." (2 CT 272.) Appellant said, "But then . . . it got . . . 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'." (2 CT 272.) Appellant admitted, "I was hittin' him pretty hard." (2 CT 273.)

At trial, the jury heard appellant's two tape-recorded interviews with investigating officers in which he made these incriminating statements. (4 RT 694, 735.)

Appellant testified in his own defense. 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 denied hitting Reginald even once and said he used only "make-believe wrestling moves" on Reginald. (5 RT 1043, 1045, 1048, 1114.) Appellant would "throw him on the bed" and Reginald would laugh. (5 RT 1037.) Appellant would jump on the bed to make it shake. (5 RT 1038.) At one point, an accident occurred. (5 RT 1038.) Appellant was jumping on the bed to make it shake but as he was coming down, Reginald turned and appellant's hip landed on Reginald's back. (5 RT 1039-1041.) Reginald seemed normal after the accident. (5 RT 1054.) Reginald 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 police, appellant testified 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.) Appellant said he "just kind of went along" with the investigating officers "because they knew, you know, basically what happened." (5 RT 1104.)

Several defense witnesses testified that 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 that 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 it would be unlikely if the child were lying on a bed. (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.)

On rebuttal, Sergeant James Rullamas contradicted appellant's version of his interview at the police station. Sergeant Rullamas never suggested the idea of toughening up his son; it was appellant who said he wanted to toughen up his son because he was acting like a baby. (7 RT 1468.) Sergeant Rullamas never told appellant he should make certain statements. (7 RT 1469.)

A jury convicted appellant of involuntary manslaughter and child abuse homicide. (2 CT 327.) The trial court sentenced him to 25 years to life for child abuse homicide and stayed sentence under Penal Code section 654 for the manslaughter. (2 CT 360.)

On appeal, appellant claimed the evidence was insufficient to support his conviction for child abuse homicide. The Court of Appeal agreed and reversed the conviction. This Court granted respondent's petition for review and held that the evidence supported the jury's verdict of child abuse homicide. The Court reversed the judgment of the Court of Appeal and remanded for further proceedings consistent with its opinion. On remand, the Court of Appeal again reversed the conviction for child abuse homicide, holding that the trial court prejudicially erred in failing to instruct sua sponte on simple assault as a lesser included offense of child abuse homicide.

SUMMARY OF ARGUMENT

The prosecution presented evidence that appellant hit his child multiple times. The medical evidence confirmed that Reginald was hit hard. Appellant denied he did anything harmful to Reginald. He claimed he accidentally fell on his child.

The trial court had no sua sponte obligation to instruct the jury on simple assault as a lesser included offense to child abuse homicide. Under the facts presented to the jury, appellant either committed an aggravated

assault on Reginald which caused his death or Reginald died as a result of an unfortunate accident.

ARGUMENT

I. THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT AN INSTRUCTION ON SIMPLE ASSAULT BECAUSE THE EVIDENCE SHOWED EITHER AN AGGRAVATED ASSAULT CAUSING DEATH OR AN ACCIDENT

The prosecution presented evidence that appellant, by his own admission, wrestled with his 26-pound child, body slammed him four times, hit him in the chest with his fist 10 or 11 times, hit him in the chest with his forearm about three times, possibly suspended the child in midair by his neck, grabbed Reginald between his legs and squeezed, dropped his knee on Reginald's back twice, and did an "atomic elbow" to his head. Appellant admitted, "I was hittin' him pretty hard."

The medical evidence confirmed Reginald was hit hard. The prosecution's expert detailed at length Reginald's extensive injuries, including internal bleeding, four lacerations to the liver, acute fractures of four ribs, and cerebral swelling. The defense's own 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 . . . ."

Appellant defended against the charge of child abuse homicide by denying that he did anything harmful to Reginald. He denied hitting Reginald even once and said he used only "make-believe wrestling moves" on Reginald. Appellant claimed he accidentally fell on Reginald.

The Court of Appeal held that the trial court prejudicially erred in failing to instruct sua sponte on simple assault as a lesser included offense of child abuse homicide. The Court of Appeal found that substantial evidence supported a simple assault instruction based on the testimony of appellant

and 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 child's death was caused by the child rolling under appellant when the latter said he jumped on the bed and further find that this act amounted to simple assault. (Typed opn. at pp. 23-24.)

The Court of Appeal erred in finding that the trial court had an obligation to instruct on its own motion on simple assault as a lesser included offense of child abuse homicide. "[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* (2001) 26 Cal.4th 779, 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." (Pen. Code, § 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 child'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.

Any error was harmless. Error in failing to instruct on a lesser included offense supported by the evidence is reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 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.'"].)

The Court of Appeal's finding of prejudicial error in the trial court's failure to give on its own motion an instruction on simple assault was erroneous. There was no evidence, much less substantial evidence, that appellant committed a simple assault on his child. Any error in failing to instruct on simple assault was harmless because the jury was not given an

"all or nothing" choice and the factual question was resolved under other properly given instructions.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: April 27, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 3,977 words.

Dated: April 27, 2011

KAMALA D. HARRIS
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Wyatt**
No.: **S189786**

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 May 18, 2011, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** 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 May 18, 2011, at San Francisco, California.

B. Wong
Declarant

B. Wong
Signature

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