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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RACHAEL E. WHEELIS,

Defendant and Appellant.

D058980

(Super. Ct. No. SCS228237)

APPEALS from judgments of the Superior Court of San Diego County, Timothy R. Walsh, Judge. Affirmed as modified.

In the joint trial of Antoinette L. Dokes and Rachael E. Wheelis, a jury convicted Dokes of second degree murder (Pen. Code, § 187, subd. (a)),¹ conspiracy to commit assault with a deadly weapon (§§ 182, subd. (a)(1), 245, subd. (a)(1)) and misdemeanor vandalism, along with making a finding that Dokes personally used a deadly weapon in the commission of the murder (§ 12022, subd. (b)(1)). The jury convicted Wheelis of voluntary manslaughter (§ 192, subd. (a)) and conspiracy to commit assault with a deadly weapon (§§ 182, subd. (a)(1), 245, subd. (a)(1)).

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

The trial court imposed a prison term of 15 years to life on Dokes, and a prison term of 11 years on Wheelis.

Dokes and Wheelis both contend that the prosecutor committed prejudicial misconduct during closing argument. Dokes additionally contends: (1) the trial court erred by not instructing the jury on an additional theory of voluntary manslaughter based on a killing without malice during the commission of an inherently violent assaultive felony; and (2) the abstract of judgment should be modified to properly reflect the trial court's striking of the deadly weapon enhancement and to delete reference to the imposition of a concurrent sentence on the conspiracy count, as the sentence was stayed pursuant to section 654. Wheelis additionally contends that the trial court erred in instructing the jury with CALCRIM No. 334 concerning accomplice testimony, as that instruction is purportedly unconstitutional. We conclude that Dokes's arguments for modification of the abstract of judgment have merit, but we reject all of Dokes's and Wheelis's other arguments. We accordingly affirm the judgment as to Wheelis, and we order modification of Dokes's abstract of judgment, affirming the judgment as modified.

I.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from Dokes's fatal stabbing of Justine Brown on April 17, 2009. The stabbing occurred during the day, outside Brown's home, during a physical struggle between Dokes and Brown, while Wheelis waited in the car in which she and Dokes had driven to Brown's home.

Dokes and Wheelis had contact with Brown in the days shortly before the stabbing because Dokes and Wheelis were living in the apartment of Brown's boyfriend, Vincent Thomas. Thomas and Brown were in the process of breaking up, and they had argued at Thomas's

apartment while Dokes and Wheelis were present. Because of the situation, Brown had expressed animosity toward Dokes and Wheelis.

Around lunchtime on the day of the stabbing, Brown spotted Dokes and Wheelis parked in a shopping center in one of Thomas's vehicles, which Thomas formerly allowed Brown to drive. Brown stopped her car in a way that blocked Dokes's and Wheelis's vehicle, and Dokes and Brown argued in the shopping center parking lot. Witnesses described the confrontation as angry and profane on the part of both women, with Dokes threatening Brown by telling her something such as "watch your back" and "I know where you live." After Brown parked her car in a space and walked into a bank, Dokes kicked the back of Brown's car, causing damage to it.

Dokes and Wheelis then drove across the parking lot to Walmart, where they purchased a folding knife, a crowbar and a bottle of bleach. They had a sales clerk open the knife's packaging. Dokes and Wheelis also asked for pepper spray in Walmart, but they were informed that Walmart does not sell that item.

After leaving Walmart, Dokes and Wheelis drove to Brown's home. They paid two dollars to a man to knock on Brown's door, which was elevated from the sidewalk by several stairs. Brown opened the door, and during an ensuing fight between Brown and Dokes, Brown incurred a fatal four-inch knife wound to the chest that perforated her heart, as well as knife cuts to her left shoulder and right knee area.

Dokes testified at trial about what happened during the fight. According to Dokes, she left the knife from Walmart at the bottom of the stairs, hidden in some bushes, and after Brown opened the door, Dokes walked up the stairs to tell Brown that she was planning to rent an apartment with Thomas, Wheelis and Dokes's boyfriend. Dokes testified that this information angered Brown, who started a physical confrontation by grabbing Dokes's hair and hitting her.

