FOR PUBLICATION

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

REYNALDO MANILA
Defendant-Appellant.

Supreme Court Appeal No. 02-017-GA
Superior Court Criminal Case No. 00-0509-CR

OPINION

Cite as: *Commonwealth v. Manila,* 2005 MP 17

Submitted on August 18, 2004
Rota, Northern Mariana Islands

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; TIMOTHY H. BELLAS, Justice P*ro Tempore*

DEMAPAN, Chief Justice:

¶ 1 In this appeal, Defendant-Appellant Reynaldo Manila ("Manila") appeals his conviction by the trial court for second degree murder and child abuse. Manila alleges error in the trial court's jury instructions. Because we find that there was no error in the jury instructions, the trial court's conviction and sentencing orders are AFFIRMED.

I.

¶ 2 Manila and his girlfriend Virgie Carolino ("Virgie") were friends with Jonathan Mendoza ("Jonathan") and Lori Dizon ("Lori"). Virgie was the godmother of Jonathan and Lori's daughter, N.R.M. ("N.R.M." or "baby"). Jonathan and Lori worked nights, and Manila would occasionally babysit N.R.M.

¶ 3 On October 27, 2000, Jonathan and Lori dropped off N.R.M. at Manila and Virgie's residence at about 4:30 p.m. When Virgie came home around 10:00 p.m. that night, Manila told her that N.R.M. had fallen off the bed. Virgie saw two red bruises on the baby's forehead; the larger of the two was approximately the size of a quarter.

¶ 4 At approximately 7:00 a.m. on October 28, 2000, Jonathan picked up the baby. He noticed the red bruises on the baby's forehead, and was informed that the baby fell from the bed.

¶ 5 Later that day at about 4:30 p.m., Jonathan and Lori dropped off the baby at Manila and Virgie's residence. Virgie was at work, thus Manila was the sole custodian of N.R.M. that evening. At around 11:00 p.m., Virgie came home from work and found Manila lying next to the baby watching television. Virgie checked on N.R.M. and found that she was lethargic. Although rushed to the hospital, the baby died.

¶ 6 Several doctors testified at trial as to the cause of death. Dr. Angela Takano testified that the baby died of multiple blunt force traumas to the head, which included Shaken Baby Syndrome. Dr. David Khorram testified that the type of hemorrhaging was not typical of external trauma, but rather Shaken Baby Syndrome. Dr. Sydney Kometani was also of the opinion that the baby died of Shaken Baby Syndrome. Dr. David Southcott, a radiologist, testified that he did not see any fractures in the skull. Thus, the findings of_these doctors and their expert medical opinions supported Shaken Baby Syndrome as the cause of death.

¶ 7 The only doctor that did not state an opinion as to the cause of N.R.M.'s death was Dr. Francois Claassens. Dr. Claassens testified that the injuries may have been caused by a pathological phenomenon in which a hit to the front of the head causes the back of the brain to bruise, but he did not issue an opinion as to the cause of N.R.M.'s death.

¶ 8 On October 22, 2001, Manila objected to the jury instructions. He argued that the instructions should require the jury to be unanimous as to the cause of death for conviction. Manila also objected on other grounds, questioning whether the child abuse charge merges into the second degree murder charge.

¶ 9 On October 23, 2001, the jury rendered its verdict and found Manila guilty of both counts, second degree murder[1] and child abuse[2] and the trial court entered a corresponding *Judgment Order* on November 13, 2001. After a sentencing hearing, the trial court entered a *Sentencing Order* on June 19, 2002, and sentenced Manila to sixty (60) years imprisonment for the crime of second degree murder. For the crime of child abuse, the court imposed a $5,000.00 fine and sentenced Manila to five (5) years imprisonment to run concurrently with his sentence for second degree murder. Manila timely filed this appeal.

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[1] 6 CMC § 1101(b).

[2] 6 CMC § 5312(a)(1).

II.

¶ 10 This Court has jurisdiction pursuant to Article IV, Section 3 of the Commonwealth Constitution and 1 CMC § 3102(a).

