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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MELCHOR ROSALES JAYUBO,

Defendant and Appellant.

H035996

(Monterey County

Super. Ct. No. SS090685)

A jury found appellant Melchor Jayubo guilty of one count of assault (Pen. Code, § 240, count two),<sup>1</sup> one count of forcible oral copulation (§ 288a, subd. (c)(2), count four), one count of assault by means of force likely to cause great bodily injury (§ 245, subd. (a)(1), count six), one count of making a criminal threat (§ 422, count seven), and one count of child endangerment (§ 273a, subd. (a), count eight).<sup>2</sup> The court sentenced appellant to nine years in state prison consisting of the midterm of six years on count four, one-third the midterm or one year on count six, one-third the midterm or eight

<sup>1</sup> All undesignated section references are to the Penal Code.

<sup>2</sup> The jury was unable to reach a verdict on one count of forcible rape (§ 261, subd. (a)(2), count one) and a second count of forcible oral copulation (§288a, subd. (c)(2), count five); the court declared a mistrial as to those counts. In addition, the jury found appellant not guilty on one count of rape by a foreign object (§ 289, subd. (a), count three). Count two had been charged as rape by a foreign object, but the jury found appellant guilty of only the lesser included offense of assault. Subsequently, the prosecutor moved to dismiss counts one and five in the interests of justice.

months on count seven, and one-third the midterm or one year, four months on count eight, all to be served consecutively. On count two, the court imposed a sentence of 180 days in county jail with credit for time served. Appellant filed a timely notice of appeal.

On appeal appellant raises a litany of issues, which we shall outline later. Subsequently, he filed a petition for writ of habeas corpus, which this court ordered considered with the appeal. In his writ petition, Jayubo argues that he was deprived of the effective assistance of counsel because his attorney failed to move to suppress statements he made when he was interviewed by police officers. We have disposed of the habeas petition by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

#### *Testimony at Trial*

Appellant and Jane Doe first met in June 2005. They began living together in February 2006. Subsequently, Jane became pregnant and their daughter was born in December 2006. However, their relationship ended on January 6, 2009. Following the break up, appellant visited Jane a few times both at home and at work.

According to Jane, on January 30, 2009, appellant entered her house through the door that her son had just left open on his way out. Appellant entered her bedroom where she was in bed with their daughter. Appellant offered to look after the baby for the day, but Jane refused and asked him to leave.

Jane carried the baby into the living room; appellant followed her. While Jane and appellant were talking about arranging for appellant to visit their daughter, appellant noticed a "hickey" on Jane. Appellant became angry and told Jane he was going to "treat [her] the way you treat a prostitute." Appellant pulled Jane into the bedroom while Jane was carrying their daughter. When they got into the bedroom, appellant pulled down Jane's pants and put his finger into her vagina; appellant's finger was curled as if he was trying to pull something out. Jane testified that she did not consent to appellant doing

this and told him that he was hurting her. At this point in time, Jane was still holding their daughter.

Shortly thereafter, appellant pushed Jane onto the "big" bed and their daughter fell to Jane's side. Appellant pulled down his pants, opened Jane's legs and put his penis inside her. However, Jane testified that appellant's penis was soft. Jane told appellant to stop because their daughter was right there on the bed. Then, appellant started to bite Jane's vagina. Jane told appellant that he was hurting her, but appellant did not stop. Their daughter was next to Jane crying and yelling, " 'Sorry. Sorry.' " Jane managed to push appellant away and started to run toward the living room. Appellant grabbed Jane and threw her onto a second bed that was in the bedroom. Again, appellant bit Jane's vagina, "many times." Their daughter was still on the other bed crying and coughing. Jane was able to get away from appellant and take their daughter to the bathroom; the child vomited.

Appellant pulled Jane back into the bedroom and told her " 'I'm going to kill you. I'm going to kill you today.' " Their daughter was still in Jane's arms. Appellant threw Jane onto the bed and started to strangle her—appellant had his hands around her throat. He put his arm across her neck, which caused her some pain. As appellant tried to strangle Jane, their daughter, who was next to Jane, continued to cry. Jane was very afraid when appellant told her that he was going to kill her. As appellant was strangling Jane, the telephone rang in the living room; appellant went to answer it. Jane grabbed their daughter and her clothes. Appellant returned, grabbed the child and struck Jane on the arm, which left a bruise. As appellant took their daughter, he told Jane " 'I'm going to come back, and I'm going to kill you' And 'I know where you're at.' " Jane got her telephone and called the police.

At trial, a recording of Jane's 911 called was played for the jury. On the tape, Jane can be heard telling the emergency operator that appellant "kept messing" with her and had taken her baby. Jane told the operator that appellant said he was going to kill her.

Jane's brother testified that when he saw appellant's car outside his sister's house, he called her because he believed that she did not want appellant coming there. After recognizing appellant's voice on the telephone, Jane's brother walked toward Jane's house where he encountered appellant coming out of the house carrying the child, but Jane's brother prevented appellant from leaving. As the police arrived, appellant went back into Jane's house.

Officer Blackmon testified that he and Officer Miller responded to Jane's call to 911. After speaking to Jane's brother they went inside the house. Officer Blackmon said that when he met with Jane she started crying; he could see that the child appeared to have been crying too. Later that day, Officer Blackmon saw that Jane had injuries to her neck and chest area. Jane told him that she was in pain in the area of her vagina as well as her neck and chest.

Officer Blackmon interviewed appellant. Appellant told him that he and Jane had an argument, but the argument did not become physical. Appellant said that after the argument he grabbed his daughter and left the apartment. Appellant denied that he had intercourse with Jane, put his finger in her vagina, or had bitten her. Officer Miller arrested appellant and Officer Blackmon arranged for Jane to be taken for an examination by the Sexual Assault Response Team (SART).

Sheree Goldman, a certified sexual assault forensic examiner, conducted the SART examination. Goldman did not detect any injuries to Jane's external genitalia or inside her vagina, but testified that this is not unusual. However, she did observe a long red scratch on the inside of Jane's left thigh and some petechiae on her right shoulder. Jane did not tell Goldman how she sustained these injuries. However, Goldman did testify that the petechiae were consistent with Jane's description of how appellant attempted to strangle her and held his arm across her throat. In addition, Jane's voice was "a little raspy," which was also consistent with Jane being strangled.

After the court certified Goldman as an expert on the effects of domestic violence on children, Goldman testified that she was unable to say what would be the effect on a two-year-old child of witnessing the incidents to which Jane had testified. However, she was very concerned about the child in this case because in general the younger the child is when they witness domestic violence the more affected they are. She did recommend that the child receive counseling.

Shortly after appellant was arrested on January 30, 2009, he was interviewed by Detectives Enriquez and Anderson at the Seaside Police Department. A recording of the interview was played for the jury.

During the interview, appellant said that he was at Jane's house to see his daughter around 7:30 a.m. after he finished work. Appellant said that at one point, he saw a "hickey" on Jane's neck and asked her where she got it. Jane kicked him and told him to leave or she would call the police. Eventually, appellant admitted they engaged in sexual acts consisting of him "fingering" Jane, by which he meant that he put his finger in her vagina, and orally copulating her. Appellant admitted that he probably put his penis near her vagina, but it was not erect. However, although appellant told the officers that he was a bit "rough," he maintained that the sex acts were consensual.

