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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **REGINALD WYATT,** Defendant and Appellant.

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

PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
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v.
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Defendant and Appellant.

Respondent respectfully petitions for review of the unpublished decision of the Court of Appeal for the First Appellate District, Division Two, attached as Exhibit A. The decision was filed on January 31, 2008, and no rehearing was sought. This petition is timely. (Cal. Rules of Court, rule 8.500(e).)

ISSUES PRESENTED

Whether a conviction for assault on a child causing death requires substantial evidence showing the defendant was subjectively aware his conduct was likely to result in great bodily injury to the child.

STATEMENT

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

Appellant began taking Reginald for overnight visits after his first birthday. (1 RT 152.) Appellant lived with his girlfriend, Tiffany Blake, and their infant daughter, Valerie, in an apartment in Oakland. (3 RT 453, 460.) Appellant and Ms. Blake were seeking custody of Reginald from Ms. Harris. (Exh. 36 at 8.)

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

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

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

177.)

Appellant went to the police department, accompanied by his brother, Oakland Police Officer Anthony Caldwell. (4 RT 645, 647, 654.) In a tape-recorded statement, appellant told police officers that on the morning in question, he wrestled and played with Reginald. (2 CT 239, 240-241, 251.) Appellant accidentally fell on top of Reginald on the bed while attempting a wrestling move. (2 CT 241-243.) Before leaving for work, Ms. Blake warned appellant that he was playing too rough with Reginald and could hurt him. (2 CT 241, 244.) After Ms. Blake left, appellant continued to wrestle Reginald for another 20 to 30 minutes. (2 CT 245-247, 252.) Appellant body slammed Reginald 4 times, hit him in the chest with his fist 10 or 11 times, and did an "atomic elbow" to Reginald's head. (2 CT 247-248.) Appellant hit Reginald in his upper chest with his forearm about three times. (2 CT 248.) Appellant may have suspended the child in midair by holding him by his neck. (2 CT 248-249; 4 RT 711.) Appellant grabbed Reginald between his legs and squeezed. (2 CT 249.) Appellant's knee went down on Reginald's back twice, a maneuver appellant called "the knee drop." (2 CT 249-250.) Appellant told the officers that he did not disclose this information earlier because he did not make a connection between what he did to Reginald and Reginald's death. (2 CT 259-260.) Appellant wanted Reginald to be more active and was trying to "toughen him up." (2 CT 267.) Appellant said, "I didn't notice and I wasn't thinkin' . . . that I can hurt him. I wasn't thinkin'." (2 CT 272.) Appellant admitted, "I was hittin' him pretty hard." (2 CT 273.)

At trial, appellant testified. He admitted prior convictions of battery on a police officer, possession of a weapon, and possession with intent todistribute cocaine. (5 RT 1009-1011.) He testified that he used only "make-believe wrestling moves" on Reginald and denied hitting him even once. (5 RT 1043, 1045, 1048, 1114.) Appellant admitted that he accidentally came down on

Reginald's back. (5 RT 1039-1041, 1047, 1053.) Reginald seemed normal after the accident. (5 RT 1054.) He had some milk and lay down. (5 RT 1054.) Appellant later found Reginald unresponsive. (5 RT 1056.) Appellant did not know what caused Reginald's death. He learned at trial that falling on Reginald could have caused his substantial injuries. (5 RT 1081.) As for his incriminating statements to the officers, appellant testified he was persuaded to think that he hit Reginald harder than he believed, began "second-guessing" himself, and thought he may have caused Reginald's death by wrestling too hard with him. (5 RT 1103, 1106, 1119-1120, 1140.)

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

A jury convicted appellant of involuntary manslaughter (Pen. Code, § 192, subd. (b))[1/] and assault on a child causing death (§ 273ab). (2 CT 327.) The trial court sentenced him to 25 years to life for assault on a child causing death and stayed sentence under section 654 for involuntary manslaughter. (2 CT 360.)

On appeal, appellant claimed the evidence was insufficient to support his conviction for assault on a child causing death. The First Appellate District, Division Two, agreed and reversed the conviction.

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1. Further statutory references are to the Penal Code.

REVIEW IS REQUIRED BECAUSE ASSAULT ON A CHILD CAUSING DEATH DOES NOT REQUIRE A DEFENDANT TO BE AWARE THAT HIS CONDUCT WOULD PROBABLY RESULT IN GREAT BODILY INJURY TO THE CHILD

In this case we take the somewhat unusual step of seeking review of an unpublished opinion of the Court of Appeal. We acknowledge that unpublished decisions do not fit easily within the criteria for review set forth in rule 8.500(b) of the California Rules of Court. However, in this case, we are compelled to seek review because we believe that the Court of Appeal has ignored plain statutory language and fundamentally misapplied this Court's precedent in reaching its conclusion that the evidence is insufficient to support a criminal conviction.

The criminal conduct at issue involves a violation of section 273ab, a statute enacted by the Legislature in 1994. This statute permits a person who assaults a child under the age of eight "by means of force that to a reasonable person would be likely to produce great bodily injury" to be punished by a sentence of 25 years to life in prison if the assault results in the death of the child. What the Legislature has done is to permit life imprisonment of an individual whose assaultive conduct results in the death of a young child without the need to prove malice, as would be required for a murder conviction. While this undeniably produces harsh consequences, they are the consequences mandated by the Legislature. And, by the terms of the statute, the Legislature has further mandated these consequences apply without the need to show that the defendant was subjectively aware that his conduct could cause death or great bodily injury to the child.

Although the Court of Appeal properly stated the applicable standard as an objective rather than a subjective one, it did not apply an objective standard to the facts. Instead, in dealing with appellant's argument about the unusual

nature of his claimed mental state, the court erroneously concluded that the evidence was insufficient to support a conviction under section 273ab because "it never occurred to appellant that he was hurting Reginald because he was playing with him." (Typed opn. at p. 23.) The Court of Appeal's approach is unfaithful to the plain language of the statute, and further conflicts with published authority by this Court and another Court of Appeal opinion. Under these circumstances, we believe review is warranted "to settle an important question of law," namely, whether the evidence must show that the defendant was subjectively aware his conduct was likely to result in great bodily injury to support conviction under section 273ab. (Cal. Rules of Court, rule 8.500(b)(1).)

In *People v. Williams* (2001) 26 Cal.4th 779 (*Williams*), this Court "reaffirm[ed] that assault does not require a specific intent to injure the victim." (*Id.* at p. 788.)

