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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO JOSEPH GARCIA,

Defendant and Appellant.

A126353

(Contra Costa County  
Super. Ct. No. 05-080316-3)

After a jury trial, defendant Alberto Joseph Garcia was found guilty of the first degree murder of David James Watson (Pen. Code, § 187, subd. (a)). The jury also found defendant had not personally used or intentionally discharged a firearm in the commission of the crime. Defendant was sentenced to a term of 25 years to life in state prison. On appeal defendant advances several arguments challenging his conviction and the amount of a court security fee. We modify the judgment by vacating the \$30 court security fee and imposing a \$20 court security fee. In all other respects, the judgment is affirmed.

**FACTUAL AND PROCEDURAL BACKGROUND**

In an information, defendant was charged with the July 21, 2007, murder of David James Watson. It was additionally alleged that during the murder defendant personally used and intentionally discharged a firearm causing great bodily injury and death to Watson. The following relevant evidence was presented at a jury trial held in February and March of 2009.

*A. Prosecution's Case*

The prosecution's theory of the case was that defendant, his friend Joaquin Agredano, and Agredano's mother, Barbara Washburn, were involved in the murder of Watson. Washburn, deemed an accomplice as a matter of law, testified as to the circumstances leading to the murder. In July 2007, Washburn was living in a second-floor apartment with the victim whom she described as her boyfriend. Her son had visited the apartment but he was not staying there at the time of the murder. Washburn had known defendant for a few months. Defendant was a friend of her son and the victim. Washburn owned a blue Ford pickup truck with a camper shell on the back. The truck had one bench seat for the driver and passengers.

On the evening before the murder, Washburn and her son picked up defendant in her truck to take him to a house in Concord. During the drive, Washburn said she was moving out of the victim's apartment. She was upset with the victim and complained about him as she had done on other occasions to her son. Defendant was saying things like he did not like the victim too much, and he was getting mad at the whole situation. Defendant said he needed to talk to the victim because he did not like what was going on. Washburn told defendant not to worry about the situation.

Once in Concord, Washburn and Agredano remained in the truck. Defendant left and later returned with a duffle bag. Defendant did not care where he was dropped off. All three then went to a San Francisco bar and stayed there until closing. Washburn wanted to stay in San Francisco, but defendant wanted to go back to Pittsburgh to see the victim. During the ride over the Bay Bridge, defendant fired a gun outside the truck window. When Washburn asked defendant what he was doing, defendant just laughed; he thought it was funny. Both Washburn and her son asked defendant to put the gun away and he placed it in his duffle bag. Washburn thought the gun could have been a sawed-off shotgun, but she was not sure.<sup>1</sup> When Washburn passed the highway exit for the victim's apartment, defendant got very upset and demanded to be taken to the victim's house.

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<sup>1</sup> The prosecution's firearms expert testified he did not know what type of shotgun was used to kill the victim.

Washburn stopped the car and Agredano got into the driver's seat and drove to the victim's apartment.

At the victim's apartment, Washburn remained in the truck and defendant and Agredano got out of the truck. Agredano stood at the side of the truck, while defendant walked upstairs to the victim's apartment. Defendant had his bag with him. Washburn yelled at her son to get defendant, saying "Let's go. He got that bag." Agredano walked to the bottom of the stairs, and yelled, "Let's go." Washburn moved into the driver's seat and started the truck. When no one answered the victim's door, defendant came down the stairs and he and Agredano started to walk towards the truck. All of a sudden, defendant turned back and Agredano stopped as well. Washburn yelled, "Let's go. I'm leaving." She drove a short distance and then turned around so that the men would believe she was actually leaving. During the time she was driving the truck she could not see her son and did not know if he went upstairs to the victim's apartment. As she was driving back towards the victim's apartment, Washburn heard a bang and then a gun go off about three times. Before the gunshots, she heard the victim say, "Hey," and after the shots, the victim again said, "Hey," and then faded away. When she heard the shots, Washburn screamed loudly because she heard the victim's voice fade away and knew he was hurt. Washburn saw defendant running downstairs; her son was already at street level. Defendant had a gun in his hands but Washburn did not see defendant's bag. The front door of the victim's apartment was wide open. Agredano got into the truck's driver's seat, Washburn moved to the middle, and defendant got into the passenger seat. Agredano told his mother to stop screaming, and she did so. Defendant was laughing and asked Washburn if she had heard what the victim sounded like, or something to that effect.

After leaving the victim's home, Agredano drove the truck to a gas station in Antioch. On the way to the gas station, defendant used his cell phone to call a number of people. He called a woman named Dorry, and asked if he could stay with her. Dorry refused to allow defendant to come to her house. Defendant also called his mother in Reno more than once. Defendant and Washburn took turns driving the truck to Reno. Once in Reno, defendant went to his mother's home, taking the gun with him. Defendant said, "I

have to go hide this from my mother.” Defendant, Washburn, and Agredano then went to a nearby coffee shop, and Washburn later drove defendant back to his mother’s home. Washburn and Agredano then returned to California.

Washburn did not report the incident to the police because she was “basically scared for [her] life.” Washburn and her son went to a cousin’s home in San Francisco. They stayed a few days and then returned to Contra Costa County in Washburn’s truck. The Contra Costa County police stopped Washburn’s truck. Washburn surrendered to the police, but Agredano took off in the truck. Agredano was later apprehended, and after a brief struggle, he was arrested by the police.

When Washburn initially spoke with the police, she lied and said she was not at the victim’s apartment at the time of the killing. She lied because she was scared of “[t]he whole situation. It was just crazy.” She was afraid for herself and her son because she did not know what defendant would do. After the police said Washburn and her son were under arrest for murder, and that what she told them next would make the difference between whether she and her son went home or went to jail, Washburn changed her story and gave the police more details about the incident. The jury was also informed that if Washburn testified truthfully and fully she would be allowed to plead to the crime of felony accessory to murder and would receive a probationary term after having served about three months in jail.