III.

¶ 11 The issues presented for review are:

1. Whether a specific unanimity instruction to the jury is required as to the cause of death in a murder case;
2. Whether a specific unanimity instruction to the jury is required as to the act underlying a conviction for child abuse; and
3. Whether the offense of child abuse is a lesser-included offense of second degree murder, and thus did the sentencing of Manila for second degree murder and child abuse violate the Double Jeopardy Clause.

¶ 12 The first two issues require the review of jury instructions. Therefore, "we must assess whether the jury instructions 'as a whole' were misleading or inadequate to 'guide the jury's deliberation.'"[3] The third issue, dealing with lesser-included offenses, is reviewed *de novo*.[4]

IV.

A. A Specific Unanimity Instruction is Not Required as to the Factual Basis Underlying the Conviction for Second Degree Murder.

¶ 13 Manila asserts that the trial court erred because the jury instructions did not require specific unanimity as to N.R.M.'s cause of death. According to Manila, there were two scenarios, presented to the jury, which could have caused N.R.M.'s death: "[t]he first scenario – a baby is shaken so violently that the whiplash smashes her brain against her skull. The second scenario – the baby is hit with a blunt object smashing her skull."[5]

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[3] *Commonwealth v. Cabrera*, 4 N.M.I. 240, 249 (1995) (*citing United States v. Varela*, 993 F.2d 686, 688 (9th Cir. 1993)).

[4] *Commonwealth v. Kaipat*, 4 N.M.I. 300, 303 n.10 (1995), *Commonwealth v. Oden*, 3 N.M.I. 186, 191 (1992).

[5] *Reynaldo Manila's Opening Brief* at 5.

¶ 14 According to the United States Supreme Court, when a crime may have been committed in various ways, jurors need not be unanimous as to the way in which the criminal act was committed. In his concurring opinion in *Schad v. Arizona*,[6] Justice Scalia stated:

> [I]t has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission. *See, e.g., People v. Sullivan*, 173 N.Y. 122, 65 N.E. 989 (1903); cf. H. Joyce, Indictments §§ 561-562, pp. 654-657 (2d ed. 1924); W. Mikell, Clark's Criminal Procedure §§ 99-103, pp. 322-330 (2d ed. 1918); 1 J. Bishop, Criminal Procedure §§ 434-438, pp. 261-265 (2d ed. 1872). That rule is not only constitutional, it is probably indispensable in a system that requires a unanimous jury verdict to convict. When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her.[7]

¶ 15 We agree with the principle that when a single crime can be committed in various ways, jurors need not agree upon the exact mode of commission. Ultimately, however, we need not apply this principle to the case at bar, as there was only one cause of death presented to the jury.

¶ 16 The quotation from *Schad*, *supra*, was cited in *Francis v. Texas*,[8] which Manila cited as supplemental authority.[9] *Francis* involved a defendant convicted of one count of indecency with a child, but two different offenses involving indecency were introduced at trial. On appeal, the court in *Francis* stated that the quotation from Justice Scalia, reproduced *supra*, “lend[s] guidance . . . in solving appellant’s issue.”[10] The court in *Francis* compared the United States Supreme Court’s opinion in *Schad*, in which one killing occurred but it may have been

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[6] *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991).

[7] *Id.*, 501 U.S. at 649-50, 111 S. Ct. at 2506, 115 L. Ed. 2d at 557 (Scalia, J., concurring).

[8] *Francis v. Texas*, 36 S.W.3d 121 (Tex. Crim. App. 2000).

[9] *Defendant’s Correction of Cited Authority Pursuant to Rule 28(j) of the Commonwealth Rules of Appellate Procedure*, filed August 16, 2004.

