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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ERIC CASTILLO, Defendant and Appellant.	E039686 (Super.Ct.No. RIF118575) **OPINION**

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Rhonda Cartwright-Ladendorf, Supervising Deputy Attorney General, and Raymond M. DiGuiseppe, Deputy Attorney General, for Plaintiff and Respondent.

Appendix A

If this were a book by Erle Stanley Gardner, it would be called *The Case of the Corona Cat Burglar*. In late July and early August 2004, defendant Eric Castillo committed a string of daring burglaries in the Corona area, breaking into houses in the middle of the night, while the inhabitants were home but asleep, and stealing electronic devices, purses, and vehicles.

Perry Mason, however, never lost a case. Defendant, on the other hand, stands convicted on nine counts of first degree burglary (Pen. Code, §§ 459, 460, subd. (a)), two counts of attempted first degree burglary (Pen. Code, §§ 459, 460, subd. (a), 664, subds. (a), (d)), two counts of unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a)), and one count of reckless evading (Veh. Code, § 2800.2). The trial court sentenced him to a total of 20 years in prison.

In this appeal, defendant contends:

1. The admission of testimony that defendant's girlfriend's statements to the police failed to corroborate defendant's own statements to the police violated the principles stated in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*).

2. In light of the testimony concerning defendant's girlfriend's statements to the police, the trial court erred by failing to give accomplice instructions.

3. Defendant's statements to the police should have been suppressed because the police did not advise him of his right to communicate with the Mexican consulate.

4. With respect to the burglary and attempted burglary charged in counts 7 and 8, there was insufficient evidence of defendant's identity as the burglar.

5. With respect to the burglary charged in count 11, the trial court erred by failing to instruct on the lesser included offense of attempted burglary.

6. With respect to the reckless evading charged in count 14, the trial court erred by failing to instruct on the definition of "distinctively marked."

7. In imposing an upper-term sentence on the principal count and consecutive sentences on all other counts, the trial court violated the principles stated in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*).

We will agree that the admission of the evidence concerning defendant's girlfriend's statements to the police violated *Crawford* (although defense counsel waived the error by failing to object on constitutional grounds below). We will also agree that the trial court erred by failing to give accomplice instructions. Furthermore, we will agree that the trial court erred by failing to define "distinctively marked." All three errors, however, were harmless under even the most stringent standard. We find no other error. Accordingly, we will affirm.

I

FACTUAL BACKGROUND

A. *July 23, 2004: Morton Burglary (Counts 1 & 5).*

The Morton family lived in a house on Pueblo Road in Corona. On July 23, 2004, at 12:00 or 12:30 a.m., Paul Morton got up to get some water and discovered that the

house had been burglarized. The burglar had entered through an unlocked door between the garage and a bathroom and exited through the front door, leaving it wide open. A computer, a DVD player, a Direct TV receiver, three digital cameras, CD's, DVD's, and two purses had been taken. The Mortons' silver 2001 Toyota Corolla had also been taken; the keys to it had been in one of the purses. Some cookies and a bottle of grape Juicy Juice were missing from the garage.

Around 9:00 a.m., the police found the Corolla, parked near Ridgeview Avenue and Holmes Avenue in Mira Loma. A 10-year-old boy who lived nearby told police that he saw a Hispanic male, aged 30 to 40, of medium height, get out of the car and run through his backyard. The bottle of grape Juicy Juice was found in the car, and defendant's fingerprints were found on the bottle.

One Larry Swick lived in a house on Marlatt Street in Mira Loma (not far from where the Corona was found). He testified that defendant came over to his house several times. He let defendant store "a bag full of stuff" in his home, on top of a bunk bed. Once, defendant brought over a white car -- possibly a Corolla.

Colleen Saybrook testified that, on either July 23 or 24, she saw defendant in Swick's front yard. Defendant offered to sell her various electronic items that were in the open trunk of a silver Corolla. The only other persons present were Swick and a male friend of Saybrook's. Nobody was holding a weapon or threatening defendant. Saybrook bought a DVD player and a camera from defendant. Her fingerprints were later found on a slide viewer in the trunk of the Mortons' Corolla.

After defendant was arrested, he admitted to the police that he entered the Morton house, stole the Corolla, drank some juice and ate some cookies that he claimed were already in the car, then left the car near Swick's house.

B. *July 27, 2004: Dellenbach Burglary (Count 2).*

The Dellenbach family lived in a house on Locust Street in Corona. On July 27, 2004, around 5:00 a.m., 17-year-old Justine Dellenbach awoke because the family dog, which had been sleeping in her bedroom, was whining. She opened the bedroom door for him. He went downstairs and began barking. She looked out of her upstairs bedroom window and, she testified, saw "someone leaving our house."