Felix Makinano testified that in July 2007, defendant came to his house with another man.<sup>2</sup> After defendant and the man left the apartment, defendant returned alone and asked Makinano to keep a bag for him. Makinano agreed, and put the bag, “a green avocado color chair holder with a . . . pull string,” inside a closet. Before securing the bag, Makinano looked inside and saw “a black shotgun.” Makinano did not examine the gun to see if it was loaded. A couple of days later, at about 10 p.m., defendant retrieved the shotgun from Makinano’s home. At that time defendant arrived in a pickup truck with a camper shell. There were two people in the truck, one male and one female. Makinano

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<sup>2</sup> Makinano later identified a photograph of Agredano as looking like the man who came with defendant.

did not recognize the woman. The man was the same man that had come to Makinano's house when defendant had earlier dropped off the shotgun. The jury was also informed that at the time of his trial testimony Makinano was on felony probation, and he had been convicted of robbery in 1992 and felony grand theft in 1995.<sup>3</sup>

In the early morning hours of July 21, 2007, the police responded to a call and found the front door of the victim's apartment had been forced in and the victim was laying on the floor. The victim later died from the loss of blood caused by shotgun wounds in his lung and blood vessels. The medical examiner could not determine how far away the shooter was from the victim or the order in which the shooter fired into the victim. However, the victim was hit front to back in his chest, left hip area, back of left heel and back of left forearm. The medical examiner believed that there was a defensive wound on the victim's forearm; the wound in the heel was consistent with the victim trying to flee at the time he was shot and would have caused the victim to fall down; and the wounds in the chest and hip area were consistent with the victim being on the ground when those wounds were sustained.

Millive Kinerman and Lawanna Nichols, the victim's downstairs neighbors, testified as to what they heard from inside each of their apartments. Shortly before the killing, Kinerman was in her bedroom, lying down and listening to the radio. She heard someone knocking on the victim's apartment door, and a female repeatedly saying, " 'Open the door.' " Kinerman did not recognize the voice but it was possible it was the woman who lived in the victim's apartment. When there was no response, the female went back downstairs and said something like, "Oh, this is a bunch of '[shit].'" Shortly thereafter, Kinerman looked out a window for just a second. She thought she saw a black truck and "a silhouette of a female because of a ponytail." The female was sitting in the

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<sup>3</sup> The prosecutor also proffered evidence that in June 2007, Agredano had been seen in possession of a "camouflage" shotgun as he left the home of Andy Dryer. A month later, on or about July 15, 2007, Dryer discovered his shotgun was missing after a burglary at his home. Unlike the guns described by Washburn and Makinano, Dryer described his missing gun as an unloaded, full-size, "semi-automatic" "12-gauge Browning Silver camouflage [greens and browns] shotgun with a scope on top of it."

truck's passenger seat. Kinerman could not see if anyone else was in the truck. Kinerman went back to listening to the radio and did not pay any attention after she left the window.

Kinerman initially testified she did not hear the truck drive away or return. She later confirmed she told the police that as the truck drove away, she heard the victim outside his apartment saying, " 'Chief, Chief.' . . . 'I would have opened the door but you had left.'" Kinerman did not think the victim was actually talking to anyone at that time. Kinerman also could not be sure she heard the truck returning. However, maybe five minutes later, Kinerman heard footsteps on the stairs leading to the victim's apartment. The footsteps were two people "simultaneously" going up the stairs, one appeared to be a male and the other a female. She heard both male and female voices saying, " 'Open the door.' " The female voice sounded like it could have been the same person that Kinerman had heard earlier. Kinerman then heard a sound that she thought was a kick on the door. After one kick and within a matter of seconds Kinerman heard the sound of "somewhat rapid" gunfire, about four or five gunshots. Kinerman then heard a very loud female scream, which she demonstrated in court. The scream sounded like it came from upstairs from the female who said, " 'Open the door.' " Kinerman heard the victim "gasp." She then heard two sets of footsteps running down the stairs. Kinerman called 911. When she next looked out her apartment window, the police were at the scene. Kinerman recalled that the victim's pit bull dogs were howling in the apartment but she never heard them bark.

Nichols testified that before the killing, she was inside her apartment and saw shadows of more than one person going towards a patio area. She also heard someone throwing rocks towards the window of the victim's upstairs apartment. The victim screamed or shouted. Nichols then heard more than one person running upstairs. She also heard her upstairs neighbor say, "Oh, shit," from inside his apartment. He sounded "[i]n shock." Nichols did not know if the victim's apartment door was open. Nichols then heard gunshots. After the gunshots, Nichols heard her upstairs neighbor's dogs barking.

Jessica Dominquez was interviewed by the police on October 23, 2007. At that time she was using a lot of methamphetamine.<sup>4</sup> She had known defendant since a few weeks before September 19, 2007. At that time he was her boyfriend and she loved him. She told the police she had had discussions with defendant on two separate times. Defendant had told her he was in a lot of trouble, he was going to have to go on the run, and he asked her to join him. Dominquez refused because she was caring for her two children. Defendant eventually told her about the trouble he was in. He said in effect that “they think I’m involved in this killing of a dude.” He told her the victim had done something wrong. Defendant and Agredano were driven to the victim’s apartment by Agredano’s mother, who was dating the victim. Defendant and his friend had “gone actually up to the apartment.” They “had knocked on the door and that someone had kicked in the door.” Defendant did not say who had kicked in the door. Defendant believed the victim “had gotten up or that he had gotten up to come to the door, something like that.” Then “they shot” the victim and left. After the last shot, defendant heard the victim “take his last breath.” Defendant did not say why they shot the victim. He just said the victim had “messed up” and he “had to be dealt with ‘cause he fucked up.’ ” Defendant did not say whether both he and his friend had a gun. When Dominquez asked defendant what he meant when he said, “we shot him,” he gave her “a look as if [she] should have known what he meant by ‘we.’ ” Dominquez told the police she thought defendant’s look meant “that he was the one to--.” Defendant never said he shot anyone. Dominquez assumed that was what defendant meant by his look. When asked if she told the police the truth, Dominquez said she told the police whatever she felt would get her out of the interview as quickly as possible. She did not remember if what she said was true or false. However, her testimony in court was the truth. The jury was also informed that Dominquez had a prior conviction for petty theft, and at the time of her trial testimony she was on felony probation, and she had two pending criminal cases, one for a felony and one

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<sup>4</sup> The prosecution proffered evidence that when Detective James Darnell Butler interviewed Dominquez she did not exhibit any signs of being under the influence of methamphetamine. Butler did not ask Dominquez to submit to a blood test because based on his experience she did not appear to be under the influence.

for a misdemeanor. If she testified truthfully and fully she would be given consideration in her pending cases.

