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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MORGAN BITSON et al., Defendants and Appellants.	B275154, B280417 (Los Angeles County Super. Ct. No. BA434959)

APPEAL from judgments of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed and remanded with directions.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant Morgan J. Bitson.

Fay Arfa for Defendant and Appellant Tristian Bennett.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Morgan Bitson and her boyfriend Tristian Bennett killed Bitson's four-year-old son Major Woods. The fatal blow severed Woods's liver in two, causing him to bleed profusely. Prior to that time, defendants inflicted many additional wounds on Woods. While in their care, Woods suffered broken ribs, burn marks, bruises, a broken arm, and the loss of vision. Defendants restricted Woods's food, causing him to suffer from hunger and chronic stress and to lose muscle tissue. Although the evidence did not show if Bitson or Bennett inflicted the fatal blow, the overwhelming evidence demonstrated that both abused him; one or both inflicted the fatal wound; and both lied about the events causing Woods's death.

The prosecutor argued that Bennett and Bitson either directly killed Woods or aided and abetted his murder. Most of the evidence against defendants was undisputed. The cause of Woods's death was undisputed. Defendants did not dispute the fact that Woods's death could not have occurred accidentally. Although Bennett argued that Bitson solely was responsible for the abuse and for Woods's death, the verdict demonstrates that the jury rejected that argument. Bitson argued that all of the percipient witnesses lied, but the verdict demonstrates that the jury rejected that argument as well.

On appeal, Bitson and Bennett raise several challenges to the judgments, but demonstrate no prejudicial error. We reject Bennett's challenges to the sufficiency of the evidence as well as his argument that the trial court erred in admitting evidence showing he abused Woods multiple times. Bennett shows no error in the denial of his posttrial motion for funds to hire a medical expert. Neither defendant demonstrates that he or she

received the ineffective assistance of counsel, and neither defendant demonstrates prejudicial instructional error.

We affirm both Bitson's and Bennett's judgment of conviction. We remand the case to the trial court to decide whether to strike Bennett's prior serious felony conviction under a newly enacted statute that will become effective January 1, 2019, Penal Code sections 667, subdivision (a) and 1385, subdivision (b), which will give trial courts discretion to dismiss or strike a prior serious felony conviction for sentencing purposes.

FACTUAL BACKGROUND

Woods was born in 2009. Prior to June 2013, Woods spent time with Bitson's friend Jasmin Shelton and her mother Lola Todd. Sometime in 2013, Shelton noticed that Woods's body suggested he had been abused. Shelton observed bruises, a burn mark, a bite mark, and a shoe print. Todd also noticed signs of abuse and questioned Bitson. Todd considered calling the Department of Children and Family Services. Shortly after telling Bitson that she may involve the Department, Bitson and Bennett picked up Woods. Bitson prevented Shelton and Todd from seeing Woods again.

In July or August 2013, Bitson took Woods to Michigan. Bitson returned with Woods in September 2013. Woods had bruises when he returned from Michigan.

After Bitson and Woods returned from Michigan, Woods lived with defendants. At that time (and prior to Bitson's trip to Michigan), defendants lived in a room in Bennett's mother's house with defendants' infant son T. and Woods. T. was born in February 2012. Bennett's relatives, Tre'Shon Carrington and

Pauline Hawkes, lived in the same house. Bitson and Bennett were the only persons responsible for Woods's care.

Bitson took Woods to the hospital in Los Angeles on September 21, 2013. During that visit, Bitson reported that Woods's eyes were crossed. Having crossed eyes is a symptom of head trauma. Specifically, swelling in the brain affects the nerves which causes the eyes to cross. Following Woods's hospital visit, a nurse indicated: "Suspected Abuse No Suspicion of Abuse." The same form indicated Woods complained of pain. It further stated: "PT ELOPED," meaning that Bitson and Woods left the hospital before a physician could evaluate Woods. Bitson later lied about the hospital visit.

On October 3, 2013 at 7:24 a.m., Woods died.

1. Testimony from Woods's Autopsy

Forensic pathologist James Ribe performed an autopsy and testified at length about Woods's injuries, finding them "too numerous to count." Ribe's undisputed testimony indicated that within hours of his death, Woods had suffered blunt force trauma to his abdominal cavity inflicted by an adult, which severed his liver in two. The trauma also bruised Woods's diaphragm, caused a blood clot in Woods's back, and affected his inferior vena cava. Ribe opined that Woods's death was not accidental but was a homicide.

Ribe described some of Woods's external injuries at the time of his death. The front and back of Woods's upper body were bruised. His left shoulder was bruised. He had two abrasions on the backside of his ribcage. The abrasions on Woods's ribcage were indicative of blunt force trauma. Underneath the abrasions, there was bruising and hemorrhaging, also indicative of blunt force trauma. Woods's ninth and tenth ribs were fractured. The

fractures were "complex," suggesting that some were partially healed and others were new. The new fractures occurred minutes or hours before Woods's death. Woods's left arm was fractured. The fracture occurred by someone twisting or wrenching the arm.

Woods's neck contained marks from someone's nails. The marks were under Woods's jawline and along his windpipe. Woods's arms, legs, neck, torso, left hip, and right thigh contained white scars. The white marks were from burns that appeared to be from a hot object or hot water. Ribe opined that the burn marks were weeks or months old.

A red mark on Woods's forearm was from a recent injury. His arms and legs contained additional "linear marks," that had started to scab. The back of Woods's neck and left shoulder had loop marks, indicating that someone hit Woods with a cord.

Woods's abdomen was "intensely distended." He appeared thin and emaciated. Woods's ribs protruded. His arms and legs were thin. His tissue was "wasting," i.e., lacking muscle tissue and fat. At the time of his death, Woods was malnourished. His body weight was far below normal for his age. Woods's thymus gland was abnormally small. The shrinkage of the thymus gland was caused by pain, fear, malnutrition, or emotional stress over a period of weeks or months.

The inside of Woods's lip was lacerated. His back was scarred. His right knee and right ankle were bruised, his left ankle was injured. The inside of his left leg contained abrasions indicative of a small, sharp object. Woods's head was bruised indicating "blunt force impact to the right side of the head above the ear." This injury occurred minutes to hours before Woods's death. The "bright red bleeding in the tissue that appeared

fresh" showed that the wound occurred shortly before Woods's death.

In addition to the head injury, Woods suffered numerous injuries within a few days of his death. A laceration inside the mucous membrane in Woods's lip had not healed. A red cut inside Woods's left arm was recent. Linear abrasions caused by a small sharp object on Woods's left leg were recent. Shortly before his death, Woods's ribs had been broken and Woods's left arm had been fractured just above his elbow. Ribe determined the fracture was within one day of death by dissecting the arm and arm bone and finding fresh bleeding under the skin.

