Filed 6/24/05

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA B. WAHLERT et al., Defendants and Appellants.	E035174 (Super.Ct.No. RIF095477) O P I N I O N

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed with directions.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant Joshua B. Wahlert.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts B, C, D, E, F, G, and H of the Analysis.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant Tracy L. Garrison.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia, Supervising Deputy Attorney General, and Janelle Boustany, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendants Joshua Blaine Wahlert and Tracy Leean Garrison were charged in count 1 of a third amended information with the murder of Michael Willison. (Pen. Code, § 187, subd. (a).)[1] The murder allegedly occurred while the defendants were engaged in the commission or attempted commission of a robbery (§ 211) and kidnapping (§ 207). (§ 190.2, subd. (a)(17)(A) & (B).) The accusatory pleading further alleged that, in connection with the murder, Wahlert personally and intentionally discharged a firearm causing great bodily injury or death (§§ 12022.53, subd. (d) & 1192.7, subd. (c)(8)), and that Wahlert and Garrison personally used a deadly and dangerous weapon, a knife (§§ 12022, subd. (b)(1) & 1192.7, subd. (c)(23)). It was further alleged that Garrison participated in the crime knowing that a principal was armed with a gun. (§ 12022, subd. (a)(1).)

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

The third amended information further charged Wahlert with being a felon in possession of a firearm (count 2; § 12021, subd. (a)(1)), being a felon in possession of ammunition (count 3; § 12316, subd. (b)(1)), and exhibiting a firearm in a rude, angry, and threatening manner or using a firearm in a fight (count 4; § 417, subd. (a)(2)).

The two defendants were tried jointly before separate juries. Garrison's jury convicted her of murder (count 1) and found true the allegations that she committed the murder while engaged in the commission of robbery and kidnapping and of knowing that a principal was armed with a gun. Her jury found not true the enhancement allegation that she personally used a deadly and dangerous weapon. She was sentenced to life without possibility of parole, plus a determinate term of one year for the principal-armed enhancement.

The Wahlert jury found him guilty on all counts and found all enhancement allegations true. He was sentenced to life without possibility of parole on count 1, plus a consecutive sentence of 25 years to life for the gun enhancement and an additional one year on the arming enhancement. He was further sentenced to three years on count 2, eight months on count 3, and one year on count 4, such terms to run consecutively. Both defendants were ordered to pay restitution to victims and a restitution fine. (§ 1202.4, subds. (a) & (b).)

CONTENTIONS ON APPEAL

Garrison contends that the trial court prejudicially erred by: (1) allowing the jury to hear Wahlert's recorded statements made during a telephone call between Garrison and Wahlert; (2) failing to instruct the jury as to accomplice principles; and (3) refusing to provide an instruction on the defense of duress. Garrison also contends that the court's minutes concerning sentencing include errors that must be corrected.

Wahlert joins in Garrison's argument as to the court's failure to instruct on accomplice principles. He further contends that: (1) instructing the jury as to the definition of implied malice in this case constituted a denial of due process; (2) the consecutive sentences on counts 2, 3, and 4 violate section 654; and (3) the sentence on the gun enhancement must be stricken because of language in section 12022.53, subdivision (j). Wahlert also seeks to correct an error in the abstract of judgment.

In the published portion of this opinion, we hold that Wahlert's statements during the recorded conversation between himself and Garrison, to the extent they were offered for their truth against Garrison, were testimonial for purpose of the confrontation clause under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*), but that their admission against Garrison was harmless. In the nonpublished portion of this opinion, we agree with Wahlert that his sentences on counts 2, 3, and 4 violate section 654, and with both defendants that certain clerical errors must be corrected; we also conclude that any errors in failing to instruct as to accomplice

principles or concerning implied malice were harmless. We reject the remaining contentions and affirm the judgments.

SUMMARY OF FACTS

Wahlert lived in a recreational vehicle on property belonging to the father of his friend, Jon Ramirez. Ramirez and his father lived in a house on the property. In the months preceding the murder of Willison, Garrison stayed intermittently with Wahlert in the recreational vehicle. The two frequently argued and Garrison would leave for several days at a time to be with Willison. According to Ramirez, Garrison was confused about who she wanted to be with.

Two or three weeks before Willison was killed, Ramirez, Garrison, and Willison went to the home of "Flako" to buy drugs. While Willison was inside Flako's house, Garrison talked to Ramirez about a plan to rob Willison. She said she wanted to give Willison's truck and other property to Wahlert and then the two would go to Las Vegas to get married. She spoke to Ramirez about this plan on two other occasions. Wahlert separately told Ramirez of his desire to "take everything that [Willison] had." Another time, Wahlert, who was jealous of Willison's relationship with Garrison, said he wanted to "beat [Willison] up." Wahlert and Garrison sometimes referred to each other as "Bonnie and Clyde."

On January 14, 2001, Willison called Ramirez to get some help getting a couch from storage into his truck. Willison arrived at Ramirez's home about 10:30 p.m. that

night. The two smoked methamphetamine. As Ramirez was putting his shoes on to leave with Willison, Wahlert and Garrison entered Ramirez's home. Garrison brought in a roll of duct tape and set it on the television set. Wahlert pulled out a gun and pointed it at Willison. When Willison pleaded to spare his life and to not "leave [his] two boys fatherless," Wahlert told him to shut up and stuck a bandana in Willison's mouth. Garrison then taped Willison's mouth and hands with the duct tape. She went through Willison's pockets, taking keys, a wallet, a necklace, and a ring, and threw them on a couch. Ramirez was, as he said, "[f]reaking out" and telling them, "No, not here." Ramirez testified that he did not do anything to encourage them; but he did not do anything to stop them "[b]ecause [Wahlert] had a gun." According to Ramirez, Wahlert never turned the gun toward Garrison, threatened her, forced her, or directed her to do anything. It appeared to Ramirez that Wahlert and Garrison were "working together."

Garrison took Willison's keys. With Wahlert pointing the gun at Willison, the three went to Willison's truck. They drove to a secluded rural area where Willison was severely beaten, repeatedly stabbed, and shot twice in the head. He died as a result.

Wahlert and Garrison returned to Ramirez's house in Willison's truck about 20 minutes after they had left with Willison. Ramirez told them "to get their stuff and to leave." Wahlert told Ramirez he was "sorry for letting that happen," gave Willison's ring and necklace to Ramirez as "compensation to help you out for what went on," and told him, "[d]on't say a word." Wahlert took Willison's other property, including a $20 bill

and credit cards. Wahlert told Garrison to pack their belongings, which she did. The two then left in Willison's truck.