The preliminary hearing testimony of Dorothy Rudkin was read to the jury. On direct examination, Rudkin, also known as Dorry, testified she was defendant's friend and had been the victim's friend. In the early morning hours of July 21, 2007, defendant called her and asked if he could "come kick it with" her. She said, "No." Defendant also said "the cops in Contra Costa County were looking for him." On cross-examination, Rudkin testified that at the time she received defendant's telephone call she was "regularly under the influence of methamphetamine." When she later spoke with the police she was also under the influence and she was nervous. At the time of her police interview, she was not in custody, on parole, or on probation, and she told them the truth. Although the police did not threaten her, they said they could put her in jail if she did not talk to them. By the time of the preliminary hearing on March 11, 2008, Rudkin did not recall the substance of the telephone call or where she was when she received the telephone call. She only remembered what she had told the detectives about the telephone call.<sup>5</sup> The jury was informed that at the time of Rudkin's preliminary hearing testimony, she was on "a felony probation," and in 2001 "she had a prior felony conviction for first degree burglary."

***B. The Defense***

Defendant chose not to testify. He recalled Detective Butler as a witness to testify concerning the unsuccessful search for the murder weapon and ammunition. Although the police had looked unsuccessfully for the shotgun and any ammunition at locations where defendant had been before and after the murder, the police did not search places where Washburn and Agredano had been either before or after the murder. While Washburn had consented to a search of her storage unit, Butler did not know if the storage unit had actually been searched. Defendant's good friend testified about his visit to her home in the early evening before the murder.

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<sup>5</sup> Rudkin was not asked how many telephone calls she received from defendant. The prosecution proffered evidence that defendant's cell phone records showed three outgoing calls were made to Rudkin after the murder: the first call was 35 seconds, the second call was 15 seconds, and the third call was 54 seconds.

## DISCUSSION

### I. Jury Instructions<sup>6</sup>

In this case, the court instructed the jury it could convict defendant of first-degree murder or the lesser included offenses of second-degree murder or voluntary manslaughter (CALJIC Nos. 8.10, 8.20, 8.30, 8.31, 8.40) on various theories: (1) he was the actual perpetrator or an aider and abettor in the commission of murder or the lesser include offenses (CALJIC Nos. 3.00, 3.01); (2) he aided and abetted assault with a deadly weapon and murder was a natural and probable consequence of the assault (CALJIC No. 3.02); (3) he aided and abetted brandishing a firearm, and murder was a natural and probable consequence of brandishing a firearm<sup>7</sup> (CALJIC No. 3.02); or (4) he conspired to commit the crimes of brandishing a firearm or assault with a deadly weapon, and murder was perpetrated by a co-conspirator in furtherance of that conspiracy and was a natural and probable consequence of the agreed upon criminal objective of that conspiracy (CALJIC Nos. 6.10.5, 6.11).

Contrary to defendant's contentions, CALJIC Nos. 3.00<sup>8</sup>, 3.02<sup>9</sup> and 6.11<sup>10</sup> have been held to be correct statements of the law generally. (*People v. Canizalez* (2011) 197

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<sup>6</sup> Our discussion is based on the instructions given in this case. The court used language found in CALJIC instructions at the time of the trial in February and March 2009. For clarity and convenience, we refer to the CALJIC instructional numbering used by the court. We express no opinion on any post-trial modifications made to the CALJIC or CALCRIM instructions.

<sup>7</sup> Although defendant questioned the submission of this alternative theory of guilt at trial, he presents no substantive argument on appeal that reversal is required on this basis. We therefore do not further address the issue. (But see *People v. Prettyman* (1996) 14 Cal.4th 248, 269 [court cautioned only that conviction for murder under the natural and probable consequence doctrine could not be based on “ ‘trivial’ ” activities].)

<sup>8</sup> The written instruction CALJIC No. 3.00 read, in pertinent part: “Persons who are involved in [committing] . . . a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: [¶] 1. Those who directly and actively [commit] the act constituting the crime, or [¶] 2. Those who aid and abet the [commission] . . . of the crime.”

<sup>9</sup> The written instruction CALJIC No. 3.02 read: “One who aids and abets [another] in the commission of a crime [or crimes] is not only guilty of [that crime][those crimes], but is

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also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime[s] originally aided and abetted. [¶] In order to find the defendant guilty of the crime of murder, [as charged in Count One,] you must be satisfied beyond a reasonable doubt that: [¶] 1. The crime of brandishing or assault with a deadly weapon was committed; [¶] 2. That the defendant aided and abetted that crime; [¶] 3. That a co-principal in that crime committed the crime of murder; and [¶] 4. The crime of murder was a natural and probable consequence of the commission of the crime of brandishing or assault with a deadly weapon. [¶] [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 of 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, so long as you are 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 of murder was a natural and probable consequence of the commission of that target crime.]” The court also instructed the jury as to the elements of the crimes of assault with a firearm and exhibiting (brandishing) a firearm.

<sup>10</sup> The written instruction CALJIC No. 6.11 read: “Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if that act or declaration is in furtherance of the object of the conspiracy. [¶] The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. [¶] [A member of a conspiracy is not only guilty of the particular crime that to [his][her] knowledge [his][her] confederates agreed to and did commit, but is also liable for the natural and probable consequences of any [crime][act] of a co-conspirator to further the object of the conspiracy, even though that [crime][act] was not intended as a part of the agreed upon objective, and even though [he][she] was not present at the time of the commission of that [crime][act]. [¶] You must determine whether the defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes, and, if so, whether the crime alleged [in Count[s] One] was perpetrated by [a] co-conspirator[s] in furtherance of that conspiracy and was a natural and probable consequence of the agreed upon criminal objective of that conspiracy.] [¶] [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 would be likely to occur. The issue is to be decided in light of all of 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.]”

corresponds to language in CALJIC No. 3.00]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 106-107 [CALJIC No. 3.02]; *People v. Prieto* (2003) 30 Cal.4th 226, 249-250 [CALJIC No. 6.11]; but see *People v. Nero* (2010) 181 Cal.App.4th 504, 518 [“even in unexceptional circumstances” court found language in CALJIC No. 3.00 “can be misleading”].) Because defendant did not request modification of these instructions on the grounds he now asserts on appeal, his claims of error are forfeited. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570; *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-1119; see *Canizalez, supra*, 197 Cal.App.4th at p. 849; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163.) Nevertheless, we will consider defendant’s arguments in light of his contention that the given instructions prejudicially affected his substantial rights. (Pen. Code, § 1259 [“appellate court may . . . review any instruction given, . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby”].)