> [A]ssault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires 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.)

This Court clarified that "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" but he "need not be subjectively aware of the risk that a battery might occur." (*Id.* at p. 788, fn. omitted; accord, *People v. Hayes* (2006) 142 Cal.App.4th 175, 180.)

Likewise, assault on a child causing death does not require a specific intent to cause great bodily injury or death to the child. (*People v. Albritton* (1998) 67 Cal.App.4th 647, 659 [*Albritton*].) The crime requires an intentional assault, but a defendant need not have actual knowledge that his act is capable of causing great bodily injury or death to the child. (*Id.* at pp. 658-659.)

"Whether the intended act in its nature is one likely to produce great bodily harm is a question for the jury." (*Id.* at p. 659.) "It is not required that the actor intend to produce great bodily injury or death, nor is it required that he know or should know the act is intrinsically capable of causing such consequences." (*Ibid.*)

Citing *Williams*, the Court of Appeal correctly stated the issue was "whether there was substantial evidence that appellant 'was aware of facts that would lead a reasonable person to realize that [his] act by its nature would directly and probably result in great bodily injury to the child.' (CALCRIM No. 820.)" (Typed Opn. at p. 21.) However, the court then conflated the subjective and objective components of assault and erroneously concluded that assault on a child causing death requires the defendant to *know* that his conduct will probably and directly result in great bodily injury to the victim. The court reversed the conviction because the evidence did not establish appellant had this subjective awareness.

According to the Court of Appeal, "there was absolutely no evidence that appellant had been violent with Reginald in the past" (typed opn. at p. 22), and "there was no evidence whatsoever that appellant was motivated by anger or frustration during his interaction with Reginald" (typed opn. at p. 23). As for appellant's statements to interviewing officers, the court found that "[t]hese statements plainly do not provide sufficient evidence to satisfy the *actual knowledge* requirement for assault. (See CALCRIM No. 820; *Williams*, *supra*, 26 Cal.4th at p. 788.)" (Typed opn. at p. 23.)

The First District concluded:

> Instead, what the evidence showed, and as appellant said both in the taped interview and at trial, it never occurred to appellant that he was hurting Reginald because he was playing with him. Appellant's actions were incredibly misguided. To say that he showed poor judgment is a gross understatement, given the disastrous consequences. Nonetheless, while the evidence reveals negligence of an astounding degree and to

> tragic effect, it does not demonstrate that appellant 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" to support the conviction for assault on a child causing death. (CALCRIM No. 820; see *Williams*, *supra*, 26 Cal.4th at pp. 788, 790.) Consequently, the judgment as to this count must be reversed.

(Typed opn. at pp. 23-24, footnotes omitted.)

The court's statement that "it never occurred to appellant that he was hurting Reginald because he was playing with him" (typed opn. at p. 23) exemplifies the flawed analysis. The question was whether a *reasonable person*, viewing the facts known to appellant, would find that appellant's conduct was likely to result in great bodily injury to the child. The evidence was undisputed that appellant knew he was applying physical force "pretty hard" to a 14-month-old child. Plainly, appellant had "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." (*Williams*, *supra*, 26 Cal.4th at p. 790.) "[A] defendant's knowledge of the relevant factual circumstances is rarely in dispute." (*Ibid.*) The only issue in dispute was whether a reasonable person would find that the force used against Reginald was likely to result in great bodily injury. (*Albritton*, *supra*, 67 Cal.App.4th at p. 658; see *Williams*, *supra*, 26 Cal.4th at p. 788.) The jury answered that question in the affirmative, given the compelling evidence of Reginald's injuries.

The Court of Appeal applied a novel subjective test that is contrary to *Williams* and *Albritton*. The "actual knowledge" component of assault does not require a subjective awareness of the likelihood of injury. (*Williams*, *supra*, 26 Cal.4th at p. 788.) "[A]ssault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur." (*Ibid.*)

We urge the Court to grant review to correct the Court of Appeal's application of an erroneous subjective awareness test to find insufficient

evidence of assault on a child causing death. This error has resulted in reversal of a serious offense warranting life imprisonment.

CONCLUSION

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

Dated: March 7, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 2,521 words.

Dated: March 7, 2008

Respectfully submitted,

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LEE, V. COPY

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

REGINALD WYATT,

Defendant and Appellant.

A114612

(Alameda County
Super. Ct. No. 147107)

I. INTRODUCTION

Reginald Wyatt (appellant) was convicted, following a jury trial, of involuntary manslaughter and assault on a child causing death. On appeal, he contends (1) the trial court improperly limited his cross-examination of a police officer during a hearing on the voluntariness of appellant's statements to officers; (2) the trial court failed to instruct sua sponte on the requirement of jury unanimity as to both counts; (3) the trial court omitted an essential element of the offense in its instruction on assault on a child causing death; (4) the trial court failed to instruct sua sponte on assault as a necessarily included offense of assault on a child causing death; (5) the trial court failed to instruct sua sponte on involuntary manslaughter as a necessarily included offense of assault on a child causing death; (6) the trial court failed to instruct the jury that criminal negligence could never support an assault conviction and that injury alone is not sufficient to establish an assault; (7) the evidence was insufficient to support the conviction for assault on a child causing death; (8) the evidence was insufficient to establish the corpus delicti for either offense; (9) California's corpus delicti rule violates due process; (10) the jury instructions directed

guilty verdicts; (11) appellant was denied his right to effective assistance of counsel; and (12) the sentence of 25 years to life constitutes cruel and/or unusual punishment.

Because we find that the evidence is insufficient to support the conviction for assault on a child causing death, we shall reverse that conviction. We shall otherwise affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

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

During trial, the court granted appellant's motion, under section 1118.1, for judgment of acquittal as to first degree murder in count 1.

With respect to count 1, the jury found appellant guilty of the lesser included offense of involuntary manslaughter. With respect to count 2, the jury found appellant guilty of the charged offense of assault on a child causing death. On its own motion, the trial court struck the great bodily injury and prior conviction allegations, pursuant to section 1385.

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

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

Prosecution Case

Charrikka Harris, mother of Reginald Wyatt Jr. (Reginald), met appellant in March 2001. They began a physical relationship, although Harris already had a boyfriend. Harris found out she was pregnant in July 2001, by which time appellant had another girlfriend. At first appellant seemed okay with the pregnancy, but shortly before Reginald was born, he said he did not think the baby was his and would not assume

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

responsibility until he found out that it was his baby. After Reginald was born, appellant refused to sign his birth certificate because "it wasn't his baby." He also refused to take a paternity test or to provide any financial support.

