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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

RENE GALLEGOS et al.,

Defendants and Appellants.

E052499

(Super.Ct.No. RIF140921)

OPINION

APPEAL from the Superior Court of Riverside County. Edward D. Webster,  
Judge. Affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and  
Appellant Rene Gallegos.

Jerry D. Whatley and John L. Dodd, under appointment by the Court of Appeal,  
for Defendant and Appellant Joanna Gonzalez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Karl T. Terp,  
Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Rene Gallegos of second degree murder of the victim, his three-month old son<sup>1</sup> (count 1—Pen. Code § 187, subd. (a));<sup>2</sup> assault on a child under eight years of age causing death as to the same victim (count 2—§ 273ab); and five counts of child neglect respectively as to his remaining offspring (§ 273a, subd. (b)). Another jury<sup>3</sup> convicted Gallegos’s girlfriend, appellant and defendant Joanna Gonzalez, of involuntary manslaughter of the victim (count 1—§ 192(b)), a lesser, necessarily included offense of the count 1 charge of second degree murder and five counts of child neglect (§ 273a, subd. (b)) as to her remaining offspring.<sup>4</sup> The court sentenced Gallegos to an aggregate, indeterminate term of 25 years to life. The court granted Gonzalez two years probation.

On appeal, Gallegos contends the court’s instruction of the jury with a bracketed portion of the pattern jury instruction CALCRIM No. 520 violated his federal constitutional right to due process by permitting the jury to find him guilty of second degree murder based on negligence rather than on the requisite intentional, deliberate, and knowing act. He further maintains the court prejudicially erred in failing to

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<sup>1</sup> The victim was born in September 2007 and died in December 2007.

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>3</sup> Gallegos and Gonzalez (collectively, “defendants”) were tried simultaneously before two separate juries except when confronted with recorded statements by the other defendant and during closing arguments.

<sup>4</sup> The court granted a section 1118.1 motion to dismiss the count 2 offense against Gonzalez of assault of a child by means of force likely to produce great bodily injury resulting in death.

adequately answer the jury's two questions regarding the instruction. Gonzalez argues insufficient evidence supported her conviction for involuntary manslaughter. She further maintains the court prejudicially erred in failing sua sponte to instruct the jury with CALCRIM No. 3500, the unanimity instruction. We affirm the judgments.

### **FACTUAL AND PROCEDURAL HISTORY**

Paramedic Jennifer Gilden responded to defendants' residence on December 28, 2007, at 8:14 a.m. The fire fighters met her and her partners outside; they were carrying a small child, the victim, in their arms. The victim had no pulse and no respirations. The fire fighters were performing CPR as they walked toward the paramedics. Paramedic Gilden intubated the victim, moved him to the ambulance, and left the scene at 8:23 a.m. The victim showed no external signs of trauma. The ambulance arrived at Riverside Community Hospital at 8:33 a.m. The victim's condition did not change in the interim despite Paramedic Gilden's continuing performance of CPR. She handed the victim off to hospital staff.

Dr. Eugene Chan, an emergency medical physician at Riverside Community Hospital, testified he received the victim at 8:33 a.m.; the victim was unresponsive and showed no signs of life. The victim was already deceased when Dr. Chan and his staff attempted to resuscitate him; their attempts were unsuccessful. Dr. Chan declared the victim dead at 8:44 a.m. He saw no external signs of trauma.

The preliminary hearing testimony of Dr. Aaron Gleckman was read into the record at trial.<sup>5</sup> Dr. Gleckman was the forensic pathologist for the Riverside County Coroner's Office who conducted the autopsy of the victim on January 7, 2008. He found multiple points of trauma on the victim's head: "[T]here were more than three injuries. There were three actual impact sites, three sites where his head was either slammed against something or something was slammed against his head, and those were all recent."

Dr. Gleckman determined the cause of the victim's death was blunt force trauma to the head: "[E]ither the baby's head was slammed against something to cause that hemorrhage under the scalp on the skin within the brain or something was used to hit [him]; and those different impact sites, that resulted in the injury to the brain and death." The deputy coroner likewise found evidence of blunt force head trauma. Dr. Gleckman testified there was no way the injuries could have been sustained accidentally: "[T]he findings are overwhelming to show that this was . . . [intentionally] inflicted force." The fatal injuries occurred within 24 hours of the victim's death. Dr. Gleckman also found evidence of older injuries suggesting the victim had sustained a continued course of abuse. Moreover, Dr. Gleckman testified there was also an element of Shaken Baby Syndrome in the case. Dr. Gleckman testified that had the victim seen a doctor after he sustained his initial injuries it could potentially have saved his life.

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<sup>5</sup> The court determined Dr. Gleckman to be unavailable as a witness.

Deputy Sheriff Kimberly Burney responded on December 28, 2007, regarding a call for medical aid for a baby who was not breathing. When she arrived, both the fire department and the paramedics were already on the scene; fire department personnel were doing chest compressions on the victim. The victim had no external signs of trauma. Gallegos appeared fidgety, but calm. Gonzalez “was very distraught. She was crying and yelling . . . .”