Contrary to defendant’s contentions, CALJIC No. 3.00 does not state a theory of guilt by telling the jury that, in effect, the actual perpetrator and the aider and abettor are—or must be found—guilty of the same offense, and given the other instructions, no juror would reasonably so interpret the language as defendant suggests. The instruction addresses only the basic, introductory concept of principal liability in that both an actual perpetrator of a crime and a person who aids and abets the perpetrator’s commission of that crime are deemed to be principals, regardless of the extent or manner of their participation in the crime. (§ 31<sup>11</sup>; see *People v. McCoy* (2001) 25 Cal.4th 1111, 1118, fn. 1 [“[w]hen the charged crime and the intended crime are the same, . . . the aider and abettor must, indeed, share the actual perpetrator’s intent”].) Consequently, if the jury in this case found defendant was a principal in the commission of first-degree murder (either as a direct perpetrator or an aider and abettor), he and any co-principal were “equally guilty” of that offense.

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<sup>11</sup> Section 31 states, in pertinent part: “All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed.”

Alternatively, if the jury in this case found defendant guilty only as an aider and abettor or conspirator under the natural and probable consequence doctrine, “the ‘equally guilty’ statement is also correct.” (*Canizalez, supra*, 197 Cal.App.4th at p. 850, fn. omitted.) “Aider and abettor culpability . . . for a nontarget, or unintended, offense committed in the course of committing a target offense has a different theoretical underpinning than aiding and abetting a target crime. Aider and abettor culpability for the target offense is based upon the intent of the aider and abettor to assist the direct perpetrator [to] commit the target offense. By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense. [Citation.] Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime. It follows that the aider and abettor will always be ‘equally guilty’ with the direct perpetrator of an unintended crime that is the natural and probable consequence of the intended crime.” (*Id.* at p. 852.) So, too, it follows that the conspirator will always be “equally guilty” with his co-conspirators of an unintended crime that is the natural and probable consequence of the intended crime. Thus, contrary to defendant’s contention, the “equally guilty” language in CALJIC No. 3.00 is a correct statement of the law when applied to natural and probable consequences aider and abettor and conspirator culpability, and therefore, properly given in this case.

We are not persuaded by defendant’s arguments that the other portions of the instructions magnified the purported error of the “equally guilty” language of CALJIC No. 3.00. “ ‘Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to

prevail over technical hairsplitting.’ ” (*People v. Williams* (1995) 40 Cal.App.4th 446, 457, quoting *Boyd v. California* (1990) 494 U.S. 370, 380-381.) The jurors were adequately informed they were to treat first degree murder, second degree murder, and voluntary manslaughter as different crimes with different elements. The jury instructions given on first degree murder (CALJIC Nos. 8.00, 8.10, 8.11, 8.20), second degree murder (CALJIC Nos. 8.30, 8.31), and voluntary manslaughter (CALJIC Nos. 8.40, 8.42, 8.43, 8.44, 8.50), as well as the related specific mental states (CALJIC Nos. 2.02, 3.31.5), treated the offenses as separate crimes and made clear that the defendant had to possess the required mental state before he could be found guilty of any of those offenses. The jury was also specifically told to consider separately and determine unanimously whether defendant was guilty of first degree murder, second degree murder, or voluntary manslaughter (CALJIC Nos. 8.50, 8.70, 8.71, 8.72, 8.74, 8.75), and specify the crime committed, if any, in the verdict sheets (CALJIC Nos. 8.70, 17.50). Any doubt as to defendant’s liability for murder in the first degree, murder in the second degree, or voluntary manslaughter, had to be resolved in defendant’s favor (CALJIC Nos. 8.71, 8.72). As part of its duty to determine whether the defendant was guilty or not guilty “as to Count One for the crime of murder in the first degree and lesser crimes,” of “[m]urder in the second degree” and “[v]oluntary manslaughter,” the jury was told it had the “discretion to choose the order in which [it] evaluate[d] each crime and consider[ed] the evidence pertaining to it.”

Defendant’s reliance on *People v. Woods* (1992) 8 Cal.App.4th 1570 (*Woods*) is misplaced. In that case, two defendants (Barry Woods and John Windham) were convicted of first degree murder after they both assaulted two victims and Woods shot and killed another victim outside a nearby apartment complex. (*Id.* at pp. 1577, 1579.) Windham was prosecuted under the theory he was an aider and abettor of the first degree murder committed by Woods outside the apartment complex because that murder was a reasonably foreseeable consequence of the earlier assaults. (*Id.* at pp. 1579, 1596.) The appellate court reversed Windham’s conviction, concluding the trial court erred when it responded to a question from the jury during deliberations by informing the jurors they

could not convict Windham of the nontarget offense of second degree murder as an aider and abettor if they determined Woods (the perpetrator of the killing) was guilty of first degree murder. (*Id.* at pp. 1577, 1590.) In so ruling, the *Woods* court held that, “in determining aider and abettor liability for crimes of the perpetrator beyond the act originally contemplated, the jury must be permitted to consider uncharged, necessarily included offenses where the facts would support a determination that the greater crime was not a reasonably foreseeable consequence but the lesser offense was such a consequence. Otherwise, . . . the jury would be given an unwarranted, all-or-nothing choice for aider and abettor liability.” (*Id.* at p. 1588.) Thus, “[i]f the evidence raises a question whether the offense charged against the aider and abettor is a reasonably foreseeable consequence of the criminal act originally aided and abetted but would support a finding that a necessarily included offense committed by the perpetrator was such a consequence, the trial court has a duty to instruct sua sponte on the necessarily included offense as part of the jury instructions on aider and abettor liability.” (*Id.* at p. 1593.) Unlike the situation in *Woods*, the jurors in this case were not “given an unwarranted, all-or-nothing choice” of either convicting defendant of first degree murder or acquitting him of any liability for the killing. (*Id.* at pp. 1588, 1590.) As a whole, the instructions informed the jury of the elements and definitions to be considered in evaluating whether defendant was guilty of first degree murder or any lesser included offense, and the requisite mental states applicable to those crimes.

