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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	
Plaintiff and Respondent,	E039277
v.	(Super.Ct.No. FVI021584)
JESUS RUIZ SANTACRUZ et al.,	O P I N I O N
Defendants and Appellants.	

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed with directions.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant Jesus Ruiz Santacruz.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant Ignacio Erudiel Nieblas.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General,

and David Delgado-Rucci, Bradley A. Weinreb and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

On May 6, 2005, defendants led sheriff's deputies and California Highway Patrol (CHP) officers on a high speed chase in two stolen vehicles, a Chevy Avalanche and a Dodge pickup truck. The chase spanned four Southern California counties from the Palmdale area to Fallbrook. Defendant Jesus Ruiz Santacruz was the driver of both vehicles; defendant Ignacio Erudiel Nieblas was the only passenger.

Defendants were tried before the same jury and convicted of numerous offenses stemming from the incident, including carjacking, unlawful driving, receiving a stolen vehicle, and child abuse, two counts of felony evading, and three counts of assault with a deadly weapon. The prosecution's theory of liability was that each defendant either directly perpetrated or aided and abetted the other in the commission of the crimes.

Santacruz was sentenced to 17 years 4 months in prison. Nieblas admitted a prison prior, and received a sentence of 18 years 8 months. Defendants appeal, and Nieblas joins Santacruz's contentions. We consider each defendant's contentions to the extent they may benefit the other defendant. We remand the matter for resentencing in light of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*). In all other respects, we affirm the judgments.

II. SUMMARY OF CONTENTIONS

We first address Nieblas's claim that the court erroneously denied his two *Faretta*[1] motions. The first motion was made shortly before jury selection began, and the second was made during jury selection. We conclude that both motions were properly denied.

We next consider defendants' claims that insufficient evidence supports several of their convictions; that the jury was improperly instructed on the natural and probable consequences doctrine; and that the use of that doctrine violated their right to due process because it permits criminal liability to be based on ordinary negligence. We conclude that substantial evidence supports each of defendant's convictions. We agree that the jury was erroneously instructed on the natural and probable consequences doctrine; however, we find the error harmless, and we reject defendants' due process claims.

Defendants further contend that their felony evading convictions in counts 4 and 7 were based on an impermissible "mandatory presumption" affecting the burden of proof on the "willful or wanton disregard" element of the offense. (Veh. Code, § 2800.2, subd. (b).) We reject this contention, following decisions of the Second, Third, and Fifth District Courts of Appeal. We also reject Nieblas's claim that the trial court had a duty to instruct sua sponte on the defense of accident in connection with the assault with a deadly weapon charges in counts 3 and 9.

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[1] *Faretta v. California* (1975) 422 U.S. 806, 819-822 [95 S.Ct. 2525, 45 L.Ed.2d 562] (*Faretta*).

Santacruz claims the trial court erroneously limited his cross-examination of Los Angeles County Sheriff's Deputy Carl Osterthaler regarding the deputy's age and weight. Even if Santacruz should have been allowed to ask the deputy these two brief questions, we find the error harmless.

We also reject defendants' claim the trial court coerced several of the verdicts by rereading CALJIC No. 17.41 to the jury following the foreperson's complaint that one juror was refusing to deliberate. The trial court reasonably concluded that rereading the instruction would assist the jurors in reaching a verdict. Moreover, no reasonable juror would have understood the instruction as pressuring him or her to reach a verdict or change his or her views to conform to the majority jurors' views.

Lastly, we address defendants' claims of sentencing error. We reject defendants' claims their sentences on count 4 (felony evading in the Avalanche) should have been stayed because that crime involved the same intent and objective as count 3 (assault upon Osterthaler with the Avalanche). However, because the trial court sentenced both defendants to the aggravated term of nine years on count 5 (carjacking), the matter must be remanded for resentencing. (*Cunningham, supra,* 127 S.Ct. 856.)

III. FACTS AND PROCEDURAL HISTORY

A. *Prosecution Evidence*

1. The Crimes Involving the Avalanche

On the morning of May 6, 2005, Sergio Calderon discovered that his blue Avalanche was missing from the driveway of his Redlands home. He had not given

anyone permission to drive the vehicle. There was broken tinted glass on the driveway, apparently from a break-in. Calderon reported the vehicle stolen.

At around 2:00 p.m. on May 6, Los Angeles County Sheriff's Deputy Jim Jorian, operating out of the Lancaster station, received a call regarding the location in Lancaster of a possibly stolen Avalanche. When Jorian arrived at the location, he saw a blue Avalanche parked on the street, with a Hispanic man standing just inside the open driver's side door. Another man was in the front passenger seat. As Jorian was waiting for a backup unit to arrive, he drove away from where the Avalanche was parked. When he returned, the Avalanche had left. Shortly thereafter, Jorian and another unit began looking for the Avalanche.

Osterthaler was on patrol when he spotted the Avalanche driving eastbound on Highway 138, just inside San Bernardino County. Osterthaler and another uniformed patrol officer, Deputy Mike Rust, pursued the Avalanche in separate patrol vehicles. They followed the Avalanche as it pulled off the highway and drove into the parking lot of a real estate office.

Osterthaler positioned his patrol vehicle at a 45-degree angle to the driver's side of the Avalanche, detained the occupants at gunpoint, and ordered them to show him their hands. As Osterthaler was directing the driver to show his hands, Rust positioned his patrol vehicle on the passenger side of the Avalanche. Rust also drew his weapon. At this point, Osterthaler was within 15 feet of the driver of the Avalanche. In court, he identified the driver as Santacruz.

Santacruz suddenly put the Avalanche in reverse, backed out of the parking space, smiled at his passenger, defendant Nieblas, then shifted into drive and drove between the two patrol vehicles. Santacruz accelerated so quickly that the rear tires of the Avalanche left track marks. Osterthaler jumped back to avoid the Avalanche. If he had not done so, the Avalanche would have hit him or hit the driver's door of his patrol vehicle, pinning him in the doorway of his vehicle. Instead of accelerating and driving through the two patrol vehicles and nearly striking Osterthaler, Santacruz could have gotten out of the realty parking lot by driving in the other direction.

After leaving the realty parking lot, Santacruz drove the Avalanche back onto eastbound Highway 138. Osterthaler and Rust continued to pursue it with their lights and sirens activated. The Avalanche began to drive recklessly in heavy traffic. It passed vehicles on the right shoulder, cut across traffic, and drove eastward in the westbound lanes, causing vehicles to leave the roadway. Osterthaler put out a broadcast that there was a stolen vehicle heading eastbound on Highway 138. After Osterthaler and Rust pursued the Avalanche for several minutes, their watch commander canceled their pursuit.

2. The Carjacking and Pursuit of the Dodge Truck

Los Angeles County Sheriff's Deputy Dale Ryken was searching for the Avalanche in a helicopter when he spotted it in a ditch off Highway 138 near the

Mountaintop Cafe.[2] Ryken also saw two individuals running from the Avalanche and up an embankment toward the Mountaintop Cafe. As Ryken hovered over the area in his helicopter, he saw the two suspects approach a white Dodge truck in the parking lot of the Mountaintop Cafe.

Michael M., Sr. (Michael Sr.) was in the driver's seat of the Dodge truck. His six-year-old son, Michael M., Jr. (Michael Jr.), was in the passenger seat. Michael Sr.'s wife and their daughter were in another vehicle parked next to the truck. Michael Sr. had just parked the truck and turned off the ignition when Santacruz opened the driver's side door. Santacruz was holding a knife with a serrated edge, and telling Michael Sr. to get out of the truck. Nieblas opened the passenger door and pointed a collapsible knife with a four-inch blade directly at Michael Jr. Santacruz held his knife within one foot of Michael Sr. Nieblas held his knife approximately 18 inches from Michael Jr.

Michael Sr. begged Santacruz to let his son out of the truck. Santacruz told him to get out and his son would not be hurt. After Michael Jr. got out of the truck, Michael Sr. got out. Santacruz got into the driver's seat and Nieblas got into the passenger seat. As Santacruz started the truck and began to back it up, Michael Jr. ran behind the truck and over to the driver's side, where his father, Michael Sr., was standing. The truck nearly struck Michael Jr. as he ran behind it, but he made it safely to the other side. Michael Sr.

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[2] The Avalanche was later recovered from the ditch. Its motor was running, the keys were in the ignition, and its rear window was broken.

and Michael Jr. were frightened by the incident. The truck contained around $600 worth of personal belongings, including clothing, compact discs, a wallet, and spare keys.

From his helicopter, Ryken saw the Dodge truck speed out of the parking lot and proceed onto eastbound Highway 138. Ryken followed the truck and never lost sight of it. As the truck traveled on Highway 138, it reached speeds between 90 and 100 miles per hour.

Osterthaler and Rust joined the pursuit of the truck in their separate patrol vehicles. As the truck traveled southbound on Interstate 15 (I-15) past Interstates 210 and 10 and approached Interstate 60, it reached speeds in excess of 80 to 100 miles per hour. It also switched back and forth between driving in the center divider and on the right shoulder, while crossing several lanes of traffic.

Eventually, CHP officers took the primary position in the pursuit of the truck. The CHP officers in pursuit were uniformed, and were driving marked patrol vehicles with their lights and sirens activated. Santacruz continued to drive recklessly as he proceeded south on I-15. Again, he drove in the center divider and on the right shoulder, cut off vehicles, made unsafe turning maneuvers, and reached speeds of up to 100 miles per hour. At one point, he sideswiped a vanpool van.

Santacruz evaded two sets of spike strips on I-15. A third set of spike strips was deployed on I-15 near Murietta. Santacruz drove over the third set of spike strips after driving in the center divider and on the right shoulder.

Santacruz exited I-15 at Murietta Hot Springs Road, but failed to stop at the intersection. He ran a stop sign, crossed over both lanes of the road, and got back onto

I-15 south. The pursuit proceeded into Temecula, where the truck veered across several lanes and exited at Rancho California Road. Again, the truck failed to stop at the intersection, crossed several lanes of traffic, and reentered southbound I-15.

At this point, one of the CHP officers noticed that the truck was riding lower on its right side and chunks of tire were flying off. The right tires of the truck were beginning to separate from the rims. On I-15 south of Rainbow, the right tires caught fire from the rims hitting the asphalt. The pursuit continued into San Diego County. Near Highway 76, the truck veered off I-15 to avoid another spike strip. It went over an embankment, rolled over several times, and came to rest at the bottom of the embankment.

Santacruz was found lying face down and unconscious on the passenger side of the truck, approximately five feet from the door. Nieblas attempted to flee on foot, but was apprehended. Both defendants were taken into custody. During a search of Nieblas, a sheath containing a knife with a three-inch blade was found.

B. *Defense Case*

Neither defendant testified or presented any affirmative evidence.

