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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY EDWARD CARVER and  
DANIEL LEE WATERMAN,

Defendants and Appellants.

G049821

(Super. Ct. No. FSB1104537)

O P I N I O N

Appeals from judgments of the Superior Court of San Bernardino County, J. David Mazurek, Judge. Affirmed as to Timothy Edward Carver. Affirmed and remanded for resentencing as to Daniel Lee Waterman.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant Timothy Edward Carver.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant Daniel Lee Waterman.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Adrienne S. Denault, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendants Timothy Edward Carver and Daniel Lee Waterman appeal after a jury found them each guilty of kidnapping to commit a robbery, second degree robbery, kidnapping to commit a carjacking, and attempted premeditated murder. We affirm the judgment of conviction entered against Carver in its entirety. We affirm the judgment of conviction entered against Waterman and remand for resentencing.

We conclude (1) any error in admitting evidence at trial of Carver's affiliation with a White supremacy criminal street gang was harmless; (2) because insufficient evidence supported instructing the jury on the defense of necessity, Carver's trial counsel was not ineffective for failing to request that instruction and the trial court did not err in failing to give that instruction sua sponte; (3) Carver was properly convicted of both kidnapping to commit a robbery in violation of Penal Code section 209, subdivision (b) and kidnapping to commit a carjacking in violation of Penal Code section 209.5, subdivision (a); (4) the trial court did not err by instructing the jury with CALCRIM Nos. 362, 371, and 372; (5) substantial evidence supported Waterman's conviction for kidnapping to commit a carjacking; (6) substantial evidence supported the court's finding that Penal Code section 654 did not apply to Waterman's convictions for attempted premeditated murder and kidnapping to commit a robbery; and (7) the trial court erred, after finding section 654 applied to Waterman's convictions for kidnapping to commit a robbery, second degree robbery, and kidnapping to commit a carjacking, by failing to stay execution of sentence as to two of those convictions.

## FACTS

On September 27, 2011, Ronald Shaltz was staying at the house of his friend, Kenneth Locke, in Redlands. Around 10:30 or 11:00 p.m. that evening, Shaltz was watching television and dozing off when he heard a knock at the door and answered it. Defendants were at the door and asked to speak with Locke; one of them, presumably Waterman, asked Shaltz to tell Locke, "it's Daniel." Shaltz had met Waterman before that night, possibly in connection with a drug sale.<sup>1</sup> Shaltz had not previously met Carver.

Shaltz checked with Locke who told Shaltz to let defendants into the house. Shaltz returned to the couch while Locke and defendants talked in the kitchen. Locke then asked Shaltz if he would take defendants to get some gas because they were out of gas. Shaltz agreed and got into his white pickup truck with defendants. Shaltz was a handyman who kept his tools in the back of his truck that had a camper shell.

While Shaltz was driving, he engaged in small talk with defendants, which evolved into a discussion about getting drugs. Shaltz had previously used methamphetamine but had been clean for two or three years before September 2011, but, due to marital troubles, had relapsed into drug use. He drove defendants, about 10 to 15 minutes, to the residence of John Owen, whom Shaltz also knew as "Lawn Mower John." Shaltz expected that one of defendants would jump out of the truck, get a gas can, and return to the truck.

Carver did get out of the truck and went through a side gate into the backyard where Owen's motorhome was located. Waterman stayed in Shaltz's truck. Shaltz got out of the truck and went inside the house on the property to say hello to his good friend, Cynthia High, who owned the house. After talking with High for about 10

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<sup>1</sup> Earlier that day, defendants, along with Joe Johnson, had used methamphetamine together at a house in Yucaipa (the Yucaipa house). Evidence was presented that Carver had been using methamphetamine during the preceding week.

minutes, Shaltz asked her whether Owen was “out back.” High replied, “[y]es,” and Shaltz went to Owen’s motorhome and said hello to Owen. There were five or six women and one man with Owen; Shaltz did not recognize any of them. He did not see Carver there.

Owen told Shaltz to “come back later.” Owen said he was going to pick up a motorhome that needed a fuel pump and he wanted Shaltz to help him with it the next morning. Shaltz replied, “yeah.” Shaltz told Owen that he had brought defendants over because they were out of gas and needed a gas can. He also discussed buying drugs. Owen told him he could purchase an eighth of an ounce (an “8 ball”) of methamphetamine for \$120 from someone who would be coming over to Owen’s house. Shaltz did not have any money but thought he knew a friend who might be interested in buying methamphetamine. Shaltz told Owen that he would let his friend know about the opportunity and that he was going to get some money.

Shaltz returned to his truck in which Waterman had remained; Shaltz saw that in the 20 minutes he had been gone, the dome light inside his truck had been taken apart; the cover and bulbs had been removed. Shaltz was afraid of Waterman and although he thought it was “weird” that the dome light had been disassembled, he was scared to say anything about it. Carver returned to the truck but did not have a gas can in his hand. Shaltz drove away.

Assuming that Carver had already placed a gas can in the back of the truck, Shaltz signaled to pull into a gas station. Defendants told him, “[o]h, no. No. No. Go. Go.” Shaltz asked defendants whether they got a gas can and one of them told him to take them back to the car they had left at Locke’s house.

Shaltz drove back to Locke’s house and went inside to borrow money from Locke, while defendants stayed in Shaltz’s truck. Locke gave Shaltz \$100. Shaltz returned to the truck. Carver got out of the truck and into the car that Shaltz had understood was out of gas. Carver followed Shaltz as he started to drive back to Owen’s

residence. Along the way, Shaltz tried to pull into a gas station, but Waterman told him to just keep driving to Owen's residence. Shaltz thought the situation was strange, but he figured that if defendants had enough gas in the car to get to Owen's residence, he could just leave them there and return to Locke's house.

