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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

THE PEOPLE,

Plaintiff and Respondent,

v.

EDUARDO ZAMORA,

Defendant and Appellant.

C067275

(Super. Ct. No. 09F04787)

THE PEOPLE,

Plaintiff and Respondent,

v.

AMBER INGRAM,

Defendant and Appellant.

C067276

(Super. Ct. No. 09F04787)

Defendants Eduardo Zamora and Amber Ingram murdered Ingram’s five-year-old son, Braeden Gardner. Zamora beat the child to death. Ingram, with knowledge that Zamora was repeatedly and severely beating her son, did nothing to prevent the abuse

and facilitated it by providing Zamora with unsupervised access to the child. Zamora and Ingram were charged with murder. (Pen. Code, § 187, subd. (a).)¹ With respect to Zamora, the murder charge included a special circumstance allegation that the murder was intentional and involved the infliction of torture. (Former § 190.2, subd. (a)(18).) Zamora was also charged with assault on a child involving force likely to produce great bodily injury and resulting in death (§ 273ab, subd. (a)) and the substantive crime of torture (§ 206). Ingram, in addition to murder, was charged with permitting a child to suffer unjustifiable physical pain or injury with an enhancement allegation that such conduct resulted in the child's death. (§§ 273a, subd. (a), 12022.95.)

Defendants were tried together before separate juries. Ingram was convicted as charged, including second degree murder. Zamora was convicted of the charged crimes, including first degree murder, but the jury found the special circumstance allegation to be not true. Zamora was sentenced to state prison for an indeterminate term of 25 years to life plus a consecutive life term. Ingram was sentenced to state prison for an indeterminate term of 15 years to life.

Defendants filed separate appeals, which we consolidated for purpose of opinion. Ingram's appeal raises two claims of error: (1) her murder conviction must be reversed because there was insufficient evidence that she intended to aid and abet Zamora's abuse of her son; and (2) the prosecutor engaged in prejudicial misconduct and violated her constitutional right to due process by arguing mutually exclusive versions of the events leading to Braeden's death to the separate juries. Zamora's appeal raises a single claim of sentencing error. He asserts that the trial court violated section 654 by imposing and executing sentence on both the conviction for assault on a child resulting in death and the conviction for torture.

¹ Undesignated statutory references are to the Penal Code.

We shall affirm both judgments. As we explain, substantial evidence supports Ingram’s murder conviction. “[A] parent who knowingly fails to take reasonable steps to stop an attack on his or her child may be criminally liable for the attack if the purpose of nonintervention is to aid and abet the attack.” (*People v. Rolon* (2008) 160 Cal.App.4th 1206, 1219 (*Rolon*)). Here, based on Ingram’s own statements to police following her son’s death, a reasonable jury could have concluded that she chose not to intervene in order to facilitate the abuse of her son and that murder was a natural and probable consequence of the severe and repeated abuse inflicted by Zamora on a five-year-old child. We further reject Ingram’s contention that the prosecutor argued mutually exclusive versions of her son’s death to the separate juries. With respect to Zamora’s appeal, we conclude that section 654 did not require the trial court to stay execution of his torture conviction.

FACTUAL BACKGROUND

When Braeden was born on July 28, 2003, Amber and William Ingram were dating.² The two married in September 2006. William was not the biological father, but took on the role of Braeden’s father from the child’s birth. Initially, the biological father had some contact with his son, but this stopped at the age of two. Braeden called William “daddy Will.” At the age of three, Braeden was trained to use the toilet and “picked it up pretty quickly,” with accidents being “few and far between.” At around the same age, Braeden was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and prescribed certain medications to manage the symptoms. These medications “calmed him down quite a bit” and made him better able to focus. William reported no significant disciplinary problems with Braeden.

² For convenience, we shall refer to William Ingram as “William” throughout this opinion.

In January 2009, Ingram informed William that she wanted a divorce. The following month, she and Braeden moved into a house with Tammy Barron, one of Ingram's close friends. Ingram began dating Zamora shortly after the move. Zamora frequently came over to the house. Barron described Ingram as an "awesome mother" prior to this new relationship. But when she started dating Zamora, the amount of time Ingram spent with her son decreased because "her attention was somewhere else."

Around this time, Braeden began having "bathroom accidents." On several occasions, he urinated in inappropriate places around the house, e.g., the toy box, the bathroom trash can, and the laundry hamper in Barron's closet. He also urinated in his pants on one occasion. When Barron told Ingram about this, Ingram responded, "Whoop his fucking ass." Barron took this comment to be a joke. However, she was concerned that Ingram's relationship with Zamora was having a negative impact on Braeden. For example, Barron described an incident in which Ingram and Zamora were kissing each other in front of Braeden and ignoring his cries for them to stop. Barron confronted Ingram about this incident, telling her to "get her head out of her ass" and "be a better mother." A couple days later, Ingram and Braeden moved out of the house they shared with Barron and into Zamora's house.

During this time period, William took care of Braeden two days a week. Braeden had no behavioral problems while he was with William. Braeden was enrolled in daycare in March 2009. He had no behavioral problems while he was at daycare. Nor did he have any bathroom accidents. After Zamora lost his job in April 2009, Ingram withdrew Braeden from daycare so that Zamora could watch him during the day. Ingram also ended Braeden's visits with William because he was "being difficult" when he returned from William's house.