Dokes stated that the women then tumbled down the stairs to the sidewalk, where they struggled, with Brown pressing her knee on the front of Dokes's torso to pin her to the ground. According to Dokes, she was able to reach the knife, which she waved around while Brown was on top of her. Dokes claimed that she did not know whether she cut Brown with the knife while waving it around. Dokes said that the fight stopped when she was able to push Brown off of her. Brown started walking to the stairs, and Dokes got into the vehicle where Wheelis was waiting for her, and they drove away. Dokes testified that she learned later that day, after being arrested by the police, that Brown had died from a stab wound incurred during the fight.

Two witnesses viewed the fight from the street. The first witness saw the fight almost from the beginning. That witness watched Dokes and Brown punching each other at the top of the stairs, and then saw them tumble down the stairs and continue fighting. The witness first noticed a knife at the bottom of the stairs when she saw the women on their knees, struggling over the knife, with the knife in Dokes's right hand and Brown pulling on Dokes's hair and pushing the knife away. The witness yelled at Dokes and Brown to stop fighting, and they did. Dokes drove away, and then Brown walked to the top of the stairs and collapsed, where the witness put pressure on Brown's wounds until the police arrived. The second witness saw only the portion of the fight at the bottom of the stairs. She saw Dokes and Brown in very physical face-to-face combat, with their arms flailing, but she did not see a knife. That witness also heard Wheelis, from inside a vehicle, tell her to "mind your own fucking business" during the fight. The witness obtained the license plate number from the vehicle, which led police to Wheelis and Dokes later that day.

Both Dokes and Wheelis were charged with murder (§ 187, subd. (a)) and conspiracy to commit assault with a deadly weapon (§§ 182, subd. (a)(1), 245, subd. (a)(1)). Dokes was also

charged with misdemeanor vandalism and the additional allegation that she personally used a deadly weapon during the murder (§ 12022, subd. (b)(1)). At trial, the prosecution argued that Wheelis was guilty of murder under either an aiding and abetting theory or because the murder was the natural and probable consequence of the conspiracy to commit an assault with a deadly weapon.

A jury convicted both Dokes and Wheelis of conspiracy to commit assault with a deadly weapon. The jury additionally (1) convicted Wheelis of voluntary manslaughter, and (2) convicted Dokes of vandalism and second degree murder, with a true finding on the deadly weapon allegation.

Both Wheelis and Dokes appeal from the judgments of conviction.

II.

DISCUSSION

A. *Prosecutorial Misconduct*

We first consider Dokes's and Wheelis's contention that the prosecutor made several statements during closing argument that constituted prejudicial prosecutorial misconduct. We begin by setting forth the applicable legal standards and then proceed to consider each alleged instance of misconduct.

1. *Applicable Legal Standards*

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such

as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (People v. Riggs (2008) 44 Cal.4th 248, 298 (Riggs).) "When the claim focuses on the prosecutor's comments to the jury, we determine whether there was a reasonable likelihood that the jury construed or applied any of the remarks in an objectionable fashion." (People v. Booker (2011) 51 Cal.4th 141, 184-185.) A showing of bad faith on the part of the prosecutor is not required to establish misconduct. (People v. Hill (1998) 17 Cal.4th 800, 822 (Hill).)

In general, "[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (Riggs, supra, 44 Cal.4th at p. 298.) However, several exceptions exist. "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if "an admonition would not have cured the harm caused by the misconduct." [Citations.] Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if "the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request." (Hill, supra, 17 Cal.4th at p. 820.)

We now turn to a discussion of the statements during the prosecutor's closing argument that Dokes and Wheelis identify as prosecutorial misconduct.

2. *The Prosecutor's Alleged Comment About His Personal Opinion of Guilt*

Dokes and Wheelis contend that during rebuttal argument the prosecutor made a comment improperly expressing a belief in the defendants' guilt, with the implication that his belief was based on evidence not presented at trial.

