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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DOREEN BANKE ALONZO,

Defendant and Appellant.

D059149

(Super. Ct. No. JCF24885)

APPEAL from a judgment of the Superior Court of Imperial County, Matias R. Contreras, Judge. Affirmed as modified, with directions.

A jury convicted Doreen Banke Alonzo of the following five crimes committed against 69-year-old Andres Spiegl at his tow truck business/residence in Salton City: (1) kidnapping to commit robbery (count 1: Pen. Code, §§ 209, subd. (b)(1), 211) (undesignated statutory references will be to the Penal Code unless otherwise specified); (2) first degree robbery (count 2: § 211); (3) elder abuse with infliction of great bodily injury (count 3: § 368, subd. (b)(1), hereafter § 368(b)(1), (2)); (4) first degree burglary (count 4: § 459); and (5) conspiracy to commit first degree robbery and first degree

burglary (§§ 182, subd. (a)(1), 211, 459).¹ With respect to the count 3 elder abuse conviction, the jury found true an enhancement allegation that the victim was 69 years old and suffered great bodily injury (§§ 368, subd. (b)(2) & 12022.7). With respect to the count 5 conspiracy conviction, the jury found that at least one member of the conspiracy² committed at least one of the following overt acts: Alonzo called a tow truck driver; the driver, Spiegl, was tied up; and money and property were taken from Spiegl.

At the sentencing hearing, the court first denied Alonzo's motion for new trial, which was based on her claim (discussed more fully, *post*) that the jury had committed misconduct during deliberations. The court found that any jury misconduct was harmless. The court then sentenced her to an aggregate prison term of life without the possibility of parole plus eight years.

Contentions

Alonzo appeals, contending (1) the court erred and violated her rights under the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution by denying her motion for new trial; (2) to the extent reversal is not required based on the jury misconduct claim raised in her new trial motion, the court erred by denying her petition for release of juror contact information, thereby preventing her from developing a full record of the jury misconduct; (3) the court prejudicially erred by admitting (a) evidence

¹ In a prior trial on the same charges, the jury was unable to reach a verdict as to Alonzo and the court declared a mistrial.

² The fifth amended information alleged that Alonzo's codefendant, Jaime Jonathan Vita, was one of the coconspirators. Vita, who was not a party to Alonzo's retrial, is not a party to this appeal.

that her boyfriend, Robert Gaeta, attempted to covertly communicate with her when she was in jail, (b) evidence that Gaeta was arrested there, and (c) Investigator Romero's opinion testimony that Alonzo and Gaeta were attempting to fabricate an alibi; (4) there is insufficient evidence to support her count 1 conviction of kidnapping for robbery because the movement of Spiegl within his own tow yard did not increase his risk of harm; (5) her count 3 conviction of elder abuse must be reversed because the court erroneously instructed the jury it could convict her on an incorrect legal theory; and (6) the sentences imposed for her count 3 conviction of elder abuse and her count 4 conviction of first degree burglary must be stayed under section 654.

We conclude the judgment must be modified to stay under section 654 the execution of the four-year prison sentence the court imposed for Alonzo's count 4 conviction of first degree burglary. As modified, the judgment is affirmed with directions.

FACTUAL BACKGROUND

A. The People's Case

1. Crimes Committed at the Salton Sea Tow Company

Spiegl, who owns and runs the Salton Sea Tow Company on a chain-link fenced 1.25-acre parcel of land where he also resides in Salton City, was born in October 1940, making him 69 years of age on January 26, 2010,³ when he was attacked and robbed in

³ All further dates are to calendar year 2010 unless otherwise specified.

this case. Another chain-link fence runs across the middle of the property and encloses Spiegl's office, garage, and residence.

At 9:42 p.m., a woman called Spiegl, told him her car had broken down and requested a tow. Expecting a short tow, Spiegl left the tow yard gate open and drove to that location in the direction of the Red Earth Casino, but did not find a disabled vehicle. As the caller's phone number was blocked, Spiegl was unable to call her back. Evidence presented at trial established that the phone call was eventually traced to the cell phone of Alonzo's codefendant, Vita (see fn. 2, *ante*).

As Spiegl was driving back to his tow yard, he passed an oncoming vehicle which had its high beams on. Blinded by the light, Spiegl was unable to identify what type of vehicle it was or who was inside. As it was unusual to have another vehicle in the area that late at night, Spiegl turned around and followed the vehicle to the casino. After losing sight of the vehicle, he eventually encountered a white pickup with a cover on the back. The pickup did not stop at one stop sign, but stopped at another. Spiegl stopped behind the pickup and wrote down the license plate number. Wanting to avoid trouble, Spiegl turned around and drove back home.

When he arrived at the tow yard, Spiegl used the searchlight on the roof of his tow truck to look around the yard. When he did not notice anything unusual, he got out, locked the gate, and walked toward his residence. It was raining heavily and it was cold. Two men suddenly attacked Spiegl. One shone a light in Spiegl's face, which blinded him, and told him, "Don't move." One of the men hit Spiegl and knocked him to the ground. One held Spiegl down as the other searched his pockets and removed his two

cell phones. The men wrapped red tape around Spiegl's jacket hood and eyes and used the tape to bind his hands and feet.

Through a hole in the tape, Spiegl saw one of the men was pointing a gun at his head. The robbers asked Spiegl, who was dazed, "Where is the money?" When Spiegl replied, "There is no money here," the robbers hit him again. Spiegl was told, "Don't move," and was hit again each time he tried to move.

One robber grabbed Spiegl by the back of his jacket, the other grabbed his legs, and they dragged Spiegl across the tow yard over gravel and rocks, around a green container, to an unfinished area with three walls in front of his office. A law enforcement investigator later determined that Spiegl had been dragged a distance of about 60 feet.

As Spiegl was lying on the ground, he tried to see as much as he could. The tape blindfold wrapped around the hood of Spiegl's jacket was somewhat flexible, and he was able to see through the tape. He saw a "woman running back and forth." Spiegl testified there was light from the garage, and he saw that the woman—whom he later identified as Alonzo from surveillance video shown him at the police station—was wearing jeans and dark boots. He did not hear her speak.

Eventually, Spiegl managed to loosen the tape wrapped around his hands and feet, got up, and bumped into one of his assailants, who knocked him unconscious with something. Eventually, after he regained consciousness and heard nothing, Spiegl managed to get untied and called 911 using the phone in the garage.

