ORIGINAL

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.

Supreme Court Case No. S161545

Court of Appeal Fourth District
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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

WALDEMAR D. HALKA
Attorney at Law
State Bar No. 137915
P.O. Box 99965
San Diego, CA 92169
Tel/Fax: (858) 273-8626
e-mail: halkalaw@sbcglobal.net

Attorney for Defendant and
Appellant Reginald Wyatt

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APPELLANT'S ANSWER BRIEF ON THE MERITS

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Defendant and appellant Reginald Wyatt (hereafter defendant) respectfully submits his Answer Brief on the Merits.

ISSUES GRANTED REVIEW

"Did substantial evidence support defendant's conviction for a caregiver's assault on a child by means of force likely to produce great bodily injury causing death (Pen. Code, § 273ab)?"

"Specifically, was there evidence that defendant was 'aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct' (*People v. Williams* (2001) 26 Cal.4th 779, 788)?"

CONCLUSIONS

The Court of Appeal correctly found there was insufficient evidence to support the mental state necessary for assault under *People v. Williams* (2001) 26 Cal.4th 779, because (1) the correct appellate review insufficiency of evidence test was applied (Opn., p. 18, quoting *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), (2) there was no substantial evidence defendant was actually aware of facts that would lead a reasonable person to realize his acts constituted a battery, (3) there was substantial evidence defendant was a loving father, (4) there was no evidence defendant had been violent with his son in the past, and (5) there was no evidence defendant's acts were motivated by anger or frustration.

Further, under *People v. Williams*, *supra*, 26 Cal.4th 779, and California law, criminal negligence cannot support an assault conviction. The jury found defendant guilty of involuntary manslaughter, and nothing in the record suggests the jury based its involuntary manslaughter conviction on different

facts.[1]

STATEMENT OF THE CASE

On May 18, 2003, 14-month-old Reginald Wyatt Jr. (hereafter Reginald) died while in the custody and care of defendant, his father. (2 RT 371-373, 379-384, 391; 3 RT 414, 468, 535.) Oakland police, firefighters, and paramedics responded to defendant's 911 call that his son was not breathing and, because there were no obvious signs of trauma to Reginald's body, police believed it was a sudden infant death syndrome death. (2 RT 268, 348-351, 357-358, 363; 4 RT 622, 644, 762.)

The next day, May 19, police learned from the autopsy pathologist that Reginald died from hemorrhage and shock due to blunt force trauma to his chest and abdomen. (2 RT 371-373, 379-384, 391; 3 RT 414.) Police obtained a warrant to arrest defendant, but before the warrant could be executed defendant voluntarily appeared at the Oakland Police Department after learning Reginald had died from blunt force trauma and police wanted to interview him. (4 RT 643-644, 783-784, 787, 795-796.)

After being at the police station for more than 9 hours, and being subjected to a 7-hour interrogation process, defendant was arrested for murder

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[1] For purposes of addressing insufficiency of evidence, the Court of Appeal "assume[d] that the jury believed the prosecution theory that Reginald was harmed by defendant's wrestling moves alone or by a combination of wrestling and falling on him, rather than solely by defendant's jumping on the bed and falling on Reginald. That is because, if the evidence was insufficient to support the Penal Code section 273ab conviction based on the wrestling scenario, it was necessarily insufficient also to support the conviction based on the jumping on the bed scenario." (Opn. at p. 21, fn. 7.)

based on his interview and inconsistent statements he had made to police on the previous day. (4 RT 540, 585, 588, 591-592, 601, 633, 635, 649, 653, 714, 721, 725-726, 736-737, 772-773, 795-797, 824, 829, 840.)

On March 20, 2004, an information was filed in the Superior Court of Alameda County charging defendant with one count of murder (Pen. Code, § 187, subd. (a)) and one count of assault by a caregiver upon a child by means of force likely to produce great bodily injury causing death (Pen. Code, § 273ab). (1 CT 97-98.) Both counts alleged personal infliction of great bodily injury within the meaning of Penal Code section 1203.075. (1 CT 98.) The information further alleged a prior felony conviction from Louisiana. (1 CT 98.) Defendant pled not guilty to the substantive charges and denied the special allegations. (1 CT 100.)

Jury trial began on March 20, 2006. (2 CT 179.) After the evidence concluded, and the People decided not to seek a first degree murder conviction, the jury was instructed on the charged crimes of assault by a caregiver upon a child and second degree murder. (2 CT 313; 8 RT 1442-1463.) The jury was instructed on both express malice (i.e. an intent to kill) and implied malice (i.e. acting with conscious disregard of danger to human life) murder. (2 CT 308-309.) As a lesser included offense of second degree of murder, the jury was instructed on the crime of involuntary manslaughter. (2 CT 310.)

On April 11, 2006, the jury found defendant guilty of involuntary manslaughter and assault by a caregiver upon a child. (2 CT 279-280, 326-327.) On its own motion, the trial court struck the great bodily injury and prior conviction allegations in the interest of justice. (2 CT 279, 281.)

Defendant filed a motion for new trial on several grounds, including the ground the verdicts were "mutually inconsistent" and contrary to the law and

evidence. (2 CT 332-354.)

On July 6, 2006, the trial court denied the new trial motion and sentenced defendant to prison for 25 years to life for the assault upon a child conviction. (2 CT 359-360, 364; 8 RT 1643-1646.) A 3-year prison term for the involuntary manslaughter conviction was stayed pursuant to Penal Code section 654. (2 CT 359-360, 362; 8 RT 1656.)

Defendant timely appealed his judgment of conviction. (2 CT 366.) In an unpublished opinion filed on January 31, 2008, the Court of Appeal, First Appellate District, Division Two, reversed the assault upon a child conviction for insufficiency of evidence, because the People failed to prove an "assault" – an essential element of Penal Code section 273ab.[2] (Opn. at pp. 2, 18-24, 33.) The Court of Appeal found that "while the evidence reveals negligence of an astounding degree and to tragic effect, it does not demonstrate that [defendant] had the requisite awareness 'of facts that would lead a reasonable person to realize that [his] act by its nature would directly and probably result in great bodily injury to the child.'" (Opn. at p. 24.)

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[2] Penal Code section 273ab provides in relevant part: "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 in the state prison for 25 years to life." (Pen. Code, § 273ab.)

STATEMENT OF FACTS

A. Introduction

The Court of Appeal identified and applied the correct standard of review for determining insufficiency of evidence. (Opn. at p. 18, quoting *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206.)

In *Ochoa*, this Court stated the well-established principles for evaluating sufficiency of evidence: "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206; *People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) "Evidence, to be 'substantial' must be 'of ponderable legal significance . . . reasonable in nature, credible, and of solid value.'" (*People v. Johnson*, *supra*, 26 Cal.3d at p. 576.)

In *People v. Johnson*, *supra*, 25 Cal.3d 557, this Court held that an appellate court reviewing sufficiency of the evidence does not limit its review to the evidence favorable to the People. (*Id.* at p. 577.) Rather, the *Johnson* court explained, "our task . . . is twofold. First, we must resolve the issue in the light of the whole record -- i.e., the entire picture of the defendant put before the jury -- and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not

every surface conflict of evidence remains substantial in the light of other facts.'" (*Id.* at p. 578, quoting *People v. Bassett* (1968) 69 Cal.2d 122, 138, fn. omitted.)

