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

COURT OF APPEAL, FIRST DISTRICT, DIVISION TWO
Case No. A114612

APPEAL FROM A JUDGMENT OF
THE SUPERIOR COURT OF ALAMEDA COUNTY
Case No. C0147107
The Honorable Jon Rolefson, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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"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))?"

CONCLUSIONS

In *People v. Wyatt* (Court of Appeal Case No. A114612), the Court of Appeal in an unpublished opinion filed on December 9, 2010, correctly concluded that simple assault (Pen. Code, § 240) is a lesser included offense of child assault homicide (Pen. Code, § 273ab).[1] (*People v. Basuta* (2001) 94 Cal.App.4th 370, 392; *People v. Stewart* (2000) 77 Cal.App.4th 785, 795; *People v. Albritton* (1998) 67 Cal.App.4th 647, 657-658, 659.) (See Opinion [hereafter "Opn."], pp. 20, 24.)

Applying the well-established test governing the duty of trial courts to sua sponte instruct on lesser included offenses (*People v.*

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[1] The crime defined in Penal Code section 273ab is "assault resulting in death of child under eight years of age": "Any 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 . . . ." (Pen. Code, § 273ab; *People v. Wyatt* (2010) 48 Cal.4th 776, 780, fn. 2.) In *Wyatt*, this Court referred to the offense as "child abuse homicide." (*Id.* at p. 780.) Defendant will refer to the crime as child assault homicide.

Breverman (1998) 19 Cal.4th 142, 148-149; *People v. Lopez* (1998) 19 Cal.4th 282, 287; *People v. Basuta*, *supra*, 94 Cal.App.4th at p. 329; *People v. Stewart*, *supra*, 77 Cal.App.4th at pp. 795-796), the Court of Appeal correctly found that the trial court erred in failing to instruct on the lesser included offense of simple assault. (Opn., pp. 20, 24.)

Having found lesser included offense jury instruction error, the Court of Appeal properly applied the *Watson* standard (*People v. Watson* (1956) 46 Cal.2d 818) for determining prejudice (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 149, 165, 169, 177-178; *People v. Blakeley* (2000) 23 Cal.4th 82, 93-94). (Opn., pp. 20, 24.)

Consequently, because the Court of Appeal correctly identified and applied existing California Supreme Court precedent in "conclud[ing] 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" (Opn., p. 2) and "[i]ts failure to do so was prejudicial" (Opn., p. 24), this Court should affirm the judgment of the Court of Appeal.

STATEMENT OF THE CASE

On May 18, 2003, 14-month-old Reginald Wyatt, Jr., died while in the custody and care of his father, defendant Reginald Wyatt. (2 RT 371-373, 379-384, 391; 3 RT 414, 468, 535.)

On March 20, 2004, defendant was charged with one count of murder (Pen. Code, § 187, subd. (a)) and one count of child assault

homicide (Pen. Code, § 273ab).[2] He pled not guilty. (1 CT 100.)

Trial by jury began on March 20, 2006. (2 CT 179.) After the People concluded its case-in-chief, the charge of first degree murder was withdrawn from the jury. (2 CT 313.) The jury was then instructed on second degree murder (2 CT 308-309) and its lesser included offense of involuntary manslaughter (2 CT 310-312). For the child assault homicide charge, the jury did not receive any lesser included offense instructions. (2 CT 285-319 [all jury instructions].)

On April 11, 2006, the jury acquitted defendant of murder and found him guilty of involuntary manslaughter and child assault homicide. (2 CT 279-280, 326-327.)

After being sentenced to prison for 25 years to life for the child assault homicide conviction and receiving a 3-year stayed term for involuntary manslaughter (2 CT 359-360, 362, 364; 8 RT 1643-1646, 1656), defendant timely appealed (2 CT 366).

On January 31, 2008, the Court of Appeal, First Appellate District, Division Two, reversed the child assault homicide conviction for insufficiency of evidence and affirmed the involuntary manslaughter conviction. The People successfully petitioned this Court for review, challenging reversal of the child assault homicide conviction.

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[2] Punishment enhancement allegations that are not relevant to the issue presented were also charged. They were never submitted to the jury and were subsequently dismissed by the trial court without objection from the People. (1 CT 98; 2 CT 279, 281.)

On May 10, 2010, this Court issued its opinion in *People v. Wyatt*, *supra*, 48 Cal.4th 776. Finding the evidence sufficient to support the child assault homicide conviction, this Court reversed the judgment of the Court Appeal and remanded the matter for further proceedings. (*People v. Wyatt*, *supra*, 48 Cal.4th at p. 786.)

On December 9, 2010, the Court of Appeal reversed the child assault homicide conviction based on the trial court's failure to sua sponte instruct on the crime of simple assault, a lesser included offense. (Opn., pp. 20-24, 30.)

This Court granted the People's petition for review.

THE COURT OF APPEAL'S OPINION

The Court of Appeal "conclude[d] 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" (Opn., p. 2) and "[i]ts failure to do so was prejudicial" (Opn., pp. 20, 24). This holding consists of three findings: (1) simple assault is a lesser included offense of child assault homicide; (2) the trial court had a sua sponte duty to instruct on this lesser included offense; and (3) the failure to instruct was prejudicial under the *Watson* test.

A. THE CRIME OF SIMPLE ASSAULT IS A LESSER INCLUDED OFFENSE OF CHILD ASSAULT HOMICIDE.

The People do not claim that the Court of Appeal erred in concluding that simple assault is a lesser included offense of child

assault homicide. (Respondent's Opening Brief on the Merits (hereafter "ROBM"), pp. 7-12.) "Assault" is a statutory element of child assault homicide. (Pen. Code, § 273ab; *People v. Wyatt*, *supra*, 48 Cal.4th at p. 780.) Consequently, under the "legal elements" test for determining lesser included offenses, assault is a lesser included offense because "'a lesser offense is necessarily included in a greater offense if . . . the statutory elements of the greater offense . . . include all the elements of the lesser offense, such that the greater offense cannot be committed without also committing the lesser.'" (*People v. Rios* (2000) 23 Cal.4th 450, 461, fn. 8; *People v. Lopez*, *supra*, 19 Cal.4th at p. 288; *People v. Stewart*, *supra*, 77 Cal.App.4th at p. 795.)

B. THE DUTY TO INSTRUCT SUA SPONTE ON LESSER INCLUDED OFFENSES IS GOVERNED BY THE *BREVERMAN* TEST.

The Court of Appeal applied the *Breverman* test (*People v. Breverman*, *supra*, 19 Cal.4th 142) in determining whether the trial court erred in failing to sua sponte instruct on the lesser included offense of assault. (Opn., p. 20 [citing *People v. Basuta*, 94 Cal.App.4th at p. 392; see also *People v. Birks* (1998) Cal.4th 108, 118].) "The principles that govern our review of this issue are well settled." (Opn., p. 20.) "If the record contains substantial evidence of [the lesser included offense of assault], the trial court was required to instruct the jury on [assault]." (Opn., p. 20; see *People v. Breverman*, *supra*, 19 Cal.4th at p. 154 [duty to instruct applies "when the evidence raises a question as to whether all of the elements of the

charged offense were present, but not when there is no evidence that the offense was less than that charged"]; *id.* at 162 [lesser included offense instructions "are required whenever evidence of the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater was committed."]; see also *People v. Hagen* (1998) 19 Cal.4th 652, 672.)

