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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

EDDIE L. MONTANEZ et al.,

Defendants and Appellants.

D058128

(Super. Ct. No. SCD204723)

APPEALS from judgments of the Superior Court of San Diego County, John S. Einhorn, Judge. Affirmed as to appellant Steve L. Montanez; affirmed in part, reversed in part, and remanded as to appellant Eddie L. Montanez.

INTRODUCTION

A jury convicted Steve L. Montanez (Steve) of the first degree murder of Delores Attig (Pen. Code, § 187, subd. (a))¹ and found true special circumstance allegations he committed the murder while aiding and abetting robbery, rape and oral copulation

¹ Further statutory references are also to the Penal Code unless otherwise stated.

(§ 190.2, subd. (a)(17)). The jury additionally found true an allegation he was armed with a firearm during the murder (§ 12022, subd. (a)). A separate jury in the same trial also convicted Steve's brother, Eddie L. Montanez (Eddie), of the first degree murder of Attig and found the firearm enhancement allegation true, but found the special circumstance allegations not true.

The trial court sentenced Steve to life in prison without the possibility of parole plus one year for the firearm enhancement. The court sentenced Eddie to 25 years to life in prison for the murder conviction plus one year for the firearm enhancement.

Steve and Eddie both appeal. Steve contends we must reverse his conviction because the trial court erroneously admitted: (1) portions of jailhouse phone calls relating remarks by his attorney, and (2) testimony about his character for violence, his past uncharged criminal acts, his prison history, and his gang affiliation. He also contends the accumulation of these errors requires reversal of his conviction.

Eddie contends we must reverse his conviction because the trial court erroneously refused to instruct the jury that the prosecution has the burden of disproving his duress defense beyond a reasonable doubt. Alternatively, he contends we must direct the trial court to modify the abstract of judgment to clarify his aggregate sentence is 26 years to life rather than 27 years to life.

We conclude Steve's claims either lack merit or any trial court errors were harmless and affirm the judgment as to him. The People concede and we agree the trial court improperly failed to instruct Eddie's jury on the burden of proof for the duress defense; however, we conclude the error was harmless. In addition, the People concede

and we agree Eddie's abstract of judgment is ambiguous and we direct the trial court to modify it to clarify the ambiguity. In all other respects, we affirm the judgment as to Eddie.

BACKGROUND

Prosecution's Case

Evidence Presented to Both Juries

In the middle of a night in June 1986, Michael Stanton, Star Lutes, and Attig drove Lutes's car to a dirt lot near a residential area below the Balboa Park municipal golf course to drink beer, smoke cigarettes, and listen to music. Stanton sat in the driver's seat and Attig and Lutes sat in the backseat. A Hispanic man came up from behind Stanton, put a gun to the left back side of his neck and told him not to move. The man commanded Stanton to crawl out through the passenger side of the car with his head down. Stanton heard a ruckus coming from the back of the car and, out of the corner of his eye, saw someone holding a gun to Lutes's head. Stanton thought there were three to five men and heard three or four voices besides his own, Lutes's and Attig's.

Stanton complied with the man's command and ended up outside the car, face down in the dirt. Almost immediately, Lutes was thrown to the ground next to Stanton. The attackers put a gun to Stanton's head and told Stanton and Lutes not to move or they would be blown away. The attackers said they had previously killed three people. The attackers bound Stanton and Lutes and went through their pockets. They took about \$15 and a small amount of marijuana from Stanton.

Stanton heard Attig being led away to a nearby embankment as she said, "No. Please. No. Please." Sometime later, Stanton heard a single gunshot coming from the direction where Attig had been taken. About 15 minutes after hearing the gunshot, Stanton realized the attackers had left. Stanton and Lutes freed themselves and called out for Attig. When Attig did not respond, Stanton and Lutes ran to Stanton's nearby apartment and Lutes called 911.