Although reasonable inferences must be drawn in support of the judgment, appellate courts may not "go beyond inference and into the realm of speculation in order to find support for a judgment." (*People v. Memro* (1985) 38 Cal.3d 658, 695.) A conviction may not be based on speculation, imagination, conjecture, or guess work. (*People v. Morris* (1988) 46 Cal.3d 1, 21; *People v. Babbitt* (1988) 45 Cal.3d 660, 681-682.)

Accordingly, because the insufficiency of evidence test requires review of the totality of the evidence, the prosecution and defense theories are important to consider in relationship to the evidence and jury's verdicts of acquittal.

While the facts must be viewed in the light most favorable to the verdicts, the insufficiency of evidence test necessarily includes verdicts of acquittal.

B. Overview of the Case

Based on the physical autopsy evidence, defendant's May 18 and 19 statements to police and others, and defendant's failure to promptly tell police or others about any "accident" involving Reginald prior to his death, the People's theory was that defendant had intentionally and brutally beat, battered, and body-slammed his son, whom he had never wanted in the first place, to death. (8 RT 1521-1522, 1540-1541, 1544, 1591-1593, 1599, 1610.)

According to the prosecutor, the jury was required to convict of murder because defendant knew that the punching and wrestling moves that resulted in Reginald's death were dangerous to his life and, therefore, at a minimum

implied malice had been established beyond a reasonable doubt. (8 RT 1524, 1527-1530, 1533-1534.) The prosecutor called on the jury to reject the defense theory of "accident" and argument that, at most, defendant could be convicted of involuntary manslaughter. (8 RT 1535-1536, 1597, 1600-1602.)

The prosecutor also argued defendant should be convicted of assault upon a child because, if the act that caused death was "intentional," there could be no "accident," and there had been no "accident" because defendant never told police on May 18 of the claimed accident. (8 RT 1538-1541.)

The defense theory was "accident" – no crime had been committed. But, if a crime had been committed, it could only be involuntary manslaughter because, at most, defendant acted with criminal negligence. (8 RT 1546-1548, 1572-1573, 1581-1582.) In support of this theory, the defense used the same autopsy findings relied on by the prosecutor, challenged the reliability of the police interrogation methods which led to defendant's "false confession" on May 19, and relied on the testimony of defendant and other witnesses to explain defendant's character, the false confession, and the actual events that led to Reginald's death. (8 RT 1547-1548, 1550-1552, 1555-1558, 1560-1563, 1569, 1571, 1573.)

C. The Evidence

1. Prosecution's Case

Reginald's mother, Charrikka Harris (hereafter Harris), and defendant never married. Before a paternity test and an appearance on a television show which established defendant's parentage, defendant had questioned whether Reginald was his child, since Harris had a boyfriend and was regularly having sex with him when she became pregnant, and defendant did not want Harris in his life. (1 RT 124, 131, 135-138, 185-187, 190-191, 199-200, 202-203.)

After defendant learned he was Reginald's father, he and Harris still had a rocky relationship and there was animosity between the two concerning custody, visitation, financial assistance, and defendant's involvement in his son's life. (1 RT 131, 134, 140-141, 143, 145-146, 150-151, 157, 184-185, 189-190, 194-195, 216.)

In May 2003, defendant was living with his girlfriend Tiffany Blake (hereafter Tiffany) and their 3-month old daughter Valerie. (1 RT 150-151, 153, 157-158, 195; 3 RT 452.) Reginald was scheduled to spend the May 17 weekend with defendant, and on May 14 defendant had asked Harris if he could have custody of Reginald. (1 RT 200.) Harris replied she would think about it. (1 RT 200.) According to Harris, the May 14 conversation was the first "decent" conversation she had had with defendant concerning their son. (1 RT 200-201.) In April, defendant had told Harris he wanted Reginald to come live with him and Tiffany. (1 RT 207, 210.)

Tiffany testified defendant was a good father to Reginald; he never harmed his son, and he never would. (3 RT 551-552.) Tiffany had never seen defendant become impatient or frustrated with Reginald, and she had never seen him physically discipline Reginald. (3 RT 562-563, 568, 571.) Both Tiffany and defendant wanted Reginald to live with them full time. (3 RT 553, 561.)

Since March 2003 Reginald had been spending more time with defendant. (1 RT 197, 227.) Harris started noticing that Reginald, after returning home from visiting his father, would fight a lot, even with her; he would jump on people's heads, climb up on top of furniture, tables and beds and then jump down; and he would wrestle with other children. (1 RT 197, 227.) Harris believed Reginald had learned these things from his father. (1 RT 197-198.)

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 ever releasing him. (3 RT 476-478, 544.) Defendant may have done this two or three times before Tiffany told him that he "shouldn't play like that." (3 RT 479-481.) Based on Reginald's "blank" facial expression and/or his crying, Tiffany believed Reginald was not having any fun. (3 RT 479-481, 545-546, 572-573.) She told defendant it was possible Reginald was not having fun, and the whole point of playing with him was for Reginald to have fun. (3 RT 479-481, 545-546.) Tiffany did not believe defendant was hurting Reginald, but she thought he was playing too rough with him. (3 RT 547, 565.) Defendant asked Tiffany, "You think so?" (3 RT 481-482, 547, 563.) When Tiffany replied "Yes," defendant stopped playing with Reginald. (3 RT 481-482, 547, 563.)

While Tiffany agreed defendant's playing with Reginald could be described as a type of wrestling move, she had never seen defendant actually wrestle Reginald or inflict any type of bodily force on him on this day or at any time. (3 RT 464, 475, 479.) On the morning of May 18, defendant was not "wrestling" with Reginald. (3 RT 464.)

About 10:45 a.m., defendant appeared with Valerie and Reginald at the first floor apartment of Douglas Curtis. (2 RT 265-266.) With Reginald in his arms, defendant asked Curtis if he would "please dial 911" because "my baby is not breathing." (2 RT 265-267.) Defendant appeared to be scared, upset, shaken, and concerned. (2 RT 267-269.)

In response to Curtis asking "what happened," defendant replied 911 was needed because his baby has asthma and he did not have the baby's

medicine. (2 RT 267-268.) Defendant also explained he had tried to call 911, but he could not get through. (2 RT 268-269.) Curtis made the call, handed the telephone to defendant, and paramedics were dispatched to the apartment complex at 10:48 a.m. (2 RT 268, 348-349, 357.)

During the 911 call, defendant stated he needed an ambulance because his 14-month-old baby had stopped breathing. (2 CT 210.) With the help of the 911 operator, defendant gave Reginald CPR, but his attempt to resuscitate Reginald failed. (2 CT 211-212.) After hearing approaching sirens, defendant hung up the telephone. (2 CT 213.)

Police and firefighters had already arrived at the apartment complex and were attempting to revive Reginald when paramedics arrived at 10:52 a.m. (2 RT 350-351, 358.) While paramedics were working on Reginald, Officer Kaizer Albino of the Oakland Police Department met with defendant. (4 RT 581-582.) Defendant was emotional, upset, crying and he had a "thousand mile stare" focused on Reginald. (4 RT 585, 600-601.)