The beatings began a few weeks later. The first beating Ingram knew about occurred when Braeden purportedly lied to Zamora. Zamora called Ingram while she

was at work, told her that he had hit Braeden with his belt, and added, “[T]his is how Mexican fathers deal with their kids that lie.” According to Ingram, she thought that was a “normal” reaction because Zamora was raised in a different culture, but told him not to hit her son anymore. When Ingram got home and examined her son, she saw that Zamora had “spanked him a lot of times” on his buttocks and back. She gave him Motrin and put ice packs on the bruises. A short time later, Braeden began “peeing the bed” and “pooped his pants” on two occasions. These incidents also prompted beatings. During the last month of Braeden’s life, Zamora beat him “10, 11, 12 times.” Each time, Ingram would give her son Motrin and put ice packs on the bruises.

The fatal beating occurred the morning of June 17, 2009. Zamora called Ingram while she was at work and told her that Braeden had “pooped his pants.” According to Ingram, she told Zamora to “just put him in his room” and that she would clean it up when she got home. Zamora then sent “a picture of the poop on the wall” to Ingram’s cell phone. About 30 minutes later, Zamora called Ingram again and said, “ ‘Braeden’s not breathing. He’s throwing up and I don’t know what to do.’ ” Ingram told him to call 911, hung up the phone, and drove home to check on her son. Zamora called 911 as instructed and informed the operator, “I’ve been grounding [Braeden’s] ass and I’ve been fucking disciplining him and he shit in his room and I think he ate shit. And he’s not fucking breathing.” When paramedics arrived, they found Braeden’s bruised and lifeless body on the floor. Zamora told one of the paramedics that Braeden “ate shit and then he stopped breathing.” When asked about the bruises, Zamora answered, “He came back from his father’s that way.”

Braeden was dead before he reached the hospital. His clavicle was broken and “widely displaced,” meaning that the break was complete and each side of the bone could be moved “quite freely.” He had five rib fractures on the left side of his chest. His left lung and thymus gland were bruised. There was bleeding in the lining of the heart, the

spleen, and the left kidney. The stomach and intestinal lining were also superficially torn. These injuries would have required the infliction of multiple forceful blows, such as punches or kicks to the chest and abdomen. Consistent with these internal injuries, Braeden had “numerous overlapping bruises” on his chest, abdomen, back, buttocks, arms, hands, legs, and feet. His lower chest had a “strap-like horizontal” bruise and several oval-shaped bruises that were “reminiscent of fingertips or knuckles.” His chest, back, arms, and legs had several “loop-shaped” bruises. Most of these bruises appeared to have been inflicted within the previous 48 hours, while some appeared to be a few days old.

Braeden’s face and head were also severely beaten. He had “numerous overlapping” bruises and scrapes on his forehead, eyelids, nose, cheeks, jaw, and ears. There was bleeding inside both of Braeden’s eyes, in the muscles of the front of his neck, and in five separate locations under his scalp. On the left side of the child’s neck, there was a “patterned injury” consisting of a “central circular abrasion surrounded by a rim of bruising.” Nine more of these “pattern” injuries were found on his chest, abdomen, arms, and legs. These injuries could have been caused by being hit with Zamora’s glass pipe. Heat from the center of the pipe bowl could have caused the central circular abrasion, while the cooler outside of the bowl would account for the rim of bruising surrounding the abrasion. Braeden also had two “V-shaped or curvilinear” bruises on his left thigh that were “reminiscent of bite marks,” bruising on his penis and scrotum that was consistent with “something like a pinch,” and bruising on the skin surrounding his anus.

Zamora is the only person who knows exactly what transpired the morning of Braeden’s death. According to his account, told to Detective Tom Koontz later that day, he noticed that Braeden had “shit on himself” as Ingram was leaving to go to work. He took the soiled mattress, comforter, and clothes outside and told Braeden to take a shower. Braeden took a shower, changed into a clean pair of underwear and T-shirt, and

sat down in his bedroom watching a movie. Zamora then fed Braeden a hotdog for breakfast. About two hours later, Zamora went into the bedroom to check on Braeden and found him on the floor in the corner of the room, leaning against the wall with his eyes open and fluttering. He had again “shit himself” and “there was shit on the wall.” Braeden was not breathing and Zamora believed that he had eaten some of his own feces. Zamora was “panicking,” picked Braeden up off the floor, carried the child into the master bedroom, placed him on the bed, and put his finger down Braeden’s throat to make him throw up. He then called 911. Zamora admitted to hitting Braeden in the past, but denied doing so that morning, saying, “I figured he had enough—I mean, look at him, he had enough.”

Later in the interview, Zamora admitted to hitting Braeden after he “shit himself” that morning. Zamora claimed that Braeden ran from him after he spanked the child, so Zamora “fucking hit him.” He might have used a closed fist, but said that he did not remember. Braeden “just grabbed his side and he sat down.” Zamora then took Braeden to the shower and cleaned him up. When he did so, his finger might have gone up the child’s rectum “a little bit.” After Braeden was clean, Zamora changed his clothes and put him in his room. A couple hours later, Zamora checked on Braeden and found him “sitting in the fucking corner” with his eyes fluttering. He could smell feces on Braeden’s breath and saw that the substance had been smeared on the wall. Zamora thought that “when [he] spanked [Braeden], [he] must have fucking hurt him.” Zamora repeated that he then carried Braeden to the master bedroom, made him throw up, and called 911. He denied putting feces in Braeden’s mouth to try to teach him a lesson. When asked whether he hit Braeden hard enough to cause internal injuries, Zamora answered, “Maybe I hit him that fucking hard.”