There were three homes on the lot; Deputy Burney had originally arrived at Gonzalez’s grandmother’s home, where the victim was; she was directed to defendants’ residence. Upon entering, she noted, “[t]here was a tile floor that was filthy, a very strong odor emitting from the entire house, and . . . just in general disrepair.” She observed the home had “[a] very strong smell” “[k]ind of like rotten food, feces.” “The whole house was just overpowering. We had to keep going outside getting air and then coming back in.” The defendants’ bathroom floor was covered in “[c]lothing, trash, debris, [and] a broken mirror.”

They found a total of four baby bottles in the home. One had mold on the top and a dried white residue on the bottom. Another had four ounces of liquid inside. In the living room were “old, spoiled food, and dishes, and debris and trash.” The kitchen had “dishes everywhere. It had old, spoiled food [on] all the dishes. There [were] nails exposed from the cabinets. There were spiders, flies, cockroaches.” She could not tell if the bedroom was carpeted because “it was so soiled and dirty that you couldn’t really tell what it was, and it was exposed concrete in between.”

A total of 13 people lived in the home. Defendants and their six children shared one bedroom. Two of Gonzalez's brothers, Raul, Jr., and Rudy, lived in another bedroom; another brother, Artemio, lived in the living room. Gonzalez's parents, Raul and Martina, lived in a third bedroom.<sup>6</sup>

Gallegos was in jail when the victim was born; he was released in November 2007. Gonzalez did not obtain a job until after Gallegos's release. Gallegos was responsible for taking care of the children while Gonzalez worked; nonetheless, Gallegos would often leave the home and children without telling anyone. In fact, he would often jump out the window so that the other members of the household would not know he had left.

Susie Thomas, a Public Health Nurse with the Riverside County Department of Social Services (the department), testified she went to a follow-up investigation at defendants' home on December 24, 2004, regarding allegations of physical abuse and neglect. She was there in part to educate defendants about Shaken Baby Syndrome; she gave them a pamphlet, told them what effects should compel them to bring a baby to the hospital, and performed a medical assessment of the children. She testified the allegation of physical abuse was unsubstantiated.<sup>7</sup>

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<sup>6</sup> We refer to Gonzalez's family members by first names out of convenience and clarity and not out of any disrespect.

<sup>7</sup> Though parties later stipulated the department's investigation in 2004 on allegations of physical abuse was unfounded, the allegation of general neglect was substantiated.

Artemio testified at trial that he saw Gallegos hit the children, though he testified at the preliminary hearing that he had not. Rudy testified Gallegos hit the children on their hands. Artemio testified Gallegos would discipline the children with time-outs and spankings. Gallegos would yell at the victim when he would cry; Artemio would hear Gallegos hit the victim in the bedroom. Gallegos would call the baby a “faggot”; Gallegos yelled at all the children loudly.

On December 22, 2007, Artemio took Gonzalez to work sometime between 3:30 and 5:00 a.m. At some point after he returned home, Martina told him something was wrong with the victim; the victim was having convulsions and shaking. Gallegos was not in the home; Artemio drove to a home three blocks away where Gallegos could always be found; Artemio believed they sold drugs at the house. Martina told Gallegos that he needed to take the victim to the hospital because he was sick. Gallegos declined at that time; he returned inside the house where they had found him. As Gonzalez was returning home from work that day, Martina informed her about the convulsions. Martina told Gonzalez she should take the victim to the doctor.

On December 28, 2007, Artemio again took Gonzalez to work between 3:30 and 5:00 a.m. Thirty minutes to one hour after Artemio had returned home, Gallegos brought the victim to Artemio and Martina. The victim looked pale, weak and limp. Martina testified she told Gallegos the victim was dying and that he should call the fire department. He told her she was crazy. Gallegos initially asked Artemio to take the victim to the hospital, but Gallegos did not want to accompany him; Gallegos decided he wanted to stay with his friends. Instead, he told Artemio to go pick up Gonzalez from

work. Artemio and Martina went to pick up Gonzalez from work; Artemio told her the victim was sick. It took them approximately one hour to pick up Gonzalez and return home.

When they arrived home, Gonzalez came out with the victim five minutes later. The victim appeared to be sleeping; Artemio did not know if the victim was breathing. Artemio drove them to their grandmother's house where Gonzalez went inside and called the ambulance. Gonzalez said the victim was no longer breathing.

During her initial police interview, Gonzalez admitted the victim had thrown up a couple times prior to Christmas and that she intended to take him to the doctor, but the clinic was closed on Christmas Eve and Christmas Day.<sup>8</sup> She told the interviewing officer Gallegos had last used drugs eight or nine years ago. She said she did not know if he had ever been arrested for drugs, but knew he had been arrested previously for what she believed was an unpaid traffic infraction. During a second interview over a week later, she told the officer Martina never told her the victim had experienced convulsions on December 22, 2007.