The responding officers took Lutes to look for Attig. They discovered Attig's body about 50 feet from Lutes's car. Attig was lying on her back, naked, with her legs spread open. A jacket covered her face. There was a lot of blood around her head and in her mouth. She had abrasions on her knees, shin, flank, and left forearm that were consistent with a physical struggle or a collapse at the scene, but no defensive injuries. She died from a gunshot fired close to her head.

Around 4:00 a.m., a night manager of a gas station in San Clemente saw a red or maroon car with four Hispanic males drive into the station. The driver and front seat passenger got out of the car. The driver had scratches and injuries on his face. He and the front seat passenger appeared older than the two backseat passengers.

The driver asked to use the restrooms, which were around the corner of the building. The driver and front passenger went toward the restrooms. The night manager followed and found the two men in the ladies' room. When he commented on their mistake, the driver became angry. The front passenger calmed the driver down and the night manager went about his business. At some point, the men moved their car next to the restrooms and sat there. They left after about 20 to 30 minutes.

Several days later, a police detective went to the gas station and retrieved Attig's wallet from one of the station's managers. The detective also retrieved Attig's purse from the station's dumpster, where the manager had thrown it the previous day.

Approximately two decades later, a criminalist reviewing cold cases conducted DNA testing on the evidence impounded in 1986, including swabs from Attig's oral, vaginal, and anal cavities. The testing showed at least three men contributed to sperm found in the vaginal and anal cavities, with Richard Archuleta being the predominant contributor.² At least two individuals contributed to sperm found in the oral cavity, with Steve being the predominate contributor. The criminalist also tested semen stains on Attig's blouse and jeans. The testing showed at least three men contributed to the stains, including Archuleta, Steve, and Steve's stepson, Eddie Cabanyog. The stains on the jeans also contained the DNA of an unknown male.

Steve and Cabanyog had access to a red Honda in 1986. After his arrest, Steve told a police detective he had only been to San Diego once, approximately six to eight years earlier.

Evidence Presented Only to Steve's Jury

Steve called Eddie's wife from jail and told her to tell Eddie "to be careful with what he says because [they were] gonna come out of this s—t" as "they don't have

² In a separate trial, a jury convicted Archuleta of first degree murder and found true an allegation a principal was armed with a firearm. The trial court sentenced him to an aggregate prison term of 26 years to life. We affirmed the conviction and sentence on appeal. (*People v. Archuleta* (Oct. 17, 2011, D057609) [nonpub. opn.])

anything on us," only Cabanyog. Steve also told her that if they were not careful, they were going to lock themselves up. He explained he had just returned from a video conference with his lawyer and investigator and they had told him "things are looking good right now."

Steve told his own wife during a subsequent jailhouse phone call that Archuleta broke the case, both Archuleta and Cabanyog talked to police officers, and Archuleta said Steve brought the gun used to kill Attig, even though Archuleta actually brought it. Steve additionally told his wife that he did not take the stereo from Lutes's car because he never got close to the car. He also said he never tied up Stanton and Lutes. He told her he had not admitted any involvement in the matter and was continuing to maintain he had never been to San Diego.

During another phone call two weeks later, Steve told his wife he did not care about the proof against him because "I was there, I know what the f—k I did and what I didn't do." He told her Eddie was making a deal with the prosecution and his own attorney had said, "The only way that they can f—k me up is if Eddie takes the stand" and implicates him. Steve then told her he had talked with Eddie and told Eddie to get his story straight because when Eddie and the others picked him up that day, they had the gun, not him and he was full of blood when the wallet was thrown away at the gas station. He explained he was covered with blood and could not drive because he "fell off the f—king mountain," which was also the reason why he had a bunch of scratches on his back, shoulder, and face, and why his hair does not grow on one part of his face.