Subsequently, appellant and Harris agreed to go on the *Maury Povich Show*, which was doing a show about paternity. Appellant took a paternity test before being flown to New York for the show; he and Harris were also given spending money. Povich announced on the show that the paternity testing showed that appellant was Reginald's father. After they returned to Oakland, appellant's attitude changed. For about two weeks, he would come to Harris's house to feed and play with Reginald. Then, he and Harris got into an argument about appellant's girlfriend and he stopped coming over.

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

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

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

Tiffany Blake was appellant's girlfriend. They lived together in Oakland and had been together since 2002. Their daughter, Valerie, was born in February 2003. On

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

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

At about 10:00 a.m., appellant called Harris and left a message that Reginald had had an asthma attack and needed his asthma machine. He sounded nervous. When appellant called back, Harris answered the phone. Appellant said Reginald could not breathe; he also said an ambulance and the police were there. Harris hung up the phone and rushed to Children's Hospital in Oakland, where she assumed Reginald would be taken. Appellant also called Blake at work between 11:00 a.m. and 12:00 p.m. Appellant told her that Reginald was not breathing and he was waiting for an ambulance. He called her back 20 to 30 minutes later on her cell phone. He was crying and said Reginald had died.[2]

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

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

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

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

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

The next day, Monday, May 19, 2003, appellant, his brother Anthony, Harris's sister, and a friend were at Harris's house when the coroner called and told Harris that the autopsy results were in and that Reginald had broken ribs, a severed liver and spleen, and had died from blunt trauma. He also said officers were en route to "pick up" appellant.

Harris hung up the phone and said to appellant, "They're going to arrest you." Appellant and his brother then drove to the Oakland Police Department.[3]

On that Monday morning, after he learned the results of the autopsy, Sergeant Rullamas asked officers to prepare an arrest warrant and to arrest appellant for murder. Before any arrest was made, Rullamas learned that appellant had come to the police station with his brother, Oakland Police Officer Anthony Caldwell. Sergeants Rullamas and Nolan interviewed appellant after reading him his *Miranda*[4] rights. In accordance with normal procedures, they interviewed appellant before taking a tape-recorded statement. Rullamas acknowledged that it was a difficult interview because appellant's brother was an Oakland police officer whose work Rullamas respected. However, harsh tactics were not necessary with appellant. It was "a very, very soft interview" since appellant "responded to kindness," which is "fairly unique."

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

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

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

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

When Rullamas had asked appellant at the hospital the previous day if there was any history of fall or accident, appellant did not tell him about the wrestling or falling on Reginald because he was just playing with him and "didn't think that had anything to do with anything." He was not trying to hide anything; he just did not think that was the cause.

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

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

The interview concluded at 7:16 p.m. Rullamas and Nolan left the interview room and went over appellant's statement. Much of what appellant said did not make sense to Rullamas and he thought "there had to be some kind of anger in there, some kind of

punishment, or something in there, in my mind, and I wanted to ask him about that." At 8:00 p.m., they returned to the room to discuss this with appellant. Appellant said "he was trying to toughen [Reginald] up a little bit, but that none of it was out of anger." Appellant also said that it was not an attempt to discipline his son, and that his form of discipline was just to take toys away from him. Nor did it have anything to do with any frustration he was feeling.

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

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

At 11:23 p.m., Rullamas and Nolan began a second taped interview with appellant. Appellant said he was not really thinking about anything when he was wrestling with Reginald; his mind was going blank. It was "[l]ike I just had a one-track mind. I was just stuck on toughening him up, playin' with Reggie, beatin' up Reggie," by which he meant "play fighting with him." When appellant said his mind went blank, he meant that "my mind musta went blank, though, for me to really . . . hit him hard enough . . . to hurt him, and I not notice it. I wasn't payin' attention, and I wasn't thinkin'. . . .

[¶] . . . [¶] . . . But then . . . came to a point where it got more serious than that, and I didn't notice and I wasn't thinkin' . . . that I can hurt him. I wasn't thinkin'.

[¶] . . . [¶] [It got more serious] because he was hit too hard. He was hit too hard, and I

wasn't . . . doin' nothin' to, you know, not hit him no harder." When asked how hard he was hitting Reginald, appellant said, "I was hittin' him pretty hard."

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

Appellant said after he landed on Reginald, Reginald lay down and appellant said, " 'Nah, it ain't time to go to sleep. Come on.' And we just kep' on playin'." Appellant also acknowledged that he felt pressures related to money, getting his barber's license, "[j]ust the every day hustle and bustle . . . just tryin' to make it. Tryin' to stay out the way." This interview ended at 11:39 p.m. and appellant was taken to jail.

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

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

Dr. David Levin, a pathologist, performed an autopsy on Reginald's body on May 19, 2003. Reginald, who was 31 inches tall and weighed 26 pounds, died of shock

and hemorrhage due to blunt force trauma to the chest and abdomen. During an external examination of the body, Dr. Levin found an abrasion on the chin and two abrasions on the neck. There was a laceration of the frenulum of the upper lip and a contusion on the chest.

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

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

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

Dr. James Crawford, medical director of the Center for Child Protection at Children's Hospital in Oakland, testified as an expert in pediatrics, in the medical evaluation of child abuse. Dr. Crawford reviewed Reginald's autopsy protocol. Reginald's injuries were "at the end of the bell curve," that is, at a level of injury that is

uncommon in a one year old. The types of injuries he suffered, including the multiple lacerations to the liver and the multiple sites of internal bleeding, "are seen only in the most serious events," such as children who are in car crashes or hit by motor vehicles.

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

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

Defense Case

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

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

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

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

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

Then he started breathing again and appellant thought he was all right. Reginald did not cry. Other than falling on Reginald, appellant did not strike him with force or do anything harmful to him.

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

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

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

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

Appellant spent the night at the home of his brother, Anthony Caldwell, where he only got a little bit of sleep. The next afternoon, appellant's brother drove them to Harris's house. Harris was there with her sister and one or two other people. The coroner's office called while appellant was there. Harris answered the phone; a short

time later she said, "blunt trauma," and dropped the phone. She was crying and in a state of shock. As appellant tried to comfort her, Harris's sister came in and said someone had hit Reginald in the chest hard. No one accused appellant of killing Reginald, and appellant did not know what had caused Reginald's death. Appellant first learned during trial that his act of falling on Reginald could have caused his son's substantial injuries.