Detective Koontz then informed Zamora that Braeden had died and confronted him with pictures showing the severity of the injuries. Zamora responded, “I fucking hit

him too hard, Officer. It's obvious I fucking hit him too hard and I beat the shit out of him too much." Zamora denied knowing how Braeden received the pattern injuries on his body and denied causing them by burning or hitting Braeden with his glass pipe, but he did admit to having bitten the child on one occasion. According to Zamora, most of the bruises on Braeden's body were from the previous two weeks. He denied hitting Braeden with anything other than his hand and a belt. He admitted to slapping the boy in the face on one occasion. When Koontz pointed to a large bruise on Braeden's side, Zamora said that he believed he inflicted that injury when Braeden tried to run from him that morning.³

Ingram also spoke to police following her son's death. At first, she denied seeing the bruises on Braeden's body and claimed that he had been wearing "long-sleeve shirts and sweats" for the previous week, which was not "normal" because the weather was hot. She also denied seeing him naked at all during that week, saying that he took a bath or shower in the morning after she had already gone to work. Ingram then acknowledged that Zamora had spanked Braeden for "peeing the bed" the previous day and claimed that she threatened to move out because of it. She also said that Braeden had hit his head "a week and a half, two weeks ago," while he was running down the hallway. Other than that, he had "just normal boy bumps and bruises."

³ Zamora's interview with Detective Koontz was video recorded and played for Zamora's jury only. Accordingly, we do not consider this evidence in assessing whether substantial evidence supports Ingram's murder conviction. However, Zamora also testified at trial and was confronted with several of his statements made during this interview. These statements were then admitted through the rebuttal testimony of Detective Koontz as prior inconsistent statements. As we explain in the discussion that follows, we need not consider Zamora's trial testimony or the inconsistent statements made during his interview with Detective Koontz in order to conclude that substantial evidence supports Ingram's murder conviction.

Later in the day, Ingram gave a more detailed statement to Detective Bruce Wanner. She continued to claim that she did not know about the bruises on Braeden's body except for one that she saw on his buttocks and lower back from when Zamora spanked him the previous day for peeing the bed. Ingram also maintained that Braeden had hit his head while running down the hallway. She then slowly began to acknowledge the extent of the abuse her son suffered at the hands of Zamora. First, she said that Zamora had "spanked him a couple of times for peeing the bed." Both times, according to Ingram, Zamora said that he used his hand and that he would not hit Braeden with anything else. Ingram also claimed that she made an appointment for Braeden to see a psychologist to find out whether he was "acting out" because she had left William and moved in with Zamora. When Detective Wanner asked her what happened that morning, Ingram said that she threatened to move out and told Zamora, "I don't think it's right for you to spank a kid over peeing the bed because he's five years old." When Ingram got to work, she e-mailed a friend and told her that she was "thinking about moving out." Ingram explained that even though she only knew about two spanking incidents, she did not think Zamora "was going to stop at that."

Detective Wanner then confronted Ingram with the fact that Braeden had "very, very severe bruising and injuries" and told her that she was being "less than truthful" about the injuries she saw on her son. Ingram agreed and said that she was "trying to find a place to go." She felt "stuck" and Zamora "made [her] feel on top of the world," telling her that he loved and cared for her, and that she was "the best thing to ever happen to him." Ingram then described the first incident of abuse, recounted in greater detail above, in which Zamora hit Braeden with a belt for purportedly lying to him. According to Ingram, she told Zamora not to hit Braeden and threatened to leave, but he "got in [her] head" and convinced her to stay. She saw the bruises following this incident, gave her son Motrin for the pain, and put ice packs on the bruises. Ingram also described an

incident that occurred about a week before Braeden's death in which Zamora hit him with a belt because he "shit on himself." Ingram again told Zamora not to hit Braeden and checked her son's injuries when she got home from work. There were 10 or 11 bruises on his back and 15 to 20 bruises on each leg. Ingram again gave Braeden Motrin for the pain, put ice packs on the bruises, and told her son, "I love you, it's going to be okay. We're going to figure this out." Ingram again threatened to leave, but Zamora again "got completely in [her] head" and convinced her to wait until she took Braeden to the psychologist to see if that straightened everything out. Ingram also stated that she was responsible for Braeden's death because she "could have protected him more." When asked why she did not do so, Ingram answered, "Because of him. He was in my head."

According to Ingram, the last time she saw her son naked was two nights before his death. When Detective Wanner showed her pictures of Braeden's bruises, she acknowledged that he had some of the bruises then, but not "the big ones." She then ended the interview, saying, "I can't look at that. I want to leave." Ingram returned to the police station the following day to finish her statement. She again explained that Zamora started beating Braeden "a few weeks after he started watching him." But this time, she acknowledged seeing bruises on her son's body "10, 11, 12 times." Each time, she gave him Motrin and ice packs. She also admitted to being "ashamed" that she "was letting that happen to him and [she] didn't do anything about it and [she] could have."