When deputies arrived, Spiegl was "freezing" and in pain.

He suffered a gash on his head, two of his teeth were missing, and he had a broken tooth, cuts on his lips, and bruises on his body from being kicked.

In addition to Spiegl's two cell phones, the robbers took \$50 in cash from his desk, \$80 or \$100 from his wallet which he kept in the truck, his credit card, his business checkbook, his collection of \$1 bills that he had collected over 20 years and was worth between \$5,000 and \$6,000, a generator, a vacuum, and a computer.

Spiegl gave Imperial County Sheriff's Deputy George Figueroa the license plate number he had written down. Deputy Marco Contreras investigated that number. Records from the Department of Motor Vehicles established that the pickup—a white Toyota Tundra—was registered to Vita at an address in Salton City.

Later that night, Deputy Contreras went to Vita's address, but Vita was not there. However, as Vita's girlfriend was speaking with Deputy Contreras, she received a phone call from Vita on her cell phone, and she told Deputy Contreras that Vita was on the phone. Deputy Contreras asked to speak with Vita, who confirmed his identity, "mumbl[ed] the whole time," and sounded "really nervous." Deputy Contreras looked at the caller ID information and saw Vita's phone number.

Vita hung up on Deputy Contreras, but soon thereafter called his girlfriend back and asked to speak with the officer. This time, the cell phone Deputy Contreras was using did not show Vita's phone number. Deputy Contreras testified that Vita again mumbled, was "very, very nervous," and did not want to answer questions.

A surveillance video recording from the Red Earth Casino showed Alonzo, Vita, and Johnny Hernandez at the casino from 7:47 p.m. to 8:32 p.m. on January 26, the night

of the robbery. David Barboza, an investigator employed by the Imperial County Sheriff's Office, asked Spiegl to view a portion of the video. Spiegl identified the woman in the video—Alonzo—as the same woman he had seen through his tape blindfold during the robbery. Spiegl recognized the woman in the video because she was wearing the same jeans and boots he had seen her wearing during the robbery. At trial, Ysidro Medina, who worked in security at the Red Earth Casino, testified he watched the surveillance video with Investigator Barboza, and Medina recognized the woman in the video as Alonzo, who he knew from having attended middle school with her.

B. Alonzo's Conduct In Jail and Investigator Romero's Opinion Testimony

During the testimony of prosecution witness Jose Romero, an investigator employed by the Imperial County Sheriff's Department, the jury heard five recordings of conversations in which Alonzo participated while she was in jail.

January 30

The first recording showed that, on January 30, Alonzo called "Vanessa" and asked her about Vita's charges and bail. Alonzo said she and Vita "were up to no good."

The second recording showed that about an hour and a half later Alonzo again spoke with Vanessa, who reported to Alonzo that Vita's bail was the same as Alonzo's, Vita's "highest charge" was "just robbery," and he "don't [*sic*] even have kidnapping on there!" Alonzo replied, "But they got me on kidnapping."

The third recording showed that on that same day (January 30) Alonzo's boyfriend, Gaeta, visited her in jail. They faced each other separated by Plexiglas and spoke by hand-held phones. Alonzo and Gaeta discussed the times certain events

occurred. Alonzo whispered to him, "[Y]ou dropped me off . . . about [10:00] . . . [9:00] to [10:00]." Following a brief delay and background noises, Gaeta told Alonzo, "I just gotta find out when, um, MARQUITOS goes to work . . . you know, when's his next day that he works." Following another brief delay and some more background noises, Alonzo said, "I gotta write this down . . . I didn't get home till about [1:00] that night." She then said, "MARQUITOS gave me a ride."

At this point during Investigator Romero's testimony, the prosecutor, referring to the recording of Alonzo's January 30 conversation with Gaeta at the jail, noted the jury had just "heard [a] lot of whispering going on; a lot of background noises and a lot of delays." The prosecutor then asked Investigator Romero, "Given your experience, 15 years, your knowledge of this case, and [your] knowledge of jail visitations, what does that indicate to you?" After the court overruled defense objections that the question was asking for speculation and an "[i]mproper opinion," Investigator Romero replied: "In my experience, I was also a correctional officer. And [in] my experience they know that the phone call [*sic*] is being taped so they attempt to communicate by hands or with their lips or writing notes or any type of communication." He added that Alonzo and Gaeta were engaging in nonverbal communication. He also explained that during the visit, which was lengthy, "there was a lot of whispering going on and a lot of pauses. And when they resumed their conversation, there was a lot of context with the rest of the conversation."

The prosecutor then asked Investigator Romero: "[B]ased on hearing this conversation, are they concocting anything, to your knowledge, based on everything that you know about this case?" Over a defense objection that the question called for

speculation, Investigator Romero opined that Alonzo and Gaeta were concocting a fake alibi.

May 11

The fourth recording showed that, several months later on May 11, Alonzo called Gaeta by telephone. Alonzo told him, "Remember that you picked me up at MARCOS', not at the casino, babe." She also told Gaeta, "[T]hey're gonna subpoena you and my mom . . . so, you should be coming to court next week." Alonzo also said, "[I]t looks pretty good for me, babe . . . I'm gonna be all right . . . okay?" Gaeta replied: "Yeah, I mean, [STUTTERING] . . . there's no way they can . . . they're just trying to . . . [unintelligible] this thing will be over . . . because you know I know that you were not there and that's the bottom line." Alonzo said, "That's the bottom line."

May 12

The last of the five recordings showed that, the next day (May 12), Alonzo again called Gaeta from jail. Alonzo told Gaeta, "[O]n your statement it's wrong . . . you said that you picked me up at the . . . at the . . . at the . . . at the casino and you picked me [voices overlapping]." Gaeta replied, "I didn't pick you up at" The following exchange then took place:

"[Alonzo]: That's what, I'm trying to say . . . well, I don't even want to talk to you about it, but you know where you picked me up . . . and you know how [voices overlapping]."