Evidence Presented Only to Eddie's Jury

Eddie told police detectives that, on the day of the murder, he, Steve, Archuleta, and Cabanyog traveled in Steve's red or maroon Honda from Coachella to Mecca and then to San Diego. They ended up in a residential area near a park area or open field and they all got out to urinate. Steve and one of the others ran ahead toward the park area. Eddie followed and when he caught up to Steve, Steve had a gun pointed at two men and a woman, who were holding their hands up. Eddie thought Steve was robbing them. Steve told the others to keep an eye on the men as he led the woman away at gunpoint and engaged in sex acts with her. After about 10 minutes, Steve called for the others to have their turn. Eddie initially declined and stayed with the two men, but Steve kept calling him over to the woman in a louder voice. He saw Steve standing over the woman with a gun and gave in because he was afraid of Steve, who was the family disciplinarian and had a violent reputation. He apologized to the woman. She looked away and asked him not to hurt her. He felt bad about what happened, did not want to participate, and did not believe he actually penetrated her or completed the act. Another person followed him and then all of them took off running toward their car except Steve, who stood back. After Eddie and the others were a distance away, Eddie heard a single gunshot.

On his way back to the car, Steve fell and scratched his face, arms, and hands. After he reached the car and got in, someone asked about the gunshot. He told them he fired a shot in the air to scare the victims.

Defense Case

Evidence Presented to Both Juries

Eddie testified Steve is his brother and is five years older. As young children, they had lived with their dad until their dad killed their stepmother in their presence. Steve became the family disciplinarian and, when Eddie was seven, Steve would beat him about two or three times a week. Steve was known to explode, he had a reputation for violence and Eddie was afraid of him. Steve never beat Eddie up when they were both adults, although Eddie purposefully stayed away from Steve when Steve got mad or was drinking or using drugs.

In 1986, Eddie moved to Coachella with his mother and uncle. He lived a few houses down from Steve and his family. Steve had been in prison and was released sometime around April 1986. While in prison, Steve became involved with the Mexican Mafia. Sometime the same year of Attig's murder, Eddie saw Steve hit an unsuspecting person with a two-by-four.

Although Eddie witnessed some of the events surrounding Attig's murder, he denied having anything to do with them and instead stood back while they occurred. Eddie knew what Steve was doing with Attig because he heard her say, "Please no. Don't," he heard Steve tell her to shut up and not to scream, and he saw Steve on top of her.

After Steve finished with Attig, he called for the others to take their turn. At the time, he had a gun in his hand. After someone else took their turn, Steve waved his gun and told Eddie "to get [his] ass over there" and take his turn. Eddie agreed to take his

turn because he was scared. Steve stood by Attig with the gun pointed at her. Eddie got on top of her and "faked it" by pulling his pants down, but leaving his underwear on. After Eddie pulled his pants down, Steve walked away. Steve never pointed the gun at Eddie. He also never threatened to shoot Eddie unless Eddie raped Attig.

After the incident, Steve and Eddie stayed in contact with one another and associated with one another. After their arrest, Eddie asked not to be placed with Steve because he was scared he might be killed for talking.

A toxicologist testified that acid phosphatase testing of an oral swab showed there was no sperm on the swab. A forensic pathologist testified there was no sperm on slides prepared from the oral or the rectal swabs. However, a forensic serologist testified there was, in fact, sperm on the slide prepared from an oral swab. He also testified the rectal swab sample was likely contaminated by vaginal drainage. Another forensic serologist conducted DNA testing on additional semen stains found on Attig's clothing and testified Eddie was excluded as a contributor to the stains.

At the time of the incident, Steve was 28 or 29, Eddie was 23, Archuleta was 17 and Cabanyog was 15. Steve was also five inches shorter than Eddie.

Evidence Presented Only to Eddie's Jury

Eight character witnesses testified Eddie was not the type of person who would rape a woman. Juan Cantu, Steve and Eddie's half brother, testified he was afraid of Steve because Steve was the family disciplinarian and would beat up his brothers, including Eddie and Cantu. Cantu also saw Steve beat up his sister's boyfriend. Their mother was not able to stop the beatings.

DISCUSSION

I

Admission of Steve's Jailhouse Phone Calls

Steve contends the trial court erred in admitting the portions of his jailhouse phone calls relating statements his attorney made to him as these statements were double hearsay. He further contends the error requires reversal of his conviction because, to the extent the statements related his attorney's assessment of the case, their admission violated his right to effective assistance of counsel and, to the extent the statements related remarks by Archuleta and Cabanyog to police officers, their admission violated his right to confront witnesses. We conclude there is no merit to these contentions.

