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CERTIFIED FOR 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) ORDER MODIFYING OPINION AND DENIAL OF PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

Respondent's petition for rehearing is denied. The opinion filed in this matter on June 24, 2005, is modified as follows:

1. On page 21, before the paragraph beginning, "We conclude . . . .," the following is inserted:

The People also contend that Wahlert's incriminating statements were admissible as adoptive admissions, which do not implicate the confrontation clause. (See *Combs, supra,* 34 Cal.4th at p. 842; *People v. Silva* (1988) 45 Cal.3d 604, 624.) An adoptive admission occurs when a party, with knowledge of the content of another's hearsay

statements, uses "'words or conduct indicating his *adoption* of, or his *belief in*, the truth of such hearsay statement.' [Citation.]" (*People v. Silva, supra*, at p. 623) The People did not raise this argument below and do not cite to the record or otherwise identify which of Wahlert's statements should be treated as admissions by Garrison or what words or conduct by Garrison support the argument. Indeed, Garrison expressly and unequivocally denied that she told Wahlert to shoot Willison and denied any involvement in the crime during the conversation, stating, "[t]he only thing I did, is I was there." When Wahlert said he would "take the fall for this," Garrison indicated that she did not understand what he was talking about. Garrison did not indicate her adoption of, or belief in, the truth of Wahlert's statements.

The People further assert that Wahlert's pretext call statements are indistinguishable from statements made by coconspirators to police agents during the course of a conspiracy, which do not implicate the confrontation clause. The People rely heavily on *United States v. Hendricks* (3d Cir. 2005) 395 F.3d 173 (*Hendricks*). In that case, multiple defendants were charged with "conspiracy, narcotics possession and distribution, and money laundering." (*Id*. at p. 175.) The United States sought to introduce evidence of conversations between a "confidential informant" and some of the defendants, which were recorded by the informant "wearing a taping device provided by the Government." (*Id*. at pp. 175 & 182.) The government argued that the statements were admissible, among other grounds, as coconspirator statements. (*Id*. at p. 175; see

Fed. Rules Evid., rule 801(d)(2)(E).) In holding that the admission of the recorded conversations did not violate the confrontation clause, the court in *Hendricks* relied entirely upon *Bourjaily v. United States* (1987) 483 U.S. 171 [107 S.Ct. 2775, 97 L.Ed.2d 144] (*Bourjaily*) and the *Crawford* court's citation of *Bourjaily*. (*Hendricks, supra,* at pp. 183-184.)

In *Bourjaily*, the Supreme Court held that the admission of a coconspirator's statement to an FBI informant during the course of a conspiracy did not violate the confrontation clause. (*Bourjaily, supra*, 483 U.S. at pp. 181-182.) In finding that "the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence," the court explained that "co-conspirators' statements, *when made in the course and in furtherance of the conspiracy*, have a long tradition of being outside the compass of the general hearsay exclusion." (*Bourjaily, supra*, at p. 183, italics added.) The *Crawford* court indicated that, while *Bourjaily* relied upon the now-rejected *Ohio v. Roberts, supra,* 448 U.S. 56 analytical framework, its outcome was, as the *Hendricks* court stated, "'consistent with' the principle that the Sixth Amendment permits the admission of nontestimonial statements in the absence of a prior opportunity for cross-examination." (*Hendricks, supra*, 395 F.3d at p. 183.)

Hendricks and *Bourjaily* are inapposite because they involve statements made by coconspirators in the course of and in furtherance of a conspiracy. (See, e.g., Fed. Rules Evid., rule 801(d)(2)(E); Evid. Code, § 1223.) By contrast, the challenged pretext call

statements here were not made by a coconspirator in furtherance of a conspiracy; the object of any conspiracy to murder Willison had long since been attained. (See *People v. Saling* (1972) 7 Cal.3d 844, 852-853.) For purposes of the confrontation clause, this distinction is critical. Statements made by coconspirators in the furtherance of the conspiracy do not implicate the confrontation clause because they are, as stated in *Crawford*, "*by their nature . . . not testimonial*." (See *Crawford, supra*, 158 L.Ed.2d at pp. 195-196, italics added; accord, *United States v. Holmes* (5th Cir. 2005) 406 F.3d 337, 348 & fn. 16; *United States v. Reyes* (8th Cir. 2004) 362 F.3d 536, 540-541 & fn. 4.) They are "a kind of authorized admission" of the party against whom they are offered. (Cal. Law Revision Com. com., 29B West's Ann Evid. Code (1995 ed.) foll. § 1223, p. 173; see also Fed. Rules Evid., rule 801(d)(2) [treating coconspirator statements as nonhearsay party admissions].) They are treated as admissions because, "by the very nature of a conspiracy, each co-conspirator authorizes the other to do and say everything that would further the conspiracy." (1 Jefferson Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 2005) Admissions and Confessions, § 3.40, pp. 102-103.) Thus, "the declarant is the agent of the other, and the admissions of one are admissible against both." (*Lutwak* v. *United States* (1952) 344 U.S. 604, 617 [73 S.Ct. 481, 97 L.Ed.2d 593]; accord, *People v. Brawley* (1969) 1 Cal.3d 277, 289.)[13]

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[13] The unique nature of coconspirator statements was explained by the Supreme Court in *United States v. Inadi* (1986) 475 U.S. 387 [106 S.Ct. 1121, 89 L.Ed.2d 390]: "[C]o-conspirator statements derive much of their value from the fact that they are made

[footnote continued on next page]

When, as here, the challenged pretext call statements are not the statements of a coconspirator made during the course of a conspiracy, neither the rule nor the rationale for treating coconspirator statements as nontestimonial applies. As stated above, Wahlert's statements were not made in the course of or in furtherance of a conspiracy. Wahlert was not acting as Garrison's agent when he made the statements; nor did Garrison authorize Wahlert's statements. Indeed, during the pretext call, Wahlert and Garrison were clearly taking different positions regarding Garrison's involvement in the crime. Because the coconspirator exception has no application here, *Hendricks* and *Bourjaily* are not controlling.

2. This change will necessitate renumbering the remaining footnotes.

3. The text of what was previously footnote 13 and is now renumbered footnote 14 is deleted and the following inserted in its place:

The People argue that our focus on the government's involvement in the production of testimony omits other considerations, such as the formality of the statement and the declarant's expectations as to whether his statements will be used at trial. While such matters may be relevant to evaluating whether a statement is testimonial under the

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[footnote continued from previous page]
in a context very different from trial, and therefore are usually irreplaceable as substantive evidence. Under these circumstances, 'only clear folly would dictate an across-the-board policy of doing without' such statements. [Citation.] The admission of co-conspirators' declarations into evidence thus actually furthers the 'Confrontation Clause's very mission' which is to 'advance "the accuracy of the truth-determining process in criminal trials."' [Citation.]" (*Id*. at pp. 395-396.)

totality of the circumstances, when the government is as extensively involved in the production of evidence as it was in this case, the formality with which the statements are made and the declarant's expectations are not determinative. For the same reason, 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.)

Except for these modifications, the opinion remains unchanged. These modifications do not effect a change in the judgment.

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/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ McKinster
J.