C. *The Verdicts and Findings*

The jury found defendants guilty as charged of unlawfully driving the Avalanche (Veh. Code, § 10851, subd. (a); count 1); receiving a stolen vehicle, the Avalanche (Pen. Code, § 496d, subd. (a); count 2);[3] carjacking the Dodge truck from Michael Sr. (Pen. Code, § 215, subd. (a); count 5); assaulting Osterthaler with a deadly weapon, the

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[3] All further statutory references are to the Penal Code unless otherwise indicated.

Avalanche (Pen. Code, § 245, subd. (a)(1); count 3); assaulting Michael Jr. with a deadly weapon, the Dodge truck (Pen. Code, § 245, subd. (a)(1); count 9); assaulting Michael Sr. with a deadly weapon, a knife (Pen. Code, § 245, subd. (a)(1); count 10); felony evading in the Avalanche and Dodge truck (Veh. Code, § 2800.2, subd. (a); counts 4 & 7); and felony child abuse upon Michael Jr. (Pen. Code, § 273a, subd. (a); count 8). The jury found that both defendants personally used knives in the commission of the carjacking, and that defendant Nieblas personally used a knife in the commission of the child abuse. (Pen. Code, § 12022, subd. (b).)

The jury found defendants not guilty of robbing Michael Sr. of the personal property in the Dodge truck. (§ 211; count 11.) The jury deadlocked 11 to 1 in favor of convicting defendants of carjacking the passenger of the truck, Michael Jr. (§ 215; count 6), and a mistrial was declared on that count. Nieblas admitted the truth of a prison prior. (§ 667.5, subd. (b).) Santacruz was on probation at the time the crimes were committed.

IV. DISCUSSION

A. *Nieblas's Faretta Motions Were Properly Denied*

Nieblas contends the trial court violated his Sixth Amendment right to represent himself by erroneously denying his *Faretta* motions. Nieblas made two *Faretta* motions. The first was made on September 1, 2005, immediately before jury selection began. The second was made on the following trial day, September 6, while jury selection was continuing. We conclude that both motions were properly denied.

1. Background

On June 2, 2005, the first amended information was filed, and defendants' joint trial was set for July 18. On July 8, trial was reset for August 29, and defendants waived time for trial, plus 60 days. At a pretrial conference on August 19, the court ordered a copy of the preliminary hearing transcript be prepared for Nieblas's conflict panel attorney, Brandon Wood, who had defended Nieblas at the preliminary hearing. The August 29 trial date was confirmed, and the matter was set for the August 25 trial readiness calendar.

On August 25, Nieblas made the first of two *Marsden*[4] motions to relieve Attorney Wood and replace him with another conflict panel attorney on the ground Attorney Wood had not sufficiently "looked into" his case. The motion was denied, and trial was reset for August 30, because Attorney Wood was engaged in another trial. The estimated time for defendants' joint trial was 30 days.

On August 30, the first day of trial, Attorney Wood was still engaged in the other trial and the matter was trailed to August 31. Both defendants told the court they were in the process of hiring private attorneys. The court ordered that both defendants, who were in custody, be allowed three phone calls each so they could arrange hiring new counsel. Still, the court admonished defendants that the matter would proceed as scheduled unless new counsel appeared the next day, August 31.

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[4] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

On August 31, the second day of trial, both defendants said they had not been allowed to make their phone calls, and the trial court again ordered that defendants be allowed to make the calls. Still, the matter proceeded as scheduled. The district attorney filed a second amended information, and both defendants pled not guilty. The trial court heard motions in limine, and ordered a bifurcated trial on Nieblas's prison prior.

On September 1, the third day of trial, Attorney Wood told the court that Nieblas had been refusing to speak with him and that Nieblas wished to make a second *Marsden* motion followed by a *Faretta* motion. Both motions were denied. At the hearing on the *Marsden/Faretta* motion, the following colloquy occurred:

"THE DEFENDANT: . . . I would like to try to do something with my case. I would like to do something for myself.

"THE COURT: What would you like to do?

"THE DEFENDANT: Look into the case and try to do some -- at least like try to do something about it, try for myself.

"THE COURT: Mr. Nieblas, let me ask you a couple of questions, okay? And please don't take this personally. I just need it for information, okay?

"What's the highest education that you've gotten?

"THE DEFENDANT: High school graduation.

"THE COURT: Have you had any law school training?

"THE DEFENDANT: No, sir.

"THE COURT: Paralegal training?

"THE DEFENDANT: No, sir.

“THE COURT: Trial training? Have you ever been like in a mock trial program?

“THE DEFENDANT: No, sir.

“THE COURT: Okay. Do you understand that . . . under *Ferretta* [*sic*], you have the right to represent yourself if the Court determines that it doesn’t become a sham or a farce? Have you ever heard the old saying that a doctor that diagnoses himself has a fool for a client? Have you ever heard that?

“THE DEFENDANT: No, sir.

“THE COURT: So when a doctor thinks that there’s something wrong with him and he diagnoses it himself, that it’s a problem because he doesn’t know what he’s doing. The same is true in the law. It’s actually even worse, especially when you’re looking at the significance of the charges for which you’re being tried.

“Do you know what the elements of a case -- of a crime is [*sic*]?

“THE DEFENDANT: I’m not sure, sir.

“THE COURT: Do you know what the elements of the carjacking is [*sic*]? Do you know what the district attorney has to prove on carjacking?

“THE DEFENDANT: That’s the reason that I’m trying to ask for that, because as long as I’m with -- that I could, *if you would let me go to the law library for myself. That’s all I’m trying to do, do something for myself, at least try to do something.*

“THE COURT: What I would be willing to do, Mr. Nieblas -- first of all, your *Marsden* motion is denied and your request for *Ferretta* [*sic*] is denied.

"But here's what I'm willing to do for you, is to allow you law library privileges during the course of this trial for the purposes -- I'm going to grant you for the purposes of law library privileges cocounsel status.

"Now, what that means is that you can go to the law library, do the research. . . . We'll give you an order to do that. Then you can talk with Mr. Wood regarding things that you read, things that you see, and he can explain them to you and how that works and whatnot. [¶] . . . [¶]

". . . I have seen young men like yourself go down very hard. I've seen defendants who have represented themselves just get blasted in court because they don't know what they're doing. And even though you think this piece of evidence should come in, if you can't present it properly it doesn't come in. So you're even in a worse situation than you were previously.

"That's why the lawyer who knows how to get things in, the evidence that you need or to ask what questions are appropriate to ask of the officers, for example, *because . . . when you act as your own attorney you're expected to act as an attorney, not as a defendant. And that's the reason why I'm denying your Ferretta [sic] motion at this time. But I will grant you cocounsel status for the law library purposes because I think that your request is legitimate. You want to know more about your case and you want to look at some books and I'm going to give you the opportunity to do that*." (Italics added.)

Thereafter, defendant told the court he had still not been allowed to make his phone calls (regarding hiring private counsel), and the court issued another order

directing that defendant be allowed to make the calls. Jury voir dire was conducted through the remainder of the day.

On September 6, the fourth day of trial, jury voir dire continued. During a break in voir dire, Nieblas renewed his *Faretta* motion. He told the court, "Your Honor, on the record I would like to exercise my constitutional right under [*Faretta, supra,* 422 U.S. 806] and be granted pro[.] per[.] status." He also said he had hired a private investigator, had not been allowed to use the law library over the weekend, and wanted "to go to the law library to do some more research about this." The court denied the renewed *Faretta* motion, saying "Based on the same issues that you brought up at the *Marsden*, your issue under *Ferrata* [*sic*] is denied." On the afternoon of September 6, the trial court put the following additional remarks on the record:

"I wanted to put on the record a little bit more regarding the *Ferrata* [*sic*] issue. I wanted to put down the fact that Mr. Nieblas has previously told me about his lack of education, he has shown during the course of this time a certain inability to communicate; that he's relying on a criminal handbook and a private investigator who is not a criminal investigator, or at least for the types of charges that we're here for; that he has previously stated he had no experience in presenting evidence, picking a jury, or acting as an attorney. And also I will find that it is not timely as we are in our third day of trial.

"The Court is citing a 199[0] case [*People v. Manago* (1990)], 220 Cal.App.3d 982 at [pages] 985 through 9[8]8 where our district [C]ourt of [A]ppeal indicated that the Court has the discretion in not allowing the defendant to represent himself if it became a

sham or a farce. And that's what I would find it would do if I were to allow Mr. Nieblas to represent himself.

"Further, *People v.* [*C*]*randall* (1988) 46 Cal.3d 833, that this appears [*sic*] to be and this is in the Court's view an attempt given the number of times that the defendants have sought to seek other counsel, to put the case over and have counsel appear that [*sic*] this is simply another attempt to delay the trial. And for those reasons the Court is denying the *Ferrata* [*sic*]."

2. Analysis

A defendant in a criminal trial has a Sixth Amendment right to represent himself. (*Faretta, supra,* 422 U.S. at p. 836.) A trial court must grant a *Faretta* motion and has no discretion to deny it provided three conditions are met: The motion is (1) unequivocal, (2) knowing and intelligent, and (3) made "a reasonable time before trial." (*People v. Welch* (1999) 20 Cal.4th 701, 729 (*Welch*); *People v. Windham* (1977) 19 Cal.3d 121, 127-128.) Motions made on the eve of trial are addressed in the sound discretion of the trial court. (*People v. Marshall* (1996) 13 Cal.4th 799, 827.)

Nieblas insists that his September 1 *Faretta* motion was timely because it was made before jury selection began. He also argues that his September 1 and September 6 *Faretta* motions were knowing, intelligent, and unequivocal. Thus, he suggests the trial court had no discretion to deny his September 1 motion. Alternatively, he argues the trial court abused its discretion in denying both *Faretta* motions.

First, it is clear the trial court had discretion to deny both *Faretta* motions because neither was made a reasonable time before trial. There is no "rigid rule" that a motion for

self-representation is to be deemed timely because it is made before actual commencement of trial. (*People v. Clark* (1992) 3 Cal.4th 41, 99.) Moreover, the purpose of the timeliness requirement is to prevent a defendant from misusing a *Faretta* motion to unjustifiably delay trial or obstruct the orderly administration of justice. (*People v. Windham, supra,* 19 Cal.3d at p. 128, fn. 5; *People v. Burton* (1989) 48 Cal.3d 843, 852.) Here, the timing of both motions certainly raised the possibility that they were designed to delay or obstruct the trial.

It is also clear that Nieblas's September 1 *Faretta* motion, made in the alternative to his *Marsden* motion, was properly denied on the grounds it was equivocal. (*Faretta, supra,* 422 U.S. at p. 835.) "'[T]he right of self-representation is waived unless defendants articulately and unmistakably demand to proceed *pro se*.'" (*People v. Marshall* (1997) 15 Cal.4th 1, 21, quoting *United States v. Weisz* (D.C. Cir. 1983) 718 F.2d 413, 426; see also *People v. Valdez* (2004) 32 Cal.4th 73, 99 [conditional demand for self-representation was ambivalent and equivocal].)