Hearsay is evidence of an out-of-court statement offered for its truth. (Evid. Code, § 1200; *People v. Alvarez* (1996) 14 Cal.4th 155, 185.) "Hearsay is not admissible unless it qualifies under some exception to the hearsay rule." (*People v. Davis* (2005) 36 Cal.4th 510, 535.) Double hearsay is not admissible unless each level falls within some exception to the hearsay rule. (Evid. Code, § 1201; *People v. Zapien* (1993) 4 Cal.4th 929, 951-952.) Under one such exception, "[a] defendant's own hearsay statements are admissible." (*People v. Davis, supra*, at p. 535.) Hearsay "is also admissible if offered for a nonhearsay purpose—that is, for something other than the truth of the matter asserted—and the nonhearsay purpose is relevant to an issue in dispute. [Citations.] For example, an out-of-court statement is admissible if offered solely to give context to other admissible hearsay statements." (*Id.* at pp. 535-536.)

In this case, the portions of Steve's jailhouse phone calls relating statements his attorney made to him were not hearsay because they were not offered to establish his attorney's statements were true. Instead, they were offered to provide context for Steve's admissions to being at the murder scene, being bloody from a fall at the murder scene, and being at the gas station in San Clemente where police detectives recovered Attig's purse and wallet. Out-of-court statements offered for such purposes do not violate the hearsay rule or raise confrontation clause concerns. (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1370.) Moreover, as Steve's recounting of his attorney's statements were not offered for their truth, they were not used as evidence against him and they did not reflect adversely on his attorney's credibility.

Furthermore, Steve's jury knew of the statements' nonhearsay purpose because, before the jury first heard the audio recordings of the phone calls, the trial court instructed the jury, "From time to time in the telephone conversations you may hear one of the parties to the call say something like my mother told me to drink milk. That's technically double hearsay. It's not that either of the people on the phone call are talking from their personal knowledge. They're just saying what some third party said to them. And that is admissible, but only as it may assist you in understanding the context in which this was said and not for the truth of the subject upon which there was conversation." "We presume the jury followed this instruction." (*People v. Davis, supra*, 36 Cal.4th at p. 537.)

Even if the trial court improperly admitted the evidence, the admission was harmless under any standard. There is no dispute Attig was shot in the head after being

sexually assaulted by multiple men. Eddie's testimony and Steve's admissions during the jailhouse calls established Steve was at the murder scene. Eddie's testimony, Stanton's testimony describing Attig being led away and pleading with her assailant, and the DNA evidence established Steve both raped Attig and compelled her to orally copulate him. Eddie's testimony and Stanton's testimony describing the theft of money and marijuana established robbery was one of the purposes of the attack on Attig, Stanton, and Lutes. Lastly, Eddie's testimony, Stanton's testimony describing a single gunshot discharged at the end of the attack, Steve's admissions that he fell and injured himself at the crime scene, and the gas station night manager's testimony describing scratches and injuries on the face of the driver of the red or maroon car established Steve was the shooter. Thus, it is clear beyond a reasonable doubt a rational jury would have found Steve guilty absent the error. (*People v. Geier* (2007) 41 Cal.4th 555, 608.)

Eddie's status as an accomplice does not alter our conclusion. Accomplice testimony may support a conviction if the testimony is corroborated by other evidence. (§ 1111.) " 'Corroborating evidence may be slight, entirely circumstantial, and entitled to little consideration when standing alone. [Citations.] It need not be sufficient to establish every element of the charged offense or to establish the precise facts to which the accomplice testified. [Citations.] It 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.' [Citation.]" (*People v. Valdez* (2012) 55 Cal.4th 82, 147-148.) Eddie's testimony was amply corroborated by: Stanton's testimony regarding the details of the crime, including the single gunshot at the end; Steve's admissions to being at the crime scene, to falling

down and injuring himself at the crime scene, and to being at the gas station; the gas station night manager's description of the injuries to the driver of the red or maroon car; and the discovery of Attig's purse and wallet at the gas station.