DISCUSSION

I. Ingram's Appeal

Ingram's appeal raises two claims of error. First, she asserts that her second degree murder conviction must be reversed because there was insufficient evidence that she intended to aid and abet Zamora's abuse of her son. Second, she argues that the prosecutor engaged in prejudicial misconduct and violated her constitutional right to due

process by arguing mutually exclusive versions of the events leading to Braeden’s death to the separate juries. We reject each of these contentions.

A. Sufficiency of the Evidence

Ingram argues that there is insufficient evidence to support her second degree murder conviction because the only evidence that her failure to prevent Zamora’s abuse of her son was intended to aid and abet the abuse was Zamora’s self-serving trial testimony, which she describes as “inherently incredible.” We disagree.

“A person who aids and abets the commission of a criminal offense is considered a principal in the crime. [Citation.] In order for criminal liability to be imposed under an aiding and abetting theory, the person must ‘act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.’ ” (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 740, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 560.) “A person who aids and abets a crime may be liable ‘for any other offense that was a ‘natural and probable consequence’ of the crime aided and abetted.” [Citation.]’ [Citation.] ‘[W]hen an individual’s criminal liability is based on the *failure* to act, it is well established that he or she must first be under an existing legal duty to take positive action. [Citations.]’ ” (*Rolon, supra*, 160 Cal.App.4th at p. 1212, quoting *People v. Heitzman* (1994) 9 Cal.4th 189, 197.)

“ ‘When a criminal statute does not set forth a legal duty to act by its express terms, liability for a failure to act must be premised on the existence of a duty found elsewhere.’ [Citation.] A criminal statute may incorporate a duty imposed by another criminal or civil statute, and ‘may also embody a common law duty based on the legal relationship between the defendant and the victim, such as that imposed on parents to care for and protect their minor children. [Citations.]’ [Citation.] ‘The common law imposes affirmative duties upon persons standing in certain personal relationships to

other persons— upon parents to aid their small children . . . a mother [may be guilty of criminal homicide] for failure to prevent the fatal beating of her baby by her lover’ ” (*Rolon, supra*, 160 Cal.App.4th at p. 1215.)

Thus, “parents have a common law duty to protect their children and may be held criminally liable for failing to do so: a parent who knowingly fails to take reasonable steps to stop an attack on his or her child may be criminally liable for the attack if the purpose of nonintervention is to aid and abet the attack.” (*Rolon, supra*, 160 Cal.App.4th at p. 1219.) Such inaction, with the requisite intent to aid the perpetrator, “can support liability for implied malice murder.” (*Ibid.*)

In *Rolon, supra*, 160 Cal.App.4th 1206, the Court of Appeal found sufficient evidence to support the defendant’s murder conviction where her boyfriend (Lopez) killed their one-year-old child (Isaac) while she “made no effort to aid her son.” (*Id.* at p. 1221.) Although a court order prevented Lopez from staying at the defendant’s apartment or having unmonitored contact with her children, she allowed him to stay there anyway. (*Id.* at pp. 1209-1210.) One night, Lopez immersed Isaac in a tub of water and unspecified chemicals and then threw him against a wall in front of the defendant. The child, who had been crying, stopped when he hit the wall. Later, Lopez went to sleep and awoke to the sound of Isaac crying. He punched the child in the chest. When the defendant told Lopez to leave Isaac alone, he told her to shut up and hit the child several more times. Early the next morning, Lopez said that he would take care of Isaac and told the defendant to go to bed, which she did. When Isaac began to cry, Lopez muffled his cries with a stuffed toy and a jacket. (*Id.* at p. 1210.) At some point, the child was also given a lethal dose of children’s cough medicine. Isaac died of a combination of blunt force injuries, suffocation, and pseudoephedrine overdose. (*Id.* at p. 1211.)

Affirming the defendant’s second degree murder conviction, the Court of Appeal in *Rolon* explained, “In this case, [the defendant] attempted to strike Lopez at least once

during the week before the homicide. According to her statement to the interrogating officers, she reprimanded Lopez when he punched her son, and after he told her to ‘shut up’ and not involve herself, she continued ‘fighting’ with him. She did not explain what she meant by ‘fighting.’ She made no effort to aid her son: she did not scream, call 911, ask a neighbor to help or call for help, or do anything else. Instead, she went to sleep and left her son alone with Lopez although she knew Lopez had recently punched him and thrown him against a wall. From this evidence, a reasonable jury could infer that [the defendant] was capable of taking some action to protect her child and that she chose not to do so, but to go to sleep and leave her son alone with Lopez. These inferences support the conclusion that [the defendant] did not take every step reasonably necessary under the circumstances to protect her son.” (*Rolon, supra*, 160 Cal.App.4th at p. 1221.)

Ingram argues that the *Rolon* decision was “predicated on case-specific evidence proving that the defendant mother’s inaction was intended to aid and abet the abuse,” while the record in this case “contains no such evidence, and allows no such conclusion.” “Most notably,” argues Ingram, “[she] was not present at the scene of the crime. She did not fail to act after seeing Zamora beat [Braeden] in a killing frenzy. Indeed, she had not been present at any time Zamora hit [Braeden].” We are not persuaded. While the *Rolon* court stated that “the jury could reasonably infer [the defendant’s] intent to aid Lopez from *her presence at the scene of the crime*, her duty to protect her child and her failure to do so” (*Rolon, supra*, 160 Cal.App.4th at p. 1219, italics added), the court did not state that presence at the scene of the crime was necessarily required in order for accomplice liability to attach. Nor would such a statement be consistent with the law. (§ 31 [principals in a crime defined as those who “directly commit the act constituting the offense, or aid and abet in its commission, or, *not being present*, have advised and encouraged its commission” (italics added)].)