"Instructions on lesser included offenses are required only if the evidence would justify a conviction of the lesser included offense." (Opn., p. 20 [citing *People v. Lopez*, *supra*, 19 Cal.4th at p. 287; *People v. Leach* (1985) 41 Cal.3d 92, 106]; see *People v. Breverman*, *supra*, 19 Cal.4th at p. 154 [the duty to instruct applies "when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged"]; see also *People v. Daniels* (1991) 52 Cal.3d 815, 868.)[3]

The Court of Appeal also applied well-established and fundamental principles essential for the correct application of the *Breverman* test:

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[3] Stated somewhat differently, "[t]his sua sponte obligation extends to lesser included offenses if the evidence 'raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. [Citations.]'" (*People v. Lopez*, *supra*, 19 Cal.4th at pp. 287-288 [quoting *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351].)

The determination must be based on the evidence. (Opn., p. 20; see *People v. Breverman*, *supra*, 19 Cal.4th at pp. 148-149 ["California law requires a trial court, sua sponte, to instruct fully on all lesser necessarily included offenses supported by the evidence']; *ibid.* [duty to instruct based on evidence, not merely theories which have the strongest evidentiary support, or upon which the defendant has openly relied]; see also *People v. Lopez*, *supra*, 19 Cal.4th at p. 288.)

The defendant's testimony, standing alone, or when combined with other defense evidence, may be sufficient to require lesser included offense instructions. (Opn., pp. 21-24; see *People v. Lewis* (2001) 25 Cal.4th 610, 646 ["The testimony of a single witness, including the defendant, can constitute substantial evidence requiring the court to instruct on its own initiative."]; *People v. Ramkeesoon*, *supra*, 39 Cal.3d at p. 351 [defendant's testimony credible enough to support instruction]; see also *People v. Sullivan* (1989) 215 Cal.App.3d 1446, 1450 [instruction warranted based on defendant's testimony and hypothesis that it is entirely true].)

"'In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury.'" (Opn., p. 20 [quoting *People v. Breverman*, *supra*, 19 Cal.4th at p. 162]; see *People v. Flannel* (1979) 25 Cal.3d 668, 684 [witness credibility is exclusive province of jury]; see also *People v. Cuevas* (1995) 12 Cal.4th 252, 276-277 [jury determines credibility of witness' testimony and extrajudicial statements]; *People v. Miller*

(1962) 57 Cal.2d 821, 828-829 [instruction required if defendant's testimony believed].)

"We look at the evidence's 'bare legal sufficiency, not its weight.'" (Opn., p. 24 [quoting *People v. Breverman, supra*, 19 Cal.4th at p. 177].)

"[T]he general rule [is] 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." (Opn., p. 24 [citing *People v. Stewart, supra*, 77 Cal.App.4th at pp. 795-796, citing *People v. Hawkins* (1995) 10 Cal.4th 920, 954].) It is a cardinal rule of appellate review that the evidentiary record must be viewed in light most favorable to the defendant and omitted instruction. (*People v. King* (1978) 22 Cal.3d 12, 15-16; *People v. Enriquez* (1977) 19 Cal.3d 221, 228; *Pekus v. Lake Arrowhead Boat Co.* (1967) 255 Cal.App.2d 864, 870.)

C. THE *WATSON* TEST GOVERNS THE DETERMINATION OF PREJUDICE.

The Court of Appeal held the error in failing to instruct on the lesser included offense of simple assault was prejudicial under *People v. Watson, supra*, 46 Cal.2d 818. (Opn., p. 24.) Under *Breverman*, as previously noted, the *Watson* test is the correct test for determining prejudice. (*People v. Breverman, supra*, 19 Cal.4th at pp. 149, 165, 169, 177-178; *People v. Blakeley, supra*, 23 Cal.4th at pp. 93-94; *People v. Cox* (2000) 23 Cal.4th 665, 677-678, fn. 7.)

While the Court of Appeal did not elaborate on the *Watson* test (Opn., p. 24) – a test which is commonly and routinely applied by lower intermediate appellate courts on a daily basis – in relying on the evidence and determining what a reasonable jury could have reasonably found based on the evidentiary record and if properly instructed on assault, the Court complied with the fundamental California constitutional requirement that appellate courts "'are not substituted for the jury'" and they "'are not to determine, as an original inquiry, the question of defendant's guilt or innocence.'" (*People v. Dail* (1943) 22 Cal.2d 642, 659.) The *Watson* test, which is predicated on the California Constitution, is therefore "'not for the purpose of determining the evidentiary value of the testimony or where the preponderance lies.'" (*Ibid.*; see full discussion of *Watson* test, *post*, Argument II.)

THE PEOPLE'S CONTENTIONS

The People do not contest the principles of law upon which the Court of Appeal relied in finding that assault is a lesser included offense, the trial court erred in failing to sua sponte instruct on this lesser offense, and the error was prejudicial under *Watson*. (ROBM, pp. 6-7 [Summary of Argument], pp. 7-13 [Argument].) Instead, the People claim the Court of Appeal simply reached the wrong conclusions in applying the *Breverman* test for assessing error (ROBM, pp. 7-11) and the *Watson* test for determining prejudice (ROBM, pp. 11-13).

Both contentions are primarily based on the theory that, as applied to the charge of child assault homicide, it was all-or-nothing with conviction of the charged offense or acquittal. (ROBM, pp. 6-11, 11-13.) The People also argue harmless error based on the involuntary manslaughter conviction, a lesser included offense of murder but not a lesser included offense of child assault homicide (Opn., pp. 26-28 [Court of Appeal agreeing with *Orlina v. Superior Court* (1999) 73 Cal.App.4th 258 that involuntary manslaughter is not a lesser included offense of child assault homicide]), because by returning that guilty verdict the jury necessarily decided the factual question posed by the omitted instruction adversely to defendant (ROBM, pp. 11-12).

Both contentions lack merit. (See Arguments I, II & III, *post.*) To the extent the People provide a statement of facts that are written in the light most favorable to the child assault homicide guilty verdict, as if the insufficiency of evidence standard applied in *People v. Wyatt*, *supra*, 48 Cal.4th at p. 781, was the controlling test in determining the lesser included offense jury instruction issue (RBOM, pp. 2-6), and argue those facts without any recognition of the correct standard of review required under *Breverman* and its progeny, or even considering that the jury may have even *in fact* rejected those very facts in finding defendant guilty of involuntary manslaughter, is unsustainable. The Court of Appeal correctly rejected this approach (Opn., p. 24), and this Court must too.