Later that morning, they tried to buy gas for the truck with one of Willison's credit cards, but the card was not approved. When the gas station attendant went to call the police, Wahlert and Garrison left.

Wahlert and Garrison drove the truck to the home of Ed and Donna Geiger, where Vernon Wood was staying. Wahlert told Wood that he had taken the truck "from a dude that he killed." He told Wood that he intended "to rob the guy . . . and stuff got out of hand and he shot him, stabbed him[,] and split." Wahlert showed Wood credit cards with the name "Michael" on them. Wahlert asked Wood to help him bury the victim, but Wood refused. He also asked Wood where he could get a 50-gallon drum. Wahlert left a bag of clothes at the house, which Ed Geiger later burned.

A couple of days after the murder, Wahlert called Ramirez to say that he and Garrison were going to Las Vegas to get married and asked Ramirez to be the best man. Later, Wahlert told Ramirez that he had shot Willison in the head and put a tarp over him. He also told Ramirez where the body was located and asked Ramirez to "take care of the body."

On January 20, 2001, Wahlert and Garrison were in Willison's truck when Wahlert displayed a gun to two women in another car. One of the women called her husband, who called 911. Shortly afterward, Wahlert was arrested for brandishing a

firearm. The police found a .30-caliber gun in the truck and a live round in Wahlert's pocket. While being booked on this charge, Wahlert commented: "I'm looking at 60 years, they just haven't found out the half of it yet."[2]

In a subsequent search of the truck, police found, among other items, a pair of blue jeans stained with Willison's blood, a man's empty wallet, a black bag, and a red bag. In the black bag were checks on Willison's personal bank account, a payroll check made out to Willison, and business cards for Willison's painting business. The red bag contained credit cards in Willison's name and a bandana.

A couple of days after Wahlert's arrest, Garrison went to Ramirez's house and told him that they had to "go back out there and take care of the body."

On January 23, 2001, nine days after the murder, Willison's body was found by a jogger. The body was covered with a tarp or mat. Police found a piece of duct tape 20 to 30 feet away from the body. Impressions of tire tracks at the scene matched those of the tires on Willison's truck. After identifying the victim as Willison, police learned that Willison's car had been impounded in connection with the arrest of Wahlert for brandishing a firearm. The police then examined the property that was taken from

[2] The sheriff's investigator that testified to this statement also stated that no one was asking Wahlert questions when he made the statement and that no one responded to the statement or asked him any questions about it.

Wahlert when he was arrested and found Willison's social security card, his contractor's state license card, and credit cards with Willison's name on them.

While Wahlert was in custody on the charge of brandishing the firearm, Kevin Duffy, an investigator for the Riverside County Sheriff's Department, interviewed him about Willison after he was advised of, and waived, his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed. 694].[3] Audiotaped recordings of these interviews were played in the presence of his jury only. Wahlert admitted shooting Willison twice, but stated that he did so after Willison came at him waving a shotgun in his arms. After shooting Willison, Willison grabbed Wahlert; Wahlert then stabbed Willison. Initially, he stated that Garrison was not there and did not participate in the killing. Later, he said that Garrison was there, but that she did not know or do anything. During one of the interviews, Wahlert wrote a note to Willison's children at the request of the investigator, in which Wahlert apologized "for the pain that [he has] caused . . . ."

While Wahlert was being interviewed in the district attorney's office, Garrison was being questioned by an investigator at a sheriff's station in Hemet.[4] According to

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[3] Some of the interviews took place at the office of the district attorney. According to the investigating officer, they "made a decision to take him over to the district attorney's office where there's a more suitable interview room where it could be audio-recorded for a longer length of time."

[4] Investigators located Garrison at a residence in Hemet, where she agreed to go to the sheriff's station to be interviewed. The investigating officer testified that Garrison was being questioned as a witness, not a suspect. The officer told her: "[Y]ou're not

[footnote continued on next page]

Garrison, she, Wahlert, Willison, and Ramirez were in Ramirez's house when Wahlert pulled a gun on Willison and had Willison empty his pockets. Wahlert then told Willison they were "gonna go for a ride." Garrison said that she insisted on going with them. After driving to a secluded location, Wahlert and Willison walked to a rocky area and argued. As Garrison started to get out of the truck, she heard two shots; then Wahlert returned and told her to get into the truck. Sometime later, they returned to the scene to find that Willison had moved about six feet and was alive. Wahlert then took a knife and walked toward Willison; when he returned, he told Garrison that he had cut Willison's throat and broke his neck. Video and audio recordings of this interview were played only to the Garrison jury.

During the day that both Wahlert and Garrison were being separately interviewed, Duffy, who was interviewing Wahlert, and the investigator interviewing Garrison, remained in "constant phone contact" with each other and arranged for Wahlert to telephone Garrison. The telephone call was described by Duffy at trial as a "pretext call." Duffy informed Wahlert that they "found [Garrison]" and that Wahlert "need[s] to talk to her and tell her to cooperate and tell the truth." Duffy told Wahlert that Garrison was in Hemet. Wahlert asked if she was "at the station," to which Duffy responded, "No,

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[footnote continued from previous page]
under arrest or anything. I asked you to come down here and you came down here with us, so I could talk to you. Ah, the door's unlocked. . . . [¶] . . . [¶] Any time if you ah, wanna go out, leave, you know stop talking to me, door's unlocked. I'll take you out, or you can walk out . . . yourself . . . ." Garrison indicated that she understood this.

. . . some other house." Duffy then dialed a number on a cell phone and handed the phone to Wahlert. Wahlert was then connected with Garrison in the Hemet sheriff's station as Duffy left the room. In Hemet, an investigator was in the room with Garrison listening to the phone call and "feeding her some questions at times."[5] The phone call was recorded and the recording played to each jury separately.[6]

During the call, Wahlert and Garrison each made statements directly or indirectly implicating themselves and each other. When Wahlert told Garrison that he had told Duffy that Willison "pulled a shotgun on" him, Garrison told him that she would "tell [them] the truth before I told [them] that." Wahlert admitted that he had lied "to keep [Garrison] safe." Wahlert told Garrison that she was "part of this" and, when Garrison said that she "told them everything that happened from the time we left [Ramirez's]," Wahlert asked, "Did you tell them you told me to do it?" When Garrison denied that she told Wahlert "to do it," Wahlert responded, "Oh, ho! That's cold. All right." Later in the conversation, Wahlert told Garrison that he would "take the fall for this." Still later in

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[5] The testimony that an investigator was "feeding [Garrison] some questions" was by Duffy, who was with Wahlert, not Garrison. There was no evidence of how many or what questions the investigator fed to Garrison. Later, in the presence of Garrison's jury only, Duffy testified that Garrison "was directed just to try to talk to [Wahlert] about the incident," and that he did not know whether "there was talk beforehand about specific questions to ask."