Defendant also argues the trial court had a sua sponte duty to instruct the jury, as part of its aiding and abetting and conspiracy instructions, that premeditated murder—not just murder—was a natural and probable consequence of the target crimes of brandishing or assault with a firearm before it could convict defendant of first-degree murder. However, although the instructions on aiding and abetting (CALJIC No. 3.02) and conspirator liability (CALJIC No. 6.11) based on the natural and probable consequence doctrine did not mention the degrees of murder, other instructions and the verdict forms required the jury to determine the degree of murder. Contrary to defendant’s contentions,

we see nothing in *Woods* that requires a trial court to sua sponte modify the CALJIC Nos. 3.02 and 6.11 instructions to include the degree of murder.<sup>12</sup>

Nor do we see any merit to defendant's contention that, under the instructions, the jurors were left to their own devices to determine how to reconcile the objective test of the natural and probable consequences with the subjective test for determining premeditation. We presume "jurors are intelligent persons and capable of understanding and *correlating* all jury instructions which are given. [Citations.]" (*People v. Mills* (1991) 1 Cal.App.4th 898, 918; emphasis added.) The jurors never asked any questions or otherwise indicated they were confused by the instructions. Defendant argues the jurors did not ask any questions because "once they decided that Agredano was the direct perpetrator and that he had acted with deliberation and premeditation, the easiest way for the jury to resolve the

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<sup>12</sup> Defendant's reliance on *People v. Hart* (2009) 176 Cal.App.4th 662 (*Hart*), is similarly misplaced. In *Hart*, the trial court instructed the jury concerning aiding and abetting liability for the nontarget offense of attempted murder under the natural and probable consequences doctrine using CALCRIM No. 402 (*Hart, supra*, 176 Cal.App.4th at p. 669), which is similar to the CALJIC No. 3.02 instruction that was used in this case. The *Hart* jury was advised to refer to separate instructions to decide whether the crimes of attempted murder and assault with a firearm were committed. (*Hart, supra*, 176 Cal.App.4th at p. 669.) The Third District reversed, concluding that the instructions did not fully inform the jury that in order to find a defendant guilty of attempted premeditated murder as a natural and probable consequence of attempted robbery, it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery, and the general instructions concerning the premeditation and deliberation elements of attempted premeditated murder did not suffice. (*Hart, supra*, 176 Cal.App.4th at p. 673.) However, since the briefs were filed in this case, *Hart* has been disapproved to the extent it is inconsistent with *People v. Favor* (2012) 54 Cal.4th 868, 879, fn. 3 (*Favor*). In *Favor*, a majority of the court held that "the jury need not be instructed that a premeditated attempt to murder must have been a natural and probable consequence of the target offense." (*Id.* at p. 872.) Rather the trial court needs only to instruct that "attempted murder . . . qualifies as the nontarget *offense* to which the jury must find foreseeability." (*Id.* at p. 879.) "[O]nce the jury finds that an aider and abettor, in general or under the natural and probable consequences doctrine, has committed an attempted murder, it separately determines whether the attempted murder was willful, deliberate, and premeditated." (*Id.* at pp. 879-880.) In so ruling, the *Favor* court distinguished attempted murder from murder that was at issue in *Woods*. (*Id.* at pp. 876-877.) However, for the reasons we have stated in the text of this opinion, *Woods* does not require reversal in this case.

issue of [defendant's] mental state was to rely upon the 'equally guilty' language of CALJIC No. 3.00." However, defendant's speculative argument as to how the jury may have applied the instructions is not persuasive in light of our conclusions that CALJIC No. 3.00 is not a theory of guilt and was otherwise properly given in this case. At trial defendant did not premise his defense on an argument that even if the actual shooter was guilty of first degree murder, defendant was guilty of unpremeditated murder or voluntary manslaughter. He argued only that he was not involved in any killing either as an actual perpetrator, aider and abettor, or conspirator, and at most he may have been guilty of being an accessory after the fact, which was an offense that was not before the jury for its consideration. Neither the jury instructions nor the prosecutor's closing arguments precluded the jury from considering defendant's arguments. By its verdict that defendant was guilty of first degree murder, the jury necessarily rejected his arguments. We therefore conclude any purported instructional error was harmless under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)<sup>13</sup>

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<sup>13</sup> In his opening brief, defendant contends the court's instructions on aiding and abetting liability based on the natural and probable consequence doctrine and conspiracy were prejudicial because the jury's finding that he did not personally use a firearm indicated it clearly rejected the theory that he personally shot Watson, and therefore his conviction for first degree murder depended on the jury finding him either an aider and abettor or a conspirator. In his reply brief, defendant clarifies his argument by contending the not true finding on the personal use of a firearm allegation is evidence the jury may have believed he did not intend to kill Watson and, if properly instructed, would have rendered a more favorable verdict. We conclude defendant's arguments based on the jury's verdict are not persuasive. The jury's verdict "shows only that there was a reasonable doubt in the minds of the jurors that defendant specifically used a [weapon]." (*People v. Santamaria* (1994) 8 Cal.4th 903, 919.) It does not show the reverse, that the jury found defendant was an aider and abettor or conspirator. (*Ibid.*) "The jury may merely have believed, and most likely did believe, that defendant was guilty of murder as either a personal [weapon] user or an aider and abettor [or conspirator], but *it may have been uncertain exactly which role defendant played*. That . . . would fully explain, and necessitate, the split verdict. [Fn. omitted.]" (*Ibid.*; see *People v. Thompson* (2010) 49 Cal.4th 79, 119.)

## II. Exclusion of Competency Reports and Limitation on Cross-Examination of Prosecution Witness Felix Makinano

### A. *Relevant Facts*

Before trial, defendant moved in limine to exclude the testimony of Felix Makinano on the ground that at the time of the murder he was “so [a]ffected by drug use and/or mental illness as to be incompetent to testify.” In support of the request, defendant asserted he was “informed and believes the Solano County Court appointed three professionals to evaluate Mr. Makinano’s competenc[y] to stand trial in his own pending matter. These records were subpoenaed by counsel in October 2008 and should be sealed in the court file herein. [Evidence Code section] 701.”<sup>14</sup>

Several hearings on the matter were held outside the presence of the jury. The trial court agreed to hold an Evidence Code section 402 hearing to determine Makinano’s testimonial competency. However, the court denied defense counsel’s request to release the two subpoenaed sealed competency reports<sup>15</sup> that had been received by the court—either for the purpose of the Evidence Code section 402 hearing or cross-examination, depending on the evidence adduced at the hearing. The court agreed with one of the psychologists that “these records are definitively privileged.” The court was willing to release “the bottom line,” ruling that the other information “is confidential and not disclosable.” In response, defense counsel argued there was case law allowing privileged records to be

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<sup>14</sup> Evidence Code section 701 reads, in pertinent part: “(a) A person is disqualified to be a witness if he or she is: [¶] (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or [¶] (2) Incapable of understanding the duty of a witness to tell the truth.”

