

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RODRIGO HERNANDEZ,

Defendant and Appellant.

B272178

(Los Angeles County  
Super. Ct. No. TA137386)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Sean D. Coen, Judge. Affirmed.

David Y. Stanley, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Senior Assistant  
Attorney General, Steven D. Matthews and Robert C. Schneider,  
Deputy Attorneys General, for Plaintiff and Respondent.

---

## INTRODUCTION

A jury convicted Rodrigo Hernandez of murdering a 13-month-old child and of assault by means of force likely to produce great bodily injury resulting in death. Hernandez contends the trial court erred in denying his request for a jury instruction on involuntary manslaughter. Because any error in the trial court's ruling was harmless, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *Lisbeth Rodriguez and Her Children*

In 2015 Lisbeth Rodriguez had four children: three daughters, Nataly, Melody, and Harmony, and a one-year-old son, Smith Fernando Garcia, Jr., whom the family called Handsome. Handsome was a happy, active baby who was crawling and just starting to talk.

Smith Fernando Garcia, Sr., whom Rodriguez referred to as Fernando, was the father of Melody, Harmony, and Handsome. In 2013, while Garcia was in prison, Rodriguez began dating Rodrigo Hernandez, also known as Rigo. Rodriguez initially agreed to marry Hernandez, but she changed her mind because she did not “believe in marriage” and viewed marriage as “just a [piece of] paper.” Rodriguez, Garcia, and Hernandez had known each other since middle school.

When Hernandez learned Rodriguez was pregnant with Handsome, he asked Rodriguez whether the baby was his child. Rodriguez told Hernandez he was not the father, but she said he “knew who it was” (i.e., Garcia). Hernandez, however, kept asking whether he was the baby's father and asked Rodriguez to

take a paternity test. Rodriguez refused because she “already knew” who the father was.<sup>1</sup>

Nevertheless, Hernandez enjoyed playing with Handsome, although sometimes he played rough with the child, and Rodriguez had to tell him to stop. He called the baby “little girl,” “little bitch,” and “menso,” which means “stupid” or “dummy.” He also tried to get the baby angry by taking his bottle away, which made Handsome cry. Hernandez also put a blanket over the baby’s face, which Rodriguez told him to stop doing because “the baby could have suffocated.” Hernandez told Rodriguez not to spoil the baby. Hernandez did not want Rodriguez to carry the baby as much as she did, and he would take the baby from her and put him in his crib. Nevertheless, Rodriguez trusted Hernandez with her children.

#### B. *May 2015*

Rodriguez occasionally noticed bruises on Handsome’s body that she could not explain, including a bruised eye and a scratch on his leg, both of which occurred when the baby was alone with Hernandez. Rodriguez, however, never saw Hernandez hit Handsome in anger.

In May 2015, the day after his first birthday, Handsome woke up sick, looked pale, and threw up several times. Rodriguez and Hernandez took him to the hospital emergency room, where the doctors diagnosed him with a virus and released him. Several days later, Handsome had a seizure when he was in the

---

<sup>1</sup> Rodriguez began having a sexual relationship with Hernandez in March 2013. Garcia was out of prison between May 2013 and January 2014, during which time Rodriguez had sex only with Garcia. Handsome was born in May 2014.

bedroom alone with Hernandez. When Rodriguez came into the room, Hernandez was holding the baby and said, "I don't know what's wrong with him." According to Rodriguez, Handsome's "body was stiff and his eyes were rolled back." They took Handsome to see a doctor, and he recovered. After this incident, Handsome did not want to be around Hernandez. When he saw Hernandez, he would cry and cling to his mother.

C. *June 7, 2015*

On June 6, 2015 the family had a birthday party for Melody. Handsome was happy, playful, and ate some food. Hernandez came over at 11:00 p.m., after the party had ended.

The next morning Handsome woke up, and Hernandez made him a bottle. Handsome drank some of the milk, but threw up.

Rodriguez and Hernandez had breakfast together. On the counter was a four-page letter Garcia had written Rodriguez from prison and signed "FNL," which stood for "Fernando and Liz." Garcia wrote that he knew Rodriguez was dating someone else. He also apologized for neglecting Rodriguez and the children, asked her to give the children his love, and said he wanted to meet her new boyfriend. Hernandez saw the letter and read it. Hernandez smiled and said, "Oh, he wants to meet me?" Hernandez went back to the bedroom.

For the rest of the day, Handsome was inactive, did not eat, and slept a lot. He continued to throw up. Hernandez wanted to go out with the girls, but Rodriguez said she wanted to stay home because her son was sick.