STATEMENT OF FACTS

Contrary to the People's position, the facts must be stated in the light most favorable to defendant and the omitted lesser included assault instruction, including defendant's testimony and explanation of his extrajudicial statements, and the medical testimony. While defendant adopts the facts of the Court of Appeal in the framework of "Prosecution Case" (Opn., pp. 3-12), "Defense Case" (Opn., pp. 12-18) and "Rebuttal" (Opn., p. 18) for purposes of general understanding, and adopts the Court of Appeal's facts which support its judgment (Opn., pp. 21-24), the following facts stated in the light most favorable to defendant and the omitted jury instruction and without reference to the party which introduced the evidence, establish both error under *Breverman* and prejudice under *Watson.*

A. THE INJURY TO DEFENDANT'S SON.

In May 2003 defendant was living with his girlfriend Tiffany Blake and their 3-month-old daughter Valerie. (1 RT 150-151, 153, 157-158, 195; 3 RT 452.) Defendant's 14-month-old son, Reginald, who lived with his mother Charrikka Harris, was spending the weekend of May 17 with defendant and Tiffany. (1 RT 200; 2 RT 371-373, 379-384, 391.)

Defendant loved his son (5 RT 975), and both he and Tiffany wanted Reginald to live with them full time. (1 RT 200, 207, 210; 3 RT 553, 561.) Defendant never showed signs of being impatient or frustrated with Reginald, and he never physically disciplined his son.

(1 RT 178-179, 181-1823 RT 562-563, 568, 571.) Defendant would never intentionally harm his son. (3 RT 551-552.)

While defendant would play with Reginald and, as part of this play, pretend to wrestle with him, defendant never actually wrestled with Reginald and he never inflicted any type of bodily force upon him. (3 RT 464, 468, 475, 479, 535.)

On Sunday morning, May 18, defendant was playing with Reginald while Tiffany was getting ready for work. (3 RT 468, 535.) Defendant was lifting Reginald up over his head, spinning him around two or three times and, then, while lowering him face-down toward the bed, defendant would "bounce" Reginald on the bed without releasing him. (3 RT 476-478, 544.) Defendant may have done this two or three times before Tiffany told him he "shouldn't play like that." (3 RT 479-481.) Although defendant was not hurting Reginald, Tiffany thought defendant was playing too rough with him because it did not appear that Reginald was having fun. (3 RT 479-481, 545-547, 563, 565, 572-573.) Tiffany told defendant it was possible that Reginald was not having fun, and the whole point in playing was for Reginald to have fun. (3 RT 479-481, 545-547, 563, 565, 572-573.) When defendant asked Tiffany, "You think so?" and she replied "Yes," defendant stopped playing with Reginald. (3 RT 481-482, 547, 563; 5 RT 1034-1036; 6 RT 1216, 1218, 1224-1227.)

Shortly after Tiffany left for work, defendant once again started playing with his son by lifting him over his head, lowering him to the bed and, when Reginald was three or four inches from the bed,

tossing him on the bed. (5 RT 1036-1037; 6 RT 1231, 1239.) Reginald was laughing and smiling while defendant was playing with him. (5 RT 1037-1038; 6 RT 1232, 1240.)

Defendant started "play wrestling" with his son (5 RT 1043-1044, 1048-1051, 1108), something that he had done before (6 RT 1247). While play wrestling, defendant "lightly touched" Reginald without injuring him. (5 RT 1043-1044, 1048, 1051, 1108.) As part of the make-believe play wresting, defendant jumped on the bed, in what he later termed "off-the-rope," as he had done before, in order to "shake" and "rock" the bed because Reginald liked it. (5 RT 1038, 1043, 1048-1049; 6 RT 1247.) This time, however, while defendant was in the air and coming down, Reginald turned and rolled over toward defendant. (5 RT 1039-1042; 6 RT 1243-1244; 7 RT 1406.) Before defendant could stop or break his fall by putting his arm down, he landed with his full body weight directly on his son. (5 RT 1039-1040, 1053; 6 RT 1244-1246; 7 RT 1406-1407.)

Reginald made a "grunt" sound. (6 RT 1247.) Defendant immediately picked up Reginald, who was not crying, to see if he was all right. (5 RT 1054; 6 RT 1248.) The wind had been knocked out of Reginald and he was not breathing but, when defendant blew on Reginald's face, Reginald got his breath, started breathing again, and, after a few minutes, he appeared to be normal. (5 RT 1054; 6 RT 1248-1249.)

Defendant thought that his son was "all right" and it never occurred to him that Reginald might "need medical attention." (5 RT

1054-1055; 6 RT 1248.) Defendant stopped playing with Reginald, gave him some milk, and sat him down on the floor with his blankets so he could watch television. (5 RT 1054-1055; 6 RT 1249-1250). Reginald appeared to be fine while watching television, and he soon laid down. (5 RT 1054-1055; 6 RT 1250.) A short time later, around 10:00 a.m., while Reginald appeared to be sleeping, defendant placed baby Valerie on the bed and defendant drifted off to sleep while watching a playoff basketball game. (5 RT 1054-1055, 1232; 6 RT 1250, 1253.)

When defendant woke up, he found his son motionless and with green fluid in his nose. (4 RT 590-592, 601; 5 RT 1056-1057; 6 RT 1255-1256.) Defendant telephoned his step-mother and Reginald's mother, Charrikka, but neither answered. Defendant left a voice message with Charrikka that Reginald had an asthma attack and needed his medicine. (1 RT 160-162; 3 RT 538; 5 RT 917; 6 RT 1260.) Defendant attempted to revive Reginald by giving him CPR for 20 minutes while twice attempting to call 911, but each time he got the same recording that all available lines were busy. (1 RT 160-162; 3 RT 538; 5 RT 1056-1057, 1059-1062; 6 RT 1255-1258, 1260-1264.)

After getting Reginald dressed because it was "cold outside," defendant picked up both Reginald and Valerie in order to leave the apartment and get help when he dropped both children. (5 RT 1062-1064; 6 RT 1217.) Defendant went to the first floor apartment of Douglas Curtis and asked Curtis to "please dial 911" because "my

baby is not breathing." (2 RT 265-267.) Defendant appeared to be concerned, upset, shaken and scared. (2 RT 267-269.)

In response to Curtis asking "what happened," defendant explained he had tried to call 911, but he was unable to get through, and 911 was needed because his baby had asthma and defendant did not have the baby's medicine. (2 RT 267-269.) Curtis made the call and handed the telephone to defendant, who told the 911 operator he needed an ambulance because his 14-month-old baby had stopped breathing. (2 RT 268, 348-349, 357; 2 CT 210.) The operator dispatched paramedics and gave defendant instructions on how to perform CPR, which defendant followed, but his attempt to resuscitate Reginald failed. (2 CT 211-212.) After hearing approaching sirens, defendant hung up the telephone. (2 CT 213.)

While paramedics tried to revive Reginald, Oakland Police Officer Kaizer Albino met with defendant. (2 RT 350-351, 358; 4 RT 581-582.) Defendant was emotional, upset, crying and had a "thousand mile stare" focused on his son. (4 RT 585, 600-602.) Unable to revive Reginald, paramedics transported him to the hospital. (2 RT 265-266, 268, 352-358, 362.) Defendant once again called Charrikka and, when she answered, he told her Reginald could not breathe and was on his way to the hospital. (1 RT 163.)