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

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

The officers did not start tape recording appellant's statement until they got him to say that he had hit his son hard while wrestling with him. Also before taping him,

Sergeant Rullamas said something about every man wanting his son to be kind of tough, but appellant had only said that Reginald was good and sat still a lot, and appellant wanted him to be more active. Then, on tape, appellant said he wanted to toughen him up, by which he only meant make him more active.

After the first tape-recorded interview, the officers left the room, then came back and said "[t]his is not adding up. Something else had to happen." They also said, "[s]ometimes people lose control, and it's all right. You know, we're all human, and we make mistakes. You know, the D.A.s are having a hard time understanding this." The officers introduced a new theme of appellant's losing control and being angry when Reginald got hurt. Later that night, the officers took a second tape-recorded statement. With both statements, it seemed like everything was scripted, with the officers and appellant "[getting] the answers down" before making the recordings. Appellant explained that when he said on the second tape that his mind went blank and he lost control, he meant he had just been playing without thinking about anything and he put his son in jeopardy by playing with him. By the end of the second interview, appellant had been convinced that he had blacked out, struck his son too hard, and killed him. In fact, appellant did not recall blacking out or hitting Reginald too hard. He was just tired and wanted to go home, and the officers would not accept his initial answers.

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

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

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

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

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

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

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

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

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

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

Rebuttal

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

III. DISCUSSION

A. *Sufficiency of the Evidence to Support the Section 273ab Conviction*

Appellant contends there was not substantial evidence to support his conviction for assault on a child causing death, under section 273ab.

" '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.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

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."

The court instructed the jury on the elements of section 273ab, pursuant to CALCRIM No. 820, which provides in relevant part: "The defendant is charged [in count] with killing a child under the age of 8 by assaulting the child with force likely to produce great bodily injury [in violation of Penal Code section 273ab].

"To prove that the defendant is guilty of this crime, the People must prove that:

"1 The defendant had care or custody of a child who was under the age of 8;

"2 The defendant did an act that by its nature would directly and probably result in the application of force to the child;

"3 The defendant did that act willfully;

"4 The force used was likely to produce great bodily injury;

"5 When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in great bodily injury to the child;

"6 When the defendant acted, (he/she) had the present ability to apply force likely to produce great bodily injury to the child;

"[AND]

"7 The defendant's act caused the child's death(;/.)

"[¶] . . . [¶] Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

"*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"An act *causes death* if:

"1 The death was the natural and probable consequence of the act;

"2 The act was a direct and substantial factor in causing the death;

"AND

"3 The death would not have happened without the act.

"A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

"A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused the death."

Relevant to our discussion of the sufficiency of the evidence are the elements of assault, as explained in depth by our Supreme Court in *People v. Williams* (2001) 26 Cal.4th 779 (*Williams*). In *Williams*, the court clarified the required mental state for assault, holding that "assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires 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.) The court further explained that a defendant cannot have the requisite 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 applied to another, i.e., a battery. [Citation.] In other words, a defendant guilty of assault *must be aware of facts* that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. *He may not be convicted based on facts he did not know but should have known.* He, however, need not be subjectively aware of the risk that a battery might occur." (*Id.* at p. 788, italics added.)

In *Williams*, *supra*, the court found that the jury instruction given, which merely required the jury to find that "a defendant willfully and unlawfully committed an act that by its nature would probably and directly result in physical force being applied to the person of another may permit a conviction premised on facts the defendant *should have known but did not actually know*. Thus, under the instruction given, a jury could conceivably convict a defendant for assault even if he did not actually know the facts sufficient to establish that his act by its nature would probably and directly result in a

battery." (*William, supra, 26* Cal.4th at p. 790.) The court noted, however, that such an instructional error "is largely technical and is unlikely to affect the outcome of most assault cases, because a defendant's knowledge of the relevant factual circumstances is rarely in dispute." (*Ibid.*)[6]

The actual knowledge requirement discussed in *Williams* is quite pertinent to our discussion of the sufficiency of the evidence because this is one of those rare cases described by the Supreme Court in which the defendant's awareness of the relevant factual circumstances was in question. Here, unlike in most other cases in which sufficiency of the evidence to support a section 273ab conviction was contested, there is no dispute regarding the cause of Reginald's death—shock and hemorrhage due to blunt force trauma to the chest and abdomen—or regarding who inflicted the injuries—appellant. (Compare e.g., *People v. Malfavon* (2002) 102 Cal.App.4th 727, 735.) Rather, what is in question here is whether there was substantial evidence that appellant "was aware of facts that would lead a reasonable person to realize that [his] act by its nature would directly and probably result in great bodily injury to the child." (CALCRIM No. 820.) That he *should* have known that he was wrestling far too hard with his young son does not satisfy this requirement. (See *Williams*, *supra*, 26 Cal.4th at pp. 788, 790.) The evidence must show *actual* knowledge on his part, and we conclude it does not. (See *ibid.*) Thus, viewing all of the evidence in the light most favorable to the prosecution, we conclude the evidence is insufficient to support the conviction for assault on a child causing death.[7]

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[6] The relevant jury instruction has been changed to set forth the knowledge requirement. (See former CALJIC No. 9.00, now CALCRIM No. 820.)

[7] For purposes of this discussion, we will assume that the jury believed the prosecution theory that Reginald was harmed by appellant's wrestling moves alone or by a combination of wrestling and falling on him, rather than solely by appellant's jumping on the bed and falling on Reginald. That is because, if the evidence was insufficient to support the 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.

What the evidence does show is that appellant was a loving father who had recently asked Reginald's mother, Charrikka Harris, to let him have custody of Reginald, so that Reginald could live with appellant, Blake and their baby. Reginald had started spending the night at their home, so that he could get used to being with them. Blake told police that appellant had never done anything that caused her concern regarding his ability to care for his son or their daughter, had never done anything reckless or dangerous, and was a good father. Even Harris, with whom appellant had had a very difficult relationship, testified at trial that she did not believe appellant had killed Reginald "on purpose."