At 3:30 p.m. Rodriguez took a shower, while Hernandez stayed in the bedroom with the baby. Nataly told her mother the

baby had thrown up again, and Rodriguez went back to the bedroom. Handsome was on the bed next to Hernandez and was pale. Rodriguez removed his clothes and saw red marks on his stomach and blood in his mouth. She told Hernandez it looked as though someone had been poking the baby. The red marks on his stomach turned to a “bluish purple” and began spreading. Handsome’s “body was stiff[] and his eyes were rolled back.” Rodriguez and Hernandez called 911.

Sheriff’s deputies and paramedics arrived and took Handsome into the ambulance. One of the paramedics described the baby as “less than lethargic,” “very limp,” and “nonresponsive.” The other paramedic recalled numerous black and blue marks on the child’s abdomen and asked one of the deputies to take pictures “because it wasn’t adding up.” He also said, “It was the worst call I’ve ever had.”

Rodriguez rode with her son and the emergency medical technicians to the hospital, and Hernandez followed in a car. While they were in the waiting room, Hernandez told Rodriguez “[t]hey were going to blame him for what happened.” When law enforcement arrived, he said, “I told you.”

#### D. *The Hospital Interviews*

Detective Yvette Salazar from the Los Angeles County Sheriff’s Department went to the hospital to investigate the extent of the child’s injuries and how they may have occurred. The detective interviewed Rodriguez and Hernandez in separate hospital rooms. From Rodriguez, Detective Salazar “wanted to determine if the child had been left outside her care, if so, with whom, and if the child had recently had a fall or any kind of accident.”

When Detective Salazar first met with Hernandez, he denied he had hit the baby. Hernandez raised the paternity issue and said he was not sure whether he was the father. Hernandez told the detective that not knowing if the child was his, and Rodriguez's refusal to have a paternity test, bothered him.

Eventually, Hernandez gave Detective Salazar more details about what had occurred that morning. Hernandez said Rodriguez was in the shower and the baby was crying and would not stop. He tried to feed the baby but the baby fell, first on his knee, because Hernandez was trying to stop the fall, and then on the floor. Hernandez was frustrated and shook the baby. When Detective Salazar asked Hernandez if he hit the child, Hernandez "initially denied it," but subsequently admitted "he did strike the child a few times" when the child was crying. He also admitted he had previously hit the baby "on two other occasions" that left bruises. Detective Salazar testified, "He told me that he struck the child four to five times in the abdomen with his hammered fist," which the detective described as "a closed fist and you use the end of your hand to strike down." Hernandez demonstrated for Detective Salazar how he hit Handsome, which the detective characterized as a "palm strike" in the stomach.

Hernandez was concerned Rodriguez would be upset with him. He admitted to the detective he "fucked up" and made "a mistake." Hernandez said it was painful not knowing who the baby's father was, and he wanted the baby to feel the pain he was feeling. He admitted he hurt the baby because he was hurting.

Detective Salazar left the room, but returned a few minutes later. Detective Salazar spoke with Hernandez about how he had hit the baby. Hernandez admitted he punched the baby in his stomach with hammer punches hard enough to leave a bruise.

He said, “I don’t know what got into me.” At this point Detective Salazar gave Hernandez his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436). Hernandez agreed to give a videotaped demonstration of how he hit the child.

Detective Salazar obtained a doll used for infant cardiopulmonary resuscitation (CPR) training from the hospital and videotaped Hernandez reenacting how he struck Handsome. Hernandez narrated his actions during the reenactment, explaining he was on the bed with Handsome, “kind of dragged him to the edge” of the bed, dropped him as he reached for the bottle, picked him up, “lost it,” and “hit him” several times. He also said he could hear the baby wheeze.

After Detective Salazar had recorded the reenactment and arrested Hernandez, the detective escorted Hernandez to see Rodriguez, and the two of them spoke briefly. Hernandez said, “I fucked up.” He told her, “I lost it. I’m sorry.” Rodriguez said, “Sorry doesn’t cover it. The baby is in . . . bad shape.” Hernandez said, “I know what’s going on. I know how he is. I’m [going to] pay for it. You know where the fuck I’m going. I just wanted to give my face to you and tell you I fucked up, you know. I’m sorry.” He added, “I fucked up. Okay. I don’t know what got into me.” He said, “I’m sorry. I’ll write to you. All right? Bye.”<sup>2</sup>

Doctors performed four surgeries on Handsome. He died on June 26, 2015.

---

<sup>2</sup> The People played for the jury the audiotapes of Detective Salazar’s interviews with Hernandez and Hernandez’s postarrest conversation with Rodriguez, and the videotape of Hernandez’s reenactment of how he hit Handsome.

#### E. *The Medical Evidence*

A forensic pathologist performed an autopsy on Handsome's body. The autopsy revealed external bruises on the abdomen, groin, leg, knee, and bicep, all caused by blunt force trauma. There were internal bruises on the diaphragm and liver, bleeding around the pancreas, and a significant laceration or tear in the arteries and veins that connect the aorta with the intestines. In addition, there was evidence of bleeding on the left side of the head near the brain. There were also fractures in the ribs in different stages of healing, suggesting the injuries had occurred at different times.

