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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DORA DIAZ, Defendant and Appellant.	H036414 (Santa Clara County Super. Ct. No. CC954415)

Dora Diaz was charged and convicted of willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 187, 189, 664, subd. (a))[1] (count one) and three counts of criminal threats (§ 422) (counts three, four, and five).[2] Defendant was sentenced to a total prison term of life with possibility of parole consecutive to a three year, four month prison term. On appeal, defendant Diaz argues that the trial court erroneously admitted gang evidence and committed multiple instructional errors. She also attacks the imposition of a booking fee.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] Adrian Alexander Bonilla was originally charged with attempted murder in count one and with felony assault in violation of section 245, subdivision (a)(1), in count two. During the hearing on the in limine motions, defense counsel mentioned that Bonilla had resolved his case.

We find no basis for reversal.[3]

I

Evidence

A. *Prosecution's Case*

Eduardo Morales ("Morales"), the stabbing victim in this case, was 21 years old at the time of trial in September 2010. In September 2009, Morales was living in a two-bedroom apartment with his mother Marta Rosales and her three young children, his mother's husband Alvaro Hernandez, the husband's brother Cesar Hernandez (also known as Cesar Hernandez Castro), his brother Carlos Danilo Morales, and his sister-in-law Indira Pineda. Morales slept on the couch in the living room.

A romantic relationship between Morales and Diaz began when he was 15 or 16 years old and they been together for about four years before the stabbing incident, which occurred in the early morning hours of September 5, 2009. The two usually met at her house on the corner of Julian Street and 19th Street or somewhere else. During the time that they were involved, Diaz was married and had four children. Her oldest child was L.S., who Morales thought was about 16 years old. According to Morales, a week or two before the incident, Diaz broke up with Morales over the phone and told him that she did not love him anymore.

Between about 1:00 a.m. and 1:30 a.m. on September 5, 2009, Morales heard hard knocking on the door and the window of his apartment, apartment one. When he peeked out the window, he saw Diaz and two females whom he did not know. The window was partly open and Morales heard Diaz and the others say, "Come out you fucking asshole." He went to put on his shoes and, while he was putting them on, he heard the window break.

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[3] Defendant Diaz's petition for writ of habeas corpus, which we considered with this appeal, is resolved by a separate order.

On the night of the September 2009 stabbing incident, Morales's mother Rosales was in bed when she heard Diaz yelling and the window break; she then went into the living room. Rosales called 911. Pineda, Morales's sister-in-law and Rosales's daughter-in-law, was awakened by screaming. Pineda recognized Diaz's voice. As Pineda was going into the living room, she heard Diaz yelling for Morales to come outside and saw Rosales in the living room and Morales near the front door. Diaz sounded aggressive and was calling Morales names and using vulgar language, like "son of a bitch," "fucking asshole," and "asshole, jerk."

Rosales knew Diaz from Guatemala; they had lived in the same village or town. Pineda also knew Diaz from Guatemala, where they had been neighbors in the same village or city when Pineda was a child. Here in San Jose, Diaz would often come to the street in front of their apartment and shout for Morales to come out. Pineda had seen Diaz outside the apartment when Diaz visited Morales. But Diaz did not spend time with Rosales's family. Neither Rosales nor Pineda knew the other two females.

Morales had a feeling of dread when the window broke but he knew his family was inside the house. Diaz repeatedly demanded that Morales come out. Morales opened the door a little, stepped partially out the door, and saw broken glass. He asked, "What's going on?" and "Why are you doing this to me?" Diaz and the other two women attacked Morales, grabbing him by the hair and dragging him two or three meters into the driveway in front of his apartment. Diaz was calling Morales "a son of a fucking bitch" and a "fucking asshole" and yelling profanities at Morales. Pineda heard Diaz say to Morales, "I'm going to kill you son of a bitch." Morales heard someone say "puro catorce," which in English means "only 14" and which, to Morales, indicated a Norteno gang. Rosales was telling the women to "let him go" and they were shoving her out of the way. The women were hitting him with their hands, both open and closed, all over

his body and kicking him with their feet; Morales was covering himself. He was knocked to the ground.

Morales was scared. He had not expected Diaz to do anything like that to him. Diaz stepped back from the assault and snapped twice and whistled. Three men emerged from behind a car and crossed the street and began hitting Morales as well. Morales again heard "puro catorce" as the men arrived. The men kicked Morales, pulled his hair, and hit him with open hands. Diaz was hitting him again. Morales suddenly felt something in his right side stomach area and felt weak. Rosales was yelling at them to leave Morales alone and Morales was trying to get away. Rosales was pulling on the shirt of one of the men and she did not realize that the man was stabbing Morales until she saw blood gushing out. She then saw his knife. Rosales did not see Diaz holding a weapon of any type.