Moreover, there was absolutely no evidence that appellant had been violent with Reginald in the past[8] or, for that matter, with any other child, including his then three-month-old baby. (Cf. *Smith v. Mitchell* (9th Cir. 2006) 437 F.3d 884, 889-890, judg. vacated *sub nom Patrick v. Smith* (2007) ___ U.S. ___ [127 S.Ct. 2126], judg. reinstated *sub nom Smith v. Patrick* (9th Cir. 2007) ___ F.3d ___ [2007 WL 4233693] [finding insufficient evidence to support a section 273ab conviction where cause of baby's death was uncertain and there was no hint of prior abuse by grandmother].) His brother, Oakland Police Officer Anthony Caldwell, testified that he had seen appellant interact with children and had never seen appellant get angry or frustrated with young children. Nor had he ever seen appellant express any frustration toward Reginald. Appellant's stepmother, Elayne Caldwell, testified that she had seen appellant with Reginald on numerous occasions, that appellant had nothing but love for his son, and that he wanted to have more time with him. Appellant's uncle, Lionell Johnson, testified that he never knew appellant to have a violent temper or to do any act of violence toward a child. (Compare *People v. Malfavon*, *supra*, 102 Cal.App.4th at p. 733 [defendant suspected of having previously hurt baby, who cried whenever she saw defendant, which angered

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[8] At trial, Harris testified about marks she had twice found on Reginald after visits with appellant. However, there was never any showing that these marks demonstrated any likely abuse by appellant. Indeed, in one instance, a paramedic told Harris that what she thought was a burn on Reginald's neck was " 'an old scratch.' "

him]; *People v. Stewart* (2000) 77 Cal.App.4th 785, 791-794 [child had evidence of old, as well as fresh, injuries; neighbor previously saw defendant push child down stairs].)

Another unusual factor in this case is that there was no evidence whatsoever that appellant was motivated by anger or frustration during his interaction with Reginald. Even in the taped interviews, when the officers probed for an indication that anger was involved or that appellant was punishing Reginald, there was not a hint that appellant acted out of anger or frustration. (Cf. *Smith v. Mitchell*, *supra*, 437 F.3d at pp. 889-890 [evidence insufficient to support defendant's section 273ab conviction where there was no evidence, inter alia, of a precipitating event].)

When the officers asked appellant during the taped interview how it could have happened that appellant hurt his son so badly, appellant said that his mind must have gone blank for him to hit Reginald "hard enough . . . to hurt him, and I not notice it. I wasn't payin' attention, and I wasn't thinkin'." When asked how it turned from play wrestling to real wrestling, appellant said, "[j]ust wasn't thinkin' at all. Just wasn't thinkin'."[9] Appellant's statements merely demonstrate his attempt to understand how he could have struck his son hard enough to fatally injure him without knowing he was doing it. These statements plainly do not provide sufficient evidence to satisfy the *actual knowledge* requirement for assault. (See CALCRIM No. 820; *Williams*, *supra*, 26 Cal.4th at p. 788.)

Instead, what the evidence showed, and as appellant said both in the taped interview and at trial, it never occurred to appellant that he was hurting Reginald because he was playing with him.[10] Appellant's actions were incredibly misguided. To say that

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[9] Appellant testified at trial that he did not recall blacking out or hitting Reginald too hard, but that, under questioning from the officers, he began second-guessing himself.

[10] That he was play-fighting with Reginald to try to get him to be more active or to "toughen him up" "[b]ecause . . . it's hard out here" does not provide evidence that appellant knew he was using undue force on his child. It merely explains part of his motivation for the play wrestling. Another part of his motivation was reflected, for example, in his statement that he did the "supplex" (which involved flipping Reginald onto the bed) many times because that move "made Reginald laugh every time."

he showed poor judgment is a gross understatement, given the disastrous consequences. Nonetheless, while the evidence reveals negligence of an astounding degree and to tragic effect, it does not demonstrate that appellant 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" to support the conviction for assault on a child causing death. (CALCRIM No. 820; see *Williams*, *supra*, 26 Cal.4th at pp. 788, 790.)[11] Consequently, the judgment as to this count must be reversed.[12]

B. *Limitation on Cross-Examination During the Voluntariness Hearing*

Appellant contends the trial court improperly limited his cross-examination of a police officer during a hearing on the voluntariness of appellant's statements to officers, thereby depriving him of his due process rights to confrontation and a fair hearing. Specifically, he argues that the trial court erred when it sustained objections to two of

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[11] We also observe that the prosecutor, when describing the fifth element of section 273ab in his initial closing argument, omitted the crucial first part of that element regarding the necessity that appellant be "aware of facts," and stated only that "a reasonable person [would have realized] that his act, by his [*sic*] nature, would directly and probably result in the great bodily injury of the child." (CALCRIM No. 820.) The misstatement of this element could only give the erroneous impression that the standard is purely objective, when it is not. The prosecutor then reiterated, "Basically, a reasonable person would know that by [*sic*] doing that to a child could result in great bodily injury." The mental state requirement for assault is complex and potentially confusing enough (see *Williams*, *supra*, 26 Cal.4th at pp. 788, 790), without the prosecutor further muddying the waters with a repeated incorrect statement of the law. (See *People v. Hill* (1998) 17 Cal.4th 800, 829-830 [" '[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]' [Citations.]"]) These misstatements, along with defense counsel's failure to request an instruction explaining that criminal negligence cannot support an assault conviction, only increased the likelihood that the jury would, as it did, convict appellant of an offense for which the evidence was insufficient.

[12] Although double jeopardy principles preclude retrial on the count alleging a violation of section 273ab (see *People v. Seel* (2004) 34 Cal.4th 535, 544), we will address other issues appellant has raised that relate also to his conviction for involuntary manslaughter.

defense counsel's questions to Sergeant Rullamas related to his alleged habit of getting suspects to talk by saying he was there to help them and promising them they could go home if they gave a statement.

1. *Factual Background*

Sergeant Rullamas testified at a pretrial hearing on the voluntariness of the statements appellant made during the interviews with Sergeants Rullamas and Nolan on May 19, 2003. Rullamas testified that, after receiving a *Miranda* warning, appellant agreed to talk to the two officers. During the interview, both the officers and appellant were very polite and friendly. The interviews were cordial and professional.

After defense counsel concluded his cross-examination of Rullamas, the trial court asked Rullamas whether he had threatened appellant or made any promises to him to get him to talk. Rullamas said he had done neither. The trial court then invited defense counsel to ask some follow-up questions, which he did. After several additional questions by defense counsel, counsel and Rullamas then engaged in the following exchange:

"[Defense counsel]: And you were telling him the whole time that you were there to help him, right?

"[Rullamas]: No.

"[Defense counsel]: Did you ever say that to him? Do you remember?

"[Rullamas]: No.

"[Defense counsel]: You don't remember saying that?

"[Rullamas]: No.