II

Admission of Eddie's Testimony About Steve's Other Bad Acts and Bad Character

Steve contends the trial court erred by admitting before Steve's jury Eddie's testimony about Steve's character for violence, his prior uncharged assaultive acts, his prior lengthy incarcerations, his prior use and sale of drugs, and his affiliation with the Mexican Mafia gang. He further contends the error requires reversal of his conviction because the evidence undermined his character and rendered his trial fundamentally unfair.

Generally, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) Such evidence may be admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." (*Id.*, subd. (b).) We review the trial court's rulings on the admission of evidence under Evidence Code section 1101 for abuse of discretion. (*People v. Fuiava* (2012) 53 Cal.4th 622, 667-668.)

In this case, the trial court did not admit the prior bad acts and bad character evidence against Steve. Instead, it appears from the record the trial court allowed Steve's jury to hear Eddie's full testimony because Eddie was a percipient witness and the trial court did not want to hamper the ability of Steve's jury to assess Eddie's credibility.³

To ensure Steve's jury would not use the evidence against Steve, the trial court instructed Steve's jury before Eddie's testimony that, "[d]uring the course of this witness's testimony, there may be certain statements, opinions, or testimony by [Eddie] dealing with his opinions as to the bad or criminal character of defendant [Steve]. That testimony is limited to [Eddie's] jury, and only goes to the issue of the state of [Eddie] and may not be considered by [Steve's] jury for any purpose." Then, in the midst of Eddie's testimony, the trial court further instructed Steve's jury, "I want to remind the jury hearing [Steve's] case that to the extent that this witness talks about a history or events that precede the June 1986 events, it's not for your consideration under any circumstance." Finally, once again before a break, the trial court instructed Steve's jury, "Okay. [Steve's] jury, remember the limitations on this witness's testimony as it relates to defendant [Steve]."

We generally presume juries follow trial court instructions. (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 669.) Assuming, without deciding, Steve rebutted this presumption and the trial court abused its discretion by allowing Steve's jury to hear the prior bad act and bad character evidence, we conclude the error was harmless under any

³ In fact, Steve's defense attorney cross-examined Eddie about some of the prior bad acts and bad character testimony, ostensibly to show Eddie was not a credible witness.

standard for the same reasons discussed in part I, *ante*. The fact that Eddie's testimony was the key evidence establishing Steve was the shooter does not alter our conclusion. This portion of Eddie's testimony reflected his eyewitness account of the events surrounding Attig's death. Steve's jury would have heard this testimony even if it had not heard the prior bad acts or bad character evidence. Moreover, as previously discussed, Eddie's testimony was amply corroborated by Stanton's testimony about hearing a single gunshot at the end of the attack, Steve's admission to being present at the murder scene and to falling down and injuring himself while fleeing, and the gas station night manager's description of scratches and injuries on the face of the driver of the red or maroon car.

The prosecutor's brief reference during her closing argument to the fact Steve had gotten out of jail a few months before the murder also does not alter our conclusion.⁴ Steve's counsel referenced much more of the prior bad acts and bad character evidence during his closing argument, including the evidence related to Steve's prior imprisonment and connection to the Mexican Mafia.⁵ Both counsel reference the evidence for the same

⁴ In the context of arguing Steve intended to kill Attig all along to prevent her from identifying him, the prosecutor remarked, "This is not a surprise. [Eddie] may want to say, 'Oh, well, what was that shot?' Come on. He can't have it both ways. [¶] He says what a scary guy [Steve] is, and yet he is surprised that he would shoot a young woman, who he has just engaged in a gang rape of. When he tell[s] us that he just got out in March of that year, out of custody, he is not going to want to go back. He had to kill her, and they all knew it."