[10] *Francis*, 36 S.W.3d at 124.

premeditated or felony-murder, and the Fifth Circuit's opinion in *United States v. Holley*,[11] in which the defendant was charged with two counts of perjury and each count alleged multiple statements. The *Francis* court concluded that the reasoning of the *Holley* case was applicable and the instructions to the jury created the possibility of a non-unanimous jury verdict:

> Looking at the *Schad* opinion, the *Holley* court noted that the two cases entertained different factual scenarios. In *Schad*, one single killing occurred. But in *Holley*, a single count encompassed two or more separate offenses. Because the jury instruction did not require jurors to agree on the falsity of one particular statement, the court concluded, "there was a reasonable possibility that the jury was not unanimous with respect to at least one statement in each count."
>
> Applying the Holley reasoning to the instant case, the jury charge given in appellant's case created the possibility of a non-unanimous jury verdict.[12]

¶ 17 Other cases cited by Manila reached similar conclusions. In *Midence v. Texas*, the Court of Appeals of Texas found that the jury charge created the possibility of a non-unanimous verdict. The jury charge "instructed the jury to find appellant guilty if they found he assaulted either Jesse Rodriguez, or Charles Nance."[13] The court held that because the assault on Jesse Rodriguez was a different offense from the assault on Charles Nance, they should have not been charged in the disjunctive. "The trial court's charge allowed the possibility of six jurors convicting appellant of the assault on Jesse Rodriguez and six jurors convicting appellant of the assault on Charles Nance. Appellant was entitled to a unanimous jury verdict. Therefore, the trial court erred in charging appellant in the disjunctive."[14]

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[11] *United States v. Holley*, 942 F.2d 916 (5th Cir.1991).

[12] *Francis*, 36 S.W.3d at 124 (citation and footnote omitted).

[13] *Midence v. Texas*, 108 S.W.3d 564, 565 (Tex. App. 2003).

[14] *Id*. (citation omitted).

¶ 18 In *Thanh Cuong Ngo v. Texas*, the "appellant assert[ed] that his right to a unanimous verdict was violated by the disjunctive submission in the jury charge of two or more separate offenses."[15] The court applied the reasoning of *Francis*:

> A trial court may submit a disjunctive jury charge and obtain a general verdict where the alternate theories involve the commission of the "same offense." [*Francis v. Texas*, 36 S.W.3d 121, 124 (Tex. Crim. App. 2000) (other citations omitted)]. However, because of the possibility of a non-unanimous jury verdict, "separate offenses" may not be submitted to the jury in the disjunctive. [*Id*. at 124-25]. Thus, we must determine whether the jury charge in this case merely charged alternate theories of committing the same offense or whether the jury charge included two or more separate offenses charged disjunctively.[16]

The Court of Appeals of Texas found that the criminal acts at issue in *Thanh Cuong Ngo* did not constitute the "same offense," thus the jury instructions were improper.[17]

¶ 19 Manila also cites another Texas case, *Clear v. Texas*. There, the defendant was convicted of the offense of aggravated sexual assault of a child. The jury charge allowed a conviction based upon a disjunctive finding among three separate offenses. On appeal, the court in *Clear* ruled that this was improper. "[W]e conclude that the error in the charge is egregious because it deprived Clear of his right to a unanimous jury verdict in that we cannot determine that the jury was unanimous in finding Clear guilty of either penetration offense."[18] Moreover, the State admitted that the trial court erred by charging in the disjunctive, in light of *Francis*.[19]

¶ 20 These cases cited by Manila all have a common theme: the jury instructions were improper because the jury could have found the defendant guilty of "separate offenses" and thus there may

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[15] *Thanh Cuong Ngo v. Texas*, 129 S.W.3d 198, 199 (Tex. App. 2004).

[16] *Id*. at 201.

[17] *Id*.

[18] *Clear v. Texas*, 76 S.W.3d 622, 624 (Tex. App. 2002).

[19] *Id*. at 623.

have not been jury unanimity. This is not the case here, however, as there is only one killing and thus only one offense was submitted to the jury. The facts of this case demonstrate that a specific unanimity instruction with regard to the cause of death was unnecessary because the expert testimony consistently supported only one cause of death: Shaken Baby Syndrome.