"[Defense counsel]: But sometimes you do say that during your interviews. Isn't that right? That you're there to help the person you're interviewing?

"[The prosecutor]: Objection. Irrelevant.

"The Court: Sustained.

"[Defense counsel]: Well, it goes to his habit and custom. His bearing on—

"The Court: Sustained.

"[Defense counsel]: I've got no—is that whole area going to be sustained on?

"The Court: Sustained, the objection to that question.

"[Defense counsel]: Isn't it true you told him you were going to take care of him, and if he just provides you with certain information that he was going to be okay, and that he was going to go home that night?

"[Rullamas]: No.

"[Defense counsel]: Isn't it true you told him if he just gave you some of the details, that he would go home that night?

"[Rullamas]: That is not true.

"[Defense counsel]: Okay. Now you do say that sometimes to people in order to have them give you confessions. Isn't that true?

"[The prosecutor]: Objection. Irrelevant.

"The Court: Sustained.

Defense counsel moved on to other questions but, during argument on the question of voluntariness, counsel said he had been precluded from going into whether appellant was persuaded to give his statements "by tactics of bold-face lies." The court responded: "No, you weren't. I sustained two objections to questions that basically asked, 'Well, you've used that tactic with other people in the past.' " The following exchange then took place between defense counsel and the court:

"[Defense counsel]: Right. To show the habit and custom of that officer.

"The Court: That's all I sustained objections to. I did not cut you off from inquiring into that. I don't care what he may have done in the past. What's at issue is what he did here. And in the absence of any—there has been no evidence presented so far—and I haven't asked, actually. I should ask you—I don't know if I asked. Did I ask you if you wanted to present any evidence?

"[Defense counsel]: No, you didn't.

"The Court: Do you?

"[Defense counsel]: No.

"The Court: Okay. There's no evidence that that's what was done here, so if there ever was a time in the past when he used such a tactic, it's not relevant to me. It's just not. At any rate—

"[Defense counsel]: Anyway, you understand the theory.

"The Court: Absolutely. And all I did was sustain the objection to two questions, which asked about tactics he may have used with other people in the past. Those are the only two objections that even remotely relate to what you're talking about, so I've got to disagree with you about what I precluded you from doing. I didn't preclude you from inquiring into the subject matter. As a matter of fact, you did. He denied it. You asked him point blank.

"[Defense counsel]: That's why I wanted to get into his habit or custom.

"The Court: Yeah, but it's not relevant to me.

"[Defense counsel]: Fine.

"The Court: Particularly since you've got to keep in mind, your question wasn't even, 'That's what you usually do, isn't it?' [¶] Your question was, 'Well, there have been occasions in the past where you have used that tactic,' so that doesn't even establish habit and custom, if you want to get picky about it. But at any event, those were the objections I sustained along those lines, so I just got to take issue with what you feel I cut you off from, because I didn't cut you off from that line of questioning. But rather just those particular questions about what he had done in the past, not with this defendant. [¶] As to what he did with this defendant, you asked him, he gave you a direct answer, and to that extent, it covered the subject matter that I consider to be relevant."

The court then ruled that appellant's statements "were made freely, voluntarily, after proper *Miranda* warnings."

2. *Legal Analysis*

Statements obtained in violation of *Miranda* are inadmissible to establish a defendant's guilt. (*People v. Boyer* (1989) 48 Cal.3d 247, 271.) "A statement is involuntary [under *Miranda*] when 'among other circumstances, it "was . . . ' "obtained

by any direct or implied promises, however slight . . . .' " [Citation.] . . . ' [Citation.]" (*People v. Jablonski* (2006) 37 Cal.4th 774, 813-814.)

Under Evidence Code section 1105, evidence of habit or custom is admissible "to prove conduct on a specified occasion in conformity with the habit or custom." "Habit" is defined as " 'a person's regular or consistent response to a repeated situation.' " (*People v. Memro* (1985) 38 Cal.3d 658, 681, fn. 22.)[13] We review a trial court's determination regarding the admissibility of habit evidence for an abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 337.)

Here, the trial court made clear that it had not precluded appellant from asking questions or presenting evidence regarding the alleged habit or custom of Sergeant Rullamas and the Oakland Police Department of making false promises to defendants to induce them to make statements. As the court stated, it simply sustained objections to two questions, not regarding what the officer habitually did during interviews, but instead regarding whether he had "sometimes" told defendants that he was there to help them or that they would go home after answering questions. These questions did not relate to Rullamas's or the Oakland Police Department's " 'regular or consistent response' " to interrogation of suspects. (*People v. Memro*, *supra*, 38 Cal.3d at p. 681, fn. 22; see *People v. Hughes*, *supra*, 27 Cal.4th at p. 337 [no abuse of discretion in exclusion of testimony of two defense witnesses that, on occasions when felony-murder victim cleaned her apartment, she left door partly open because proffered evidence was insufficient to establish that victim had such a habit or custom].)

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[13] " ' "Custom" means the routine practice or behavior on the part of a group or organization that is equivalent to the habit of an individual.' [Citation.]" (*People v. Memro*, *supra*, 38 Cal.3d at p. 681, fn. 22.)

Since answers to the two questions at issue would not have demonstrated that Rullamas habitually said these same things to defendants, we conclude the trial court did not abuse its discretion when it sustained the prosecutor's objections.[14]

C. ***Failure to Instruct on the Need for Jury Unanimity***

Appellant argues that, as to both of the charged offenses, the court should, sua sponte, have instructed the jury that it had to agree unanimously "that the People have proved that the defendant committed at least one of [the acts charged] and you all agree on which act [he] committed." (CALCRIM No. 3500.)

We disagree, for at least two separate and distinct reasons. First, and as our Supreme Court made clear recently in one of the leading cases on this issue, this sua sponte duty arises only "when the evidence suggests more than one discrete crime" and distinctly does not obtain "where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*), cited and quoted in the Bench Notes to CALCRIM No. 3500.)

Second, but clearly related to this statement of the rule, there is also no such sua sponte duty to instruct if the offense constitutes a "continuous course of conduct." (*People v. Maury* (2003) 30 Cal.4th 342, 423.) As Division Five of this court has noted recently—and doing so by quoting a decision of our Division Three—this exception arises " ' "when the acts are so closely connected that they form part of one and the same transaction, and thus one offense." ' " (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115 (*Napoles*), quoting *People v. Avina* (1993) 14 Cal.App.4th 1303, 1309.)[15]

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[14] Having concluded that the court did not improperly limit defense counsel's cross-examination of Sergeant Rullamas, it follows that there was no violation of appellant's rights to a fair hearing and to confront witnesses.