⁵ More particularly, Steve's counsel argued, "[Eddie] wants to save his own skin, and his ultimate motive to lie. His ultimate motive is to lie to save himself. And the story that he tells, in the end, is preposterous. [¶] He says that he is afraid of Steve, who

purpose—to persuade the jury it should find at least some of Eddie's testimony not credible. Furthermore, the trial court informed the jury before deliberations that the jury must follow the trial court's instructions and that "[d]uring the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." Again, we presume the jury followed these instructions (*People v. Fuiava, supra*, 53 Cal.4th at p. 669) and nothing in the record suggests otherwise.

III

Cumulative Error

Steve contends we must reverse his conviction because the accumulation of the above claimed errors was not harmless beyond a reasonable doubt. For the same reasons we concluded it is clear under any standard neither of the above claimed errors separately affected the jury's verdict, we conclude it is clear under any standard they did not collectively affect the jury's verdict. (See *People v. Valdez, supra*, 55 Cal.4th at p. 181.)

he didn't really hardly grow up with, and with whom he had little to do with, really, as an adult, but that he is afraid. Steve had a gun. He is waving it around. He says to Eddie, 'It's your turn;' 'get over here and take your turn.' [¶] And Eddie says that he is afraid of him, so he strips down to his underwear, and he pretends to rape this woman, but he just pretended. I hate it when that happens. [¶] He says that his brother is connected in the jail, in the prison system and is violent and connected to gangs, Mexican Mafia, and that he is evil incarnate. And if that was so, he would have been too scared to have gotten on the witness stand in the first place and tell you this stuff. If it was so, he wouldn't have made it through this past weekend, much less the three years that this has been going on since his arrest. [¶] And I submit to you, you should reject what he has to say out of hand."

IV

Duress Instruction

Using a modified version of CALCRIM No. 3402, the trial court instructed Eddie's jury regarding the defense of duress⁶ as follows: "The defendant is not guilty of Murder and/or Special Circumstances alleged herein if he acted under duress. The defendant acted under duress if, because of threat or menace, he believed that his life would be in immediate danger if he refused a demand or request to commit the crime[s]. The demand or request may have been express or implied. [¶] The defendant's belief that his life was in immediate danger must have been reasonable. When deciding whether the defendant's belief was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed. [¶] A threat of future harm is not sufficient; the danger to life must have been immediate."

Because the trial court considered it a misstatement of law, the trial court refused to instruct the jury with the part of the CALCRIM No. 3402 that states, "The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of murder." Eddie contends the trial court's refusal to give this part of the instruction requires reversal

⁶ "Although 'duress is not a defense to any form of murder,' [citation] 'duress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony. [Citations.] If one is not guilty of the underlying felony due to duress, one cannot be guilty of felony murder based on that felony.' " (*People v. Wilson* (2005) 36 Cal.4th 309, 331.)

of his conviction. The People concede the error, but contend it was harmless beyond a reasonable doubt. We agree with the People.

"A trial court must instruct the jury on the allocation and weight of the burden of proof [citations], and, of course, must do so correctly. It must give such an instruction even in the absence of a request [citation], inasmuch as the allocation and weight of the burden of proof are issues that 'are closely and openly connected with the facts before the court, and . . . are necessary for the jury's understanding of the case.'" (*People v. Mower* (2002) 28 Cal.4th 457, 483-484.) For a duress defense, a defendant has the burden of raising a reasonable doubt as to the existence of the facts underlying the defense. (*Id.* at p. 479, fn. 7; *People v. Graham* (1976) 57 Cal.App.3d 238, 240.) The prosecution must then establish beyond a reasonable doubt the defense is inapplicable. (See *People v. Saavedra* (2007) 156 Cal.App.4th 561, 571.)

As the trial court failed to fulfill its instructional duty, it plainly erred. Instructional errors, including misdescriptions, omissions, or presumptions, are generally reviewed under the "harmless beyond a reasonable doubt" standard stated in *Chapman v. California* (1967) 386 U.S. 18, 24. We, therefore, " 'proceed to consider whether it appears beyond a reasonable doubt that the error did not contribute to this jury's verdict.' " (*People v. Huggins* (2006) 38 Cal.4th 175, 212.)

