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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

DONOVAN LEE AVILA et al.

Defendants and Appellants.

E054855

(Super.Ct.No. RIF146283)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas Kelly, Judge.

(Retired judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to art.

VI, § 6 of the Cal. Const.) Affirmed with directions.

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant Donovan Lee Avila.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant Steven Blodgett Windust.

J. Courtney Shevelson, under appointment by the Court of Appeal, for Defendant and Appellant Manuel Rene Acosta.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and William M. Wood and Gary W. Brozio, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant Donovan Lee Avila appeals from his conviction of first degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a); count 1), robbery (§ 211; count 2), and first degree burglary (§ 459; count 3). Avila contends: (1) codefendant Windust's statements to an officer were unreliable hearsay and should have been excluded under *Crawford*<sup>2</sup> and *Bruton*<sup>3</sup>; (2) the trial court erred in permitting hearsay evidence for the truth of Avila's preconceived intent to kill and of his being an untrustworthy thief; (3) the trial court erred in instructing the jury to disregard that a prosecution witness was in custody when he testified; (4) the trial court erred in failing to award custody credit for actual time served; and (5) the doctrine of cumulative error requires reversal. In addition, Avila joins the arguments of his codefendants to the extent they are of benefit to him.

Defendant Manuel Rene Acosta appeals from his conviction of first degree murder (§ 187, subd. (a); count 1), robbery (§ 211; count 2); and first degree burglary (§ 459;

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

<sup>3</sup> *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).

count 3).<sup>4</sup> Acosta contends the trial court's instruction on the natural and probable consequences doctrine deprived him of due process because the instruction did not require the People to prove that a reasonable person would have known that premeditated and deliberate murder and lying-in-wait murder were natural and probable consequences of aggravated assault, and (2) the trial court erred in failing to award custody credit for actual time served. In addition, Acosta joins the arguments of his codefendants to the extent they are of benefit to him.

Defendant Steven Blodgett Windust appeals from his conviction of second degree murder (§ 187, subd. (a); count 1), robbery (§ 211; count 2), and burglary (§ 459; count 3).<sup>5</sup> Windust contends his sentence for the robbery should be stayed under section 654 because the robbery and burglary were committed during a continuous course of events and with the same intent and objective.

The People concede that Avila and Acosta are entitled to credit for actual time served before trial. We find no other prejudicial errors.

## II. FACTS AND PROCEDURAL BACKGROUND

Avila, Acosta, and Windust were jointly charged with murder (§ 187, subd. (a)), robbery (§ 211) and burglary (§ 459). Avila and Windust were jointly tried to the same

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<sup>4</sup> Acosta was also convicted of possession of a firearm by a felon (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1); count 4), but he raises no contention on appeal relating to that count.

<sup>5</sup> Windust was also convicted of receiving a stolen vehicle (§ 496d, subd. (a); count 5), but he raises no contention on appeal relating to that count.

jury, and Acosta was tried to a second jury. Except as otherwise indicated, the evidence was heard by both juries.

### **A. Background Events**

In October 2008,<sup>6</sup> Douglas DiDominicus (the victim) lived in a converted garage that he called the bunker, on Mt. Vernon Street in Riverside. The victim sold drugs, and he kept the drugs and money in a safe in a closet in his home.

The victim was close friends with Steven Watson and Jeffrey Duncan. About a month before October 3, Duncan started hanging out with Avila, and Avila and Duncan often partied and slept overnight at Watson's apartment. They were all using speed.

Avila frequently bragged about his "juice" in the community and talked about being a "big dog" on the streets that had sources and weapons. He also claimed connections with the Mexican Mafia. Watson became uncomfortable, and he told Duncan and Avila to move out. They left, and Watson changed his locks. The victim told Watson and others that Avila was a moocher, a fake, and a thief who was not to be trusted; one of the victim's friends had warned the victim about Avila.

After changing his locks, Watson told Duncan his concerns about Avila and told Duncan not to come over if he was with Avila. Duncan came to Watson's apartment, and Avila appeared "out of nowhere" and entered. Watson told Avila he was not welcome, and Avila said not to stick his nose in the situation or he would end up as a "casualty of war." Watson later discussed the situation with the victim.

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<sup>6</sup> Unless otherwise indicated, all relevant events occurred in 2008.

Duncan testified that he became friends with Avila about a month before the homicide. He met Acosta only once, two or three days before the homicide, when he drove Avila to Acosta's house, where Avila and Acosta talked outside Duncan's hearing. Both Watson and the victim told Duncan of their concerns about Avila.

Duncan told Avila about some of the things the victim had said, and Avila became angry and hostile; he said the victim was "dead." Avila wanted to set up the victim through Windust at Windust's house. Duncan then warned the victim about Avila's threat. He testified the victim always carried a gun and kept another in his safe.