<sup>15</sup> One psychologist appeared in court in response to the defense subpoena. She asserted “privilege” for the report she had prepared relating to Makinano. When asked to explain the assertion, the psychologist stated the records were confidential and they were held in confidence. “As being his psychologist, the person who conducted the evaluation, it’s my responsibility that those records don’t fall into hands that can be used against Mr. Makinano.” When asked if she was prohibited from producing the records to the court, the psychologist replied it was her understanding she would produce the records to the court and ask the court to hold them in confidence. The court said the records would be accepted “for the Court file,” and the court would review them at some later time.

released if it was necessary for a fair trial. Defense counsel indicated the court could release the reports with a protective order, asserting that he needed to know more than the determination reached by the experts. “It is the symptoms and the disorders that Mr. Makinano may suffer from that affect—maybe not so much his ability to testify now, but they refer back to the events that he’s going to be trying to recall and testifying about as well as at the time he was interviewed.” In response, the court stated: “I can tell you that he was interviewed on November 21st, 2007, at the Solano County jail, . . . [a]nd it was in regard to the charges of carrying a dirk or dagger[,] which were dated October 16th, 2007. [¶] I think I can tell you that while at the County Jail the jail medical doctor had prescribed some medication for him. However, the bottom line of [the psychologist] was not only that Mr. Makinano was competent to stand trial at that time but also that he was capable of making rational decisions about his medication. [¶] It’s a very, very brief report. It is a grand total of two and a half pages.” Defense counsel then made a formal request for the release of the report to him with a protective order so that he could be a little more informed. The court replied: “We are going to have the 402 hearing with Mr. Makinano tomorrow. Should information in this report become pertinent while he’s being questioned, I may release more information. But at this time this is all I’m going to release.” Defense counsel also asked to know if the psychologist had come to a “psychological diagnosis,” and if so, if Makinano had “an illness that m[ight] impact a witness’s ability to be a witness or to recall, recollect, and relate . . . .” The prosecutor replied there was no diagnosis because the report related to whether Makinano was competent to stand trial, to which the court stated, “That’s correct. It was not a diagnosis.”

The court held an Evidence Code section 402 hearing regarding Makinano’s testimonial competency. Before the hearing, defense counsel again asked to review the subpoenaed competency reports for the purpose of conducting the hearing. The court denied the request. Defense counsel also asked the court if its review “yield[ed] any information that would bear on [counsel’s] ability to cross-examine on the issue presented at the 402 hearing, which would be essentially competenc[y] to testify under section 701 of the Evidence Code.” The court replied, “[W]e have two conflicting opinions from two

separate psychologists. That's where we are now. We do not have the third document which you subpoenaed which potentially is the tie breaker, but we haven't seen it. So for now one document says he wasn't [competent] and one document says he was [competent.]" Defense counsel then proceeded to question Makinano.

Makinano testified he was not then on medication nor had he been prescribed medication to be taken the morning of the hearing. Nor was he under the care of mental health professionals. However, within the last year he had been prescribed medication because he was hallucinating. He was not sure when he was first prescribed the medication, but it was after he was arrested in Solano County in October 2007. Makinano had been hearing voices. When asked if he was seeing things that weren't there, Makinano replied, "No, I think I was hearing things more than seeing things." When asked how long he had been hearing voices before he was jailed in Solano County, the witness replied, "Well, I never told anybody, but . . . occasionally, when I use[d] meth . . . I started to hear voices. It started to take a toll on me, yeah."

When first asked how long he had been experiencing the phenomenon of hearing voices, Makinano said, "Through my use of . . . drugs, and that would be like 15 to 18 years," starting at the age of 13. He later testified he began to hear voices "just within the last year." Makinano "imagine[d]" that his hearing voices in October 2007 interfered with his ability to accurately perceive what was going on around him. He began hearing voices before he went to jail. He heard voices in September 2007, which led him to call the police. He dialed 911 because he thought someone was trying to kill him. He could not recall if he heard voices as early as August 2007, but he did not think so because he "was clean" for two and a half years.

Makinano then testified he had "relapsed" at the end of March 2007. When asked if he heard voices between March and "say the start of summer of 2007," the witness replied, "Not at first." When asked if he recalled hearing voices during the summer, the witness replied, "not as bad as it was . . . after the situation happened, no." Even though it wasn't as severe, the witness said the voices had begun by the summer of 2007. Makinano associated hearing the voices with his use of methamphetamine. When asked if he used

methamphetamine during the summer of 2007, the witness said, “Yes, when I relapsed, yeah.”

When first asked if his use of methamphetamine during the summer of 2007 affected his ability to accurately comprehend what was going on around him, the witness replied, “Of course I made a wrong choice.” However, when he was again asked if his drug use affected his ability to accurately understand what was going on around him, the witness replied, “At that time no. . . . [n]ot in the summer.” When asked if hearing voices periodically affected his ability to understand what was going on around him, the witness replied, “I can say that it made me using and hearing voices, yeah, I made the wrong choice of a couple [of] things, yeah.” When defense counsel indicated he was not talking about choices, but asking if Makinano believed he was able “to accurately sort of perceive and understand what was going on around [him],” the witness replied, “Yes.”

When asked if he believed his memory had been affected by his previous use of methamphetamine, Makinano replied, “For the long use of me using, sure it has.” When asked in what ways his memory had been affected, Makinano stated: “Dates, names, and so on,” and “events too.” However, as he sat in court the witness thought his memories were accurate. When asked if his memories could be based on hallucinations, the witness replied, “I can say they’re based on truth.”

Makinano recalled defendant came to his Concord apartment on three occasions. When asked if those occasions were during March and September of 2007, the witness indicated the occasions occurred in the beginning and during his relapses. When asked if he believed his use of methamphetamine in that time frame prevented him from now remembering accurately what happened when defendant came to his apartment, Makinano replied: “I can tell you that there would be things that I don’t remember and there would be things that I do remember.” When asked if it was possible that some of the things he did remember were based on hallucinations and not reality, the witness replied, “No.” On cross-examination, Makinano confirmed he was not then experiencing hallucinations and he knew the difference between the truth and a lie.