The barking woke Justine's mother Christine Dellenbach. When Christine said, "Show me," the dog led her out to the front porch. She then saw a man across the street, walking away, carrying a box-like object on his shoulder. She described him as being of medium height, with dark hair. The burglar had entered through a rear sliding glass door, which may have been left unlocked, and exited through the front door, which had been locked, leaving it ajar. He took a computer and a pair of tennis shoes.

On July 31, 2004, the police searched Swick's house; they found the Dellenbachs' computer printer on top of the bunk bed.

Defendant admitted to the police that he entered the Dellenbach house and took a computer from their living room. He said that their dog barked and scared him away.

C. *July 30, 2004: Multiple Burglaries*.

1. *Tsuei Burglary (Count 10).*

Wendy Tsuei lived in a house on Ridgeview Terrace in Corona. On July 30, 2004, around 2:00 or 2:30 a.m., she was awakened by her house alarm. Her sliding glass door had been opened, which would have set off the alarm. No property was missing.

Defendant admitted to police that he opened Tsuei's rear sliding glass door; he said the alarm went off, and that scared him away.

2. *Salgero Burglary (Count 12).*

The Salgero family lived in a house on Via Santiago in an unincorporated area just outside Corona. On July 30, 2004, a Kawasaki VCR/DVD player and a Harley-Davidson telephone were taken from the house. A side door was left wide open; outside a rear sliding door, a baseball cap was found.

Defendant admitted to police that he entered the Salgero house and took a CD player and a telephone.

3. *Gutierrez Burglary (Count 9).*

The Gutierrez family lived in a house on the corner of Via Santiago and Via Felipe in Corona. On July 30, 2004, sometime between 2:00 and 3:00 a.m., 12-year-old Valerie Miranda, who was lying on a loveseat in the living room, heard a sound in the hallway. Defendant, holding a flashlight, then came from the hallway into the living room. He picked up a purse and started rifling through it. Valerie could see his face by the light of the flashlight. He went into the kitchen, then ran out of the kitchen door.

Valerie's father Octavio Gutierrez was asleep in his truck, in the garage, after an argument with his wife. He awoke to find a Hispanic male, in the doorway from the house, shining a flashlight around the garage. Gutierrez yelled, "Hey." The burglar then ran back into the house and out the back door. Gutierrez testified that defendant looked "kind of" like the burglar.

The burglar had entered through an open bedroom window, after removing the screen. No property was missing. However, a purse that had been in the living room was found on the floor in the doorway to the garage. Also, the Salgeros' Kawasaki VCR/DVD player and Harley-Davidson telephone were found in the front yard, just outside the bedroom window.

Defendant admitted to police that he entered the Gutierrez house, looked though some purses, and left behind some property from the Salgero house.

4. *Haworth Burglary (Count 11).*

The Haworth family lived in a house on Via Santiago in Corona. On July 30, 2004, around 3:00 a.m., Bartley Haworth was awakened by his wife, who said she heard noises like someone trying to break in coming from their utility porch. She had turned on all the outside lights, and the noises had stopped.

The utility porch was fully enclosed and roofed. It housed a washer, a dryer, and a freezer. It had one door to the backyard and another door into the kitchen of the house. A window screen to the porch had been pushed in and broken. An attempt had been

made to jimmy the lock on the kitchen door. The door to a shed in the backyard had been opened, and various tools had been taken out of it but were left behind in the yard.

Defendant admitted to police that he removed screens from the Haworths' utility porch in an attempt to enter the house.

5. *Allen Burglary (Count 4).*

The Allen family lived in a house on Live Oak Place in Corona. On July 30, 2004, around 4:45 a.m., Molly Allen was asleep in an upstairs bedroom when she heard someone walking around. Meanwhile, her 17-year-old daughter Melissa woke up because someone walked into her upstairs bedroom. Assuming it was her father, she went back to sleep.

The Allens' dog started barking. Melissa woke up again and realized that someone holding a flashlight was looking behind a computer monitor on her desk. Meanwhile, Molly heard someone running. When she went to see what was going on, she found a computer from Melissa's room and a heater from her other daughter's room in the hallway.

The burglar had entered the garage through the garage door, which had been left partly open. He had rummaged through Molly's purse, which was in her car in the garage. He had placed a television, a camcorder, and a radio that were in the garage inside the Allens' van. The keys to the van, which had been in the van, were missing. The burglar had then entered the house through a connecting door from the garage. Finally, he ran out the front door, leaving it wide open.

Defendant admitted to police that he went into the Allen house.

6. *Miller Burglary (Count 8).*

The Miller family lived in a house on Sapphire Lane in Corona. On July 30, 2004, between 4:45 and 5:30 a.m., a burglar entered the house through a living room window that had been left partially open, but locked. Accordingly, the burglar had entered the garage via the unlocked garage door, taken a pair of pliers, and used the pliers to remove the lock on the window. He left the pliers on top of the window screen, which he had removed and left on the ground. He took a camera and two purses from the house.