Although the trial court did not specifically instruct Eddie's jury on the burden of proof for the duress defense, the trial court's other instructions provided the jury with the necessary guidance. The trial court instructed the jury that Eddie was not guilty of murder if he acted under duress. In addition, the trial court instructed the jury that Eddie

was presumed innocent and the People had the burden of proving every element of the crime of murder, including the intent element, beyond a reasonable doubt. The trial court also instructed the jury to consider the instructions as a whole, and that before the jury could rely on circumstantial evidence to conclude the defendant had the required intent or mental state, the jury must be convinced the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent or mental state. The trial court explained that if the jury could draw two or more reasonable conclusions from the circumstantial evidence, and one supported a finding the defendant had the required intent and another supported a finding the defendant did not have the required intent, the jury must conclude circumstantial evidence did not prove the required intent.

Collectively, these instructions informed the jury that to prove Eddie guilty, the prosecution had to prove he did not act under duress.

Counsel's closing remarks both supported and demonstrated this burden of proof. During his closing remarks, Eddie's counsel repeatedly emphasized Eddie did not have the burden of proving anything, but rather the prosecution had the burden to prove any fact necessary for a conviction, including Eddie's mental state, beyond a reasonable doubt. Eddie's counsel also spent almost no time discussing the duress defense, taking the position the jury did not need to consider it because Eddie never committed a crime in the first place. Conversely, the prosecutor devoted a considerable portion of her closing remarks to attacking Eddie's credibility about the facts underlying his duress defense and otherwise refuting the defense.

The prosecutor's task was not particularly difficult because of the weakness of the duress evidence. The duress defense only applies where a person acted under threats or menaces sufficient to show the person had reasonable cause to and did believe the person's life would be endangered if the person refused. (§ 26.) "The common characteristic of all the decisions upholding [a duress defense] lies in the immediacy and imminency of the threatened action: each represents the situation of a present and active aggressor threatening immediate danger; none depict a phantasmagoria of future harm.'" (*People v. Vieira* (2005) 35 Cal.4th 264, 290.) Eddie's own statements established any perceived threat from Steve was not immediate. Although Steve had a gun when he called Eddie over to Attig, Steve pointed it at Attig. He did not point it at Eddie or otherwise threaten to use it on Eddie if Eddie did not follow orders. Further, when Eddie realized what Steve was doing, he did not flee or attempt to stop Steve because he was surprised by Steve's actions, he was "a little intimidated" by Steve due to Steve's reputation, and he was scared and was not using good judgment. None of these reasons shows he reasonably and actually believed his life was in immediate danger if he did not participate in raping Attig. Accordingly, we conclude beyond a reasonable doubt the trial court's error in failing to instruct the jury with the burden of proof part of the CALCRIM No. 3402 instruction did not contribute to the jury's verdict.

Abstract of Judgment

The abstract of judgment states the trial court sentenced Eddie to 26 years to life for the murder conviction. It also states the trial court sentenced him to one year for the firearm enhancement, making it mistakenly appear Eddie's aggregate sentence is 27 years to life. Eddie contends we should direct the trial court to modify the abstract of judgment to clarify the aggregate sentence is 26 years to life, consisting of 25 years to life for the murder conviction plus one year for the firearm enhancement. The People concede the abstract of judgment is ambiguous and should be clarified. We agree.

" [A] a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts.' " (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Mistakes in an abstract of judgment are considered clerical errors and may be corrected at any time. (*Id.* at p. 196.) As the abstract of judgment in this case is potentially misleading as to Eddie's aggregate sentence, we shall direct the trial court to modify the abstract of judgment to conform to the sentence orally pronounced: 25 years to life for the murder conviction and one year for the firearm enhancement.

DISPOSITION

As to Steve Montanez, the judgment is affirmed. As to Eddie Montanez, the matter is remanded to the trial court with directions to modify the abstract of judgment to clarify his aggregate sentence is 26 years to life, consisting of 25 years to life for the murder conviction and one year for the firearm enhancement. The trial court is further directed to send a copy of the modified abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.