[6] The recording played to the Wahlert jury included discussions between Wahlert and the investigator that took place before and after the phone call with Garrison. These additional discussions were not played to the Garrison jury.

the conversation, there was an exchange that suggested that Wahlert killed Willison because Garrison said she was afraid of Willison. When Garrison denied that she was afraid of Willison, Wahlert declared, "My life's over because I cared about you." Garrison responded by telling Wahlert, "Well then you shouldn't have done it" and that he "should've thought about that before." Wahlert warned Garrison that the police wanted to "make [her] an accessory," to which Garrison explained, "[t]he only thing I did, is I was there." The following exchange then took place:

"WAHLERT: And you didn't tell me to shoot him?

"GARRISON: Nope!

"WAHLERT: Oh, ho-oh! You don't love me, do you?

"GARRISON: You know what does that have to with thing [*sic*]. I do love you. But I never told you, I never told you to do anything. . . . I never told you to kill him. I never told you to shoot him.

"WAHLERT: OOOOhhhh! Tracey!!!! Tracey!!!!"[7]

Police also recorded one conversation between Wahlert and his mother and another conversation with Wahlert, his mother, and an investigator, both of which were played to his jury only. During these conversations, Wahlert stated he "did it because I was scared of [Willison]. And I did it because . . . [Garrison] said she was scared of

[7] Spelling and punctuation are as set forth in the transcripts of the audio recordings admitted into evidence.

[Willison]." He told his mother that Garrison told him to kill Willison. When the investigator was present, Wahlert stated that Garrison had "used me to get this dude done" and that Garrison "set me up to do this." Following these interviews and conversations, Wahlert told the investigator that Garrison "duct taped [Willison]."[8]

After Willison's death, Garrison made admissions to several others about her involvement in the killing. The night after the killing, she told Tiffany Walls that Wahlert shot a man and that she slit the victim's throat.[9] Within a couple of days of the murder, she told Kellie White that she had repeatedly stabbed Willison and killed him. Within two weeks after the murder, Garrison told Victoria Lauderdale that a man was supposed to give her money and did not; she and Wahlert went to the man's house where she had taped the man's hands and legs while Wahlert held him; they robbed him of drugs and money; and then they took him to a field where Wahlert shot him twice. She further told Lauderdale that when she and Wahlert returned to the scene of the shooting and found the victim alive, Wahlert cut the man's throat. Garrison did not tell Lauderdale that she had been forced to participate in the murder. About two weeks after

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[8] Evidence of this statement was introduced through the testimony of the investigating officer in the presence of Wahlert's jury only.

[9] Walls testified at trial that Garrison told her that Wahlert "made her cut his throat." In Walls's prior statement to police, she told police that Garrison told her that she stabbed or cut Willison's throat, but never mentioned that she was forced or made to do so.

the murder, Garrison told Vernon Wood that she planned to rob Willison; that she bound him with duct tape and robbed him of his truck and $20; and that Wahlert then shot and stabbed him. On two occasions after Wahlert was arrested, when Ramirez and Garrison were among friends, Garrison "joke[d] around about how much she liked duct tape."

Garrison was interviewed by police again in May 2001 and December 2001.[10] In these interviews, Garrison denied having any relationship with Wahlert. She said that Wahlert told her to duct tape Willison, but she refused. Rather than insisting upon going with Wahlert and Willison in the truck, as she previously stated, she went along only after Wahlert pointed the gun at her and said "[y]ou're going too." Garrison explained the apparent inconsistency by stating: "[Wahlert] said, 'You're going too. Let's go,' and then I don't know if he thought about it or what. But he wasn't gonna - he wasn't gonna let me go with him, and then that's when I insisted on going." She denied taking things from Willison's pockets and denied stabbing Willison. She did not try to stop Wahlert, Garrison explained, because she was afraid that he would shoot her too. At the conclusion of this last interview she was taken into custody. Audio and video recordings of these interviews were played to Garrison's jury only. Neither Wahlert nor Garrison testified at trial.

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[10] During these interviews she was advised of her rights under *Miranda v. Arizona, supra,* 384 U.S. 436.

ANALYSIS

A. *Admissibility of the Pretext Call*

Audio recordings of the "pretext call" conversation between Wahlert and Garrison were played to each of the juries separately. Garrison contends that the playing of the pretext call recording was contrary to her rights under the confrontation clause of the Sixth Amendment as interpreted in *Crawford.* Although *Crawford* was decided after the trial in this case, Garrison did not forfeit the claim by failing to raise it below.[11] "Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703.) The rule announced in *Crawford* is such a rule, and courts have applied it retroactively to cases pending on appeal. (See *People v. Song* (2004) 124 Cal.App.4th 973, 982; *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1400.) We independently review whether evidence was admitted in violation of the confrontation clause. (*Lilly v. Virginia* (1999) 527 U.S. 116, 137 [119 S.Ct. 1887, 144 L.Ed.2d 117].)

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[11] Garrison objected at trial to the playing of the recording before her jury. Garrison's counsel argued that statements made by Wahlert during the pretext call inculpated Garrison and, because Wahlert was not subject to cross-examination during trial, the introduction of the statements violated Garrison's rights on "Eighth, Sixth and 14th Amendment grounds." The court overruled the objection and allowed the recording to be played in its entirety. Wahlert made no objection below to the playing of the pretext call recording and does not assert on appeal that its admission into evidence violated the confrontation clause or join in Garrison's argument on this point.

We conclude that the recording was inadmissible under the confrontation clause, but that the admission was harmless beyond a reasonable doubt.

In *Crawford*, the United States Supreme Court reshaped confrontation clause analysis. Prior to *Crawford*, an unavailable witness's out-of-court statement against a criminal defendant was admissible if it bore "adequate indicia of reliability." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S.Ct. 2531, 65 L.Ed.2d 597].) This test was met if the statement fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." (*Ibid*.) The *Crawford* court found this framework "so unpredictable that it fails to provide meaningful protection from even core confrontation violations." (*Crawford, supra*, 158 L.Ed.2d at p. 200.) While the confrontation "[c]lause's ultimate goal is to ensure reliability of evidence," *Crawford* explained, "it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Id.* at p. 199.)