The prosecutor made the statements at issue during his rebuttal closing argument. Specifically, in the context of explaining that it would still be first degree murder under a lying in wait theory if Dokes left the knife at the bottom of the stairs rather than attacking Brown with the knife at the top of the stairs, the prosecutor stated:

"I'm going to suggest something else to you. Even if you believe that the knife was at the bottom of the stairs, what's that indicative of? Isn't that still bringing a knife to a fistfight? *Now, I don't think that that's what happened, so that's not my theory.* I'm just telling you that if it's your theory, it's still lying in wait." (Italics added.)²

A few sentences later, after discussing that Dokes could have believed she was putting herself in a position of strength by hiding the knife at the bottom of the stairs so that she could surprise Brown with it, the prosecutor commented:

"I don't think that's the way it happened. But if you think that's the way it happened, it still lends itself to first degree murder, because she knew that once Justine Brown got to the bottom of those stairs, boom, it was going to be the knife in the hand using it on Justine Brown."

Focusing on both of the italicized sentences, Dokes and Wheelis contend that the prosecutor's comment led the jury to believe that he had information, unavailable to them, that the knife attack began at the top of the stairs.

Dokes's and Wheelis's argument is premised on the well-settled rule that "[a] prosecutor may not express a personal opinion or belief in a defendant's guilt 'where there is substantial

² As defense counsel interposed an objection to this statement and later referred to it as a basis for a mistrial motion, the appellate argument has been properly preserved.

danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial.'" (*People v. Adcox* (1988) 47 Cal.3d 207, 236, quoting *People v. Bain* (1971) 5 Cal.3d 839, 848.) "[A] prosecutor is free to give his opinion on the state of the evidence, and in arguing his case to the jury, has wide latitude to comment on both its quality and the credibility of witnesses. [Citations.] It is misconduct, however, to suggest to the jury in arguing the veracity of a witness that the prosecutor has information undisclosed to the trier of fact bearing on the issue of credibility, veracity, or guilt. The danger in such remarks is that the jury will believe that inculpatory evidence, known only to the prosecution, has been withheld from them." (*People v. Padilla* (1995) 11 Cal.4th 891, 945-946.) "The prosecutor's comments must, of course, be evaluated in the context in which they were made, to ascertain if there was a substantial risk that the jury would consider the remarks to be based on information extraneous to the evidence presented at trial." (*People v. Mincey* (1992) 2 Cal.4th 408, 447-448.)

Based on the entire context of the prosecutor's closing argument, we conclude that a reasonable juror would not have understood the prosecutor to be commenting on a belief premised on facts outside of the evidence presented at trial. Significantly, the initial location of the knife attack was one of most disputed facts at trial. The location where Dokes first used the knife was relevant to Dokes's claim that she used the knife in self-defense, and, conversely, to the prosecution's claim that Dokes and Wheelis went to Brown's house with the intent to attack her with the knife. Both the defense and the prosecution called experts on blood stain pattern analysis to testify as to what the blood stains at the scene indicated about where the knife attack occurred. Before making the comments to which Dokes and Wheelis object, the prosecutor devoted a significant portion of his rebuttal argument to a discussion of the testimony of the blood stain pattern experts. After discussing that evidence, the prosecutor stated, "[Brown is]

attacked at the door, because that's what the . . . blood stain pattern analysis tells you, number 1. And number 2, [the witness to the incident] tells you she sees the victim actually in her door frame fighting. She is trying to push [Dokes] out. She is attacked again at the bottom of the stairs." In this context, the prosecutor's comment that "I don't think that that's what happened, so that's not my theory," clearly refers back to the argument he just made about the evidence and served to remind the jury of that argument. It cannot reasonably be interpreted as a statement based on evidence outside of the record.

3. *The Prosecutor's Comments That the Jury Should Not Apply a Subjective Standard*

Dokes and Wheelis contend the prosecutor misstated the law in his rebuttal closing argument by purportedly representing that the subjective viewpoint of Dokes and Wheelis was not legally relevant to any factual issue in the case. Dokes and Wheelis rely on the principle that "[a]lthough counsel have 'broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law.'" (*People v. Mendoza* (2007) 42 Cal.4th 686, 702.)