¶ 21 Dr. Takano testified that N.R.M. died due to multiple blunt traumas to the head, and this can include Shaken Baby Syndrome.[20] She stated that the lucid interval[21] would be less than twenty-four hours, thus the injury could not have happened more than twenty-four hours prior to when the baby was brought to the hospital.[22] She testified that the bruises were not caused by Shaken Baby Syndrome and that they were unrelated to the death of N.R.M.[23]

¶ 22 Dr. Khorram, a board-certified ophthalmologist, was also called as an expert witness. He testified that the eye injuries and the bleeding inside N.R.M.'s eyes were consistent with Shaken Baby Syndrome.[24] On a scale of one to four, with four being the most severe, Dr. Khorram testified that the severity of the retinal hemorrhage was a "plus three which is a moderately severe amount of retinal hemorrhage which would correlate with a[] moderately severe amount of shaking."[25]

¶ 23 Dr. Komentani, a board certified pediatrician, also gave her opinion as to the cause of N.R.M.'s death. She testified that Shaken Baby Syndrome was the cause of death.[26]

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[20] Excerpts of Record ("E.R.") at 12-13.

[21] The lucid interval is the timeframe in which the baby was conscious after the injury. E.R. at 13.

[22] E.R. at 14.

[23] E.R. at 16.

[24] E.R. at 77.

[25] E.R. at 26-27.

[26] E.R. at 72.

¶ 24 In addition, there were no abnormalities noticed in N.R.M.'s skull. Dr. Southcott, a radiologist, testified that in his review of the CT scans of N.R.M. he did not notice any fractures in N.R.M.'s skull.[27]

¶ 25 Thus, the findings of all of these medical experts who testified at trial were consistent with the cause of death as Shaken Baby Syndrome. The only medical expert that did not state Shaken Baby Syndrome was the cause of death was Dr. Francois Claasens, who did not have a final opinion about the cause of N.R.M.'s death.[28]

¶ 26 Manila's assertion that there were two scenarios presented to the jury, one in which N.R.M. was shaken violently and another in which a blunt object smashed her skull, is incorrect. In fact, Manila's briefs have numerous misrepresentations of the record. For example, Manila stated that "Dr. David Southcott, a Radiologist [sic] testified that he could see fractures in the skull and the width of the fracture depends on the amount of force applied to the head."[29] Later in his opening brief, Manila stated, "Dr. Takano testified that the baby died of multiple blunt force trauma. Dr. Southcott testified that he could see fractures in the skull, which would lend credence to Dr. Takano's blunt force trauma conclusion."[30]

¶ 27 These are misrepresentations of the testimony of Dr. Southcott and Dr. Takano. Dr. Southcott testified that when he reviewed the CT scan of N.R.M. he "didn't see any abnormality of the skull."[31] Dr. Southcott was then asked if he could hypothetically see skull fractures in an infant if indeed skull fractures were present:

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[27] E.R. at 74.

[28] E.R. at 57.

[29] *Reynaldo Manila's Opening Brief* at 5.

[30] *Id.* at 6.

[31] E.R. at 74.

> Commonwealth: [I]f there's trauma to the skull for I say a six month old infant, would you be able to see any type of a trauma to the skull or evidence of that?
> Dr. Southcott: Ahh, I could see skull fractures.
> Commonwealth: You would be able to see skull fractures?
> Dr. Southcott: Yeah, some.[32]

Thus, Dr. Southcott did *not* see any fractures in N.R.M.'s skull. As evidenced by reading Dr. Southcott's testimony reproduced *supra*, Manila's paraphrasing of Dr. Southcott's testimony is misleading and false.

¶ 28 In addition, Manila's paraphrasing of Dr. Takano's testimony is similarly deceptive. Manila contends that Dr. Takano's medical opinion was at odds with the doctors that testified that the cause of death was Shaken Baby Syndrome.[33] This is absolutely false. Dr. Takano testified that there were hemorrhages on the back of N.R.M.'s retinas, caused by "sheer forces" which are "rotational forces or whiplash type of forces that have been applied somehow to the baby's skull and eyes."[34] When asked by the Commonwealth, "[s]o when you . . . say whiplash do you mean, like a sudden jerking of the head?" Dr. Takano replied, "That's right."[35] Dr. Takano's testimony continued as follows:

> Commonwealth: Now based upon your training, your education and experience the autopsy you performed on six month old [N.R.M.] within the bounds of reasonable medical certainty have you formed an expert opinion concerning the cause of death of baby [N.R.M.]?
> Dr. Takano: Yes, I have.
> Commonwealth: And could you tell us that opinion?