Officer Albino took defendant up to defendant's apartment and interviewed him for approximately 20 minutes. (4 RT 585, 588, 592, 601.) Still emotionally distraught and crying, defendant gave a statement. (4 RT 590-592, 601.) After the interview, defendant upon

request wrote down his statement. (4 RT 591-592, 601.)

Reginald was "flat-line" when he arrived at the hospital. (2 RT 358.) Except for a little "age-appropriate" scratch on Reginald's chin, there were no obvious signs of injury or trauma to Reginald's body and no signs of shaken baby syndrome. (4 RT 705-706.) Defendant was en route to the hospital when he was told that Reginald was dead. (5 RT 1071-1072.)

After arriving at the hospital, defendant telephoned Tiffany and, while crying and weeping, told her that Reginald was dead. (3 RT 566-567.) Upon seeing Reginald, defendant broke down, tried to hold Reginald, and refused to leave him until restrained and ushered out of the room. (5 RT 1073.) While at the hospital defendant was interviewed by Sgt. James Rullamas of the Oakland Police Department. (4 RT 629, 633, 635, 772-773.)

After leaving the hospital defendant spent the night with his brother, Antony Caldwell, a police officer with the Oakland Police Department. (5 RT 949, 1073; 6 RT 1280.) Caldwell spent much of the night and early morning hours of May 19 trying to console defendant. (5 RT 973.)

In response to Caldwell asking defendant if he had any idea about what may have caused Reginald's death, defendant replied, "Hey, I was just, you know, for the most part, I'm playing with my son, and we're on the bed, and he's just, you know, playing around." (5 RT 973; 6 RT 1281.) Then, all of a sudden, defendant admitted, "Man, I accidentally fell on my son. But, you know, it's not like he

had a reaction, like he was injured, or anything like that. You know, it was like, okay, all right. Reginald, go ahead, go lay down." (5 RT 974.) Defendant further stated he fell asleep watching a playoff basketball game after putting Reginald down and, when he woke up, he found Reginald motionless. (5 RT 968.)

Defendant slept less than two hours before he and his brother went to Charrikka's house on May 19. (5 RT 1073.) Upon arriving at the house, defendant told Charrikka he had accidentally fallen on Reginald. (6 RT 1282.) In response to a telephone call from the coroner, Charrikka started screaming, "He beat my baby. He beat my baby." (5 RT 926, 948, 950-952.) Caldwell contacted Sgt. Nolan, the partner of Sgt. Rullamas (4 RT 796-797), who told him, "I'm gonna need to talk to your brother, and . . . could he come down." (5 RT 926, 950.) Caldwell relayed the message to defendant, who responded: "Man, I don't have nothing to hide." (5 RT 926-927.)

As Caldwell drove defendant to the police station he told defendant he had nothing to hide, to "just be truthful," and "tell the truth." (5 RT 928, 931.) Once at the station, defendant was kept waiting for about two hours before waiving his right to remain silent prior to his interview. (4 RT 795-796.) During the next seven to seven and a half hours defendant answered questions about what had happened when he was playing with his son and subsequent events. (4 RT 795-796.)

In his trial testimony, defendant explained that during his May 19 taped statements he was referring to play-wrestling, not actual

wrestling, and that any statements giving the impression that he had actually wrestled with his son and that he had physically harm him, other than falling on him, were the product of sleep deprivation, confusion, his second-guessing himself as to what he had actually done in light of being told about Reginald's actual injuries, and the interrogation methods used by the detectives, including "scripting" the taped interrogation after an oral interview, and defendant's attempt to please the interrogators so that he could end the interrogation and go home. (5 RT 1045-1046, 1052-1053, 1093, 1097-1099, 1101, 1103, 1105-1106, 1119-1120, 1135, 1140-1141; 6 RT 1168-1170, 1180; 7 RT 1351, 1358-1359, 1369-1370, 1372, 1375.) Defendant explained to the jury that he never believed he was confessing to murder or any crime during the May 19 interrogation and that he believed he would be going home after answering the interrogator's questions. (5 RT 1135; 7 RT 1358-1359, 1375.)

Defendant also explained the statements he gave to Officer Albino on May 18, which were true to the best of his knowledge under the trying circumstances in which they were made and his "emotional" mental state. (5 RT 1066-1067.) Defendant admitted he was "kind of blowing off" Officer Albino because he was focusing and concentrating on Reginald, and he never considered that his falling on Reginald caused his son's condition. (5 RT 1068.)

In neither defendant's May 18 oral statement to Officer Albino nor in his written statement did defendant mention having "wrestled" with Reginald. (4 RT 591-592, 601.) During his May 18 hospital

statement to Sgt. Rullamas, defendant never mentioned anything about "wrestling" with Reginald. (4 RT 635, 772-773.)

In concluding his testimony, defendant told the jury that, although he had just been "playing" with his son, his actions were "stupid." (5 RT 1047; 7 RT 1369.) Defendant admitted he was "basically ignorant to . . . really think I could . . . fall on my son with causing him no harm, and because I didn't see nothing to . . . just believe that . . . everything was all right." (7 RT 1388.) Defendant further explained: "That was not through my, you know, lack of knowledge about, you know, I guess, you know, children. And then about, you know, the injuries that could be caused, so you know, I was, you know, I was ignorant right there by it. I was just kind of like not really, you know, paying attention." (7 RT 1388.) Looking back now, defendant now knew "I should have just took him to the hospital right away, . . . just have him checked up, because . . . even if nothing was wrong, at least, you know, they could have – maybe could have did something . . . and my son could be here today." (7 RT 1388-1389.)

B. THE CAUSE OF REGINALD'S DEATH WAS BLUNT FORCE TRAUMA.

Reginald, who was 31 inches tall and weighed 26 pounds, died from hemorrhage and shock due to blunt force trauma. (2 RT 371-373, 379-384, 391; 3 RT 414.) Dr. David Levin, M.D., who performed the autopsy on Reginald's body, could not give an opinion as to whether the trauma to Reginald's chest, abdomen and possibly

back (2 RT 371-373, 379-384, 386-389, 391-394, 398; 3 RT 414, 500, 502, 505) was caused by multiple or a single blunt force trauma (3 RT 434, 442-445).

The trauma caused four fractured ribs (two fractured ribs to each side of the body, near the back), and injured Reginald's heart, abdominal cavity, left lung, liver, and small and large intestines. (2 RT 386-389, 392-394, 398; 3 RT 500, 502, 505.) Children would respond differently to receiving such injuries (3 RT 526-527; 7 RT 1337, 1348) – some may be rendered immediately unconscious and others may not (3 RT 423-424, 426, 448; 3 RT 505, 507, 525; 7 RT 1337, 1348); some may be able to stand while others may not (7 RT 1337, 1348); and some may cry or scream while others may go into immediate shock and remain silent (3 RT 423-424; 3 RT 505; 7 RT 1337, 1348). If a child remained conscious and awake, it would be expected the child would show some sign of distress and change his or her behavior, such as becoming very quiet or sitting still, possible "absolutely still." (3 RT 507, 525; 7 RT 1339.)