In making his September 1 motion, Nieblas did not tell the court he wanted to represent himself at trial. Instead, he said he wanted to "try to do something" for himself, such as investigate the facts and "go to the law library." In response, the trial court ordered that Nieblas be given law library access. Nieblas was satisfied with this and did not insist he be allowed to represent himself. Indeed, at the conclusion of the hearing, he complained he had not been allowed to make the phone calls the court had ordered he be allowed to make for the purpose of hiring private counsel.

Nevertheless, on the following trial day, September 6, Nieblas made a clear and unequivocal demand for self-representation. We therefore address whether the trial court abused its discretion in denying the motion. In exercising its discretion, the trial court was required to consider all relevant circumstances, including: (1) the quality of defendant's representation; (2) the defendant's prior proclivity to substitute counsel; (3) the reasons for the request; (4) the length and stage of the proceedings; and (5) the disruption or delay which might reasonably be expected to follow. (*People v. Windham, supra,* 19 Cal.3d at pp. 128-129; accord, *People v. Jenkins* (2000) 22 Cal.4th 900, 959.)

Nieblas argues the trial court abused its discretion in denying the motion because it made no effort to consider any of the *Windham* factors. Instead, he argues, the court denied the motion based solely on his low education level and his apparent inability to competently represent himself at trial.

A defendant's ability to competently represent himself is not a proper factor for a court to consider under *Faretta*. (*Welch*, *supra,* 20 Cal.4th at pp. 732-734.) "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." (*Godinez v. Moran* (1993) 509 U.S. 389, 399 [113 S.Ct. 2680, 125 L.Ed.2d 321], fn. omitted; accord, *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1529.) Thus, the trial court erred

to the extent it relied on Nieblas's lack of education or inability to competently represent himself in denying his September 6 motion. (*Welch, supra,* 20 Cal.4th at p. 734.)[5]

Although the trial court erred to the extent it relied on Nieblas's evident inability to represent himself, the court also based its ruling on evidence that both motions were made for the purpose of delaying the trial. This was a proper reason for denying both

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[5] In denying the September 6 motion, the trial court relied on this court's decision in *People v. Manago* (1990) 220 Cal.App.3d 982 (*Manago*). There, we held it was not an abuse of discretion to deny a *Faretta* motion where the defendant demonstrated he was unable to "present a rudimentary defense." (*Manago, supra,* at p. 988.) We noted that granting the *Faretta* motion under these circumstances would have allowed the defendant to turn his trial into "a mockery," or "a sham and a farce." (*Manago, supra,* at p. 988.) Thus, here, the trial court said it was not going to allow Nieblas to represent himself because his lack of legal skills and experience would have allowed his trial to become a "sham or a farce."

In *Manago,* we followed *People v. Burnett* (1987) 188 Cal.App.3d 1314 (*Burnett*), which interpreted *Faretta's* knowing and intelligent waiver of counsel requirement as *also* requiring that a defendant possess a minimal ability to competently represent himself. (*Manago, supra,* 220 Cal.App.3d at pp. 986-988.) But *Manago* and *Burnett* were decided before *Godinez* and *Welch*. In *Godinez*, the high court clarified that a trial court may not ascertain or measure a defendant's competence to waive his right to counsel by evaluating his ability to represent himself. (*Welch, supra,* 20 Cal.4th at pp. 733-734, citing *Godinez v. Moran, supra,* 509 U.S. at pp. 399-400.) Instead, *Faretta's* knowing and intelligent waiver requirement means that the defendant must be "'made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." [Citation.]'" (*Welch, supra,* at p. 733, citing *Faretta, supra,* 422 U.S. at p. 835.)

Thus, the court in *Welch* concluded that a defendant's ability to represent himself at trial, no matter how abysmal, is not a proper factor to consider in denying his *Faretta* motion. (*Welch, supra,* 20 Cal.4th at pp. 733-734.) In reaching this conclusion, the *Welch* court implicitly overruled *Burnett* and *Manago*. Earlier, in *People v. Nauton* (1994) 29 Cal.App.4th 976, 979 through 981 and footnote 2, the Third District Court of Appeal disagreed with *Manago* and *Burnett* for the same reasons expressed in *Welch*.

Faretta motions (*People v. Windham, supra,* 19 Cal.3d at p. 128), and the record amply supports it.[6]

Nieblas waited until August 25, four days before trial was scheduled to begin on August 29, to make his first *Marsden* motion to relieve Attorney Wood. After the trial court found no grounds to grant the *Marsden* motion and explained to Nieblas that Attorney Wood was an experienced, competent attorney and "a fighter," Nieblas made a second *Marsden* motion on September 1, the third day of trial, and immediately followed that motion by making an equivocal *Faretta* motion. The September 1 *Faretta* motion devolved into a simple request to conduct some legal research at the law library. Still, on the following trial day, September 6, Nieblas made an unequivocal *Faretta* motion. In the meantime, Nieblas was attempting to hire private counsel.

In view of these circumstances, the trial court reasonably concluded that Nieblas made both his *Faretta* motions for the purpose of delaying the trial. Indeed, it was reasonable to conclude that on September 6, Nieblas was not serious about representing himself, because on the previous trial day, September 1, he made it clear that all he wanted to do was "[l]ook into" his case and conduct some of his own legal research.

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[6] We also note that the trial court's September 1 inquiry concerning Nieblas's educational level and legal experience was appropriate to the extent it sought to ascertain whether Nieblas's waiver of his right to counsel was knowing and intelligent -- that is, whether Nieblas understood the consequences of his decision and the "dangers and disadvantages of self-representation." (See, e.g., *People v. Phillips* (2006) 135 Cal.App.4th 422, 428.) This is a fundamental requirement of *Faretta*. (*Faretta, supra,* 422 U.S. at p. 835.)

Moreover, "'by juggling his *Faretta* rights with his right to counsel interspersed with *Marsden* motions,'" the trial court reasonably concluded that Nieblas was "'playing "the *Faretta* game,"'" that is, he was playing games with the court in an effort to delay the trial. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1049; *People v. Williams* (1990) 220 Cal.App.3d 1165, 1168-1170.) Accordingly, both *Faretta* motions were properly denied.[7]

Lastly, we note that Nieblas's reliance on *People v. Nicholson* (1994) 24 Cal.App.4th 584 (*Nicholson*) is misplaced. There, it was held that the trial court abused its discretion in denying the defendants' *Faretta* motions, because they did not request a continuance, they had not demonstrated a proclivity to substitute counsel, and there was no showing that granting the motion would have delayed or disrupted the proceedings. (*Nicholson, supra,* at p. 592.) Nieblas emphasizes that he never requested a continuance of the trial, either on September 1 or 6. But Nieblas's failure to request a continuance does not undermine the trial court's conclusion that he was using his *Faretta* motions to delay the proceedings, in view of his demonstrated proclivity to substitute counsel and "play the *Faretta* game." As the *Nicholson* court said, had the defendants "suggested or

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[7] Contrary to Nieblas's claim that the trial court failed to consider any of the *Windham* factors, the trial court implicitly considered *all* of the *Windham* factors in denying the second *Faretta* motion -- the quality of defendant's representation, his prior proclivity to substitute counsel, his reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the grant of the motion. (*People v. Windham, supra,* 19 Cal.3d at p. 128.)

expressed an intent to delay the proceedings, the trial court would have been justified in denying their *Faretta* motions." (*Nicholson, supra,* at p. 592.)

B. *Substantial Evidence Supports Defendants' Convictions in Counts 1, 2, 3, 8, and 9*

Defendants challenge the sufficiency of the evidence supporting several of their convictions. Santacruz claims insufficient evidence supports his child abuse conviction (count 8), on the ground this crime was not a natural and probable consequence of the carjacking. He also claims insufficient evidence supports his conviction for assaulting Michael Jr. with the Dodge truck (count 9), on the ground there was no evidence he had the requisite mental state for assault.

We reject these contentions. As we explain, substantial evidence showed that Santacruz directly aided and abetted the child abuse in count 8. It is not necessary, as Santacruz argues, to analyze the sufficiency of the evidence on count 8 solely under the natural and probable consequences doctrine. We also find sufficient evidence to support Santacruz's conviction for assaulting Michael Jr. with the Dodge truck.

Nieblas claims there is insufficient evidence he aided and abetted the driving or taking away of the Avalanche (count 1) or the receipt of the Avalanche as stolen property (count 2). He further claims there is insufficient evidence to support his convictions for assaulting Osterthaler with the Avalanche (count 3) and assaulting Michael Jr. with the Dodge truck (count 9) because neither of these crimes were natural and probable consequences of the underlying target offenses of felony evading and carjacking, respectively. We also find sufficient evidence to support each of Nieblas's convictions.

1. Standard of Review

In reviewing a claim that insufficient evidence supports a criminal conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- from which a jury comprised of reasonable persons could have found the defendant guilty of the crime beyond a reasonable doubt. (*Welch, supra,* 20 Cal.4th at p. 758.) We presume in support of the judgment the existence of every fact the jury could have reasonably deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

2. Aider and Abettor Liability

The law imposes criminal liability on all "principals" to a crime. (§ 31; *People v. Nguyen* (1993) 21 Cal.App.4th 518, 529.) Principals include persons "concerned" in the commission of the crime, "whether they directly commit the act constituting the offense, or aid and abet in its commission . . . ." (§ 31.) "A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164; *People v. Beeman* (1984) 35 Cal.3d 547, 560-561.) Intent is rarely susceptible of direct proof, but may be inferred from all the facts and circumstances. (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245.) A person's mere presence at the scene of a crime, even if he or she knows or suspects a crime is occurring or is about to occur, is by itself insufficient to

sustain a conviction based on aiding and abetting. (*People v. Nguyen, supra,* at pp. 529-530, citing *People v. Durham* (1969) 70 Cal.2d 171, 181.)

3. <u>The Natural and Probable Consequences Doctrine</u>

Under the natural and probable consequences doctrine, "'[An aider and abettor] is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. . . . [¶] It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must be found by the jury.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 261 (*Prettyman*).)

"The determination whether a particular criminal act was a natural and probable consequence of another criminal act aided and abetted by a defendant requires application of an objective rather than subjective test." (*People v. Nguyen, supra,* 21 Cal.App.4th at p. 531.) The question is "whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*Ibid.*)

4. <u>Evidence Supporting Santacruz's Convictions</u>

(a) *Child Abuse (Count 8)*

Child abuse is committed by willfully placing a child in a situation likely to cause the child great bodily harm and causing the child to suffer. (*People v. Odom* (1991) 226 Cal.App.3d 1028, 1032-1033; § 273a, subd. (a).) Santacruz was convicted of child abuse (count 8), as a result of Nieblas's holding a knife to Michael Jr. when Santacruz and Nieblas carjacked the Dodge truck from Michael Sr.

Santacruz argues that insufficient evidence supports his child abuse conviction because Nieblas's commission of the crime was not a natural and probable consequence of his (Santacruz's) perpetration of the carjacking. Santacruz argues it was not reasonably foreseeable to him that Nieblas would take out a knife and threaten Michael Jr., because he (Santacruz) already had a knife pointed at Michael Sr., and pointing a knife at Michael Jr. was not necessary to accomplish the carjacking.