Officer Albino took defendant up to defendant's apartment and interviewed him from 11:15 a.m. to 11:40 a.m. (4 RT 585, 588, 592, 601.) Prior to the interview, defendant had called Tiffany and told her Reginald was not breathing. (3 RT 485, 535-536.)

Still emotionally distraught and crying, defendant explained to Officer Albino how he had played with Reginald around 9:00 a.m., he put Reginald down on the floor on his blankets before taking a nap, and after he woke up around 10:45 a.m., he found Reginald not breathing and with green fluid in his nose. (4 RT 590-592, 601.) Defendant tried CPR and called 911, but he

could not get through to 911.[3] (4 RT 591.) After the interview, defendant wrote down his statement, and neither his written nor oral statement included any mention of his having "wrestled" with Reginald. (4 RT 591-592, 601.)

After spending several minutes attempting to revive Reginald's lifeless body, paramedics decided to transport him to Children's Hospital. (2 RT 265-266, 268, 352-358, 362.) Defendant once again called Harris and, after reaching her, he told her Reginald could not breathe and he was being taken to the hospital. (1 RT 163.)

Reginald was "flat-line" when he arrived at the hospital at 11:01 a.m. (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.) Reginald was formally pronounced dead at 11:24 a.m. (4 RT 701.) Defendant called Tiffany and, while crying and weeping, told her Reginald was dead. (3 RT 566-567.)

Sgt. James Rullamas of the Oakland Police Department arrived at the hospital shortly after 1:00 p.m. and interviewed defendant. (4 RT 629.) Defendant stated that, except for dropping Reginald while attempting to leave the apartment, Reginald had not suffered any other falls or accidents. (4 RT 633.) Defendant, who was upset and distraught and in disbelief, did not mention anything about wrestling with Reginald or playing too rough with him. (4 RT 635, 772-773.) Because there were no signs of obvious trauma to Reginald's body, Sgt. Rullamas believed it was a sudden infant death

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[3] Telephone records and testimony established that defendant had called 911 twice, and before calling 911 he had attempted to call his step-mother and Harris. (1 RT 160-161; 3 RT 538.) Defendant left a voice mail with Harris, saying Reginald had an asthma attack and he needed his medicine. (1 RT 161-162.)

syndrome death, notwithstanding allegations from members of Harris' family that defendant had murdered Reginald. (4 RT 622, 644, 762, 767-770.)

The autopsy on Reginald's body was performed by David Levin, M.D., on May 19. Reginald, who was 31 inches tall and weighed 26 pounds, died from hemorrhage and shock due to blunt force trauma to his chest and abdomen. (2 RT 371-373, 379-384, 391; 3 RT 414.) The trauma, which could have also included blunt force trauma to Reginald's back, caused four fractured ribs (two fractured ribs to each side his 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.) Those injuries would not have resulted in Reginald's immediate death, and it could have taken more than an hour for him to die. (3 RT 423, 448.)

Sgt. Rullamas learned of the autopsy results at 11:40 a.m. (4 RT 641-642, 775-776, 778-779, 783.) He asked his partner to obtain an arrest warrant and arrest defendant for murder. (4 RT 643-644, 783-784.)

Family members, including defendant and defendant's brother Anthony Caldwell, a police officer with the Oakland Police Department, had gathered at Harris' house on May 19. (1 RT 172, 174-175.) Shortly after 1:00 p.m., Harris received a call from the coroner and learned that Reginald had suffered broken ribs and died from hemorrhaging due to blunt force trauma. (1 RT 172, 174-176; 4 RT 610-611.)

Harris turned to defendant and told him that police were en route to "arrest" him. (1 RT 177, 212.) Defendant did not offer any explanation as to how Reginald might have suffered such injuries. (1 RT 176-177.) Nor did defendant respond when Harris' sister, Linda, directly accused him, "He did this." (4 RT 616.)

Caldwell called the Oakland Police Department and was told that detectives wanted to interview his brother. (4 RT 787.) Caldwell drove defendant to the police station, arriving there around 2:35 p.m. (4 RT 795-796.) Defendant's interview with Sgt. Rullamas and his partner Sgt. Nolan did not begin, however, until 4:15 p.m. (4 RT 796-797.) The interview process lasted until 11:39 p.m., after which defendant was arrested and taken to jail. (4 RT 736-737.)

Harris believed defendant loved their son and, even after learning that defendant had been charged with murder, she did not believe defendant had purposefully killed Reginald. (1 RT 178-179, 181-182.) Harris continued to visit defendant in jail up to September 2003, until both the prosecutor and family members told her defendant had intentionally killed Reginald, family members had stopped talking to her, and she had heard defendant's taped statements during the preliminary hearing. (1 RT 181-182, 184, 230-231, 234.)

In his statement of May 19, made after receiving *Miranda* warnings both before an untaped and taped interview, defendant talked about "snapping" and "going off" on Reginald, performing wrestling moves on Reginald, which he demonstrated, and having jumped on Reginald with his full weight when attempting to jump on the bed and make it bounce up and down.[4] (2 CT 239-241; 4 RT 649-651, 669-672, 680-683, 685-687, 690, 692, 820, 824-826.) Defendant stated he had wrestled with Reginald before without anything ever happening, and wrestling was a way to "toughen up" Reginald. (4 RT 732.)

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[4] Consistent with Oakland Police Department policy, Sgt. Rullamas conducted an un-taped interview first, and, after close to 2 hours had elapsed and defendant talked about "wrestling" with Reginald, Sgt. Rullamas began the tape-recorded interview. (2 CT 233-234; 4 RT 796-797, 810, 815-818.)

When wrestling with Reginald, defendant was just doing "the same old same old." (2 CT 247, 252.)

Defendant further explained in detail how, with Reginald lying on the bed, he ran and jumped on the bed, i.e. "comin' off the top rope," in order to make the bed shake, and, as he was coming down, Reginald "kinda rolled" and his "whole body came down on" Reginald. (2 CT 241, 243-244, 268.) Reginald "grunted," "like the wind had got knocked out of him," but he did not cry and he was still smiling." (2 CT 243, 245, 268; 4 RT 712.) Sgt. Rullamas did not believe defendant's jumping on Reginald could cause all of Reginald's internal injuries. (4 RT 825-826.)

After defendant fell on Reginald with his full body weight of 170 pounds, Reginald got "kinda sleepy" and appeared to be tired. (2 CT 268.) Defendant, however, continued to play with him, like "boxers," and he punched Reginald in the chest. (2 CT 244-247.) While playing "boxer," defendant "thought" he might have hit Reginald "harder"in the chest, but Reginald stayed on his feet. (2 CT 245-246.) Defendant estimated he could have hit Reginald up to ten or eleven times in the chest. (2 CT 247.) Defendant also stated he may have dropped an "atomic elbow" on Reginald's head and back, he may have used his forearm to strike Reginald's upper chest possibly three times, and he may have done some "knee-drops" on Reginald. (2 CT 249-250.)

Defendant stopped only when he became tired, and he placed Reginald down on the floor with his blankets so Reginald could watch television. (2 CT 252-253.) Reginald just sat there and watched television, just like he "always" did. (2 CT 252-253.) Defendant fell asleep on the bed and did not wake up until around 10:30 a.m., when he found Reginald was not moving or breathing. (2 CT 253-254.)