But not all out-of-court statements offered against an accused must be tested by cross-examination. The confrontation clause provides criminal defendants with "the right . . . to be confronted with the *witnesses* against him." (U.S. Const., 6th Amend., italics added.) The out-of-court statements that are the subject of the confrontation clause are thus statements made by "witnesses." "Witnesses," the *Crawford* court stated, are those who "bear testimony." (*Crawford, supra*, 158 L.Ed.2d at p. 192.) The clause is thus

concerned with "a specific type of out-of-court statement" -- the "testimonial" statement. (*Id*. at p. 193.) When the testimonial statement of an unavailable witness is offered against an accused at trial and the accused has not had a prior opportunity to cross-examine the witness, the confrontation clause bars the use of the statement. (*Id*. at p. 203; see also *People v. Combs* (2004) 34 Cal.4th 821, 842 (*Combs*).) Because Wahlert did not testify at trial[12] and could not be compelled by Garrison to do so (see U.S. Const., 5th Amend.), he was unavailable for purposes of the confrontation clause (see *People v. Gordon* (1990) 50 Cal.3d 1223, 1251, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835; *United States v. Matthews* (2d Cir. 1994) 20 F.3d 538, 545).

Statements made during certain types of proceedings are necessarily testimonial: "Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Crawford*, *supra*, 158 L.Ed.2d at p. 203.) In determining whether a statement made under other circumstances is testimonial, we look to *Crawford*'s rationale. Prior testimony and police interrogations are testimonial, the court explained, because they "are the modern practices with closest kinship to the abuses at which the *Confrontation Clause* was directed." (*Ibid*.) By contrast, an "off-hand, overheard remark" is not testimonial because "it bears little resemblance to the civil-law abuses the

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[12] A defendant who does not testify at trial is presumptively exercising his Fifth Amendment privilege against self-incrimination. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1053; *People v. Mosqueda* (1970) 5 Cal.App.3d 540, 545.)

Confrontation Clause targeted." (*Id*. at p. 192.) As to statements that fall within the broad gap between these examples, courts should therefore examine the circumstances surrounding the making of the statements in the light of the policy of preventing such abuses.

Based upon its review of the historical background of the clause, the court concluded that "the principal evil at which the *Confrontation Clause* was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." (*Crawford, supra,* 158 L.Ed.2d at p. 192.) Although the "common-law tradition is one of live testimony in court subject to adversarial testing," England had adopted elements of civil law practice, such as allowing justices of the peace to examine witnesses before trial, then permit the witnesses' hearsay statements to be admitted at trial against an accused. (*Id.* at pp. 187-188.) "The *Sixth Amendment* must be interpreted," the court stated, "with this focus in mind." (*Id*. at p 192.)

The "[i]nvolvement of government officers in the production of testimony with an eye toward trial," the court explained, "presents unique potential for prosecutorial abuse--a fact borne out time and again throughout a history with which the Framers were keenly familiar." (*Crawford, supra,* 158 L.Ed.2d at p. 196, fn. 7.) The court also referred to the need for the confrontation clause to protect against "flagrant inquisitorial practices," and expressed a particular concern for abuse with regard to police interrogations. "Police interrogations," the court stated, "bear a striking resemblance to examinations by justices

of the peace in England. . . . [¶] That interrogators are police officers rather than magistrates does not change the picture either. . . . *The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace."* (*Id.* at pp. 193-194, italics added.) In light of the "principal evil" of *ex parte* examinations and the court's focus on government involvement, courts must, when evaluating whether a statement is testimonial for purposes of the confrontation clause, pay particular attention to whether, and to what extent, the out-of-court statement was the product of government involvement in "the production of testimony with an eye toward trial." (*Id.* at p. 196, fn. 7; see *United States v. Saner* (S.D. Ind. 2004) 313 F.Supp.2d 896, 901-902.) This is necessarily a case specific, fact-based inquiry.

Here, the pretext call was arranged, initiated by and at the suggestion of the investigating officer, and recorded in connection with the sheriff's office investigation of the Willison murder. A pretext call, Duffy explained, is made by a witness at the direction of the police to "a suspect or somebody else involved in the investigation. [The investigators] tape-record the telephone conversation and . . . instruct the witness on what to say." The detectives use pretext calls "to gather evidence and/or incriminating statements." Wahlert, who was in custody for brandishing a firearm, was taken to the district attorney's office for questioning; Garrison was asked to go to the Hemet sheriff's office. The pretext call required cooperation and "constant phone contact" between

Duffy, in the district attorney's office, and one or more investigators in Hemet. Garrison was told before the call, at a minimum, "to try to talk to [Wahlert] about the incident"; Duffy testified that Garrison was fed questions from an investigator during the call. Duffy told Wahlert that Garrison was not at a sheriff's station and instructed him to tell Garrison "to cooperate and tell the truth." Duffy punched in the number for the call to Garrison and handed the phone to Wahlert. Under such circumstances, the statements made by Wahlert and Garrison during the call were brought about as a result of extensive government involvement in the "production of testimony with an eye toward trial." (*Crawford, supra*, 158 L.Ed.2d at p. 196, fn. 7.)

The People contend that the defendants' "comments during the pretext call were more akin to casual remarks than to 'testimony'" and that "it was no different than two suspects having a conversation in the back of a patrol car." We disagree. The investigators did not merely allow Wahlert and Garrison to talk by telephone, but set up and implemented an investigative technique specifically designed to "gather evidence and/or incriminating statements" from the defendants. Duffy directed Wahlert to tell Garrison to cooperate and tell the truth, while the investigator with Garrison either fed her questions or, at a minimum, told her how to conduct the call and to get Wahlert to talk about the murder. The level of police involvement here was thus far greater than overhearing a conversation between two suspects.

We conclude that here the significant police involvement amounted to the kind of "[i]nvolvement of government officers in the production of testimony with an eye toward trial" that the confrontation clause was intended to prevent. The statements made by Wahlert during the call, used against Garrison at trial, were therefore, to the extent they were offered for their truth, "testimonial."[13] Because Wahlert was not available to testify at trial and Garrison did not have a prior opportunity to cross-examine him,[14] the court erred in admitting his pretext call statements against Garrison.

Admission of an extrajudicial statement in violation of a defendant's right under the confrontation clause does not require reversal if it was "harmless beyond a reasonable doubt." (*Lilly v. Virginia*, *supra*, 527 U.S. at pp. 139-140, citing *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Song*, *supra*, 124

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[13] Because of the extent of government involvement in the production of testimony in this case, we need not consider how the proposed "various formulations" of testimonial statements described in *Crawford* might apply to these facts. (See *Crawford, supra,* 158 L.Ed.2d at p. 193; see, e.g., *People v. Sisavath*, *supra*, 118 Cal.App.4th at p. 1402; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 173-174.)