Defendant denied entering the Miller house.

7. *Evans Attempted Burglary (Count 7).*

The Evans family lived in a house on Sapphire Lane in Corona. On July 30, 2004, between 5:15 and 5:30 a.m., Angelique Evans heard her dogs in the backyard barking. When she went to investigate, she found that the gate to the backyard had been opened. She saw someone running away from her house and across the street. A metal hook or clip that the Evanses used to secure the gate was missing; the police later found it near the Macias house (see below).

Defendant denied entering the Evans house.

8. *Macias Burglary (Counts 3 & 6).*

The Macias family lived in a house on Sapphire Lane in Corona, across the street from the Evans family. On July 30, 2004, sometime before 5:45 a.m., a burglar entered the Macias house by removing the screen from a dining room window that had been left

open. The burglar then entered the garage and drove off in the Maciases' white 1993 Toyota pickup truck, which contained a wallet, a white hard hat, and tools (including two compressors) worth $11,000. The keys to the pickup had been taken from a closet inside the house.

Defendant admitted to police that he entered the Macias house and stole the pickup.

When the police searched Larry Swick's house, they found tools and other items from the Maciases' truck.

9. *Police Chase (Count 14).*

On the night of July 30-31, 2004, based on information from Colleen Saybrook, the police staked out Swick's house. At 2:15 a.m., they saw the Maciases' pickup arrive. At 4:40 a.m., when it left again, a police officer in an unmarked car followed it.

A police officer in a marked patrol car soon joined in the pursuit. He turned on his lights and sirens, but the driver of the pickup did not stop. As the officer followed the pickup, it drove on the wrong side of the road for about 100 yards; it also went over the posted speed limit. It went down a dirt road through a field, at an unsafe speed for the conditions. Finally, it slid down a dirt embankment and crashed. The driver got out and ran. The officer chased him on foot, but he got away.

Defendant's fingerprints were found on a white hard hat in the pickup and on the outside of the tailgate of the pickup. He admitted to the police that he had been driving the pickup.

D. *August 9, 2004: Mejia Burglary (Count 13).*

The Mejia family lived in a house on Peacock Lane in Riverside. On August 9, 2004, at 4:00 a.m., Gabriel Mejia was awakened by his dogs barking, but he went back to sleep. The next morning, Mejia discovered that a burglar had taken various items, including a DVD player, a jukebox, and his daughter's purse. A rear sliding glass door, which had been left unlocked, was open an inch or two; the garage door was also open.

E. *August 9, 2004: Defendant's Arrest*.

On August 9, 2004, around 2:30 p.m., a police officer spotted defendant standing by a red Honda at a 7-Eleven in Corona. Two other people -- defendant's girlfriend Daisy Deleon and one Javier Rodriguez -- were in the car. Defendant admitted that the car belonged to him. Defendant was arrested. Inside the car, the police found property taken from the Mejia house. They also found latex gloves.

When the police interviewed defendant, he said four other men, including "Juan," "Pancho" and "Pablo," had forced him to commit the burglaries: "[T]hey threatened me, they killed me [*sic*], they stabbed me. They all beat me . . . ." As a result, he had "blood in [his] eyes." They had tied him up, thrown gasoline and acid on him, and burned him. At the interview, however, he had no visible burns or other injuries, even though he was wearing a short-sleeved t-shirt and shorts, nor did he offer to display any.

Defendant said the men would wait for him outside and watch him through binoculars. Some of them carried guns or knives. However, he also said they would go inside the houses with him and watch him. He did not call the police because the men

pointed guns at him. He admitted, however, that, during at least one burglary, the only person with him was Daisy Deleon.

The men would take the loot away from him. They gave him tools, which he traded for methamphetamine. They also gave him food and drugs. He said, "I just steal . . . to eat . . . or for drugs . . . ." When asked, "[W]hat was the reason you were stealing from these houses?," he replied, "I just wanted, well[,] cloth[e]s or like that."

The particulars of defendant's story kept changing. For example, at first, he said the other men just showed up with the Maciases' pickup. Next, he admitted being present when the pickup was taken. Finally, he admitted taking the pickup himself. Similarly, at first, defendant said it was the other men who took the Moltons' Corolla. Then he admitted taking it himself, although he still claimed that they gave him the keys and they put the loot in the car.

At one point, defendant said that when the alarm went off (apparently referring to the Tsuei house), the other men left in a car, but he left on foot; he did not see them again until the next day. However, when the police asked him about other burglaries that night, he said the other men came back an hour or two later and picked him up.

Defendant said these men lived among some trees under a freeway overpass, near Grand Boulevard and Third Street, and in some nearby houses. He offered to take the police to them. After the interview, the police drove defendant around while defendant pointed out houses he had burglarized. However, he did not take them to the men who had threatened him, nor did he point out any house in which they lived.