Appellant testified in his own defense that after he and Jane ended their relationship on January 6, 2009, he moved out and began living in his car. On January 25, 2009, he visited Jane in her home in order to do laundry for her and the baby, something he did when he lived with Jane. He and Jane had a consensual sexual encounter. On January 29, he visited Jane at work and she invited him to come to her home the following day to visit their daughter.

Accordingly, on the morning of January 30, around 7:30 a.m., he went to Jane's home at the end of his night shift at work. He knocked on the door and Jane invited him in. He found Jane in the bedroom breast feeding their daughter. After Jane finished feeding their daughter Jane went into the living room and appellant followed her. They

discussed money and appellant offered to give Jane money for rent and child care. As he approached Jane to hold their daughter, he noticed a hickey on Jane's neck. Appellant asked Jane how she got the hickey, but she became hostile and admitted that she had engaged in prostitution because appellant had not given her enough money. Appellant said that he responded by telling Jane he was going to get full custody of their daughter.

Jane walked into the bedroom holding the baby and appellant followed. Jane put the baby down on the bed and then attempted to strike appellant repeatedly. Appellant was able to block her blows with his hands. However, during the scuffle, Jane tripped on a cushion and fell on to the bed. Jane indicated that she wished to have sexual relations with appellant by pointing to her groin area and asking appellant if he wanted "some of this"; he agreed.

Jane undressed with appellant's assistance. Appellant set up two pillows on the bed in order to block their daughter's view. Appellant testified that he orally copulated Jane and inserted his finger into her vagina, but removed it when Jane complained that it hurt. Appellant believed that Jane was enjoying the sexual acts. Appellant removed his pants and attempted to have intercourse with Jane, but was unable to achieve an erection. Appellant put on his pants and lay beside Jane and asked her if she was okay. Jane nodded affirmatively.

Jane got up and started dressing for work. Appellant offered to take their daughter to McDonalds for breakfast while Jane went to work. Jane agreed and followed him as he walked out of the house carrying their daughter. Appellant asked Jane if he could borrow the child seat from Jane's car because he did not have one. Jane went back into the house, but did not return. Appellant was approached by Jane's brother who pushed him and asked him what he was doing with the child. Appellant refused to explain himself and said that he was the child's father. Appellant put the child on the ground and pushed Jane's brother. The police arrived shortly thereafter.

Appellant testified that during the interview with Detectives Enriquez and Anderson he was confused and tired and told the police what he thought they wanted to hear.

### *Discussion*

#### *I. Ineffective Assistance of Counsel*

Appellant contends that he was deprived of the effective assistance of counsel because defense counsel failed to move to exclude "damaging statements" that he made in the course of his interview with Detectives Anderson and Enriquez as these statements were made in response to a coercive interrogation and, therefore, were inadmissible.

Without doubt, a criminal defendant has a state and federal constitutional right to the effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Pope* (1979) 23 Cal.3d 412, 422, overruled on another ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800.)

In order to show ineffective assistance, a defendant has the burden of establishing that: (1) trial counsel's performance fell below prevailing professional standards of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome of the case would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.) A reasonable probability is one " 'sufficient to undermine confidence in the outcome.' " (*Id.* at p. 218, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland* ).)

Nevertheless, a reviewing court need not assess the two factors of the inquiry in order; and if the record reveals that petitioner suffered no prejudice, we may decide the issue of ineffective assistance of counsel on that basis alone. (*Strickland, supra*, 466 U.S. at p. 697.) If it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice that course should be followed. (*Ibid.*)

Furthermore, "[a] defendant who raises the issue on appeal must establish deficient performance based upon the four corners of the record. 'If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

Thus, the standard of appellate review of a claim of ineffective assistance of counsel is well established. " ' "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of professional assistance.' " [Citation.] "[W]e accord great deference to counsel's tactical decisions" [citation], and we have explained that "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation]. "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts." [Citation.] [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 954.)

It is important to note that defense counsel argued in closing that the interview was "very long, and it occurred several hours after the incident on January 30. The incident was between 7:30 and 7:45. The interview was late in the afternoon several hours later. And remember too, that Mel works nights. He had been up way more than 24 hours when the interview occurred and had had no sleep. [¶] Both officers interrogated him for hours. They were pushing him for some sort of confession. They were trying to put words in his mouth, and he was trying desperately to please them. After about two hours, he finally tried to make it stop. He was desperately trying to tell them something to make this stop. [¶] He even asked them at one point, if you recall, 'What do you want me to say?' And the officer said, 'You made a mistake.' And he said, 'Okay, I made a mistake.' [¶] And then they tried to get him to say he forced her. They pressured him. They said,

'Why is she in the hospital?' 'What is going on there?' He didn't know. Why would he know? You saw his face, just like I did. He is desperately - - 'What? Why is she there? What could have happened? What could have had happened?' [¶] So he agrees; maybe it was too forceful. Maybe-maybe when I put my finger in, it was too forceful. But his story about the finger and her story are completely different. He tells you that was part of their routine. And when he put the finger in, it wasn't in hooked fashion. When she said, 'Stop. Stop. It hurts,' he removed it. Not forcibly. He removed it. He was just trying to figure out what to tell them to make the interrogation stop. [¶] In the end, he never confessed to a crime. He never confessed to any crime. He even agreed to take a polygraph to proof [sic] he was telling the truth. The officers tried in the end, said, 'Do you want to change your story? Is there anything else?' He goes, 'How can I change my story?' He did not change his story because he couldn't."<sup>3</sup>

This is not a case where defense counsel's failure to seek suppression permitted the prosecution to gain an advantage at trial without a strategic benefit to the defendant. (See, e.g., *In re Wilson* (1992) 3 Cal.4th 945, 955-956 [ineffective representation claim supported by showing that counsel's failure to seek exclusion of adverse evidence arose from misunderstanding of law rather than informed tactical decision].) Rather, here, defense counsel used the interview to show that although the officers were relentless in trying to get appellant to change his story and admit that the sexual acts were non-consensual, appellant maintained his position that he and Jane had engaged in consensual acts.

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<sup>3</sup> Having reviewed the entire interview transcript we agree with defense counsel's assessment of the interview. Although, appellant agreed that he might have been too forceful, and that might have been a mistake, he never retreated from his position that all the sex acts were consensual. Taken in context, it is quite apparent that appellant was not saying he forced himself on Jane, but rather that he was more forceful during the consensual sex acts than Jane normally enjoyed.

"The choice of when to object and when to allow the evidence to come in as offered is inherently a matter of trial tactics. Ordinarily the tactical decisions of trial counsel will not be reviewed with the hindsight of an appellate court. [Citations.] The decisions which counsel must make in the courtroom will necessarily depend in part upon what he [or she] then knows about the case, including what his [or her] own client has told him [or her]." (*People v. Garrison* (1996) 246 Cal.App.2d 343, 350-351.)