At trial, Gonzalez testified she lied to the officer when she denied Martina told her about the victim incurring convulsions; she only reported Martina told her the victim had been shaking. On December 22, 2007, Martina had told her the baby had been sick and had convulsions. During the week between December 22 and 28, 2007, Martina told her the victim had been vomiting. Gonzalez testified she had previously been informed by

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<sup>8</sup> For confrontation clause purposes, Gonzalez's and Gallegos's recorded police interviews were played only to their own respective juries.

individuals from the department of the symptoms of Shaken Baby Syndrome; those symptoms included convulsions, vomiting, and lethargy. Nevertheless, she believed Martina was exaggerating regarding the victim's symptomology because his temperature was normal and he looked normal and happy.

Contrariwise, Gonzalez testified she was still concerned about the victim and planned to take him to the clinic on December 24, 2007, but it was closed. She admitted she knew Gallegos had been arrested for possession of methamphetamine and that she knew Gallegos hung out at a residence rumored to be a house where drugs were sold. She conceded that leaving the children with a methamphetamine user would be dangerous. On December 28, 2007, Gallegos was the person responsible for the victim.

Gallegos called forensic pathologist Harry Bonnell to the stand. Dr. Bonnell testified he read the autopsy report, medical records, and evidence in the case. He contended a blood culture should have been performed to rule out an infection as the cause of death. Dr. Bonnell testified there were a number of other possible causes for the victim's subdural hematomas other than blunt force trauma: (1) infection; (2) injuries sustained during birth that rebleed after incurring minor bumps; and (3) injuries caused by a short fall.

Nevertheless, Dr. Bonnell testified the victim could have died from abusive head trauma. Moreover, he admitted he could not say with certainty what caused the victim's death. Furthermore, he conceded rebleeds of subdural hematomas were unlikely in C-section births and even in vaginal births after the child was one month of age or older; Gonzalez gave birth to the victim by C-section. Finally, Dr. Bonnell testified that in his

medical opinion no matter how hard you shake a child, you cannot cause brain damage unless you hit the child's head on something.

Joseph Cohen, Chief Forensic Pathologist for the Riverside County Coroner's Office from July 26, 1999, to August 8, 2010, reviewed both Dr. Gleckman's and Dr. Bonnell's reports and the autopsy photographs. He testified the photographs showed fresh contusions from blunt force trauma. He opined the cause of death was multiple blunt impact injuries inflicted to the head of the victim within minutes or hours of his death. Dr. Cohen testified there was no evidence of infection even in the absence of cultures.

## **DISCUSSION**

### **A. CONSTITUTIONALITY OF CALCRIM NO. 520**

Gallegos contends the court's instruction of the jury with a modified version of CALCRIM No. 520, which included bracketed language referencing negligence, permitted the jury to find him guilty by a lesser standard than required by law; thus, violating his federal due process rights. Regardless of the People's argument that Gallegos invited or forfeited the issue, we hold there was no reasonable likelihood the jury applied the instructions in the unconstitutional manner posited.

On October 19, 2010, the People filed their amended request for jury instructions, including CALCRIM No. 520. On October 22, 2010, prior to the completion of trial, the court engaged in the following colloquy with the People, counsel for Gallegos, and counsel for Gonzalez regarding the instruction:

“The Court: . . . And then, obviously, I have to go back and correct the printing on 520, and I’m going to modify the instruction. I guess I’ll go through the whole effort and make one for [each defendant] . . . but we’re only talking about implied malice; is that correct?”

“[People]: That’s correct.

“The Court: And I filled in the duty part of father/mother has a legal duty to care for, protect and provide medical care for his/her child; are you agreeable to that?”

“[People]: I am.

“The Court: [Gallegos’s counsel], are you okay with 520 the way it’s phrased[?]”

“[Gallegos’s counsel]: I am generally if I could have the weekend—obviously, maybe if I have an objection on Monday—I just had a big question mark to make sure that the legal duty was proper[ly] defined there.”

Gonzalez’s counsel requested language requiring that the death be foreseeable in order to be the natural and probable consequence of defendant’s act. The court responded: “Well, I’m a little bit leery about drafting court language to instruction[s] that[] [have] been approved. But, again, one thing I’m not going to do is rewrite it right here. If somebody wants to write an instruction with the language they think is appropriate, we can discuss it, but at this point, 520 is the instruction I’ll give.” The court and parties held further discussion regarding the proposed version of CALCRIM No. 520 later that day.

After completion of trial, the court reviewed its proposed written instructions with counsel. The court asked, “Any objection to my modifying 520 to take out 1 and just

renumber 1A to 1 and put that in its place?” The People responded, “I think that would be better, your Honor.” Gonzalez’s counsel agreed: “That seems more appropriate.” Soon after, the court discussed the modified version of CALCRIM No. 520 with Gallegos’s counsel. The court then asked Gallegos’s counsel whether he was “okay with everything so far, except for our discussion about 580?” Gallegos’s counsel replied, “Yes.”

