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In the Supreme Court of the State of California

SUPREME COURT
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Deputy

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. A114612
Alameda County Superior Court, Case No. C0147107
The Honorable Jon Rolefson, Judge

RESPONDENT'S REPLY BRIEF ON THE MERITS

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ARGUMENT

I. THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT AN INSTRUCTION ON SIMPLE ASSAULT

Appellant contends that there was substantial evidence to support an instruction on simple assault as a lesser included offense of child abuse homicide because the jury could have rejected the prosecution's theory and decided that his "jumping on the bed produced the injuries that eventually led to his son's death." (AB 25.) Appellant states that "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." (AB 28, emphasis in original.)

Appellant's defense was that he was not guilty of any offense because his son died as a result of appellant accidentally "falling on his son while play-wrestling with him." (8 RT 1573, see 8 RT 1548, 1567, 1569, 1573-1575, 1577, 1579-1581.) Defense counsel argued that appellant "had no idea when he started falling that he was going to land with all his weight on his son" (8 RT 1574), and that appellant "was not aware that when he started coming down, when he landed, that it would cause the death of his child." (8 RT 1578). Counsel characterized Reginald's death as a "[t]errible, tragic, fatal accident." (8 RT 1579.)

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* (2010) 48 Cal.4th 776, 780.) Under the defense's accident theory, appellant was *not* aware of facts that would lead a reasonable person to realize that Reginald would probably be crushed to death by the weight of appellant's fall. Consequently, under the defense

theory, appellant would not be guilty of assault and there was no evidence to support a simple assault instruction.

Moreover, if appellant was aware of facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct, his crime would be aggravated assault, not simple assault. Reginald's injuries were severe and extensive, "basically at the end of the bell curve." (3 RT 498.) Reginald had injuries 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.) Such injuries could support only a finding of aggravated assault, not simple assault.

This case is similar to *People v. Yeats* (1977) 66 Cal.App.3d 874, in which the court stated:

> Defendant's remaining contention is that the court committed error in not instructing *sua sponte* on simple assault. (Pen. Code § 240.) It is true that simple assault is included within the offense of assault by means of force likely to produce great bodily injury. (See *People v. Rupert*, *supra*, 20 Cal.App.3d 961, 968.) However, it is equally true that "the trial court may properly refuse to instruct upon simple assault where the evidence is such as to make it clear that if the defendant is guilty at all, he is guilty of the higher offense." (*People v. McCoy*, 25 Cal.2d 177, 187-188 [153 P.2d 315]; see also *People v. Cabral*, 51 Cal.App.3d 707, 713 [124 Cal.Rptr. 418]; *People v. Fleig*, 253 Cal.App.2d 634, 642 [61 Cal.Rptr. 397].) This is especially true where the defense, as here, is that the defendant did not commit the assault. (*People v. Groce*, 18 Cal.App.3d 292, 295 [95 Cal.Rptr. 688].)
>
> In the case at bench the jury had only two alternatives from which to choose. Either defendant did not assault Pauline, or he assaulted her with an 18-inch length of lead pipe and inflicted the dreadful injuries previously described. Accepting the latter alternative, the jury could not have returned a verdict of simple assault. There was no error committed in the refusal of the trial court to instruct *sua sponte* on simple assault.

(*People v. Yeats*, *supra*, 66 Cal.App.3d at pp. 879-880.)

By the same token, in this case, either appellant did not assault Reginald or he assaulted him with his fists and legs and inflicted the egregious injuries that led to Reginald's death.

II. ANY ERROR IN FAILING TO GIVE A SIMPLE ASSAULT INSTRUCTION WAS HARMLESS

The jury, by finding appellant guilty of involuntary manslaughter, 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.[1] (8 RT 1516; 2 CT 311 [CALCRIM No. 580].)[2] Thus, any error in failing to instruct on simple assault was harmless because the jury necessarily decided the factual question posed by the omitted instruction adversely to appellant under other properly given instructions. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085; *People v. Sedeno* (1974) 10 Cal.3d 703, 721.)