Even if this court assumed for the sake of argument that the interview was inadmissible because it was the result of a coercive police interrogation, "[w]hether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations] failure to object seldom establishes counsel's incompetence. [Citations.]" (*People v. Hayes* (1990) 52 Cal.3d 577, 621.)

Here, it is quite apparent that defense counsel's strategy of presenting appellant as being in a position of nothing to hide was more helpful to his defense than harmful. Although appellant's statements were minimally damaging in some respects—he admitted he made a mistake and that he had probably been more forceful during the sex acts than Jane usually enjoyed—competent counsel could reasonably believe that the majority of his statements helped his defense in other respects. (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) Appellant's interview was, for the most part, exculpatory—he repeatedly insisted that the encounter with Jane was consensual. Defense counsel knew that the jury would view the videotape of the interview and see appellant's demeanor and condition. Defense counsel could reasonably have decided that the jury would agree that appellant was tired, confused and willing to say anything to make the interview end. Appellant so testified at trial.

Since the record shows that defense counsel had a reasoned basis, i.e. made a reasonable tactical decision, for not moving to suppress the interview, appellant's claim of ineffective assistance of counsel must fail.

## *II. Sufficiency of the Evidence of Child Endangerment*

Initially, appellant contended that his conviction on count eight—felony child abuse—must be reversed because there was insufficient evidence to prove all the elements of the offense. Specifically, appellant argued that one of the elements of this offense is that the defendant's conduct must be carried out under circumstances or conditions likely to produce great bodily harm or death and the record is devoid of such evidence.

Relevant here, section 273a provides that "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering . . . shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years." (§ 273a, subd. (a).)

As this court has explained before, "For a defendant to be guilty of violating section 273a, subdivision (a) [a felony], his conduct must be willful and it must be committed under circumstances 'likely to produce great bodily harm or death.' [Citation.]" (*People v. Cortes* (1999) 71 Cal.App.4th 62, 80.) Absent either of these elements, there can be no violation of the statute. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1216.) Whether or not the element "under circumstances or conditions likely to produce great bodily harm or death" is present is a question for the trier of fact. (*Id.* at p. 1221.)

In reviewing this issue, this court noticed that the court gave a modified version of Judicial Council of California Criminal Jury Instruction 821 (CALCRIM No. 821), which omitted the element "[t]he defendant inflicted pain or suffering on the child or caused or permitted the child to suffer under circumstances or conditions likely to produce great bodily harm or death." (Judicial Council of California Criminal Jury Instructions, CALCRIM No. 821 (2010) at p. 81.) Accordingly, we requested supplemental briefing

on the issue of whether or not the omission of this element relieved the prosecution of proving that element of the crime.

Having received the supplemental briefing, we now consider that issue.

As appellant points out, the sole factor that distinguishes felony child abuse from misdemeanor child abuse is the presence of the element "under circumstances or conditions likely to produce great bodily harm or death."

The version of CALCRIM No. 821 given by the court in this case listed as an element of felony child abuse that the defendant must have been "criminally negligent when he caused or permitted the child to suffer or be in danger." The instruction went on to tell the jury that "A person acts with criminal negligence when, one, he acts in a reckless way that creates a high risk of death or great bodily harm. [¶] And, two, a reasonable person would have known that acting in that way would create such a risk."

Appellant appears to concede that taken in isolation, this part of the instruction cured the court's erroneous omission of the element "under circumstances or conditions likely to produce great bodily harm or death."<sup>4</sup> Nevertheless, appellant points out that the instruction was not given in isolation. Here, the entire charge to the jury included two instructions -- one on felony child abuse and one on misdemeanor child abuse. Each contained a definition of criminal negligence; the one noted *ante* and a definition pursuant to California Judicial Council of California Criminal Jury Instruction 823 (CALCRIM No. 823) that told the jury that a defendant acts with criminal negligence "when, one, he acts in a reckless way that is a gross departure from the way an ordinarily careful person[] would act in the same situation. [¶] The person's act amounts to [a] disregard for human life, or indifference to the consequences of his acts. [¶] And, three,

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<sup>4</sup> Appellant concedes that since criminal negligence is an element of the offense of felony child abuse and since by definition it consists of the defendant acting in a way that creates a high risk of death or great bodily harm, then a jury's determination that the defendant was criminally negligent necessarily implies that they also determined that the circumstances were not only likely to pose such a risk, but did pose it.

a reasonable person would have known that acting this way would naturally and probably result in harm to others."<sup>5</sup>

"Under established law, instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*People v. Flood* (1998) 18 Cal.4th 470, 479-480 (*Flood*.) "[I]nstructional errors that have the effect of removing an element of a crime from the jury's consideration encompass a broad spectrum of circumstances and may be assessed in the context of the evidence presented and other circumstances of the trial to determine whether the error was prejudicial." (*Id.* at p. 489.)

"In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record. [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

Here, the trial court implied that it would give the jury copies of the written instructions for use during deliberations. However, the record does not show that the court provided the jury with CALCRIM Nos. 821 or 823.<sup>6</sup> Accordingly, we must assume

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<sup>5</sup> The current version of CALCRIM No. 821 contains the same definition of criminal negligence as the 2010 version of CALCRIM No. 823 with which the jury was instructed in this case. That is, a defendant acts with criminal negligence when "1. He or She acts in a reckless way that is a gross departure from the way an ordinarily careful person would act in the same situation; [¶] 2. The person's acts amount to disregard for human life or indifference to the consequences of his or her acts; [¶] And [¶] 3. A reasonable person would have known that acting in that way would naturally and probably result in harm to others." (Judicial Council of California Criminal Jury Instructions, CALCRIM No. 821 (2011) p. 598.)

<sup>6</sup> On our own motion we requested that the record be augmented with the written jury instructions that were given to the jury. We were informed by the clerk of the superior court that no written instructions other than those contained in the clerk's transcript were given to the jury. Those instructions do not contain CALCRIM Nos. 821 and 823.

that the jury had only the oral instruction from the court, which encompassed two definitions of criminal negligence. Thus, as noted the jury was instructed in two different ways on how to find criminal negligence, one that referred to creating a high risk of death or great bodily harm and one that did not. Furthermore, the verdict forms with which the jury was supplied distinguished the two crimes—felony child abuse and misdemeanor child abuse—only by reference to their Penal Code designations.<sup>7</sup> Thus, there was nothing to remind the jury of which definition of criminal negligence went with which Penal Code violation.

In essence, respondent argues that although the modified version of CALCRIM No. 821 omitted the element that the circumstances surrounding the defendant's conduct be likely to produce death or great bodily harm, the instruction was not erroneous because it included the requirement that the defendant be found criminally negligent, and it contained a definition of " 'criminal negligence' " that included the requirement that the defendant's conduct create a risk of death or great bodily harm. Thus, respondent argues, the jury must have found that the defendant's conduct created circumstances that satisfy the omitted element of the offense because we must presume the jury followed the court's instructions and since the jury found appellant guilty of felony child endangerment we must presume the jury applied the definition of criminal negligence given in conjunction with that instruction. Respondent is missing the point.