"[Gaeta]: [Voices overlapping] [STUTTERING] . . . be quiet already! [B]e quiet already! [B]ecause [voices overlapping]"

Alonzo then asked Gaeta to visit her "tomorrow." Gaeta cryptically said, "[T]omorrow, in my hand . . . I'm going to . . . I'm going to put some . . . some . . . some little things there for you." (Italics added.) He then repeatedly asked Alonzo whether she understood. Alonzo replied, "I don't understand," and then laughed. Gaeta told her he was going to "cut" himself on his finger, and then said, "I was gonna ask you . . . do you understand me?" Alonzo replied, "Okay." Gaeta referred to "that guy," and told Alonzo, "he's gonna probably ask me this and that . . . do you understand me?" Alonzo replied, "Yeah." Gaeta then referred to his hand again, saying, "I [unintelligible] on my hand . . . and . . . and I can't hide it, do you understand me?" He then said, "[H]e tells me, pay attention to what he's gonna ask you, you know?" (Italics added.) Soon thereafter, Alonzo told Gaeta, "[T]he statement looks good . . . I mean, *I have my alibi.*"

After this fifth recorded conversation was played for the jury, Investigator Romero opined that this conversation between Alonzo and Gaeta "continues with the fake alibi." The prosecutor noted that "[i]n the last part of the conversation that we heard, Gaeta is talking about his hands." She then asked Investigator Romero, "Based on your experience, knowledge and facts of this case, what does that mean [or how should it] be interpreted?" Investigator Romero replied, "That [Gaeta] was going to come visit her and [he] was going to try to communicate with her through his hand."

Gaeta's arrest during his May 18 jail visit

On May 18, Gaeta came to the jail to visit Alonzo. Rita Nakadaira, a correctional clerk employed by the Imperial County Sheriff's Office, testified she was at the front desk of the jail that day, monitoring visitation. She remembered Gaeta's visit because, "when

he entered the jail area he noticeably, he did have writing on his hands. And I did see that."

Imperial County Sheriff's Investigator Ryan Kelley testified he contacted Gaeta in a secured area of the jail on May 18, the day Gaeta visited Alonzo there, and he saw the following written on Gaeta's left palm: "When last seen?"; "What were you doing there?"; "How did you get there?"; "Marcos was not there when I picked you up"; "What did I pick you up on?"; and "I love you." Another officer took a photograph of Gaeta's left palm in the presence of Investigator Kelley, who authenticated the photograph at trial. Investigator Kelley testified he arrested Gaeta in the jail "[f]or communication with the prisoner [(Alonzo)] without permission from the officer in charge and for resisting, delaying or obstructing a peace officer."

B. The Defense

Alonzo did not testify. During his closing argument, defense counsel argued that Alonzo was innocent because she was not present during the commission of the crimes against Spiegl in his tow yard.

DISCUSSION

I. DENIAL OF NEW TRIAL MOTION (CLAIM OF JUROR MISCONDUCT)

Alonzo first contends the court committed prejudicial error and violated her rights under the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution by denying her motion for new trial, in which she argued jurors committed misconduct by violating the court's instruction that they not consider or discuss in their deliberations her failure to testify. We conclude the court properly found that jury misconduct occurred,

but that it was harmless. Accordingly, we also conclude the court did not err or violate Alonzo's federal constitutional rights by denying her new trial motion.

A. *Background*

1. *Court's instruction*

Regarding the fact that Alonzo did not testify, the court instructed the jury under CALCRIM No. 355 as follows:

"A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. *Do not consider, for any reason at all, the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.*" (Italics added.)

2. *Alonzo's petition for disclosure of juror information*

After the jury returned its verdicts, defense counsel sought a continuance of the sentencing hearing to investigate a potential juror misconduct claim that, during deliberations, jurors had discussed the fact that Alonzo did not testify or present an alibi. The court granted the requested continuance.

Thereafter, the defense filed a petition under Code of Civil Procedure section 237 requesting disclosure of the telephone numbers and addresses of all the jurors to assist the preparation of a new trial motion based on the alleged misconduct. The People opposed the petition. Following a hearing, the court found the defense had presented a prima facie case for partial disclosure of juror information and ordered that "at least one juror be summoned to discuss certain issues."

a. *In camera questioning of juror No. 10 and the court's petition ruling*

On January 4, 2011, juror No. 10 was questioned in chambers by the court and counsel in response to Alonzo's claim of juror misconduct. The court asked the juror to clarify the statement he had made about the fact that Alonzo did not testify during the trial. Juror No. 10 replied that while in the jury room with the other jurors, he said something to the effect that "[i]t didn't help her defense." When asked about the reaction of the other jurors, juror No. 10 answered that "it seemed to not really affect" them. The juror added, "One juror did say if it was them [*sic*] and . . . they [*sic*] didn't do it, they [*sic*] would have sung like a canary."

The court then asked, "[W]hat was the next comment, if any?" Juror No. 10 replied that both he and the foreperson said, "We are getting off track here," and "Let's get back on track."

In response to defense counsel's questioning, juror No. 10 indicated that another juror first raised the subject of Alonzo's decision to not testify, but juror No. 10 did not recall who it was. Juror No. 10 explained it was then that he said, "It didn't help." He indicated that the third juror who made the comment about singing like a canary was a female, there was only one discussion about Alonzo's failure to testify, and that discussion took place "[m]aybe an hour or two" after the jury began its deliberations and "[a] few hours" before the jury rendered its verdicts.

The court questioned juror No. 10 further, clarifying that the jurors' conversation about Alonzo's not testifying consisted of three brief comments and the admonishment that the jury should get back on track.

i. *Court's findings and ruling*

After juror No. 10 exited chambers, the court addressed Alonzo's petition for disclosure of juror information and found there was no need for any further disclosure of such information. The court found that "we have a full account of what happened," noting that "if we open this up and [bring] in" the other 11 jurors, "there may be little nuances of what happened." The court then denied Alonzo's request for disclosure of additional juror information, finding that juror No. 10's account was "very credible," and "this is probably as good as it's going to get for the defense." The court found that "there's no question but that there's been juror misconduct" because "they discussed the fact that Miss Alonzo did not testify." The court indicated that the pertinent question was whether the juror misconduct warranted a new trial. However, the court added it was "important" that one of the juror was "mindful" of the fact that discussion of Alonzo's failure to testify was not appropriate and told the other jurors they were "off track" and that the jurors "acknowledged that, left it, and moved on."

3. *Alonzo's motion for new trial*

Alonzo thereafter filed a motion for new trial in which she complained about the jury misconduct and claimed the juror comment about singing like a canary showed the juror believed the burden of proof had shifted to the defense, and that Alonzo was required to account for her whereabouts on the night of the crimes. In support of her motion, Alonzo attached a copy of the reporter's transcript of the January 4, 2011 proceeding in chambers (discussed, *ante*) at which juror No. 10 was questioned.