The police looked in the area around the overpass and spoke to people at nearby businesses. However, they found no evidence that anybody was living there.

Most of the burglaries took place within a few blocks, and all of them within a few miles, of each other. (See Appendix A, *post*, p. 30.) No usable fingerprints were found at the scene of any of the burglaries.

F. *Defense Evidence*.

Robert Halverson testified that he first met defendant in July 2004. A few weeks later, but still in July, defendant showed up at Halverson's house with "cuts and burns all over his body." The whites of his eyes were completely red. There was bruising and swelling around his eyes. Halverson photographed defendant's eye area, but did not photograph his other injuries. After Halverson heard that defendant had been arrested, he contacted the police.

Defendant admitted to Halverson that he was using drugs. He also admitted that he was selling stolen property, which he said he had gotten from "friends" who wanted him to sell it for them.

Larry Swick testified that he first met defendant in mid-July. At that time, defendant was homeless and living under a freeway overpass in Norco. Defendant appeared to have been beaten, because the whites of his eyes were completely red. He also had a burn on one hand.

II

DAISY DELEON'S STATEMENTS

Defendant contends the trial court erred by allowing a police officer to testify regarding out-of-court statements by defendant's girlfriend, Daisy Deleon. Defendant also contends the trial court erred by failing to instruct on accomplice testimony.

A. *Additional Factual and Procedural Background*.

Defendant told the police that Deleon had been with him during one or two of the burglaries. When asked why, he said, "She was driving."

Deleon refused to testify. Initially, she cited the Fifth Amendment; however, even after the prosecutor offered her immunity and the trial court ordered her to testify, she still refused, in the presence of the jury, and she was held in contempt.

Defense counsel objected to the admission of Deleon's statements to the police, explaining, "I have no opportunity to cross-examine the witness," and citing *Crawford*. The trial court responded, " . . . I think you're right. But we'll deal with that tomorrow. Just be prepared to discuss that tomorrow morning . . . ."

Later that same day, however, a police officer testified that he had interviewed Deleon, and that she had answered all of his questions. He was then asked:

"Q Did Daisy Deleon provide any corroboration of the defendant during [*sic*; *sc*. "doing"] the burglaries as a result of being threatened?

"A Yes.

"[DEFENSE COUNSEL]: Objection. Hearsay.

"THE COURT: Overruled.

"Q (BY [THE PROSECUTOR]) She did provide corroboration that the defendant did burglaries while being threatened?

"A Oh, no, not while being threatened, no.

"Q Was she able to verify any of the information about him being threatened?

"A No."

The next morning, defense counsel said, " . . . I didn't want to bring this up in front of . . . the jury yesterday, but I would ask the Court to admonish the People." He explained that the officer had "slipped in" some of his interview of Deleon, even though defense counsel "ha[d] had no opportunity to cross-examine [her] . . . ." The trial court did not remember the testimony. It did rule, however, that her statements to the officer were inadmissible, because "that's an end-run around *Crawford* . . . ." (Italics added.)

B. *Testimony about Deleon's Out-of-Court Statements*.

Defendant argues that the officer's testimony that Deleon's statements had failed to corroborate defendant was inadmissible hearsay and that its admission violated the confrontation clause.

The officer's testimony about Deleon's failure to corroborate defendant was indeed hearsay. It supplied information about the content of her out-of-court statements, albeit in the form of testimony about what they did *not* contain. Moreover, although hearsay is defined, in part, as a "statement" (Evid. Code, § 1200, subd. (a)), a "statement," in turn, includes "nonverbal conduct of a person intended by him as a

substitute for oral or written verbal expression." (Evid. Code, § 225, subd. (b).) Accordingly, silence, when offered to prove the *nonexistence* of a fact *not* asserted, is hearsay. (See, e.g., Evid. Code, § 1272; *People v. Preston* (1973) 9 Cal.3d 308, 314; *Carlston v. Shenson* (1941) 47 Cal.App.2d 52, 55-56.) We have not found any applicable hearsay exception. (Because we conclude that the evidence was inadmissible hearsay, we need not consider defendant's alternative contention that it was improper opinion testimony.)

Also, Deleon's statements to the police were undoubtedly "testimonial" within the meaning of *Crawford*. (See *Davis v. Washington* (2006) ___ U.S., ___, ___ [126 S.Ct. 2266, 2273-2274].) Deleon was unavailable to testify at trial, and defendant had had no previous opportunity to cross-examine her. Accordingly, the admission of the officer's testimony about her out-of-court statements violated the federal confrontation clause. (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 53-56.)

The People argue that defendant waived any contention based on the confrontation clause by failing to object on this ground at trial. We agree. (Evid. Code, § 353, subd. (a).) A hearsay objection is insufficient to preserve a confrontation clause claim. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) Moreover, when defense counsel did raise the confrontation clause issue, even belatedly, he did not move to strike the testimony; he merely asked the trial court to admonish the prosecutor not to elicit such evidence again.