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[32] E.R. at 74-75.

[33] *Reynaldo Manila's Opening Brief* at 6-7. "In summary, two of [the] prosecution's expert witnesses were of the opinion that N.R.M.'s injuries were cause [sic] by blunt force trauma cause [sic] from some external force. Two of the prosecution's expert witnesses were of the opinion that N.R.M.'s injuries were cause [sic] by violent shaking causing whiplash that made N.R.M.'s brain collide with her skull." *Id*.

[34] E.R. at 12.

[35] *Id*.

> Dr. Takano: I believe that the baby died ahh due to multiple blunt trauma to the head.
> Commonwealth: Okay, and can this include or exclude Shaken Baby Syndrom[e]?
> Dr. Takano: It can include of course baby – ahh Shaken baby Syndrom[e] and it does not exclude it.[36]

Thus, Dr. Takano's testimony was in line with the other doctors that gave their medical opinion that Shaken Baby Syndrome was the cause of death.

¶ 29 In short, all of the medical experts that gave their opinion to a medical certainty as to the cause of N.R.M.'s death stated that the cause of death was Shaken Baby Syndrome. In addition, Dr. Takano testified that the injury could not have happened more than twenty-four hours before N.R.M. was brought to the hospital. Thus, the facts of this case support only one cause of death: Shaken Baby Syndrome.

¶ 30 In light of caselaw and the factual background of this case, we find that the jury instructions as a whole were not "misleading or inadequate to guide the jury's deliberation." Thus, the trial court did not err by not requiring the jury to unanimously agree on the cause of N.R.M.'s death.

B. A Specific Unanimity Instruction is Not Required as to the Criminal Act Underlying the Conviction for Child Abuse.

¶ 31 Manila also asserts that "when there is evidence of numerous criminal acts, the prosecution must elect a single act upon which it will rely for conviction, or the court must instruct the jury that all must agree on the specific criminal act."[37] While this may be accurate in certain circumstances, neither of these alternatives was necessary in this case because there was only one criminal act proffered by the Commonwealth to the jury to find Manila guilty of both second degree murder and child abuse.

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[36] E.R. at 12-13.

[37] *Reynaldo Manila's Opening Brief* at 3.

¶ 32 “When the facts show two or more criminal acts which could constitute the crime charged, the jury must unanimously agree on the same act to convict the defendant.”[38] Accordingly, the State “must elect the specific criminal act on which it is relying for conviction, or the trial court must instruct the jury that all the jurors must agree that the same underlying criminal act was proven beyond a reasonable doubt.”[39] Exceptions apply, such as “if the evidence shows the defendant was engaged in a ‘continuing course of conduct.’”[40]

¶ 33 In the case at bar, however, the facts do not show “two or more criminal acts which could constitute the crime charged” as there is only one criminal act at issue: the alleged shaking of N.R.M., which ultimately lead to her death. Therefore, where it is clear from the evidence presented that the prosecution relies on a particular act to prove a defendant committed a crime, a specific unanimity instruction is not required for the jury to agree on a specific criminal act because there is only one act at issue.

¶ 34 Manila argues that the Commonwealth introduced evidence of bruising to the baby’s head as well as evidence of Shaken Baby Syndrome, so either the Commonwealth was required to elect the specific criminal act on which it is relying for conviction or the trial court should have instructed the jury that all the jurors must agree that the same underlying criminal act that was proven beyond a reasonable doubt. Manila is incorrect, as the record reflects that the Commonwealth did not argue that the events that resulted in the bruises established a separate incident for which the jury could find Manila guilty of either second degree murder or child abuse.