Shaltz drove straight to Owen's residence and parked the truck. While Carver was parking the car he had been driving, Shaltz and Waterman walked into the backyard. Shaltz asked Owen about the drugs. Shaltz saw there were a few other people in the backyard.

Shaltz told Owen he had only \$100 and handed him the money. Owen counted the money, told Shaltz the cost was \$120, and then talked to a man in the backyard. Owen returned to Shaltz, handed him back the money, and said, "it's 120." Shaltz asked Owen if there was something they could work out, such as letting him buy a smaller amount of methamphetamine. Owen said he would see what he could do and told Shaltz to go into the motorhome. Shaltz went inside the motorhome and sat down. About 15 to 20 minutes later, Owen returned with another man, told Shaltz that he could not do the deal, and asked the man to walk Shaltz to the back gate to make sure he got there safely. Shaltz thought Owen's behavior was unusual.

After Shaltz was escorted about six feet away from the motorhome, he was struck on the head from behind. Shaltz grabbed his head and then was shoved. He fell down. He saw four pairs of boots or black shoes around him. Waterman and a man, whom Carver referred to at trial as "[t]he drug dealer," kicked Shaltz while he was on the ground. Shaltz heard someone say, "I'm gonna stab him." He was stabbed in his side six or seven times and once in the chest, puncturing his lung. He was hit with something but was not sure whether he was being hit with boots, feet, wood, or bricks. He could not see the faces of his attackers. He moaned and had difficulty breathing. Shaltz was told to "[s]hut the 'F' up." Shaltz was blindfolded and the drug dealer zip-tied his hands

together behind his back; he was covered with a tarp. Shaltz's jewelry, watch, wallet, cell phone, shoes, and the \$100 in cash were taken from him.

Shaltz heard someone ask what they were going to do with him. He heard a vehicle back up outside of the gate and what sounded like somebody removing tools from the back end of a truck. The tarp was pulled off Shaltz; someone grabbed him from behind, and told him to stand up and be quiet. Shaltz was unable to get up and was helped to his feet. He was led, while blindfolded, to what he learned later was the back of his own truck and was pushed into it by Owen and the dealer.

Carver got into the driver's seat of Shaltz's truck and drove off, followed by Waterman in his car. At some point while driving, Carver and Waterman became separated. Waterman then drove to the Yucaipa house, arriving at 5:00 a.m. Joe Johnson, and a close friend of Carver's, Rikki Johnson,<sup>2</sup> were at the Yucaipa house. Waterman said that he had "fucked up." Rikki helped Waterman change his bloody clothes and clean his tennis shoes. Rikki, Joe, and Waterman got into Waterman's car and drove around looking for Carver. After they found Carver driving around, Carver exited the truck and got into the car with Joe and Rikki, and Waterman got into the truck; they all headed back to the Yucaipa house. When they arrived at the Yucaipa house, Rikki helped Carver change his bloody clothes and clean his shoes.

Defendants, Rikki, and Joe talked about "who was going to go where and what we were gonna do." Carver left the group and smoked a cigarette. Waterman told Joe that somebody was in the back of the truck. When they decided to leave, Joe drove Rikki and Carver in the car following Waterman who drove Shaltz's truck.

After driving 10 to 15 minutes, Waterman pulled over into an orange grove and told Joe the truck needed gas. Joe agreed to get a gas can. Waterman told him to

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<sup>2</sup> Because Rikki Johnson and Joe Johnson, who are not related to each other, share the same last name, we refer to them by their first names in the interest of clarity. We intend no disrespect.

“[h]urry, because it’s getting bright outside.” Joe drove Rikki and Carver in the car to Joe’s grandmother’s house where he retrieved a gas can. They drove to a gas station to get gas and returned to Waterman. Joe and Waterman put gas in the truck.

Joe and Waterman discussed taking back streets through Redlands to Moreno Valley. At some point, Waterman talked about “something along th[e] lines” of burning Shaltz’s body. Joe drove Carver and Rikki in the car, followed by Waterman driving the truck, toward Moreno Valley. The plan was to drive to a remote area in Moreno Valley and dispose of Shaltz and his truck. At some point, Joe asked Carver what he wanted to do with Shaltz and his truck. Carver said he wanted to drop Shaltz off in a field by a hospital and burn the truck.

After Waterman almost got into a car accident, he called Joe and told him he was really tired and could not drive anymore. He also said Shaltz was making a lot of noise in the back of the truck. Waterman and Joe pulled their vehicles over to the side of the road; Waterman and Carver switched places. Carver, now driving the truck, followed Joe, driving Rikki and Waterman in the car, toward Moreno Valley. During the drive, Joe asked Waterman what he wanted to do with Shaltz and the truck, and Waterman said, “[j]ust get rid of it all.” Waterman wanted to kill Shaltz and burn the truck because fingerprints would be left behind.

Both vehicles stopped at a gas station in Moreno Valley for about 10 minutes. Carver put gas in the truck, and Waterman and Rikki went into the gas station convenience store. Waterman then told Rikki that he had stabbed Shaltz. Joe drove Rikki and Waterman in the car, and Carver, driving the truck, followed them. Seven minutes later, Carver got into a head-on collision with another vehicle. Joe turned the car around and stopped. Waterman said, “[m]y cell phone . . . [m]y cell phone” and ran to the truck. Two minutes later, he returned to the car and said, “[t]here’s no cell phone and [Carver]’s not in the car.” Rikki pointed out Carver who was in the middle of the street and looking at the accident scene. Good Samaritans stopped to offer assistance,

including two men in military fatigues. Rikki waved her hands at Carver in an effort to communicate to him to get in the car. He did not go to them, and Joe, Rikki, and Waterman left the scene and drove to Rikki's house in Banning.