[14] The People do not contend, and we do not believe, that Garrison's participation in the pretext call could be considered a prior opportunity for cross-examination for purposes of the confrontation clause. This opportunity "is generally satisfied when the defense is given a full and fair opportunity to probe and expose [the] infirmities [of a witness's testimony] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 22 [106 S.Ct. 292, 88 L.Ed.2d 15].) Garrison, acting for the police, did not have a "full and fair opportunity to probe and expose [the] infirmities" of Wahlert's statements.

Cal.App.4th at p. 982.) Under this standard, "we must ultimately look to the *evidence* considered by defendant's jury under the instructions given in assessing the prejudicial impact or harmless nature of the error." (*People v. Harris* (1994) 9 Cal.4th 407, 428.)

Garrison's jury was instructed as to aiding and abetting liability for the murder of Willison.[15] As to her participation in the murder, whether as a direct perpetrator or as an aider and abettor of Wahlert's actions, the evidence of Garrison's guilt was overwhelming without regard to Wahlert's statements during the pretext call. The jury heard evidence from Ramirez of Garrison's plans to rob Willison of his truck. Ramirez described how Garrison, "working together" with Wahlert, bound Willison with duct tape as Wahlert held a gun on Willison, emptied Willison's pockets of his keys and wallet, and voluntarily left with Wahlert and Willison. Garrison and Wahlert returned to

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[15] The jury was instructed in accordance with CALJIC No. 3.01 as follows: "A person aids and abets the commission of the crime when he or she (1) with knowledge of the unlawful purpose of the perpetrator, and (2) with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and (3) by act or advice aids, promotes, encourages, or instigates the commission of the crime. [¶] Mere presence at the scene of the crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." In addition, in accordance with a special instruction requested by the People, the jury was instructed: "Those who aid and abet a crime and those who directly perpetrate the crime are principals and are equally guilty of the crime. You need not unanimously agree or individually determine whether the defendant is an aider or abettor or a direct perpetrator. [¶] Individual jurors themselves need not cho[o]se among the theor[ies], so long as each is convinced of guilt. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that she was an aider and abettor[,] but no such doubt that she was one or the other."

Ramirez's property a short time later and then left together in Willison's truck. After the murder, Garrison told Ramirez that they had to "go back out there and take care of the body" and joked about how she liked duct tape.

Garrison argues that Ramirez was an unreliable witness because he gave statements to police that varied from his trial testimony, admitted to lying during police interviews, and is "a heavy methamphetamine addict who had committed crimes of moral turpitude . . . and had served time in prison." While such matters are certainly relevant to the question of Ramirez's credibility, even taking such evidence into consideration, Ramirez's testimony as a whole presents a strong and detailed description of Garrison's involvement in the crime.

Several witnesses testified that Garrison had told them of her involvement in the robbery, kidnapping, and murder of Willison. Garrison's descriptions of the murder varied somewhat. In some versions, she had stabbed or cut Willison herself, while to other people she stated that she had bound the victim with duct tape and robbed him before Wahlert killed him. Garrison argues that such inconsistencies, and the fact that the jury found the enhancement allegation that she personally used a weapon not true, indicates that the jury likely believed Garrison was a "boaster," fabricating the extent of her involvement. That the jurors rejected the weapon enhancement shows only that they were not satisfied beyond a reasonable doubt that Garrison actually stabbed Willison. Yet, while the testimony from these witnesses was inconsistent as to whether Garrison

admitted to being a direct perpetrator of the killing or an aider and abettor, the testimony from the various witnesses was consistent and compelling as to her involvement in the crime under one theory of participation or the other. Moreover, the strength of the evidence of her participation in the crime is contrasted with the absence of any meaningful exculpatory evidence.

The pretext call statements by Wahlert did not play a significant part in the prosecution's case against Garrison. The statements about which Garrison complains imply that Garrison told Wahlert to shoot Willison. During final argument, the prosecutor referenced the pretext call to highlight this implication, stating, "We heard the tape-recorded interview between [Garrison] and [Wahlert], where he basically tells her, You told me to shoot him." In addition to this brief mention of the pretext call, the prosecutor read excerpts of the pretext call transcript during her rebuttal argument to show that Garrison was a "master manipulator." The references to the call, however, are relatively insignificant in light of the prosecutor's emphasis on other evidence.

Based upon our review of the entire record, the evidence against Garrison of her involvement in the robbery, kidnapping, and murder is overwhelming and convincing without regard to Wahlert's pretext call statements. The introduction of such statements, we conclude, had an inconsequential impact, if any, on the jury's verdict. Accordingly, the error was harmless beyond a reasonable doubt.

B. *Accomplice Instructions*

Garrison contends that there was substantial evidence at trial that Ramirez "was an accomplice to the robbery and hence to the robbery felony murder" and, therefore, the court was required to sua sponte instruct the jury on accomplice principles. Wahlert joins in this argument. "If there is evidence that a witness against the defendant is an accomplice, the trial court must give jury instructions defining 'accomplice.' (E.g., CALJIC No[s]. 3.10, 3.14, 3.15, 3.17.) It also must instruct that an accomplice's incriminating testimony must be viewed with caution (e.g., CALJIC No. 3.18) and must be corroborated (e.g., CALJIC No[s]. 3.11, 3.12, 3.13). If the evidence establishes that the witness is an accomplice as a matter of law, it must so instruct the jury (e.g., CALJIC No. 3.16); otherwise, it must instruct the jury to determine whether the witness is an accomplice (e.g., CALJIC No. 3.19)." (*People v. Felton* (2004) 122 Cal.App.4th 260, 267-268.)

The defendants rely primarily upon evidence of a letter Ramirez wrote to a third party in which he stated, "me, [Wahlert and Garrison], his bitch, duct taped, robbed his apartment, bank account, took it all. All we gave him was a .30[-]caliber behind the ear, took it all. [Garrison] is runnin'. They're court ordering me to tell what I know. Well, I don't know shit." They also point to evidence that Ramirez had initially considered participating in Garrison's plan to rob Willison, evidence that Wahlert gave some of Willison's property to Ramirez as "compensation to help [him] out for what went on,"

and the "extraordinary coincidence that Willison just happened to be at Ramirez's home when Wahlert was ready to commit the crime."

Even if such evidence was sufficient to support the giving of accomplice instructions, the failure to give such instructions here was harmless. "A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record. [Citation.] 'Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]' [Citation.] The evidence 'is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.'" (*People v. Lewis* (2001) 26 Cal.4th 334, 370, quoting *People v. Fauber* (1992) 2 Cal.4th 792, 834.) "A defendant's own conduct, declarations and testimony may furnish adequate corroboration for the testimony of an accomplice." (*People v. Rippberger* (1991) 231 Cal.App.3d 1667, 1684.)