The court ultimately instructed Gallegos’s jury with the following version of CALCRIM No. 520: “The defendant is charged in Count 1 with murder in violation of Penal Code section 187. To prove that the defendant is guilty of this crime, the People must prove that: Number one, the defendant committed an act that caused the death of another person, *or, 1A. Owing a duty to [the victim], the defendant intentionally failed to act and that failure to act caused the death of [the victim]*; and number two, when the defendant acted, he had a state of mind called malice aforethought. Malice aforethought may be implied malice. [¶] The defendant acts with implied malice if: Number one, he intentionally committed an act; *or 1A, owing a duty to [the victim], he intentionally failed to act*; and, number two, the natural and probable consequences of the act were dangerous to human life; and number three, at the time he acted he knew his act was dangerous to human life; and number four, he deliberately acted with conscious disregard for human life. . . . [¶] An act causes death if the death is the direct, natural, and probable consequence of the act and 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 the circumstances established by the evidence. [¶] . . . A father has a legal duty to care for, protect, and provide medical care for his child. *If you conclude that the defendant owed a duty to [the victim], and the defendant failed to perform that duty, his failure to act is the same as doing a negligent or injurious act.*” (Italics added.)

During its deliberations, Gallegos’s jury issued a request reading, “We ask for clarification on the charge ‘murder in the second degree’—the word ‘INTENTIONAL’ . [¶] Count 1: 1A: Owing a duty . . . baby Anthony[.]” The court asked the foreperson for an explanation of the jury’s request. The foreperson replied that they needed clarification because when considering the word “‘intentional.’ Accidental comes to mind . . . . [¶] . . . [¶] On the second page, the very last comment or the statement where it states that it’s his duty, etcetera, to [the victim], and by not acting is the same as possibly an injurious act, with that in mind, does that—if that’s felt does that fulfill 1A, for example, but if it was—it’s the word ‘intentional’ where one of the jurors or two of the jurors . . . .” The court responded with a lengthy exposition regarding the differences between intentional and accidental acts and failures to act. The court told the jurors that counsel were concerned the court had not answered the question; if so, the court advised the jury to put in writing another question that it could answer.

The jury later responded with a second written request, apparently at the direction of only one juror, reading, “Regarding Count 1: 1A [¶] ‘Intentionally failed to act’ and ‘unknowingly failed to act’ are two different meanings.’ [¶] Question: If he unknowingly failed to act does this make it intentional?” The court permitted both counsel to argue a clarification of the issue for an additional two minutes.

Defendant contends the former two italicized portions of the instructions, which were modifications to the pattern instruction made by the court in addition to the latter italicized portion that was a bracketed part of the pattern instruction, permitted the jury to find Gallegos guilty of murder in the second degree even if it found his sole criminal act was failing to realize he should have taken the victim to the hospital when the victim exhibited symptoms of physical illness. In other words, it erroneously permitted the jury to find defendant guilty of second degree murder based only upon Gallegos's negligence. He argues this position is underscored by the fact that the jury twice requested clarification of the instruction.

“The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law [citation] and also whether instructions effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration [citations].” (*People v. Posey* (2001) 32 Cal.4th 193, 218.) “Against a claim of this kind, an appellate court reviews a trial court's instruction independently: The underlying ‘question is one of law, involving as it does the determination of . . . applicable legal principles . . . .’ [Citation.]” (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

Nonetheless, ““With regard to criminal trials, “not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is ““ whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.”” [Citation.] “[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.”” [Citation.] If the charge as a whole is ambiguous, the question is

whether there is a “reasonable likelihood that the jury has applied the challenged instruction in a way” that violates the Constitution.” [Citation.]’ [Citations.]” (*People v. Letner* (2010) 50 Cal.4th 99, 182.)

“Murder is the unlawful killing of a human being . . . with malice aforethought.” (§ 187, subd. (a).) “Malice may be express or implied.” (§ 188.) Here, the latter is at issue. “Malice is implied when the killing is proximately caused by “an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.” [Citation.] In short, implied malice requires a defendant’s awareness of engaging in conduct that endangers the life of another—no more, and no less.” (*People v. Knoller* (2007) 41 Cal.4th 139, 143.) ““The general rule, supported by numerous authorities in England and the United States, is that *if death is the direct consequence of the malicious omission of the performance of a duty, such as of a mother to feed her child, this is a case of murder*; but if the omission is not willful, and arose out of neglect only, it is manslaughter.’ [Citations.]” (*People v. Burden* (1977) 72 Cal.App.3d 603, 616.)