One of the good Samaritans was Detective Bolivar Jimenez of the Santa Ana Police Department, who had been travelling on the road where the collision occurred. When he walked up to Shaltz's truck, he heard moaning. He, along with the two servicemen, saw Shaltz, bloodied and disheveled, in the back of the truck. Shaltz told Jimenez that he had been kidnapped.

Jimenez looked for the driver of the truck. He was told that Carver, who was standing some distance away, was the driver. Jimenez approached Carver, told him he was a police officer, and wanted to find out what had caused the accident. Carver turned away from Jimenez and said he did not believe Jimenez was a police officer. After Carver refused to cooperate, Jimenez placed him under arrest.

Rikki testified at trial that Waterman told her and others that he had stabbed Shaltz multiple times, and that Shaltz was hit in the head with a golf club, put in the back of the truck, and taken to where Joe and Rikki were. Rikki also testified she was familiar with the Kross Family Skins, a White supremacist gang. She testified Joe was a member of that gang and was "pretty high up there" in its hierarchy. She believed Waterman was a member, but Carver was not a member. Carver had told Rikki, however, he had been "introduced as a member of the family." Rikki stated Carver had tattoos spelling "pure hate" on his knuckles and a cross on his hand. Rikki and Carver also ended conversations saying "88," which, she testified, stood for "h[e]il Hitler." Carver told Rikki to tell Joe that he loved Joe's life. Rikki also testified that she and Carver had never discussed racism and she had never heard Carver espouse White supremacy ideology. Rikki further stated she had been threatened not to testify in court otherwise "[i]t's gonna be bad for you." She said that Waterman told her Carver had nothing to do with the stabbing of Shaltz.

Detective Daniel Whitten of the San Bernardino County Sheriff's Department testified regarding the history, symbols, and traditions of Kross Family Skins and its presence in the high desert communities. He testified that Joe and one of Rikki's boyfriends, Jaron Hopkins, were full-fledged members, and Joe was considered an "elder" and a "shot caller" within the gang. Whitten stated Waterman was at least strongly associated with Kross Family Skins, and if he was not yet a full-fledged member, he was due to be one. Whitten's opinion was based upon the individuals with whom Waterman associated, his tattoos that expressed the gang's ideology, and conversations Whitten had had with Rikki and other officers. Waterman had a tattoo that said "pure" and "hate" and also the numbers "1488." The number "14" referred to a 14-word statement saying something similar to "[w]e must secure an existence for our people and for White children." Whitten testified that Carver was an associate of Kross Family Skins at the time of the charged offenses because of his association with Joe, Waterman, Rikki, and Hopkins. Carver had a "pure hate" tattoo across the knuckles of his hands and a shaved head. Whitten stated his knowledge of Carver's affiliation was relatively recent.

Carver testified at trial. He testified about his extensive drug use and lack of sleep in the days leading up to the commission of the charged offenses. He stated he met Waterman on September 27, 2011. Carver denied any plan to harm Shaltz before they arrived at Locke's residence the second time. Carver saw Waterman and the drug dealer kicking Shaltz in the head and chest. Carver saw Shaltz bleeding heavily, the drug dealer zip-tie Shaltz's hands behind his back, and the dealer and Owen put Shaltz in the back of the truck. Carver testified he was afraid of being harmed like Shaltz so he agreed to drive the truck. Carver also testified that after he had become separated from Waterman, he drove around trying to find him. Carver admitted no one had threatened him during this time period. He also admitted that after he had been taken into custody,

he told the police a false story about finding the truck with the keys in it in Beaumont, taking it, and later learning that a person was in the back.

### PROCEDURAL HISTORY

The San Bernardino County District Attorney's Office filed an information against both Carver and Waterman, alleging one count each of kidnapping to commit a robbery in violation of Penal Code section 209, subdivision (b)(1) (count 1); second degree robbery in violation of Penal Code section 211 (count 2) (the robbery); assault by means likely to produce great bodily injury in violation of Penal Code section 245, subdivision (a)(1) (count 3); kidnapping to commit a carjacking in violation of Penal Code section 209.5, subdivision (a) (count 4); carjacking in violation of Penal Code section 215, subdivision (a) (count 5); and attempted premeditated murder in violation of Penal Code sections 664 and 187, subdivision (a) (count 6).<sup>3</sup> As to all counts, the information alleged Waterman had suffered one prior serious or violent felony conviction, within the meaning of Penal Code sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (a)(1) and (b) through (i).

The jury found defendants guilty of counts 1, 2, 4 and 6, and not guilty of count 3. The jurors were instructed that if they reached a verdict on count 4, they were not to reach a verdict on count 5. The trial court dismissed count 5 in the interests of justice. The court found true the prior conviction allegation as to Waterman.

The court sentenced Carver: "total commitment to state prison is for 7 years determinate followed by an indeterminate sentence of 7 years to life with possibility of parole." (Capitalization omitted.) The court sentenced Waterman to a

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<sup>3</sup> The information also alleged all six counts against Owen and contained prior conviction allegations against him. During trial, the court granted a mistrial as to Owen. Owen is not a party to this appeal and references to him in this opinion are limited to those relevant to the issues raised by defendants in their appeals.

“total commitment to state prison . . . for 23 years determinate followed by 14 years to life.” (Capitalization omitted.)

Defendants each filed a notice of appeal. Each filed an opening appellate brief in which he joined in the other’s arguments to the extent they might accrue to his benefit.