Whatever the child's reaction, Dr. Paul Herrmann, M.D., a specialist in forensic pathology, believed a care-giver "would notice a difference" in the child. (7 RT 1337.) Dr. Herrmann, however, did not know whether a child with such injuries would show signs or discomfort or "simply be very, very, very quiet and unresponsive." (7 RT 1339.) If Reginald had gone into shock, Dr. Herrmann expected Reginald "would be rather unresponsive" and he might act quietly, lie down, and appear to be going to sleep. (7 RT 1337, 1349.)

The injuries received by Reginald would not have resulted in immediate death, and it could have taken Reginald more than an hour to die (3 RT 423, 426, 448; 7 RT 1340).

The lack of any damage to Reginald's spleen and lack of multiple contusions on Reginald's body indicated to Dr. Levin that Reginald had not been severely beaten or even struck numerous times. (3 RT 420-421, 429-431.) There was no physical evidence that Reginald had received any blows to the head, the contusion found on the top of Reginald's forehead could have occurred as a result of Reginald being dropped, and the other minor abrasions, bruises and injuries found during the autopsy could have resulted from the handling of Reginald after infliction of the blunt force trauma or during medical treatment. (2 RT 401-402, 407-409; 3 RT 412, 419, 496-497, 514-516.)

Dr. James Crawford, M.D., a physician at Children's Hospital, agreed with Dr. Levin that it was medically possible that all of the serious injuries could have been caused by a single blow. (3 RT 512-513, 528-529, 531.) Dr. Crawford believed Reginald received at least one severe blow. (3 RT 509.) While Dr. Crawford believed there had been multiple blows (3 RT 528), he could not give any opinion as to how the injuries occurred (3 RT 529).

Based on the autopsy report prepared by Dr. Levin, Dr. Herrmann concluded it was possible, "a likelihood or a possibility" for all of Reginald's internal injuries to have been caused by a single blow to the right side of Reginald's back from a 170 pound man

(defendant) jumping on Reginald while Reginald was on a bed. (7 RT 1309-1313, 1316-1325, 1331-1333, 1339, 1342.) Dr. Herrmann could not give an opinion whether it would be "reasonably probable" for the single-blow injuries to have occurred while Reginald was on the bed, because "it all depends on how much the bed gives, how the child is lying, how the fall actually occurs," "how much the child would be compressed," and "the distance" of the fall. (7 RT 1334-1335, 1342.)

Dr. Herrmann acknowledged that while it was "equally possible" that the internal injuries could have been caused by other forms of trauma (7 RT 1316-1317, 1329, 1339, 1347), he agreed with Dr. Levin that the physical evidence and condition of Reginald's body, which was "remarkably free of bruises" (7 RT 1317, 1346), were inconsistent with Reginald having been "beaten with hands" or "struck with a fist" or receiving "multiple blows to the chest with fists" (7 RT 1317, 1326, 1339, 1343-1345). Dr. Herrman also agreed other injuries reflected in the autopsy report were consistent with being caused by CPR, medical procedures, or causes that did not result in the internal injuries. (7 RT 1322-1323, 1326-1329.)

ARGUMENTS

I

THE COURT OF APPEAL CORRECTLY CONCLUDED THAT THE TRIAL COURT ERRED IN FAILING TO SUA SPONTE INSTRUCT ON SIMPLE ASSAULT AS A LESSER INCLUDED OFFENSE OF CHILD ASSAULT HOMICIDE.

The Court of Appeal correctly identified and applied the *Breverman* test in finding the trial court erred in failing to sua sponte instruct on assault as a lesser included offense of child assault homicide. The legal principles upon which *Breverman* and its progeny are based, dating date back to the beginning of statehood (see Pen. Code, § 1259; *People v. Guidice* (1887) 73 Cal. 226, 227 [lesser included offense of simple assault is included in information charging aggravated assault with duty to instruct on simple assault if there is any evidence tending to establish simple assault]; *People v. Barry* (1891) 90 Cal. 41, 42-43 [no error in failing to instruct on lesser included offense if evidence shows defendant is guilty of charged offense or no offense at all]), serves three important interests: (1) removing the danger of all-or-nothing verdict choices which impair the jury's truth-ascertainment function; (2) prohibiting the People from obtaining a conviction of a greater offense than that established by the evidence; and (3) preventing a defendant from obtaining an acquittal when the evidence is sufficient to establish a lesser included offense (*People v. Breverman, supra*, 19 Cal.4th at pp.

154-155, 158-159). In this manner, the *Breverman* test "ensures that the jury will consider the full range of possible verdicts not limited by the strategy, ignorance, or mistake of the parties" (*People v. Wickersham* (1982) 32 Cal.3d 307, 324), and guarantees the jury an opportunity to "fairly appraise the legal effect of defendant's version of what had occurred in light of proper instructions and the applicable legal theories" (*People v. Miller*, *supra*, 57 Cal.2d at pp. 828-829).

Because a greater inclusive offense cannot be committed without also committing a lesser included offense, "facts that would support a conviction of the greater offense necessarily allow a conviction of the lesser." (*People v. Rios*, 23 Cal.4th at p. 463, fn. 10.) Construing the facts in the light most favorable to the omitted instruction, with full recognition that this evidence and the jury instructions received by the jury could lead a reasonable jury to convict defendant of child assault homicide based solely on defendant's jumping up in the air and landing on his son, the Court of Appeal correctly found error.[4]

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[4] The jury was properly instructed on CALCRIM No. 200 [Duties of Judge and Jury – jury alone is to decide what happened based on trial evidence] (2 CT 286-287); No. 220 [Reasonable Doubt] (2 CT 288); No. 226 [Witnesses – jury alone must judge credibility or believability of witnesses] (2 CT 293-295); No. 301 [Single Witness's Testimony – testimony of only one witness can prove any fact] (2 CT 297); No. 297 [Evaluating Conflicting Evidence – jury must decide what conflicting evidence to believe] (2 CT 297); No. 358 [Evidence of Defendant's Statements] (2 CT 298); No. 332 [Expert Witness Testimony] (2 CT 302-303).

Indeed, the jury may have *in fact* found the child assault homicide conviction based on defendant's testimony that he caused his son no injury except for his jumping up and landing on his son, which was corroborated by the medical evidence. "The testimony of a single witness, including the defendant, can constitute substantial evidence requiring the court to instruct on its own initiative." (*People v. Lewis*, *supra*, 25 Cal.4th at p. 646.) A jury is free to accept all, some or none of the evidence in support of the prosecution's case. (*People v. Jeter* (1964) 60 Cal.2d 671, 675-675.) The record is clear the jury closely considered defendant's extrajudicial statements (2 CT 324-325) in light of his testimony.