According to Dr. Levin, the injuries he saw during the autopsy could have been caused by the wrestling moves described by defendant in his taped statement to police, with different blunt force trauma being inflicted on Reginald's head, chest, abdomen, and back. (2 RT 363-364, 398, 400; 3 RT 434, 436-438.) While one might expect a child to cry upon receiving the type of injuries suffered by Reginald, it would be possible for a child not to cry. (3 RT 423-424.) Reginald could have remained conscious for a time after receiving his injuries, and it may have taken more than an hour for Reginald to die. (3 RT 423-424, 426, 448.)

Dr. Levin admitted, however, all of the blunt force trauma and injuries, except for the head injury, could have come from a single and significantly strong blunt force trauma. (2 RT 400-403; 3 RT 421-422.) If defendant had jumped up and landed with his full weight on Reginald, all of the internal injuries could have been caused by such force. (3 RT 443.)

While Dr. Levine could not say one way or the other whether all the injuries that led to the hemorrhaging, shock, and death had been caused by a single blunt force trauma (3 RT 434, 442-445), there was no damage to Reginald's spleen, which was unusual if Reginald had actually been struck numerous times on the left and right side of his body. (3 RT 420-421.) If Reginald had been severely beaten, Dr. Levin would have expected to find multiple contusions that were not present on Reginald's body. (3 RT 429-431.)

Dr. Levine further testified that the contusion on the top of Reginald's forehead could have occurred as a result of Reginald being dropped, and there was no physical evidence Reginald had received a blow to his head. Other minor abrasions, bruises and injuries found during the autopsy could have resulted from the handling of Reginald after the infliction of the blunt force

trauma or during medical treatment. (2 RT 401-402, 407-409; 3 RT 412, 419, 496-497, 514-516.)

James Crawford, M.D., a physician at Children's Hospital, testified that the type of injuries suffered to Reginald's liver established at least one severe blow and possibly a great number of blows. (3 RT 509.) In his opinion, however, there had been multiple blows. (3 RT 528.) However, 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 could not testify as to how the injuries occurred. (3 RT 529.)

According to Dr. Crawford, a child receiving the type of injuries suffered by Reginald would be expected to react in some manner and not act "normal." (3 RT 489, 505-507, 524.) Dr. Crawford would expect a conscious child to cry, be upset, or show signs of distress upon receiving such injuries. (3 RT 505.) If the injured child remained conscious and awake, he expected the child would become irritable, very quiet, and sit still or show some other sign of distress. (3 RT 507, 525.) But every child might respond differently. (3 RT 526-527.)

2. Defense Case

Defendant testified and denied actually wrestling with Reginald. Defendant explained he had only been "play wrestling" with Reginald, Reginald was only "lightly touched" while they were playing, and he never struck or hit Reginald. (5 RT 1043-1044, 1048-1051, 1108.)

During the May 19 taped statement, defendant was describing and demonstrating "play wrestling" moves, not actual wrestling moves, and he would never perform actual wrestling moves on his son. (5 RT 1044, 1049, 1052-1053.) Defendant never struck Reginald in the chest, although as part

of the "play wrestling" he did pretend to hit and "lightly push" him in that area. (5 RT 1045-1046.)

After Tiffany told defendant he was playing too rough with Reginald, he stopped playing with him. (5 RT 1034-1036; 6 RT 1216, 1218, 1224, 1226-1227.) Shortly after Tiffany left for work, defendant started playing with Reginald and once again started lifting Reginald up over his head, lowering him to the bed, and, when Reginald was 3 or 4 inches from the bed, tossing him on the bed. (5 RT 1036-1037; 6 RT 1231, 1239.) Defendant continued playing with Reginald in this manner because he thought Reginald liked it, based on Reginald's laughter and smile. (5 RT 1037-1038; 6 RT 1232, 1240.)

Reginald also played with Reginald by jumping on the bed with Reginald on it in order to "shake" and "rock" the bed. (5 RT 1038, 1043.) In defendant's mind, in make-believe wrestling with Reginald, this was called "off-the-rope." (5 RT 1048-1049.) Defendant had previously played with Reginald in this manner. (6 RT 1247.) This time, however, after defendant jumped up and was coming down, Reginald turned and rolled over toward defendant. (5 RT 1039-1042; 6 RT 1243-1244; 7 RT 1406.) Defendant could not stop his fall and, before he could break the fall by putting his arm down, he landed with his full body weight directly on Reginald. (5 RT 1039-1040, 1053; 6 RT 1244-1246; 7 RT 1406-1407.) Reginald made a "grunt" sound. (6 RT 1247.)

Defendant immediately rolled off Reginald and picked him up to see if he was all right. (5 RT 1054; 6 RT 1248.) Reginald was not crying, but the wind had been knocked out of him and he could not get his breath. (5 RT 1054; 6 RT 1248.) After 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.)

Thinking Reginald was "all right," defendant never thought 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 on his blankets so he could watch television. (5 RT 1054-1055; 6 RT 1249-1250.) Reginald appeared to be fine when he was sitting up watching television, but he soon laid down. (5 RT 1054-1055; 6 RT 1250.)

A short time later, around 10:00 a.m., defendant placed baby Valerie on the bed with him and he drifted off to sleep while watching a playoff basketball game. (5 RT 1055, 1232; 6 RT 1250.) By that time, Reginald appeared to be sleeping. (5 RT 1054-1055; 6 RT 1252-1253.)

Defendant testified about what he did after waking up and finding Reginald motionless. (5 RT 1056; 6 RT 1255-1256.) He described the numerous telephone calls the had tried to make, including the two 911 calls, while attempting to revive Reginald by giving him CPR.[5] (5 RT 1056-1057, 1059-1061-1062; 6 RT 1256-1258.) When defendant saw "green stuff" come out of Reginald's nose, he thought he might have "killed his son." (5 RT 1057.) Defendant testified about getting Reginald dressed because it was "cold outside" and dropping both children as he was leaving the apartment. (5 RT 1062-1064; 6 RT 1217.)

While en route to the hospital in a police car, defendant learned Reginald was dead. (5 RT 1071-1072.) Defendant broke down and, after seeing Reginald in the hospital, he tried to hold Reginald and not leave the

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[5] Based on telephone records, defendant's call to his step-mother, Elaine Caldwell, occurred at 10:32 a.m. (5 RT 917; 6 RT 1260.) For close to 20 minutes defendant attempted CPR, while attempting to call Elaine, Harris, and 911 twice. (6 RT 1260-1264.) Each time defendant called 911 he got the same recording that all available lines were busy. (6 RT 1263-1264.)

room, but he was restrained and ushered out of the room. (5 RT 1073.)

Defendant accepted his brother's offer to spend the night with him. (5 RT 949, 1073; 6 RT 1280.) Caldwell spent much of the night and early morning trying to console defendant. (5 RT 973.) Defendant testified he stayed up all night, and estimated he had received less than two hours sleep before he and his brother went to Harris' house on May 19. (5 RT 1073.)

In response to Caldwell asking defendant what had happened at the house, defendant told him what had happened and that he had fallen on Reginald, but defendant could not recall the actual conversation and he did not know whether it occurred during the night or the morning of May 19. (6 RT 1281.)