## DISCUSSION

### I.

#### CARVER’S ISSUES ON APPEAL

##### A.

#### *Any Error in Admitting Evidence of Carver’s Affiliation with Kross Family Skins Was Harmless.*

Carver argues the trial court violated Evidence Code section 352 and Carver’s constitutional rights to due process by admitting evidence of his affiliation with Kross Family Skins. For the reasons we will explain, we do not need to determine whether the admission of the Kross Family Skins evidence constituted error because, even assuming it was error, any such error was harmless.

Before trial, the court held an Evidence Code section 402 hearing on the admissibility of evidence regarding Kross Family Skins and defendants’ affiliation with it. Carver’s trial counsel objected to the admission of such evidence on the grounds it was irrelevant and inadmissible under Evidence Code section 352 because it was unduly prejudicial and would require an undue consumption of time. The court ruled the gang evidence was “admissible to show aiding and abetting and to provide a motive as to why two people who recently met each other might have engaged in particular criminal activity, including luring . . . the victim over for the purposes of a drug deal and then robbing him and then joining together to dispose of or eliminate the victim in this case as a way of protecting their identities or perfecting their escape from the crime.” The court

further stated the Kross Family Skins evidence would also be admitted “for the purposes of the victim’s fear of testifying or of not coming forward to truthfully report the story and also with respect to [Rikki] as to any fear she may have or any bias she may have to protect Mr. Carver or anyone else associated with the crime.”

At trial, Rikki and Whitten testified regarding Kross Family Skins and defendants’ affiliation with the gang. Rikki testified, inter alia, (1) Joe, Hopkins, and Waterman were members of Kross Family Skins, but Carver was not; (2) Joe was high up in the hierarchy of Kross Family Skins; (3) saying “88” means “h[e]il Hitler” and that she and Carver ended conversations by saying “88”; and (4) Carver told Rikki to tell Joe that he loved Joe’s life.

Whitten testified about the history of Kross Family Skins and his expert opinion that Joe and Hopkins were members of that gang. Whitten testified that, in his opinion, Waterman was strongly associated with Kross Family Skins if not already a full-fledged member. He stated his opinion was based on “the individuals [Waterman] associates with,” Waterman’s tattoos expressing the gang’s ideology, and conversations Whitten had with Rikki and law enforcement personnel. Waterman had the words “pure hate” tattooed around his wrist with “1488” in “the middle.” Whitten explained that “pure hate” tattoos were common among White supremacists.

Whitten also testified that Carver was an associate of Kross Family Skins. Whitten’s opinion was based on Carver’s association with Waterman, Hopkins, Joe, and Rikki; Carver’s “pure hate” tattoo across the knuckles of his hands; and Carver’s request that Rikki tell Joe that Carver loved Joe’s life.

Even if we were to assume the trial court erred by admitting the evidence regarding Kross Family Skins and Carver’s affiliation with that gang, any such error was harmless. Defendants were convicted of kidnapping to commit a robbery, the robbery, kidnapping to commit a carjacking, and attempted premeditated murder. The evidence showed defendants were actively involved in the commission of the crimes—this was not

a case of guilt established by passive association. Carver admitted to at least being present when Shaltz was attacked by Waterman and the drug dealer. Carver admitted driving Shaltz's truck from Owen's residence, knowing a badly beaten, bound, and blindfolded Shaltz was under the camper shell. When defendants arrived at the Yucaipa house, they were observed wearing bloody clothing and shoes. Carver was part of a group whose plan was to dispose of Shaltz and Shaltz's truck by driving to a remote part of Moreno Valley and setting the truck on fire. Carver drove the truck containing Shaltz during the last leg of the journey to that destination until he got into the car accident which resulted in Shaltz being rescued. Under those circumstances, any error in admitting evidence of Carver's relatively recent affiliation with Kross Family Skins was harmless under any standard.

The harmless effect of any error admitting the Kross Family Skins evidence is further shown by the instructions given to the jury as to the limited purposes for which that evidence could be considered. Before Rikki testified, the trial court instructed: "During the course of her testimony, there may be some information relayed by her as to Mr. Waterman or Mr. Carver's membership, association, or affiliation with the Kross Family Skins. You may consider the evidence of gang activity only for a limited purpose. [¶] First of all, it's up to you to decide the credibility or believability of that evidence, basically, to determine whether or not Mr. Carver and Mr. Waterman are members o[r] affiliates or associated with the Kross Family Skins. But if you so find that, then you can use that evidence only for a limited purpose, and that's whether the defendants either, or any of the defendants, acted with the knowledge or intent to aid or abet the commission of a crime. [¶] It can also be used to show fear on the part of a witness or bias or prejudice on the part of a witness in their testimony. So it may affect the credibility of believability of a witness. And also, you can consider . . . the facts and information, if that is relied on by an expert witness in reaching his opinion. You may not consider this evidence for any other purpose. [¶] You may not conclude from this

evidence that a defendant is a person of bad character or that he has a disposition to commit crime. Also, this evidence is limited to Mr. Carver and Mr. Waterman, if believed; it does not apply to Mr. Owen.”

At the close of evidence, the jury instructions included CALCRIM No. 1403, which stated: “You may consider evidence of gang activity only for the limited purpose of deciding whether: [¶] A defendant acted with the intent and knowledge to aid and abet the commission of any of the charged crimes or lesser included offenses; [¶] OR [¶] The defendant had a motive to commit the crimes charged; [¶] OR [¶] A defendant acted under duress. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.”

We presume the jury followed the trial court’s instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

Any error admitting the evidence of Carver’s affiliation with Kross Family Skins was harmless under any standard.