Certainly, we presume jurors are intelligent persons and capable of understanding and correlating all jury instructions that are given. (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.) Further, we must presume that jurors follow all instructions.

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<sup>7</sup> Specifically, the verdict forms for count eight stated "We, the jury, sworn to try the above-entitled case, find the defendant MELCHOR ROSALES JAYUBO, GUILTY/NOT GUILTY of the crime of Child Endangerment, In Violation of California Penal Code section 273a(a)" and "We, the jury, find the defendant GUILTY/NOT GUILTY of the lesser included offense of Child Endangerment, in violation of California Penal Code Section 273a(b)."

(*People v. Horton* (1995) 11 Cal.4th 1068, 1121.) Nevertheless, here the jury was given two different instructions on the definition of criminal negligence. As the United States Supreme Court has noted with regard to conflicting instructions, "[a] reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." (*Francis v. Franklin* (1985) 471 U.S. 307, 322.)

By giving two different instructions on criminal negligence and failing to instruct that to find felony child abuse the jury had to find that it was carried out under circumstances or conditions likely to produce great bodily harm or death, the court effectively relieved the prosecutor of the burden of proving that element beyond a reasonable doubt thus depriving appellant of a jury trial on a valid theory of felony child abuse. This error contravenes both the United States and California Constitutions. (See *United States v. Gaudin* (1995) 515 U.S. 506, 509–510; *Flood, supra*, 18 Cal.4th at pp. 479–480.) To the extent the error implicates federal constitutional rights, our inquiry is governed by the harmless error standard expressed in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). When such error consists of a failure to instruct on an element of a charge or amounts to an instruction of a legally incorrect theory, the judgment must be reversed unless the People prove beyond a reasonable doubt that the error did not contribute to the verdict in the case at hand; one way to meet this burden is to show from the verdicts that the jury necessarily found all the elements required to convict under a proper theory. (*People v. Lewis* (2006) 139 Cal.App.4th 874, 884 (*Lewis*).

Nonetheless, "[t]he test is not whether a hypothetical jury, no matter how reasonable or rational, would render the same verdict in the absence of the error, but whether there is any reasonable possibility that the error might have contributed to the conviction in this case. If such a possibility exists, reversal is required." (*Lewis, supra*, 139 Cal.App.4th at p. 887.) Similarly, the California Supreme Court has held that "[w]hen one of the theories presented to a jury is legally inadequate, such as a theory

which ' "fails to come within the statutory definition of the crime" ' [citations], the jury cannot reasonably be expected to divine its legal inadequacy. The jury may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime. In such circumstances, reversal generally is required unless 'it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory.' [Citation.]" (*People v. Perez* (2005) 35 Cal.4th 1219, 1233.)

We cannot say beyond a reasonable doubt that the omission of the element under circumstances or conditions likely to produce great bodily harm or death from the felony child abuse jury instruction coupled with the two different instructions on criminal negligence, plus the sheer volume of instructions orally given (eight counts all with lesser included offenses), did not contribute to the verdict in this case;<sup>8</sup> the jury was faced with two different standards to be applied in determining whether the crucial threshold between a misdemeanor and a felony had been crossed. There was nothing to remind the jury that there was this crucial distinction. Since it is not possible to conclude that the jury necessarily convicted appellant on the correct legal theory for felony child abuse, reversal is required. (*Lewis, supra*, 139 Cal.App.4th at p. 891.)<sup>9</sup>

### *III. Instructional Error-Child Endangerment*

In view of the fact that we must reverse appellant's conviction on the felony child abuse count we need not address appellant's argument that CALCRIM No. 821 is argumentative and one sided.

### *IV. Instructional Error-Circumstantial Evidence*

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<sup>8</sup> The instructions as orally given by the court take up 37 pages in the reporter's transcript.

<sup>9</sup> Since we must reverse appellant's conviction on count eight we need not address appellant's argument that there was insufficient evidence that his conduct was carried out under circumstances or conditions likely to produce great bodily harm or death.

The court instructed the jury that "Facts may be proved by direct or circumstantial evidence, or a combination of both. [¶] Direct evidence can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that evidence is direct evidence that it was raining. [¶] Circumstantial evidence also may be called indirect evidence. Circumstantial evidence does not directly prove the facts to be decided, but it is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question. [¶] For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside. [¶] Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state, and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. [¶] You must decide whether a fact . . . in issue has been proved based on all of the evidence." The instruction as given tracks the language of Judicial Council of California Criminal Jury Instruction 223 (CALCRIM No. 223).

Further, the court told the jury that "The People must prove not only that the defendant did the acts charged, but also that he acted with a particular intent. The instructions for each crime explains the intent required. [¶] An intent may be proved by circumstantial evidence. Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to conclude that the defendant had the required intent, you must be convinced that [the] only reasonable conclusion supported by the circumstantial evidence, is that the defendant had the required intent. [¶] If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that

the defendant did have the required intent, and another reasonable conclusion supports a finding that he did not, you must conclude that the required intent was not proved by the circumstantial evidence; however, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable." This instruction as given tracks the language of Judicial Council of California Criminal Jury Instruction 225 (CALCRIM No. 225).

Appellant contends that the trial court erred in failing to instruct the jury sua sponte with CALCRIM No. 224 regarding circumstantial evidence to prove count six (assault with force likely to produce great bodily injury) and count seven (criminal threat) because elements of these offenses—other than intent— were supported only by circumstantial evidence.<sup>10</sup> Further, appellant contends that the error was of federal constitutional dimension.

As appellant points out, the bench notes accompanying CALCRIM No. 225 state, "Give this instruction when the defendant's intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial evidence. If other elements of the offense also rest substantially or entirely on circumstantial evidence, do not give this instruction. Give CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*. (See *People v. Marshall* (1996) 13 Cal.4th 799, 849 . . . ; *People v. Hughes* (2002) 27 Cal.4th 287, 347 . . . )" (Judicial Council of California Criminal Jury Instruction 225 (2011) pp. 59-60.)

It is well established, and our Supreme Court has consistently held, an instruction defining circumstantial evidence is not necessary unless the prosecution substantially relies on such evidence to prove its case. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1113; *People v. Brown* (2003) 31 Cal.4th 518, 563.) The instruction need not be given when

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<sup>10</sup> Appellant contends that the same is true as to the child abuse count. However, since we must reverse his conviction on that count we do not address that argument.

circumstantial evidence merely corroborates the direct evidence. (*People v. Yeoman* (2003) 31 Cal.4th 93, 142; *People v. Anderson* (2001) 25 Cal.4th 543, 582.)

A trial court is required to instruct the jury, sua sponte, on the general principles of law relevant to the issues raised by the evidence. (*People v. Martinez* (2010) 47 Cal.4th 911, 953; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1171.) We determine the correctness of jury instructions from the entire charge of the court, rather than by judging an instruction or portion of an instruction in artificial isolation. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.)