Here, there was ample corroborating evidence to connect Garrison with the crime. Garrison told investigators that she was with Wahlert when he held Willison at gunpoint in Ramirez's home and then insisted on going with Wahlert and Willison. After the murder, she told Tiffany Walls that Wahlert shot a man and that she slit his throat. She told Kellie White that she had killed Willison. She told Victoria Lauderdale that she bound a man's hands and legs with tape, that she and Wahlert then robbed him, and that Wahlert shot him and cut his throat. Two weeks after the murder, she told Vernon Wood

of the plan to rob Willison, and that she bound him with duct tape, robbed him, and that Wahlert shot and stabbed him.

Garrison argues that the inconsistencies in the witnesses' testimony as to Garrison's descriptions of the crime gave the jury "considerable reason to reject Garrison's admissions." Although the descriptions of the crime varied -- sometimes *she* cut Willison's throat, for example, while in other descriptions it was *Wahlert* who cut his throat -- the evidence of her willing participation in the crime was consistent and amply corroborated Ramirez's testimony. Thus, if accomplice instructions should have been given, the failure to do so was harmless.

There is also ample corroborating evidence connecting Wahlert with the crime. Vernon Wood testified that Wahlert told him that he had taken Willison's truck "from a dude that he killed." Wahlert told him that he shot and stabbed the victim, and asked Wood to help bury him. At the time Wahlert was arrested for brandishing a firearm, he was in Willison's truck and had in his possession credit cards and other personal items belonging to Willison. Other items, including a pair of pants stained with Willison's blood, were also found in the truck. Most compelling is Wahlert's multiple admissions of shooting and stabbing Willison.

The failure to instruct the jurors to view accomplice testimony with caution was also harmless. The court instructed the jurors that they could consider prior inconsistent statements of a witness in considering the witness's credibility (CALJIC No. 2.13), that

they may consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witnesses (CALJIC No. 2.20), that a witness who is willfully false in one material part of his or her testimony is to be distrusted in others (CALJIC No. 2.21.2), and that they may consider prior convictions in determining believability of the witness (CALJIC No. 2.23). Such instructions were sufficient to inform the jury to view Ramirez's testimony with care and caution. (See *People v. Lewis, supra,* 26 Cal.4th at p. 371.) Moreover, Garrison's attorney argued extensively as to why Ramirez's testimony should be viewed as unreliable. In light of the instructions given and, in Garrison's case, the argument of counsel, we conclude that there was no reasonable probability that the defendants would have received a more favorable result if the jurors had been instructed to view Ramirez's testimony with caution. (See *ibid*.)

C. *Duress Instructions*

At trial, Garrison requested that the court give CALJIC No. 4.40 on the defense of duress.[16] The court denied the request, stating "there's insufficient evidence that justifies

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[16] This instruction provides: "A person is not guilty of a crime [other than _____] when [he] [she] engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances: [¶] 1. Where the threats and menaces are such that they would cause a reasonable person to fear that [his] [her] life would be in immediate danger if [he] [she] did not engage in the conduct charged, and [¶] 2. If this person then actually believed that [his] [her] life was so endangered. [¶] This rule does not apply to threats, menaces, and fear of future danger to [his] [her] life[,] [nor does it apply to the crime[s] of (crime punishable by death)]." (CALJIC No. 4.40.)

the giving of this instruction." Garrison contends that the court's ruling was error. We disagree.

Duress can "provide a defense to murder on a felony-murder theory by negating the underlying felony." (*People v. Anderson* (2002) 28 Cal.4th 767, 784.) "[T]he defense of duress is available only to those 'who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their *lives would be endangered* if they refused.'" (*People v. Perez* (1973) 9 Cal.3d 651, 657.) A trial court is required to instruct the jury on the defense of duress if there is substantial evidence to support the defense. (*People v. Keating* (1981) 118 Cal.App.3d 172, 178.) Substantial evidence is evidence from which a reasonable jury could conclude that there was duress sufficient to negate the requisite criminal intent. (*People* v. *Carr* (1972) 8 Cal.3d 287, 294.) "Although a trial court should not measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, the court need not give the requested instruction where the supporting evidence is minimal and insubstantial. Doubts as to the sufficiency of the evidence should be resolved in the accused's favor." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145, fn. omitted.)

To support her argument that there was substantial evidence to warrant the giving of CALJIC No. 4.40, Garrison points to evidence that: (1) Ramirez, in his initial interview with police, said that while Wahlert was pointing the gun at Willison, Wahlert

instructed Garrison to bind Willison with duct tape; (2) Garrison told the police that she told Wahlert that she was not going to duct tape Willison; (3) Garrison told the police that when they were leaving Ramirez's home, Wahlert said, "Come on baby girl, you're going too," and pointed the gun at her "[a]ll the way out the door"; and, (4) Wahlert had previously physically harmed Garrison and she "was very afraid of [Wahlert] and what he might do." In light of the entire record, this is not "substantial evidence" to support the giving of a jury instruction on duress.

Without reiterating all of the evidence, the record is abundantly clear that Garrison was a willing participant in the events of January 14, 2001. Prior to the incident, Garrison told Ramirez that she wanted to rob Willison and take his truck. When she and Wahlert entered the room in which Willison and Ramirez were located, she was carrying the duct tape. Ramirez testified that Wahlert never pointed the gun at Garrison or otherwise threatened her. It appeared to Ramirez that the two were "working together." She told police that when Wahlert told her to "stay out of it," she insisted on going with them. Most significantly, after the incident, Garrison made statements to several third persons describing her active involvement in the crime, and Ramirez's testimony that Garrison joked afterwards about duct tape. The trial court did not err in refusing to give CALJIC No. 4.40.

D. *Implied Malice Instructions*

In connection with the instructions on murder, Wahlert's jury was given, without objection, CALJIC No. 8.11 on the definition of express and implied malice.[17] Wahlert contends that the court should not have instructed the jury as to the definition of implied malice without informing the jury that the definition had no application to first degree murder. Because the jury was given the instruction on implied malice, he argues, it is possible that the jury found Wahlert guilty of first degree murder based upon a finding of implied malice, thus denying him due process.

CALJIC No. 8.11 defines "malice" for purposes of the crime of murder's "malice aforethought" requirement. The instruction further states that the requisite malice may be either express or implied. As the jury was further instructed, murder is classified into two degrees and that if they found Wahlert was guilty of murder, they must determine whether the murder "be of the first or second degree." (See CALJIC No. 8.70.) They were instructed as to two theories of first degree murder: (1) deliberate and premeditated murder, and (2) first degree felony murder. (See CALJIC Nos. 8.20 & 8.21.)