The People opposed the motion, arguing the jurors did not commit misconduct because the three comments about Alonzo's failure to testify were "natural" and "transitory" comments, given that she claimed at trial that she could not have committed any of the crimes because she was not present at the crime scene. The prosecution asserted the comments were just "a passing reference to an inappropriate matter."

At the hearing on Alonzo's new trial motion that preceded the sentencing, the court, after hearing additional arguments from both counsel, again found juror misconduct had occurred, but denied the motion on the ground the misconduct "did not harm [her] case." Noting it had instructed the jury to neither comment on, nor consider, the fact that Alonzo did not testify, the court found that "three of them did comment on it." However, the court characterized the misconduct as "technical misconduct," and repeatedly found the juror comments did not demonstrate any bias. The court indicated it had considered the total record, including the evidence presented against Alonzo. The court highlighted some of the most incriminating evidence, including the evidence showing Alonzo attempted to fabricate an alibi (discussed, *ante*), and found that "[t]he complete record shows a very, very strong case against [her]." The court noted that the jurors made the comments "at the very outset of the deliberation" and found the jurors "couldn't have discussed a lot of this." The court stated that the strong evidence against Alonzo "must have certainly been on their minds" and that it was "a little bit of human nature" for the jurors to wonder why she did not testify. Noting that the foreperson "recognized what was going on" and put the other jurors "back on track" by advising them that the comments about Alonzo's failure to testify were not appropriate, the court

found that, "looking at the whole record," the comments of the three jurors did not have "a significant impact on the jury when they arrived at their verdict," and "there was no real harm" to Alonzo. Concluding that "the presumption of prejudice is overcome when one looks at the whole record," the court denied Alonzo's new trial motion.

B. *Applicable Legal Principles*

A defendant has a constitutional right to a trial by an impartial jury. (*In re Hamilton* (1999) 20 Cal.4th 273, 293.) "An impartial jury is one in which no member has been improperly influenced [citations] and every member ' "is capable and willing to decide the case solely on the evidence before it." ' " (*Id.* at p. 294.)

"Prejudicial jury misconduct constitutes grounds for a new trial." (*People v. Blackwell* (1987) 191 Cal.App.3d 925, 929, citing § 1181, subd. 3.) In general, jurors commit misconduct when they directly violate the oaths, duties, and admonitions imposed on them. (*In re Hamilton, supra*, 20 Cal.4th at p. 294.)

This court has explained that "[t]o challenge the validity of a verdict based on juror misconduct, a defendant may present evidence of overt acts or statements that are objectively ascertainable by sight, hearing, or the other senses." (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1116, citing *People v. Danks* (2004) 32 Cal.4th 269, 302 & Evid. Code, § 1150, subd. (a).) "No evidence may be presented concerning the subjective reasoning processes of a juror that can neither be corroborated nor disproved" (*People v. Cissna, supra*, at p. 1116, citing *People v. Danks, supra*, at p. 302, *In re Hamilton, supra*, 20 Cal.4th at pp. 294, 296 & *In re Carpenter* (1995) 9 Cal.4th 634, 653-654.)

A jury that violates a trial court's instruction not to discuss the defendant's failure to testify commits misconduct. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1425 (*Leonard*)). "This misconduct gives rise to a presumption of prejudice, which 'may be rebutted . . . by a reviewing court's determination, upon [an examination of] the entire record, that there is no substantial likelihood that the [defendant] suffered actual harm.' " (*Ibid.*; see also *People v. Danks, supra*, 32 Cal.4th at p. 303 [applying a similar standard to allegations of juror bias].)

"Transitory comments of wonderment and curiosity, although misconduct, are normally innocuous, particularly when a comment stands alone without any further discussion. . . ." (*People v. Hord* (1993) 15 Cal.App.4th 711, 727-728.)

1. *Standard of review*

On appeal from a ruling denying a new trial motion based on juror misconduct, we defer to the trial court's factual findings if supported by substantial evidence and exercise our independent judgment on the issue of whether prejudice arose from the misconduct. (*People v. Loker* (2008) 44 Cal.4th 691, 747; *People v. Cissna, supra*, 182 Cal.App.4th at p. 1117.)

C. *Analysis*

The Attorney General does not dispute that the jurors committed misconduct by discussing the fact that Alonzo did not testify, and thus a rebuttable presumption of prejudice arose. (See *Leonard, supra*, 40 Cal.4th at p. 1425.) Accordingly, the issue presented here is whether the presumption of prejudice has been rebutted. (*Ibid.*)

Independently reviewing the entire record, we conclude the presumption of prejudice has been rebutted because the record shows there is no substantial likelihood Alonzo suffered actual harm as a result of the jury misconduct. As discussed more fully, *ante*, juror No. 10, who was one of the three jurors who improperly commented during deliberations on Alonzo's failure to testify, was questioned at length in chambers by both the court and Alonzo's counsel. The record supports the court's finding that the presumption of prejudice created by the juror misconduct in this case was rebutted. During the questioning by the court and counsel, juror No. 10 presented a detailed and consistent account of the nature and extent of the jurors' comments. The court accepted the version of the jurors' comments that juror No. 10 presented, and found juror No. 10 was "very credible." We will not disturb that credibility determination, which is supported by the record of that proceeding. (See *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 ["[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness . . ."], quoting *People v. Jones* (1990) 51 Cal.3d 294, 314.)

The record also shows the jurors' comments were brief, they were made early in the deliberative process⁴ without any suggestion that any of the jurors believed Alonzo's failure to testify indicated she was guilty, and the foreperson admonished the jury that the comments were inappropriate and the jury must get "back on track." According to juror No. 10, whose in camera responses the court credited, the inappropriate comments "seemed to not really affect" the other jurors.

⁴ The record shows the jury's deliberations began at 9:00 a.m. on October 8, and the verdicts were taken at 4:24 p.m. later that day.

The California Supreme Court has recognized that "[i]t is natural for jurors to wonder about a defendant's absence from the witness stand." (*People v. Loker, supra*, 44 Cal.4th at p. 749, citing *Leonard, supra*, 40 Cal.4th at p. 1425.)

Here, as the court properly found, it was "a little bit of human nature" for the jurors to wonder why she did not testify, and the jurors' brief comments, although misconduct, were merely innocuous "[t]ransitory comments of wonderment and curiosity." (*People v. Hord, supra*, 15 Cal.App.4th at pp. 727-728.)