2. Expert Testimony on Child Abuse

A child abuse pediatrician, Janet Arnold-Clark, testified, and her testimony was undisputed. According to Arnold-Clark the marks on Woods's neck and torso were indicative of child abuse. Woods's arm fracture was indicative of "someone yanking or pulling on the bone to the point that" it broke. Posterior rib fractures also suggested child abuse. Woods's head showed indication of both old and new trauma. Arnold-Clark testified that in May 2013, Woods was overweight and between May and October, he became emaciated. Chronic stress and starvation reduced the size of his thymus gland.

Arnold-Clark testified that the cause of Woods's death was "severe protruding blunt force trauma to the abdomen which caused a complete breaking of the liver into two pieces." "It's caused by a very forceful, kick, stomp, or punch into the abdomen."

3. Events Immediately Preceding Woods's Death

Bennett and then Hawkes (Bennett's mother) administered cardio pulmonary resuscitation (CPR) to Woods. At Hawkes's request, Bitson called 911 at 6:46 a.m. on October 3, 2013. Carrington, who lived with defendants and Woods, observed that, at that time, Woods "looked lifeless. . . ."

Paramedics responded to the 911 call and transported Woods to Centinela Medical Center. Bitson accompanied Woods in an ambulance and cried hysterically.

When he arrived at the hospital, Woods had no pulse and was not breathing. Dr. Cesar Aristeiguieta unsuccessfully attempted to resuscitate him. Dr. Aristeiguieta observed that Woods's head was disproportionate to the size of his body, his knees protruded prominently, and his abdomen was distended. Additionally, Dr. Aristeiguieta observed Woods had wounds scattered throughout his entire body.

4. Interviews With Defendants and Bennett's Family Members Shortly After Woods's Death

Bitson, Bennett, and Woods were in their bedroom when the fatal blow was inflicted.

a. Bitson

Bitson told a social worker that on October 3, 2013, Woods complained of stomach pain. Woods went to the bathroom and then returned to their bedroom. Bennett observed that Woods's arm was limp and started to scream.

Bitson told one social worker that she did not observe any marks on Woods's body the night before his death when she bathed him. Bitson told another social worker that T. caused the

bruises on Woods's body. Bitson reported that she accidentally scratched Woods's back trying to keep him from falling off the bed after Woods took T.'s toy.

b. Bennett

Bennett told a social worker that he considered himself Woods's stepfather. Bennett believed he had a "good" relationship with Woods.

Bennett reported that on October 3, 2013, Woods complained of a stomach ache. Woods went to the bathroom, and when he returned, Bennett noticed that Woods was limp. Bennett started screaming and instructed Bitson to find Hawkes.

Bennett told another social worker that T. hit Woods with a toy truck, causing Woods to bruise. Bennett was unaware that Woods had any other injuries.

c. Tre'Shon Carrington

Carrington, Bennett's nephew who lived in the same house as Bennett for several months preceding Woods's death, told a detective that he observed Bennett hit Woods in the face and body. Carrington also saw Bitson hit Woods. Carrington expressed concern that defendants refused to feed Woods. Carrington noticed that Woods began suffering injuries after T. was born (in February 2012).

d. Paulette Hawkes

Hawkes referred to Bennett as Woods's father. Hawkes told a social worker that she threatened to call the Department of Children and Family Services if Bennett hit Woods. Hawkes also reported hearing both Bennett and Bitson yell at Woods. Hawkes reported that defendants treated T. better than Woods. Hawkes

expressed concern that defendants locked Woods in their bedroom. Hawkes reported that both Bitson and Bennett told Woods to "shut the fuck up."

e. Tatanisha Lewis

Bennett's sister, Tatanisha Lewis, told a detective that Bennett did not like Woods. Lewis remembered observing Woods's eyes cross. Lewis threatened to call the Department of Children and Family Services when she saw that Woods's eyes were crossed, but she did not call because Bitson took Woods to the hospital. Bitson did not tell Lewis that she left the hospital before a physician could evaluate Woods. Bitson incorrectly told Lewis that x-rays had been taken.

Lewis expressed concerns for Woods's safety to Police Sergeant Brian Poor who responded to the 911 call. Lewis reported that Bennett would prohibit Woods from leaving the bedroom he shared with defendants. Lewis observed bruising on Woods's neck and believed Woods appeared malnourished.

On October 3, 2013, Lewis expressed concern for Woods's safety. She told a social worker that she saw a bruise on Woods's neck and that Woods was unable to see candy Lewis tried to give him. Lewis reported that Woods regularly requested food and always appeared hungry. Lewis overhead a phone conversation between Bennett and Woods in which Bennett asked Woods if Woods wanted Bennett "to beat his ass . . . ." Lewis reported that Bennett and Bitson told Woods to "shut the fuck up" and treated Woods poorly in comparison to T.

Lewis expressed concern that Bennett would be told about her statements to the social worker. Lewis was concerned because Bennett had sent her a text message stating: "I can't

believe you made these statements to these people and the police." Lewis received the message in November 2013.

f. Anthony Johnson

Bennett's nephew, Anthony Johnson, heard defendants yell at Woods and tell him to stay in the corner. When the door to defendants' room was broken, Johnson saw Woods standing in the corner, sometimes with his arms up in the air. If Woods lowered his arms, defendants would require him to remain in the corner for a longer period of time. Johnson saw Bitson slap Woods's face and hit his arm, leg, and buttocks. Johnson heard Bennett order Woods to hold a box of car brakes in his arms. Johnson reported that defendants favored T. over Woods. Johnson reported that defendants fed Woods only noodles.

5. Bennett's Family's Testimony

Except for Carrington, none of Bennett's family members testified consistently with his or her prior statements to the police and social workers. Basically, they testified that they remembered very little and had no concerns for Woods's safety while in defendants' care. Johnson expressed concern that Woods gained too much weight, and no concern that he was emaciated. Lewis testified she rarely saw Woods and had no concern for Woods's safety.

Carrington noticed that Woods was happier and more talkative when Bennett was not at home. Carrington testified that Woods's behavior changed in 2013. In September 2013, Woods's entire body was bruised. Carrington did not call the police because Hawkes told him not to call the police and warned him to mind his own business.

Carrington testified defendants forced Woods to hold a box of brakes at chest level and would be punished if he dropped them. Woods held the brakes for 30 to 45 minutes. Both Bitson and Bennett were present, but Carrington believed Bitson told Woods to stand in the corner. On another occasion, Carrington observed Woods standing in the corner holding a gallon of juice.

Bennett yelled at Carrington when Carrington gave food to Woods. Bennett told Carrington not to feed Woods and threatened Carrington if Carrington disregarded the order. Carrington observed that Woods was extremely skinny. In the weeks before Woods died, Carrington observed a scar on Woods's neck, a mark below Woods's eye, and observed that Woods had a "lazy eye."