Marie Anacker, the victim's girlfriend, visited the bunker on October 2. The victim came to the door with a gun and told her that he was scared and they had to leave. He said Avila wanted to kill him. They went to a park, where the victim said he had told the friend with whom Avila was staying that Avila was untrustworthy, Avila had a prior for stealing, and it was not good to have him staying there. The victim said Avila had learned of the conversation and was angry, which made the victim afraid for his life and had prompted him to buy a surveillance system for the bunker and a lock for the gate. He told Anacker not to come to his house anymore.

Telephone records showed that the victim and Windust had exchanged several telephone calls on October 2 and 3.

### **B. Events of October 3**

In the evening of October 3, the victim spoke to his mother about going to a place in Mission Grove to buy a gun. The victim told a friend he was going on an errand to buy a handgun; the victim and the friend arranged to meet later, but the victim never

showed up. Also that evening, the victim told Anacker he had to “handle his beef” with Avila and would call her later. Neither Anacker nor the victim’s mother ever heard from him again.

On October 3, the victim went to Windust’s home, where he was beaten to death in the garage. The cause of death was multiple fractures from blows to the head from a blunt instrument. Windust admitted he struck the victim once in the arm with a bat. Avila admitted he had “got into it” with the victim and had “thumped him up,” at Windust’s house, but that was “really about it.” He denied knowing where the victim was, but admitted the victim had taken “[m]aybe, an ass kicking.”

### **C. Events After the Homicide**

Avila telephoned Duncan between 9:00 and 10:00 p.m. on October 3 and demanded they meet. Duncan agreed to meet him at a convenience store, and the three defendants arrived in the victim’s car with Avila driving. Duncan asked why they were in the victim’s car, and Avila said not to worry about it and ordered him to get in. Avila had a gun in his lap and specks of red on his shirt, and Acosta had a gun tucked next to the console.<sup>7</sup> When Duncan got into the car, Acosta pointed a gun at him and asked where the victim lived. Duncan agreed to take them there because he was afraid for his life. Avila said the victim was dead and that Avila had the victim’s fingers in his pocket. (In fact, the autopsy showed the victim’s fingers were intact.)

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<sup>7</sup> Duncan told detectives he had seen what he thought was blood on Acosta’s gun. At trial, he denied seeing blood on the gun and testified he did not recall telling the detectives that. Later at trial, he testified he had seen a “red smudge” on Acosta’s gun.

Defendants entered the victim's house using the victim's keys and took items, including watches, jewelry, clothing, and the safe from the closet. Once back in the victim's car, Avila and Acosta discussed the contents of the safe; Avila said he was "happy already with what's done" or was "satisfied with what he got." They went to a house, where someone came out and gave Duncan a ride home.

Windust returned to his house with Avila about 1:30 a.m. on October 4. Avila was carrying a duffel bag, and they went into Windust's room. At 7:30 a.m., Windust's housemate saw Avila washing his shirt and cleaning his sneakers. On the morning of October 5, Windust offered his housemate a handgun, saying "[s]ome things happened," and the housemate might need it for protection. Windust had a second gun, a semiautomatic, in his waistband. Windust asked the housemate to move his car out of the garage, explaining that he had to clean up some oil or something spilled. The housemate saw Windust's truck in the driveway. It looked dirty, as if Windust had taken it off road.

After trying unsuccessfully to contact the victim, Anacker and the victim's mother made a missing person's report on Monday, October 6.

On October 6, Avila showed up in the victim's car at the house of a friend, Rick Jones, with marijuana and speed. Avila used the victim's credit card three times on October 6 at a gas station and tried to use it twice the next day, but it was declined. He took Jones and two women to casinos, where he provided everyone with money and paid for their rooms and meals. Avila told Jones he was a "killa" and that he had shot a man through the head because the man "owed him money and disrespected him. He said the man would not go down, so he had to "kick him down," and there was blood everywhere.

He said he had wrapped the victim and dumped him, and he was concerned the body might be found. Avila was arrested on October 10 while driving the victim's car. A Ruger P85 nine-millimeter gun was found in Avila's bag at Jones's house.

Swabs of blood from Windust's garage floor, ceiling, and a water heater strap were determined by DNA profiling to be the victim's blood. A wooden baseball bat was recovered from the garage, but tests for blood on it were inconclusive.

On October 10, the victim's body was located under a tree off a dirt road. The body was wrapped in a blue tarp tied with rope, and inside the tarp, the victim's head was wrapped in a towel secured with duct tape, and his hands, feet, arms, and upper torso were bound with rope and duct tape. The victim had been alive when he was bound. \$700 in cash was found in the victim's pants pocket.

The body was significantly decomposed, which made it impossible to determine the cause of some injuries. The autopsy did not confirm that the victim had been shot, although a small wound to the ear could have been a gunshot wound. The pathologist determined the cause of death was blunt impact injuries to the head.