CALCRIM Nos. 224 and 225 both instruct the jury on the proper use of circumstantial evidence.<sup>11</sup> (*People v. Yeoman, supra*, 31 Cal.4th at p. 142; *People v. Samaniego, supra*, 172 Cal.App.4th at p. 1172.) CALCRIM No. 225 "informs the jury on how to consider circumstantial evidence when only the element of mental state or intent has been proven by such evidence." (*People v. Samaniego, supra*, at p. 1171, fn. 12.) Thus, CALCRIM No. 225 is to be used in place of CALCRIM No. 224 " 'when the defendant's specific intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial evidence.' " (*People v. Samaniego, supra*, at p. 1171; *People v. Honig* (1996) 48 Cal.App.4th 289, 341 [ CALJIC No. 2.02].) Both instructions "provide essentially the same information on how the jury should consider circumstantial evidence, but CALCRIM No. 224 is more inclusive." (*People v. Samaniego, supra*, at p. 1172; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142.) The California Supreme Court has held that CALJIC No. 2.01, the predecessor to CALCRIM No. 224, should not be given when circumstantial evidence merely corroborates other evidence. (*People v. Yeoman, supra*, at p. 142; *People v. Brown* (2003) 31 Cal.4th 518, 563.) Where circumstantial evidence is not the primary means by which the prosecution

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<sup>11</sup> CALCRIM Nos. 224 and 225 are substantially the same as their predecessors, CALJIC Nos. 2.01 and 2.02, respectively. (*People v. Samaniego, supra*, 172 Cal.App.4th at p. 1171, fn. 12.)

seeks to establish the defendant's guilt, CALCRIM No. 224 may confuse and mislead the jury. (*People v. Brown, supra*, at p. 563; *People v. Yeoman, supra*, at p. 142; *People v. Anderson, supra*, 25 Cal.4th at p. 582.)

Appellant contends that as to the criminal threat charge, one of the elements of the offense is that the fear experienced by the target of the threat be reasonable under the circumstances. Appellant argues that there was no direct testimony going to this element so that the only basis on which the jury could determine beyond a reasonable doubt that Jane's fear was reasonable under the circumstances was by drawing an inference from other evidence such as her testimony about the events leading up to the threat.

As to the felony assault and simple assault, appellant contends that the defendant must be aware that the act he committed, by its nature could be reasonably expected to result in the application of force to someone; and he never testified that he had any such awareness.

Thus, appellant argues the prosecution " 'substantially relied' " on circumstantial evidence to prove a number of elements it was required to prove.

In *People v. Wiley* (1976) 18 Cal.3d 162, 174–176, the Supreme Court upheld the trial court's failure to give CALJIC No. 2.01 on the ground that the People had not substantially relied on circumstantial evidence to prove the defendant's guilt and that the circumstantial evidence in the case was not equally consistent with a rational conclusion that the defendant was innocent.

Appellant's argument rests on a faulty premise. That is, that if any one element of a crime rests on circumstantial evidence then the jury must be instructed with CALCRIM 224. That is not the standard. CALCRIM No. 224 need not be given sua sponte if there is *any* circumstantial evidence, but only where the prosecution's case rested substantially on circumstantial evidence.

We reiterate that an instruction on the sufficiency of circumstantial evidence is not required in every case where a charged offense includes a mental element--such as intent

to steal, or knowledge--which must be proved by inferences drawn from circumstantial evidence. Instead, the rule is that such an instruction must be given sua sponte when the prosecution's case rests primarily or substantially on circumstantial evidence. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49.) An important corollary of the rule on the giving of circumstantial evidence is that the instruction need not be given, even upon request, where the circumstantial evidence is only incidental to, or corroborative of, the direct evidence (*id.* at p. 50), or where the circumstantial evidence is not equally consistent with a rational conclusion that the defendant is innocent of the crime charged. (*People v. Wiley, supra*, 18 Cal.3d at p. 175; see also *People v. Wolcott* (1983) 34 Cal.3d 92, 109, fn. 8.)

In our view, this is a case to which the corollary applies. First, the prosecution's case rested substantially on direct evidence, i.e. the testimony of Jane. "Direct evidence is evidence which is applied to the fact to be proved, immediately and directly, and without the aid of any intervening fact or process." (*People v. Malbrough* (1961) 55 Cal.2d 249, 251.) Direct evidence proved that appellant was the person that made the threat to Jane while he was attempting to strangle her. The only inference to be proved from that evidence was that Jane's fear was reasonable under the circumstances. No contrary inferences are suggested by this evidence. We fail to see how anyone could be anything other than afraid of a threat to kill while being strangled.

Similarly, as to assault with force likely to produce great bodily injury and the simple assault that was the lesser included offense of rape by a foreign object (count two), direct evidence proved that appellant was the person that assaulted Jane. The only inference to be drawn from Jane's testimony was whether appellant was aware of facts that would lead a reasonable person to realize that his or her act by its nature would directly and probably result in the application of force to someone. Again, no contrary inferences can be drawn from the evidence.

On the other hand, if the jury accepted appellant's version of events at face value, no inference drawing was required. If the jury believed that appellant engaged in consensual sex acts with Jane, no further inferences were necessary to find him not guilty. Circumstantial evidence was not implicated by appellant's testimony, and a circumstantial evidence instruction was not necessary for the jury to evaluate the comparative credibility of the witnesses.

Appellant contends that the "logic" of *People v. Salas* (1976) 58 Cal.App.3d 460 (*Salas*) compels reversal in this case.

We find *Salas* to be distinguishable. In *Salas*, the defendant was charged with aggravated robbery, which required proof of two distinct specific intents: the intent to permanently deprive the owner of his property, and the intent to inflict great bodily injury. The trial court in that case gave both CALJIC 2.01 and CALJIC 2.02; however, in CALJIC 2.02 the court included only the intent to permanently deprive. The *Salas* court held that "[t]he failure of the court to give CALJIC instruction No. 2.02 with respect to the issue of defendant's specific intent to inflict great bodily injury on the victim might well have led the jury to conclude that it could find that defendant possessed such an intent by the circumstantial evidence introduced without giving consideration to the requirement that the proved circumstances were not only consistent with the hypothesis that he had such specific intent, but were irreconcilable with any other rational conclusion." (*Salas, supra*, 58 Cal.App.3d at pp. 474-475.) A combination of pleading and instructional error convinced the court that a miscarriage of justice had occurred. (*Id.* at pp. 475-476.)

The *Salas* court's holding does not speak to the necessity of giving a circumstantial evidence instruction in the first place. It rests on the assumption that the "circumstantial evidence introduced" in that case was substantial and not merely corroborative or incidental to the direct evidence and that, as a result, some sort of instruction on the sufficiency of circumstantial evidence in general was warranted. In fact, this assumption

is underscored by the fact that the trial court in *Salas* gave both CALJIC 2.01 and 2.02. The error in *Salas* was that having already determined that a circumstantial evidence instruction was required, the trial court vitiated that instruction by giving the truncated version of CALJIC 2.02 which mentioned one, but not both, specific intents at issue in the case. Such is not the case here. Further, the precise holding in *Salas*--that it was error not to instruct with CALJIC 2.02 with respect to a great bodily injury enhancement--was disapproved by the California Supreme Court in *People v. Wolcott, supra*, 34 Cal.3d at page 109. To the extent appellant asks us to apply the "logic" of *Salas*, such logic does not apply here.