Near the beginning of his rebuttal argument the prosecutor stated:

"What the defense wants you to do is say exactly what we talked about in voir dire. They want you to say these are two girls, 18, 19 at the time. They didn't know what they were doing. You have to look at it through their eyes. Nothing could be farther from the truth. [Objection by defense counsel.] If that was the case, then in every case you would get instructions, look at it through the eyes of a 22-year-old. Look at it through the eyes of a 27-year-old. Look at it through the eyes of a drug addict. Look at it through the eyes of a 50-year-old. You don't get that. You won't get that. As a matter of fact, you get the contrary. Average person of average disposition. That's why you're here."

Dokes contends that in making these comments, the prosecutor improperly negated the subjective component involved in deciding whether Dokes acted in imperfect self-defense and whether she killed with implied malice. Dokes points out that, as stated in CALCRIM No. 571, when considering imperfect self-defense the jury must examine whether "[t]he defendant

actually believed" she was in imminent danger and that immediate use of deadly force was necessary to defend against the danger. Further, when considering implied malice, the jury must find, as stated in CALCRIM No. 520, that the defendant *knew* her actions were dangerous to human life, and that she acted with conscious disregard of that danger. Wheelis adopts Dokes's argument and further contends the prosecutor's comments improperly negated the specific intent finding required to convict the defendants of conspiracy to commit assault with a deadly weapon. (See CALCRIM No. 415; *People v. Morante* (1999) 20 Cal.4th 403, 416 [among other things, "[a] conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense"].)

Dokes's and Wheelis's arguments depend on the premise that the prosecutor's comments reasonably could be interpreted as a broad statement that the defendants' subjective viewpoint was legally irrelevant to any of the issues before the jury, including implied malice, imperfect self-defense and conspiracy. However, in the context of the prosecutor's entire rebuttal closing argument, we cannot accept that premise. Put in context, any reasonable juror would understand the prosecutor's comments to refer to the standard the jury should use to determine whether Dokes and Wheelis acted in the heat of passion with sufficient provocation to make them guilty of voluntary manslaughter rather than murder. After making the statement quoted above near the beginning of his rebuttal argument to introduce the themes he would be discussing, the prosecutor later returned to the same subject matter. Specifically, when discussing whether the facts supported a finding that Dokes acted in the heat of passion for the purposes of a voluntary manslaughter conviction, the prosecutor stated:

"Did she act rashly under the influence of . . . intense emotion? . . . Would that provocation in the parking lot cause the person of average disposition to act? And

those are the exact words. It doesn't say 19-year-old. It doesn't say 18-year-old girl. It just says, the person of average disposition. That means you, I hope. So you can't set up your own standard of conduct, and that's what they want you to do. And the law says, no, you can't. So look at CALCRIM No. 570. It's going to be . . . titled voluntary manslaughter. Take a look at it. Get down to the bottom and it will say that stuff."³

By making these comments and specifically referring the jury to CALCRIM No. 570, the prosecutor cleared up any ambiguity in his earlier statements. When referring to an "[a]verage person of average disposition" early in his rebuttal argument, the prosecutor was referring to the issue of whether the killing was committed in the heat of passion, not to any of the legal requirements for implied malice, imperfect self-defense or conspiracy, as Dokes and Wheelis contend.

Further, the jury would not have reasonably believed the prosecutor to be stating that no subjective component was involved in imperfect self-defense, because during the rebuttal argument, he specifically pointed out that "its also not voluntary manslaughter [under an imperfect self-defense theory] because there has to be an actual belief in imminent danger . . . and the actual belief that . . . you'd need to use immediate deadly force."

Based on the entirety of the prosecutor's rebuttal argument, we conclude that he did not misstate the law as to the subjective components of implied malice, imperfect self-defense and conspiracy.

³ The text of CALCRIM No. 570 — which instructs on voluntary manslaughter based on killing in heat of passion — specifically states that "in deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts."