We disagree with Santacruz's analysis. It is not necessary to analyze Santacruz's liability for the child abuse based on the natural and probable consequences doctrine, because the evidence showed he directly aided and abetted Nieblas's commission of the child abuse. In other words, the People did not have to prove that the child abuse was a natural and probable consequence of the carjacking, because the two crimes were committed by both defendants, acting in concert, and the same conduct underlay both crimes.

Indeed, the carjacking of the Dodge truck from Michael Sr. was accomplished by both defendants, acting in concert. Defendants had just abandoned the Avalanche in the

ditch and were running from police on foot. Santacruz went to the driver's door of the Dodge truck and Nieblas went to the passenger door. Together, they pulled knives on the two occupants, Michael Sr. and Michael Jr., and quickly forced them out of the truck. By acting in concert, defendants were likely to realize their goal of escaping from police.

Moreover, the joint conduct underlying the carjacking of Michael Sr. was the same joint conduct underlying the child abuse of Michael Jr. with the knife (count 8). Based on the manner in which the crimes were committed, the jury could have reasonably inferred that Santacruz aided and abetted Nieblas's direct commission of the child abuse. Or, the jury could have reasonably inferred that Santacruz aided and assisted Nieblas in pointing a knife at Michael Jr. as a means of facilitating the carjacking of Michael Sr.

(b) *Assaulting Michael Jr. With the Dodge Truck (Count 9)*

Santacruz challenges the sufficiency of the evidence supporting his conviction for assaulting Michael Jr. with the Dodge truck (§ 245, subd. (a)(1)) on the ground there is no evidence he had the mental state required to commit the assault. He specifically argues there is no evidence he "knew of the facts necessary to make him aware that, in backing the pickup truck, he almost struck young Michael [Jr.]." In other words, he argues he is not guilty of the assault because there is no evidence he knew that Michael Jr. was either behind the truck or about to run behind the truck.

An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.)[8] Assault is a general intent crime which has "always focused on the nature of the act and not on the perpetrator's specific intent." (*People v. Williams* (2001) 26 Cal.4th 779, 785-786.) "'The gravamen of the crime [of assault] . . . is *the likelihood that the force applied or attempted to be applied* will result in great bodily injury.' [Citation.]" (*People v. Colantuono, supra,* 7 Cal.4th at p. 217.) Accordingly, specific intent to injure is not an element of assault. (*People v. Williams, supra,* at p. 786.) Instead, an assault requires "an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Id*. at p. 790.)

More specifically, "a defendant is only guilty of assault if he intends to commit an act 'which would be indictable [as a battery], if done, either from its own character or that of its natural and probable consequences.' [Citation.] Logically, a defendant cannot have such an intent *unless he actually knows those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another*, i.e., a battery. [Citation.] In other words, a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not

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[8] "The required mental state for simple assault and assault with a [deadly weapon], as charged here [citation], is the same. The greater crime varies from the lesser only in that it contains the additional element of the use of a firearm. There is no additional or different mental element." (*People v. Colantuono* (1994) 7 Cal.4th 206, 223, fn. 1 (conc. opn. of Mosk, J.).)

know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." (*People v. Williams, supra,* 26 Cal.4th at pp. 787-788, italics added.)

Thus, to be guilty of assaulting Michael Jr. with the truck, Santacruz had to be "aware of the facts that would lead a reasonable person to realize" that his act of backing up the truck "would directly, naturally and probably result" in a battery upon the child. (*People v. Williams, supra*, 26 Cal.4th at p. 788.) A defendant cannot be guilty of assault based on facts he did not know but should have known, and mere recklessness or criminal negligence is still not enough to constitute an assault. (*Ibid*., citing *People v. Colantuono*, *supra,* 7 Cal.4th at p. 219.) Although, as Santacruz points out, there is no evidence he knew that the child was running behind the truck, the evidence showed he was aware of "facts that would lead a reasonable person to realize" that his act of backing up the truck was likely to result in a battery upon the child.

The entire incident happened within seconds. There were bushes directly in front of the truck, and little room for a pedestrian to walk in front of the truck. Michael Jr. got out on the passenger side before his father got out on the driver's side. Nieblas had just pointed a knife at Michael Jr. and had forcibly separated him from his father. After Michael Sr. got out of the truck, he began yelling for Michael Jr. and was moving toward the back of the truck. The evidence suggests that Michael Jr. began moving toward the back of the truck while the passenger door was still open. All of these facts were apparent to Santacruz before he began to back up the truck. And as Santacruz began to back up the truck, Michael Sr. began yelling to his son to run faster to avoid being hit.

A reasonable person in Sanacruz's position, knowing these facts, would have realized before beginning to back up the truck, and while doing so, that the child was in danger of being hit by the truck. Under these circumstances, substantial evidence supports the jury's conclusion that Santacruz's action in backing up the truck would directly, naturally, and probably result in a battery upon the child.

5. Evidence Supporting Nieblas's Convictions

(a) *Unlawful Driving and Receiving (Counts 1 and 2)*

Nieblas was a passenger in the Avalanche; Santacruz was the driver. Nieblas claims there is insufficient evidence that he aided and abetted Santacruz's unlawfully taking or driving of the Avalanche (count 1) or that he aided and abetted Santacruz's receipt of the Avalanche as stolen property (count 2). We disagree. We conclude there is substantial evidence that Nieblas aided and abetted these crimes.

Vehicle Code section 10851, subdivision (a) provides that "[a]ny person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense . . . ."

Section 496d, subdivision (a) provides: "Every person who buys or receives any motor vehicle . . . that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any motor

vehicle . . . from the owner, knowing the property to be so stolen or obtained, shall be punished . . . .”

A defendant may not be convicted of unlawfully *taking* and receiving the same stolen vehicle. (*People v. Garza* (2005) 35 Cal.4th 866, 880-881.) He may, however, be convicted of unlawfully *driving* and receiving the same stolen vehicle following the taking of the vehicle (i.e., posttheft driving of the vehicle). (*Ibid*.) Both defendants' convictions in count 1 must have been based on the unlawful posttheft driving of the Avalanche. The prosecutor conceded there was no evidence that defendants stole the Avalanche, and argued only that defendants were unlawfully driving the Avalanche, knowing it was stolen.

As Nieblas points out and as the jury was instructed, being a mere passenger in a car, without more, is insufficient to establish a violation of Penal Code section 496d, subdivision (a) or Vehicle Code section 10851. (Special Instruction No. Two.) (*People v. Clark* (1967) 251 Cal.App.2d 868, 874; *People v. Champion* (1968) 265 Cal.App.2d 29, 32.) But here, the evidence of Nieblas's guilt in counts 1 and 2 was based on more than his status as a mere passenger in the Avalanche. It was based on substantial evidence that Nieblas, knowing the Avalanche was stolen, actively aided and abetted Santacruz's unlawful driving of the Avalanche and jointly possessed the Avalanche with Santacruz.

CALJIC No. 2.15 (Possession of Stolen Property) correctly instructed the jury: “If you find that the defendant[s were] in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the

defendants are guilty of the crime of unlawful driving or taking of a motor vehicle and possession of stolen property. Before guilt may be inferred, there must be corroborating evidence tending to prove the defendant's [*sic*] guilt. However, this corroborating evidence need only be slight and need not by itself be sufficient to warrant an inference of guilt. [¶] As corroboration[,] you may consider the attributes of possession -- time, place, and manner, that the defendants had an opportunity to commit the crimes charged, and the defendant's [*sic*] conduct and any other evidence which tends to connect the defendants with the crimes charged."

CALJIC No. 2.15 reflects the settled principle that: "Possession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt. [Citations.] . . . '[P]ossession of stolen property, accompanied by no explanation, or an unsatisfactory explanation of the possession, *or by suspicious circumstances*, will justify an inference that the goods were received with knowledge that they had been stolen. . . .'" (*People v. McFarland* (1962) 58 Cal.2d 748, 754, italics added.) This rule applies "whether the crime charged is theft, burglary, or knowingly receiving stolen property." (*Id.* at p. 755; see also *People v. Mendoza* (2000) 24 Cal.4th 130, 176 [upholding burglary conviction based on adequate corroborating evidence].)

As used in CALJIC No. 2.15, "conscious possession" means the defendant must knowingly *possess* the stolen property or exercise knowing dominion and control over it; it does not mean there must be direct evidence the defendant knew the property was stolen. (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1171-1172.) The requisite

possession may be actual or constructive, and it need not be exclusive. (*In re Anthony J.* (2004) 117 Cal.App.4th 718, 728.)

Regarding count 2, there is no question that Nieblas was in conscious possession of the Avalanche and that he possessed it jointly with Santacruz. Initially, the Avalanche was observed by Jorian parked on a street with one man in the front passenger seat and the other standing at the open driver's door. When Jorian returned after briefly leaving the area, the truck was no longer present. And, after Osterthaler and Rust pursued the Avalanche on Highway 138, both Santacruz and Nieblas refused to follow Osterthaler's order to get out of the Avalanche. Nieblas's refusal to follow Osterthaler's order showed that he, together with Santacruz, was exercising joint dominion and control over the Avalanche.

Regarding counts 1 and 2, the attributes of Nieblas's possession also showed he knew the Avalanche was stolen. He was in possession of the Avalanche shortly after it was stolen, and the Avalanche had a broken window. And he refused to follow Osterthaler's order to get out of the truck in the realty parking lot. Together, these facts support a reasonable inference that Nieblas knew the Avalanche was stolen.

Regarding count 1, the evidence also showed that Nieblas encouraged Santacruz's unlawful driving of the Avalanche away from the presence of Osterthaler. His refusal to get out of the Avalanche when he had the opportunity to do so and his subsequent actions in aiding and abetting the carjacking, indicated he actively aided and encouraged Santacruz's unlawful driving of the Avalanche.

(b) *Assaults of Osterthaler and Michael Jr. (Counts 3 and 9)*

Nieblas claims the evidence is insufficient to support his convictions for aiding and abetting Santacruz's assault on Osterthaler with the Avalanche (count 3) and for aiding and abetting Santacruz's assault on Michael Jr. with the Dodge truck (count 9). He argues there is no evidence that Santacruz's commission of these crimes was a natural and probable consequence of the underlying or target crimes. We disagree.

To have found Nieblas guilty as an aider and abettor to the assaults on Osterthaler and Michael Jr. under the natural and probable consequences doctrine, the jury did not have to find that Nieblas intended to aid, encourage, or facilitate the actual assaults. Instead, the jury only had to find that the assaults were a natural and probable consequence of the underlying target crimes. In the case of the assault on Osterthaler, the underlying target crimes were unlawful driving (count 1), and defendants' initial attempt to evade Osterthaler in the realty parking lot (count 4). In the case of the assault with the truck on Michael Jr. (count 9), the underlying target crime was the carjacking of the Dodge truck from Michael Sr. (count 5).