We do not find it reasonably likely the jury, as instructed, believed it could find Gallegos guilty of second degree murder based solely on an act of negligence in failing to take the victim to the hospital when he exhibited signs of physical illness. First, neither the court nor either counsel below interpreted the jury’s questions in such a manner. Rather, the People were certain the question focused on the complexity between finding guilt for an intentional action and/or an intentional failure to act, the latter being an area

where the People had experienced jury confusion in prior cases. Gallegos's counsel, on the other hand, exhibited complete perplexity as to the meaning of the jury's question. Second, CALCRIM No. 520 as given clearly informed the jury that in order to find Gallegos guilty of second degree murder, it was required to find either that Gallegos *intentionally* committed an act that caused the death of the victim or *intentionally* failed to act causing the death of the victim; the language did not permit a guilty verdict based on a negligent act or failure to act. The latter language using the word "negligent" did not alter the requisite elements the jury was required to find in order to convict Gallegos of second degree murder.

Third, the court also instructed the jury with CALCRIM No. 582, the pattern instruction for the lesser offense of involuntary manslaughter, which requires a criminally negligent act or failure to act. It is incomprehensible the jury would come to a determination that it could more easily convict Gallegos of the more serious crime of second degree murder based upon a lesser finding of simple negligence, than it could find him guilty of the lesser crime of involuntary manslaughter based upon the higher standard of criminal negligence. Fourth, both counsel argued to the jury the correct interpretation of the requisite findings for it to render a guilty verdict of second degree murder against defendant. The People argued Gallegos beat the victim. They argued the act, or failure to act, had to be intentional. Gallegos's counsel likewise argued that in order to be found guilty of second degree murder, the jury must find Gallegos deliberately acted or intentionally failed to act. Gallegos's counsel also argued the requisite finding of criminal negligence if the jury were to find defendant guilty of the

lesser included offense of involuntary manslaughter “or, if you believe that he acted reasonably given the circumstances, something short of criminal negligence, he would be not guilty of all charges.” Thus, it is not reasonably likely the jury attached itself to the word “negligent” in the instruction and disregarded the express, requisite findings necessary to convict Gallegos of second degree murder. The court’s instruction did not deprive Gallegos of due process.

B. COURT’S ANSWER TO JURY’S QUESTIONS

Gallegos contends that even if CALCRIM No. 520 as given would survive constitutional scrutiny, the court abused its discretion in the manner it responded to the jury’s questions, failing to help the jury understand the legal principles it was asked to apply. We disagree.

After the jury submitted its first question, the court proposed bringing the jury into the courtroom and asking the foreman to clarify the question. The People responded, “I don’t have an objection to that, but I think it’s clear what they mean. They’re talking about, obviously, the failure-to-provide-medical-care or protect version of a murder theory, and if—the Court knows that the language, which is not good language, in 521A is, ‘Owing a duty to [the victim] the defendant intentionally failed to act,’ and that is a very difficult phrase for every jury that I’ve ever had deal with this issue because it’s basically telling the jury that somebody intentionally didn’t do something, which is a very hard concept, I think, to understand. It’s also an oxymoron. That he intentionally didn’t do something is just a very difficult concept for jurors to understand. I think that’s the question, but I’m happy to have them asked if that’s what the court wants to do.”

Gallegos's counsel responded: "There's two choices, really. Just tell them, basically, some version of, that everything you need to know is already in the jury instructions, or bring them out as you stated and find out what they really mean." The court asked the foreperson for an explanation of the request. The foreperson stated the jury needed clarification because when considering the word "'intentional.' Accidental comes to mind . . . . [¶] . . . [¶] On the second page, the very last comment or the statement where it states that it's his duty, etcetera, to [the victim], and by not acting is the same as possibly an injurious act, with that in mind, does that—if that's felt does that fulfill 1A, for example, but if it was—it's the word 'intentional' where one of the jurors or two of the jurors . . . ."

The court then went on to give a rather lengthy elucidation of the difference between "intentional" and "accidental": "Let me just first say about the word 'intentional' and the word 'accidental,' that's easier. The issue about intentionally not doing something is much more difficult. But an intentional act can be a deliberate act. For example, a chess master playing chess, moving a piece might [be] a very deliberate act that might take five minutes. That is an intentional act. But if somebody trips in front of you and you reflexively catch them, that's an intentional act even though that's a reflex. You can have many different kinds of intentional acts. [¶] What a mistake is what many of you understand as an accident. If you're playing golf, if you slice a shot, hit a tree, and you hit somebody with a ball, that's an accident. Or you back your car out and you have a pick-up truck next to you, and you're hoping the car coming down the road is going to stop because you can't see because you have the big side of pick-up

truck. That's what I'm thinking when . . . I back out. If that person doesn't see your backup lights and you back into that person, that's an accident. [¶] If you're playing basketball and you come down and land on somebody's foot, you don't want to land on that foot because that's how you're going to get a sprained ankle. That would be an accident, okay? I think those are easy to understand. [¶] The question about intentionally not doing something is—let's say your spouse tells you, 'I need for you to go to the store and pick up some milk,' and you decide you're not going to do it because you want to stay home and watch the baseball game, you intentionally decided not to do that. Does that help?"