#### **D. Acosta's Statement to the Police**

The following evidence was heard only by Acosta's jury.

Acosta was arrested and interviewed on October 10. A recording of his interview was played for the jury, which was also provided with a transcript. Acosta initially denied any involvement in the victim's disappearance or murder and stated he knew nothing about it. He then admitted he had used a power washer earlier in the week, but

he again denied killing the victim or helping others kill him, and he had no idea what had happened in Windust's garage, except that he thought it had been a fight.

Acosta said he did not know why he and Avila had gone to Windust's house. He then said Avila had asked him to accompany him to watch his back, so he went "[j]ust [to] have his back." He thought it was going to be a "rough up or something" of a guy who owed Avila "money or something" or who had "disrespected" Avila. When they arrived at Windust's house, Acosta sat in the living room while Avila and Windust talked "hush-hush." The victim rang the doorbell, and Windust answered the door. They went toward the kitchen. Acosta heard talking and scuffling in the laundry room area that led to the garage. Acosta did not see Avila or Windust with a gun.

Acosta remained in the living room while Avila and Windust pushed the victim into the garage. Acosta thought they were beating him up until he heard a gunshot and entered the garage. The victim seemed to be all right because he was standing and scuffling; it appeared that the shot had nicked his ear. Avila and Windust both "socked" the victim as he tried to fight them off.

The victim was on the ground, and Avila handed Acosta a bat, but Acosta refused to hit the victim. Acosta denied hitting the victim but said that Windust had hit the victim with a bat. Avila was holding a bloody gun and had blood on him. Acosta backed out of the scene, and he saw blood everywhere. When they left, the victim was still breathing. Acosta took the bloody gun so "this fucking moron [would not] pick it up and shoot him . . . ."

Avila drove them to pick up Duncan, and they then went to the victim's house and entered with a key. They found the safe and loaded it into the car, and they took other property. Avila dropped Acosta off, and the next day, the others gave him \$100. On Saturday or Sunday, Acosta returned to Windust's garage, and the victim was gone. Acosta borrowed a power washer and tried to clean up the garage, although someone else had already cleaned it considerably.

Acosta denied knowing where the victim's body was placed, and he denied having anything to do with that. Avila told Acosta not to worry about what had happened to the victim and that it had been taken care of. Acosta threw away the clothes he had worn that night, and he threw into a dumpster the trash bags of rags that had been used to clean the garage.

## **E. Verdicts and Sentences**

### *1. Avila*

Avila's jury found him guilty of first degree murder (§ 187, subd. (a)), robbery (§ 211), and first degree burglary (§ 459). } The trial court found true the allegations of six prior convictions for which he had served prison terms (§ 667.5, subd. (b)). The trial court sentenced Avila to 25 years to life for the murder, plus a consecutive determinate term of 13 years for the other counts and the enhancements.

### *2. Windust*

After trial began, Windust entered a plea of guilty to receiving a stolen vehicle (§ 496d, subd. (a)). While the jury was deliberating, Windust entered a plea of guilty to second degree murder (§ 187, subd. (a)), robbery (§ 211), and first degree burglary

(§ 459). The trial court sentenced Windust to 15 years to life for the second degree murder and to consecutive terms of six years for burglary, one year for robbery, and eight months for receiving a stolen vehicle.

### 3. *Acosta*

Acosta's jury found him guilty of first degree murder (§ 187, subd. (a)); robbery (§ 211), and first degree burglary (§ 459); and he pleaded guilty to being a felon in possession of a firearm (former § 12021, now § 29800, subd. (a)(1); count 4). The trial court sentenced him to 25 years to life for the murder, plus a consecutive determinate term of seven years eight months for counts 2 through 4.

Additional facts are set forth in the discussion of the issues to which they pertain.

## III. DISCUSSION

### **A. Admissibility of Windust's Statement Against Codefendants**

Avila and Acosta contend Windust's statements to an officer were hearsay and should have been excluded under *Crawford* and *Bruton*.

#### 1. *Additional Background*

Acosta's counsel objected before trial to the admission into evidence of any of Windust's statements on the grounds the statements were hearsay, there had been no opportunity for cross-examination, and the statements were inherently unreliable. The trial court tentatively ruled that the statements would be admissible under Evidence Code section 1230 but agreed to revisit its ruling if a party objected during trial. Avila and Acosta renewed their objections to the admission of Windust's statements. The trial court ruled that redacted statements were admissible.

In the portion of Windust's interview that was played for the jury, Windust said the victim had come to his house the previous week to buy speed. The victim "bought dope and he left." Windust then said he had had conversations with the victim "[o]n the phone with each other back and forth, he wanted to buy my gun." Windust told the victim to come over. Windust said no one else had known about "that mess in the garage" or the fight in the living room, although his housemate "had to know," and "kind of maybe figured something." He said the gun he had planned to sell the victim was a Ruger P85 nine-millimeter.<sup>8</sup> The portion of the interview admitted into evidence ended with the following exchange:

"Q. And that's the . . . gun that [the victim] thought he was gonna buy, is that right?