In any event, as the court correctly found, the evidence of Alonzo's guilt (discussed more fully, *ante*, in the factual background) was "extremely strong." For example, the surveillance video recording from the Red Earth Casino showed Alonzo with Vita and Hernandez at the casino from 7:47 p.m. to 8:32 p.m. on the night of the robbery, shortly before the victim (Spiegl) received the 9:42 p.m. phone call from a female caller—who used what the parties agree on appeal was Vita's cell phone—who lured him away from his tow yard where the crimes were committed later that night after he returned. Before trial, Spiegl identified the woman in the video—Alonzo—as the same woman he had seen through his tape blindfold during the robbery incident. In addition, the prosecution presented strong evidence that Alonzo, during recorded conversations in jail, made self-incriminating statements (such as "they got me on kidnapping") and tried to fabricate an alibi with the assistance of her boyfriend.

For all of the foregoing reasons, we conclude there is no substantial likelihood Alonzo was prejudiced by the jury's brief comments regarding her failure to testify, and

thus the court did not err or violate her constitutional rights by denying her new trial motion.

II. DENIAL OF PETITION FOR RELEASE OF JUROR CONTACT INFORMATION

Alonzo also contends that, to the extent reversal is not required based on the jury misconduct claim raised in her new trial motion, the court erred by denying her petition for release of juror contact information, thereby preventing her from developing a full record of the jury misconduct. We reject this contention.

A. Background

As set forth more fully, *ante*, in the background related to Alonzo's claim that the court erroneously denied the motion for new trial, Alonzo filed a petition for disclosure of the telephone numbers and addresses of *all* the jurors, asserting she needed the information for the preparation of her new trial motion. Following a hearing on the petition, the court ordered that "at least one juror be summoned to discuss certain issues." Later, after juror No. 10 was questioned in chambers by the court and counsel in response to Alonzo's petition and claim of juror misconduct, the court found that juror No. 10 gave a "full account" (discussed, *ante*) that was "very credible." The court ruled there was no need for any further disclosure of juror information, finding that "this is probably as good as it's going to get for the defense."

B. Applicable Legal Principles

After the recording of a jury verdict in a criminal case, the court's record of personal juror identification information (names, addresses, and telephone numbers) is sealed. (Code Civ. Proc., § 237, subd. (a)(2).) On a petition filed by a defendant or his or

her counsel, a trial court may in its discretion grant access to such information when necessary to the development of a motion for new trial or "any other lawful purpose." (Code Civ. Proc., § 206, subd. (g).)

A trial court's denial of a petition for access to juror identification information is reviewed for abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317.)

C. *Analysis*

Alonzo claims the court prejudicially prevented her from fully developing the record of juror misconduct when it denied her petition for release of juror information. She complains that juror No. 10's "paraphrased account of other jurors' statements did not provide the court with adequate information to deny [her] motion for new trial."

We conclude the court did not abuse its discretion in denying Alonzo's petition for release of the sealed juror contact information. During the extensive in camera questioning by the court and counsel, juror No. 10 presented a detailed and consistent account of the nature and extent of the jurors' comments regarding Alonzo's failure to testify. The court accepted the version of the jurors' comments that juror No. 10 presented, and found that juror No. 10's "full account" was "very credible," essentially concluding that juror No. 10 was a credible witness. We will not disturb that credibility determination, which is supported by the record of that proceeding. (See *People v. Jones, supra*, 51 Cal.3d at p. 314.) The court did not err by denying Alonzo's petition.

III

CLAIMS OF EVIDENTIARY ERROR REGARDING ALIBI FABRICATION

Next, Alonzo contends the court prejudicially erred by admitting (1) evidence that her boyfriend Gaeta attempted to covertly communicate with her when she was in jail, (2) evidence that he was arrested there, and (3) Investigator Romero's opinion testimony that Alonzo and Gaeta were attempting to fabricate an alibi. These contentions are unavailing.

A. Background

During the testimony of Investigator Romero, as discussed more fully, *ante*, the jury heard five recordings of conversations Alonzo had with various people while she was in jail. Three of those recorded conversations were between Alonzo and her boyfriend. The first occurred on January 30 when Gaeta visited her in jail, and the other two took place by telephone on May 11 and 12. As this evidence is set forth in detail in the factual background, we do not summarize it again here.

B. Analysis

1. Writing on Gaeta's left palm

Alonzo first contends the court prejudicially erred by admitting the testimony of Investigator Kelley that he saw the following written on Gaeta's left palm when he contacted Gaeta in a secured area of the jail on May 18 when Gaeta was there to visit Alonzo:

"When last seen?"; "What were you doing there?"; "How did you get there?"; "Marcos was not there when I picked you up"; "What did I pick you up on?"; and "I love you."

Alonzo asserts this evidence was inadmissible because "[she] did not authorize the writing," and "[t]here was insufficient evidence [she] directed Gaeta to write on his hand." This assertion is unavailing. Alonzo has cited no authority, and we are aware of none, that required the prosecution to present evidence that Alonzo authorized or directed Gaeta to write on his palm. Alonzo's reliance on *People v. Hannon* (1977) 19 Cal.3d 588, 597, is unavailing, as the decision in that case sets forth no such requirement. We conclude the court properly admitted this evidence because it was relevant to the factual issues of whether Alonzo and Gaeta tried to fabricate an alibi during their pretrial conversations when she was in jail, and whether Alonzo thereby exhibited a consciousness of guilt.

2. Investigator Romero's opinion testimony and his testimony about Gaeta's arrest

Alonzo also contends the court prejudicially erred by admitting (1) Investigator Romero's opinion testimony that Alonzo and Gaeta were concocting a fake alibi, and (2) Investigator Romero's testimony that Gaeta was arrested at the jail on May 18 for "illegal communication with an inmate" (Alonzo).

In support of the first contention, Alonzo asserts Investigator Romero's opinion was inadmissible because "[t]he jury was fully equipped to evaluate [her] and Gaeta's statements and determine whether they were an effort to fabricate an alibi"; and, thus, it "did not assist" the jury. This contention is unavailing.

Evidence Code section 801, subdivision (a) "permits the introduction of testimony by a qualified expert when that testimony may 'assist the trier of fact.' " (*People v. Brown* (2004) 33 Cal.4th 892, 900.)