Carrington remembered Bitson taking Woods into the bathroom and hitting him. Woods cried after Bitson hit him. Bennett was not in the bathroom during this beating. Carrington also remembered another time hearing a smack and then hearing Woods start to cry. Woods and Bennett were in the bedroom at the time.

Carrington heard Bitson yell at Woods after Woods urinated in bed. Carrington heard other sounds suggesting that someone was hitting Woods. Carrington testified that Woods was punished nine consecutive days for urinating in bed. Sometime between March and October 2013, Carrington saw Bennett hit Woods twice after Woods urinated in the bed. On one occasion, Carrington saw Bennett grab Woods's right arm and drop him. In addition to dropping Woods, Bennett threw Bitson on the bed.

Carrington was afraid to testify because Hawkes warned him that defendants' friends might beat him up.

6. Defense Evidence

Bitson did not testify and no witness testified in her defense. Bennett did not testify. Jennifer Morgan testified in Bennett's defense. Morgan lived next door to Hawkes. Morgan regularly, heard Bitson scream and slap Woods. She first heard Bitson scream at Woods in 2010. Bitson would say, " 'Shut the fuck up' " and then would slap Woods. Morgan heard Bitson tell Woods " 'you should be lucky that I even feed you.' " The screaming Morgan heard sometimes lasted an hour or two.

Morgan also heard Bitson beating Woods. Once when Bitson was beating Woods, Morgan heard a male voice say, " ' You got to stop that.' " Although she speculated that the male could have been Bennett, Morgan acknowledged that she did not know if the voice was his. It could have been "any other male in the house . . . ."

In 2012, Morgan called 911 to report Bitson. When Bitson learned that Morgan called the police, Bitson went to Morgan's home and yelled at her.

7. Evidence of Bennett's Recorded Phone Call

In a recorded phone call, Bennett said: "I'll be out so long as motherfuckers that made statements don't come to court, so long as motherfuckers that made statements don't come to court I'll be straight . . . ." In another call, Bennett stated that in court "they have to bring the people that made statements to court cuz if they don't come to pretrial and then they don't come to trial they have to drop the case."

PROCEDURAL BACKGROUND

1. Preliminary Hearing

At the preliminary hearing, the prosecutor argued that defendants engaged in a continuous course of child abuse.

2. Information

Bitson and Bennett were charged with murder (Pen. Code,[1] § 187) and assault on a child causing death (§ 273ab, subd. (a)). The People alleged Bennett suffered two prior serious or violent felonies within the meaning of the three strikes law and one serious felony conviction pursuant to section 667, subdivision (a)(1).

3. Prosecutor's Closing Argument

With respect to child abuse, the prosecutor argued that it was "a course of conduct that took place over a period of time." She argued that murder was a foreseeable consequence of the course of child abuse. The prosecutor described the course of child abuse, arguing that "[n]ot much of his [Woods's] body was untouched. The prosecutor argued that jurors could convict the defendants of murder if they found Woods's death was a foreseeable consequence of the child abuse. "The two of them engaged in a pattern of child abuse over a period of time that resulted in multiple injuries that ultimately led to the final fatal injury to [Woods]'s liver."

The prosecutor emphasized that both defendants abused Woods. The prosecutor argued that defendants could be liable either as a direct perpetrator or as an aider and abettor. The

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[1] Undesignated statutory citations are to the Penal Code.

prosecutor argued that a parent's failure to protect his or her child is an "affirmative" act. She argued that Bitson could be liable for failing to protect Woods from Bennett if Bennett inflicted the fatal blow. The prosecutor did not argue the same with respect to Bennett, but instead argued that he participated "in the child abuse that culminated" in Woods's death. She also emphasized Bennett's family members' reluctance to testify and Bennett's recorded call expressing hope that no one would testify.

4. Bitson's Closing Argument

Bitson's counsel emphasized that during Woods's September 21, 2013 doctor visit, a nurse identified no signs of child abuse. Counsel argued that numerous witnesses lied including Morgan. Counsel argued that Bitson's call to 911 and the fact that she accompanied Woods to the hospital showed that she cared whether Woods lived or died.

5. Bennett's Closing Argument

Bennett's counsel argued that Bitson was responsible for Woods's death. Counsel further argued that Bennett owed Woods no duty "just because he lived with the mother." Counsel argued that Woods was not in Bennett's care. "It was Ms. Bitson's child." Counsel argued that Bitson beat Woods every day for nine days before he died. Counsel argued that there was no evidence Bennett abused Woods.

Bennett's counsel also argued that Bennett properly disciplined Woods because he thought Woods hit T. Counsel argued that Bennett "didn't do anything beyond reasonable discipline for the child at the time, if even that."

6. Jury Instructions

Jurors were instructed to consider each defendant separately. Jurors were instructed on aiding and abetting liability. The trial court further instructed jurors that they did not need to determine whether defendant acted as a direct perpetrator or as an aider and abettor. The court instructed jurors that a defendant may be guilty not only of the crime he or she intended to aid and abet but also of any crimes committed that were the natural and probable consequence of the target crime. Child abuse was identified as the target crime.

The trial court instructed jurors on second degree murder, including an instruction on express and implied malice. In the context of the murder instructions, the trial court instructed jurors that "[a] parent or guardian has a legal duty to protect his or her child or a child under their care and custody. [¶] If you conclude that the defendant owed a duty to Major Woods, and the defendant failed to perform that duty, his or her failure to act is the same as doing a negligent or injurious act."

The trial court instructed jurors on involuntary manslaughter as a lesser included offense of murder. "When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life than the crime is involuntary manslaughter. [¶] The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk."

The court also instructed jurors on the second charge, killing a child under age 8 by assaulting the child with force likely to produce great bodily injury. One of the elements of the offense was that "[t]he defendant's act caused the child's death."

7. Jury Verdict and Trial Court Findings

Jurors found both defendants guilty of murder and guilty of assault on a child causing death. The trial court found Bennett's prior strike convictions to be true.

8. Bennett's Motion to Dismiss or for a New Trial

Bennett filed a posttrial motion arguing that he received the ineffective assistance of counsel. Specifically, Bennett argued that his trial counsel should have called four additional witnesses.

In a declaration in support of Bennett's motion, Brandon Aubert averred that he spoke to a defense investigator but did not testify at trial. From 2011 to 2013, Aubert travelled with Bennett in connection with their work in the music industry. They were in Los Angeles from June through September 2013 and Bennett was regularly in the recording studio. According to Aubert, Bennett "loved" Woods and Woods appeared healthy when he was with Bennett. Woods "always seemed happy to be with Tristian [Bennett]. Tristian [Bennett] treated Woods . . . like his son and I, for a long time, did not realize Woods was not Tristian's biological son."

Notes from trial counsel's investigator indicated that the investigator interviewed Aubert, and Aubert reported that Bennett and Woods "had a very loving, father-son relationship" and Bennett "viewed Woods as his own." Aubert reported that Bennett was Woods's primary caretaker. Aubert did not observe Bennett discipline the children.