[15] Interestingly, both *Napoles* and *Avina* were child-abuse cases, albeit arising under different statutes than involved here. Also interestingly, the doctor testifying for the prosecution in *Napoles* was the same Dr. James Crawford who, as noted above (see *ante* pp. 11-12), testified here that the injuries causing Reginald's death most probably arose from "multiple, and potentially many impacts."

Both principles clearly apply here: the "roughhousing" with Reginald took place, according to all the testimony, exactly in the same room of the same apartment within an hour—or at the most two hours—of time on the same Sunday morning.[16] Some of the "roughhousing" appellant described as forms of wrestling, i.e., "atomic elbow," the "knee drop," "coming off the top rope," etc. It was, at least per appellant's first recorded statement to the police, in connection with that latter "wrestling" maneuver that appellant's hip came down on Reginald's stomach. (See *ante* p. 7.) This statement, together with the testimony of Dr. Crawford and the results of the autopsy on Reginald, makes clear that there was both a "continuous course of conduct" here, i.e., "roughhouse wrestling" and, in any event, only one "discrete crime." (*Russo, supra*, at p. 1132.).

D. *Corpus Delicti Issues*

Appellant contends both that the evidence was insufficient to establish the corpus delicti for either offense and that California's corpus delicti rule violates due process.

1. *Sufficiency of the Evidence to Establish the Corpus Delicti for Both Offenses*

"The corpus delicti of any crime is defined as the combination of '(a) the fact of the injury, loss, or harm, and (b) the existence of a criminal agency as its cause.' [Citation.] In essence, '[t]he corpus delicti . . . consists of at least slight evidence that somebody committed a crime.' [Citation.] In a homicide case, 'proof of death caused by a criminal agency' constitutes the corpus delicti. [Citation.]" (*People v. Malfavon*, *supra*, 102 Cal.App.4th at p. 734.)

Here, the evidence showed that, when appellant was left alone with him, Reginald was uninjured. Before leaving for work, Blake told appellant to stop playing so roughly with him. The medical evidence showed that Reginald died after suffering massive internal injuries. All of this circumstantial evidence supports the reasonable inference that Reginald died of injuries caused by appellant's criminal conduct. As the appellate

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[16] The fact that the prosecutor chose to stress, in his closing argument, the "jumping on the bed" part of the rough playing with Reginald does not change the applicable rules in the slightest.

court explained in *People v. Malfavon*, *supra*, 102 Cal.App.4th at pages 734-735: "Only a 'slight or prima facie showing' need be made to meet the corpus delicti rule's foundation. [Citation.] ' "[T]he foundation may be laid by the introduction of evidence which creates a reasonable inference that the death could have been caused by a criminal agency [citation], even in the presence of an equally plausible noncriminal explanation of the event." [Citation.]' [Citation.]"

The evidence was sufficient to establish the corpus delicti in this case.[17]

2. *California's Corpus Delicti Rule and Due Process*

According to appellant, California's corpus delicti rule violates due process because, under *In re Winship* (1970) 397 U.S. 358 (*Winship*), *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and their progeny, including the recent case of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856], the accused is entitled to have corpus delicti proven beyond a reasonable doubt, rather than having it established only by "slight evidence," as current law requires.

CALCRIM No. 359, with which the jury was instructed in this case, provides: "The defendant may not be convicted of any crime based on [his] out-of-court statement[s] alone. You may only rely on the defendant's out-of-court statements to convict [him] if you conclude that other evidence shows that the charged crime [or a lesser included offense] was committed.

"That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.

"The identity of the person who committed the crime [and the degree of the crime] may be proved by the defendant's statement[s] alone.

"You may not convict the defendant unless the People have proved [his] guilt beyond a reasonable doubt."

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[17] In light of this conclusion, appellant's claim that counsel was ineffective for failing to move, at the close of the prosecution case, for dismissal of both charged offenses on this ground must also fail. (See *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.)

The corpus delicti rule, which has its roots in the common law, "is intended to ensure that [a criminal defendant] will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1169.) This rule, which merely requires that a preliminary, cautionary step be taken before a jury may consider whether the prosecution has proven guilt of an offense beyond a reasonable doubt, plainly does not fall under the reach of *Winship*, *Apprendi* and their progeny.

Here, moreover, the instructions clearly informed the jury that, once it found that evidence of corpus delicti had been shown, it could not convict appellant of either charged offense unless the prosecution had proved appellant's guilt beyond a reasonable doubt. (See CALCRIM Nos. 220, 359.) There was no due process violation.[18]

E. *Allegedly Directed Guilty Verdicts*

Appellant contends the jury instructions in this case directed guilty verdicts since, once the jury found appellant acted negligently and committed an unlawful criminal homicide, it could not reasonably acquit appellant of any charged or lesser included homicide offense.[19] We disagree.

The involuntary manslaughter instruction explained that, to be convicted of that offense, appellant must have acted with criminal negligence, which "involves more than ordinary carelessness, inattention, or mistake in judgment." (CALCRIM No. 580.) It further stated that he must have acted "in a reckless way that creates a high risk of death or great bodily injury" and that "[a] reasonable person would have known that acting in that way would create such a risk. [¶] In other words, a person acts with criminal negligence when the way he . . . acts is so different from the way an ordinarily careful

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[18] Thus, defense counsel was not ineffective for failing to object that the standard CALCRIM instruction on corpus delicti (CALCRIM No. 359) violates *Winship*, *Apprendi* and their progeny. (See *Strickland v. Washington*, *supra*, 466 U.S. at pp. 688, 694.)

[19] In light of our reversal of the section 273ab conviction, this issue is only applicable to the conviction for involuntary manslaughter.

person would act in the same situation that his . . . act amounts to disregard for human life or indifference to the consequences of that act." (*Ibid.*) This instruction plainly told the jury that it had to find that all of the elements of involuntary manslaughter, including criminal negligence, had been proven beyond a reasonable doubt before it could convict appellant of that offense.

There was no directed verdict in this case.[20]

IV. DISPOSITION

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

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[20] Given this conclusion, appellant's claim that counsel was ineffective for failing to offer instructions that would prevent a directed verdict once the jury found a criminal homicide cannot succeed. (See *Strickland v. Washington, supra*, 466 U.S. at pp. 688, 694.)

Haerle, J.

I concur:

Richman, J.