Here, the Attorney General appears to concede Investigator Romero's opinion testimony did not assist the jury. Specifically, the Attorney General asserts that, "[v]iewed in the context of the recorded words that [Alonzo] and Gaeta actually said aloud to each other, Investigator Romero's testimony was merely cumulative and not prejudicial. His belief that the couple was engaged in fabricating an alibi merely confirmed the obvious."

We shall assume, without deciding, that the challenged opinion testimony of Investigator Romero was inadmissible because it did not assist the jury.

We shall also assume, without deciding, that Investigator Romero's testimony about Gaeta's arrest was inadmissible. We note the Attorney General does not argue in favor of its admissibility, asserting instead that "there was no harm in the jury hearing that Gaeta was arrested after they heard that he came into the jail with some writing on his left hand, consistent with what he told [Alonzo] he would do."

Alonzo's claims of evidentiary error are unavailing because the assumed errors are harmless. As a preliminary matter, we reject Alonzo's contention that reversal is required because the admission of the challenged testimony rendered the trial "fundamentally

unfair" and there is no showing the error was harmless beyond a reasonable doubt.⁵

Noting that the court, in denying her new trial motion at the sentencing hearing, stated that the alibi evidence was "very, very damning," Alonzo asserts that "the consciousness of guilt evidence was crucial to the case." She also states that Investigator Romero's opinion testimony "tipped the scales."

We conclude Alonzo has failed to show the assumed errors rendered the trial "fundamentally unfair," and thus the applicable test for prejudice is the *Watson* harmless error standard, under which the judgment may be overturned only if "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As we have already discussed, the evidence of Alonzo's guilt (apart from Investigator Romero's testimony) was very strong. As set forth more fully in the factual background, the prosecution presented substantial evidence from which a reasonable jury could find that Alonzo used Vita's cell phone to make the fake towing service request to lure Spiegl away from his tow yard. She was videotaped with Vita and Hernandez at the Red Earth Casino shortly before she made that call, and Spiegl identified her when he viewed the videotape. She also made self-incriminating statements during five recorded conversations while in jail, including statements showing she intended to fabricate a story about where she was at the time the crimes against Spiegl were committed. In sum,

⁵ Under the *Chapman* harmless error standard, "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; see *Chapman v. California* (1967) 386 U.S. 18, 24.)

Alonzo has failed to meet her burden of demonstrating a reasonable probability she would have obtained a more favorable result in the absence of the erroneous admission of Investigator Romero's testimony.

IV. SUFFICIENCY OF THE EVIDENCE (COUNT 1)

Alonzo claims there is insufficient evidence to support her count 1 conviction of kidnapping to commit robbery because the movement of Spiegl within his own tow yard did not increase his risk of harm. We reject this claim.

A. Standard of Review

When assessing a challenge to the sufficiency of the evidence supporting a conviction, we apply the substantial evidence standard of review, under which we view the evidence "in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa, supra*, 6 Cal.4th at p. 1206; *People v. Jones, supra*, 51 Cal.3d at p. 314.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

B. *Analysis*

In order to convict a person of kidnapping to commit robbery (§ 209, subdivision (b)(1)), the prosecution must prove the movement of the victim was not merely incidental to the commission of the robbery. (*People v. Rayford* (1994) 9 Cal.4th 1, 12; CALCRIM No. 1203.) In other words, the movement must create a risk of harm to the victim that would not necessarily be present in a robbery. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152; *People v. Rayford*, at p. 12.) The jury considers the distance the defendant moved the victim and the scope and nature of the movement. (*People v. Rayford*, at p. 12.) The Supreme Court has explained that movement increases the risk of harm when it decreases the likelihood of detection, increases the danger inherent in a victim's foreseeable attempts to escape, or enables the attacker "to commit additional crimes." (*People v. Dominguez*, at p. 1152.)

This case is a textbook example of kidnapping to commit robbery. Spiegl was dragged by Alonzo's two male cohorts some 60 feet over gravel, during a rain storm, from an area of the tow yard that was open to public view to an enclosed area away from public view. Spiegl was blindfolded, his hands and feet were bound, and, thus, he was totally under their control. He had no means of escape and could not expect help from a passer-by.

Alonzo claims the movement of Spiegl 60 feet within his tow yard did not substantially increase his risk of harm because the tow yard was in a remote area. This claim is unavailing. It is pure speculation to assume no one drove by the tow yard during the robbery after Spiegl was moved the 60 feet to a place that was not open to public

view. The evidence supports the jury's finding that the movement in this case was not merely incidental to the robbery. (See *People v. Rayford*, *supra*, 9 Cal.4th at p. 12.)

V. CLAIM OF INSTRUCTIONAL ERROR (COUNT 3: ELDER ABUSE)

Next, Alonzo contends her count 3 conviction of elder abuse with infliction of great bodily injury (§ 368(b)(1))⁶ must be reversed because the court erroneously instructed the jury it could convict her of this crime on an incorrect legal theory. Specifically, she claims the court erroneously instructed the jury under CALCRIM No. 830 that she could be convicted of count 3 if she "caused or *permitted*" (italics added) Spiegl to suffer or be injured.⁷ Citing *People v. Heitzman* (1994) 9 Cal.4th 189 (*Heitzman*), she asserts that "to be convicted of elder abuse for *permitting* abuse, the

⁶ Section 368(b)(1) provides: "Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed six thousand dollars (\$6,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or four years."

⁷ The court instructed the jury under CALCRIM No. 830, in part, as follows: "To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant willfully caused or *permitted* Mr. Spiegl to suffer unjustifiable physical pain or mental suffering; [¶] 2. The defendant caused or *permitted* Mr. Spiegl to suffer or be injured under circumstances likely to produce great bodily harm or death; [¶] 3. Mr. Spiegl is an elder adult; . . . [¶] 4. When the defendant acted, she knew or reasonably should have known that Mr. Spiegl was an elder adult; [¶] AND 5. The defendant was criminally negligent when she caused or *permitted* Mr. Spiegl to suffer or be injured or be endangered." (Italics added.)

defendant must have a legal duty to control the conduct of the abuser." Here, she argues, the court erroneously allowed the jury to convict her of count 3 "using a legally impermissible theory" because she "had no duty to control Hernandez and Vita," who perpetrated the elder abuse. We conclude the court erred by instructing the jury under CALCRIM No. 830, but conclude the error was harmless.