"A. Mm, yeah.

"Q. Well you hit him with the baseball bat at least once.

"A. Yeah, I know I hit him in the arm."

## 2. *Analysis*

Avila's theory of the case was that a reasonable doubt existed as to his guilt because the victim had come to the meeting armed, thereby creating the need for self-defense. Avila contends the challenged evidence undercut that defense because it minimized Windust's involvement and left Avila as the killer using excessive force.

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<sup>8</sup> As recounted above, that was the type of gun found among Avila's possessions after his arrest.

Avila frames the *Bruton* rule as follows: “The rule on constitutionally effective redaction is . . . that the co-defendant’s statement cannot ‘implicate’ another defendant.” That statement of the rule is inconsistent with *Richardson v. Marsh* (1987) 481 U.S. 200 (*Richardson*). As the court explained in *People v. Homick* (2012) 55 Cal.4th 816, 874, “‘*Aranda*<sup>9]</sup> and *Bruton* stand for the proposition that a “nontestifying codefendant’s extrajudicial self-incriminating statement that inculcates the other defendant is generally unreliable and hence inadmissible as violative of that defendant’s right of confrontation and cross-examination, even if a limiting instruction is given.” [Citation.]’ [Citation.] The United States Supreme Court ‘limited the scope of the *Bruton* rule in [*Richardson*]. The court explained that *Bruton* recognized a narrow exception to the general rule that juries are presumed to follow limiting instructions, and this narrow exception should not apply to confessions that are not incriminating on their face, but become so only when linked with other evidence introduced at trial. [Citation.]’ [Citation.]” Thus, a constitutional violation does not occur when ““a codefendant’s statement is not incriminating on its face, and becomes so only when linked to other admitted evidence, if the trial court gives a proper limiting instruction.”” (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 138, citing *Richardson, supra*, at pp. 208, 211.)

In *Gray v. Maryland* (1998) 523 U.S. 185, the court held that the codefendant’s confession was facially incriminatory, and thus inadmissible even with a limiting instruction, when the confession, “despite redaction, obviously refer[red] directly to

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<sup>9</sup> *People v. Aranda* (1965) 63 Cal.2d 518.

someone, often obviously the defendant, and . . . involve[d] inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.” (*Id.* at p. 196.) The court held that replacing the defendant’s name with a blank, symbol, or neutral pronoun was insufficient. (*Ibid.*) Here, in contrast, Windust’s statements were not “*facially* incriminat[ory]” as to Avila and did not “obviously refer directly to someone” else. (*Ibid.*) Rather, the statements became incriminatory only when considered with other properly admitted evidence.

In *Richardson*, a codefendant confessed that he and a third accomplice had driven to the victims’ home, and the accomplice said he would have to kill the victims after robbing them. All references to the defendant were redacted, and the jury was instructed not to consider the confession as to the defendant. (*Richardson, supra*, 481 U.S. at pp. 203-205.) The defendant later testified she had been in the car with the others, but had not heard that conversation, and she had not intended to rob or kill anyone. Following her conviction of felony murder, she argued the trial court had committed *Bruton* error in admitting the codefendant’s confession. The Supreme Court found no error, because the confession was not incriminating on its face but became so only when linked with evidence introduced later at trial, in that case, the defendant’s own testimony.

(*Richardson, supra*, at p. 211.) *Richardson* is directly on point. Windust’s statement made no mention of defendant’s presence at his house when the victim was there; the statement became incriminating against Avila only when linked with other properly admitted evidence. We conclude there was no *Bruton* error in admitting Windust’s statements.

### 3. *Crawford*

A codefendant's redacted statement that contains no evidence against the defendant does not implicate the confrontation clause. (*People v. Stevens* (2007) 41 Cal.4th 182, 199.) "The same redaction that 'prevents *Bruton* error also serves to prevent *Crawford* error.' [Citation.]" (*People v. Stevens, supra*, at p. 199.) Because we have found no *Bruton* error, we further conclude *Crawford* does not apply.

#### **B. Hearsay Evidence**

Avila contends the trial court erred in permitting hearsay statements of the victim's girlfriend for the truth of a preconceived intent to kill and of Avila being an untrustworthy thief.

##### *1. Additional Background*

As recounted above, Anacker testified the victim told her on October 2 that Avila wanted to kill him. She explained, "He told me that [Avila] was staying at a friend's house and that he had told the friend that [Avila] was untrustworthy and that he had a prior with stealing and that it wasn't a good idea for him to have him staying with him. And he said that that information got out to [Avila] and that [Avila] was upset for him to say something like that. And [the victim] told me that he was scared for his life, that he had bought a surveillance system to set up, that he had also bought a lock to put on the gate so that no one could go in the backyard without him hearing it."