## B.

### *Insufficient Evidence Supported Instructing the Jury on the Defense of Necessity.*

Carver argues the trial court failed to instruct the jury, sua sponte, on the defense of necessity. He also argues, in the alternative, his trial counsel was ineffective for failing to request such an instruction. Insufficient evidence supported giving such an instruction.

The trial court must instruct the jury on the general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case. (*People v. Martinez* (2010) 47 Cal.4th 911, 953; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) As applied to the defense of necessity, "[t]he standard for evaluating the sufficiency of the evidentiary foundation is whether a reasonable jury, accepting all the [defendant's] evidence as true, could find the defendant's actions justified by necessity. [Citation.]" (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1539.) However, a trial court has no sua sponte duty to instruct the jury on the defense of necessity if there is insufficient evidence in the record to support the defense. (See *People v. Miceli* (2002) 104 Cal.App.4th 256, 267.)

"The defense of necessity generally recognizes that "the harm or evil sought to be avoided by [the defendant's] conduct is greater than that sought to be prevented by the law defining the offense charged." [Citation.] The defendant, who must have possessed a reasonable belief that his or her action was justified, bears the burden of proffering evidence of the existence of an emergency situation involving the imminence of greater harm that the illegal act seeks to prevent. [Citations.] . . . '[I]t is not acceptable for a defendant to decide that it is necessary to kill an innocent person in order that he [or she] may live, particularly where, as here, [the defendant]'s alleged fear related to some future danger.'" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 100.)

The defense of necessity is not codified in California. (*People v. Health* (1989) 207 Cal.App.3d 892, 900.) "Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally

covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. Thus, when A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity.' [Citation.] An underlying premise common to both defenses is 'if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail.' [Citation.]" (*Id.* at pp. 899-900.)

Here, the jury was instructed with CALCRIM No. 3402 on the defense of duress as follows: "A defendant is not guilty of Counts One, Two, Four and/or Five or a lesser included offense, if he acted under duress. A defendant acted under duress if, because of threat or menace, he believed that his life would be in immediate danger or that he was in immediate danger of suffering great bodily injury if he refused a demand or request to commit the crimes. The demand or request may have been express or implied. [¶] You may also consider evidence of duress in deciding whether a defendant had the specific intent required for Counts One, Two, Four and/or Five. [¶] A defendant's belief that his life was in immediate danger or he was in immediate danger of suffering great bodily injury must have been reasonable. When deciding whether a defendant's belief was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed. [¶] A threat of future harm is not sufficient; the danger to life must have been immediate. [¶] The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of Counts One, Two, Four and/or Five or a lesser included offense. [¶] This defense does not apply to the crime of Attempted Murder or to Assault by Means of Force Likely to Produce Great Bodily Injury or the lesser offenses of Simple Ass[au]lt and Simple Battery."

Carver argues that an instruction on the defense of necessity “was particularly required in the present case because Carver’s candid admission that neither Waterman nor [Joe] Johnson expressly threatened him seriously damaged his duress claim. . . . Given the lack of a specific threat but presented with testimony that Carver reasonably feared Waterman and Johnson, the trial court had before it substantial evidence to require instruction on necessity.”

“To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that [h]e violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which [h]e did not substantially contribute to the emergency.” (*People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135.)

Carver’s evidence was insufficient to permit a reasonable jury to find the elements of the necessity defense were established. Carver did not show he committed the crimes of which he was convicted to prevent significant and imminent bodily harm or evil to himself or someone else. The record shows he had reasonable legal alternatives to continuing in the commission of the crimes because he had opportunities, particularly when he was alone driving Shaltz in the back of Shaltz’s truck, to contact law enforcement or otherwise seek help. Carver’s continuing participation in the offenses, and particularly his driving toward a remote part of Moreno Valley to dispose of Shaltz and his truck, only created greater danger for Shaltz. No reasonable jury could conclude Carver reasonably believed his acts were necessary to prevent greater harm under the circumstances.

As an instruction on the defense of necessity was not at all supported by the evidence in the record, the trial court did not err by failing to give such an instruction sua sponte, and Carver’s trial counsel was not ineffective for failing to request it.

C.

*Carver Was Properly Convicted of Both Kidnapping to Commit a Robbery and Kidnapping to Commit a Carjacking.*

Carver argues he was erroneously convicted of kidnapping to commit a robbery and kidnapping to commit a carjacking when the record shows both offenses were based on the same movement. Carver's argument is without merit.

Carver was convicted of kidnapping to commit a robbery in violation of Penal Code section 209, subdivision (b), which provides in relevant part: “(1) Any person who kidnaps or carries away any individual to commit robbery . . . shall be punished by imprisonment in the state prison for life with the possibility of parole. [¶] (2) This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.”

Carver was also convicted of kidnapping to commit a carjacking in violation of Penal Code section 209.5, which provides in pertinent part: “(a) Any person who, during the commission of a carjacking and in order to facilitate the commission of the carjacking, kidnaps another person who is not a principal in the commission of the carjacking shall be punished by imprisonment in the state prison for life with the possibility of parole. [¶] (b) This section shall only apply if the movement of the victim is beyond that merely incidental to the commission of the carjacking, the victim is moved a substantial distance from the vicinity of the carjacking, and the movement of the victim increases the risk of harm to the victim over and above that necessarily present in the crime of carjacking itself.”

Carver contends that because both kidnapping-related convictions were based on the same movement of Shaltz in the back of his truck, multiple convictions based on that conduct are impermissible. (See *People v. Burney* (2009) 47 Cal.4th 203,

233 [“the crime of kidnapping continues until such time as the kidnapper releases or otherwise disposes of the victim and [the defendant] has reached a place of temporary safety”].)