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[17] The instruction as given is, in part, as follows: "Malice may be either expressed or implied. Malice is expressed when there is manifested an intention unlawfully to kill any human being. [¶] Malice is implied when (1) the killing resulted from an intentional act; (2) the natural consequences of the act are dangerous to human life; and (3) the act was deliberately performed with knowledge of danger to and conscious disregard for human life." (CALJIC No. 8.11.)

Under the first theory, they were instructed that "[a]ll murder which is perpetrated by any kind of willful, deliberate and premeditated killing with *express malice* aforethought is murder of the first degree." (Italics added.)[18] (See CALJIC No. 8.20.) Wahlert points out that, although this instruction makes clear that murder committed with "express malice" (as well as willfully and with deliberation and premeditation) is first degree murder, it does not preclude the possibility that first degree murder could also be committed with implied malice. This possibility could have been effectively avoided if the court had also given CALJIC No. 8.31, which defines murder in the second degree to include the killing of a human being with implied malice. (See *Combs*, *supra*, 34 Cal.4th 856-857.) In *Combs*, as here, the defendant claimed that the giving of CALJIC No. 8.11, defining implied malice, violated his right to due process because it permitted the jury to find him guilty of first degree murder based on implied malice. (*Id*. at p. 856.) In that case, the trial court also gave CALJIC No. 8.20 (defining first degree murder as including

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[18] The jurors were also instructed: "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon a pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree." (See CALJIC No. 8.20.)

CALJIC No. 8.21, as modified, was given to the jury as follows: "The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of robbery or the crime of kidnaping [*sic*] is murder of the first degree when the perpetrator had the specific intent to commit that crime. That crime meaning either robbery or kidnaping [*sic*]. [¶] The specific intent to commit robbery or kidnaping [*sic*] in the commission or attempted commission of that crime must be proved beyond a reasonable doubt."

express malice) and CALJIC No. 8.31 (defining second degree murder as including implied malice).[19] Our state Supreme Court rejected the defendant's claim, stating that "the instructions as a whole clearly conveyed to the jury that implied malice did not apply to . . . first degree deliberate, premeditated murder . . . ." (*Id*. at p. 857.)

Our case differs from the facts in *Combs* because the court in our case did not give CALJIC No. 8.31. Thus, unlike in *Combs,* the instruction that ties express malice to first degree murder (CALJIC No. 8.20) was not accompanied by its second degree murder, implied malice, counterpart (CALJIC No. 8.31). Having been informed of the meaning of implied malice, the jurors were not given the other instruction telling them what to do with that definition. Without the instruction on second degree murder to which the implied malice definition could be applied, they might have believed that first degree murder could also be based upon implied malice.

We need not decide, however, whether the failure to give CALJIC No. 8.31, or to otherwise provide clarification regarding the use of the implied malice definition, was error because any error was harmless. Even if the omission constitutes a misinstruction

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[19] CALJIC No. 8.31 provides: "Murder of the second degree is [also] the unlawful killing of a human being when: [¶] 1. The killing resulted from an intentional act, [¶] 2. The natural consequences of the act are dangerous to human life, and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [¶] When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being."

on the elements of an offense, the omission is harmless when "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained' [citation]." (*People v. Swain* (1996) 12 Cal.4th 593, 607, quoting *Chapman v. California, supra,* 386 U.S at p. 24.) In addition to being instructed on first degree murder by deliberation and premeditation, the jury was also instructed that it could have found Wahlert guilty of first degree murder -- regardless of their finding of express or implied malice -- if the killing occurred during the commission of the crime of robbery or kidnapping. (See § 189; CALJIC No. 8.21.) Although the jurors did not reveal the theory or theories by which they found Wahlert guilty of murder, they did find true the special circumstances that Wahlert committed the murder while engaged in the commission of the crimes of robbery and kidnapping. Thus, even if the jurors did not find express malice, they necessarily found Wahlert guilty of first degree murder under the felony-murder theory. Any error, therefore, could not have contributed to the verdict.

Defendant's reliance on *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 666-670, is misplaced. There, the jury was instructed that it could convict the defendant of murder based on malice, or felony murder based on the theory that a death occurred during the commission of an assault with a deadly weapon. The latter instruction was erroneous, the court held, because, in California, felony murder cannot be predicated on an assault with a deadly weapon. (*Id*. at pp. 666-667.) The court further held that defendant was denied a fair trial, because the jury may have convicted him based on the erroneous felony-

murder instruction. (*Id*. at pp. 669-670.) Here, however, the jury was not given an erroneous theory upon which to convict defendant. Rather, the jury was properly instructed on both first degree deliberate and premeditated murder and first degree felony murder. And in view of these instructions and the true findings on the special circumstances allegations, the jury could not have convicted defendant of first degree murder based solely on implied malice.

E. *Consecutive Sentences for Wahlert on Counts 2, 3, and 4 Under Section 654*

The court imposed consecutive sentences on Wahlert on counts 2 (possession of a firearm by a felon), 3 (possession of ammunition by a felon), and 4 (brandishing a firearm). Wahlert contends that, under section 654, the sentences on two of the counts must be stayed. The People do not dispute this claim, stating that it "appears to have merit, for the reasons set forth in appellant Wahlert's briefing."

Section 654 prohibits multiple punishment where a single criminal act or omission violates more than one penal statute.[20] This statutory prohibition has been extended to cases where an indivisible course of conduct violates several different penal statutes. (See *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) Whether multiple criminal acts constitute an indivisible course of conduct for purposes of section 654 "depends on the

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[20] Section 654, subdivision (a), provides, in relevant part: "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."

intent and objective of the actor." (*Ibid*.) This is a question of fact for the trial court. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.) Prior to sentencing, the trial court is required to determine whether section 654 "requires a stay of imposition of sentence on some of the counts." (Cal. Rules of Court, rule 4.424.) Here, the court did not make an express determination under section 654 or rule 4.424 of the California Rules of Court.

The second, third, and fourth counts arise from the arrest of Wahlert on January 20, 2001, following his brandishing of a firearm in the presence of Jennifer Kay. Upon his arrest, the police found a .30-caliber gun in the truck and a live round in Wahlert's pocket. Wahlert argues that there is no evidence that he "entertained multiple criminal objectives which were independent of and not merely incidental to each other." The People, in conceding the issue, do not point to any such evidence; and even if the court is deemed to have made an implied determination under section 654 to impose multiple punishments, it did not disclose any facts in the record supporting the determination. Nor has our review of the record revealed facts supporting separate punishments.