Appellant contends that his conviction of involuntary manslaughter could have been based on his testimony that he "was negligent in not taking his son to get checked out *after* falling on him" (AB 36), rather than on

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[1] Appellant was charged with murder in count one and child abuse homicide in count two. (1 CT 97-99.) The trial court granted appellant's motion under Penal Code section 1118.1 for acquittal as to first degree murder in count one and instructed the jury on second degree murder. (2 CT 205, 308.) The court also instructed the jury on involuntary manslaughter as a lesser included offense of second degree murder in count one. (2 CT 310.) The jury found appellant guilty in count one of the lesser included offense of involuntary manslaughter. (2 CT 326.) The jury found him guilty in count two of the charged offense of child abuse homicide. (2 CT 327.)

[2] The jury was instructed that involuntary manslaughter is the commission of a lawful act with criminal negligence, and that a person acts with criminal negligence when he acts in a reckless way that creates a high risk of death or great bodily injury and a reasonable person would have known that acting in that way would create such a risk. (8 RT 1516.)

evidence that he hit his son in a series of wrestling moves. If this is true, appellant argues, then the jury's verdict of involuntary manslaughter did not decide the factual question posed by the omitted simple assault instruction. (AB 37.) Appellant's contention, based entirely on speculation, has no merit.

The prosecution argued that appellant was guilty of the charged offense of murder and not the lesser included offense of involuntary manslaughter because appellant "intentionally brutalized this child." (8 RT 1538.) Defense counsel argued that appellant was not guilty of any crime because Reginald's death was an accident. However, counsel strategically conceded "there is evidence that he committed involuntary manslaughter if you find that his course and conduct in playing in the manner he did, he endangered the life of this child in the manner in which the law describes as criminally negligent." (8 RT 1582.)

Appellant's failure to seek medical care for Reginald after falling on him was never presented to the jury as a theory for involuntary manslaughter. Thus, the jury never considered that theory and this Court should not accept that theory as a possible basis for the involuntary manslaughter conviction. (See *Yates v. Evatt* (1991) 500 U.S. 391, 409, overruled on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 73, fn. 4 [prosecution's failure to present transferred intent theory to jury prevented court from applying that theory to evidence in assessing harmless error]; *People v. Lewis* (2006) 139 Cal.App.4th 874, 886 ["even though there may be sufficient evidence to support a conviction on a theory not presented to the jury, because the theory was not presented to the jury, a reviewing court is barred from determining that the error is harmless"]; *People v. Smith* (1984) 155 Cal.App.3d 1103, 1145 ["It would deprive the defendant of his right to a jury trial if an appellate court could find a theft on a theory not presented to the jury"].)

Furthermore, appellant's failure to seek medical care for Reginald after falling on him was never raised as a theory for involuntary manslaughter in the Court of Appeal. Arguments raised by a defendant in the Supreme Court but not in the Court of Appeal will not be addressed. (*People v. Cookson* (1991) 54 Cal.3d 1091, 1100.)

Appellant contends that, absent an instruction on simple assault as a lesser included offense of child abuse homicide in count two, the jury was forced into an all-or-nothing choice. (AB 34.) Appellant recognizes that the jury had the alternative of convicting him of involuntary manslaughter as a lesser included offense of second degree murder in count one. However, he argues that this Court should "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." (AB 37.)

Because the jury had the alternative of convicting appellant of involuntary manslaughter, it was not forced to choose between convicting him of child abuse homicide or acquitting him altogether. The jury had the option to convict appellant of involuntary manslaughter only and to acquit him of child abuse homicide. (See *Schad v. Arizona* (1991) 501 U.S. 624, 646-648 [no "all or nothing" choice between murder and acquittal because jury was instructed on second degree murder]; *People v. Avila* (2009) 46 Cal.4th 680, 707 [same].) Appellant's no "cross-over consideration" argument is based on the illogical premise that the absence of a lesser included offense instruction on one count forces the jury into an all-or-nothing dilemma no matter how many lesser offenses are presented to the jury as alternatives in other counts.

CONCLUSION

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

Dated: July 14, 2011

Respectfully submitted,

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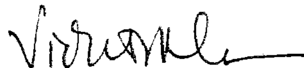

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 1,474 words.

Dated: July 14, 2011

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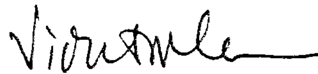

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DECLARATION OF SERVICE BY U.S. MAIL

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 July 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 July 18, 2011, at San Francisco, California.

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Declarant	Signature

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