Trial counsel's investigator also interviewed Yolanda Aubert, who knew Bennett through Brandon Aubert. Yolanda Aubert reported that Bennett had such a close

relationship with Woods that she did not realize Woods was not his child. Yolanda Aubert never saw Bennett discipline Woods. Yolanda Aubert reported that "it appeared that [Bennett] had a loving family with no issues."

Trial counsel's investigator interviewed Jermal Jones who reported that Bennett was a "great family man." Jones believed that Bennett was close to Woods.

In an interview with trial counsel's investigator, Antoine Perry reported that he observed Bennett "giving attention, love, and care to Woods." Perry did not regularly interact with Bennett. Perry never realized that Bennett was not Woods's biological father and observed Bennett "giving nothing but love to Woods."

At a hearing on Bennett's motion for a new trial, Bennett's trial counsel testified that he did not recall why he chose not to call the four witnesses, whom he had investigated.

The trial court denied Bennett's motion for new trial.

9. Sentence

The court sentenced Bitson to prison for 25 years to life on the assault causing death of a child and stayed a 15 year-to-life sentence on murder. The trial court sentenced Bennett pursuant to the three strikes law to prison for 75 years to life on the assault causing death of a child. The trial court stayed Bennett's sentence on murder. The court added an additional five years to Bennett's sentence pursuant to section 667, subdivision (a)(1). Both Bennett and Bitson filed timely notices of appeal.

DISCUSSION

We discuss defendants' arguments in the following order: (1) Bennett's challenge to the sufficiency of the evidence; (2) Bennett's challenge to the admission of evidence that he abused Woods; (3) Bennett's argument that the trial court erred in denying his posttrial request for funds to hire a medical expert; (4) Bitson's and Bennett's multiple claims of ineffective assistance of counsel; (5) Bitson's and Bennett's claims of instructional error; and (6) Bennett's argument that the case must be remanded for the trial court to exercise its newly gained discretion whether to strike the section 667, subdivision (a)(1) enhancement. Although on appeal each defendant blames the other, the jury found them both guilty.

1. Sufficiency of the Evidence

Bennett argues that the record lacks substantial evidence to support his convictions. His argument ignores the appropriate standard of review, under which substantial evidence supported his convictions.

" ' "When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also

reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." ' " (*People v. Booker* (2011) 51 Cal.4th 141, 172.) The standard is the same in cases in which the prosecution relies on circumstantial evidence. (*People v. Latham* (2012) 203 Cal.App.4th 319, 326.)

a. Murder

According to Bennett, "[t]he evidence showed Bennett had nothing to do with a pattern of abuse or the October 3, 2013 fatal blow." Bennett states that "the evidence showed only Bennett's mere presence in the room." Bennett further argues that all of Woods's injuries were inflicted when Woods was with Bitson in Michigan. As respondent points out, Bennett simply ignores the substantial evidence supporting his conviction.

Bennett participated in a course of child abuse and reasonable jurors could have concluded that Bennett inflicted the fatal blow. Bennett suspended Woods from Woods's right arm and then dropped Woods. Bennett hit Woods after Woods urinated in the bed, hitting Woods's torso and head. Another time Bennett hit Woods, causing Woods to cry. Bennett was present when Bitson forced Woods to stand in the corner holding a box of brakes for a prolonged period of time. Bennett prevented Woods from leaving the bedroom. Bennett chastised Carrington for feeding Woods and threatened Carrington.

Even if jurors concluded that Bitson inflicted the fatal blow, the evidence supported the conclusion that Bennett aided and abetted Bitson. Bennett accompanied Bitson to pick up Woods when Todd threatened to involve the Department of Children and Family Services. Bennett personally abused Woods and encouraged the abuse by warning Carrington not to feed Woods

and by threatening Woods. When Woods urinated in bed, both Bitson and Bennett physically abused him.

The undisputed evidence that Woods's suffered numerous wounds shortly before his death contradicts Bennett's characterization of the abuse as occurring only when Bitson and Woods were in Michigan. In the weeks before Woods's death, Carrington, who lived in Los Angeles, observed Woods' several injuries. On September 21, 2013 Woods's eyes were crossed, indicating head trauma. Woods visited a hospital in Los Angeles, confirming that he was in Los Angeles. Numerous other wounds occurred shortly before Woods's death including Woods's broken arm and trauma to Woods's head. The fatal wound occurred in Bennett's presence, and the jury could have found that Bennett inflicted the fatal blow or aided and abetted the events leading up to Woods's death. Because of all this evidence, there is no merit to Bennett's contention that all of the child abuse occurred when Woods was in Michigan with Bitson.

b. Assault Causing Death of a Child

Bennett argues that his conviction for assault causing death of a child must be reversed because the "evidence failed to show that Bennett had care or custody of" Woods. Care or custody of a child under eight is an element of assault causing death of a child. (§ 273ab, subd. (a).) Section 273ab covers not only parents and guardians, "but also individuals who do not necessarily have as substantial a relationship to a child as a parent, guardian, and/or babysitter, but who nevertheless have been entrusted with the care of a child, even for a relatively short period of time." (*People v. Perez* (2008) 164 Cal.App.4th 1462, 1469.)

Based on the following evidence, reasonable jurors could have concluded that Bennett had been entrusted with the care of Woods. Woods lived in a room with Bennett and Bitson in Bennett's mother's home. Bennett described himself as Woods's stepfather. Bennett's mother described Bennett as Woods's father. Bennett told other family members how to interact with Woods and threatened them if they failed to follow his instructions. (See *People v. Perez*, *supra*, 164 Cal.App.4th at p. 1470; *People v. Culuko* (2000) 78 Cal.App.4th 307, 335; *People v. Cochran* (1998) 62 Cal.App.4th 826, 833.)

2. Alleged Improperly Admitted Evidence

We have rejected Bennett's argument that "[t]he evidence showed Bennett had nothing to do with a pattern of abuse or the October 3, 2013 fatal blow." Bennett next argues that the evidence necessary to show a pattern of abuse was irrelevant and should have been excluded. According to Bennett, the following evidence was improperly admitted: (1) Carrington's testimony that Bennett and Bitson forced Woods to hold a box of brakes and a gallon of juice; (2) Carrington's testimony Bennett told him not to feed Woods; (3) Carrington's testimony that Bennett hit Woods in the head, and Bennett dropped Woods after holding his arm; and (4) Todd and Shelton's testimony about scratches, bruises, and burn marks on Woods. According to Bennett "[t]he evidence lacked relevance."

Bennett's challenge to the relevancy of the evidence is forfeited and borders on the frivolous.[2] Relevant evidence is

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[2] Respondent correctly argues that Bennett forfeited this issue because he failed to object to the evidence in the trial court. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186; Evid. Code, § 353.)

evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) We conclude the evidence was relevant to prove that Bennett participated in a course of child abuse, the target offense of the prosecutor's natural and probable consequences theory for the murder charge.