At the conclusion of the hearing, defense counsel submitted on the issue of Makinano's testimonial competency. The court ruled Makinano would be allowed to testify before the jury. "He understood the questions asked. He answered appropriately. He appeared to me to answer truthfully and consider and weigh answers before he provided them." Counsel then addressed other aspects of the witness's testimony that would be allowed to be presented to the jury. Specifically, the prosecutor asked—based upon the competency hearing—whether the court was going to allow defense counsel to question Makinano about hallucinations in front of the jury. The court ruled: "I don't see that it's appropriate. He answered those questions specifically. And . . . clearly he's a meth user and has been a meth user for a long time. No one is trying to paint any other picture of him than that. But in terms of hallucinations, I don't believe I'm going to allow it . . . ." Defense counsel objected, stating: "Just for the record, let me indicate that I believe it would be appropriate for the jury to hear that so they can appropriately evaluate his testimony. I understand the Court's ruling and I won't . . . invite it."<sup>16</sup>

## ***B. Analysis***

### **1. Withholding of Competency Reports**

Defendant argues the trial court's failure to release the competency reports prejudicially undermined his right to cross-examine Makinano at both the Evidence Code section 402 hearing and at trial. We disagree. The trial court examined the reports in camera and essentially concluded that with some very minor exceptions they contained no information that would require disclosure to ensure defendant a fair trial. We have also examined the reports in camera and concur with the trial court's ruling. The reports contain no information that would have any arguable bearing on Makinano's mental state

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<sup>16</sup> In his briefs, defendant suggests the trial court should have permitted cross-examination regarding Makinano's hallucinations based on Makinano's statements that were recorded in a police report prepared after his arrest in October 2007. According to defendant, Makinano's statements to the police "draw a direct link" between his hallucinations and the events surrounding defendant and the shotgun. However, defendant never asked the trial court to consider Makinano's statements in the police report before ruling on the matter. "[W]e cannot hold the trial court abused its discretion in rejecting a claim that was never made." (*People v. Valdez* (2004) 32 Cal.4th 73, 109.)

or ability to perceive and accurately recall events that occurred at the time of his meetings with defendant in the summer of 2007 or at the time of Makinano's interview with the police regarding defendant. Consequently, we see no prejudicial error in the trial court's refusal to release Makinano's competency reports.<sup>17</sup>

## **2. Limitation on Cross-Examination**

We also see no error in the trial court's refusal to allow defense counsel to cross-examine Makinano regarding his hallucinations. "Except as otherwise provided by statute, no evidence is admissible except relevant evidence. (Evid. Code, § 350.) Relevant

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<sup>17</sup> In light of our determination, we do not need to address defendant's appellate argument that the competency reports were not privileged pursuant to the psychotherapist-patient privilege under the Evidence Code. We also deny defendant's request that we make the competency reports available to him if they are, in fact, discoverable so that he might demonstrate prejudicial error. Before defendant filed his opening appellate brief, we denied his motion to unseal the competency records. In so ruling, we explained: "There is no indication the competency evaluations were provided to either [defendant] or his counsel in the trial court. The right to appellate review is limited to a determination as to whether the lower court's ruling was correct. This court may make its determination by reviewing the sealed, confidential documents. (See *People v. Price* (1991) 1 Cal.4th 324, 493 [appellate counsel not entitled to view privileged material to assess whether trial court properly ruled on discovery request]; see also *People v. Collins* (1986) 42 Cal.3d 378, 395, fn. 22; *Herrera v. Superior Court* (1985) 172 Cal.App.3d 1159, 1163; Cal. Rules of Court, rule 8.328(c)(6).) Moreover, there is no indication that [defendant's] counsel has sought Makinano's consent to unseal confidential and privileged competency evaluations as to which Makinano holds the privilege and has a privacy interest. (See *People v. Price*, *supra*, 1 Cal.4th at p. 493.)" On appeal defendant renews his request for disclosure of the competency reports, pursuant to *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) and its progeny, and the reciprocal discovery rules in Penal Code sections 1054 et. seq. However, at trial defendant did not argue he was entitled to disclosure of the subpoenaed competency reports because the reports were in the government's possession within the meaning of *Brady*. Additionally, defendant cites no decision, and we have found none, "concluding that records physically in the hands of private psychologists, and which have been sought through subpoenas directed to private parties, fall within . . . *Brady*" merely because the psychologists were court-appointed to perform an examination to determine the witness's competency to stand trial in an unrelated proceeding. (*People v. Hammon* (1997) 15 Cal.4th 1117, 1125, fn. 3.) *Barnett v. Superior Court* (2010) 50 Cal.4th 890, *People v. Coyer* (1983) 142 Cal.App.3d 839, and *People v. Kelley* (1997) 52 Cal.App.4th 568, are factually distinguishable from this case, and do not warrant disclosure of the competency reports.

evidence is evidence ‘having any tendency in reason to prove or disprove any disputed fact. . . .’ (*Id.*, § 210.) The trial court is vested with wide discretion in determining the relevance of evidence. [Citation.] The court, however, has no discretion to admit irrelevant evidence. [Citation.] ‘Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact in light of Evidence Code section 210, which requires that evidence offered to prove or disprove a disputed fact must have a tendency in reason for such purpose.’ [Citation.]” (*People v. Babbitt* (1988) 45 Cal.3d 660, 681-682 (*Babbitt*); see *People v. Kraft* (2000) 23 Cal.4th 978, 1035 [“evidence leading only to speculative inferences is irrelevant”].)

Contrary to defendant’s contentions, the court’s ruling did not violate any state evidentiary rules or abridge his federal constitutional right to confront a witness by preventing an effective cross-examination of Makinano. Makinano attributed his hallucinations to his chronic use of methamphetamine. However, he explicitly testified that his ability to perceive and recall the events in the summer of 2007 was impacted by his chronic drug use, not his hallucinations.<sup>18</sup> At trial defendant made no offer of proof that Makinano’s hallucinations, separate from his chronic drug use, would likely have affected his ability to accurately perceive and recall relevant events in the summer of 2007. Without expert testimony regarding the issue, “ ‘[t]he inference which defendant sought to have drawn from the [proffered evidence] is clearly speculative, and evidence which produces only *speculative* inferences is *irrelevant* evidence.’ [Citation.]” (*Babbitt, supra*,

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<sup>18</sup> Contrary to defendant’s contention, Makinano never testified that his hallucinations “ ‘somewhat’ ” affected his memory of the summer of 2007. In support of this contention, defendant refers us to pages 411 and 412 of the trial transcript. At those pages the following questioning took place: [Defense Counsel]: “And now the same question with hearing the voices. Do you think, having had that experience in 2007 of hearing these voices, do you think that affects your memory as you sit here now of things that happened in 2007 in the summertime? [¶] [Makinano]: Say that again. [¶] The Court: Can you remember back today to events that happened in the summer? [¶] [Makinano]: Somewhat, sure, yeah.” Thus, contrary to defendant’s contention, the record indicates Makinano was answering the court’s question, and not counsel’s earlier question as to whether his hearing voices affected his memory. Our reading of the record is supported by Makinano’s later responses to questions in which he explicitly stated his belief that his hallucinations did not affect his memory of the events in the summer of 2007.