We also believe that the error was harmless under any standard. A violation of the federal confrontation clause requires reversal unless it was harmless beyond a reasonable

doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [106 S.Ct. 1431, 89 L.Ed.2d 674].) Among the "factors courts should consider in determining whether such an error is harmless beyond a reasonable doubt . . . are 'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.'" (*People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1225, fns. omitted, quoting *Van Arsdall*, at p. 684.)

Defendant admitted committing nearly all of the burglaries; his main defense was duress. His duress claim, however, was not credible. His story kept changing, then changing again, always in the direction of admitting that he did more, while the mystery men who forced him to commit the burglaries did less.

Defendant told police that the mystery men waited outside the houses; if so, all he had to do was call the police while he was inside. Of course, he contradicted himself by also claiming that they entered the houses with him. None of the burglary victims, however, saw more than one burglar. When defendant was seen getting out of the Mortons' Corolla, no one was with him. He even admitted that when he crashed the Maciases' pickup and ran away, there was no one with him. Saybrook testified that when defendant offered to sell her stolen goods, none of the mystery men were present and no one was threatening him.

Defendant also claimed that the mystery men had stabbed him, cut him, and burned him. However, he had no visible injuries, nor did he offer to show the police any injuries that were not visible. Similarly, while defendant kept telling the police that he could take them to the mystery men, he failed to do so, and they could not find any evidence that the men ever existed.

Admittedly, Robert Halverson corroborated defendant's testimony that he had been beaten and burned. However, his testimony actually hurt defendant more than it helped, because, although Halverson had meticulously photographed defendant's bloodshot eyes, he had not bothered to photograph any of defendant's other supposed injuries. Larry Swick likewise testified that defendant had been beaten, but he admitted that he based his testimony solely on defendant's bloodshot eyes.

Finally, the jury could properly consider Deleon's very refusal to testify as evidence that she would not corroborate defendant. Once she had been offered immunity, she no longer had any constitutional privilege not to testify. Her refusal to therefore was admissible nonhearsay evidence that, if she were to testify, her testimony would not support defendant's duress claim. (See Sen. Com. on Judiciary, com. on Assem. Bill No. 3212 (1965 Reg. Sess.) reprinted at 29B pt. 4 West's Ann. Evid. Code (1995 ed.) foll. § 1200, p. 4 [nonassertive conduct is admissible nonhearsay evidence to prove the actor's belief in a fact, and hence to prove that the fact believed is true].)

In this context, the testimony regarding Deleon's out-of-court statements was essentially cumulative. The testimony itself was brief. By the very next morning, the

trial court had forgotten all about it. Defense counsel evidently did not consider it particularly prejudicial, because he did not move to strike it. Neither the prosecutor nor defense counsel referred to it in closing argument. Apparently the jury did not consider defendant's guilt to be a close question at all; it returned its verdicts after little more than three hours of deliberations. We are therefore convinced, beyond a reasonable doubt, that the admission of this evidence did not contribute to the verdict in any way.

C. *Failure to Give Accomplice Instructions.*

Whenever the testimony of an accomplice has been introduced, the trial court must give jury instructions defining "accomplice." (E.g., CALJIC Nos. 3.10, 3.14, 3.15, 3.17.) It must also instruct that an accomplice's incriminating testimony must be viewed with caution (e.g., CALJIC No. 3.18) and must be corroborated (e.g., CALJIC Nos. 3.11, 3.12, 3.13). (*People v. Hayes* (1999) 21 Cal.4th 1211, 1270-1271 and 1271, fn. 17; see also *People v. Zapien* (1993) 4 Cal.4th 929, 982.)

An "accomplice," for this purpose, is defined as "one who is liable to prosecution for the identical offense charged against the defendant . . . ." (Pen. Code, § 1111; see also *People v. Avila* (2006) 38 Cal.4th 491, 564-565.) Accomplice "testimony" includes "'"all out-of-court statements of accomplices . . . used as substantive evidence of guilt which are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police."' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 555, italics omitted, quoting *People*

v. Williams (1997) 16 Cal.4th 153, 245, quoting *People v. Jeffery* (1995) 37 Cal.App.4th 209, 218.)

Defendant told the police that Deleon drove him to the sites of one or two of the burglaries. He also told them that, on the night of July 29-30, she brought along two male "friends" (evidently meaning some of the men who had been threatening him). After one of them opened Tsuei's sliding glass door and set off the alarm, Deleon drove them away. Although this evidence did not prove that Deleon was defendant's accomplice as a matter of law, it was sufficient to require the trial court to give accomplice instructions.