3. No Error In Denying Bennett's Posttrial Request for a Forensic Medical Expert

After jurors found Bennett guilty, Bennett's newly retained counsel requested an order authorizing funds for an "expert medical doctor to assist the defense in preparing a motion for [new] trial." Bennett's counsel stated, "I believe that an expert will help me show that, based on the timing of the injuries, Mr. Bennett never abused" Woods. On appeal, Bennett makes the same argument. Bennett further argues that the denial of his request for funds to hire an expert denied him a fair trial.

As respondent points out, Bennett fails to explain how the denial of his *posttrial* request could have affected the fairness of his trial. Bennett cites no authority supporting his position that an indigent defendant is entitle to posttrial funds for ancillary services. The authority he cites provides for such services only as reasonably necessary to prepare a defense.[3] (*People v. Hajek*

Nevertheless, we chose to consider it to forestall a claim of ineffective assistance of counsel.

[3] Citing *People v. Sarazzawski* (1945) 27 Cal.2d 7, 17, Bennett correctly argues that a defendant should have a reasonable opportunity to prepare for trial, but the denial of Bennett's posttrial request could not have affected his ability to prepare for trial. *Sarazzawski*'s holding that a trial court's refusal to hear a defendant's motion for new trial is not evaluated

and Vo (2014) 58 Cal.4th 1144, 1255, overruled on another ground as stated in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) Bennett fails to show any error in denying his posttrial request for funds to hire a medical expert.

4. Neither Defendant Demonstrates Ineffective Assistance of Counsel

Both defendants argue that they received the ineffective assistance of trial counsel. To demonstrate ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1406.) " 'Counsel's performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.' " (*Ibid.*) If a defendant cannot demonstrate prejudice, we need not address the adequacy of trial counsel's performance. (*People v. King* (2010) 183 Cal.App.4th 1281, 1298.)

Reviewing courts defer to trial counsel's reasonable tactical decisions " ' " 'and there is a "strong presumption that counsel's conduct falls within the wide range of professional assistance." ' " ' " (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1147.) "[C]ompetent counsel should realistically examine the case, the evidence, and the issues, and pursue those avenues

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for harmless error has been overruled. (*People v. Braxton* (2004) 34 Cal.4th 798, 817.) In any event, that ruling does not apply here because the trial court heard Bennett's motion for a new trial.

of defense that, to their best and reasonable professional judgment, seem appropriate under the circumstances." (*Id.* at pp. 1147-1148.) "Defendant's burden is difficult to carry on direct appeal. We reverse on the ground of inadequate assistance on appeal only if the record affirmatively discloses no rational tactical purpose for counsel's act or omission." (*Id.* at p. 1148.)

a. Bitson Does Not Show She Received the Ineffective Assistance of Counsel

Bitson argues that her counsel rendered ineffective assistance because he failed to present two defenses—battered woman syndrome and duress. Because Bitson identifies no evidence supporting either defense, she fails to demonstrate her counsel was ineffective in not presenting them to the jury. (Cf. *People v. Hart* (1999) 20 Cal.4th 546, 628.)

"Battered woman's syndrome 'has been defined as "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives." ' " (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1083-1084.) Here, there was no evidence Bitson was abused physically and psychologically over an extended period of time. Bitson did not testify, and no witness testified that Bitson was abused on her person or psychologically. There was evidence that Bennett once threw Bitson on the bed, but this isolated incident was not supportive of the inference Bitson suffered physical abuse over an extended period of time or that she suffered from battered woman's syndrome.

Duress applies when the defendant "committed the act or made the omission charged under threats or menaces sufficient to show they had reasonable cause to and did believe their lives would be endangered if they refused." (§ 26, subd. (6).) There

was no evidence that Bitson committed the child abuse under any threat by Bennett. There was no evidence that Bitson believed her life would be endangered if she refused, and no evidence that such belief would have been reasonable.

b. Bennett Demonstrates No Ineffective Assistance of Counsel

Bennett raises two claims of ineffective assistance of counsel. First, he argues that his counsel was deficient in failing to conduct an adequate investigation. Second, he argues that his counsel was deficient in failing to object to alleged prosecutorial misconduct.

i. Bennett demonstrates no ineffectiveness based on his trial counsel's alleged failure to conduct an adequate investigation

According to Bennett, his counsel rendered ineffective assistance by failing to investigate and call Brandon Aubert, Yolanda Aubert, Jermal Jones and Antoine Perry to testify at trial. Bennett's argument relies on several misstatements. First, Bennett's statement that defense counsel "failed to adequately investigate the case" is belied by the record. All of the witnesses Bennett argues should have been presented (proposed witnesses) were interviewed by trial counsel's investigator. Second, Bennett overstates the probative value of the proposed witnesses' proposed testimony. Bennett claims that the proposed testimony would disprove that Bennett abused Woods. Although none of the proposed witnesses observed Bennett abuse Woods, none was present in Bennett's home, where the abuse occurred and none spent extended periods of time with Woods.

Bennett also mischaracterizes Brandon Aubert's testimony as purportedly showing that "[b]ecause Bennett spent his time out of the house and out of Los Angeles, he could not have abused" Woods. To the contrary, Aubert placed Bennett in Los Angeles at the relevant time – June through October 2013. The fact that Bennett and Aubert travelled outside of Los Angeles at other times was thus not exculpatory.

Putting aside the mischaracterizations, there was no support for Bennett's claim that failing to call the proposed witnesses harmed him. The record shows just the opposite: The Auberts, Jones, and Perry would have undermined Bennett's defense that Bennett did not have the care and custody of Woods because Woods was not his son. Each proposed witness described Bennett in a caregiving role. Brandon Aubert described Bennett as Woods's primary caretaker. Bennett cannot demonstrate prejudice from the failure to call proposed witnesses that would have torpedoed one of his defenses.

ii. Bennett demonstrates no ineffective assistance failing to object to alleged prosecutorial misconduct

Bennett argues that his trial counsel rendered ineffective assistance in failing to object to alleged prosecutorial misconduct during closing argument.[4] Specifically, he asserts that the

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[4] "It is well settled that making a timely and specific objection at trial, and requesting the jury be admonished (if jury is not waived), is a necessary prerequisite to preserve a claim of prosecutorial misconduct for appeal. [Citations.] 'The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury,

prosecutor misstated the law on the duty of care owed by a nonbiological father, incorrectly suggested that Morgan (the neighbor who overheard Bitson abuse Woods), heard both Bitson and Bennett yelling at Woods, and improperly appealed to the passions of the jurors. We need not consider whether Bennett's counsel was deficient in failing to object to that purported prosecutorial misconduct because Bennett fails to demonstrate any prejudice. Stated otherwise, he does not demonstrate a reasonable probability the result would have been different if his counsel had objected. (See *People v. Lawley* (2002) 27 Cal.4th 102, 136 [" '[A] court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of the alleged deficiencies.' "].)