45 Cal.3d at p. 682; see *People v. Stitely* (2005) 35 Cal.4th 514, 549-550; see also *People v. Rubin* (2008) 168 Cal.App.4th 1144, 1148 [“there is no due process right to present irrelevant evidence”].) Additionally, the court ruled only that defense counsel would not be allowed to question Makinano about his hallucinations. Defense counsel was not precluded from questioning Makinano about the effect of his chronic use of methamphetamine on his ability to accurately perceive and recall his meetings with defendant and his later interview with the police.<sup>19</sup> Thus, even if the trial court erred in its ruling, we conclude it was harmless under any standard of review. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

### **III. Admission of Preliminary Hearing Testimony of Dorothy Rudkin**

#### **A. Relevant Facts**

Defendant’s trial started on February 5, 2009. After the prosecutor served Dorothy Rudkin with a subpoena to appear at the trial, the witness was arrested. On February 11, after the trial was adjourned for the day, Rudkin was brought into court while she was in custody. The prosecutor asked the court to order Rudkin back to court on February 24, if she was released from custody or posted bail. The court granted the prosecutor’s request, telling the witness: “Ms. Rudkin, you’re ordered to appear here, in case you bail, on February 24th at 8:30. That’s a court order. You don’t need a further subpoena for that. And any failure to appear will result in a bench warrant. You understand?” Rudkin replied, “Yes.” Rudkin then said, “after this county” she had to go to “Santa Rita” county, and then corrected herself, and said she meant “Alameda County.” The prosecutor indicated she would work with Rudkin’s attorney.

On February 24, Rudkin failed to appear as previously ordered by the court. The prosecutor reported that Rudkin’s Contra Costa County case had been dismissed and she was no longer in custody. The prosecution’s investigator testified that Rudkin had posted bail on February 19, and had been released from Contra Costa county jail. At the court’s

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<sup>19</sup> Although defendant cross-examined both Washburn and Dominguez about their drug use, and a portion of Rudkin’s preliminary hearing testimony that was read to the jury included cross-examination about her drug use, defense counsel apparently choose not to question Makinano about his drug use.

request, the prosecution's investigator contacted the Santa Rita jail classification deputy, who confirmed that Rudkin was not in custody in the Santa Rita jail in Alameda County.

The prosecutor requested permission to read Rudkin's preliminary hearing testimony into the record on the grounds she had testified at the hearing, she had not appeared as ordered by the court, and the prosecution had made attempts to locate the witness but she was not in custody. Defense counsel objected, contending the prosecutor had not taken sufficient steps to locate Rudkin as the trial was still ongoing and there was still time to locate her. Defense counsel noted the prosecution had contact information through friends, family, or the witness herself, and the witness's release from custody was insufficient to show that she was unavailable.

The court overruled the defense objection: "Normally I would agree with you. If she had not been present before me and I had not ordered her back personally, I would agree with you the showing would be insufficient at this point. However, I personally ordered her to be here . . . at 8:30. [¶] And she indicated that she understood. And in fact, the information came from her that she thought she might have a warrant and would be transported to Santa Rita which is why I even asked the question. [¶] But since she's not in custody here and she's not in custody in Santa Rita, she is in disregard of the court order. I am going to issue a bench warrant for her arrest. I am going to allow the preliminary hearing testimony to be read."

### ***B. Analysis***

The parties present extensive arguments regarding the propriety of the admission of Rudkin's preliminary hearing testimony on the basis of the witness's unavailability. However, we do not need to address and express no opinion on the court's ruling in response to the parties' arguments during the trial. As we now discuss, even if the evidence should have been excluded, we conclude its admission was harmless under any standard of review. (*Chapman v. California, supra*. 386 U.S. at p. 24; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Contrary to defendant's contention, Rudkin was not a crucial prosecution witness. The substantive portion of her testimony—defendant's statement that the cops were

looking for him—was independently before the jury through Dominquez’s testimony that defendant discussed fleeing because it was believed he was involved in the murder. Additionally, we see no basis for defendant’s assertion that Rudkin was a “credible witness.” As argued by defense counsel in his closing, Rudkin’s credibility was undermined by her regular use of methamphetamine at the time she received the telephone call from defendant and when she later discussed the matter with the police. Rudkin’s criminal history, her reasons for talking to the police, and “[t]he fact [she] did not appear as a witness [at trial] may have further undermined [her] credibility in the eyes of the jury.” (*People v. Pitts* (1990) 223 Cal.App.3d 1547, 1557.) The prosecutor’s reference in her closing statement to Rudkin’s testimony does not demonstrate the importance of the testimony, as defendant suggests. The prosecutor’s rebuttal remark reminding the jury of Rudkin’s testimony was nothing more than a reasonable response to defense counsel’s closing arguments as to how the jury should consider the witness’s testimony. We therefore conclude defendant has not demonstrated that the admission of Rudkin’s preliminary hearing testimony was prejudicial error requiring reversal.

#### **IV. Cumulative Effective of Errors**

We reject defendant’s contention that reversal is required based on the cumulative effect of the purported errors raised on appeal. “[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]” (*People v. Hill* (1998) 17 Cal.4th 800, 844-845.) This is not such a case. The record demonstrates that any purported errors, considered individually or collectively, were not so prejudicial as to deny defendant a fair trial or a reliable verdict.

#### **V. Court Security Fee**

At the time of defendant’s conviction on March 4, 2009 (date of verdict), Penal Code section 1465.8 required the court to impose a \$20 court security fee, and not \$30 as reflected both in the court’s oral pronouncement of sentence on September 18, 2009<sup>20</sup> and

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<sup>20</sup> Although the clerk’s minute order of sentencing correctly reflects the imposition of a \$20 court security fee, the court’s oral pronouncement of sentence constitutes the

the abstract of judgment. (See Stats. 2007, ch. 302, § 18; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327-1328; see also *People v. Davis* (2010) 185 Cal.App.4th 998, 1000-1001 [version of statute in effect at time of conviction controls for purpose of imposing monetary assessments].) Thus, we agree with the parties that the judgment should be modified by vacating the \$30 court security fee and imposing a \$20 court security fee.

### DISPOSITION

The judgment is modified by vacating the \$30 court security fee and imposing a \$20 court security fee. In all other respects, the judgment is affirmed. The trial court is directed to send a corrected abstract of judgment to the Department of Corrections and Rehabilitation reflecting the modification in the amount of the court security fee.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Siggins, J.

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rendition of the judgment and is controlling. (*People v. Freitas* (2009) 179 Cal.App.4th 747, 750, fn. 2.)