The foreman responded, "We'd have to go back." The court then expanded upon its previous explanation: "Those are pretty clear examples, in my own mind, of—in everyday life. And remember, we talked about your common sense and experience, that's what we're talking about when you're jurors. I have had the experience where jurors try to read too much into this and try to come up with special definitions of words and so forth, so, again, when the instruction says, your common sense and life experience, we don't want you to forget that, okay? All right." The foreperson returned with the jury for deliberations.

The People complained about the court's answer, requesting the court make clear Gallegos need not have intended death be the outcome of his failure to act; "I'm confident that's what the confusion is here." Gallegos's counsel replied, "Well, at this point, I think that the foreperson asked the question and you gave an answer and they said that they would like to go back." The court retorted, "I think I'll leave it at that."

Nevertheless, the People continued to complain the court's examples were incorrect as explanations of the law. The court eventually told the jurors that counsel were concerned he had not answered their question and asked that, if so, they write out another question so he could address it.

The jury complied sending out another request reading "Regarding Count 1: 1A [¶] 'Intentionally failed to act' and 'unknowingly failed to act' are two different meanings.' [¶] Question: If he unknowingly failed to act does this make it intentional?" Gallegos's counsel responded, "As I told [the prosecutor] earlier, I think the easy answer is no, but—it's clearly not the same thing, but I'm trying to get behind the question. I have no idea what they're talking about." The prosecutor insisted, "I still think there's no difference when she substitutes 'unknowing' for 'unintentional.' I think I know the issue, and I just think they're having trouble expressing it, but I know we've had a difference of opinion on what they're asking. And I would . . . ask the Court . . . to give us a minute or two to reopen argument . . . to discuss this and see if we could solve the problem."

Gallegos's counsel replied, "Obviously, [the prosecutor], maybe because of a prior case, seems certain that he knows what the issue is. At this point, I am completely confused as to what they're talking about. I suspect that the language of 520 is sort of mixing and matching things. Obviously, the circumstances known to Gallegos at the time factors into whether he intentionally failed to act or not on something. I think the easy answer is—whether unknowingly is the same as intentionally, is no." The court responded "I think the real question is whether or not he knew that the failure to get

medical care was dangerous to human life, and that's what the 'unknowingly' should be focused on."

Gallegos's counsel agreed: "Right. So under the second 1A under implied malice, factors one through four or five should all be read in [¶] . . . [¶] conjunction with one another." The court concurred: "I agree. I agree completely. . . . The question really is whether or not that failure to act was with conscious disregard for life. Because he made a choice not to seek medical care . . . ." Juror No. 10, the juror who apparently made both requests, then stated, "Well, my question is, if he unknowingly did this act, I mean, if he didn't know what to do at the time that these acts happened, if he did not know what to do, was that intentionally—did he intentionally not do something?"

Gallegos's counsel observed the juror was "focusing on the implied malice. I believe that part's clear. . . . I mean, it's getting so specific right now, we're clearly dealing with just one of the 12 jurors. I fear that we're going to invade the province of the jury and start, you know, going places that we shouldn't. I think she needs to make up her own mind." The prosecutor again requested the court give each of them a minute to argue in answer to the request. The court agreed to give each of them two minutes to argue.

The court then went on the record with the jurors and explained, "the attorneys have heard the specific concern that [juror No. 10] has, and at some point when the question gets very specific, if I answer the question directly, it's almost like I'm telling the jurors what to do in terms of the verdict. So, the compromise position, we're now clearly allowed to do this, is allow the attorneys about two minutes to explain what they

understand that means and to see if that help[s] you see. [¶] . . . [¶] But again, I'm afraid that if I answer your question directly, I may, essentially, be telling the jury what to do, and I don't really want to do that."

The People explained that "intentional" referred to whether the defendant unreasonably gambled with the victim's life in refusing to obtain medical help after having been educated about the repercussions of the particular symptoms displayed by the victim. Defendant argued, "the question is from yesterday if he, meaning [Gallegos], unknowingly failed to act, does this make it intentional, and the simple answer to that question is no. If you have an unknowing act, then it does not make it intentional. . . . [¶] . . . [¶] . . . So in situations where I don't know if I should go to the doctor, I don't know how sick [the victim] is, I want to wait for [Gonzalez] to come, that would be read in conjunction with did he knowingly act or fail to act knowing that it was dangerous to human life, did he consciously disregard human life? And if it's no, he didn't knowingly act in that way, then it would be not guilty to murder." The jury returned to deliberations at 8:41 a.m. It announced it had a verdict at 1:30 p.m.