Moreover, the *Rolon* court cited with approval a number of out-of-state cases, including *People v. Stanciel* (1992) 153 Ill.2d 218, two consolidated appeals, both of which involved “the death of a child, murdered by the boyfriend of the child’s mother,” and in which “the mother knew of the on-going abuse of the child by the murderer.” (*Stanciel*, at p. 232.) In one of the appeals, the mother (Peters) was not present when the fatal blows were struck. (*Id.* at p. 237.) The Illinois Supreme Court held that in both appeals “the mother’s knowledge of [the] on-going abuse, coupled with the continued, sanctioned exposure of the child to this abuse, is sufficient to hold the mother accountable for the murder of the child.” (*Id.* at p. 232.) Rejecting the argument that “because Peters was not present when the fatal blows were struck, she could not have aided [her boyfriend] in the murder,” the court explained, “First, actual presence at the commission of a crime is not a requirement of accountability. [Citation.] Second, a defendant may be found to have aided and abetted without actively participating in the overt act itself. [Citation.] In Peters’ case, the aid rendered may be found in Peters’ act of placing [her son] in the control of the principal, a known abuser. This delegation of exclusive control of the child to [the abuser] constituted the act of aiding a principal under the accountability statute.” (*Id.* at p. 237.)⁴

Similarly, here, substantial evidence supports the conclusion that Ingram knew about the severe abuse Zamora was inflicting upon Braeden during the month leading up to his death and aided Zamora by continuing to expose her son to the abuse. While she claims that “[s]he was only aware that Zamora was hitting [Braeden] with a belt more

⁴ The Illinois accountability statute provided in relevant part: “ ‘A person is legally accountable for the conduct of another when: [¶] . . . [¶] . . . [e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.’ (Ill. Rev. Stat. 1987, ch. 38, par. 5-2(c).)” (*Stanciel, supra*, 153 Ill.2d at pp. 232-233.)

often than the twice he had admitted,” this mitigated statement of her knowledge is belied by the record. As mentioned, Ingram told Detective Wanner that Zamora started beating Braeden “a few weeks after he started watching him.” She acknowledged seeing bruises on her son’s body “10, 11, 12 times.” Rather than remove Braeden from this abusive environment, or at the very least ensure that Zamora did not have unsupervised access to her son, Ingram continued to allow Zamora to watch the child while she was at work. And when she came home to new bruises on her son’s body, she simply gave him Motrin for the pain and put ice packs on the bruises.

As in *Rolon, supra*, 160 Cal.App.4th 1206, Ingram’s jury was justified in concluding that Ingram failed to take reasonable steps to protect her son. Indeed, she admitted as much to Detective Wanner when she said that she was “ashamed” that she “was letting that happen to [Braeden] and [she] didn’t do anything about it and [she] could have.” The reason she chose not to intervene, by her own words, was that Zamora “was in [her] head.” She felt “stuck” in the relationship because Zamora “made [her] feel on top of the world,” told her that he loved and cared for her, and said that she was “the best thing to ever happen to him.” Rather than leave Zamora to protect her son, she opted to schedule an appointment for Braeden to see a psychologist—thinking if Braeden stopped aggravating Zamora by “acting out,” perhaps the abuse would stop. The law requires more from a parent than wishful thinking. It requires the parent to take reasonable steps to protect his or her child from abuse, which Ingram failed to do.

Finally, Ingram appears to concede that substantial evidence supports her second degree murder conviction if we consider Zamora’s trial testimony. Zamora testified that both he and Ingram hit Braeden. According to Zamora, he caused some of the bruises on Braeden’s legs, feet, buttocks, and “[a] little bit above the waist.” He also “accidentally” hit Braeden once in the face with the belt. Zamora denied causing any of the bruises on Braeden’s chest, back, shoulders, neck, and face. He also claimed that on two occasions

he heard “smacking,” “a thump now and then,” and “crying” coming from Braeden’s bedroom while Ingram was in the room with her son. According to Zamora, the morning Braeden died, he spanked the child three or four times with the belt for defecating in his pants. Then, while Zamora got “stoned” in the living room, Ingram cleaned Braeden up in the shower and took him into his bedroom. Zamora heard “smacking” and “crying” coming from Braeden’s room. When Ingram came out, she said that Braeden was grounded and left to go to work. Zamora checked on Braeden a couple hours later and found him leaning against the wall with his eyes fluttering back and forth. He noticed that Braeden had feces in his mouth and put his finger down the child’s throat to make him throw up. He then carried Braeden to the master bedroom, again tried to make him vomit, noticed his eyes were still fluttering, rushed to the bathroom to try to revive him in the shower, and then carried the child back to the bedroom. At this point, Ingram called. He told her that Braeden was not breathing, hung up the phone, and called 911. Later in Zamora’s testimony, he claimed that Ingram inflicted the injuries on Braeden’s body “two days before he passed away.”