4. *The Prosecutor's Comments About Creating the Danger Necessitating Self-defense*

Dokes contends that the prosecutor also misstated the law in commenting that a defendant cannot claim self-defense when she has created the danger against which she is defending.

In the course of the prosecutor's rebuttal closing argument, he stated,

"Now, like I said, this act, this thing that gets you hot and bothered that's in the parking lot, that's not at her house. And even if you think, well, she got to the house, she really didn't intend to do anything bad, blah, blah, blah, blah, blah, you can't create the danger. That's another jury instruction. You can't create a danger and then say, oh, oh, oh, I've got to defend myself. That would be stupid. The law is not that stupid." The prosecutor was plainly referring to CALCRIM No. 3472, in which the jury was instructed that "[a] person does not have the right to self-defense if she provokes a fight or quarrel with the intent to create an excuse to use force."

Dokes argues that the prosecutor's remark misstated the law because it contradicted the statement in *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179-1180, that imperfect self-defense is available "when the victim's use of force against the defendant is unlawful, even when the defendant set in motion the chain of events that led the victim to attack the defendant."

We need not consider the merits of Dokes's argument because she has not preserved it for appellate review. Although defense counsel interposed an objection after the prosecutor made the statement that is at issue, the objection was expressly "based on the slide" that was displayed to the jury during the prosecutor's remark. As clarified during the subsequent motion for a mistrial, the objection referred to the prosecutor's display of slides that stated the elements of manslaughter, which defense counsel considered to be a misstatement of the law. The motion

therefore was not related to the prosecutor's remark that is the subject of Dokes's appellate argument, and the issue is not preserved for appeal.⁴ (*Riggs, supra*, 44 Cal.4th at p. 298.)

B. *The Trial Court Did Not Err in Rejecting Dokes's Proposed Jury Instruction on an Additional Theory of Voluntary Manslaughter*

We next consider Dokes's contention that the trial court erred by not instructing the jury on an additional theory of voluntary manslaughter based on a killing during the commission of an inherently violent assaultive felony, but in which the defendant did not act with malice aforethought. Dokes bases her argument on two cases.

First, Dokes cites *People v. Garcia* (2008) 162 Cal.App.4th 18, 31 (*Garcia*), which stated, in dictum, that "an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter." As *Garcia* explained, if a defendant unlawfully killed, but did not act with express or implied malice and the facts did not invoke the felony murder doctrine, he could not be guilty of murder. Therefore, he must be guilty of either involuntary or voluntary manslaughter. (*Id.* at p. 32.) As *Garcia* understood the controlling law, however, the definition of involuntary manslaughter does not encompass a defendant who kills in the course of an inherently dangerous felony. (*Ibid.*) Therefore, *Garcia* concluded that a defendant who kills, without malice, in the course of an inherently dangerous

⁴ Dokes argues that in the event defense counsel failed to preserve any of the prosecutorial misconduct issues for appeal, defense counsel was ineffective. We conclude that Dokes has not established ineffective assistance of counsel with respect to defense counsel's failure to object to the prosecutor's implicit reference to CALCRIM No. 3472 because defense counsel's omission may have been based on a tactical decision that any misstatement of law in the prosecutor's remarks would be cleared up when the jury referred to the specific instruction that the prosecutor was referencing. "Reviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions." (*People v. Lucas* (1995) 12 Cal.4th 415, 442; see also *People v. Anderson* (2001) 25 Cal.4th 543, 569 ["When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation."].)

felony that does not invoke the felony murder doctrine, is guilty of at least voluntary manslaughter. (*Id.* at pp. 31-32.)

Second, Dokes cites *People v. Bryant* (2011) 198 Cal.App.4th 134 (*Bryant*), which concluded that the trial court erred in failing to instruct the jury on the theory of voluntary manslaughter described in *Garcia*. However, after Dokes filed her opening appellate brief, our Supreme Court granted review of that decision. (*People v. Bryant*, review granted Nov. 16, 2011, S196365.) In reply, Dokes argues that we nevertheless should rely on *Garcia*, as *Bryant* did, to conclude that the trial court erred in not instructing that "an unintentional killing without malice, committed during the course of an inherently dangerous assaultive felony, constitutes voluntary manslaughter."