Caldwell testified he asked defendant if he had any idea what may have caused Reginald's death, and 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.) Then, all of a sudden, defendant said, "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 said he did not believe Reginald had been hurt, because Reginald did not respond like he had been hurt. (5 RT 968.) After putting Reginald down, defendant fell asleep while watching a playoff basketball game. (5 RT 967-968.) When defendant woke up, he found Reginald motionless. (5 RT 968.)

Upon arriving at Harris' house on May 19, defendant told Harris he had accidentally fallen on Reginald. (6 RT 1282.) After Harris received the telephone call from the coroner and started screaming, "He beat my baby. He beat my baby," Caldwell contacted Sgt. Nolan. (5 RT 926, 948, 951-952, 950.) Sgt. Nolan told Caldwell, "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 told him: "Man, I don't have nothing to hide." (5 RT 926-927.) Defendant did not consider himself a suspect. (6 RT 1286.)

Caldwell agreed to take defendant to the police station. (5 RT 926-927.) Caldwell did not think his brother had "anything to worry about" in agreeing to a police interview because "everything pointed that this was an accident." (5 RT 960-961.) It did not even cross Caldwell's mind that there had been "foul play," because he knew defendant loved his son. (5 RT 975.) On the way to the police station Caldwell told defendant he had nothing to hide, to "just be truthful," and "tell the truth." (5 RT 928, 931.)

After they arrived at the police station, in the presence of defendant, both Sgt. Rullamas and Sgt. Nolan told Caldwell, "Hey, we'll take care of him. Hey, man, don't worry about it." (5 RT 929, 1089, 1091.) Caldwell replied he appreciated it, and asked if they would give him a telephone call after they were finished so he could come back and pick up his brother. (5 RT 929.) Caldwell was told, "Sure, no problem," and was given a two to three hour estimation for the interview. (5 RT 929.)

Defendant explained his May 19 taped statements, which somehow transformed play-wresting into actual wrestling because the detectives had wanted him to demonstrate the wrestling moves, 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, the interrogation methods used by the detectives, where they made "suggestions" as to what had happened and would not take "no" for an answer, and his attempt to please the interrogators in order to end the interrogation and go home. (5 RT 1045-1046, 1052-1053, 1093, 1097, 1098-1099, 1101, 1103, 1105-1106, 1119-1120, 1140-1141; 6 RT 1168-1170, 1180; 7 RT 1351, 1369-1370, 1372.) Defendant

further testified the "taped" interviews were "scripted" by the detectives through their questioning, he never believed he was confessing to murder or any crime, and he understood he was going home after he answered their questions. (5 RT 1135; 7 RT 1358-1359, 1375.)

Defendant also explained his May 18 statements, 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 fall on Reginald had caused Reginald's condition. (5 RT 1068.)

Paul Herrmann, M.D., a specialist in forensic pathology, reviewed the autopsy report for Reginald and concluded it was possible for all of Reginald's internal injuries to have been caused by a single blow to the right side of Reginald's back, inflicted by a 170 pound man (defendant) jumping on him. (7 RT 1309-1313, 1316-1319, 1320-1325, 1331-1333, 1339.) If Reginald was on a bed, as opposed to his being on the floor, when he was jumped on, there was probably less chance he would have suffered all of those internal injuries, because a bed would give, but such injuries were nevertheless "still a likelihood or a possibility." (7 RT 1333-1334.) The injuries "could have occurred on a bed." (7 RT 1342.) Dr. Herrmann could not give an opinion whether such injuries would be "reasonably probable" if they 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.)

According to Dr. Herrmann, while it was "equally possible" that other forms of trauma could have caused the injuries (7 RT 1316-1317, 1329, 1339,

1347), the injuries 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, 1345.) Usually, in child abuse cases involving multiple blows, the blows are "reflected on the skin by the presence of multiple bruises," and Dr. Herrmann would expect to find bruises "over broken ribs" if a blow had caused the broken ribs, as opposed to a compression or squeezing injury. (7 RT 1343, 1344.) Dr. Herrmann explained: "A blow to the abdomen almost always leaves evidence of bruises on the skin, either from the knuckles of the fist or fingerprints, if it's a flat hand that's been used." (7 RT 1343, 1345.) "And injuries to the face are very common in battered children. Bruises over the face and scalp, and so forth, and we don't see that in this case. This is a case resulting in severe internal injuries, but no significant external injuries, indicating to me that some very blunt force caused these." (7 RT 1343, 1345.) If Reginald had been beaten, Dr. Herrmann would have expected bruises on his body, but Reginald's body was "remarkably free of bruises." (7 RT 1317, 1346.)

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.)

Dr. Herrmann could not speculate concerning how a child might react after receiving the type of injuries suffered by Reginald, because a child could still be conscious or become unconscious, may or may not be able to stand, could go into immediate shock, be "absolutely still," or "scream from pain." (7 RT 1337, 1348.) After receiving such injuries, Dr. Herrmann believed, a child "would certainly change its behavior." (7 RT 1339.) Whatever the child's reaction, Dr. Herrmann believed a care-giver "would notice a difference" in the child. (7 RT 1337.) He did not know whether the child

would show signs of discomfort or "simply be very, very, very quiet and unresponsive." (7 RT 1339.)

If Reginald had gone into shock, Dr. Herrmann expected he "would be rather unresponsive." (7 RT 1337.) He might act quietly, lie down, and appear to be going to sleep. (7 RT 1349.) Death was not instantaneous because Reginald bled to death. (7 RT 1348-1349.)

Based on Reginald's injuries alone, Dr. Herrmann was unable to testify whether or not the blow or blows that inflicted these injuries were intentional or unintentional. (7 RT 1340.)

While testifying, defendant admitted he had caused the death of his son and he now understood that, although he had just been "playing" with Reginald, his actions were "stupid." (5 RT 1047; 7 RT 1369.) In concluding his testimony, on redirect examination, defendant admitted he was "basically ignorant to . . . really think that I could . . . fall on my son without 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, 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.)

ARGUMENT

THE COURT OF APPEAL CORRECTLY CONCLUDED THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE "ASSAULT" FINDING NECESSARY FOR DEFENDANT'S PENAL CODE SECTION 273AB CONVICTION.

This Court has defined (*People v. Rocha* (1971) 3 Cal.3d 893), explained (*People v. Colantuono* (1994) 7 Cal.4th 206), and refined its explanation of the mental state necessary for the crime of assault (*People v. Williams, supra*, 26 Cal.4th 779). Despite these efforts, *Williams* does not provide a complete or settled definition of the *mens rea* necessary for assault and battery. Indeed, when closely read, the conflicting language in *Williams* only adds to the confusion. While this Court need not overrule *Williams*, although it should and adopt Justice Kennard's views expressed in her dissenting opinions in *Colantuono* and *Williams*[6], it does have to further refine and explain *Williams,* and expressly discuss the *unlawful* element found in the statutory definitions of both assault and battery, and how it impacts on the *mens rea* element. (See e.g. *People v. Watson* (1981) 30 Cal.3d 290 [the Court clarified the requirement a defendant must actually understand the life-threatening quality of his act for the purpose of the second degree murder

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[6] Due to the limited nature of review as expressed by this Court's order, defendant is not presenting separate argument in support of overruling *Williams*. However, in order to properly address whether the evidence is insufficient to support the *mens rea* requirements for assault and battery, this Court must ascertain what those elements are. To this extent, it would be proper for this Court to consider overruling *Williams* in as much as it is inconsistent with common law battery and assault, which the Legislature intended to enact in codifying the law in Penal Code section 240 and 242.

implied-malice].)