Ingram asserts that Zamora’s “self-serving” and “internally inconsistent” testimony cannot support her murder conviction, pointing out that it “was so patently false that the prosecution did not even argue it.” Instead, the prosecution argued that she “knew Zamora had beaten [Braeden], not that she ever hit him herself.” Ingram also asserts that Zamora’s trial testimony was “inherently improbable” because (1) “it was vividly contradicted by Zamora’s own admissions to the police,” and (2) the claim that Ingram inflicted the injuries two days before Braeden’s death “was contradicted by the physical evidence,” specifically, the medical evidence that Braeden’s internal injuries were likely “inflicted on the morning of his death.” It doesn’t matter because, as we have explained, Ingram’s own statements to Detective Wanner are sufficient to establish that

she knew about the severe abuse Zamora was inflicting upon Braeden during the month leading up to his death and aided Zamora by continuing to expose her son to the abuse.

The jury could also have reasonably concluded that murder was a natural and probable consequence of the severe and repeated abuse inflicted by Zamora on a five-year-old child. (See *People v. Culuko* (2000) 78 Cal.App.4th 307, 333 [murder was natural and probable consequence of felony child abuse].) Thus, we affirm Ingram's murder conviction as supported by substantial evidence.

B. Prosecutorial Misconduct

We also reject Ingram's contention that the prosecutor violated her constitutional right to due process by "deceptively and unfairly argu[ing] mutually exclusive versions of crucial facts," i.e., the events leading up to Braeden's death, to the separate juries.

1. The prosecutor's closing arguments.

As mentioned, Ingram and Zamora were tried together before separate juries. In her closing argument before Ingram's jury, the prosecutor argued that "Ingram watched over time as the violence by her boyfriend against her son escalated and escalated and escalated over and over and over again." The prosecutor argued that when Ingram went to work the morning Braeden died, she "knew that [her son] was beaten and suffering and injured and looked like [the autopsy photos] when she left him that morning, okay. Not only all of the other times that this was happening, but that morning, on June 17th, she took a look at her son, looking like [the autopsy photos], she had to know he was in agony, she had to know he was in pain, she saw the injuries to him." According to the prosecutor, "This beating did not happen in less than three hours. You saw Braeden's body, okay. She leaves for work. She leaves her child in the care of this man that she knows caused those injuries to him, such that you saw [in] the autopsy photos. Those photos tell you what she saw, because, folks, *those didn't all happen* in that very small window period of time that morning. Yes, they are acute, and acute means that morning,

and it could have been up to a day, even one before that, according to the coroner.” The prosecutor continued, “She does nothing to protect this child. And, again, she makes a fatal decision on the 17th of June to let that man be alone with her child in that condition, suffering and dying, and *then he gets another final fatal beating* and it’s over.” (Italics added.)

Later in the argument, the prosecutor repeated that the abuse “escalated over a period of at least a week where Braeden was beaten so badly, his body gave out.” Still later, she argued, “[Ingram] was only gone for a few hours, less than three that morning, okay. All that abuse and this shutdown of [Braeden’s] system and his death *did not all happen in three hours*, okay. That child was significantly bruised and beaten with developed colored scarring to his body from head to toe when she saw him and left him that morning.” (Italics added.) The prosecutor then stated, “That child had *a number of those injuries* when she left him—when she left him with [Zamora] and you know that from the nature and extent of those blows and those injuries and the well-developed color on those bruises on the outside markings and what he must have been exhibiting—what he must have been exhibiting in terms of pain, in terms of discomfort, in terms of lethargy, okay. A child doesn’t endure this kind of trauma and not exhibit symptoms. [¶] He is not a toddler, he can speak. He had to have been telling his mother to help him. He had to have been telling his mother he hurt. He had to have been asking for protection, and she doesn’t protect him. She abandons him again and leaves him trapped alone in this prison with this man, and those are her choices and those choices *allowed Zamora to kill [Braeden] that morning.*” (Italics added.)

The prosecutor continued, “*They didn’t all happen during that short time frame.* Look at the pictures yourself. It’s clear, it took time to do this. This wasn’t a blowup of rage that morning. It escalated, *it became fatal that morning*, but [Ingram] certainly is on notice well before that that this could possibly happen.” (Italics added.) The prosecutor

then pointed out that Ingram admitted to Detective Wanner that Zamora had beaten her son in the past. She also quoted from Zamora's statement to Detective Koontz, in which he initially denied hitting Braeden that morning because, in Zamora's words, "look at him, he [had] had enough." The prosecutor added, "He is telling you that child looked like that that morning *before his fatal beating* where he inflicted some new injuries, but make no mistake, *for the most part* that child looked like that that morning." (Italics added.) The prosecutor also pointed out that Ingram claimed to have threatened to leave Zamora the night before and argued, "Why? Because [her son] looked like that. That is another reason you know she saw those injuries and how severe they were the night before."

In front of Zamora's jury, purportedly in irreconcilable conflict with the foregoing argument, the prosecutor argued, "The internal injuries and bone breaks are acute, okay. Those are the most severe, the most significant injuries [the coroner] believes happened that morning. And who is with Braeden that morning? Zamora." The prosecutor further argued, "So who inflicted these injuries? It's clear beyond much debate who is responsible. How do you know that [Zamora] is responsible? Well, because of the timing of the onset of the symptoms and when Braeden died and the coroner's opinion about those traumas being so acute that they would cause symptoms that would have been immediately apparent, like unconsciousness, like stopping breathing, all of those things happened during the three-hour window of time that [Zamora] is alone with this child that day."