True, Shaltz was continuously and forcibly detained from the time of the robbery at Owen’s residence until Shaltz was rescued following the car accident. However, the continuous conduct does not preclude convictions for both kidnapping for carjacking and kidnapping for robbery. Under Penal Code section 954, a person may be convicted of multiple offenses based on the same conduct when the individual’s conduct violated more than one statute. (Pen. Code, § 954; *People v. Wiley* (1994) 25 Cal.App.4th 159, 162-163 [“Kidnapping for robbery and kidnapping for ransom involve different elements and different statutes. [Citation.] Section 954 permits multiple convictions where two or more different offenses are committed together in their commission.”].) Neither kidnapping offense is a lesser included offense of the other. (*People v. Pearson* (1986) 42 Cal.3d 351, 355 [“multiple convictions may *not* be based on necessarily included offenses”].)

Carver’s reliance on *People v. Thomas* (1994) 26 Cal.App.4th 1328 in support of his argument is misplaced. In *People v. Thomas*, the appellate court reversed one of two counts of kidnapping to commit a robbery in violation of Penal Code section 209, subdivision (b), because both counts were based on a single abduction followed by a continuous period of detention in violation of the same statute. (*People v. Thomas, supra*, at pp. 1334-1335.) *People v. Jackson* (1998) 66 Cal.App.4th 182, 189-190, is also distinguishable because, in that case, the appellate court held a simple kidnapping conviction must be reversed when it is a lesser necessarily included offense of the defendant’s convictions for kidnapping to commit robbery and kidnapping to commit oral copulation.

Carver was therefore properly convicted of both kidnapping to commit a robbery and kidnapping to commit a carjacking. We find no error.

D.

*The Trial Court Did Not Err by Instructing the Jury with CALCRIM Nos. 362, 371, and 372 as None of Them Embodies “Irrational Permissive Inferences in Violation of Due Process.”*

Carver contends CALCRIM Nos. 362, 371, and 372, the “consciousness of guilt” instructions given to the jury, “embody irrational permissive inferences in violation of due process.” (Capitalization & boldface omitted.) He contends the phrase “aware of his guilt,” contained in each of those instructions, improperly permitted the jury to presume guilt based solely on false statements, leaving the scene of the crime, or hiding or fabricating evidence. Carver’s challenge to those CALCRIM instructions is without merit.

The California Supreme Court has held, “[a] permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.” (*People v. Mendoza* (2000) 24 Cal.4th 130, 180 (*Mendoza*)). The jury was instructed with CALCRIM No. 362, which stated: “If defendant Timothy Carver made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was *aware of his guilt* of the crime and you may consider it in determining his guilt. You may not consider the statement in deciding any other defendant’s guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself.” (Italics added.)

In *People v. Howard* (2008) 42 Cal.4th 1000, 1021, the Supreme Court rejected the argument that CALCRIM No. 362 invites the jury to draw irrational and

impermissible inferences with regard to a defendant's state of mind at the time the offense was committed. CALCRIM No. 362 is permissive, not mandatory, and allowed the jury to compare Carver's testimony with other evidence to determine whether any of his statements was "false or deliberately misleading, and if so, what weight should be given to that evidence." (*People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104.) The jury could properly infer whether Carver was aware of his guilt and could consider that inference along with other evidence to reach a verdict. (See *People v. Showers* (1968) 68 Cal.2d 639, 643 [jury may properly infer consciousness of guilt from the defendant's false trial testimony regarding incriminating circumstances]; *Mendoza, supra*, 24 Cal.4th at p. 180 [that a defendant's flight after commission of crime might show a "consciousness of guilt" violates neither reason nor common sense].)

For the same reasons, CALCRIM Nos. 371 and 372 did not allow the jury to impermissibly presume guilt. The jury was instructed with CALCRIM No. 371 as follows: "If a defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was *aware of his guilt*. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. [¶] If someone other than a defendant tried to create false evidence, provide false testimony, or conceal or destroy evidence, that conduct may show the defendant was aware of his guilt, but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person's actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself. [¶] If you conclude that a defendant tried to hide evidence, discouraged someone from testifying, or authorized another person to hide evidence or discourage a witness, you may consider that conduct only against that defendant. You may not consider that conduct in deciding whether any other defendant is guilty or not guilty." (Italics added.)

The jury was also instructed with CALCRIM No. 372, which stated: “If a defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was *aware of his guilt*. If you conclude that a defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself.” (Italics added.)

In *People v. Hernández Ríos* (2007) 151 Cal.App.4th 1154, 1158, the appellate court rejected a similar challenge to the “aware of his guilt” language contained in CALCRIM No. 372, citing California Supreme Court authority that upheld the constitutionality of its predecessor, CALJIC No. 2.52. The court stated: “On whether a flight instruction permitting a jury to infer ‘awareness of guilt’ is constitutional, the California Supreme Court’s rejection of an analogous challenge to CALJIC No. 2.52 is instructive. In *People v. Mendoza* (2000) 24 Cal.4th 130 . . . , the defense argued that ‘the instruction creates an unconstitutional permissive inference because it cannot be said with “substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.”’” (*Id.* at p. 179.) Noting that a permissive inference violates due process ‘only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury,’ *Mendoza* held that permitting ‘a jury to infer, if it so chooses, that the flight of a defendant immediately after the commission of a crime indicates a *consciousness of guilt*’ is not violative of due process. (*Id.* at p. 180, italics added.)” (*People v. Hernández Ríos, supra*, at p. 1158.)