Although Bennett correctly cites the standard for prejudice, he literally makes no argument how that standard demonstrates any prejudice from the prosecutor's asserted misconduct. His briefing is devoid of any such analysis. Given Bennett's failure to show prejudice, he has failed to demonstrate ineffective assistance of counsel.

5. Defendants Demonstrate No Prejudicial Instructional Error

Bitson and Bennett mount numerous challenges to the jury instructions. "In reviewing a claim of instructional error, the ultimate question is whether 'there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner.' [Citation.] '[T]he correctness of jury instructions is to

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to correct any error and mitigate any prejudice.' "
(*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328; see also *People v. Spencer* (2018) 5 Cal.5th 642, 683.)

be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.] 'Moreover, any theoretical possibility of confusion [may be] diminished by the parties' closing arguments . . . .' [Citation.] ' " 'Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case.' " ' " (*People v. Hajek and Vo*, *supra*, 58 Cal.4th at p. 1220.)

An instructional error that precludes the jury from considering an element of an offense is evaluated for prejudice under the test announced in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*People v. Larsen* (2012) 205 Cal.App.4th 810, 829 (*Larsen*).) Other instructional error is evaluated under the more lenient test in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Larsen*, *supra*, 205 Cal.App.4th at p. 829.) However, there is a split authority on which test applies where the trial court incorrectly failed to give a unanimity instruction.[5] (*People v. Napoles* (2002) 104 Cal.App.4th 108, 119, fn. 8.) For purposes of this appeal, we apply the stricter *Chapman* standard.

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[5] Bitson incorrectly argues that the alleged instructional errors were structural. "Structural errors in the criminal context include the total deprivation of the right to counsel at trial, a biased judge, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, denial of the right to a public trial, and an erroneous jury instruction on reasonable doubt." (*People v. Thomas* (2007) 150 Cal.App.4th 461, 467.)

a. Defendants' Arguments that the Trial Court Erred in Failing to Instruct Jurors on Lesser Included Offenses Lack Merit

Bitson argues that the trial court should have instructed jurors sua sponte on felony child abuse and corporal injury to a child—crimes Bitson argues are lesser included offenses of assault causing the death of a child. Bennett contends that the trial court should have instructed jurors on involuntary manslaughter based on misdemeanor abuse or battery. Defendants' arguments are unpersuasive.

The trial court must instruct on general principles of law, which includes instructions on lesser included offenses " ' " 'when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.' " ' " (*People v. Banks* (2014) 59 Cal.4th 1113, 1159, overruled on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.) " '[N]o fundamental unfairness or loss of verdict reliability results from the lack of instructions on a lesser included offense that is unsupported by any evidence upon which a reasonable jury could rely.' " (*People v. Avila* (2009) 46 Cal.4th 680, 707.)

This court independently reviews whether the trial court improperly failed to instruct on a lesser included offense. (*People v. Banks, supra*, 59 Cal.4th at p. 1160.) For purposes of this appeal, we assume without deciding that the offenses of child abuse and corporal injury to a child are lesser included offenses of assault causing death of a child.

i. No substantial evidence showed Bitson committed only child abuse or corporal injury to a child

Child abuse occurs when "[a]ny 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, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered . . . ." (§ 273a, subd. (a).)

Corporal injury to a child is committed when a person "willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition." (§ 273d.)

Assault causing death of a child is committed by "[a]ny person, having the care or custody of a child who is under eight years of age, who assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death . . . ." (§ 273ab, subd. (a).)

Bitson fails to identify any substantial evidence supporting the theory that she committed only child abuse or corporal injury to a child, rather than assault causing death of a child. The difference between the assumed lessers and the greater offense is that the greater requires the child's death. Here, it was undisputed that Woods died as a result of a fatal assault, severing his liver into two pieces. Both Ribe and Arnold-Clark testified that Woods died nonaccidentally as the result of a forceful blow to his abdomen. Given this undisputed evidence Bitson cannot reasonably argue that the injury resulted only in a

traumatic condition or a situation endangering Woods's health. The undisputed evidence showed Bitson committed the greater, not the assumed lesser offenses, either directly or as an aider and abettor.

ii. No additional involuntary manslaughter instruction was warranted

Bennett recognizes that jurors were instructed on involuntary manslaughter. Bennett, however, argues that the trial court additionally should have instructed jurors on involuntary manslaughter based on the commission of an unlawful act not amounting to a felony, i.e., battery and misdemeanor child abuse. According to Bennett, jurors could "have found that Bennett inflicted or aided and abetted the fatal injuries during the commission of a misdemeanor battery or child abuse with no intent to kill."

Although involuntary manslaughter is a lesser included offense of murder (*People v. Prettyman* (1996) 14 Cal.4th 248, 274), Bennett fails to show any substantial evidence supported the conclusion that this case involved only misdemeanor child abuse or battery. The abuse was so severe that it killed Woods. The trial court is not required to instruct on a lesser included offense unsupported by any evidence upon which a reasonable jury could rely. (*People v. Avila*, *supra*, 46 Cal.4th at p. 707.)

Moreover, as respondent points out, the jury necessarily concluded that Bennett committed second degree murder, and not involuntary manslaughter despite having been instructed on

involuntary manslaughter.[6] By rejecting the involuntary manslaughter theory, the jury necessarily concluded that Bennett harbored the intent to kill or conscious disregard for human life. By resolving the issue adversely to Bennett under other properly given instructions, Bennett suffered no prejudice from any error in failing to give a lesser included involuntary manslaughter instruction based on misdemeanor child abuse or battery. (*People v. Prettyman*, *supra*, 14 Cal.4th 248, 276.)

b. Defendants' Challenges to the Absence of a Unanimity Instruction Lack Merit

Bitson argues that the trial court committed instructional error when it failed sua sponte to instruct the jury with CALCRIM No. 3500, known as the unanimity instruction, on both charged counts.[7] That instruction ensures that where the

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[6] The trial court instructed jurors: "When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter." The trial court also instructed jurors: "In order to prove murder the People have the burden of proving beyond a reasonable doubt that the defendant acted with intent to kill or with the conscious disregard for human life. If the People have not met either of these burdens, you must find the defendant not guilty of murder."

[7] CALCRIM No. 3500, which was not given provides: "The defendant is charged with _____ <insert description of alleged offense> [in Count] [sometime during the period of _____ to _____].

"The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People

evidence shows separate acts that each could support a conviction, the jury must agree unanimously which act the defendant committed in order to reach a verdict. Bitson argues that the evidence demonstrated that Bitson could have aided and abetted Woods's death by a single act or omission, for example if the jury found she was present when Bennett delivered the fatal blow and she failed to intervene.