The jury was never instructed that it could not base a guilty verdict of child assault homicide based solely on defendant's jumping on the bed. (2 CT 285-319.) Nor do the People expressly argue that the jury could not have factually rested its child assault homicide conviction based solely on defendant's jumping on the bed. (ROBM, pp. 7-11.) Indeed, if the involuntary manslaughter conviction was based on defendant's infliction of injury upon his son based on his jumping on the bed, as opposed to defendant's failure to timely seek medical attention (see Argument II discussion, *post*), the jury's rejection of the prosecution's theory of murder and closing argument adds further support that the jury in fact found that defendant's jumping on the bed produced the injuries that eventually led to his son's death. (See 8 RT 1521-1522, 1524, 1527-1530, 1533-1534, 1535-1536, 1538-1541, 1544, 1591-1593, 1597, 1600-1602, 1610

[prosecutor's argument that defendant was guilty of express and implied murder based on defendant intentionally and brutally beat, battered and body-slammed his son, whom he never wanted in the first place, to death, and jury should reject the defense theory of accident which, at most, amounted to involuntary manslaughter].)

The fact that this Court in *People v. Wyatt*, *supra*, 48 Cal.4th 776, construed the evidence in the light most favorable to the prosecution's evidence and theories in applying the sufficiency of evidence test has no bearing on whether the jury *in fact* based its guilty verdict solely on defendant jumping and landing on his son. Additionally, this Court's conclusion that the evidence was sufficient to convict based on the prosecution's evidence and theories has no bearing on the proper application of the lesser included offense standard for determining jury instruction error, which requires the opposite approach – construing the evidence in the light most favorable to the defendant and omitted jury instruction.

Based on the evidence, as properly construed under *Breverman* and the lesser included offense doctrine, and the Court of Appeal's detailed and reasoned discussion of this evidence (Opn., pp. 20-24), this Court should affirm the Court of Appeal's conclusion that the jury could have reasonably acquitted defendant of child assault homicide and yet find him guilty of simple assault.

Under both *People v. Williams* (2001) 26 Cal.4th 779 and *Wyatt*, in order to commit assault, a person need only "willfully commit an act that by its nature will probably and directly result in

injury to another" with "aware[ness] of the facts that would lead a reasonable person to realize that an [injury] would directly, naturally and probably result from his conduct," even if the person "'honestly believes that his act was not likely to result in a[n injury],'" so long as "a reasonable person, viewing the facts known to the defendant, would find that the act would directly, naturally and probably result in a[n injury]." (*People v. Wyatt, supra*, 48 Cal.4th at p. 781.) Assault is a general intent crime. (*People v. Hernandez* (2011) 51 Cal.4th 733, 747 [citing both *People v. Williams* (2001) 26 Cal.4th 779, 788 and *People v. Wyatt, supra*, 48 Cal.4th at 780].) *Wyatt* reaffirmed and quoted *People v. Williams*, that "'assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur.'" (*People v. Wyatt, supra*, 48 Cal.4th at p. 785.) An assault may occur even if a defendant honestly believes that his act was not likely to result in physical force being applied to another. (*Id.* at p. 781.) Nor is physical injury necessary to establish assault. While battery necessarily includes assault (*People v. Ortega* (1998) 19 Cal.4th 686, 692), assault does not necessarily include battery.

While every jumping on a bed with a 14-month-old child on it will not necessarily constitute an assault due to varying circumstances, this does not mean that the crime of assault is *per se* inapplicable to such circumstances or that every such act cannot constitute an assault. That is for the jury to decide based on the totality of the circumstances after being instructed on the elements of assault.

When the act of an adult male jumping on a bed with a 14-month-old on it results in death, as in this case for purposes of lesser include offense jury instruction analysis, and this act may be the basis for conviction of the crime of child assault homicide, under the circumstances of this case the trial court erred in failing to instruct on the lesser included offense of assault because a reasonable jury could conclude that, notwithstanding the act amounting to assault, this assault was not "by means of force that to a reasonable person would be likely to produce great bodily injury." (Pen. Code, § 273ab.) As the Court of Appeal properly found, a jury could reasonably conclude that in jumping on the bed *next* to Reginald, as opposed to jumping *on* Reginald, defendant committed a simple assault. (Opn., pp. 23-24.) In terms of *Breverman*, the evidence was "'substantial enough to merit consideration' by the jury" that the defendant was guilty of only the lesser offense of assault and not the greater offense of child assault homicide. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.)

II

THE COURT OF APPEAL CORRECTLY HELD THAT THE FAILURE TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF SIMPLE ASSAULT CONSTITUTED PREJUDICIAL ERROR UNDER *PEOPLE V. WATSON* (1956) 46 CAL.2D 818.

The Court of Appeal correctly applied the *Watson* standard and found prejudicial error based on the extensive and detailed recitation

of facts which established both error and prejudice because, absent the error, there exists a reasonable probability the jury would have acquitted defendant of child assault homicide and convicted him of simply assault.

As previously noted, in *Breverman*, this Court replaced the "near automatic reversal" standard for failure to instruct on lesser included offenses with the *Watson* test for determining prejudicial error. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 149.) Under *Watson*, the reviewing court conducts an "'examination of the entire cause, including the evidence,'" and reversal is required when "it appears 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred." (*Id.* at pp. 149, 176.)

The focus of the *Watson* test is on what a reasonable jury "is *likely* to have done in the absence of the error" (*Id.* at pp. 177-178). In this context, a "reasonable probability" is a "reasonable chance" that the outcome would have been more favorable to the defendant. (*People v. Blakeley*, *supra*, 23 Cal.4th at p. 99.) The appellate court does not act as a *defacto* jury and determine for itself guilt or innocence. (*People v. Dail*, *supra*, 22 Cal.2d at p. 659.)

While each case must be decided on its own facts, there are fundamental principles that guide the inquiry and determination. "There is a reasonable probability of a more favorable result within the meaning of *Watson* when there exists 'at least such an equal balance of reasonable probabilities as to leave the court in serious

doubt as to whether the error affected the result.'" (*People v. Mower* (2002) 28 Cal.4th 457, 484.) There is prejudice under *Watson* when the jury "might have entertained a reasonable doubt in [defendant's] favor" (*id.* At 484-485), especially when the jury has been given an improper all-or-nothing choice. "'Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.'" (*People v. Ramkeesoon, supra*, 39 Cal.3d at p. 351 [citation omitted].) "An error that impairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless." (*People v. McDonald* (1984) 37 Cal.3d 351, 376.)

While establishment of lesser included offense jury instruction error may not automatically establish prejudice under the *Watson* test, the error itself weighs heavily in favor of a finding of prejudice because the error establishes that a reasonable jury could have convicted solely of the lesser included offense. Further, the fact that the defendant was deprived of a jury decision on the lesser included offense question weighs heavily in favor of reversal because this not only implicates the defendant jury trial rights under the California Constitution but jury trial rights under the United States Constitution. The underlying premise for the near automatic reversal standard was that the erroneous failure to instruct constituted a denial of the right to have the jury determine each material issue presented by the evidence. (See *e.g. People v. Ray* (1975) 14 Cal.3d 20, 31-32; *People v. Mayberry* (1975) 15 Cal.3d 143, 157, 158.) Because this right to

have the jury determine all material issues presented by the evidence did not simply disappear with the change of standards for determining prejudice (see *People v. Miller*, *supra*, 57 Cal.2d at pp. 828-829; 2 CT 286-287 [CALCRIM No. 200 (Duties of Judge and Jury)]), the fact that the jury was foreclosed from determining whether the evidence demonstrated that the defendant was guilty only of the lesser included offense is a factor to consider under the *Watson* test.