Once again, however, the error was harmless under any standard. In part II.B, *ante*, we held that the admission of the officer's testimony regarding Deleon's statements was harmless beyond a reasonable doubt. We now conclude, for the same reasons, that the trial court's failure to instruct the jury to discount that same evidence was equally harmless.

III

FAILURE TO COMPLY WITH THE VIENNA CONVENTION

Defendant contends that, because the police failed to advise him that he had a right to communicate with the Mexican consulate, his subsequent statements to them were inadmissible. Anticipating the counterargument that his trial counsel waived this contention by failing to move to suppress the statements on this ground, he also contends that this failure constituted constitutionally ineffective assistance.

Under the Vienna Convention on Consular Relations (Vienna Convention), the "competent authorities" must, "without delay," inform a foreign national who has been arrested or detained that he or she has the right to communicate with his or her consulate. (T.I.A.S. No. 6820, 21 U.S.T. 77, art. 36(1)(b).) Penal Code section 834c was enacted in 1999 to implement the Vienna Convention. It provides, as relevant here: "[E]very peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country . . . ." (Pen. Code, § 834c, subd. (a).)

Alas for defendant, two months after he filed his opening brief, the United States Supreme Court held that a violation of the notice provision of the Vienna Convention does not require the suppression of an arrestee's subsequent statements as a remedy. (*Sanchez-Llamas v. Oregon* (2006) ___ U.S. ___ [126 S.Ct. 2669, 165 L.Ed.2d 557].) Defendant has waived the argument that Penal Code section 834c independently requires suppression by failing to raise it in his reply brief. In any event, the reasoning of *Sanchez-Llamas* convinces us that state law does not require suppression, either. Accordingly, the trial court did not err by admitting defendant's statements, and his trial counsel did not render ineffective assistance in this regard.

IV

THE SUFFICIENCY OF THE EVIDENCE OF THE BURGLARY AND ATTEMPTED BURGLARY THAT DEFENDANT DID *NOT* ADMIT

Defendant contends there was insufficient evidence to support his convictions on count 7 (Evans attempted burglary) and count 8 (Miller burglary). Although defendant admitted entering or attempting to enter all of the other homes that he allegedly burglarized, he denied entering or attempting to enter the Evans and Miller homes.

"We often address claims of insufficient evidence, and the standard of review is settled. 'A reviewing court faced with such a claim determines "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.] We examine the record to determine "whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] Further, "the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*People v. Moon* (2005) 37 Cal.4th 1, 22, quoting *People v. Catlin* (2001) 26 Cal.4th 81, 139, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560], *People v. Wader* (1993) 5 Cal.4th 610, 640, and *People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Here, on the night of July 29-30, 2004, defendant committed a string of burglaries, all in a single Corona neighborhood. In these, and in other burglaries, his general modus

operandi was to enter a house while the inhabitants were asleep, using an unlocked garage door, sliding glass door, or window. Among the items he preferred to take were electronic devices (including, in the Morton burglary, cameras) and purses. He never left any fingerprints at the houses, evidently because he wore gloves.

Around 4:45 a.m., defendant finished burglarizing the Allen house on Live Oak Place. Sometime between 4:45 and 5:30 a.m., a burglar entered the Miller House on Sapphire Lane, just two or three blocks away. This entry was made through a partially open window. When the burglar realized that the window was locked, he entered the garage, through the unlocked garage door, to get some pliers, and used them to remove the lock from the window. He took a camera and two purses. He left no fingerprints.

Sometime between 5:15 and 5:30 a.m., a prowler entered the backyard of the Evans house, also on Sapphire Lane, but was scared away by barking dogs. Angelique Evans saw someone running away across the street. He left no fingerprints.

Finally, sometime before 5:45 a.m., defendant entered and burglarized the Macias house, which was also on Sapphire Lane, just across the street from the Evans house. The metal clip the prowler had had to remove in order to open the Evanses' gate was found outside the Macias house.

Given the similarities between these burglaries, in terms of time, place, and modus operandi, it is not merely a reasonable inference that defendant committed them all -- it is almost certain. To conclude otherwise, we would have to suppose that a second cat

burglar chose to operate in the same place and at the same time as defendant, literally crossing his path.

Although defendant denied entering or trying to enter these two particular houses, the jury was not required to believe him. He could have had other reasons for denying this -- because he wanted to lessen his culpability, or simply because he forgot.

We therefore conclude that the convictions on counts 7 and 8 were supported by substantial evidence.

V

FAILURE TO INSTRUCT ON ATTEMPTED BURGLARY

AS A LESSER INCLUDED OFFENSE

OF THE BURGLARY CHARGED IN COUNT 11

Defendant contends that, in connection with count 11 (Haworth burglary), the trial court erred by failing to instruct on the lesser included offense of attempted burglary. Defendant did enter the Haworths' utility porch, but he was scared away before he was able to enter the house proper. Accordingly, this issue turns on whether there was substantial evidence that the utility porch was *not* a "house, room, . . . or other building" within the meaning of Penal Code section 459.