Avila's counsel stated, "Your honor, I'm assuming the hearsay is not being offered for the truth. That is not why I'm objecting, but I will request an admonition concerning the information." The prosecutor stated that the evidence was offered for state of mind

and motive, and the court responded that it would be admissible under Evidence Code section 1250. Avila’s counsel responded, “I think it comes in. I just don’t think—if it’s offered for state of mind. It’s therefore nonhearsay. The court ruled, “It comes in under 1250. Overruled.”

## 2. Forfeiture

The People contend Avila forfeited any error by failing to raise a timely and proper objection. We will nonetheless exercise our discretion to address the issue on the merits.

## 3. Analysis

We agree the trial court should have instructed the jury as requested, that the use of the evidence was limited to nonhearsay purposes. (Evid. Code, § 355; *People v. Riccardi* (2012) 54 Cal.4th 758, 824-825.) However, we find the error harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 [harmless beyond a reasonable doubt] *People v. Watson* (1956) 46 Cal.2d 818, 836 [harmless error].)

With respect to evidence of Avila’s bad character, i.e., that Avila was untrustworthy and a thief, Avila’s own counsel elicited the same evidence through cross-examination of Watson.<sup>10</sup> Thus, Avila is precluded from challenging the admission of

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<sup>10</sup> Avila’s counsel questioned Watson about “a concern over let’s call it the [Avila] problem amongst your group of friends.” The following exchange occurred:

“[Avila’s counsel] Q And you’re talking about the [Avila] problem. Right?”

“A Yes.

“Q Amongst yourselves. And [the victim] is telling you essentially that [Avila] is a moocher, and he’s a thief, and he’s not to be trusted. Those types of things. Yes?”

“A Yes. [¶] . . . . [¶]

[footnote continued on next page]

the evidence through Anacker's testimony. (See, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1138-1139 [when defense counsel elicited testimony about the defendant's prior conviction and imprisonment, he was barred from challenging the admission of the same evidence for impeachment purposes].) Defendant argues that "[a]n attempt to attack the merits of damaging testimony to which a party has unsuccessfully objected has long been recognized as a necessary and proper trial tactic, and it may not be deemed a waiver of a continuing objection." [Citations.]” (*People v. Venegas* (1998) 18 Cal.4th 47, 94.) *Venegas* is not on point. In that case, the defendant objected to the admission of DNA evidence but the trial court overruled the objection as to results obtained under a modified ceiling methodology. Thereafter, the defendant elicited more favorable results under a different methodology on cross-examination “in order to mitigate the effect of the erroneously admitted evidence.” (*Ibid.*) Here, in contrast, defense counsel did *not* object to the admission of the evidence, recognizing that it was admissible for a limited purpose. Rather, he requested an admonition to the jury. Moreover, eliciting the same evidence through cross-examination of a second witness could hardly be characterized as mitigating the effect of Anacker's testimony.

With respect to Anacker's testimony that the victim feared Avila, Duncan also testified that Avila had threatened to kill the victim before the murder and that the victim

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*[footnote continued from previous page]*

“Q And by that, he meant kind of a phony tough guy or fake gangster?  
“A Not necessarily. Just [the victim's] main concern was [Duncan].”

feared Avila.<sup>11</sup> In short, the evidence about which Avila now complains was cumulative to other properly admitted evidence.

Finally, and most importantly, the case against Avila was overwhelming. Avila told Jones he had shot someone and that blood had been everywhere. He also told Jones he had disposed of the body but was afraid it would be found. He told Duncan the victim was dead. He admitted to the police that he had beaten the victim. While Avila obviously exaggerated details, i.e., that he had put a hole through the victim's head and had the victim's fingers in his pocket, that does not diminish the force of the remaining evidence.

We conclude the error in failing to admonish the jury to limit its consideration of the challenged evidence to nonhearsay purposes was not prejudicial.

### **C. Witness in Custody**

Avila contends the trial court erred in instructing the jury to disregard that a prosecution witness was in custody when he testified.

#### *1. Additional Background*

When he testified, Duncan was being held in custody for being uncooperative and failing to appear on a material witness warrant. He testified that when he walked past the holding cells while being brought to court, Avila and Acosta, on different occasions, had

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<sup>11</sup> Duncan testified that Avila, in “describ[ing] his juice or power,” had said “[p]eople were afraid of him.” Duncan confirmed that he had shared the victim's concerns with Avila, and Avila had responded by becoming very angry. When asked if Avila had made any threats toward the victim, Duncan testified Avila had said, ““He's dead.”” Duncan had told that to the victim about a week before his death. No objection was raised to the testimony.

said something like, “If you talk, you’re a dead man.” Both Acosta and Avila said the same thing the day of his testimony. In his statement to the police, he implicated an innocent man. He admitted he would do so if it helped his purpose, and his purpose was to get out of custody as soon as possible. He could go as soon as he finished testifying, and he would testify to whatever he was asked. Duncan testified he had not complied with the subpoenas because he was afraid of being hurt or killed. Avila had told him about Avila’s connections with the Mexican Mafia, and said, “[i]f you say anything about them negative, the consequences are death.”