Other factors for consideration under *Watson* include, but are not limited to, (1) whether evidence is overwhelmingly against the defendant on the issue under review (*People v. St. Martin* (1970) 1 Cal.3d 524, 532) or is sharply conflicting (*People v. Dail*, *supra*, 22 Cal.2d at pp. 650, 659) or is equally balanced (*People v. Dewberry* (1959) 51 Cal.2d 548, 557-558); (2) the nature of the testimony (*People v. Garcia* (1984) 36 Cal.3d 539, 557 [direct or equivocal testimony]; *People v. Greer* (1947) 30 Cal.2d 589, 596-597 [no direct evidence]); (3) the relative strength or weakness of the prosecution's evidence (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 177-178; *People v. McDonald*, *supra*, 37 Cal.3d at p. 376) and defense evidence (*People v. McDonald*, *supra*, 37 Cal.3d at p. 376); and (4) the existence of evidence tending to raise a reasonable doubt the defendant committed the charged offense (*People v. Rios*, *supra*, 23 Cal.4th at p. 466, fn. 12).

In addition to considering the actual evidence, how the error may have affected the jury's view of that evidence must be considered. A reviewing court must assume the jury, had it been

given proper instructions, might have drawn different inferences more favorable to the defendant and rendered a verdict in his favor on those issues. (*Logacz v. Limansky* (1999) 71 Cal.4th 1149, 1155-1156.)

All of the above factors support the Court of Appeal's reasonable and correct judgment that reversal is required under the *Watson* test. The conflicting evidence and the jury's general verdict precludes a finding that the child assault homicide was based on blunt force trauma other than defendant's jumping and landing on his son. The prosecution's case that defendant hit, struck and body-slammed his son while actually wrestling with him is weak, circumstantial, conflicting and dependent upon conflicting extrajudicial statements made by defendant, who explained those statements, with the jury acquitting defendant of murder. For purposes of *Watson* analysis, there can be no harmless error finding based on the ground that the "assault" which the jury found to support the child assault homicide conviction was not defendant's sole act of jumping up and landing on his son.

On the question of whether the evidence of such assault was, as a matter of law, only an assault "by means of force that to a reasonable person would be likely to produce great bodily injury" (Pen. Code, § 273ab) so that it can reasonably be found that the jury could lawfully be placed in the all-or-nothing verdict choice, no such evidence exists. The evidence based on defendant's testimony, which the jury had the right to believe, was that he had jumped on the bed before with Reginald on it while playing with Reginald without

incident. The jury would reasonably conclude that under these circumstances, and the circumstances described by defendant that resulted in his landing on his son and causing injuries that resulted in death, that the evidence was wholly insufficient to support a finding that an assault by means of force that to a reasonable person would be likely to produce great bodily injury *in fact* occurred or, alternatively, that reasonable doubt existed as to the crime of child assault homicide.

The Court of Appeal correctly applied the *Watson* test and reached the only reasonable conclusion possible – absent the error there was a reasonable chance the jury would have convicted defendant of simple assault if given the opportunity.

III

THE PEOPLE'S HARMLESS ERROR CONTENTIONS OF NO IMPROPER ALL-OR-NOTHING VERDICT CHOICE AND FACTUAL ISSUES NECESSARILY RESOLVED AGAINST DEFENDANT ARE UNSUPPORTED BY LAW AND EVIDENCE.

The People's primary claim of harmless error rests on one theory – defendant was properly convicted of involuntary manslaughter – stated in two different ways. First, the jury in finding defendant guilty of involuntary manslaughter necessarily decided the factual questions posed by the omitted lesser included offense assault instruction against the defendant. (ROBM, p. 11.) Second, because

the jury found defendant guilty of involuntary manslaughter as a lesser included offense of the charged murder, there was no improper all-or-nothing choice for the charged child assault homicide. (ROBM, pp. 11-12.) Both contentions lack merit.[5]

A. THE IMPROPER AND UNLAWFUL ALL-OR-NOTHING VERDICT CHOICE FOR CHILD ASSAULT HOMICIDE.

The crime of involuntary manslaughter is not a lesser included offense of child assault homicide. (*People v. Stewart*, *supra*, 77 Cal.App.4th at p. 796; *Orlina v. Superior Court*, *supra*, 73 Cal.App.4th at p. 262.) The Court of Appeal reached the same conclusion. (Opn., pp. 26-28.) Absent the required simple assault lesser included offense instruction, the jury was improperly forced into making an all-or-nothing verdict choice of either convicting defendant of the charged offense or acquitting him when the jury knew that defendant's act of jumping and landing on his son caused

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[5] While the People also argue there was no prejudicial error because there was no evidence that defendant committed only simple assault, this claim merely repeats the People's argument that no error occurred. (ROBM, p. 12.) Further, the claim must be rejected because it merely repeats the meritless argument which the Court of Appeal correctly rejected (Opn., p. 24), because it is premised on the inapplicable insufficiency of evidence standard (ROBM, p. 11), i.e. the facts are construed in the light most favorable to the People, instead of the correct test of construing the facts in the light most favorable to the defendant and the omitted instruction. This claim, therefore, must be rejected for the reasons previously stated in Argument I, *ante*.

death. Under these circumstances, a jury would feel compelled to convict in order to avoid acquittal of assault-death-causing conduct.

The People's argument that the jury's involuntary manslaughter conviction prevents a finding of improper all-or-nothing verdict choice is not supported by law, logic, evidence or the jury instructions actually received by the jury.

The jury was expressly instructed that each count must be decided separately. (2 CT 316 [CALCRIM No. 3515].) The People's multiple-count-cross-over argument – in which there is an attempt to use a lesser included offense for one count (the murder count) to argue non-prejudicial error as to an entirely separate and distinct second count (the child assault homicide count) for which no lesser included offenses were given to the jury – improperly attempts to transform involuntary manslaughter into a lesser included offense of child assault homicide.

Further, and more importantly, the People's contention is based on the unwarranted and unreasonable assumption that the jury violated their oaths and the CALCRIM No. 3515 instruction and considered the two counts jointly.

Instead of tending to establish harmless error, the People's argument only highlights the prejudice caused by the failure to instruct on assault as a lesser included offense of child assault homicide. The giving of lesser included offense instructions for one charge/count and omission of any lesser included offense instructions for a second charge/count could only signal to the jury that as to the

latter offense it is all-or-nothing.

In addition to ignoring the jury instructions which the jury was required to follow and is presumed on appeal to have followed absent evidence to the contrary (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148; *People v. Harris* (1994) 9 Cal.4th 407, 426), the People's contention ignores the facts. The jury returned a general verdict finding defendant guilty of involuntary manslaughter and it was bound only by the evidence and involuntary manslaughter instruction (see 2 CT 310-312 [CALCRIM No. 580 (Involuntary Manslaughter)]), not theories presented by the parties. Based on defendant's testimony, in which he basically admitted he was negligent in not taking his son to get checked out *after* falling on him, and the medical evidence that Reginald bled to death probably within an hour of receiving the injuries, the jury's involuntary manslaughter conviction could be based on defendant's omission, i.e. "a lawful act," instead of the "assault" that initially produced those injuries. (See 2 CT 310-312 [CALCRIM 580 (Involuntary Manslaughter)]. Of course, based on the jury's general verdicts, there is no way of knowing what the jury actually relied on or decided. (*People v. Ramkeesoon*, *supra*, 39 Cal.3d at p. 352, fn. 2.)