Bennett's argument is more nuanced. He contends that the unanimity instruction was required on the child abuse charge, which was the target offense for the murder charge under a natural and probable consequences theory. He asserts he was never charged with felony child abuse under section 273a, subdivision (a). Instead, the prosecution charged defendants with child homicide and second degree murder on a single date. The prosecution never charged a continuous course of conduct. He further asserts the prosecution alleged several distinct acts during Woods's short life and that none constituted continuous child abuse and none was close in time.

We do not have to decide whether the trial court erred in failing to give the unanimity instruction. As set forth below, we conclude any such error was harmless beyond a reasonable doubt.

"Under *Chapman*, '[w]here the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that [the] defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless.' [Citation.] For example, where the defendant offered the same defense to all criminal acts, and 'the jury's verdict

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have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

implies that it did not believe the only defense offered,' failure to give a unanimity instruction is harmless error. [Citation.] But if the defendant offered separate defenses to each criminal act, reversal is required. [Citations.] The error is also harmless '[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence . . . .' " (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 577.)

Bitson argues that she was prejudiced because "the evidence was weak" both that she engaged in a continuous course of conduct and that she participated in the final blow that severed Woods's liver. The overwhelming and largely undisputed evidence belies Bitson's argument. Eyewitnesses saw and heard Bitson abuse Woods. Bitson hit Woods so many times it prompted her neighbor to call the police. Bitson chastised her neighbor for reporting the repeated abuse. Carrington also considered calling the police, but Hawkes warned him to remain silent. Bitson lied about having Woods evaluated by a physician after his eyes were crossed after she prevented the physician from even examining Woods. Although Bitson argued that all of the witnesses against her lied, the verdict demonstrates that the jury rejected that argument. Additionally, the jury could not have disagreed on which blow Woods suffered was the fatal one because that evidence also was undisputed. In short, jurors resolved the credibility dispute raised by Bitson, and Bitson identifies no prejudice from the absence of the unanimity instruction.

Bennett also fails to demonstrate prejudice. According to him, "The extensive time gaps between the abuse showed

Bennett could not have continuously abused [Woods]. The instructional omission allowed the prosecutor to improperly argue Bennett committed a continuous course of child abuse leading to [Woods]'s death. The prosecutor's argument allowed the jury to convict Bennett of some act without agreeing on which act Bennett committed or failed to commit."

By convicting Bennett of assault causing death of a child, jurors necessarily concluded that he committed an act that caused the child's death. They were required to conclude "[t]he death would not have happened without the act." It was undisputed that the blow to Woods's abdomen, which severed his liver caused Woods's death. Contrary to Bennett's argument the jurors necessarily agreed that he was either a direct perpetrator or aider and abettor of the fatal act—the one that severed Woods's liver in two. Thus, based on the entire charge, Bennett offers no viable theory that jurors could disagree on what act he committed or failed to commit. Moreover, jurors necessarily rejected Bennett's defenses: that he was not in a caretaking relationship with Woods and that Bitson was responsible for the abuse. Under these circumstances, the assumed error in failing to give the unanimity instruction was harmless beyond a reasonable doubt.

c. Bitson Demonstrates No Error In Instructing Jurors that They Did Not Have to Agree whether Defendant Was a Perpetrator or an Aider and Abettor

The trial court instructed jurors: "You need not unanimously agree, nor individually determine, whether a defendant is an aider or abettor or a direct perpetrator. The individual jurors themselves need not choose among the theories

so long as each is convinced of guilt. There may be a reasonable doubt that a defendant was the direct perpetrator, and similar doubt th[at] he or she was the aider and abettor, but no such doubt that he or she was one or the other."

Bitson correctly states: "The jury need not unanimously agree on whether the defendant was an aider and abettor or a direct perpetrator of the offense." Then, she argues: [T]he trial court erred in instructing jurors that they did not have to unanimously agree on whether she was an aider and abettor or a direct perpetrator. Bitson's argument is contrary to California law.

Jurors are not required to decide unanimously whether a defendant was a direct perpetrator or an aider and abettor. (*People v. Wilson* (2008) 44 Cal.4th 758, 801.) In *Culuko*, *supra*, 78 Cal.App.4th 307, the court held that a trial court does not err in instructing jurors that there is no unanimity requirement concerning whether the defendant was a perpetrator or an accomplice. Even if jurors could not decide whether a defendant was the perpetrator or an aider and abettor "it would be 'absurd . . . to let the defendant go free because each individual juror had a reasonable doubt as to [her] exact role.' " (*Id*. at p. 323.) Bitson demonstrates no error.

Bitson makes numerous other statements unsupported by the record or legal authority. She states the instruction was "misleading because it excused the unanimity requirement." This statement fails to show a unanimity instruction was required, and we have already rejected that claim. Bitson argues that the challenged instruction allowed jurors to "collectivize" her guilt with Bennett's, but the trial court instructed jurors "[y]ou must separately consider the evidence as it applies to each

defendant." Bitson correctly points out that the aider and abettor's mens rea may be greater than that of the direct perpetrator (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120), but she fails to show how that principle assists her. In short, Bitson demonstrates no error in the instruction.

Bitson also identifies no prejudice from the instruction. Her claim that she suffered prejudice because "the jury could have found there was a reasonable doubt that Appellant [Bitson] was the direct perpetrator and a reasonable doubt she was an aider and abettor, and still found Appellant guilty of both counts anyway" is unpersuasive. The challenged instruction did not allow jurors to convict if they found Bitson was neither a perpetrator nor an aider and abettor. It simply instructed jurors that they did not need to agree on her role. The prosecutor similarly argued that jurors did not have to agree on which defendant inflicted the fatal blow, but they had "to agree that they were both involved either as perpetrator or as aider's and abettors."

d. The Trial Court Did Not Err In Rejecting Bennett's Request for an Instruction on Parental Discipline

Earlier Bennett argued there was no substantial evidence that he was Woods's caregiver. Now, in contrast, he argues that the court erred in refusing his request to instruct the jury on justifiable parental discipline, implicitly arguing that he was a parent. According to Bennett "[t]he jury could have found Bennett did not commit any acts of abuse; only discipline."

Under CALCRIM 3405, the instruction Bennett's trial counsel requested regarding justifiable discipline would apply if "a reasonable person would find that punishment was necessary

under the circumstances and that the [ ]physical force . . . used was reasonable." (CALCRIM 3405.) The trial court concluded the instruction was not warranted because no substantial evidence supported the conclusion that Woods's injuries were inflicted in the course of discipline. The trial court also concluded that no substantial evidence showed that the purported discipline was reasonable.