The pathologist concluded that, because of the depth of the bruising and the internal bleeding, the amount of force required to inflict the injuries to the interior organs was "severe." He also concluded the injuries were consistent with child abuse, the cause of death was blunt force trauma, and the manner of death was "death at the hands of another."

The primary pediatric surgeon who treated Handsome in the hospital stated that during the first surgery he discovered the liver was "mush" (or, according to another doctor, "shattered") due to a blunt force. He also discovered that the main blood vessels to the intestine had been "ripped away from the . . . the aorta." The surgeon explained that this kind of tear in the blood vessels requires an impact of "significant force," such as those usually seen in high speed car accidents. As a result of the shear in the blood vessels from the aorta, a "significant amount of intestines [was] compromised or dying."<sup>3</sup>

---

<sup>3</sup> Two of the four surgeries the doctors performed on Handsome were to remove portions of his intestines that were "compromised or dead."



Another pediatrician testified the child's injuries were "extraordinarily unusual" and required a "direct blunt force trauma to the abdomen of [a] very significant amount of force." He explained the injuries suggested "the child suffered very significant blunt force trauma to the abdomen causing the acute injuries which ultimately led to a series of events that led to his death. The fact that there were healing rib fractures . . . is telling us that there were prior injuries to this child. The rib fractures also had different amounts of healing on them that we can see in the x-rays. So it wasn't just one time. It's at least two, probably three or more times of prior trauma to this child." The pediatrician also stated an accidental drop or fall on a knee would "absolutely not" cause these kinds of injuries. He opined that "this child suffered abusive, very forceful trauma on multiple occasions that . . . occurred over a period of time of several weeks."

F. *Hernandez's Trial Testimony*

Hernandez testified he never intentionally hit Handsome, although he acknowledged he did play a little rough with him at times. He said he kept asking Rodriguez for a paternity test because Handsome made facial expressions Hernandez had seen his other son make, and people said Handsome looked like Hernandez's father. Hernandez denied he was jealous of the baby because the baby was not his son. He stated he loved the child and treated him like his own son.

Hernandez testified that on June 7, 2015 Handsome appeared ill. "He was in the bed laying with me. He started crying, you know. I got up, tried to pick him up, get the bottle from the foot head. At this time he slipped off my hand. In order

[to] stop him from hitting the floor, I reacted and put my knee, made him kind of stop and he did end up hitting the floor, but it wasn't an impact. It was more of an impact to me hitting my knee. I picked him up. He was all right. He stopped crying but he . . . wasn't responding, like I put the bottle in, he wouldn't reach it. . . . I felt him where [his body] was hard [and stiff].” Hernandez said the child was not responding and “his eyes were rolling back.” When asked how he reacted, Hernandez stated, “I struck him in the stomach and he kind of came back, and he coughed, and his eyes rolled back to normal—not to normal, but they were rolling around, but he was kind of, like, still there and he cried. He threw up and that’s when Lisbeth came out [of] the shower, grandma came in. That’s when we ended up calling 911.”

Hernandez acknowledged he hit Handsome four or five times, but said he did not intend to harm or kill him and he did not think he hit him hard enough to hurt him. He said he hit the baby in a panic, “out of frustration and out [of] not getting an answer from him. I was thinking I was losing him. I did struck him. During the strikes he coughed and his eyes came back and I immediately hugged him and picked . . . him up and I didn’t know what else to do.” He said he was trying to help the baby.

#### G. *The Verdict*

The jury found Hernandez guilty of second degree murder (Pen. Code, § 187, subd. (a))<sup>4</sup> and assault on a child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child’s death (§ 273ab, subd. (a)). The trial court sentenced Hernandez to a prison term of 25 years

---

<sup>4</sup> Statutory references are to the Penal Code.

to life on the conviction for assault on a child resulting in death, and imposed and stayed under section 654 a prison term of 15 years to life on the conviction for second degree murder. Hernandez appealed the same day.

## DISCUSSION

### A. *Standard of Review*

Involuntary manslaughter is a lesser included offense of murder. (*People v. Thomas* (2012) 53 Cal.4th 771, 813.) “One commits involuntary manslaughter either by committing “an unlawful act, not amounting to a felony” or by committing “a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.”” (*People v. Abilez* (2007) 41 Cal.4th 472, 515; see § 192, subd. (b); *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1139.)

The court must instruct on involuntary manslaughter as a lesser included offense only if there is substantial evidence from which a jury could reasonably conclude the defendant committed involuntary manslaughter but not murder. (*People v. Thomas, supra*, 53 Cal.4th at p. 813.) “If the evidence presents a material issue of whether a killing was committed without malice, and if there is substantial evidence the defendant committed involuntary manslaughter, failing to instruct on involuntary manslaughter would violate the defendant’s constitutional right to have the jury determine every material issue.” (*People v. Abilez, supra*, 41 Cal.4th at p. 515.)