Consequently, the jury's involuntary manslaughter conviction may be wholly and reasonably factually distinct and separate from the child assault homicide conviction. Most certainly, the involuntary manslaughter conviction is not inconsistent with a finding that, as applied to the child assault homicide count, the evidence proved only

a simple assault.

This Court should construe the facts and verdicts in keeping with the jurors' oaths that they would follow the law as given by the trial court and decide the murder/lesser included offense count and child assault homicide/non-included offense count separately, without any cross-over consideration of involuntary manslaughter in the determination of the child assault homicide count.

B. THE INVOLUNTARY MANSLAUGHTER VERDICT DID NOT NECESSARILY DECIDE ANY FACTUAL QUESTION POSED BY THE OMITTED LESSER INCLUDED OFFENSE ASSAULT INSTRUCTION.

If the jury *in fact* found defendant guilty of involuntary manslaughter based on his subsequent failure to timely have his son checked out after falling on him then, of course, the jury's involuntary manslaughter guilty verdict did not decide any factual or, for that matter, legal question involving the child assault homicide count, yet alone the question of whether the "assault" (Pen. Code, § 240) based on jumping on the bed was only a simple assault or only an assault "by means of force that to a reasonable person would be likely to produce great bodily injury." (Pen. Code, § 273ab.)

Moreover, even if it may be speculated that the jury premised its involuntary manslaughter conviction based on the "assault" created by defendant's jumping on the bed, there can be no finding that in convicting defendant of involuntary manslaughter the jury necessarily decided that this "assault" was "by means of force that to

a reasonable person would be likely to produce great bodily injury," instead of only a simple assault.

Under both *Stewart* and *Orlina* (*People v. Stewart*, *supra*, 77 Cal.App.4th 785; *Orlina v. Superior Court*, *supra*, 73 Cal.App.4th 258), as well as the Court of Appeal's finding (Opn., pp. 27-28), involuntary manslaughter is a lesser-related offense and may be committed without the jury ever making any factual finding necessary for a child assault conviction. The only conclusion relating to the involuntary manslaughter conviction is that the jury determined the act or omission was done "without intent to kill and without conscious disregard of the risk to human life" (2 CT 310-312). (*People v. Sheldon* (1989) 48 Cal.3d 935, 961-962.)

Consequently, there can be no finding that the factual question posed by the omitted assault lesser included offense instruction was necessarily resolved adversely to the defendant under other, properly given instructions, or the jury's involuntary manslaughter verdict. (*People v. Ramkeesoon*, *supra*, 39 Cal.3d at pp. 351-352; *People v. Wickersham*, *supra*, 32 Cal.3d at p. 336; *People v. Sheldon*, *supra*, 48 Cal.3d at p. 961-962.)

While an assault may be the basis for an involuntary manslaughter conviction, the evidence need only establish "that such misdemeanor was dangerous to human life or safety under the circumstances of its commission." (*People v. Cox*, *supra*, 23 Cal.4th at p. 675.) A finding that an assault may be dangerous to human life or safety under the circumstances of its commission for purposes of

involuntary manslaughter does not require, as mandated by Penal Code Section 273ab, any factual inquiry or legal finding that the assault is "by means of force that to a reasonable person would be likely to produce great bodily injury."

Moreover, based on the involuntary manslaughter instruction actually given to the jury, it does not appear the jury would even consider any assault as a means of establishing involuntary manslaughter because the instruction is limited to "a lawful act." (2 CT 310-312.)

Finally, the involuntary manslaughter instruction specifically directed the jury to not make any factual findings relating to other "other homicide offenses" because involuntary manslaughter was different than those homicides. (2 CT 310-312.) Whether the jury considered the jury instruction's reference to "other homicide offenses" as limited to murder-homicide or included child assault homicide is unknown, but this statement is consistent with the specific instruction that all counts must be decided separately. (2 CT 316.)

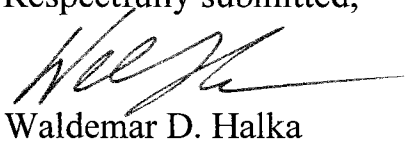
In conclusion, the People's attempt to use the adverse-finding harmless error doctrine to, in effect, transform the involuntary manslaughter conviction into a conviction of child assault homicide must therefore be rejected.

CONCLUSION

The Court of Appeal correctly identified and applied existing California Supreme Court and intermediate appellate court case law in concluding that the crime of simple assault is a lesser included offense of child assault homicide, that the trial court erred in failing to sua sponte instruct on the lesser include offense of simple assault, and that this error was prejudicial under the *Watson* test. There are no reasonable or justifiable grounds for this Court to intervene and reverse the Court of Appeal's judgment.

Dated: June 22, 2011

Respectfully submitted,



Waldemar D. Halka
Attorney for Defendant and
Appellant Reginald Wyatt

CERTIFICATE OF COMPLIANCE

I, Waldemar D. Halka, counsel for appellant, certify pursuant to rule 8.520(c)(1) of the California Rules of Court, that the word count for this Answer Brief on the Merits is 9,819 words, excluding the tables, this certificate, and any attachment permitted under the rules. This document was prepared in WordPerfect X5, and this is the word count generated by the program for this document. The brief uses a 14 point Times New Roman font.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Diego, California, on June 22, 2011.

Waldemar D. Halka
Attorney for Defendant and
Appellant Reginald Wyatt

DECLARATION OF SERVICE

I, Waldemar D. Halka, declare under penalty of perjury I am over 18 years of age; I am not a party to the action herein; my business address is P.O. Box 99965, San Diego, California 92169. I caused to be served a copy of the following document to each of the parties listed below:

APPELLANT'S ANSWER BRIEF ON THE MERITS
People v. Wyatt
Case No. S189786

Clerk of Court of Appeal First District, Division Two 350 McAllister St. San Francisco, CA 94102	***Appellate Court***
Hon. Jon Rolefson, Judge c/o Clerk of Alameda Superior Court 1225 Fallon Street Oakland, CA 94612	***Trial Court***
Office of the Attorney General 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102	***Appellate Counsel for Plaintiff-Respondent***
Alameda County District Attorney 1225 Fallon Street, Room 900 Oakland CA 94612	***Trial Counsel for Plaintiff-Respondent***
Reginald Wyatt (CDC # F33546) Salinas Valley State Prison P.O. Box 1050 Soledad, CA 93960-1050	***Defendant-Appellant***
First District Appellate Project 730 Harrison Street, Ste. 201 San Francisco, CA 94107	***Appellate Program***

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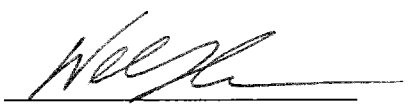

Waldemar D. Halka