People v. Wyatt, A114612

Conc. and dis. opn. of Kline, P.J.

I concur in all portions of the majority's opinion except the portion concluding that the trial court did not have a sua sponte duty to instruct on the need for jury unanimity. I dissent solely from that portion of the majority opinion.

The majority concludes (maj. opn. at pp. 29-30, *ante*) that no unanimity instruction was required either because the evidence showed "only a single discrete crime," but left "room for disagreement as to exactly how that crime was committed" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132), or because the offense constituted a "continuous course of conduct" (*People v. Maury* (2003) 30 Cal.4th 342, 423). I disagree.

In *People v. Davis* (2005) 36 Cal.4th 510, 560 (*Davis*), the California Supreme Court addressed the question whether a unanimity instruction was required in a case in which the prosecution presented evidence of two distinct acts of robbery—(1) the taking of a third person's car from the victim and that third person, or (2) the taking of the victim's rings—but did not elect which of those two acts it was relying on to prove the robbery of the victim. The court concluded the defendant was entitled to a unanimity instruction because the evidence showed two distinct takings and the prosecutor argued that the jury could rely on either theory to convict the defendant of robbing the victim. (*Id.* at p. 561.) The court further concluded that the omission of the unanimity instruction was prejudicial because it could not determine from the record whether some jurors found the defendant guilty of one of the takings while others relied solely on the other taking. (*Id.* at p. 562.)

The Attorney General argued in *Davis* that the robbery conviction could be affirmed despite the lack of a unanimity instruction "because the taking of the Honda and the taking of the rings were so closely connected as to form one continuous transaction [citations], and thus it would have been inconceivable for a juror to believe that defendant committed one robbery, but disbelieve he committed the other [citations]." (*Davis*, *supra*, 36 Cal.4th at p. 561.) The Supreme Court explained that it was "not persuaded. In

each of the cases the Attorney General relies on, we concluded that a unanimity instruction was not required (or, even if required, we found no prejudice) either because the defendant offered the same defense to both acts constituting the charged crime, so no juror could have believed defendant committed one act but disbelieved that he committed the other, or because 'there was no evidence . . . from which the jury could have found defendant was guilty of' the crime based on one act but not the other. [Citation.] The same cannot be said here. As explained above, the potential defenses to the two acts of robbery were entirely different: as to the car, the defense was that [the victim] was not legally in possession of it; as to the rings, the defense was that its taking constituted only the lesser included crime of theft." (*Id.* at p. 562; accord, *People v. Stankewitz* (1990) 51 Cal.3d 72, 100 ["The 'continuous conduct' rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them"]; *People v. Diedrich* (1982) 31 Cal.3d 263, 282-283 [finding omission of unanimity instruction prejudicial where defendant's defenses to two possible acts of bribery underlying single charged offense differed; hence, it was "not a case where the jury's verdict implies that it did not believe the only defense offered"].) The court in *Davis* further explained that there was evidence from which the jury could have found the defendant guilty of robbery based on the taking of the car, but not the rings. (*Davis*, at p. 562.) *Davis* demonstrates that the failure to give a unanimity instruction in the circumstances of this case constituted prejudicial error.

First, the evidence here showed that appellant fatally injured Reginald *either* by performing a series of wrestling moves on him *or* by falling on him while trying to jump on the bed. Thus, the evidence does not show a single discrete crime, with two possible ways in which it could have been committed. (Compare *People v. Russo*, *supra*, 25 Cal.4th at p. 1132.) Rather, it shows two possible acts, one or both of which might have been a crime, but with each one wholly distinguishable from the other. (See *Davis*, *supra*, 36 Cal.4th at p. 561.)

Similarly, if the sole evidence were the various wrestling moves, they might well fall within the "continuous course of conduct" exception to the unanimity instruction

requirement in that those moves were all part of a continuous transaction that occurred over a short period of time; were subject to the same defense, i.e., that appellant did not strike his son violently while they play-wrestled; and there was no evidence from which the jury could logically find that appellant did one wrestling move, but not another. (See *People v. Maury*, *supra*, 30 Cal.4th at p. 423.) However, the other possible act regarding which evidence was presented—that appellant fell on Reginald on the bed—was a distinct act; was subject to a completely different defense, i.e., that appellant accidentally fell on his son while trying to jump on the bed to make it bounce; and there was evidence from which the jury could find that appellant either performed wrestling moves on his son or fell on him while trying to jump on the bed. Indeed the evidence showed and the parties argued that the injuries had resulted from the wrestling or the jumping on the bed, not from both. (See *ibid.*)

Moreover, and very significantly, the prosecutor's closing argument heavily emphasized that the jury could find appellant guilty of both murder and assault on a child causing death based on the defense theory that appellant injured Reginald while jumping on the bed or, alternatively, on the prosecution theory of wrestling moves. (See, e.g., *People v. Norman* (2007) 157 Cal.App.4th 460, 466 [unanimity instruction required where "the evidence supported more than one discrete crime of theft and the prosecution not only failed to elect among the crimes, but actually argued both to the jury"].)

Hence, in the present case, as in *Davis*, appellant was entitled to a unanimity instruction because the evidence showed two distinct acts or sets of acts, subject to completely different defenses, and the prosecutor argued that the jury could rely on either theory to convict the defendant of both charges. (*Davis, supra*, 36 Cal.4th at pp. 561-562.) This failure to instruct was also prejudicial in that, based on the evidence, some jurors could have believed that appellant committed the charged offenses by wrestling with his son while others could have decided he did so by jumping on Reginald, and nothing in the record indicates that the jurors in fact did unanimously agree on which of the acts constituted the crimes. (See *ibid.*)

I would therefore reverse the judgment due to the trial court's failure to instruct on the requirement of jury unanimity. I would also reiterate the "Advice to Trial Judges" set forth in the case of *People v. Norman*, *supra*, 157 Cal.App.4th 460, in which the Third District Court of Appeal recently pointed out that "failure to give a jury unanimity instruction (now CALCRIM No. 3500) is the most common kind of instructional error in criminal cases," and advised trial judges to "put CALCRIM No. 3500 on your list of standard instructions to give, then ask yourself: 'Is there some reason *not* to give this instruction in this case?' " (*Id.* at p. 467.)

Kline, P.J.

A114612, *People v. Wyatt*

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Wyatt**

No.: **A114612**

I declare:

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

On March 7, 2008, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 7, 2008, at San Francisco, California.

B. Wong
Declarant

B. Wong
Signature

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