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[38] *Washington v. Fiallo-Lopez*, 899 P.2d 1294, 1298 (Wash. Ct. App. 1995) (*citing Washington v. Petrich*, 683 P.2d 173, 176 (Wash. 1984), *modified*, *Washington v. Kitchen*, 756 P.2d 105, 109 (Wash. 1988)).

[39] *Id*. (*citing Kitchen*, 756 P.2d at 109).

[40] *Id*. (*citing Washington v. Handran*, 775 P.2d 453, 457 (Wash. 1989); *Washington v. Craven*, 849 P.2d 681, 684 (Wash. Ct. App. 1993)).

¶ 35 The testimony regarding the bruises on N.R.M.'s forehead is relevant to some degree, such as to the overall care she received while she was in Manila's custody. Based upon our review of the record, the only evidence presented as to the cause of the bruising was the testimony of Virgie in which she stated that Manila told her that the baby fell off the bed. Assuming this to be true as it was the only evidence presented as to what caused the bruises, and that N.R.M. fell off the bed by accident, this would perhaps make Manila negligent but it would not make him guilty of child abuse. To be guilty of child abuse a defendant must inflict physical harm "[w]illfully and intentionally,"[41] thus mere negligence will not suffice to find a defendant guilty of this crime. We find no reason to assume that the jury convicted Manila of child abuse, a crime requiring willful and intentional conduct for conviction, for the possibly negligent act of allowing N.R.M. to fall off the bed which resulted in bruising.

¶ 36 The Commonwealth states in its brief: "[e]vidence of the bruising was material to show [that] the baby sustained other injuries while in [Manila's] care, even though the cause of those injuries was never fully developed during trial and no separate charges for the time period of Oct[ober] 26-27 were brought."[42] We agree. The expert medical testimony revealed that N.R.M. received an injury that resulted in bruising that was not life-threatening and that the bruising was unrelated to the ultimate death of N.R.M.

¶ 37 Therefore, it is evident that the testimony regarding the bruising was not introduced as a separate act in which to find Manila guilty of child abuse. There is nothing in the record to suggest that since the jury instructions did not require the jury to agree on a specific act to convict Manila of child abuse, they were somehow misleading or inadequate to guide the jury's

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[41] 6 CMC § 5312(a)(1).

[42] *Appellee's Response Brief on Appeal* at 7.

deliberation. There was only one act at issue: the alleged shaking of N.R.M. on October 28, 2000. Therefore, we find no error by the trial court with respect to this issue.

C. Child Abuse is Not a Lesser-included Offense of Second Degree Murder; a Conviction for Second Degree Murder Does Not Automatically Prove That a Defendant is Guilty of Child Abuse.

¶ 38 Manila's argument in his opening and reply briefs, with regard to this issue, is unclear. Manila stated that there were two issues for review, both of them involving alleged error in the jury instructions with regard to Manila's right to a unanimous jury verdict.[43] Manila, however, goes on to make the following argument in his opening brief in the middle of his discussion of the first unanimity issue:

> However, a paradox occurs under the blunt force trauma scenario. Manila contends that by merely proving the elements of second degree murder, the charge of child abuse is inadvertently bootstrapped into the charge of second degree murder. Child abuse is not a lesser included offense of second degree murder. By virtue of being a person under the age of 18 and under the care of a babysitter, Manila is inadvertently charged with child abuse – when, if the blunt force trauma theory is true, only the charge of second degree murder would be appropriate. This scenario twists the logic and purpose of the child abuse statute so that any offense against a person under the age of 18 with some inkling of custody is automatically guilty of child abuse. By way of example, a police officer who is too rough with a sixteen-year [sic] driver during a traffic stop, if found guilty for assault, is also guilty of child abuse. Another example would be if a teacher gets into a fight with one of his students. If the student dies and the teacher were convicted with manslaughter, the teacher is automatically guilty of child abuse.[44]

Manila also stated the following in his reply brief regarding this issue:

> The second defect, and perhaps more subtle, is the possibility of [sic] that some of the jurors may have piggy-back [sic] the Second Degree Murder conviction on the Child Abuse conviction. First, if the Court agrees with [Manila's] argument and finds that the Child Abuse charge through the First Amended Information was defective and can not stand, and some of the jurors reached the Second Degree Murder conviction based on their belief that Appellant

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43 *Reynaldo Manila's Opening Brief* at 1-2.