A. *Standard of Review*

"It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 (*Guiton*)). If that is the only error, the error is one of state law subject to the *Watson* test for prejudice (discussed, *ante*), under which reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result in the absence of the error. (*Id.* at pp. 1129-1130; see *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

The California Supreme Court explained in *Guiton* that "[i]n determining whether there was prejudice, the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict." (*Guiton*, *supra*, 4 Cal.4th at p. 1130.) The high court also explained that "instruction on an unsupported theory is prejudicial only if that theory became the *sole* basis of the verdict of guilt; if the jury based its verdict on [a] valid ground, or on both the valid and the invalid ground, there would be no prejudice, for there would be a valid basis for the verdict." (*Ibid.*, italics added.)

B. *Analysis*

The California Supreme Court has explained that criminal liability for elder abuse may be imposed under section 368 "on any person who affirmatively causes or inflicts unjustifiable pain or suffering on an elder, as well as on anyone who *permits* the infliction of such abuse on an elder"; and, thus, "the class of potential defendants includes both those who directly inflict the abuse as well as those who *passively fail to act*." (*Heitzman, supra*, 9 Cal.4th at p. 214, italics added.) By including such offenders in the class of "potential defendants," the high court in *Heitzman* did not address or preclude the imposition of criminal liability for elder abuse on defendants found guilty of that offense under theories of conspiracy or aiding and abetting. (See *id.* at pp. 197-214.)

Here, during closing arguments before the court instructed the jury, the prosecutor conceded there was "no evidence" that Alonzo "actually hit, beat, [or] dragged" Spiegl, adding that "there were points in time that Mr. Spiegl testified that he didn't know which one of the three [(Vita, Hernandez, and Alonzo)] were hitting him, kicking him, beating him" because "[h]e lost consciousness . . . several times." As there was no evidence Alonzo participated in the acts of blindfolding Spiegl, dragging him 60 feet across the tow yard over gravel during a rain storm, and repeatedly attacking him physically, her criminal liability for elder abuse with infliction of great bodily injury could not be based on a theory that she directly inflicted such abuse.

Alonzo's criminal liability for this crime also could not be based on a theory that she permitted such abuse. In order for criminal liability to arise under section 368 for *permitting* an elder to suffer unjustifiable pain or suffering, "a defendant must stand in a

special relationship to the individual inflicting the abuse on the elder such that the defendant is under an existing duty to supervise and control that individual's conduct." (*People v. Heitzman, supra*, 9 Cal.4th at p. 212.) Here, Alonzo argues, and the Attorney General does not dispute, that she did not stand in a special relationship with Vita and Hernandez and thus did not have a legal duty to control Vita and Hernandez, the perpetrators of the elder abuse.

Accordingly, we conclude the court erred by instructing the jury under CALCRIM No. 830 that Alonzo could be convicted of elder abuse with infliction of great bodily injury as charged in count 3 if she caused or *permitted* Spiegl to suffer or be injured because that instruction "ha[d] no application to the facts of the case." (*Guiton, supra*, 4 Cal.4th at p. 1129.)

We also conclude, however, that the court's instructional error was harmless under the *Watson* harmless error standard. Specifically, we conclude the record shows the jury's count 3 elder abuse verdict was based on a "valid ground" (*Guiton, supra*, 4 Cal.4th at p. 1130)—the prosecution's theory of conspiracy and the natural and probable consequences doctrine—and, thus, Alonzo has not shown, and cannot demonstrate, she would have obtained a more favorable result in the absence of the instructional error.

The prosecutor argued during closing arguments that Alonzo conspired⁸ with Vita and a third suspect (Hernandez) to burglarize Spiegl's tow yard and rob him and that Alonzo

⁸ As Alonzo does not challenge the sufficiency of the evidence supporting her count 5 conviction of conspiracy to commit first degree robbery and first degree burglary, we need not summarize that evidence here.

was liable under the natural and probable consequences doctrine for the elder abuse with infliction of great bodily injury that Vita and Hernandez inflicted on Spiegl because a reasonable person in her position would have known that the commission of such abuse was a natural and probable consequence of the commission of those crimes.

The record shows the court properly instructed the jury under a modified version of CALCRIM No. 402 that the jury could find Alonzo guilty of elder abuse with infliction of great bodily injury if the prosecution "prove[d] that [¶] 1. The defendant is guilty of First Degree Robbery and First Degree Burglary; [¶] 2. During the commission of First Degree Robbery and First Degree Burglary, a coparticipant in that First Degree Robbery and First Degree Burglary committed the crime of . . . Elder Abuse, Infliction of Injury; [¶] AND [¶] 3. *Under all the circumstances, a reasonable person in the defendant's position would have known that the commission of . . . Elder Abuse, Infliction of Injury was a natural and probable consequence of the commission of the First Degree Robbery and First Degree Burglary.*" (Italics added.) Alonzo does not claim the court committed error by giving this instruction, nor does she challenge the sufficiency of the evidence supporting the jury's findings that (1) Alonzo was guilty of the crimes of first degree robbery (count 2) and first degree burglary (count 4), (2) a coparticipant in those crimes (Vita, Hernandez, or both) committed elder abuse with infliction of great bodily injury against Spiegl during the commission of those crimes, and (3) a reasonable person in Alonzo's position would have known that the commission of elder abuse with infliction of great bodily was a natural and probable consequence of the commission of the first degree robbery and first degree burglary.

For the foregoing reasons, we conclude that although the court erred by instructing the jury that Alonzo could be convicted of elder abuse with infliction of great bodily if she caused or permitted Spiegl to suffer or be injured, the error was harmless.

VI. *SECTION 654 (COUNTS 3 & 4)*

Last, Alonzo contends the sentences imposed for her count 3 conviction of elder abuse and her count 4 conviction of first degree burglary must be stayed under section 654. We reject her contention as to count 3, as to which the court imposed a consecutive one-year prison term plus a consecutive three-year term for the infliction of great bodily injury enhancement. However, we conclude the judgment must be modified to stay under section 654 the execution of the consecutive four-year term the court imposed for Lowe's count 4 conviction of first degree burglary. As modified, the judgment is affirmed.