As will be shown below, the *unlawful* element is part of the *mens rea* for assault and battery and, based on the common law definitions and elements of those crimes, both assault and battery require an evil purpose or intent before an individual may be convicted of either crime. Because no such intent was proven in this case, the Court of Appeal correctly concluded there is insufficient evidence to support an "assault" finding necessary for defendant's Penal Code section 273ab conviction.

A. Applicable Law

1. Penal Code section 273ab

Penal Code section 273ab defines the crime of caregiver's assault on a child by means of force likely to produce great bodily injury causing death in clear and express terms: "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 . . . ." (Pen. Code, § 273ab, emphasis added.)

"Assault" is a necessary element of Penal Code section 273ab. (*People v. Basuta* (2001) 94 Cal.App.4th 370, 391, 398; *People v. Stewart* (2000) 77 Cal.App.4th 785, 795; *People v. Albritton* (1998) 67 Cal.App.4th 647, 657-658, 659.)

Section 273ab does not define "assault." However, Penal Code section 240 defines "[a]n assault [as] an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.)

2. California's Statutory Definitions of Assault and Battery

"At common law an assault was defined as an attempted battery." (*In re James M.* (1973) 9 Cal.3d 517, 521.) "Since its first session, our legislature has defined criminal assault as an attempt to commit a battery by one having present ability to do so." (*Id.* at p. 522; Stats. 1850, ch. 99, § 49, p. 243; now Pen. Code, § 240.)

Assault and battery require "guilty intent." (*People v. Wells* (1904) 145 Cal. 138, 141.) Like all crimes, assault has an *actus reus* and *mens rea*. "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." (Pen. Code, § 20.)

"The mental state required for battery is the same as that required for assault. 'An assault is an incipient or inchoate battery; a battery is a consummated assault. "An assault is a necessary element of battery, and it is impossible to commit battery without assaulting the victim." [Citations.]'" (*People v. Hayes* (2006) 142 Cal.App.4th 175, 180, quoting *People v. Colantuono*, *supra*, 7 Cal.4th at pp. 216-217.)

Penal Code section 240 defines assault as "an *unlawful* attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240, emphasis added; *People v. Rundle* (2008) 43 Cal.4th 76, 143.)

"A battery is any willful and *unlawful* use of force or violence upon the person of another." (Pen. Code, § 242, emphasis added; *People v. Toro* (1989) 47 Cal.3d 966, 972.)

Because "courts should strive to avoid constructions that make statutory words surplusage" (*People v. De Porceri* (2003) 106 Cal.App.4th 60, 69), as a matter of law, "willful" use of force or violence upon the person of another

is not a battery.[7] The use of force or violence must be *unlawful.*

Similarly, as a matter of law, an attempt, coupled with a present ability, to commit a violent injury on the person of another is not an assault. The attempt must be *unlawful.* An "[a]ssault 'is not simply an adjunct of some underlying offense [like criminal attempt], but an independent crime statutorily delineated in terms of certain *unlawful conduct* immediately antecedent to battery.'" (*People v. Williams*, *supra*, 26 Cal.4th at p. 787, citations omitted, emphasis added.) "'An assault is an incipient or inchoate battery; a battery is a consummated assault.'" (*Id.* at p. 787.)

3. *People v. Colantuono* (1994) 7 Cal.4th 206

In *People v. Colantuono*, *supra*, 7 Cal.4th 206, a majority of this Court reaffirmed *People v. Rocha*, *supra*, 3 Cal.3d 893, and its conclusions that the crime of assault is an attempt to commit a battery, it is a general intent crime, and the *mens rea* element for assault does not require a specific intent to cause any particular injury, to severely injury another, or to injure in the sense of inflicting bodily harm. (*People v. Colantuono*, *supra*, 7 Cal.4th at pp. 213, 214.) Based on the definition of battery, the *Rocha* court held that the criminal intent necessary for assault "'is the general intent to wilfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another.'" (*Id.* at p. 214.)

"From the foregoing [the *Colantuono* majority] distill[ed] the following principles concerning the mental state for assault: The mens rea is established

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[7] "The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." (Pen. Code, § 7, no. 1.)

upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e. a battery." (*Id.* at p. 214.) "Battery," as the majority previously noted, is defined as "'any willful and unlawful use of force or violence upon the person of another.'" (*Ibid.*)

Interpreting the words "willful" (Pen. Code, § 7, no. 1) and "force or violence, the majority concluded: "Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm." (*People v. Colantuono*, *supra*, 7 Cal.4th at p. 214 & fn. 4.) "The evidence must only demonstrate that the defendant willfully or purposefully attempted a 'violent injury' or 'the least touching,' i.e., 'any wrongful act committed by means of physical force against the person of another.'" (*Id.* at p. 214, quoting *People v. McCoy* (1944) 25 Cal.2d 177, 191.) The majority opinion reasoned: "In other words, '[t]he use of the described force is what counts, not the intent with which the same is employed.' (*People v. Finley* (1963) 219 Cal.App.2d 330, 340 [].) Because the offensive or dangerous character of the defendant's conduct, by virtue of its nature, contemplates such injury, a general intent to commit the act suffices to establish the requisite mental state. (See *People v. Peak* (1944) 66 Cal.App.2d 894, 902 [], disapproved on other grounds in *People v. Carmen* (1951) 36 Cal.2d 768, 776 [].)" (*Id.* at pp. 214-215.)

In support of this conclusion, the majority opinion defined the word "attempt" in "its ordinary sense" as intended by the Legislature in 1872, "not as the term of are we currently conceptualize, i.e. a failed or ineffectual effort to commit a substantive offense." (*Id.* at p. 216 & fn. 7.) The majority relied on the original concept of criminal assault which "must precede the battery." (*Id.* at p. 216.) "Considered from this perspective, it is clear that the question of intent for assault is determined by the character of the defendant's willful

conduct considered in conjunction with its direct and probable consequences." (*Id.* at p. 217.) "If one commits an act that by its nature will likely result in physical force on another, the particular intention of committing a battery is thereby subsumed." (*Id.* at p. 217.)

While the majority defined "attempt," its discussion omitted a discussion of the essential element of "unlawful attempt" or the battery element of "unlawful" use of force. (*Id.* at p. 214.) Therefore, based on the elements discussed but not the entire elements of those crimes which both have an "unlawfulness" element, the majority opinion held the mental state for assault could be satisfied if the defendant "willfully engaged in conduct that would directly, naturally, and probably result in injury [or violent injury] to another . . . ." (*Id.* at p. 218, fns. 9 & 10.)

4. ***People v. Williams*** **(2001) 26 Cal.4th 779**

In *People v. Williams*, *supra*, 26 Cal.4th 779, a majority of this Court reaffirmed that "mere recklessness or criminal negligence" is not sufficient to support a conviction for assault. (*People v. Williams*, *supra*, 26 Cal.4th at p. 788.)