Under the circumstances presented in this case, we need not, and do not, decide the issue currently before our Supreme Court in *People v. Bryant, supra*, S196365, namely whether a trial court should instruct, in the appropriate case, that a killing without malice that occurs during the commission of an inherently dangerous assaultive felony constitutes voluntary manslaughter. As we will explain, even were our Supreme Court to decide that such an instruction is warranted in some cases, this is not such a case because substantial evidence does not support a finding that Dokes acted without implied malice.

Voluntary manslaughter is a lesser included offense of murder. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) "[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*Id.* at p. 162.) The existence of "'any evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant

is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]'" that the lesser offense, but not the greater, was committed." (*Ibid.*) Therefore, even if the theory of voluntary manslaughter described in *Garcia* and *Bryant* were held to be legally tenable, an instruction based on that theory would be required only if substantial evidence in the record would permit a jury to find that Dokes was guilty of voluntary manslaughter under that theory, but not guilty of murder.

The theory of voluntary manslaughter described in *Garcia* and *Bryant* applies only when the defendant committed an unlawful killing *without malice*. We therefore examine whether substantial evidence would support a finding that Dokes acted without malice when she killed Brown. "Malice may be either express (as when a defendant manifests a deliberate intention to take away the life of a fellow creature) or implied. [Citation.] 'Malice is implied when the killing is proximately caused by "'an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" [Citation.] In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another. . . .'" (*People v. Cravens* (2012) 53 Cal.4th 500, 507.)

We conclude that even according to Dokes's own account of her actions during the killing, the only reasonable conclusion is that she acted with implied malice. As Dokes described the incident, she waved around the knife while engaged in an intense physical confrontation with Brown, recognizing that she may be cutting Brown with the knife, but not knowing if she did so. According to all accounts, Brown and Dokes were engaged in very physical face-to-face combat, with their arms flailing. Waving a knife around in that setting is an

act, the natural consequences of which are dangerous to life, and the record contains no evidence to support a finding that Dokes was unaware that using a knife in such a setting could cause a fatal injury. Therefore, substantial evidence is lacking for a finding that Dokes acted *without* implied malice when using the knife on Brown. Because this is not a case in which the jury could reasonably find a lack of malice, the trial court did not have a duty to instruct with any lesser included offense to murder that depended on an express finding that Dokes acted without malice.

C. *Wheelis Has Not Established That CALCRIM No. 334 Is Unconstitutional*

Wheelis challenges the constitutionality of CALCRIM No. 334, which sets forth the law on corroboration of accomplice testimony, contending that it improperly lessens the prosecution's burden to prove the elements of a crime beyond a reasonable doubt.

To examine Wheelis's argument, we begin with the legal background to CALCRIM No. 334. It is well established that a jury may use the testimony of an accomplice in making a finding as to the defendant's guilt only if the accomplice's testimony is corroborated. (§ 1111; *People v. Zapien* (1993) 4 Cal.4th 929, 982; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128 (*Rodrigues*).)⁵ An "accomplice's testimony is admissible and competent," but "such testimony has been 'legislatively determined' never to be sufficiently trustworthy to establish guilt beyond a reasonable doubt unless corroborated." (*People v. Frye* (1998) 18 Cal.4th 894, 968.) As for the type of corroboration required before the jury may consider an accomplice's testimony, our Supreme Court has explained that "[a]lthough the evidence offered in corroboration must

⁵ Section 1111 provides in relevant part: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

connect the accused with the commission of the crime charged, it 'may be slight and entitled to little consideration when standing alone.'" (*People v. Tewksbury* (1976) 15 Cal.3d 953, 969 (*Tewksbury*)).

Based on these principles, the trial court instructed with CALCRIM No. 334, in relevant part:

"If you decide that Ms. Dokes was an accomplice, then you may not convict the defendant . . . based on Ms. Dokes's testimony alone. If you decide Ms. Dokes was an accomplice, you may use the testimony of an accomplice to convict the defendant Ms. Wheelis only if:

"1. The accomplice's testimony is supported by other evidence that you believe;

"2. That supporting evidence is independent of the accomplice's testimony;
AND

"3. That supporting evidence tends to connect the defendant to the commission of the crimes.

"Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime[s], and it does not need to support every fact about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

"Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

Wheelis contends that this instruction "improperly convey[s] the notion that an accomplice's testimony, plus any corroborating evidence, however 'slight,' equals a conviction." Put another way, she reads the instruction as stating that "accomplice testimony plus slight supporting evidence is sufficient to permit [the jury] to find the defendant guilty." According to Wheelis, the instruction "effectively understates the burden of proof at trial, diluting reasonable

doubt," and the jury is likely to interpret the "slight corroboration equation as a replacement for reasonable doubt." She argues that "[b]y using the term 'slight,' the instruction manifestly tells the jury that guilt may be inferred on the basis of evidence that does not rise to the standard of proof beyond a reasonable doubt"6

We reject this argument because it misreads the plain language of the instruction. Contrary to Wheelis's contention, CALCRIM No. 334 does not state that where accomplice testimony is admitted, a jury may convict based on *slight* corroborating evidence instead of based on evidence that proves the defendant's guilt *beyond a reasonable doubt*. Instead, the instruction does nothing more than limit the circumstances in which the jury may *consider* an accomplice's testimony as part of the evidence of the defendant's guilt.⁷ As the instruction

⁶ In the course of her argument, Wheelis incorrectly states that the slight corroboration standard is taken from case law discussing the standard for appellate review regarding the sufficiency of the evidence. On the contrary, our Supreme Court has consistently referred to the slight corroboration requirement as the type of corroboration that is needed at trial to satisfy section 1111's requirement that accomplice testimony be corroborated. (*Rodrigues, supra*, 8 Cal.4th at p. 1128; *Tewksbury, supra*, 15 Cal.3d at p. 969; *People v. Wade* (1959) 53 Cal.2d 322, 329; *People v. Negra* (1929) 208 Cal. 64, 69.) It not a standard of appellate review.

⁷ Contending that it is relevant to whether CALCRIM No. 334 is unconstitutional, Wheelis cites case law that discusses a jury instruction permitting the jury to infer guilt of a theft-related crime based on the defendant's possession of recently stolen property and slight corroborating evidence. (See *People v. Parson* (2008) 44 Cal.4th 332, 356 [discussing CALJIC No. 2.15]; *People v. Prieto* (2003) 30 Cal.4th 226, 248 [same]; *People v. Barker* (2001) 91 Cal.App.4th 1166, 1173 [same].) We find those cases to be inapposite. The jury instruction on possession of stolen property permits a jury to draw *an inference of guilt* solely from the possession of the property and slight corroborating evidence. Here, in contrast, CALCRIM No. 334 does *not* instruct the jury on a permissive inference of guilt. Instead, it addresses the very different issue of whether the jury may even *consider* the accomplice's testimony when deliberating on the defendant's guilt. Moreover, even if the cases that Wheelis cites had some relevance here, they hurt rather than help her position that CALCRIM No. 334 impermissibly lowers the prosecution's burden of proof. In *Prieto* our Supreme Court examined the "slight" corroboration language of CALJIC No. 2.15, and rejected the defendant's argument that it absolved the prosecution of its burden of establishing guilt beyond a reasonable doubt. (*Prieto, supra*, 30 Cal.4th at p. 248.)

unambiguously explains, the jury may *use* the accomplice's testimony as evidence upon which to base a conviction *only* if there is at least slight corroboration of that testimony. The instruction does not address the prosecution's burden of proof to establish the defendant's guilt, and we perceive no reasonable possibility that the instruction would be read by a juror to supplant the prosecution's burden to prove guilt beyond a reasonable doubt.