Duncan’s testimony was fraught with inconsistencies and contradictions, both internally and with his earlier statements to detectives. He explained that he had been high during his interview with the detectives, and said, “I never know what I’m going to say when I’m high.” He conceded he had “lied a lot” and “too many [times] to count” during the questioning, but he was telling the truth at trial. He said he had lied to the police because he was scared, and when he was scared, he would lie. He also admitted he was scared in court but denied lying under oath. He agreed that in court, he had “point[ed] a lot of the blame and the finger at [Avila and Acosta] and minimize[d] the blame on [Windust].” He believed his memory was better in court than it had been in 2008.

The trial court instructed the jury with a modified version of CALCRIM No. 337, as follows: “When Jeffrey Duncan testified, he was in custody. The fact that a witness is in custody does not by itself make a witness more or less believable. Evaluate the witness’s testimony according to the instructions I have given you.”

## 2. Analysis

We do not judge a single instruction in isolation, but we review asserted instructional error in the context of the overall charge to the jury. (*People v. Huggins* (2006) 38 Cal.4th 175, 192.) If a defendant contends an instruction restricted the jury's consideration of the evidence, we determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Boyde v. California* (1990) 494 U.S. 370, 380-381.)

As noted, defendant frames the issue as follows: "The jury should not have been told to disregard the fact Duncan was being held in custody." Defendant argues that removal of the witness's custody status from consideration of his credibility violates due process. (*Alford v. United States* (1931) 282 U.S. 687 [restriction of cross-examination as to whether witness was in custody]; and *Smith v. Illinois* (1968) 390 U.S. 129.)

However, defendant's argument collapses on its face because the jury was *not* told to disregard Duncan's custody status, and the jury could not reasonably have interpreted the instruction to require that. Rather, as recounted above, the trial court instructed the jury that the fact of custody did not *by itself* make a witness more or less believable and that the jury should evaluate Duncan's testimony according to other instructions. CALCRIM No. 226 instructed the jury to evaluate witnesses' testimony based on "anything that reasonably tends to prove or disprove the truth or accuracy" of the testimony, including whether the witness's testimony was influenced by a "personal interest in how the case [was] decided"; what the witness's "attitude [was] about the case

or about testifying”; and whether the witness had engaged in “other conduct” that reflected on his believability. Nothing in the instructions prevented the jury from considering Duncan’s custody status in evaluating his testimony, and consequently, there was no due process violation.

#### **D. Custody Credit**

Both Avila and Acosta contend the trial court erred in failing to award custody credit for actual time served. The People properly concede error. Avila and Acosta were entitled to credit for actual time served. (§ 2900.5.) We will therefore order their abstracts of judgment amended accordingly.

#### **E. Natural and Probable Consequences Instruction**

Acosta contends the trial court’s instruction on the natural and probable consequences doctrine deprived him of due process because the instruction did not require the People to prove that a reasonable person would have known that premeditated and deliberate murder and lying in wait murder were natural and probable consequences of aggravated assault.

##### *1. Issue Pending in Supreme Court*

We first note that in *People v. Chiu*, 2012 Cal. LEXIS 7962, review granted August 15, 2012, S202724, the court granted review to consider the following issue: “Does a conviction for first degree murder as an aider and abettor under the natural and probable consequences doctrine require that premeditated murder have been a reasonably foreseeable consequence of the target crimes or only that murder have been such a consequence?” (California Courts, Appellate Courts Case Information (March 29, 2013))

<[http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc\\_id=2014866&doc\\_no=S202724&search=party&start=1&query\\_partyLastNameOrOrg=chiu](http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2014866&doc_no=S202724&search=party&start=1&query_partyLastNameOrOrg=chiu)> [as of March 2013].)

## *2. Additional Background*

The trial court instructed the jury based on CALCRIM No. 403, as follows:

“Before you may decide whether the defendant is guilty of murder, pursuant to Penal Code section 187, you must decide whether he is guilty of assault with force likely to produce great bodily injury, pursuant to Penal Code section 245, subdivision (a), subsection (1).

“To prove that the defendant is guilty of Murder, the People must prove that:

“1. The defendant is guilty of assault with force likely to produce great bodily injury;

“2. During the commission of assault with force likely to produce great bodily injury, a coparticipant in that assault with force likely to produce great bodily injury committed the crime of murder;

“AND

“3. Under all the circumstances, a reasonable person in the defendant’s position would have known that the commission of the murder was a natural and probable consequence of the commission of the assault with force likely to produce great bodily injury.