Moreover, a trial court does not commit error of constitutional dimension by failing to instruct on circumstantial evidence if it has properly instructed on reasonable doubt. As explained in *People v. Rogers* (2006) 39 Cal.4th 826: "Insofar as the federal Constitution itself does not require courts to instruct on the evaluation of circumstantial evidence where, as here, the jury properly was instructed on reasonable doubt [citations], defendant's claim necessarily rests on the asserted arbitrary denial of a state-created liberty interest. [Citation.] We doubt the common law right to a circumstantial evidence instruction rises to the level of a liberty interest protected by the due process clause. [Citation.]" (*Id.* at pp. 886-887; see also *People v. Smith* (2008) 168 Cal.App.4th 7, 18-19.) Here, appellant's jury was properly instructed on reasonable doubt and the People's burden of proof, and his constitutional claim necessarily fails.

#### *V. Instructional Error-Failure to Give a Unanimity Instruction*

Appellant was charged with a single count of assault by means of force likely to cause great bodily injury and a single count of making a criminal threat. Appellant asserts that there was evidence before the jury of multiple acts that could have been the basis of either of those charges and the prosecutor did not make a clear election as to which acts she was relying on. Accordingly, appellant argues that the court had a sua sponte duty to instruct the jury that in order to find him guilty of those two charges, it

must unanimously agree on which specific action constituted each offense. Appellant asserts that as to the criminal threat charge, Jane described two distinct threats—one, when appellant pulled her back from the bathroom into the bedroom and told her that he was going to kill her, and two, when prior to walking out the front door with their daughter he told Jane that he was going to come back and kill her. Similarly, with respect to the assault charge, appellant contends that Jane testified that he put his hands around her throat and attempted to strangle her and subsequently he hit her on the arm leaving a bruise.

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 (*Russo*)). 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. (*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, supra*, 25 Cal.4th at p. 1133.)

Thus, "[w]hen an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.]" (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534 (*Melhado*)). When the prosecution does not make an election as to which act supports the charge, the trial court has a sua sponte duty to instruct the jury on unanimity. (*Ibid.*)

"If the prosecution is to communicate an election to the jury, its statement must be made with as much clarity and directness as would a judge in giving instruction. The record must show that by virtue of the prosecutor's statement, the jurors were informed of their duty to render a unanimous decision as to a particular unlawful act." (*Melhado, supra*, 60 Cal.App.4th at p. 1539.) Our review of the entire record satisfies us that an election *was* made as to both the criminal threat count and the assault by means of force likely to cause great bodily injury count.

As to the assault by means of force likely to cause great bodily injury count, the prosecutor made it quite plain during argument that she was electing to base this count on appellant's attempt to strangle Jane. Specifically, the prosecutor told the jury "Count 6: Assault with force likely to produce great bodily injury. You heard testimony that the defendant strangled Jane Doe, that he had his arm around her throat and his forearm across her throat. You heard testimony that she had a raspy voice. She had redness that the officers saw immediately when they went out to her apartment and responded. She had redness around her throat area. And you saw the petechiae - - broken capillaries - - that are on the shoulder. And you heard testimony from Sherrie Goldman, an expert in strangulation that, that force applied could result in great bodily injury, or even death."

Subsequently, when discussing what she was required to prove, the prosecutor told the jury, "Count 6: Assault with for[c]e likely to produce great bodily injury. . . . [¶] We heard Jane Doe's testimony. We saw the video where the defendant admits to doing this. We heard testimony from Sheree Goldman. At one point the defendant had his hands around Jane Doe's neck. And he demonstrates this for you in the video, and then he takes his forearm and places it over Jane Doe's throat. And we know that that's what happened because we can see evidence of it on Jane Doe's shoulder. [¶] And Sheree Goldman testified that this type of injury, this type of bruising, occurs from the application of force when pressure is applied to one particular area of the body, and that's called petechiae. And you'll have these photos when you go back to deliberate. [¶] We heard that

strangulation can cause serious injury, and it can happen very quickly. The application of pressure to a neck where Jane Doe testified she couldn't breathe. There was redness around her neck area that the officer saw after they arrived; it was still there. The raspy voice that Sheree Goldman testified to that she could hear. And that's the force that was likely to cause great bodily injury. [¶] That he did it willfully. That means that he did the act on purpose, not that he intended to injure her. That he took his hand and put a forearm across her neck, that he did that act on purpose, that's all that's required; it's not required that the defendant intend to cause great bodily injury. It's also not required that Jane Doe actually suffered great bodily injury; it's simply required that he did an application of force that was likely to cause great bodily injury, and that he was aware what he was doing. [¶] When he put his hands around her throat and his forearm of [*sic*] her throat and threatened to kill her, he was very aware of what he was trying to do. He was angry, he was violent, and he was full of rage, and he had the ability to apply the force necessary." At no point did the prosecutor make a contrary statement or suggest that the other alleged assaultive act—the punch to the arm—could be considered in conjunction with count 6.<sup>12</sup>

Similarly, as to the criminal threat count, the prosecutor argued, "Count 7: Criminal threats. The defendant threatened to kill Jane Doe, and he did that while he was strangling her." Again, when explaining what she was required to prove, the prosecutor told the jury, "Count 7: Criminal threat. The defendant willfully threatened. That means he made the statement on purpose; it wasn't an accident. He specifically said, 'I intend to kill you.' That was his statement that he made orally. He intended it as a threat. There's no other explanation for saying, 'I'm going to kill you today.' Which is what Jane Doe

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<sup>12</sup> The only time that the prosecutor mentioned the punch to the arm was in explaining that a sexual assault crime may be based on the testimony of the complaining witness alone and that no corroboration is necessary. The prosecutor went on to say, however, that there was corroboration in this case and mentioned the petechiae on the shoulder and the bruise that occurred when appellant punched Jane.

testified that he said to her. [¶] It was clear, immediate, unconditional, and specific that it would be carried out. He had his hand around her throat right after he had just raped her; so it was pretty clear and specific that it could be carried out. [¶] Caused fear in Jane Doe. Jane Doe testified she was afraid. She was afraid for her life, and her fear was reasonable. It is reasonable that when someone has their hand around your throat and they're threatening to kill you that they will carry out that threat." At no time in connection with this count did the prosecutor mention the second threat that Jane said appellant made as he was taking their daughter from her.

Here the prosecutor's election was plainly communicated to the jury. Since no reasonable juror could have been in doubt as to the prosecution's election as to counts six and seven, the trial court was not required to instruct on unanimity. (See *Melhado, supra*, 60 Cal.App.4th at p. 1539.)<sup>13</sup>

#### *VI. Cumulative Instructional Error*

Appellant submits that reversal is mandated in this case on each of the instructional errors described *ante*. Appellant asserts, however, that if this court finds each error individually harmless, the cumulative effect of all these errors demonstrates that a miscarriage of justice occurred.

Certainly, our Supreme Court has recognized that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.)