"The trial court has a duty to help the jury understand the legal principles the jury is asked to apply. [Citation.] In particular, under section 1138 the court must attempt 'to clear up any instructional confusion expressed by the jury.' [Citation.] But '[t]his does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information.' [Citations.] In exercising that discretion, the trial court 'must at

least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given.’ [Citations.]” (*People v. Giardino* (2000) 82 Cal.App.4th 454, 465.) “An appellate court applies the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury. [Citation.]” (*People v. Waidla* (2000) 22 Cal.4th 690, 745-746; *People v. Eid* (2010) 187 Cal.App.4th 859, 882.)

In the instant case, it is unclear precisely what miscomprehension of CALCRIM No. 520 juror No. 10 was having. The People and the court appear to have initially believed the point of contention to be whether a person who fails to act can do so deliberately. The court’s protracted explanation contained a number of examples differentiating between intentional acts, intentional non-acts, and unintentional acts. Nonetheless, Gallegos’s counsel did not concur with the court’s or the People’s understanding of the query; rather, he appeared stumped as to the meaning of the question. Under the circumstances, where the question is not clearly understood by the court or either party, we cannot say the court’s attempted explanation amounted to an abuse of its discretion to attempt to aid the jury in its duties.

Moreover, the court’s initial attempt at aiding the jury did not end the matter. The jury came back with another question. The court questioned the particular juror who proposed the question. Though we agree with Gallegos’s counsel that the most efficient manner of dealing with the second question would have been merely to answer “no”; again, where the respective parties could not agree on precisely what the question meant,

it is difficult to assign blame to the court for not knowing how to definitively remedy the juror's inquiry.

Furthermore, the court permitted the parties additional time to give their own explanations to the jury. Gallegos's counsel stated unequivocally "If you have an unknowing act, then it does not make it intentional." It is notable that neither of the jury questions ever mentioned the word "negligent." Here, the trial court spent a great deal of time discussing the jury questions with counsel, querying the jury foreperson and the juror who asked the question, attempting to answer the question itself, and allowing counsel the additional opportunity to argue the matter. We find no abuse of discretion in the trial court's near-Herculean efforts to clarify the query of one juror. Finally, even if the court abused its discretion, it was not reasonably probable that any error resulted in a less favorable outcome for Gallegos. (*People v. Eid, supra*, 187 Cal.App.4th at p. 882.) As noted *ante*, it is unfathomable the jury would believe it could convict Gallegos of the more serious crime of second degree murder based upon a finding of mere negligence, but only find him guilty of the lesser crime of involuntary manslaughter based upon a higher standard of culpability.

### C. SUFFICIENCY OF THE EVIDENCE

Gonzalez contends insufficient evidence supports her conviction for involuntary manslaughter. We disagree.

"In reviewing a criminal conviction challenged as lacking evidentiary support, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is

reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.]’ [Citation.]” (*People v. Streeter* (2012) 54 Cal.4th 205, 241.)

“‘A charge of manslaughter may be predicated upon a failure to act as well as upon an act. Willful failure of a person to perform a legal duty, whereby the death of another is caused, is murder, but if the omission was not willful, but was the result of gross or culpable negligence, it is involuntary manslaughter.’ [Citation.]” (*People v. Montecino* (1944) 66 Cal.App.2d 85, 101; *People v. Burden, supra*, 72 Cal.App.3d at pp. 614-615; 1 Witkin, Cal. Crim. Law (3d ed. 2000) Crimes Against the Person, § 232, p. 842; CALCRIM No. 582.)

Here, substantial evidence supported the jury’s determination that Gonzalez had willfully failed to protect the victim from Gallegos. Gonzalez had lived in a single bedroom with Gallegos and their six children for nearly two months. The condition of the home was exceptionally decrepit and filthy, demonstrating a general lack of concern on Gonzalez’s part for the health and welfare of her children. Gonzalez’s family members testified Gallegos would hit the children; Artemio specifically testified Gallegos would hit the victim and call him a “faggot.” Dr. Gleckman found evidence of older injuries suggesting the victim had sustained a continued course of abuse. It is inconceivable that living in such close quarters with Gallegos and her other family members Gonzalez was unaware of Gallegos’s behavior toward the children and the victim in particular.

Moreover, she told the interviewing officer Gallegos had last used drugs eight or nine years ago. She said she did not know if he had ever been arrested for drugs, but knew he had been arrested previously for what she believed was an unpaid traffic infraction. However, she later admitted she knew Gallegos had been arrested for possession of methamphetamine. She testified she knew Gallegos hung out at a residence rumored to be where drugs were sold. She conceded that leaving the children with a methamphetamine user would be dangerous. Her initial lie regarding Gallegos's drug use reveals a consciousness of guilt. Nonetheless, despite being aware that Gallegos hit the children, yelled at the victim, and potentially used drugs, she left Gallegos responsible for taking care of the children while she worked.