The defendant in *People v. Hernández Ríos, supra*, 151 Cal.App.4th at page 1158, argued, as Carver does in this case, that the “‘culprit’” in CALCRIM No. 372 (and, as Carver also argues, in CALCRIM Nos. 362 and 371) is the word “‘aware’” which was not used in CALJIC No. 2.52. CALJIC No. 2.52 instead referred to consciousness of guilt. The defendant in *People v. Hernández Ríos* argued the use of the

word “‘aware’” had “‘left open the question whether the defendant was guilty by instructing that the defendant’s flight could be considered as *evidence of guilt*’ but ‘not as *evidence of his awareness of his guilt*.’” (*People v. Hernández Ríos, supra*, at p. 1158.) The appellate court disagreed with the defendant’s argument, and after engaging in an “etymological analysis” based on dictionary definitions of the words “‘aware’” and “‘[c]onscious,’” the court concluded: “Since the dictionary defines ‘consciousness’ as ‘[s]pecial awareness or sensitivity: class consciousness; race consciousness’ ([American Heritage Dict. (4th ed. 2000)] p. 391, italics omitted), ipso facto the special awareness that *Mendoza*[, *supra*, 24 Cal.4th 130,] allows a jury to infer from a flight instruction is ‘guilt consciousness’ (in the syntax of the dictionary) or ‘consciousness of guilt’ (in the syntax of the California Supreme Court). [Citations.] As the inference in *Mendoza* passes constitutional muster, so does the inference here.” (*Id.* at pp. 1158-1159.)

The appellate court in *People v. Hernández Ríos, supra*, 151 Cal.App.4th at page 1159, “[b]y parity of reasoning to both *Mendoza*[, *supra*, 24 Cal.4th 130,] and [*People v. Navarette*[(2003) 30 Cal.4th 458],” rejected the argument that “CALCRIM No. 372 impermissibly presumes the existence of [the defendant’s] guilt and lowers the prosecution’s burden of proof.”

Furthermore, the jury was given CALCRIM No. 200, which instructed the jury to decide the facts based only on the evidence, and to pay careful attention to all the instructions and consider them as a whole. The jury was also given CALCRIM No. 220, which instructed that the prosecution was required to prove defendants’ guilt beyond a reasonable doubt. Considering all the instructions collectively, there is no reasonable possibility the jury understood the challenged instructions in a way that undermined the presumption of innocence or in a way that relieved the prosecution of its burden of proof.

We find no error.

## II.

### WATERMAN'S ISSUES ON APPEAL

#### A.

##### *Substantial Evidence Supported the Kidnapping to Commit a Carjacking Conviction.*

Waterman argues substantial evidence did not support his conviction for kidnapping to commit a carjacking because insufficient evidence showed Shaltz was kidnapped in order to facilitate a carjacking. Waterman's argument is without merit.

“When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility. [Citation.]” (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) The testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to support a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181.)

As discussed *ante*, Waterman was convicted of kidnapping to commit a carjacking in violation of Penal Code section 209.5, subdivision (a), which provides punishment for “[a]ny person who, during the commission of a carjacking and in order to facilitate the commission of the carjacking, kidnaps another person who is not a principal in the commission of the carjacking.” The offense of carjacking is defined in Penal Code section 215, subdivision (a) as “the felonious taking of a motor vehicle in the possession

of another . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.”

Waterman argues that “there was no evidence that Shaltz was kidnap[p]ed in order to facilitate the commission of a carjacking offense, but the evidence instead showed that Shaltz’s truck was taken to facilitate the kidnapping for robbery offense.” Waterman does not assert that insufficient evidence showed he carjacked Shaltz, within the meaning of Penal Code sections 209.5, subdivision (a) and 215, subdivision (a), or that insufficient evidence showed Waterman kidnapped Shaltz in the commission of a carjacking.

Quoting the California Supreme Court’s opinion in *People v. Monk* (1961) 56 Cal.2d 288, 295, the appellate court in *People v. Perez* (2000) 84 Cal.App.4th 856, 860-861, analogized the offense of kidnapping to commit a robbery to the offense of kidnapping to commit a carjacking, as follows: “The California Supreme Court has held that ‘where a kidnap[p]ing occurs after the actual perpetration of a robbery such kidnap[p]ing may be kidnap[p]ing for the purpose of robbery if it may reasonably be inferred that the transportation of the victim was to effect the escape of the robber or to remove the victim to another place where he might less easily sound an alarm.’ [Citation.] Therefore, if there is substantial evidence that appellant intended the kidnapping to effect an escape or prevent an alarm from being sounded, his conviction for kidnapping during the commission of a carjacking must stand.”

The appellate court in *People v. Perez, supra*, 84 Cal.App.4th at page 861, further stated, “[t]he question is not whether the kidnapping *did* in fact effect an escape, or prevent an alarm from being sounded, but whether appellant *intended* the kidnapping to effect an escape. An escape attempt that is poorly thought out is still an escape attempt.”

Here, the record shows that after Shaltz was attacked and robbed of his personal effects, defendants decided to take his truck even though they had access to another vehicle that Carver had driven to Owen's house. The evidence showed Shaltz was told to be quiet and was covered with a tarp while the truck was being moved to load Shaltz into the back of it. He was bound and then forced to remain hidden under the camper shell of the back of his own truck while defendants took turns driving the truck from place to place. Shaltz was thereby prevented from escaping or sounding an alarm about having not only been robbed but also carjacked. This evidence, viewed in the light most favorable to the judgment of conviction, was sufficient to permit a reasonable jury to reach a logical inference as to defendants' intent to take Shaltz in the truck to facilitate their escape by preventing him from sounding an alarm. (Evid. Code, § 600, subd. (b) ["An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."].) Substantial evidence thus supported defendants' convictions for kidnapping to commit a carjacking.

## B.

### *Waterman's Contentions of Sentencing Error*

Waterman asserts two contentions of sentencing error. We address each in turn.