"A negligent person has no desire to cause the harm that results from his carelessness, and he must be distinguished from a person guilty of willful misconduct, such as assault and battery, who intends to cause harm. Willfulness and negligence are contradictory terms . . . . If conduct is negligent, it is not willful; if it is willful, it is not negligent." (*Mercer-Fraser Co. v. Industrial Accident Commission* (1953) 40 Cal.2d 102, 116 [quoting *Donnelly v. Southern Pac. Co.* (1941) 18 Cal.2d 863, citations omitted,

including citation to Prosser, Torts)].[8]

Due to this rule, and in light of the factual circumstances of the case, the *Williams* court concluded "a jury cannot find a defendant guilty of assault based on facts he should have known but did not know." (*People v. Williams*, *supra*, 26 Cal.4th at p. 778.)

Accordingly, the *Williams* court clarified the mental state for assault and found "a defendant is only guilty of assault if he intends to commit an act 'which would be indictable [as battery], if done, either from its own character or that of its natural and probable consequences." (*Id.* at pp. 787-788.) The "underlying conduct must immediately precede the commission of the violent injury that is, ""[t]he next movement would, *at least* to all *appearance*, complete the battery.'"''" (*People v. Rundle*, *supra*, 43 Cal.4th at p. 144, quoting *People v. Williams*, *supra*, 26 Cal.4th at p. 786).

"Logically," the *Williams* court reasoned, "a defendant cannot have such an intent unless he actually knows those facts sufficient to establish that his act by its nature will probably and directly result in physical force being

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[8] "'[C]riminal negligence' had a common law meaning" when Penal Code section 20 was enacted. (*People v. Penny* (1955) 44 Cal.2d 861, 877.) "'The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences.'" (*Ibid.*) The essential elements of criminal negligence are (1) knowledge, actual or imputed, that the act of the slayer tended to endanger life, (2) the facts must be such that the fatal consequence of the negligent act could reasonably have been foreseen, and (3) it must appear that the death was the natural and probable result of a reckless or culpably negligent act. (*Id.* at p. 880.) There is no criminal negligence if it appears the death was "the result of misadventure." (*Ibid.*)

applied to another, i.e. a battery." (*People v. Williams*, *supra*, 26 Cal.4th at p. 788.)

Under *Williams*, "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." (*Id.* at p. 788, emphasis added.) "He, however, need not be subjectively aware of the risk that *a battery* might occur." (*Ibid.*, emphasis added.) "For example, a defendant who honestly believes that his act was not likely to result *in a battery* is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find the act would directly, naturally and probably result in a battery." (*Id.* at p. 788, fn. 3, emphasis added.) The proper focus, therefore, is on the crime of "battery." (*Id.* at p. 790.)[9]

Applying this "battery" language, the defendant must know that the facts surrounding his act by their nature will probably and directly result in the *unlawful* application of physical force against another, not merely the application of force.

The underlying basis for *Williams* is the crime of "battery" and, more specifically, the "common law" crime of battery. This includes the common law crime of assault, since assault is a necessarily lesser included offense of battery. "[W]e must look to the historical 'common law definition' of assault." (*Id.* at p. 786.) "[T]he Legislature, consistent with the historical understanding

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[9] *Williams* is confusing because it apparently attempts to say the same thing using different language, i.e., he must commit "an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Id.* at p. 790.) Application of this language does not require a probable battery because it only requires probable application of physical force, which, as previously noted, is not battery.

of assault, presumably intended to adopt the third 1872 definition of attempt . . . ." (*Id.* at p. 787.) "[W]e acknowledge that parts of the code commissioners comment to section 240 suggest that assault requires a specific intent to injure"; "[w]e do not, however, find these parts of the comment compelling in light of the historic conception of assault . . . ." (*Id.* at p. 787, fn. 2.)

California's statutory crimes of assault and battery are "substantially the old or common-law definition." (*People v. Wells*, *supra*, 145 Cal. at p. 140 [Penal Code section 240 definition of assault is substantially the common law definition].)

The *Williams* court found "the crime of assault has always focused on the nature of the act and not on the perpetrator's specific intent." (*People v. Williams*, *supra*, 26 Cal.4th at p. 786.) If "specific intent" is meant to signify a "specific intent to injure the victim" (*id.* at pp. 787 fn. 2, 788), this may be true based on a conclusion assault is a "general intent crime" (*id.* at p. 788; but see, *id.* at 791-797, dis. opn. Kennard, J., joined by Werdegar, J.)

However, the debate found in *Williams* and other California case law involving whether assault is a specific intent crime or a general intent crime overlooks an important aspect of the common law definitions of assault and battery. (See *People v. Wright* (2002) 100 Cal.App.4th 704, 706 [common law definition of assault required "an intent to inflict injury"]; *People v. Heckathorne* (1988) 202 Cal.App.3d 458, 466 ["Simple assault is merely an attempted battery. At common law it was a specific intent crime because all attempts were, by definition, in that category. For policy reasons, however, [the California Supreme Court] has determined assault . . . is nonetheless a general intent crime. (*People v. Rocha* (1971) 3 Cal.3d 893, 898-899; *People v. Hood* (1969) 1 Cal.3d 444, 455-459.) The policy is based on a frank

determination to remove intoxication (not arising to a level of unconsciousness) as a defense to assault . . . ."].)

The common law rule of assault and battery "places emphasis on the intent or state of mind of the person accused." (*State v. Roberts* (N.C. 1967) 155 S.E.2d 303, 305.) "'The *intention* to do *harm* is of the essence of an assault.'" (*Perkins v. Stein & Co.* (Ky. 1893) 22 S.W. 649, 650, quoting 2 Greenleaf on Evidence, section 83.)

Further, the absence of a specific intent to injure does not fully address or discuss the question of *unlawful purpose* as it applies to the common law crimes of assault and battery. Several state courts have expressly recognized common law assault and battery require unlawful conduct, as does the express language of both Penal Code sections 240 and 242, and contains elements of being rude, angry, or acting with hostile or evil intent. (See *Ford New Holland, Inc. v. Beaty* (Ala. 1992) 602 So.2d 1198, 1200; *Johnson v. State* (Ala. Crim. App. 1993) 629 So.2d 708, 710, quoting *Seigel v. Long* (1910) 169 Ala. 79, 82, 53 So. 753, 754; *State v. Redmon* (Iowa 1976) 244 N.W.2d 792, 797; *State v. Brown* (Iowa App. 1985) 376 N.W.2d 910, 913; *Perkins v. Stein & Co., supra*, 22 S.W. at p. 650; *Lamb v. State* (Md.App. 2001) 786 A.2d 783, 798; *Woods v. State* (Md.App. 1972) 288 A.2d 215, quoting Clark & Marshall, *Law of Crimes* (Seventh Edition), § 10.19; *State v. Deveau* (Me. 1976) 354 A.2d 389, 389; *State v. Smith* (Me. 1973) 306 A.2d 5, 6; *Lewis v. Metropolitan General Sessions Court* (Tenn. Crim. App. 1996) 949 S.W.2d 696, 703; *Huffman v. State* (Tenn. 1956) 292 S.W.2d 738, 742, quoting 6 C.J.S. Assault and Battery, §§ 60 & 70; *Reese v. State* (Tenn. Crim. App. 1970) 457 S.W.2d

877, 881, quoting Underhill's Criminal Evidence, 4th ed. § 594.)[10]

B. Application of Facts to Law

The Court of Appeal correctly concluded that "while the evidence reveals negligence of an astounding degree and to tragic effect, it does not demonstrate that [defendant] had the requisite awareness 'of facts that would lead a reasonable person to realize that [his] act by its nature would directly and probably result in great bodily injury to the child.'" (Opn. at p. 24.)