"[A] building's outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization. Thus, whereas decisions treat an 'ordinary, unenclosed front porch' of a house [citation] as not part of the building's outer boundary, because a

reasonable person usually would believe that a member of the general public did not need authorization to pass onto such a porch, they treat *a screen door to an enclosed porch of a house* [citations] and a locked gate covered with iron mesh in front of an enclosed and roofed front stairway of a house [citation] as part of the building's outer boundary, because a reasonable person usually would believe that a member of the general public needed authorization to walk through such a screen door or gate." (*People v. Valencia* (2002) 28 Cal.4th 1, 11, fn. omitted, italics added, quoting *People v. Brown* (1992) 6 Cal.App.4th 1489, 1497.)

Defendant does *not* appear to be arguing that the jury could have found that he did not actually *enter* the porch. To the contrary, he concedes that "[t]he evidence here established that appellant had gained entry to the utility porch . . . ." That evidence included the fact that the door between the porch and the house had been damaged in an attempt to jimmy the lock.

The utility porch was fully enclosed and roofed over. The door between the porch and the outside world was locked; defendant had to remove a window screen to get in. Thus, the utility porch was not analogous to an ordinary, unenclosed front porch; rather, it was analogous to an enclosed porch with a screen door. No reasonable person would have believed that the porch was open to the general public. As a matter of law, by entering the utility porch, defendant entered a building.

We therefore conclude that the trial court had no duty to instruct on attempted burglary in connection with count 11.

VI

FAILURE TO DEFINE "DISTINCTIVELY MARKED"

Defendant contends that, in connection with count 14 (reckless evading), the trial court erred by failing to instruct on the definition of "distinctively marked."

Reckless evading requires, among other things, that the pursuing peace officer's vehicle be "distinctively marked." (Veh. Code, §§ 2800.1, subd. (a)(3), 2800.2, subd. (a)(1).) While this appeal was pending, our Supreme Court held that a vehicle is "distinctively marked," for this purpose, "if its outward appearance during the pursuit exhibits, *in addition to* a red light and a siren, one or more features that are reasonably visible to other drivers and distinguish it from vehicles not used for law enforcement so as to give reasonable notice to the fleeing motorist that the pursuit is by the police." (*People v. Hudson* (2006) 38 Cal.4th 1002, 1010-1011, fn. omitted.) It further held that, because this definition of "distinctively marked" differs from its definition in "common parlance," the trial court has a duty to instruct on it sua sponte. (*Id*. at pp. 1011-1013.)

Here, the trial court failed to instruct on the legal definition. As the trial predated *Hudson*, this was understandable. Nevertheless, it was error.

The applicable harmless error test is "whether it appears '"'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"' [Citation.] '"To say that an error did not contribute to the verdict is . . . to find that error unimportant *in relation to everything else the jury considered on the issue in question, as revealed in the record.*"' [Citation.]" (*People v. Hudson, supra*, 38 Cal.4th at p. 1013,

quoting *People v. Hagen* (1998) 19 Cal.4th 652, 671 and *People v. Harris* (1994) 9 Cal.4th 407, 426.)

"One situation in which instructional error removing an element of the crime from the jury's consideration has been deemed harmless is where the defendant concedes or admits that element. [Citations.]" (*People v. Flood* (1998) 18 Cal.4th 470, 504.) Among the "circumstances indicat[ing] that [the] defendant effectively conceded this issue" (*ibid*.) are that the "[d]efendant never referred to this element of the crime during the trial and did not argue to the jury that the prosecution had failed to prove this element beyond a reasonable doubt . . . . Furthermore, [the] defendant presented no evidence regarding the . . . element, and failed to dispute the prosecution's evidence regarding the issue." (*Id*. at p. 505.)

In *Hudson* itself, the pursuing officers' car was a Ford Crown Victoria, equipped with a siren, a red light in the front interior, and a blue-amber blinking light in the rear; otherwise, the car was unmarked. (*People v. Hudson*, *supra*, 38 Cal.4th at pp. 1006, 1009-1010.) The Supreme Court found the error prejudicial "because the jury could have found that the police vehicle here was not distinctively marked. The model of the car does not qualify as a distinctive mark because . . . there was no evidence at trial that this model was used exclusively by the police and not by other motorists. The blue amber lights might be a distinctive mark, but under the circumstances a jury could have determined that this feature was not reasonably visible to other drivers." (*Id*. at p. 1014.)

Here, by contrast, the jury could *not* have found that the pursuing police vehicle was not distinctively marked. The pursuing officer testified that he was in "a marked patrol car," which he described as a "black and white Riverside County Sheriff's unit." Defense counsel effectively admitted or conceded that the car was distinctively marked by failing to cross-examine the officer or to present additional evidence on this issue, and failing to refer to it, in closing argument or otherwise, at trial. Hence, we are convinced beyond a reasonable doubt that the instructional error did not contribute to the verdict.