“[W]e employ a de novo standard of review and independently determine whether an instruction on the lesser included offense of voluntary manslaughter should have been given.” (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; see *People v. Nelson* (2016) 1 Cal.5th 513, 538 [“[o]n appeal, we review independently the question whether the trial court improperly failed to instruct on a lesser included offense”].) “Substantial evidence is evidence from which a jury could conclude beyond a reasonable doubt that the lesser offense was committed. [Citations.] Speculative, minimal, or insubstantial evidence is insufficient to require an instruction on a lesser included offense.” (*People v. Simon* (2016) 1 Cal.5th 98, 132.) “The ‘substantial evidence requirement is not satisfied by “any evidence . . . no matter how weak,” but rather by evidence from which a jury could conclude “that the lesser offense, but not the greater, was committed.”’” (*People v. Nelson*, at p. 538.)

B. *Any Error in Refusing To Instruct the Jury on Involuntary Manslaughter Was Harmless*

Trial counsel for Hernandez asked for a jury instruction on involuntary manslaughter. Counsel argued: “If the jury were to decide that [Hernandez] committed a battery on this child and . . . he had the right to strike the child but he used excessive force, it was just a battery or an assault, that I think would put us into the involuntary manslaughter category.” The trial court denied the request, ruling there was no substantial evidence to support giving the instruction. The court stated: “My feeling as to that is that there is not substantial evidence warranting the giving of that [instruction] because I do not believe we have an unlawful act not amounting to a felony here nor do we have an

act which is ordinarily lawful which involves a high degree of risk of death or great bodily harm. And because of that I don't believe involuntary manslaughter should be given."

Hernandez contends the trial court erred in refusing to instruct the jury on involuntary manslaughter.<sup>5</sup> He argues there was substantial evidence he committed a lawful action that involved a high degree of risk of great bodily harm.<sup>6</sup> Hernandez argues his testimony "supplied the evidence that he was trying to resuscitate [Handsome], a lawful act, as argued by [trial] counsel, but the amount of force he applied in that effort was obviously excessive in his time of panic."

Whether Hernandez's testimony was substantial evidence to support giving an instruction on involuntary manslaughter is a close question. Hernandez never stated he was trying to resuscitate Handsome. He said he hit Handsome because he was scared, "lost it," was in a "complete panic," and "didn't know what else to do." He explained he struck the child "out of frustration" and because he was not "getting an answer from him." He told Detective Salazar he struck the child, not in an attempt to administer CPR, but to make the child feel the pain he was feeling. And Hernandez never told Rodriguez, the doctors, Detective Salazar, or anyone at the scene or in the hospital that he hit Handsome to try to revive him or save his life. Nevertheless, Hernandez did state, in response to a question by

---

<sup>5</sup> Trial counsel for Hernandez also requested an instruction on voluntary manslaughter, which the trial court similarly refused. Hernandez does not challenge that ruling.

<sup>6</sup> Hernandez does not contend there was substantial evidence he committed "an unlawful act, not amounting to a felony."

the prosecutor, that Handsome's injuries were an accident because he was trying to help him, and that after he hit Handsome in the abdomen the baby "coughed and his eyes came back," which could be interpreted as evidence of a misguided and unreasonable effort at resuscitation.

Any error in refusing to give an instruction on involuntary manslaughter based on these excerpts of Hernandez's testimony, however, was harmless because the jury convicted Hernandez of a violation of section 273ab, assault on a child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death. Violation of section 273ab is a felony, punishable by a prison term of 25 years to life. (*People v. Wyatt* (2010) 48 Cal.4th 776, 780, fn. 2; *People v. Norman* (2003) 109 Cal.App.4th 221, 227.) As the People correctly point out, because the jury convicted Hernandez of violating section 273ab, the jury "could not rationally have concluded that he was guilty of a lawful act, a misdemeanor, or a noninherently dangerous felony for [the murder count], even had it been instructed with lesser offense instructions." In particular, because the jury found Hernandez committed an unlawful, felonious act, the jury could not have found, as Hernandez argues, that he committed a lawful act that involved a high degree of risk of great bodily harm. Therefore, any error in failing to instruct on this involuntary manslaughter theory was harmless. (See *People v. Castaneda* (2011) 51 Cal.4th 1292, 1359 ["[a] trial court's failure to instruct the jury on a lesser offense that is necessarily included in the greater offense charged is harmless if "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant

under other, properly given instructions””]; accord, *People v. Lujano* (2017) 15 Cal.App.5th 187, 195-196.)

### **DISPOSITION**

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.