#### 1.

*The trial court did not err by finding Penal Code section 654 inapplicable as to Waterman's convictions for attempted premeditated murder and kidnapping to commit a robbery.*

Waterman first asserts the trial court erred by failing to stay execution of sentence, pursuant to Penal Code section 654, on his conviction for either attempted premeditated murder or kidnapping to commit a robbery. Waterman's argument is without merit.

Penal Code 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.” The purpose of section 654 is to “prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one offense—the one carrying the highest punishment.” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

“It has long been established that the imposition of concurrent sentences is precluded by [Penal Code] section 654 [citations] because the defendant is deemed to be subjected to the term of *both* sentences although they are served simultaneously.’ [Citation.] Instead, the accepted ‘procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable.’ [Citations.] Accordingly, although there appears to be little practical difference between imposing concurrent sentences, as the trial court did, and staying sentence on two of the convictions, as defendant urges, the law is settled that the sentences must be stayed to the extent that section 654 prohibits multiple punishment.” (*People v. Jones* (2012) 54 Cal.4th 350, 353.)

“Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of [Penal Code] section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*People v. Correa* (2012) 54 Cal.4th 331, 336.) Section 654’s applicability “is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence

to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Waterman contends the trial court erred by failing to stay execution of sentence of either his attempted premeditated murder conviction or his kidnapping to commit a robbery conviction, under Penal Code section 654, because, he asserts, those two offenses were committed with the same intent and objective. At the sentencing hearing, the court stated: "The Court thinks the attempted murder was a separate attempt—or separate intent—predominantly independent intent that evolved over the period of the evening. There were many times for Mr. Waterman to extricate himself from the attempted murder. The Court believes that was formed after they drove around, went to the house, were in contact with . . . Joe[]. But there are other names that he goes by where they went to the house, cleaned their clothes, changed clothes, cleaned their shoes. [¶] There was some driving around in an orange grove, there was stopping at a gas station, all of which occurred over a considerable span of time. There were many opportunities for Mr. Waterman to disengage from further behavior. So that's why the Court would impose those consecutively."

Substantial evidence supported the trial court's finding that Waterman's intent and objective were different with regard to the attempted premeditated murder and kidnapping to commit a robbery offenses. The evidence showed Waterman kidnapped Shaltz to facilitate the robbery of Shaltz's material effects and later his truck as well as facilitate Waterman's escape. The evidence showed that after defendants reached the Yucaipa house and Waterman expressed that he had messed things up that night, Waterman began forming a plan about what to do with Shaltz. Ultimately, he decided to kill Shaltz and destroy his truck in a remote part of Moreno Valley. The trial court,

therefore, did not err in concluding Penal Code section 654 did not apply to Waterman's convictions for attempted premeditated murder and kidnapping to commit a robbery.

2.

*After finding Penal Code section 654 applicable as to Waterman's convictions for the robbery, kidnapping to commit a robbery, and kidnapping to commit a carjacking, the trial court erred by imposing concurrent sentences instead of staying execution of sentence as to two of those offenses.*

Waterman contends the trial court erred by imposing concurrent prison sentences for the robbery, kidnapping to commit a robbery, and kidnapping to commit a carjacking convictions. He asserts the court instead should have stayed execution of sentence for two of those three convictions under Penal Code section 654.

At the sentencing hearing, the trial court stated, "I think the . . . robbery, the kidnapping to commit the robbery, the kidnapping for carjacking were all predominantly the same intent committed close in time." The court imposed a 14-year-to-life term for Waterman's kidnapping to commit a robbery conviction and ordered that sentence to run consecutive to the 18-year sentence the court imposed for Waterman's attempted premeditated murder conviction. The court imposed a 14-year-to-life term for Waterman's kidnapping to commit a carjacking conviction, which the court stated would "run concurrent[ly]" with the sentence it imposed for the kidnapping to commit a robbery conviction. As to the robbery conviction, the court stated, "the Court will run that concurrent because it feels that the intent with which that was committed was not predominantly independent of the kidnapping or robbery kidnapping for carjacking, part of the same course of conduct done relatively close in time." The court imposed a 10-year term for the robbery conviction and stated it would run concurrent to the 18-year term the court imposed for the attempted premeditated murder conviction.

In the respondent's brief, the Attorney General stated: "Based on the trial court's comments at sentencing, the sentence on either the kidnapping to commit robbery or kidnapping for carjacking should be stayed pursuant to Penal Code section 654." The Attorney General did not address whether the trial court should have also stayed execution of sentence as to the robbery conviction.

The record shows the trial court also found the prior conviction enhancement allegations in the information against Waterman to be true. At the sentencing hearing, the court imposed two five-year "concurrent" sentences for prior conviction enhancements, and one five-year consecutive sentence for another prior conviction enhancement. Neither the sentencing hearing transcript nor the trial court's minute order expressly identifies which enhancement term applied to which conviction. "Where the base term of a sentence is stayed under [Penal Code] section 654, the attendant enhancements must also be stayed." (*People v. Bracamonte* (2003) 106 Cal.App.4th 704, 709; see *People v. Montes* (2014) 58 Cal.4th 809, 898.)

In light of the foregoing, the trial court erred in sentencing Waterman, and we therefore remand with directions, as set forth in the disposition *post*, that the court resentence Waterman in accordance with Penal Code section 654.

#### DISPOSITION

The judgment of conviction entered against Carver is affirmed in its entirety. The judgment of conviction entered against Waterman is affirmed and remanded for Waterman to be resentenced to stay execution of sentence for any offense (and any attendant enhancement) to which the trial court concludes Penal Code section 654 applies. We direct the trial court to thereafter prepare an amended abstract of

judgment for Waterman and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.