VII

BLAKELY

Defendant contends that, in imposing an upper-term sentence on the principal count and consecutive sentences on all other counts, the trial court violated *Blakely*.

Defendant admits that he is raising this contention mainly to preserve it for federal review. Our state Supreme Court has held, in *People v. Black* (2005) 35 Cal.4th 1238, that trial court fact-finding that results in the imposition of upper-term and/or or consecutive sentences pursuant to California law does not violate a defendant's federal constitutional right to trial by jury as construed in *Blakely*. As defendant acknowledges, *Black* requires us to reject his contention. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

VIII

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

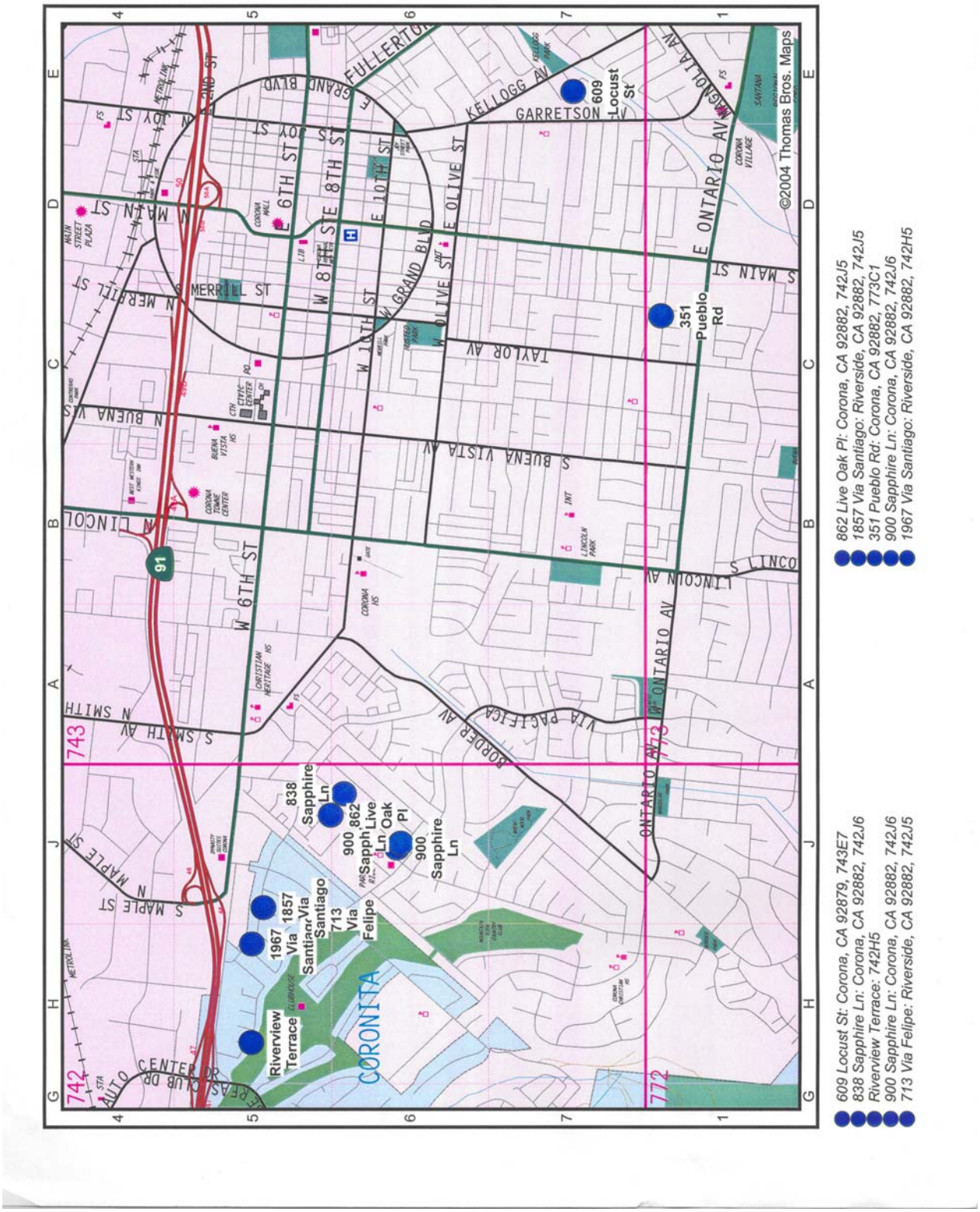
RICHLI
Acting P.J.

We concur:

GAUT
J.

KING
J.

APPENDIX



Appendix A