2. Analysis.

"[T]he People's use of irreconcilable theories of guilt or culpability, unjustified by a good faith justification for the inconsistency, is fundamentally unfair, for it necessarily creates the potential for— and, where prejudicial, actually achieves— a false conviction or increased punishment on a false factual basis for one of the accuseds." (*In re Sakarias*

(2005) 35 Cal.4th 140, 159-160 (*Sakarias*); see also *Nguyen v. Lindsey* (9th Cir.2000) 232 F.3d 1236, 1240 (*Nguyen*) [“a prosecutor’s pursuit of fundamentally inconsistent theories in separate trials against separate defendants charged with the same murder can violate due process if the prosecutor knowingly uses false evidence or acts in bad faith”].)

In *Sakarias*, our Supreme Court explained, “By intentionally and in bad faith seeking a conviction or death sentence for two defendants on the basis of culpable acts for which only one could be responsible, the People violate ‘the due process requirement that the government prosecute fairly in a search for truth’ [Citation.] In such circumstances, the People’s conduct gives rise to a due process claim (under both the United States and California Constitutions) similar to a claim of factual innocence. Just as it would be impermissible for the state to punish a person factually innocent of the charged crime, so too does it violate due process to base criminal punishment on unjustified attribution of the same criminal or culpability-increasing acts to two different persons when only one could have committed them. In that situation, we *know* that *someone* is factually innocent of the culpable acts attributed to both.” (*Sakarias, supra*, 35 Cal.4th at p. 160; see also *Thompson v. Calderon* (9th Cir.1997) 120 F.3d 1045, 1057 (*Thompson*) [prosecutor “asserted as the truth before Thompson’s jury the story he subsequently labeled absurd and incredible in Leitch’s trial”], revd. on other grounds *sub nom. Calderon v. Thompson* (1998) 523 U.S. 538 [140 L.Ed.2d 728].)

Ingram argues that her due process rights were violated because the prosecutor argued to her jury that “the killing blows were inflicted the night before [Braeden’s] death,” while she argued to Zamora’s jury that “the internal injuries had occurred the morning of [Braeden’s] death.” We disagree for two reasons. First, viewing the argument delivered to Ingram’s jury in its entirety, we cannot conclude that a reasonable jury would have understood the prosecutor to be arguing that the killing blows were delivered the night before Braeden’s death. The point the prosecutor was making was

that Braeden was suffering ongoing abuse, that many of the child’s injuries were visible and known to Ingram the night before his death, and that she nevertheless chose to leave him with Zamora the next morning. Indeed, the prosecutor clearly stated, “She abandons him again and leaves him trapped alone in this prison with this man, and those are her choices and those choices *allowed Zamora to kill him that morning.*” (Italics added.) Even the portions of the argument so heavily relied upon by Ingram, i.e., that Braeden “looked like [the autopsy photos] when she left him that morning,” were clarified later in the argument when the prosecutor stated that Braeden “had *a number of those injuries* when she left him” and that “*for the most part* that child looked like that that morning.” (Italics added.)

Second, unlike *Thompson, supra*, 120 F.3d 1045, this is not a situation in which the prosecutor argued that both defendants committed a murder that was committed by only one of them. And unlike *Sakarias, supra*, 35 Cal.4th 140, this is not a situation in which the prosecutor argued that one defendant inflicted certain blows and then turned around and argued that the same blows were inflicted by the other defendant. Here, both Ingram and Zamora could be found guilty of Braeden’s murder—Zamora as the direct perpetrator who inflicted the fatal blows, and Ingram as an aider and abettor who knew about the severe abuse Zamora was inflicting upon Braeden during the month leading up to his death and aided Zamora by continuing to expose her son to the abuse. These were the theories used to convict each defendant. Nothing in the prosecutor’s closing arguments suggested that Ingram was the one who inflicted the fatal blows. Thus, regardless of what the prosecutor said about *when* the fatal blows were struck, this is not the type of situation in which “we know that *someone* is factually innocent of the culpable acts attributed to both.” (*Sakarias, supra*, 35 Cal.4th at p. 160; see *Nguyen, supra*, 232 F.3d at p. 1240 [“both defendants could be guilty of the same crime because of the nature of the crime—the murder of an innocent bystander during gang warfare”].)

We find no prosecutorial misconduct. Nor do we find a violation of Ingram’s due process rights. And because the prosecutor’s arguments were not irreconcilable, Ingram’s claim of judicial estoppel also fails.

II. Zamora’s Appeal

Zamora’s appeal raises a single claim of sentencing error. He asserts the trial court violated section 654 by imposing and executing sentence on both the conviction for assault on a child resulting in death and the conviction for torture. He is mistaken.