As discussed, "'[An aider and abettor] is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. . . ." (*Prettyman, supra,* 14 Cal.4th at p. 261.) Whether the assaults were natural and probable consequences of the underlying offenses is a question of fact for the jury, and requires the application of an objective test. (*People v. Nguyen, supra,* 21 Cal.App.4th at p. 531.) The question is whether, in view of all the circumstances, a reasonable person in Nieblas's position would have or should have

known that the assaults were a reasonably foreseeable consequence of the acts or crimes Nieblas aided and abetted. (*Ibid*.)

Applying these principles, the jury could have reasonably inferred that the assault on Osterthaler was a reasonably foreseeable consequence of the unlawful driving and attempt to evade police in the Avalanche. Defendants were in the process of committing these crimes when the assault on Osterthaler was committed. And, when defendants disobeyed Osterthaler's order to get out of the Avalanche at gunpoint, it was reasonably foreseeable to Nieblas that Santacruz was going to attempt to flee in the Avalanche. A natural and probable consequence of this was that Osterthaler might well be assaulted in the process of defendants' continued unlawful driving and escape from the realty parking lot. Although Santacruz did not have to drive between the two police vehicles to get out of the parking lot, a reasonable person in Nieblas's position would have realized that, in attempting to escape from the parking lot, Santacruz might strike one of the officers, particularly Osterthaler, who was standing near one of the avenues of escape.

Similarly, in view of the particular circumstances in which the carjacking was committed, the jury could have reasonably inferred that Santacruz's assault on Michael Jr. with the Dodge truck was a reasonably foreseeable consequence of the carjacking. The circumstances of the carjacking were that Michael Jr. was left standing outside the passenger side of the truck, separated from his father, and unaccompanied by an adult, after Nieblas forcibly removed him from the truck at knifepoint. In view of this circumstance, it was reasonably foreseeable to a person in Nieblas's position that Michael

Jr. would attempt to run to his father and, in backing up the truck, Santacruz would commit an assault upon the child.

C. *The Jury Was Inadequately Instructed on the Natural and Probable Consequences Doctrine Regarding Nieblas's Liability in Counts 3 and 9, But the Errors Were Harmless*

Santacruz and Nieblas contend the jury was inadequately instructed on the natural and probable consequences doctrine relative to several of the charged crimes. Nieblas claims the trial court prejudicially erred in failing to instruct the jury to specifically determine whether the charged crimes of Santacruz's assaults on Osterthaler and Michael Jr. (counts 3 and 9, respectively) were natural and probable consequences of the unlawful driving (count 1) and felony evading (count 4) in the case of the assault on Osterhaler, or the carjacking (count 5), in the case of the assault on Michael Jr. Regarding Nieblas's claims, we agree that the instructions on the natural and probable consequences doctrine relative to counts 3 and 9 were erroneous. Nevertheless, we find the errors harmless.

Santacruz claims the trial court prejudicially erred in failing to instruct the jury to specifically determine whether the charged crime of Nieblas's child abuse (count 8) was a natural and probable consequence of Santacruz's carjacking of the truck from Michael Sr. (count 5). He also claims the trial court had a duty to instruct the jury to determine whether his assault on Michael Jr. with the Dodge truck (count 9) was a natural and probable consequence of the commission of carjacking (count 5) or the felony evading in the Dodge truck (count 7). We need not address these claims in light of our conclusion that Santacruz directly perpetrated the assault on Michael Jr. with the truck (count 9) and

that he aided and abetted Nieblas's commission of the child abuse upon Michael Jr. (count 8).

1. Error in CALJIC No. 3.02

As given, CALJIC No. 3.02 (Principals—Liability for Natural and Probable Consequences) failed to identify each charged offense for which defendants were alleged to be liable, under the natural and probable consequences doctrine, and failed to tie each charged offense to the underlying target offenses. In lieu of identifying any charged crimes and underlying target offenses, the instruction identified uncharged, lesser included offenses of several charged, greater offenses.[9] But under the natural and

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[9] As given, CALJIC No. 3.02 instructed the jury: "One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime but is also guilty of any other crime committed by a principal which is the natural and probable consequence of the crimes originally aided and abetted.

"In order to find the defendant guilty of the crimes charged you must be satisfied beyond a reasonable doubt that:

"1. The crimes as charged were committed;

"2. That the defendant aided and abetted those crimes;

"3. That a co-principal in that crime committed the crimes as charged;

"4. That the crimes committed were a natural and probable consequence of the crimes charged.

"a. The crime of Penal Code Section 240, assault, was a natural and probable consequence of the commission of the crime of Penal Code Section 245[, subdivision] (a)(1), assault with a deadly weapon.

"b. The crime of Vehicle Code Section 2800.1[, subdivision] (a), evading an officer, was a natural and probable consequence of the commission of the crime of Vehicle Code Section 2800.2[, subdivision] (a), evading an officer with willful or wanton disregard.

"c. The crime of Penal Code Section 273a[, subdivision] (b), child endangerment, was a natural and probable consequence of the commission of the crime of Penal Code Section 273a[, subdivision] (a)[,] child abuse.

"d. The crime of [Penal Code section] 487, grand theft, was a natural and probable consequence of the crime of Penal Code Section 211, robbery.

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probable consequences doctrine, the issue is not whether a lesser included offense is a natural and probable consequence of a greater offense.[10] The issue is whether a charged crime was a natural and probable consequence of an intended, target crime that the defendant aided and abetted. (*Prettyman, supra,* 14 Cal.4th at p. 261.)

Where, as here, the prosecution relies on the natural and probable consequences doctrine as a theory of a defendant's liability, and the jury is instructed on the doctrine, the trial court has a duty to identify and describe for the jury, on its own initiative, the underlying target offenses which are supported by substantial evidence. (*Prettyman, supra,* 14 Cal.4th at pp. 266-267.) Identifying and describing the target offenses is necessary to "minimize the risk that the jury, generally unversed in the intricacies of

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"e. The crime of Penal Code Section 484, petty theft, was a natural and probable consequence of the commission of the crime of Penal Code Section 211, robbery.

"In determining whether a consequence is 'natural and probable,' you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen.

"You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted as long as you're satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified and defined target crime and that the crime alleged were [*sic*] the natural and probable consequence of the commission of that target crime."

[10] Other instructions identified lesser, necessarily included offenses to the charged offenses. For example, CALJIC No. 9.00 instructed that assault was a lesser, necessarily included offense of assault with a deadly weapon; CALJIC No. 12.85 instructed that misdemeanor evading was a lesser, necessarily included offense of felony evading; and CALJIC No. 14.02 instructed that theft was a lesser, necessarily included offense of robbery.

criminal law, will 'indulge in unguided speculation' [citation] when it applies the law to the evidence adduced at trial." (*Id*. at p. 267.) Identifying and describing the target offenses also assists the jury in properly determining whether a defendant who aids and abets a target crime is liable for another, charged crime under the natural and probable consequences doctrine. (*Ibid*.)

Under the natural and probable consequences doctrine, "the jury must decide: whether the defendant (1) with knowledge of the confederate's unlawful purpose; and (2) with the intent of committing, encouraging, or facilitating the commission of any target crime(s); (3) aided, promoted, encouraged, or instigated the commission of the target crime(s). The jury must also determine whether (4) the defendant's confederate committed an offense *other than* the target crime(s); and whether (5) the offense committed by the confederate was a natural and probable consequence of the target crime(s) that the defendant encouraged or facilitated." (*Prettyman, supra,* 14 Cal.4th at p. 271.)

Here, the trial court's instructions encompassed each of these five aspects of the natural and probable consequences doctrine.**[11]** Thus, the instructions did not withdraw an

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11 The jury was further instructed that, "One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime but is also guilty of any other crime committed by a principal which is the natural and probable consequence of the crimes originally aided and abetted." (CALJIC No. 3.02.) And, "In determining whether a consequence is 'natural and probable,' you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur

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element of an offense from the jury's codetermination. (*Prettyman, supra*, 14 Cal.4th at pp. 271-272.) Instead, the instructions were somewhat ambiguous because they left open the possibility that the jury might engage in unguided speculation concerning what specific target offenses underlay Nieblas's alleged liability for the assaults in counts 3 and 9. (*Id.* at p. 272.)

In reviewing an ambiguous instruction that does not withdraw an element of an offense from the jury's consideration, "'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.'" (*Prettyman, supra,* at p. 272*,* citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385].) And here, it is not reasonably likely that the jury misapplied CALJIC No. 3.02 or the natural and probable consequences doctrine in finding Nieblas guilty on counts 3 and 9.

First, it was clear from the facts surrounding the crimes that the unlawful driving of the Avalanche (count 1) and felony evading in the Avalanche (count 4) were the target offenses underlying the assault on Osterthaler with the Avalanche (count 3), and that the carjacking (count 5) was the target offense underlying the assault on Michael Jr. with the

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[footnote continued from previous page]
if nothing unusual has intervened. 'Probable ' means likely to happen. [¶] You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted as long as you're satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified and defined target crime and that the crime alleged were [*sic*] the natural and probable consequence of the commission of that target crime." (*Ibid*.) The jury was also instructed that mere presence at the scene of a crime and mere knowledge that a crime is being committed do not amount to aiding and abetting. (CALJIC No. 3.01.)

Dodge truck (count 9). Indeed, defendants were in the process of unlawfully driving the Avalanche and evading police in the Avalanche when Santacruz assaulted Osterthaler with the Avalanche. And they were in the process of committing the carjacking when Santacruz assaulted Michael Jr. with the Dodge truck.

The prosecutor also made it clear to the jury that unlawful driving was one of the target offenses underlying count 3. In closing argument, the prosecutor asked the jury, "Is it a natural and probable consequence of riding in a stolen car [the Avalanche] that the driver would attempt to run over a police officer in an effort to get away?"

For these reasons, it is not reasonably likely that the jury was confused or engaged in "unguided speculation" regarding other possible target offenses underlying the assaults on Osterthaler or Michael Jr. For the same reasons, it is not reasonably probable that the outcome of the trial would have been any different had the error not occurred. (See *Prettyman, supra,* 14 Cal.4th at pp. 270-274 [applying *Watson*[12] standard of review to failure to instruct on alleged target offense of burglary].)

D. *The Natural and Probable Consequences Doctrine Did Not Violate Defendants' Due Process Rights*

Santacruz contends that the natural and probable consequences doctrine violated his right to due process of law, because it allowed the jury to find him criminally liable for child abuse of Michael Jr. based on his mere negligence, even though his direct liability for the crime requires a more culpable mental state. Nieblas joins this contention

[12] *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).

relative to his aggravated assault convictions in counts 3 (Osterthaler) and 9 (Michael Jr.), without further argument.