Accordingly, the judgment against Wahlert should be modified to reflect the imposition of the sentence on count 2 (possession of a firearm by a felon under § 12021, subd. (a)(1)), which "provides for the longest potential term of imprisonment" among counts 2, 3, and 4 (§ 654; compare §§ 18 & 12021, subd. (a)(1) [count 2; maximum of three years] with § 12316, subd. (b)(1) & (3) [count 3; maximum of one year] and § 417,

subd. (a)(2) [count 4; maximum of one year]). The sentences as to the remaining counts shall be stayed.[21]

F. *Gun Enhancement*

Wahlert was sentenced to life imprisonment without parole on count 1. He was also sentenced to an additional 25 years under subdivision (d) of section 12022.53 because the jury found true the firearm enhancement allegation. Wahlert contends that the enhancement penalty must be stricken because of language in subdivision (j) of section 12022.53. We disagree.

Section 12022.53 imposes sentence enhancements for firearm use or discharge in the case of felonies listed in subdivision (a), including murder. (§ 12022.53, subd. (a).) If the defendant personally uses a firearm, the enhancement is 10 years. (*Id.* at subd. (b).) If the defendant intentionally and personally discharges a firearm, the enhancement is 20 years. (*Id.* at subd. (c).) If the defendant intentionally and personally discharges a firearm and proximately causes death or great bodily injury, the enhancement is 25 years to life. (*Id.* at subd. (d).)[22] The sentence enhancements must be added consecutively to

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[21] The abstract of judgment for Wahlert does not reference the sentence on count 4. Although none of the parties comment on this omission, it should nevertheless be corrected.

[22] At the time of the crime, subdivision (d) of section 12022.53 provided: "Notwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, and who in the commission of that felony intentionally and personally discharged a firearm

[footnote continued on next page]

the base term for the crime. (*Id.* at subds. (b), (c) & (d).) Our state Supreme Court has stated that the "legislative intent behind section 12022.53 is clear: 'The Legislature finds and declares that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime.' [Citation.]" (*People v. Garcia* (2002) 28 Cal.4th 1166, 1172.)

Wahlert's argument is based upon language in subdivision (j) of section 12022.53. That subdivision provides: "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, *unless another provision of law provides for a greater penalty or a longer term of imprisonment*." (Italics added.)

Wahlert contends that the italicized language precludes the enhancement of his sentence because the statute providing for life imprisonment without parole (§ 190.2,

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[footnote continued from previous page]
and proximately caused great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by a term of imprisonment of 25 years to life in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony." Murder, under section 187, is one of the felonies specified in subdivision (a) of section 12022.53. (§ 12022.53, subd. (a)(1).)

subd. (a)), under which he was sentenced, is "another provision of law [that] provides for a greater penalty of imprisonment" than the additional 25 years provided for under subdivision (d) of section 12022.53. The same argument was addressed and rejected in *People v. Chiu* (2003) 113 Cal.App.4th 1260. The *Chiu* court stated: "The entire sentence at issue in subdivision (j) reads: '*When an enhancement specified in this section* has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.' (Italics added.) The subject of this sentence, grammatically speaking, is the 'enhancement specified in this section'—that is, one of the three applicable enhancements for firearm use or discharge specified in subdivisions (b) through (d). When one of those three enhancements for firearm use or discharge has been properly charged and found true, the court shall impose the applicable punishment under subdivision (b), (c), or (d), unless another provision of law provides for a greater penalty or a longer term of imprisonment *for that firearm use or discharge*, in line with that subject. The 'greater penalty' part of subdivision (j) ensures that the '[n]otwithstanding any other provision of law' language in subdivisions (b) through (d) does not inadvertently supersede a law that would impose an even *greater* punishment on a defendant for employing a firearm in committing one of the enumerated crimes."

(*People v. Chiu, supra,* at p. 1264.) We agree with the *Chiu* court's analysis and interpretation of the statute.[23] Accordingly, we reject Wahlert's claim.

G. *Custody Credits*

Wahlert and Garrison each assert that the abstracts of judgment erroneously failed to state any credit for time spent in custody. This is inconsistent with the reporter's transcript and the court's minutes which show that the court awarded 779 days of presentence credit for Garrison and 1,099 days of presentence credit for Wahlert. The People do not dispute the contentions and request that the abstracts of judgment be corrected to reflect the correct number of custody credits. The defendants' arguments are supported by the record and we will order the requested modifications.

H. *Restitution Fine*

At the sentencing hearing, the court ordered that Wahlert and Garrison pay victim restitution of two amounts, for which "the defendants are jointly liable," and, additionally, a $10,000 "restitution fine." (See § 1202.4, subds. (a) & (b).) After reciting

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[23] The California Supreme Court has granted review of *People v. Shabazz* (2004) 125 Cal.App.4th 130, review granted March 16, 2005, S131048, which presents the following issue: "When a defendant is convicted of an offense that is punishable by a sentence of imprisonment for life without the possibility of parole, is the defendant also subject to a sentence enhancement of 25 years to life under . . . section 12022.53, subdivision (d), for personally discharging a firearm and causing death, or does . . . section 12022.53, subdivision (j), preclude the imposition of that enhancement when the punishment for the defendant's underlying felony is imprisonment for life without the possibility of parole?" (Summary of Cases Accepted During the Week of Mar. 14, 2005.)

the two victim restitution amounts, the minute order concerning Garrison's sentencing hearing states, "Court imposes 2 victim restitution *fines* to be paid jointly/severed [*sic*]." (Italics added, capitalization omitted.) The minute order then recites the $10,000 amount.

Garrison argues that the minute order reference to "fines" in connection with the victim restitution orders is erroneous and should be stricken. (Garrison does not contend that the victim restitution obligation may be joint and several.) The People do not dispute this contention and agree that the matter should be corrected. We will instruct the court to do so.

DISPOSITION

The judgment against Wahlert is modified to reflect a stay of the sentences imposed on counts 3 and 4. So modified, that judgment is affirmed.

The judgment against Garrison is affirmed.

The court is instructed to modify the abstract of judgment for Wahlert to reflect the sentence on count 4 (see fn. 21), the staying of the sentences on counts 3 and 4 pursuant to section 654, and a credit for time spent in custody of 1,099 days. The court is further instructed to modify the abstract of judgment for Garrison to reflect a credit for time spent in custody of 779 days. The court is directed to send copies of the modified abstracts of judgment to the Department of Corrections.

The court is further instructed to issue an order correcting and modifying its minute order dated January 23, 2004, to modify the lines that read, "COURT IMPOSES 2

VICTIM RESTITUTION FINES TO BE PAID JOINTLY/SEVERED" to read, "VICTIM RESTITUTION TO BE PAID JOINTLY/SEVERALLY."

CERTIFIED FOR PARTIAL PUBLICATION

/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ McKinster
J.