Courts are authorized to conclude, as a matter of law, defendant's conduct was merely negligent (*People v. Young* (1942) 20 Cal.2d 832, 838) and not "wanton and reckless misconduct" (*Donnelly v. Southern Pacific Co., supra*, 18 Cal.2d at p. 872 ["There is no allegation that he intended to throw the switch the wrong way."]). "On this evidence, a reasonable person could not conclude that *a battery* would 'directly' and 'immediately' result from defendant's conduct." (*People v. Chance* (2006) 141 Cal.App.4th 618, 624, emphasis added.)

Intent must be proven to a jury beyond a reasonable doubt. (*People v. Carmen, supra*, 36 Cal.2d at p. 776.) Under the substantial evidence test set forth in the Introduction (see pp. 6-7, *ante*), a conviction cannot be based on speculation, guesswork and surmise. (*People v. Morris, supra*, 46 Cal.3d at p. 21; *People v. Babbitt, supra*, 45 Cal.3d at pp. 681-682.)

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[10] "'An assault may consist of any act tending to do corporal injury to another, accompanied with such circumstances as denote at the time *an intention*, coupled with the present ability, of using actual violence against the person.'" (*Reese v. State, supra*, 457 S.W.2d at p. 881, emphasis added.)

The People's theory that defendant had actually wrestled with Reginald and during that wrestling had punched him several times in the chest and stomach, performed an atomic elbow on him, kneed him in the back would qualify as an "assault" which, to a reasonable person, would be likely to result in great bodily injury. The medical evidence, namely, the lack of bruising on Reginald's body, rendered the People's "beaten-to-death" theory insubstantial, incredible, and not of solid value. (*People v. Johnson*, *supra*, 26 Cal.3d 557, 576.) Indeed, this theory was apparently rejected by the jury when it returned a verdict of involuntary manslaughter as a lesser included offense of express and implied malice murder. It defies imagination to think the jury acquitted defendant of implied malice murder if it honestly believed that he had deliberately done those horrible things to Reginald. Consequently, the section 273ab conviction cannot be sustained on this theory.

Even if the jury did convict defendant of assault upon a child on the basis of play wrestling with Reginald, the evidence is still insufficient to support the verdict. "[M]ere recklessness or criminal negligence is still not enough" to establish an assault. (*People v. Williams*, *supra*, 26 Cal.4th at p. 788.) Defendant's act of play wrestling with his 14-month-old son may have been negligent and reckless, even criminally negligent, but it was not an "assault" on Reginald.

Because a father has the right to touch his son while playing with him, something more is needed for a criminal assault. That something more is a mental state that requires more than an act that may or will result in a touching; the mental state must raise to the level of an *unlawful* touching. Under the "battery test" set forth in *Williams*, the test should be "actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the *unlawful* application of physical force against another"

because "battery" requires wilful and *unlawful* force or violence. A father who loves his son and is "playing" with his son has no intent to *unlawfully* harm and batter his son.

The question is what are the relevant facts that the defendant should know. Here, the defendant knew he was playing. In *Williams*, the defendant knew he was shooting with evil motive. Courts cannot look at the act or acts in abstract but in connection with what the defendant knew. Here, the act is not just wrestling, but play wrestling that the defendant had knowledge of. The wrestling was not done for evil or criminal purpose.

Nor can the section 273ab conviction be sustained on the theory that defendant's jumping on the bed, while playing with Reginald while Reginald was on the bed, constituted an assault. While one may assault a person who is resting on a bed, a father's mere jumping on a bed in playing with his son does not constitute a "criminal" assault. A father has the lawful right to play with his son and there is no evidence here of evil or criminal purpose. Defendant's conduct of jumping on the bed with his son on it was a negligent act which, even if criminally negligent, is not sufficient to establish assault.

The Attorney General seizes on the confusing and wrong application-of-force language of *Williams* to support his position, instead of the required battery *unlawful* application of force language.[11] Defendant obviously knew he was applying force to his son because he was playing with his son. Under the application of force language of *Williams*, the Attorney General finds him

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[11] The Attorney General is not relying on the "battery" language of the *Williams* opinion, which he acknowledges in the issue presented and at page 8 of Opening Brief on the Merits, but relies on the "actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (OBOM at p. 8; see also p.10 ["Plainly . . . application of physical force against another."].)

guilty. But application of force is not sufficient to establish battery; parents have the right to play with their children. The issue under *Williams*, with its focus on the crime of "battery," is whether defendant realized he was applying *unlawful* force and whether persons could reasonably believe he was applying *unlawful* force within the meaning of battery.

Because defendant's purpose was playing with his son and does not come within the purposes identified in common law assault and battery to injure or act out of anger or for purposes of revenge or evil purpose or intent, defendant did not know of facts that would likely result in a battery. Nor could any reasonable person, knowing that defendant was playing with his son, conclude that a battery, which requires evil intent, was likely.

There is no substantial evidence defendant was actually aware of facts that would lead a reasonable person to realize his acts constituted a battery. There is substantial evidence defendant was a loving father and no evidence was introduced to show that defendant had been violent with his son in the past. There is also no evidence defendant's acts were motivated by anger or frustration.

The Attorney General acknowledges the Court of Appeal found negligence. (OBOM at p. 10.) This finding is supported by the jury's verdicts. The Attorney General does not explain how a defendant can be convicted of both negligence and assault based on the same facts. The fact the jury found defendant criminally negligent does not justify the assault conviction.

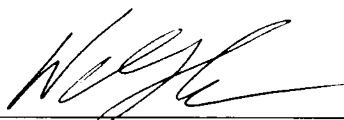
For all the above reasons, the Court of Appeal correctly reversed the section 273ab conviction for insufficiency of evidence.

CONCLUSION

The Court of Appeal correctly concluded the evidence is insufficient to sustain a finding of "assault," an essential element of Penal Code section 273ab. For the reasons stated in this brief, this Court should affirm the Court of Appeal's decision to the extent it reversed the section 273ab conviction.

Dated: August 4, 2008

Respectfully submitted,



Waldemar D. Halka
Attorney for Defendant and
Appellant Reginald Wyatt

CERTIFICATE OF LENGTH

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 document is 11,093 words, excluding the tables, this certificate, and any attachment permitted under the rules. This document was prepared in WordPerfect 11, and this is the word count generated by the program for this document.

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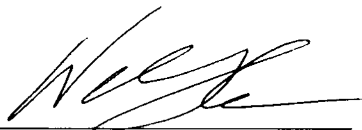

Waldemar D. Halka
Attorney for Defendant and
Appellant Reginald Wyatt

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
Supreme Court Case No. S161545

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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***
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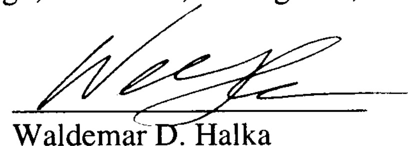

Waldemar D. Halka