The same due process challenge to the natural and probable consequences doctrine was raised and rejected in *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 108 (*Coffman*). There, one of the defendants, Coffman, was convicted of murder, and the jury was instructed on the natural and probable consequences doctrine relative to the charged offense of murder. (*Id*. at pp. 16, 106, 108.) In rejecting Coffman's due process claim, the court reasoned that, "Liability as an aider and abettor requires knowledge that the perpetrator intends to commit a criminal act together with the intent to encourage or facilitate such act; in a case in which an offense that the perpetrator actually commits is different from the originally intended crime, the natural and probable consequences doctrine limits liability to those offenses that are reasonably foreseeable consequences of the act originally aided and abetted." (*Id*. at p. 108.)

We are bound by *Coffman* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455); accordingly, we reject defendants' identical due process claims. Furthermore, the *Coffman* court implicitly reasoned that the liability of an aider and abettor under the natural and probable consequences doctrine is predicated on much more than mere negligence; it is also predicated on the aider and abettor's intentional act of aiding, facilitating, or encouraging a direct perpetrator's commission of a target offense, with knowledge of the direct perpetrator's criminal purpose. (*Coffman, supra,* 34 Cal.4th at p. 108; see also *Prettyman, supra,* 14 Cal.4th at p. 261.)

As Santacruz points out, the jury in *Coffman* necessarily found that the defendant intended to kill based on special circumstance findings. (*Coffman, supra,* 34 Cal.4th at p. 106; CALJIC No. 8.81.17.) This fact, however, does not change our conclusion. Regardless of whether the jury had found that Coffman intended to kill, it could have convicted her of murder based on her liability as an aider and abettor under the natural and probable consequences doctrine.

E. *Defendants' Felony Evading Convictions (Counts 4 and 7) Were Not Based on an Impermissible Presumption Affecting the Prosecution's Burden of Proof*

Santacruz claims the statute on felony evading, Vehicle Code section 2800.2, contains an impermissible "mandatory presumption" on the "willful or wanton disregard" element of the offense, in violation of his due process right to have the jury determine the element of the offense. Nieblas joins this claim without further argument. We do not agree.

The same argument defendants raise here has been considered and rejected by the Second, Third, and Fifth District Courts of Appeal. (*People v. Pinkston* (2003) 112 Cal.App.4th 387 [Second District]; *People v. Williams* (2005) 130 Cal.App.4th 1440 [Third District]; *People v. Laughlin* (2006) 137 Cal.App.4th 1020 [Fifth District]; see also *People v. Mutuma* (2006) 144 Cal.App.4th 635 [Fifth District].) For the reasons explained in these opinions, we reject defendants' claims.

It is a misdemeanor to attempt to evade a uniformed peace officer in a marked patrol car with its lights and sirens activated. (Veh. Code, § 2800.1, subd. (a).)[13] It is an alternate misdemeanor felony if the evader drives with "willful or wanton disregard for the safety of persons or property." (Veh. Code, § 2800.2, subd. (a).)[14] Here, Nieblas and Santacruz were charged and convicted of two counts of felony evading. (*Ibid*.; counts 4 and 7.)

Subdivision (b) of Vehicle Code section 2800.2, the statute in issue here, states: "For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under [Vehicle Code] Section 12810 occur, or damage to

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[13] Vehicle Code section 2800.1, subdivision (a) provides: "Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor . . . if all of the following conditions exist: [¶] (1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) The peace officer's motor vehicle is distinctively marked. [¶] (4) The peace officer's motor vehicle is operated by a peace officer . . . and that peace officer is wearing a distinctive uniform."

[14] Vehicle Code section 2800.2, subdivision (a) provides: "If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year. . . ."

property occurs." The jury was given CALJIC No. 12.85, which set forth the statutory definition of "willful or wanton disregard."[15]

Defendants argue that subdivision (b) of Vehicle Code section 2800.2 contains a constitutionally impermissible "mandatory presumption." They argue that the statute and the instruction reflecting it, CALJIC No. 12.85, lessened the prosecution's burden of proof on the "willful or wanton disregard" element of felony evading, because it *required* the jury to infer "willful or wanton disregard" based on three or more traffic point violations.

"A mandatory presumption tells the trier of fact that if a specified predicate fact has been proved, the trier of fact *must* find that a specified factual element of the charge has been proved, unless the defendant has come forward with evidence to rebut the presumed connection between the two facts. [Citations.] In criminal cases, a mandatory presumption offends constitutional principles of due process of law because it relieves the prosecutor from having to prove each element of the offense beyond a reasonable doubt. [Citations.]" (*People v. Williams, supra,* 130 Cal.App.4th at pp. 1444-1445.)

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[15] As pertinent here, CALJIC No. 12.85 told the jury: "A willful or wanton disregard for the safety of persons or property also includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time the person driving commits three or more Vehicle Code violations, such as failing to stop in the event of an accident, reckless driving, excessive speed, unsafe lane change or damage to property occurs. [¶] 'Willful or wanton' means an act or acts intentionally performed with a conscious disregard for the safety of persons or property. It does not necessarily include an intent to injure."

Vehicle Code section 2800.2, subdivision (b), however, does not contain a mandatory rebuttable presumption. Rather, "it sets out the Legislature's *definition* of what qualifies as willful and wanton conduct . . . [and] establishes a rule of substantive law . . . ." (*People v. Pinkston, supra,* 112 Cal.App.4th at p. 392; accord, *People v. Williams, supra,* 130 Cal.App.4th at pp. 1445-1446, *People v. Mutuma, supra,* 144 Cal.App.4th at p. 641, and *People v. Laughlin, supra,* 137 Cal.App.4th at p. 1025.) "A rule of substantive law defines in precise terms conduct that establishes an element of an offense as a matter of law. [Citation.] There is no presumption and there is nothing to rebut." (*Id.* at p. 1026.)

In other words, Vehicle Code section 2800.2, subdivision (b) does not *lessen* the prosecution's burden of proving the element of "willful or wanton disregard." Instead, it *defines* one way the element can be proved as a matter of law -- that is, by proof of three or more violations that are assigned a traffic point count. (See *People v. Pinkston, supra,* 112 Cal.App.4th at pp. 392-393.) "Three point violations are willful and wanton disregard by definition, so there is nothing other than their existence for the jury to find." (*People v. Mutuma, supra,* 144 Cal.App.4th at p. 641.)

Although three or more point violations do not necessarily compel the conclusion that a defendant acted with a willful or wanton disregard for the safety of persons or property, "*as that term has traditionally been defined*," Vehicle Code section 2800.2, subdivision (b) has "greatly expanded the meaning of the phrase 'willful or wanton disregard for the safety of persons or property' to include conduct that ordinarily would not be considered particularly dangerous." (*People v. Laughlin, supra,* 137 Cal.App.4th

at p. 1025, italics added, citing *People v. Howard* (2005) 34 Cal.4th 1129, 1138 [felony evading is not an inherently dangerous felony for purposes of second degree felony-murder rule].) We therefore reject defendants' claims that Vehicle Code section 2800.2, subdivision (b) and the instruction reflecting it, CALJIC No. 12.85, lessened the prosecution's burden of proof on the "willful or wanton disregard" element of the felony evading counts.

F. *The Trial Court Did Not Have a Duty to Instruct on the Defense of Accident*

Nieblas was convicted of aiding and abetting Santacruz's assaults upon Osterthaler and Michael Jr., respectively, with the Avalanche and Dodge truck (counts 3 and 9). Relative to these counts, he contends the trial court prejudicially erred in failing to give, on its own motion, a modified version of CALJIC No. 4.45 on the defense of accident. He did not request any form of the instruction.[16] We conclude there was no duty to give the instruction sua sponte.

A trial court must instruct sua sponte on defenses, but only if there is substantial evidence to support the defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 157.) The defense of

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[16] In its standard form, CALJIC No. 4.45 reads: "When a person commits an act or makes an omission through misfortune or by accident under circumstances that show [no] [neither] [criminal intent [n]or purpose,] [nor] [[criminal] negligence,] [he] [she] does not thereby commit a crime." But when, as here, the charged crimes are general intent crimes, the reference to criminal negligence in CALJIC No. 4.45 should be deleted. (*People v. Lara* (1996) 44 Cal.App.4th 102, 110.) Thus, Nieblas argues, the instruction should have been modified to read: "'When a person commits an act through misfortune or accident under circumstances that show no criminal intent or purpose, he does not thereby commit a crime.'"

accident, as reflected in CALJIC No. 4.45, is based on section 26, which provides, in pertinent part, "All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Five—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence."

It is important to remember that Nieblas's liability for the assaults in counts 3 and 9 was based on the prosecution's theory that the assaults were a natural and probable consequence of Nieblas's aiding and abetting Santacruz's unlawful driving and felony evading (relative to the assault on Osterthaler) and carjacking (relative to the assault on Michael, Jr.). There was no evidence that Nieblas aided and abetted the underlying crimes of unlawful driving, felony evading, or carjacking, *by accident*. Nor is it a defense that the assaults occurred by accident. The proper defense or argument would be that the assaults were not reasonably foreseeable or were not natural and probable consequences of the underlying target crimes, in view of all of the circumstances. (*Prettyman, supra,* 14 Cal.4th at p. 261.)

Indeed, Nieblas's newly discovered defense of accident is based on the remarks of Santacruz's counsel during closing argument that the assault upon Osterthaler happened "really fast," and that Santacruz did not realize he nearly hit Michael Jr. because the boy's head could barely be seen above the truck bed. These arguments, and the evidence supporting them, effectively constituted a defense that the assaults were not reasonably foreseeable, or were not natural and probable consequences of the underlying target

crimes. In sum, there was no duty to instruct on the defense of accident, because there was no evidence to support the defense.

G. *The Trial Court Did Not Coerce the Jury's Verdict*

Santacruz claims the trial court coerced several of the verdicts by rereading CALJIC No. 17.41 during deliberations. Nieblas joins this contention without further argument. We find it without merit.

1. Background

During the second full day of deliberations and after the jury had been deliberating for nearly five hours, the jury foreperson sent a note to the court listing, by number, several complaints about the conduct of one of the jurors. In the note, the foreperson indicated the juror did not appear to be impartial, refused to follow the law and instructions, and was steadfastly holding to her views while refusing to consider the views of the other jurors. After conferring with counsel, the court discussed the matter with the foreperson outside the presence of the other jurors. The following exchange occurred:

"THE COURT: Would you please take your seat up here? [¶] I got a note and it's one that concerns us.

"THE JURY FOREPERSON: Yes.

"THE COURT: What I would like to do is go number by number [in your note] and just kind of get an idea of what it is that you're talking about.

"THE JURY FOREPERSON: Okay.

“THE COURT: All right. [Reading the note,] ‘One juror does not seem to be able to be impartial by way of actions. Example, calling the defendants ‘kids,’ ‘teenagers,’ and making statements like the [district attorney] is piling on charges to these kids.’

“Now, the one thing that I want to point out is that every juror is entitled to their own opinion.

“THE JURY FOREPERSON: Right.

“THE COURT: I don’t know that No. 1 in and of itself is -- is that the extent of that number?

“THE JURY FOREPERSON: That’s the extent of . . . No. 1.

“THE COURT: Okay. Now, No. 2 says: ‘Using conjecture and scenarios not following the jury instructions. Example, not willing to follow the law as stated.’ [¶] Now, that one really concerns me.