Furthermore, Dr. Gleckman testified there was also an element of Shaken Baby Syndrome in the case. Gonzalez had previously been given information regarding the symptoms exhibited by a child who has incurred Shaken Baby Syndrome. When Gonzalez returned home from work on December 22, 2007, Martina informed her the victim had experienced convulsions. Martina told her she should take the victim to the doctor. During her initial police interview, Gonzalez admitted the victim had thrown up a couple of times prior to Christmas and that she intended to take him to the doctor, but the clinic was closed on Christmas Eve and Christmas Day. During the week between December 22 and 28, 2007, Martina told her the victim had been vomiting.

During her second interview, Gonzalez told the deputy Martina never told her the victim had experienced convulsions on December 22, 2007. Gonzalez testified at trial she lied to the deputy when she denied Martina told her about the victim experiencing

convulsions. Thus, Gonzalez had been told the victim exhibited symptoms she knew to be indicative of Shaken Baby Syndrome. Gonzalez testified she was concerned about the victim and planned to take him to the clinic. Her failure to take the victim to the doctor the day after she had been told of the victim's symptoms, December 23, 2007, when the clinic would presumably have been open, or even after Christmas, further reflects a disregard for the health of the victim. Moreover, her lie to the interviewing deputy about being told of the victim's convulsions reflects a consciousness of guilt that she had not taken him to the doctor, and continued to leave him in Gallegos's care. Thus, the People adduced substantial evidence from which the jury could reasonably have concluded that Gonzalez willfully failed to protect the victim from Gallegos's fatal behavior toward the victim.

D. UNANIMITY INSTRUCTION

Gonzalez contends the court erred in declining to give the jury the unanimity instruction. We disagree.

A criminal defendant is entitled to a verdict in which all 12 jurors concur as a matter of due process under the state and federal Constitutions. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) In any case in which the evidence would permit jurors to find the defendant guilty of a crime based on two or more discrete acts, either the prosecutor must elect among the alternatives or the court must require the jury to agree on the same criminal act. “[C]ases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.] [¶] This requirement of

unanimity as to the criminal act ‘is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.’ [Citation.] . . . The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.’

[Citation.]” (*Id.* at pp. 1132-1133.) Where it is warranted, the court must give the instruction sua sponte. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.) The omission of a unanimity instruction is reversible error if, without it, some jurors may have believed the defendant guilty based on one act, while others may have believed him guilty based on another. (*Russo*, at p. 1133.)

In *People v. Taylor* (2010) 48 Cal.4th 574, the defendant argued that “because the prosecution presented two distinct factual scenarios in support of its burglary theory, the trial court erred in failing to give a unanimity instruction regarding that offense.” (*Id.* at p. 627.) The court noted in *Russo* it had “discussed the crime of burglary to illustrate ‘the difference between discrete crimes, which require a unanimity instruction, and theories of the case, which do not.’” (*Taylor*, at p. 627.) Thus, where the evidence showed two different entries into two separate homes on two separate dates, both with burglarious intent, the unanimity instruction would be required. (*Ibid.*) “On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant’s precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the ‘theory’ whereby

the defendant is guilty. [Citation.]” (*People Russo, supra*, 25 Cal.4th at p. 1132.) Thus, where the entry element of burglary could have been committed at either one of two different times, both of which were argued to the jury, no unanimity instruction was required. (*Taylor*, at pp. 627-628.)

Here, the People requested the court instruct Gallegos’s jury with the unanimity instruction because there were “two distinct theories” for the murder. The court declined to give the instruction observing, “[t]he reason why it’s not required is—the murder or the death is considered the act. . . . Here, there’s only one act, which is the death of the child.” We believe the same reason applies to render unnecessary the instruction as to Gonzalez’s jury. As Gonzalez’s appellate counsel repeatedly notes, the People argued two “theories” of her guilt. As discussed in *Taylor* and *Russo ante*, the presentation of different “theories” as to how a single crime occurred does not require that the court give the unanimity instruction.

Moreover, even to the extent one could view the evidence as presenting more than one act by Gonzalez amounting to a willful failure to protect the victim, we believe such acts would constitute a continuous course of conduct that would, likewise, negate any need for the unanimity instruction. (See *People v. Culuko* (2008) 78 Cal.App.4th 307, 325; *People v. Riel, supra*, 22 Cal.4th at p. 1199; *People v. Jones* (1990) 51 Cal.3d 294, 321; *People v. Napoles* (2002) 104 Cal.App.4th 108, 115-116.) Even if error, cases generally hold the omission of a unanimity instruction harmless if the record reveals “no rational basis, by way of argument or evidence, by which the jury could have distinguished between [the acts which would constitute the offenses].” (*People v. Deletto*

(1983) 147 Cal.App.3d 458, 473; *People v. Matute* (2002) 103 Cal.App.4th 1437, 1450.)

We find no rational basis to distinguish between Gonzalez's ostensible, multiple failures to protect; thus, we find no prejudice.

**DISPOSITION**

The judgments are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER  
J.

We concur:

HOLLENHORST  
Acting P. J.

KING  
J.