Thus, the combined effects of multiple *errors* may indeed render a trial fundamentally unfair. (See *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) However, since with respect to the counts that we leave intact, we have found none of appellant's claims of error meritorious, a cumulative error argument cannot be sustained.

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<sup>13</sup> In light of this conclusion, we need not determine whether any error might have been harmless, or what standard of prejudice should apply to such a prejudicial error analysis.

No serious errors occurred, which whether viewed individually or in combination, could possibly have affected the jury's verdict. (*People v. Martinez* (2003) 31 Cal.4th 673, 704; *People v. Valdez* (2004) 32 Cal.4th 73, 128.) To put it another way, since we have found no substantial error in any respect, appellant's claim of cumulative prejudicial error must be rejected. (*People v. Butler* (2009) 46 Cal.4th 847, 885.)

#### VII. 654 Error

The court sentenced appellant to consecutive terms of one year on count six, the felony assault charge, and eight months on count seven, the criminal threat charge. Appellant contends that this sentence was improper because "the record shows that the threats and the assault were part and parcel of the same indivisible transaction." Therefore, appellant argues, pursuant to section 654, the shorter of the two sentences—the eight months for the criminal threat—should have been stayed.

Respondent counters that the "evidence show[ed] that when appellant grabbed Jane Doe, pulled her into the bedroom, threw her onto the bed, and threatened to kill her, the baby was in her arms. Although the baby was not the object of his threat to kill Jane Doe, it was plainly a victim of the aggravated assault." Thus, respondent contends that the "multiple victim exception" applies to this case. Respondent cites to *People v. Centers* (1999) 73 Cal.App.4th 84 in support of this contention. Alternatively, respondent argues that the evidence here shows that appellant had two intents; one he attempted to strangle Jane "to treat her like a prostitute for having sex with another," and two, "threatened to kill her to gain full custody of the baby."<sup>14</sup>

By way of a supplemental opening brief, appellant argues that if the baby can be considered the victim of the assault, then section 654 precludes separate punishment for

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<sup>14</sup> Respondent takes two diametrically opposed positions. Respondent's argument that the multiple victim exception to section 654 applies, effectively concedes that the assault on Jane and the criminal threat to Jane arose from the same indivisible course of conduct with one single objective.

the assault and the child endangerment count. Respondent disagrees and asserts that not only was the baby exposed to serious physical harm during appellant's violent attack on Jane while she was holding the baby, but also when appellant fought with Jane's brother in his attempt to escape.

Section 654 prohibits punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207–1208.)

Thus, if a defendant is convicted of several offenses that were incident to one objective, the defendant may be punished for any one of such offenses, but not more than one. (*People v. Perez* (1979) 23 Cal.3d 545, 551 (*Perez*).

To put in another way, section 654 has been applied not only where there is one "act" but also where there is a course of conduct that violates more than one statute, but nevertheless constitutes an indivisible transaction. (*Perez, supra*, 23 Cal.3d at p. 551.) Whether a course of conduct is divisible and thus gives rise to more than one act under section 654 depends on the defendant's intent and objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) If all of a defendant's offenses were incident to one objective, he or she may be punished for any one of the offenses, but not more than one. (*Ibid.*) However, if a defendant entertains multiple criminal objectives independent of and not merely incidental to each other, he or she may be punished for the independent violations committed in pursuit of each objective even though the violations were part of an otherwise indivisible course of conduct. (*Perez, supra*, 23 Cal.3d at p. 551.)

On the other hand, the California Supreme Court has held that section 654 does not prohibit multiple punishments where the defendant's single objective during an indivisible course of conduct results in crimes of violence against multiple victims. (*People v. Miller* (1977) 18 Cal.3d 873, 885 (*Miller*) overruled on other grounds as stated in *People v. Oates* (2004) 32 Cal.4th 1048, 1067, fn. 8.)

Under the multiple victim exception, " ' "even though a defendant entertains but a single principal objective during an indivisible course of conduct, he [or she] may be convicted and punished for each crime of violence committed against a different victim." [Citations.]' " (*People v. Centers, supra*, 73 Cal.App.4th at p. 99 (*Centers*).)

In *Centers, supra*, 73 Cal.App.4th 84, upon which respondent relies to argue that the multiple victim exception applies in this case, the defendant entered a residence and kidnapped one of the three occupants, and the multiple victim exception was applied to permit sentencing on both the kidnapping and burglary convictions. The information in *Centers* did not allege specific victims of the burglary, but the evidence supported the conclusion that at least one was not also a victim of the kidnapping. (*Id.* at pp. 101-102.)

The defendant in *Centers* complained that the multiple victims had not been named in the information. As a consequence, the jury did not find that any particular person was the victim of either the burglary or a personal firearm use enhancement. Relying on *Miller, supra*, 18 Cal.3d 873, the defendant insisted that the multiple victim exception did not apply where there are no jury findings that the defendant committed violent crimes against multiple named victims. (*Centers, supra*, at pp. 100-101.)

The *Centers* court dismissed this argument stating, "We think this reads too much into *Miller*. Certainly under *Miller*, if it has been alleged, proved, and found true that the defendant committed violent crimes against multiple named victims, this is sufficient to invoke the multiple victim exception; but *Miller* does not hold this is necessary. [¶] We know of no case in which the court declined to apply the multiple victim exception simply because the victims had not been named in the information." (*Centers, supra*, 73 Cal.App.4th at p. 101.)

The *Centers* court concluded: "Finally, the trial court's implied finding of multiple victims is supported by substantial evidence. Indeed, defendant does not argue otherwise. Raines was indubitably the victim of the kidnapping. Grundman was the victim (or at least a victim) of the burglary, because she lived in the home. [Citation.]

Grundman also was a victim of defendant's menacing display of a firearm during the burglary. It could be argued that Raines, too, was a victim of the burglary and the personal firearm use. Nevertheless, there was at least one victim of the burglary and the personal firearm use who was not also a victim of the kidnapping. This was sufficient." (*Centers, supra*, 73 Cal.App.4th at pp. 101–102.)

However, here, with the exception of the child abuse charge, the information specifically alleged that the victim of each charged offense, and the single victim, Jane, was the same in each of the offenses. We are convinced that this case is more analogous to *In re Henry* (1966) 65 Cal.2d 330, 331. There, the defendants hit a liquor store owner with a gun and then shot him while robbing the store. Although the defendants accosted a sales clerk in the store, pointing a gun at him and demanding money from the cash register, since the information alleged both crimes were committed solely against the store owner, the Supreme Court held the multiple victim exception to section 654 did not apply. (*Id.* at pp. 332–333.) Rather, it held assault of the store owner and robbery of the store were part of the same indivisible transaction and therefore set aside the sentence on the assault. (*Id.* at p. 333.) Here, based on the prosecutor's argument, it is quite apparent that the felony assault charge was based on appellant attempting to strangle Jane. We must not lose sight of the purpose behind section 654, which is to insure that a defendant's punishment will be commensurate with his culpability. (*Perez, supra*, 23 Cal.3d at pp. 550-551.)

As to respondent's argument that the evidence here shows that appellant had two intents: one, he attempted to strangle Jane "to treat her like a prostitute for having sex with another," and two, he "threatened to kill her to gain full custody of the baby," we are not convinced.