“THE JURY FOREPERSON: Yeah.

“THE COURT: Can you give me an example of how this person is not following the law?

“THE JURY FOREPERSON: This is what the other jurors were saying, because this person is coming up with different scenarios than what we heard from the jury box of what was happening.

“How do I explain that one? That’s a good one. They’re stating that, Well, one person was completely innocent of all charges and just a passenger, and we should just give it to the other person. Or that person will agree that that person needs to be charged

with all the charges; that aiding and abetting is not -- that nothing else is coming into play. And she's using her personal opinion against the witnesses. Does that make sense?

"THE COURT: Well, it does but it depends on what the opinion is. Is it an opinion from her own experience? Is it an opinion -- is it just her opinion that she's stating? Is it something that somebody told her to say?

"THE JURY FOREPERSON: We're not sure. I believe that it's coming from her own personal belief, and as the other jurors were stating to me -- there's about four of them that came to me. [¶] . . . [¶]

"THE JURY FOREPERSON: And as far as following the law, we've had it stated to us or stated outright. We've read it from the jury thing and it's pretty self-explanatory in there, and she's like, Nope. And that's it. And she's arguing with everyone else.

"THE COURT: Is it a situation where you guys are talking about facts, talking about the law, and she's basically crossing her hands and saying, I'm not going to deliberate?

"THE JURY FOREPERSON: Yes.

"THE COURT: All right.

"No. 3: 'Labeling witnesses, making derogatory remarks, doubting the integrity of witnesses.'

"Again, everybody is entitled to their opinion.

"THE JURY FOREPERSON: Yeah.

“THE COURT: And I’m not sure that -- I mean, they shouldn’t be making derogatory opinions about anybody, I don’t think, but that’s my own personal, opinion, okay?

“THE JURY FOREPERSON: Yeah.

“THE COURT: But certainly jurors are entitled to do that.

“THE JURY FOREPERSON: Okay.

“THE COURT: So I don’t know that [No.] 3 in and of itself is that bad.

“THE JURY FOREPERSON: No. Just she was calling certain witnesses chubby and things like this. And it was --

“THE COURT: Child what?

“THE JURY FOREPERSON: Chubby.

“THE COURT: Oh, chubby.

“THE JURY FOREPERSON: Yeah. It just causes a little more dissention in there, and we didn’t -- I don’t feel that that’s appropriate, you know. [¶] . . . [¶]

“THE COURT: No. 4 is: ‘Causing disruption and delays in the jury room, not allowing others to speak.’

“What do you mean by that?

“THE JURY FOREPERSON: She just is pushing her point over and over and over again, the same arguing with everyone, arguing with everyone and constantly just sitting there going, No. I will not do it. This is what it is, and saying the same thing over and over again. And it’s causing more and more delays because we can’t get a word in edgewise with her.

"THE COURT: When she says that is she referring to a jury instruction that she's relying on or just her own personal feeling?

"THE JURY FOREPERSON: A jury instruction. We are reading the jury instructions and then she -- it's her own opinion that she is applying to this.

"THE COURT: Okay. Is there anything else while we're out here that you would like to tell me about this situation?

"THE JURY FOREPERSON: I just -- I think that she is a little bit biased on some things, on the defendants almost.

"THE COURT: Is it bias based on a personal feeling or experience, or is it a bias based on her interpretation of the law and the facts?

"THE JURY FOREPERSON: Her interpretation of the law and the facts."

Following this discussion, the trial court held a conference with the prosecutor and defense counsel. Thereafter, the jury was called back into the courtroom, the court reread CALJIC No. 17.41 to the jury, and directed the jurors to continue with their deliberations.

As Santacruz points out, CALJIC No. 17.41 was reread to the jury at 2:08 p.m. on September 22, 2005. On the preceding day, September 21, the foreperson signed the verdict forms on counts 1 (unlawful driving) and 5 (carjacking), finding both defendants guilty on these counts. Also on September 21, the jury found true the allegation that both defendants personally used knives in count 5.

But the verdict forms finding defendants guilty on counts 4, 7, 8, 9, and 10, and Nieblas's personal use finding on count 8 were signed on September 22 or 23.

Defendants argue that the verdicts signed on September 22 and 23 were coerced, because they were reached after the court reread CALJIC No. 17.41.

2. Applicable Law

Section 1140 provides: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

"The determination whether there is a reasonable probability of agreement rests within the sound discretion of the trial court. [Citation.] 'Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived "'as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.'" [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 363-364.)

3. Analysis

Defendants contend that the rereading of CALJIC No. 17.41[17] after deliberations had already begun "was almost certainly perceived as coercive by the minority juror, who must have known that the comments were directed at her." They also argue "it cannot be doubted that her fellow jurors used the instruction to encourage, cajole or harass her into changing her views" to conform to the majority's views. We disagree.

Under the circumstances presented here, the trial court reasonably concluded that rereading CALJIC No. 17.41 after only five hours of deliberations would better enable the jurors to communicate with each other. Nor would a reasonable juror in the minority juror's position have understood the instruction as coercive. Indeed, although the minority juror may have perceived that the instruction was directed at her, the instruction in no way suggested that she should change her views to conform to the majority's views. Nor was there anything in the instruction that permitted the majority jurors to "cajole" or "pressure" the minority juror into changing her views.

Although defendants acknowledge that CALJIC No. 17.41 "is not coercive in the abstract," they maintain it was coercive simply because it was reread after deliberations had already begun. Not so. The instruction itself stated, "The attitude and conduct of

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[17] As originally given and as reread to the jury, CALJIC No. 17.41 stated: "The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change an opinion even if shown it is wrong. Remember that you are not partisans or advocates in this matter. You are impartial judges of the facts."

jurors *at all times* are very important. It is rarely helpful for a juror *at the beginning of deliberations* to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown it is wrong. . . ." (Italics added.) There was nothing inappropriate about rereading the instruction after only five hours of deliberations.

Defendants further argue that the rereading of CALJIC No. 17.41 would not have been perceived as coercive if the court had also reread CALJIC No. 17.40. The latter instruction would have reminded the jury that, "The People and the defendant are entitled to the individual opinion of each juror," and the jurors should "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." Although it would have also been appropriate to reread CALJIC No. 17.40, the fact it was not reread does not support defendants' argument that rereading CALJIC No. 17.41, by itself, was error.

H. *The Limited Cross-examination of Osterthaler*

On direct examination, Osterthaler testified he had to "jump" into his police vehicle to avoid being struck by the Avalanche as it backed out of the realty parking lot. On cross-examination, Santacruz's counsel asked Osterthaler his age. The prosecutor objected on relevance grounds. At sidebar, counsel explained that Osterthaler's age and weight were relevant to impeach "the believability of his story" that he was agile enough to "jump" to avoid being struck by the Avalanche. The court sustained the objection

under Evidence Code section 352, on the ground “the undue consumption of time will outweigh the [probative] value [of the evidence].”

Santacruz claims the trial court abused its discretion in excluding the evidence of Osterthaler’s age and weight under Evidence Code section 352. He further claims the exclusion of the evidence violates his due process right to present relevant defense evidence, and his Sixth Amendment right to confrontation. Nieblas joins the former argument, without further argument.

1. Applicable Law

Under Evidence Code section 352, a trial court has discretion to exclude evidence “if its probative value is substantially outweighed by the probability that admission will unduly consume time . . . .” (*People v. Mincey* (1992) 2 Cal.4th 408, 439.) On appeal, the court’s exercise of discretion will not be reversed absent a clear showing of abuse. (*Ibid*.)

And, even though “‘Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of *significant* probative value to his defense’ . . . the proffered evidence must be ‘competent, substantial and significant.’ . . .” (*People v. De Larco* (1983) 142 Cal.App.3d 294, 305.) Thus, the exclusion of defense evidence under Evidence Code section 352 ordinarily “does not impermissibly infringe on a defendant’s right to present a defense.” (*People v. Mincey, supra*, 2 Cal.4th at p. 440.)

Nor will the exclusion of impeachment evidence under Evidence Code section 352 violate the confrontation clause “unless a reasonable jury might have received a

significantly different impression of the witness's credibility had the excluded cross-examination been permitted. [Citations.]" (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.)

2. Analysis

Osterthaler's testimony was the only evidence presented in support of the charge in count 3 of assault with a deadly weapon. Evidence of Osterthaler's age and weight was of some probative value on the issue of whether he was telling the truth when he testified he had to "jump" out of the way of the Avalanche as Santacruz was backing it out of the realty parking lot. Even so, the jury was able to observe Osterthaler and assess whether he was agile enough to, as he put it, "jump" out of the way of the Avalanche. Moreover, defense counsel fully explored the precise location of Osterthaler and his patrol vehicle in relation to the Avalanche at the time of the alleged assault. Indeed, the trial court implicitly and reasonably concluded that asking Osterthaler his age and weight would have distracted the jurors and confused the issues.

But even if the trial court abused its discretion in excluding the evidence of Osterthaler's age and weight under Evidence Code section 352, it is not reasonably probable that the error affected the outcome. (*Watson, supra,* 46 Cal.2d at p. 836.) For the same reasons, the exclusion of the evidence did not violate defendants' rights to present a defense. Nor would the jury have received a significantly different impression of Osterthaler's credibility had the evidence been admitted; thus, the exclusion of the evidence did not violate defendants' confrontation rights.

I. *The Trial Court Properly Refused to Stay Defendants' Sentences for Felony Evading in the Avalanche (Count 4)*

Defendants were convicted of felony evading based on their evading police in the Avalanche (count 4). They were each sentenced to eight months (one-third the midterm) on count 4, plus a consecutive one-year term (one-third the midterm) for assaulting Osterthaler with the Avalanche (count 3).

Santacruz contends the trial court erroneously failed to stay his sentence on count 4, on the grounds the assault upon Osterthaler with the Avalanche and the felony evading in the Avalanche were part of a continuous course of conduct in which he harbored the single intent and objective of evading the police. Nieblas joins this claim without further argument. We find it without merit.

1. Applicable Law

"Section 654[**18**] precludes multiple punishments for a single act or indivisible course of conduct. [Citation.]" (*People v. Hester* (2000) 22 Cal.4th 290, 294.) The purpose of section 654 is to prevent multiple punishment for a single act or omission, or indivisible course of conduct, even though that act or omission or indivisible course of conduct violates more than one statute and thus constitutes more than one crime. (*People v. Harrison* (1989) 48 Cal.3d 321, 335; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

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18 Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Section 654 is intended to ensure that a defendant's punishment is "commensurate with his culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 550-551.)

"It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible." (*People v. Harrison, supra,* 48 Cal.3d at p. 335.) If the defendant's crimes "were merely incidental to, or were the means of accomplishing or facilitating one objective, [the] defendant may be found to have harbored a single intent and therefore may be punished only once." (*Ibid.*, citing *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) Multiple punishment is proper, however, where the defendant entertained multiple criminal objectives which were independent of each other. (*People v. Harrison, supra,* at p. 335, citing *People v. Beamon* (1973) 8 Cal.3d 625, 639.)