D. *Dokes's Contention That the Abstract of Judgment Should Be Modified Has Merit*

1. *The Abstract of Judgment Should Be Modified to Reflect the Trial Court's Decision to Strike the One-year Enhancement for the Deadly Weapon Allegation*

As we have explained, the jury made a true finding on the allegation that Dokes personally used a deadly weapon in the commission of the murder (§ 12022, subd. (b)(1)). During the sentencing hearing, the trial court stated that it was exercising its discretion to strike the one-year enhancement associated with the deadly weapon allegation. However, instead of reflecting that decision, the minute order and the abstract of judgment state that the one-year enhancement has been imposed but stayed. Dokes argues that we should order that abstract of judgment be corrected to reflect the trial court's decision to strike the one-year enhancement.

As the trial court recognized, it had discretion, under section 1385 to strike the punishment for an enhancement that would otherwise be imposed under section 12022, subdivision (b)(1) for use of a deadly weapon. (*People v. Jones* (2007) 157 Cal.App.4th 1373, 1384.) The reporter's transcript of the sentencing hearing further establishes that the trial court intended to exercise that discretion and to accordingly strike the punishment for the deadly weapon allegation. The record of the trial court's oral pronouncement of sentence controls over a conflicting minute order or abstract of judgment. (*People v. Farrell* (2002) 28 Cal.4th 381, 384; *People v. Mesa* (1975) 14 Cal.3d 466, 471.)

The Attorney General concedes that the abstract of judgment should be corrected to reflect the trial court's decision to strike the punishment for the one-year enhancement associated with the deadly weapon allegation. We therefore order that Dokes's abstract of judgment be corrected to show that the trial court struck the punishment associated with the enhancement for use of a deadly weapon as described in section 12022, subdivision (b)(1).

2. *The Abstract of Judgment Should Be Modified to Show Only That the Sentence on the Conspiracy Count Was Stayed, Omitting Any Indication That the Sentence Is to Run Concurrent to the Sentence on the Murder Count*

In a nunc pro tunc order after sentencing, the trial court entered a "corrected" sentence for Dokes on the conspiracy count (count 2), stating that it was imposing a three-year determinate sentence "concurrent" to the 15-years-to-life indeterminate sentence for the murder count (count 1), and that the sentence on the conspiracy count was "stayed per [section] 654." The abstract of judgment reflects a three-year sentence for the conspiracy counts and states, "Determinate term on count 2 is concurrent to indeterminate term on count 1 and stayed per [section] 654."

Dokes argues that when a sentence on a particular count is stayed pursuant to section 654, the proper procedure is to impose and stay the sentence on that count, but not to indicate whether the sentence, if not stayed, would have been served concurrently or consecutively. She contends that the trial court therefore acted improperly in indicating that the sentence on the conspiracy count should be served concurrently, and that we should order the abstract of judgment to be modified to delete reference to the concurrent sentence.

The Attorney General concedes that Dokes is correct and that the abstract of judgment should be modified. We agree with the parties. Where section 654 applies, the imposition of a concurrent sentence is not proper. (*People v. Miller* (1977) 18 Cal.3d 873, 887 ["Section 654

when applicable precludes punishment 'under' more than one criminal provision. It has long been established that the imposition of concurrent sentences is precluded by section 654 [citations] because the defendant is deemed to be subjected to the term of *both* sentences although they are served simultaneously.".) "Imposition of concurrent sentences is not the correct method of implementing section 654, because a concurrent sentence is still punishment. [Citations.] For this reason, the imposition of concurrent terms is treated as an implied finding that the defendant bore multiple intents or objectives, that is, as a rejection of the applicability of section 654." (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1468.)

We therefore order modification of Dokes's abstract of judgment to omit the imposition of a concurrent sentence on the conspiracy count.

DISPOSITION

The judgment in Wheelis's case is affirmed in all respects. The abstract of judgment in Dokes's case is modified to reflect (1) that the sentencing enhancement for the deadly weapon allegation under section 12022, subdivision (b)(1) associated with the murder count is stricken, and (2) deletion of the reference to a concurrent sentence for the conspiracy count (count 2). The trial court is directed to forward to the Department of Corrections and Rehabilitation a new abstract of judgment. As so modified, the judgment in Dokes's case is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.