Bennett fails to show the trial court erred in concluding no substantial evidence showed that the force inflicted on Woods was reasonable. (See *People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1050 [corporal punishment is unjustified when it is excessive].) It was undisputed that the force Bennett characterizes as discipline broke Woods's bones, lacerated him, bruised him, and severed his liver into two pieces. Jurors necessarily concluded that Bennett used force "likely to produce great bodily injury" and that his act "caused the child's death." Given these findings, Bennett's conduct cannot be described as justifiable parental discipline.

e. Defendants Demonstrate No Prejudicial Error In Instructing Jurors on a Parent's Legal Duty

In the context of instructing jurors on murder, the trial court gave the following instruction: "A parent or guardian has a legal duty to protect his or her child or a child under their care and custody. [¶] If you conclude that the defendant owed a duty to . . . [Woods], and the defendant failed to perform that duty, his or her failure to act is the same as doing a negligent or injurious act."

Bitson argues that the word "injurious" should instead have been "affirmative." Bitson argues that she suffered

prejudice from the term "injurious" because it allowed jurors to find her "failure to perform her parental duty was the same as if she landed the fatal blow." Bitson also argues that jurors could have found her guilty of murder without finding that she had the specific intent to commit or to aid and abet a murder.

Bennett argues that the instruction should not apply to him because he was not Woods's parent.

i. Bitson demonstrates no prejudicial error

For purposes of this appeal, we assume for argument's sake that the term "injurious" should have been "affirmative." In her argument, the prosecutor used the term "affirmative," not the term "injurious." The (assumed) error was harmless beyond a reasonable doubt under the test in *Chapman*, *supra*, 386 U.S. at p. 24. (See *People v. Harris* (1994) 9 Cal.4th 407, 424-426 [applying *Chapman* test to instructional error that concerns incorrect instruction on element of offense].)

Substituting the word injurious for the word affirmative could not have harmed Bitson. The charged conduct, as well as the target offense, were indisputably injurious. Bitson cannot reasonably argue that her failure to protect Woods from a fatal blow severing his liver into two pieces was only affirmative, not injurious. Moreover, in convicting Bitson of child assault homicide, the jurors found that Bitson's act caused Woods's death. Thus, jurors necessarily concluded she perpetrated or aided and abetted the fatal act.

Bitson's argument that jurors could have convicted her of murder without concluding she harbored the requisite mens rea ignores the instructions as a whole. The trial court instructed jurors that specific intent was a prerequisite to second degree

murder. Jurors also were instructed that when defendant intentionally acted or intentionally failed to act the defendant "knew his or her act or failure to act was dangerous to human life; and "[h]e or she deliberately acted or failed to act with conscious disregard for human life." Additionally, jury rejected a theory of involuntary manslaughter, and thereby necessarily concluding that Bitson acted with express or implied malice.

iii. Bennett demonstrates no prejudicial error

As noted, Bennett argues that the instruction on a parent's legal duty should not have applied to him because he was not Woods's biological parent.

We need not decide whether the parental duty should be extended to a person such as Bennett holding himself out as a parent and fulfilling a parental role. In this case, reversal is not warranted because Bennett demonstrated no prejudice under any standard. Bennett's entire argument that he suffered prejudice is as follows: "The evidence failed to prove Bennett aided and abetted any of Bitson's actions. The evidence showed that Bitson alone inflicted the injuries. No evidence showed that Bennett, with knowledge of Bitson's unlawful purpose and with the intent of committing, encouraging, or facilitating that purpose, aided and abetted Bitson in the commission in the commission of those acts. At best the evidence would support Bitson's conviction for the charged offenses on the theory that she was the actual perpetrator of those crimes."

Bennett's argument is based on a mischaracterization of the record. The undisputed evidence showed that Bennett was a direct perpetrator of abuse and supported the inference that he encouraged Bitson. Although the jury could have found that

either Bitson or Bennett inflicted the fatal blow, overwhelming evidence showed that both Bennett and Bitson abused Woods. Bennett suspended Woods from his arm and then dropped him. Bennett hit Woods. Bennett prevented Woods from leaving the bedroom he shared with defendants and T. Bennett threatened Carrington if Carrington continued to feed Woods, contributing to Woods's starvation. Bennett also encouraged Bitson by accompanying her to pick up Woods from Shelton and Todd and by threatening Woods over the phone. Together defendants required Woods to hold a box of brakes for 30 to 45 minutes. Even if Bitson initiated the abuse, Bennett encouraged and participated in it. After Woods's death, Bennett covered up his and Bitson's role and he attempted to dissuade his sister from reporting the abuse.

Additionally, when the instructions are viewed as a whole, jurors necessarily concluded that Bennett's act caused Woods's death. The instructions further required that the act would "directly and probably result in the application of force" and that the force was "likely to produce great bodily injury." Thus, even if the court erred in instructing jurors that they could consider Bennett's failure to act in determining murder, in assessing child assault homicide, jurors necessarily concluded that it was Bennett's act that caused Woods's death either as a direct perpetrator or as an aider and abettor. Given this finding, Bennett cannot demonstrate any prejudice from the challenged instruction.[8]

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[8] We find no cumulative error. Although Bennett requests to join in Bitson's "relevant" argument, he identifies no argument benefitting him. Moreover, Bitson raises no viable challenge that would assist either her or Bennett.

6. The Case Must Be Remanded for the Trial Court to Exercise Its Discretion Whether to Strike the Serious Felony Conviction

Under current law, a trial court did not have the authority "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (§ 1385, subd. (b).) Senate Bill No. 1393, adopted September 30, 2018, amended sections 667 and 1385 to omit this restriction, thus granting trial courts discretion to strike the prior conviction as it relates to the five-year sentence enhancement under section 667, subdivision (a)(1). (See Sen. Bill No. 1393 (2017-2018 Reg. Sess.); *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) The amendments will become effective January 1, 2019. (Cal. Const., art. IV, § 8, subd. (c)(1).)

Bennett argues that Senate Bill No. 1393 applies retroactively to his case, and we therefore should remand so the trial court may exercise its discretion and decide whether to strike the serious felony enhancement. Respondent acknowledges that after January 1, 2019, the statute applies retroactively to defendant. Because Bennett's sentence will not be final prior to January 1, 2019, remand is appropriate. It would serve little purpose for us to decline to resolve his challenge as unripe only to have it return to us through some other mechanism. We thus proceed to address the issue on the merits.

Respondent argues that remand is not warranted in this case because the trial court indicated that it would not be in the furtherance of justice to reduce defendant's 80-year-to-life sentence.

We conclude that the record is silent concerning how the trial court would have exercised its discretion. Although the trial

court indicated that Bennett had an active role in the child abuse, the court did not consider whether striking the serious felony enhancement would be in furtherance of justice. The trial court expressed no intention to impose the maximum sentence. Remand therefore is necessary for the trial court to exercise its newly-obtained discretion. (Cf. *People v. McDaniels* (2018) 22 Cal.App.5th 420, 426-427.)

DISPOSITION

The judgments are affirmed. The case is remanded to the trial court to decide whether to strike the five-year enhancement for Bennett's prior serious felony conviction and if the enhancement is stricken, to resentence defendant.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J. CHANEY, J.