"""The defendant's intent and objective are factual questions for the trial court; . . . there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced. . . .""" (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085, citations omitted.) An implied finding that the crimes were divisible must be upheld on appeal if substantial evidence supports it. (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.) Where, however, the relevant facts are undisputed, the application of section 654 is a question of law. (*Neal v. State of California, supra,* 55 Cal.2d at p. 17.)

2. Analysis

On this record, substantial evidence supports the trial court's implicit finding that defendants harbored separate criminal objectives in evading the police in the Avalanche

and in assaulting Osterthaler with the Avalanche. Osterthaler testified that the driver of the Avalanche, Santacruz, could have exited the realty parking lot by driving straight ahead rather than by backing up and nearly striking him and his patrol vehicle. In Osterthaler's opinion, Santacruz was either trying to strike him personally or trying to strike his vehicle and disable it so he could escape. But neither of these objectives was necessary to facilitate the escape. In other words, Santacruz did not have to attempt or risk striking Osterthaler or his patrol vehicle in order to escape in the Avalanche. Thus, the trial court could have reasonably concluded defendants harbored a separate intent and objective in assaulting Osterthaler in the Avalanche (count 3) and in evading police in the Avalanche (count 4).

J. *Defendant's Claims of Sentencing Error*

Santacruz was sentenced to an aggregate term of 17 years 4 months; Nieblas to 18 years 8 months. Both defendants were sentenced to the upper base term of nine years for their carjacking convictions in count 5. (§ 215, subd. (b).) In addition, both defendants were sentenced to the upper term of three years for their personal use enhancements on count 5. (§ 12022, subd. (b)(2).) Nieblas's sentence also includes a one-year term for his having served a prior prison term within the meaning of section 667.5.

Defendants claim their upper term sentences on count 5 (their nine-year base terms and their three-year personal use enhancement terms) must be reduced to the middle terms of five and two years, respectively, in light of the United States Supreme Court's recent decision in *Cunningham, supra,* 127 S.Ct. 856 (imposition of upper term sentence based on facts found by judge under California's determinate sentencing law (DSL)

violates Sixth and Fourteenth Amendment right to jury trial). Defendants further argue that the matter must *not* be remanded for resentencing; rather, this court must reduce their sentences to the middle terms, because there is no provision under California law for a jury trial on factors in aggravation.

For the reasons explained below, we conclude that the trial court did not violate *Cunningham* in sentencing Santacruz to the upper *base* term on count 5, because, as Santacruz acknowledges, the trial court based its selection of this upper term on the fact that Santacruz was on probation at the time of the carjacking. (Cal. Rules of Court, rule 4.421(b)(4).)[19] As we explain, this falls within the "recidivism exception" to a defendant's constitutional right to a jury trial on factors in aggravation, or factors that increase a sentence beyond the statutory maximum. (*People v. McGee* (2006) 38 Cal.4th 682, 709 (*McGee*).) However, we reduce the term imposed for Santacruz's personal use enhancement on count 5 from three years to two years, because it is also clear from the record that this upper term sentence was not based on any recidivism exception, separate and apart from the fact that Santacruz was on probation. (§ 1170, subd. (b); rule 4.420(c) [prohibiting dual use of factors in imposing upper base term and enhancement term].)

We remand this matter with directions to resentence Nieblas, because it is clear from the record that the trial court impermissibly based its selection of his upper base term on count 5 on the fact that Nieblas had served a prior prison term (rule 4.421(b)(3)), the same factor it used to impose the one-year term for the prison prior (§ 667.5). This

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[19] All further references to rules are to the California Rules of Court.

was an impermissible dual use of factors. (§ 1170, subd. (b); rule 4.420(c).) Furthermore, it is unclear from the record whether the court would have sentenced Nieblas to both upper terms, based on its finding that Nieblas had a prior conviction and its separate finding that Nieblas had served a prior prison term. For these reasons, the matter must be remanded to the trial court with directions to exercise its discretion in resentencing Nieblas, based on the fact of his prior conviction and his prison prior.

1. Santacruz's Upper Base Term Sentence of Nine Years on Count 5 Was Properly Imposed, But His Upper Term of Three Years for the Personal Use Enhancement on Count 5 Must Be Reduced to the Middle Term

The People argue that, because Santacruz's upper base term sentence was based on the court's finding that he was on probation at the time he committed the carjacking, it falls (rule 4.421(b)(4)) under the *Almendarez-Torres*[20] or "recidivism exception" to the *Apprendi*[21] rule, upon which *Cunningham* is based. We agree, because the record clearly indicates that Santacruz's upper term sentence was based on the fact that he was on probation. This falls under the recidivism exception. We therefore uphold Santacruz's upper term sentence on count 5.

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[20] *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350] (*Almendarez-Torres*).

[21] *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*) (other than the fact of a prior conviction, any fact used to increase the maximum penalty for a crime must be submitted to a jury and found true beyond a reasonable doubt).

The *Almendarez-Torres* or recidivism exception clearly applies to the "fact" of a prior conviction. (*Apprendi, supra,* 530 U.S. at p. 590; *Almendarez-Torres, supra,* 523 U.S. 224, 226, 228.) And, as the People point out, various courts, including the California Supreme Court, have recognized that the *Almendarez-Torres* exception applies not only to the mere fact of a defendant's prior conviction, but more broadly to "matters relating to recidivism." (*McGee, supra,* 38 Cal.4th at pp. 700-706, citing and discussing *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223, and decisions from other jurisdictions.)

As these courts have observed, matters relating to recidivism are unrelated to the elements of the crime for which the defendant is on trial, and as such do not require "full due process treatment" or findings by a jury beyond a reasonable doubt. (See *McGee, supra,* 38 Cal.4th at pp. 700-706, and cases cited.) Santacruz disagrees, arguing that the *Almendarez-Torres* exception must be narrowly construed and applies only to the "mere fact" of a prior conviction. (*Shepard v. United States* (2005) 544 U.S. 13, 24-26 [125 S.Ct. 1254, 161 L.Ed.2d 205].)

Indeed, the scope of the *Almendarez-Torres* exception has not been settled by the United States Supreme Court. (See *McGee, supra,* 38 Cal.4th at pp. 707-709.) But as the *McGee* court recognized, "there is a significant difference between the nature of the inquiry and the factfinding involved in the type of sentence enhancements at issue in *Apprendi* and its progeny [e.g., whether the defendant had a particular mens rea in committing the charged crime] as compared to the nature of the inquiry involved in examining the record of a prior conviction to determine whether that conviction

constitutes a qualifying prior conviction for purposes of a recidivist sentencing statute . . . ." (*McGee, supra,* at p. 709.)

Thus, in *McGee*, the court held that the defendant was not entitled to have a jury decide whether his Nevada robbery convictions qualified as strikes under California law. (*McGee, supra,* 38 Cal.4th at p. 709.) And in *Thomas*, the court held that the defendant was not entitled to a jury trial on whether he had served two prior prison terms within the meaning of section 667.5. (*People v. Thomas, supra,* 91 Cal.App.4th at pp. 222-223; see also *People v. Belmares* (2003) 106 Cal.App.4th 19, 28 [no right to jury trial on whether defendant was person identified in section 969b packet as having served two prior prison terms] and *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165 [same].)

As the *McGee* court recognized, the United States Supreme Court may, in future decisions, extend the *Apprendi* rule to encompass matters related to recidivism, including, as pertinent to Santacruz, a court's imposition of an upper term sentence based on the court's finding that the defendant (Santacruz) was on probation at the time of the crime. But until the United States Supreme Court limits or abolishes the *Almendarez-Torres* exception in this manner, we are bound by the *McGee* decision. (*Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at p. 455.)[22]

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[22] The Sixth District Court of Appeal recently held in *People v. Guess* (Apr. 24, 2007, H029808) __ Cal.App.4th __ [2007 D.A.R. 5681], that a defendant "being admitted to parole" did not fall within the recidivism or exception to the *Apprendi* rule, because it involved "action by the Department of Corrections [and Rehabilitation], which is not subject to the same 'procedural safeguards' or 'reliability factors' as a conviction." (*Id.* at [p. 5687].) Based on the reasoning set forth in *McGee*, we believe we are bound to read the recidivism exception more broadly than the court did in *Guess*. Thus, we

[footnote continued on next page]

It is also clear from the record, however, that the court did not rely upon a separate and distinct recidivism exception -- apart from the fact that Santacruz was on probation -- in imposing the upper term of three years for Santacruz's personal use enhancement on count 5. Neither the court nor the jury found, for example, that Santacruz had a prior conviction or had served a prior prison term. Nor could the court have permissibly relied upon the fact that Santacruz was on probation in imposing both the upper base term on count 5 *and* the upper term for the personal use enhancement on count 5, because this would have constituted a dual use of factors in violation of section 1170, subdivision (b) and rule 4.420(c). We therefore reduce Santacruz's personal use enhancement term from three years to two years.

2. Nieblas Must Be Resentenced

The People argue that Nieblas's upper term sentence on count 5 also falls under the recidivism exception, because it was based on Nieblas's admission that he had served a prior prison term at the time of the carjacking. However, as Nieblas points out, it appears that the court may have used the same factor -- the fact of his prior prison term -- in imposing both the upper term of nine years on count 5 *and* a one-year term for his prison prior. (§ 667.5.) If so, this was an impermissible dual use of factors. (§ 1170, subd. (b); rule 4.420(c).)

[footnote continued from previous page]
conclude that the trial court's finding that Santacruz was on *probation* at the time of the carjacking fell within the recidivism or *Almendarez-Torres* exception to the *Apprendi* or *Cunningham* rules.

Alternatively, the People argue that the error in sentencing Nieblas to the upper base term on count 5 was harmless beyond a reasonable doubt. (*Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 165 L.Ed.2d 466]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.) We disagree, because we cannot discern from the record whether the court would have imposed the upper base term of nine years on count 5, or only the one-year prison prior, had it known it could only use the fact of Nieblas's prison prior to impose one term or the other, but not both. And, although the court also found that Nieblas, like Santacruz, was on probation at the time of the carjacking, it is unclear from the record how this affected the court's exercise of its sentencing discretion. This factor, in combination with the fact that Nieblas's prior performance on probation was unsatisfactory, may have properly served as the basis for imposing the upper term of three years for Nieblas's personal use enhancement on count 5 (rule 4.421(b)(4) & (5)), but it is not clear whether it did.

V. DISPOSITION

The sentence imposed upon Santacruz for his personal use enhancement on count 5 is hereby reduced from three years to two years. The matter is remanded to the trial court with directions to amend Santacruz's abstract of judgment accordingly, and to forward a copy of Santacruz's amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment against Santacruz is affirmed.

The matter is remanded to the trial court with directions to exercise its discretion in resentencing Nieblas, consistent with the reasons expressed in this opinion. In all other respects, the judgment against Nieblas is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Miller
J.