“A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

“A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the assault with force likely to produce great bodily injury, then the commission of murder was not a natural and probable consequence of assault with force likely to produce great bodily injury.

“To decide whether [the] crime of murder was committed, please refer to the separate instructions that I will give you on that crime.

“The People are alleging that the defendant originally intended to aid and abet assault with force likely to produce great bodily injury.

“If you decide that the defendant aided and abetted this crime and that murder was a natural and probable consequence of that crime, the defendant is guilty of murder.”

### 3. *Analysis*

Under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the target offense he actually intends, but also of “any other offense that was a ‘natural and probable consequence’ of the crime aided and abetted.” (*People v. Prettyman* (1996) 14 Cal.4th 248, 260.) Liability “is measured by whether a reasonable person in the defendant’s position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.’ [Citation.]” (*People v. Medina* (2009) 46 Cal.4th 913, 920.) “Whether a nontarget

offense is a reasonably foreseeable consequence of the target offense is a fact-specific inquiry to be resolved by a jury.” (*People v. Favor* (2012) 54 Cal.4th 868, 882 (*Favor*.)

In *People v. Woods* (1992) 8 Cal.App.4th 1570 (*Woods*), on which Acosta relies<sup>12</sup> the jury sent the trial court a question during deliberations inquiring whether a defendant could be found guilty of aiding and abetting second degree murder if the perpetrator of the murder was guilty of first degree murder. The trial court responded, “No.” (*Id.* at p. 1579.) The appellate court found the trial court had erred, explaining, “[T]he aider and abettor and the perpetrator may have differing degrees of guilt based on the same conduct depending on which of the perpetrator’s criminal acts were reasonably foreseeable under the circumstances and which were not. [Citation.]” (*Id.* at pp. 1586-1587, italics omitted.) In other words, the error in *Woods* was that the trial court foreclosed the jury from considering second degree murder as to the defendant if it found the co perpetrator was guilty of first degree murder.

Acosta argues that the instructions on the natural and probable consequences doctrine did not inform the jury it could find him guilty of second degree murder; in other words, that second degree murder was a reasonably foreseeable consequence of the target crime of assault, but the instructions did not permit the jury to find him guilty of second degree murder as a lesser offense of first degree murder. However, in contrast to *Woods*, here, the trial court instructed the jury it could not find Acosta guilty of murder unless it

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<sup>12</sup> Acosta also relied on *People v. Hart* (2009) 176 Cal.App.4th 662. However, after he filed his opening brief, our Supreme Court overruled that case in *Favor, supra*, 54 Cal.4th at p. 868, 879, fn. 3.)

determined both that he was guilty of assault with force likely to produce great bodily injury, and murder was a natural and probable consequence of the target crime. The trial court referred the jury to other instructions for information about murder: “To decide whether [the] crime of murder was committed, please refer to the separate instructions that I will give you on that crime.” CALCRIM No. 520 gave the definition of murder, and the last sentence of that instruction stated that if the jury decided the defendant had committed murder, it then had to decide whether the murder was first or second degree. CALCRIM No. 521 described the two theories of first degree murder (deliberate/premeditated and lying in wait) and informed the jury that “All other murders are of the second degree.” In addition, CALCRIM No. 521 referred the jury to CALCRIM No. 520 for the elements of second degree murder. Finally, unlike the defendant in *Woods*, Acosta was tried to his own jury; therefore, his jury was not faced with the situation of finding Avila guilty of first degree murder and wondering how to handle Acosta’s vicarious liability.

In *Favor*, our Supreme Court held that the trial court was not required to instruct the jury that premeditated attempted murder was a natural and probable consequence of robbery. (*Favor, supra*, 54 Cal.4th at p. 879.) Rather, the court held, “it is only necessary that the attempted murder ‘be committed by one of the perpetrators with the requisite state of mind.’” (*Ibid.*) As the People recognize, *Favor* is not precisely on point because it dealt with anomalies regarding premeditated attempted murder (*id.* at pp. 876-877); nonetheless, its general reasoning is equally applicable to the present case. In this case, the instructions given, taken as a whole, allowed the jury to apply the natural and

probable consequences doctrine to either first degree or second degree murder and thus did not exclude the possibility of a second degree murder conviction for Acosta. We reject Acosta's challenge to the instructions.

#### **F. Section 654**

Windust contends his sentence for the robbery should be stayed under section 654 because the robbery and burglary were committed during a continuous course of events and with the same intent and objective. The trial court sentenced him to an indeterminate 15-year term for murder, a consecutive six-year term for the burglary, and a consecutive one-year term for the robbery.