As a general rule, the sentencing court determines the defendant's "intent and objective" under section 654. (See, e.g., *People v. Coleman* (1989) 48 Cal.3d 112, 162.) We review the court's implied determination of a defendant's separate intents for

sufficient evidence in a light most favorable to the judgment, and presume in support of the court's findings the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

Here, the evidence showed that appellant told Jane "I'm going to kill you today" as he threw her onto the bed and attempted to strangle her. No evidence supports respondent's assertion that appellant attempted to strangle Jane to treat her as someone would treat a prostitute. The death threat that preceded the attempted strangulation was part of the same course of conduct and was indicative of appellant's intent to put Jane in immediate fear for her life based on his present ability to kill her. The prosecutor argued as much during her opening argument to the jury—"Jane Doe testified she was afraid. She was afraid for her life, and her fear was reasonable. It is reasonable that when someone has their hand around your throat and they're threatening to kill you that they will carry out that threat."

In sum, we agree with appellant that counts six and seven were based on an indivisible course of conduct with the same intent and objective.

" 'Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.' [Citation.]" (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

Accordingly, when the court resentences appellant we will order that the sentence on count seven be stayed pursuant to section 654.<sup>15</sup>

### *VIII. Sentencing Error*

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<sup>15</sup> Since we have concluded that the multiple victim exception does not apply here, and since we have reversed appellant's conviction on count eight, we need not address appellant's supplemental argument that section 654 precludes punishment for the assault and the child abuse charge.

The court imposed consecutive sentences on counts six, seven and eight. Appellant contends that we must remand for resentencing because the court failed to state on the record its reasons for so doing.

Respondent urges that any claim of error due to the trial court's failure to state its reasons was forfeited when defendant failed to object at the sentencing hearing. Appellant acknowledges defense counsel's failure to request a statement of reasons forfeits the issue on appeal. Nevertheless, appellant claims that counsel's failure constitutes ineffective assistance of counsel.

We agree that any error in the trial court's failure to state its reasons for imposing consecutive sentences may be forfeited by the failure to object. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) Nevertheless, since this case must be returned to the trial court for further proceedings and resentencing, we need not address this issue other than to remind the trial court that California Rules of Court, rule 4.406(b)(5) requires that when imposing consecutive sentences the sentencing court give reasons for its sentencing choice.<sup>16</sup>

### *IX. Custody Credits*

In sentencing appellant, the trial court imposed a jail term of 180 days with credit for time served and stated that the "balance of the defendant's custody [credits] will be applied to the felonies." The court made no mention of the actual number of days for that balance. However, both the abstract of judgment and the clerk's minutes indicate that the court awarded appellant 484 days—421 actual and 63 good time/work time.

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<sup>16</sup> California Rules of Court, rule 4.406(a) provides in pertinent part, "If the sentencing judge is required to give reasons for a sentence choice, the judge must state in simple language the primary factor or factors that support the exercise of discretion or, if applicable, state that the judge has no discretion. The statement need not be in the language of these rules. It must be delivered orally on the record." Reasons are required when the court imposes consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5).)

Appellant contends that the trial court miscalculated his custody credits and the discrepancy can be attributed to the way the court sentenced him on count two (simple assault). Appellant points out that it appears that the court "subtracted half of the 180-day jail sentence on count 2 from [his] 574 days of actual custody,<sup>17</sup> which yielded a result of 484 days, and then computed a number of actual days, 421, which when increased by the fifteen percent conduct credits authorized by section 2933.1 yielded the same result."

Nevertheless, appellant asserts that the formula employed by the court to reduce his presentence custody credits is irrelevant because the court should not have reduced his credits at all. Appellant explains that the court's failure to specify whether the jail term sentence it imposed for count two was consecutive or concurrent rendered the sentence concurrent by default. Therefore, all of the jail term with associated conduct credits should have been credited against his prison term.

Again, since we must remand this case to the trial court for further proceedings and resentencing we need not address this issue as it can be raised in the trial court at resentencing.

#### *X. Restitution Fine*

At sentencing, with regard to a restitution fund fine, the court said "the Court imposes a fine of \$200 for each year of incarceration pursuant to 1202.4(b)."

Appellant points out that he was sentenced to nine years in state prison. Thus, he asserts that the fine should be \$1800. However, appellant notes that in spite of the statement by the court, the minute order and the abstract of judgment indicate the

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<sup>17</sup> Appellant asserts that he was arrested on January 31, 2009 and remained in custody until his sentencing hearing, which was held on August 27, 2010, a time span of 574 days. Respondent does not dispute that this calculation is correct and we do not disagree. The probation officer's report indicates that appellant had 572 actual days and 85 days conduct credit for a total of 657. However, a handwritten notation indicates 574 actual days and 86 days of conduct credit.

imposition of a greater restitution fine in differing amounts. Again, we address this issue for the guidance of the trial court on remand.

Appellant is correct. The clerk's minutes reflect a restitution fine of "\$200 multiplied by the number of years of imprisonment, multiplied by the number of convicted Felony counts. (PC 1202.4(b)(2))"  $\$200 \times 9 \text{ (years)} \times 4 \text{ (felony counts)} = \$7200$ . However, the abstract of judgment reflects that the fine should be "\$5400 per PC 1202.4(b)."

Respondent concedes that there are conflicting restitution fine amounts and that the matter should be clarified.

"As a general rule, a record that is in conflict will be harmonized if possible. [Citation.] If it cannot be harmonized, whether one portion of the record should prevail as against contrary statements in another portion of the record will depend on the circumstances of each particular case. [Citation.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 226.)

Generally, when there is a discrepancy between the minute order or the abstract of judgment and the oral pronouncement of judgment, the oral pronouncement controls. (*People v. Farrell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mitchell* (2001) 26 Cal.4th 181, 185.) This is so because "[e]ntering the judgment in the minutes being a clerical function [citation], a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error." (*People v. Mesa* (1975) 14 Cal.3d 466, 471.)

Although the clerk's minutes contain Judge Duncan's signature, it appears to be the kind that is produced by a rubber stamp. Accordingly, we have no way of knowing if the judge actually read and signed the minutes or the clerk of the court applied the signature with the stamp. In these circumstances, we give greater credence to the oral pronouncement of judgment.

It may very well be as respondent seems to suggest that the court meant to use the full statutory formula in section 1202.4, subdivision (b)(2). However, that is not what the court said. Since state double jeopardy and due process guarantees prohibit an increase in a restitution fine following the successful appeal of a conviction (*People v. Hanson* (2000) 23 Cal.4th 355, 358-367), the restitution fine as orally imposed by the court must stand on remand as the maximum the court can impose.

*Disposition*

The judgment is reversed and the matter is remanded to the trial court for possible retrial on count eight. If the prosecution elects not to retry this count the court shall resentence appellant. If the prosecution elects to retry appellant on count eight, at the conclusion of the retrial the court shall resentence appellant. The court shall stay the sentence on count seven pursuant to Penal Code section 654.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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WALSH, J.\*

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\* Judge of the Superior Court of Santa Clara County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.