As relevant, section 654, subdivision (a) provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

This section has been interpreted to preclude multiple punishment for “a single act or indivisible course of conduct.” (*People v. Assad* (2010) 189 Cal.App.4th 187, 200.) “ ‘The divisibility of a course of conduct depends upon the intent and objective of the defendant. . . . [I]f the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ ” (*People v. Akins* (1997) 56 Cal.App.4th 331, 338-339; *People v. Nubla* (1999) 74 Cal.App.4th 719, 730.) However, as our Supreme Court recently explained, a defendant may not be punished twice for a *single act* simply because he or she harbored multiple criminal objectives. (*People v. Mesa* (2012) 54 Cal.4th 191, 199-200.) Instead, the intent and objective test determines whether a course of conduct is indivisible and must therefore be treated as a single “act” within the meaning of section 654. (*People v. Akins, supra*, 56 Cal.App.4th at pp. 338-339.) Whether a defendant harbored multiple criminal objectives is a question of fact, the trial

court's determination of which must be upheld on appeal if supported by substantial evidence. (*People v. Nubla, supra*, 74 Cal.App.4th 730; *People v. McKinzie* (2012) 54 Cal.4th 1302,1368-1369.)

Here, as mentioned, Zamora was convicted of murder (count one), assault on a child involving force likely to produce great bodily injury and resulting in death (count two), and torture (count three). At sentencing, Zamora's attorney argued that section 654 precluded the trial court from imposing and executing sentence on both counts one and three because "the murder that was found to be true by [Zamora's] jury was committed during the course of a torture." Zamora's attorney explained, "I believe by a finding that the special circumstance was not true [the jury] rejected the notion that this was an intentional murder. And I say that because the special circumstance adds the element of an intentional murder, um, on top of elements that the jury did find to be true. So I think it's safe to say that this jury convicted [Zamora] of murder on a felony murder theory, the murder being during the course of torture, so I find it problematic that the Probation Department would recommend sentencing to consecutive terms on that same course of conduct."

The prosecutor agreed, but urged the trial court to sentence Zamora to a term of 25 years to life on count two, as the principal term, and then impose a full consecutive term of life on count three. The prosecutor explained that the trial court could "use count two as the principal term and avoid the [section] 654 issue because the torture that happened in count three went well above and beyond, um, the conduct that led to the child's death in this case. There was evidence of pinching, biting, burning, other types of, um, injuries to this child that were not necessarily causes of death and are not shared within the same kind of intent required for count two." The prosecutor further explained that any of the blows inflicted the morning of Braeden's death that resulted in the child's death "would have been enough to hold [Zamora] accountable for count two and 25-to-life," while the

torture alleged in count three “went above and beyond the assaultive conduct [that caused Braeden’s death] and went into the realm of torturing this child and doing things to this child that did not result in his death that were for a sadistic purpose[.]” Moreover, argued the prosecutor, “the time frames are different in count two and count three.”

The trial court imposed and executed sentence on counts two and three, finding that “the assault resulting in death, as well as the torture, are separate events” and that “the separate events are involved with different time frames.”

Zamora argues that “since the evidence showed that he acted with only one intent—an intent to harm the child that resulted in death—the torture conviction should also have been stayed.” We are not persuaded. Torture involves the infliction of great bodily injury with “the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose.” (§ 206.) The evidence revealed that Zamora tortured Braeden for at least two weeks prior to the child’s death. According to his own words, he beat Braeden “fucking two, three times a week.” Zamora admitted to biting Braeden during this period of time. And while he denied burning or hitting Braeden with his glass pipe, the jury could have concluded from the coroner’s testimony concerning the pattern injuries on Braeden’s body that Zamora did so. As Zamora stated to Detective Koontz, that would be “fucking cruel.” Thus, the evidence supports the trial court’s conclusion that Zamora tortured Braeden during the weeks leading up to the final beating that ended the child’s life.

Conversely, it was Zamora’s final beating of Braeden, by means of force likely to produce great bodily injury and resulting in the child’s death, that made Zamora liable for violation of section 273ab charged in count two. While, as Zamora argues, he may well have had the same intent in committing this crime, i.e., “to torture [Braeden],” he had time to reflect on his prior torturous conduct and renew his intent to sadistically inflict pain and suffering on this five-year-old child. (See *People v. Harrison* (1989) 48 Cal.3d

321, 335-336 [section 654 did not apply where the defendant committed three acts of vaginal penetration during a span of seven to 10 minutes; each time the initial attack was interrupted by the victim's struggle, the defendant voluntarily resumed his sexually assaultive behavior]; *People v. Trotter* (1992) 7 Cal.App.4th 363, 367-368 [section 654 did not apply where the defendant had time to reflect between the shots he fired at a police officer and renewed his intent to harm the officer].)

We conclude that substantial evidence supports the trial court's conclusion that Zamora's final assault resulting in Braeden's death was punishable separately from the torture that occurred in the weeks leading up to this assault. This conclusion is consistent with the purpose of section 654, which is "to insure that a defendant's punishment will be commensurate with his culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 552.) A defendant who tortures a child over the course of at least two weeks, has time to sleep on his decision to so ruthlessly abuse the child, and then beats the child to death the next morning, is more culpable than a defendant who either commits the torture or commits the assault resulting in death. This conclusion is also consistent with *People v. Assad, supra*, 189 Cal.App.4th 187, in which we recently held that the trial court did not err in separately punishing the defendant for three incidents of domestic violence and for torture where the defendant did not carry his burden of showing that the incidents of domestic violence were part of the course of conduct on which the torture conviction was based. (*Id.* at p. 201.)

DISPOSITION

The judgments are affirmed.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

NICHOLSON, J.