44 *Id*. at 7.

> Manila abuse [sic] N.R.M. Then, [sic] Second Degree Murder conviction also can not stand.[45]

¶ 39 Because this issue is suggested in terms of whether or not child abuse is a lesser included offense of second degree murder and whether proof of second degree murder automatically proves a defendant guilty of child abuse where the victim is under the age of eighteen and under the care of the defendant, we treat it as a separate issue, in order to afford Manila full review of all issues.

¶ 40 We agree with Manila that child abuse is not a lesser included offense of second degree murder. "An offense is a lesser included offense if its elements 'are a subset of the charged offense.' This determination is accomplished by a textual comparison of the pertinent statutes."[46] Therefore, a textual comparison of the second degree murder and child abuse statutes is necessary. The text of the relevant statutes read as follows:

> **Murder**.
> Murder is the unlawful killing of a human being by another human being with malice aforethought.
> (a) *First Degree Murder*. First degree murder is a murder which is:
> (1) Willful, premeditated, and deliberated;
> (2) Perpetrated by poison, lying in wait, torture, or bombing; or
> (3) One that occurs during the perpetration or attempted perpetration of arson, rape, burglary, robbery, or any sexual abuse of a child.
> (b) *Second Degree Murder*. Second degree murder is murder which is not one of the types specified as first degree murder.[47]
>
> **Child Abuse or Neglect: Offense Defined**.
> (a) A person commits the offense of child abuse if the person:
> (1) Willfully and intentionally strikes, beats or by any other act or omission inflicts physical pain, injury or mental distress upon a child under the age of 18 who is in the persons custody, such pain or injury being clearly

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[45] *Reynaldo Manila's Reply Brief* at 3-4.

[46] *Kaipat*, 4 N.M.I. at 303 (citations and footnotes omitted).

[47] 6 CMC § 1101(a)-(b).

> beyond the scope of reasonable corporal punishment, with the result that the child's physical or mental health and well-being are harmed or threatened.[48]

¶ 41 As evidenced above, the elements of child abuse are not a subset of second degree murder. The *actus reus* is different for each crime. The *actus reus* of child abuse (when a defendant "strikes, beats or by any other act or omission inflicts physical pain, injury or mental distress upon a child under the age of 18 who is in the persons custody . . .")[49] differs from that of second degree murder ("the unlawful killing of a human being by another human being.")[50]

¶ 42 Furthermore, the *mens rea* is different for each crime. Child abuse requires an act that is "willful[] and intentional[],"[51] whereas second degree murder does not require willful and intentional conduct.[52] Clearly these offenses are distinct and child abuse is not a lesser-included offense of second degree murder.

¶ 43 Whether this issue is treated separately from the other two or merged with either one, it is clear that Manila's argument ultimately fails. These crimes have distinct elements and, as Manila agrees, child abuse is not a lesser included offense of second degree murder. Thus, it is unclear as to how this alleged "bootstrapping" of a child abuse charge and second degree murder charge occurs. A conviction for second degree murder does not necessarily imply a conviction for child abuse when the victim is under the age of eighteen and under the custody of the defendant, thus there was no error here by the trial court.

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[48] 6 CMC § 5312(a)(1).

[49] *Id.*

[50] 6 CMC § 1101.

[51] 6 CMC § 5312(a)(1).

[52] 6 CMC § 1101.

V.

¶ 44 The Superior Court's *Judgment Order* and *Sentencing Order* are AFFIRMED.

SO ORDERED this 7th day of October 2005.

/s/__________________________________
MIGUEL S. DEMAPAN
Chief Justice

/s/________________________________
ALEXANDRO C. CASTRO
Associate Justice

/s/________________________________
TIMOTHY H. BELLAS
Justice P*ro Tempore*