“Section 654 prohibits multiple punishment for a single act or an indivisible course of conduct. [Citations.] Whether a defendant's conduct constitutes a single act under section 654 depends on the defendant's intent in violating penal statutes. If the defendant harbors separate though simultaneous objectives in committing the statutory violations, multiple punishment is permissible. [Citation.]” (*People v. Williams* (2009) 170 Cal.App.4th 587, 645 [Fourth Dist., Div. Two].) Additionally, “[m]ultiple criminal objectives may divide those acts occurring closely together in time. [Citations.]” (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1565.)

Whether the defendant entertained multiple criminal objectives is a question of fact for the trial court, and we uphold its findings if they are supported by substantial evidence. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.) “In conducting the

substantial evidence analysis we view the facts . . . “in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” [Citation.]’ [Citations.]” (*People v. Garcia, supra*, 167 Cal.App.4th at p. 1564.)

Windust asserts the robbery and burglary were an indivisible course of conduct because “the crime of robbery is not complete until the robber has won his way to a place of temporary safety,” (*People v. Carroll* (1970) 1 Cal.3d 581, 585.) and that the robbery was not complete until defendants left the victim’s house and thereafter arrived at a place of temporary safety.

Whether a robber has reached a place of temporary safety is a question of fact. (*People v. Carter* (1993) 19 Cal.App.4th 1236, 1251.) The standard is an objective one: the “issue to be resolved is whether a robber had actually reached a place of temporary safety, not whether the defendant thought that he or she had reached such a location.” (*People v. Johnson* (1992) 5 Cal.App.4th 552, 560.)

Here, the trial court could reasonably have found, for purposes of section 654, that defendants had reached a place of temporary safety when they drove away from Windust’s garage in the victim’s car. They had left the scene of the robbery and were no longer in the presence of the victim; there was no evidence of pursuit; and no one was challenging their possession of the victim’s car and keys. (See, e.g., CALCRIM No.

3261.<sup>13</sup>) Meanwhile, defendants were conducting other activities, including telephoning Duncan, arranging to meet him at the convenience store, picking him up there, and driving to the victim's home. Substantial evidence supports the trial court's implied finding that defendants had reached a place of temporary safety before committing the burglary.

Windust also argues the evidence did not show he had separate intents in taking the victim's keys, car, and other property, but instead showed that "the intent and objective of the robbery and burglary were precisely the same, to obtain [the victim's] property . . . ." The robbery of the victim's keys and car took place at Windust's apartment at Sydney Harbor. The burglary took place later at the victim's apartment on Mount Vernon. And, as noted above, before going to the victim's apartment, defendants drove to a convenience store where they picked up Duncan. (See, e.g., *People v. Green* (1996) 50 Cal.App.4th 1076, 1085 [separate punishments for robbery and carjacking were proper because the carjacking was separated in time and place from the initial robbery]; *People v. Akins* (1997) 56 Cal.App.4th 331, 340 [Fourth Dist., Div. Two] [section 654 did not preclude separate sentence enhancements for two robberies not only because there were multiple victims, but also because "the two robberies were committed

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<sup>13</sup> CALCRIM No. 3261 provides, "[The crime of robbery . . . continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. [¶] The perpetrator[s] (has/have) reached a temporary place of safety if: [¶] (He/She/They) (has/have) successfully escaped from the scene; [and] [¶] (He/She/They) (is/are) no longer being chased(; [and]/.) [¶] (He/She/They) (has/have) unchallenged possession of the property(; [and]/.) [¶] [(He/She/They) (is/are) no longer in continuous physical control of the person who is the target of the robbery.]]"

at different locations, separated by time”].) We conclude substantial evidence supports the trial court’s implied finding that defendants had separate objectives in committing the robbery and burglary.

Citing *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, Windust also contends his consecutive sentences for burglary and robbery violate his right to due process under the Fourteenth Amendment. Windust does not further develop that argument, and *Hicks v. Oklahoma* does not address multiple punishment for separate offenses. We consider the due process argument forfeited because Windust has failed to support it with relevant authorities or reasoned argument. (See, e.g., *People v. Watkins* (2009) 170 Cal.App.4th 1403, 1410.)

#### **G. Cumulative Error**

Avila argues the cumulative error doctrine requires reversal. Because we have rejected his individual arguments on the merits (with the exception of the conceded sentencing error), we conclude the cumulative error doctrine is inapplicable.

#### **H. Arguments of Codefendants**

Avila and Acosta join the arguments of their codefendants to the extent they are of benefit. Because we have rejected each argument on the merits (with the exception of the conceded sentencing error), we further conclude there is no benefit to either defendant in such joinder.

### **IV. DISPOSITION**

The trial court is directed to prepare new abstracts of judgment for Avila and Acosta reflecting their actual custody credits, and to forward the amended abstracts of

judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

RICHLI

J.