A. *Background*

For her conviction of kidnapping to commit robbery, the court sentenced Alonzo to an indeterminate term of life with the possibility of parole. For her conviction of first degree robbery, the court imposed, but stayed under section 654, a consecutive determinate prison term of one year four months (i.e., one-third the midterm of four years). For her conviction of elder abuse, the court imposed a consecutive one-year term (i.e., one-third the middle term of three years), plus a consecutive three-year term for the infliction of great bodily injury enhancement on a victim 69 years of age. For her conviction of first degree burglary, the court imposed a consecutive midterm of four years. Last, for her conviction of conspiracy to commit first degree robbery and first

degree burglary, the court imposed, but stayed under section 654, a consecutive term of one year four months (i.e., one-third the midterm of four years).

B. *Section 654*

Section 654, subdivision (a) provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Section 654 "precludes multiple punishment for a single act or omission, or an indivisible course of conduct" (*People v. Deloza* (1998) 18 Cal.4th 585, 591) and ensures the defendant's punishment will be commensurate with his or her criminal culpability (*People v. Kramer* (2002) 29 Cal.4th 720, 723). If a defendant suffers two convictions and punishment for one is barred by section 654, that section requires the sentence for one conviction be imposed and the other be *imposed and then stayed*. (*People v. Deloza*, at pp. 591-592.)

Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the defendant, not the temporal proximity of the offenses. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) Generally, if all the criminal acts were incident to one objective, then punishment may be imposed only as to one of the offenses committed. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1781.)

The question of whether a defendant harbored multiple criminal objectives is a question of fact for the trial court to decide. (*People v. Coleman* (1989) 48 Cal.3d 112,

162.) A trial court's determination that a defendant held multiple criminal objectives will be upheld on appeal if it is supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.)

C. *Analysis*

1. *Count 3*

We reject Alonzo's claim that the one-year sentence imposed for her count 3 elder abuse conviction and the related three-year enhancement, both of which the court ordered her to serve consecutively to the life-with-possibility-of-parole sentence it imposed for her count 1 conviction of kidnapping to commit robbery, must be stayed under section 654. Citing *People v. Bradley* (2003) 111 Cal.App.4th 765 (*Bradley*), Alonzo asserts she may not be separately punished for count 3 because she "did not participate in the conduct underlying Count 3," she was convicted of that count under a theory of natural and probable consequences "based on her participation in the robbery and burglary," and she "did not have an independent intent [to] commit elder abuse."

Alonzo's reliance on *Bradley* is unavailing. In that case, the female defendant was convicted of robbery and attempted murder as an aider and abettor. (*Bradley, supra*, 11 Cal.App.4th at p. 767.) According to a plan she devised with her two male accomplices, the defendant lured the prosperous looking victim into his car and drove with him to a location where the accomplices entered the car. The defendant got out of the car and joined a female friend in another car following behind the victim's car, and they all drove to a residential area where the victim was robbed by the male accomplices. (*Id.* at pp. 767-768.) However, when the accomplices asked the victim to climb into the trunk of the

car, the victim claimed he did not know how to open the trunk because the car was not his, and one of the accomplices then shot him. (*Id.* at p. 768.) Finding that the robbery and attempted murder had different objectives, the trial court sentenced the female defendant to consecutive prison terms for the two offenses. (*Id.* at p. 767.) The Court of Appeal reversed, finding that section 654 prohibited consecutive sentencing for the two crimes because the defendant "only had a single criminal objective—the robbery of [the victim]" (*Bradley, supra*, at p. 771), and, thus, she was less culpable than her male confederates. (*Id.* at pp. 767, 771.) The *Bradley* court reasoned that the defendant was "unaware" of the unplanned second crime—attempted murder—until after it was committed, and thus she "[did not] have an opportunity to prevent or even protest its commission. As a result, there simply was no evidence [she] exhibited the more dangerous mental state warranting a consecutive sentence under [section] 654." (*Bradley, supra*, at p. 771.)

Here, Alonzo did exhibit a more dangerous mental state warranting under section 654 the consecutive count 3 sentences the court imposed. Unlike the *Bradley* defendant, who had removed herself from the crime scene prior to the unplanned attempted murder by getting out of the victim's car and climbing into another vehicle, the evidence shows Alonzo was present and played an active role during the burglary and robbery while her two confederates were inflicting the elder abuse that was the natural and probable consequence of those crimes. As detailed more fully, *ante*, substantial evidence showed that Alonzo lured Spiegl away from his tow yard by calling him and claiming she needed a tow. Instead of staying inside Vita's truck, she joined him and their third confederate at

the crime scene and participated in the burglarizing of Spiegl's property. Spiegl testified that while he lay on the floor after being physically attacked, bound, blindfolded, robbed, and dragged in the rain over gravel across the tow yard, he saw Alonzo running back and forth through his loosened blindfold. Spiegl also testified he was repeatedly assaulted while in his helpless position. A rational jury could reasonably infer Alonzo knew about the elder abuse with great bodily injury that her confederates were perpetrating while she was indifferently running around near Spiegl actively helping her coconspirators take his possessions. The foregoing evidence establishes that Alonzo acted with a more dangerous mental state and greater culpability than the *Bradley* defendant, warranting the court's imposition of the consecutive count 3 sentences to ensure her punishment is commensurate with her criminal culpability. (See *People v. Kramer, supra*, 29 Cal.4th at p. 723.)

2. *Count 4*

Alonzo also contends the consecutive four-year prison sentence the court imposed for her count 4 conviction of first degree burglary must be stayed under section 654. We conclude the court erred by not staying that sentence under section 654.

When a defendant commits both burglary and the underlying intended felony against a single victim, section 654 generally permits punishment for one of the crimes, but not for both, because the burglary is merely incident to, and a means of perpetrating, the intended felony. (See *People v. James* (1977) 19 Cal.3d 99, 119-120 [burglary and intended robbery]; see also *People v. Cline* (1998) 60 Cal.App.4th 1327, 1335 [burglary and intended theft].)

Here, the court punished Alonzo for her count 1 conviction of kidnapping to commit robbery by sentencing her to life in prison with the possibility of parole. Alonzo correctly argues that count 1 and count 4 were both "committed for the same objectives to steal from Spiegl." Thus, under section 654, punishment may be imposed only as to one of those offenses. (*People v. Rodriguez, supra*, 47 Cal.4th at p. 507.) We conclude the judgment must be modified to stay under section 654 the execution of the consecutive four-year term the court imposed for Alonzo's count 4 conviction of first degree burglary.

DISPOSITION

The judgment is modified to stay under Penal Code section 654 the execution of the four-year prison sentence imposed for Alonzo's count 4 conviction of first degree burglary. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect this modification of the judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

NARES, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.