Morales was feeling very lightheaded and saw a hand with a blade coming at him and put up an arm to protect himself. The blade went all the way through his left forearm. During the attack, Morales was trying to cover up his body. Morales heard them repeatedly call him a "fucking asshole" and heard someone say "puro norte," which means "only north" and conveyed to him that they were in a gang.

According to Morales, one of the two females accompanying Diaz was wearing a white shirt, was taller than him, and had "white skin" and long "dark yellow hair," and appeared to be about 17 or 18 years old. He remembered that the other female was short and Hispanic. Morales did not see any tattoos on them but he knew that Diaz had a red butterfly tattoo on her back. Rosales recalled that one of the two was wearing a sort of gray-colored sweater and the other was wearing a red shirt.

The men's clothing made Morales think they were "Cholos," by which he meant they were in a gang. One man looked like Diaz's son L.S. and he was wearing a white shirt with some red lettering; this was the person who stabbed him. Another man's face

was familiar from the neighborhood. The man whom Morales believed was Diaz's son was about Morales's height, he was "a little bit fuller than" Morales, who weighed about 200 or 210 pounds.

The attack lasted about five minutes and then sirens were heard. All the assailants except Diaz ran off, got into the car, a Lincoln, and seemed to be waiting for Diaz.

Before she took off, Diaz approached Morales and lifted his shirt. She saw his wound, called him a "fucking asshole," and laughed. She told Morales, "If you don't die from this one, you'll die next time around."

Pineda, who had witnessed the stabbing, was scared. Pineda told Diaz something to the effect, "leave him alone, he's already hurt." Diaz looked angry and appeared ready to hit Pineda; Pineda grabbed Diaz's hands to prevent Diaz from hitting her. Diaz was calling Pineda a "fucking bitch." Pineda said, "Please don't hit me because I'm pregnant." Even though he felt dizzy, Morales, who was wearing tennis shoes, kicked Diaz in order to protect his sister-in-law. Diaz gestured for the assailants to come back and one of them was about to come back across the street when a siren was heard. Diaz told Pineda, "I'm going to kill you." Diaz said to Pineda and Rosales, "You're going to pay for this." Diaz indicated that she was going to kill everyone who lived there "one by one." Pineda remembered trembling because she was terrified. Pineda did not see any type of object in Diaz's hand on the night of the incident.

The sirens sounded closer and Diaz left. Morales testified that he heard Diaz say "puro catorce" as she was leaving.

Cesar Hernandez, the brother of Rosales's husband, slept in the living room of apartment one. At trial, he identified Diaz from the incident. He did not go outside until Rosales was saying that Morales was about to die. When he went outside, he saw Morales against a wall, grabbing himself. Morales was bleeding and he saw a lot of blood. He saw people getting into a car across the street. He heard Diaz angrily yell that

"she wasn't garbage that she could be left so easily." He saw Diaz and Pineda yelling at each other. He went back into the house and then, looking out the window, he saw Diaz leave.

Alvaro Hernandez, Rosales's husband, was asleep when the incident began. After Rosales woke him up, he heard a woman screaming outside, and Rosales said, "Get up because they're going to kill him." When he went to the front door, he saw a woman screaming at Rosales that she was going to kill everyone. He heard Pineda saying, "Leave, leave." A group of men and women were crossing the street and getting into a car parked on the other side of the street. The threatening woman took off. He saw that Morales was hurt and bleeding a lot.

Alvaro Hernandez gave Morales a shirt to wrap around himself right after the attack. Rosales was on the phone to police.

The recorded 911 call was played for the jury. The recording contains inaudible portions and a few snatches of voices of unspecified speakers. At one point, Rosales reported that "she came with many cholos" and "[a] man stabbed him--" No threats can be heard on the recording.

On September 5, 2009, Rommel Macatangay, a San Jose police officer, was dispatched to a disturbance and arrived at about 2:00 a.m. He was the first to arrive. He saw large quantities of blood in multiple locations, broken glass, and a broken window of an apartment. Morales, who was bleeding heavily, was with family members at the front of the apartment complex's driveway. Officer Macatangay informed dispatch of the medical emergency situation. Morales told the officer that he had been stabbed.

Francis Magalang, a San Jose police officer, was on duty the night of September 5, 2009. He was dispatched to the scene of a reported stabbing. He arrived at about 2:05 a.m. and saw the victim sitting on a curb. His clothes were heavily soaked in blood and he was bleeding heavily. Officer Magalang noticed a trail of blood starting from the

doorway of an apartment, going along the driveway, and ending at the curb line where the victim was sitting. Emergency personnel arrived shortly thereafter. The emergency personnel removed the victim's clothing.

Eduardo Sandoval, a Spanish-speaking, certified bilingual San Jose police officer assisted with the investigation of the stabbing incident on September 5, 2009. He first spoke privately with Rosales, the mother of the victim, who was "in complete shock," "in tears, and terrified." She was fearful for her life and the lives of family members. Officer Sandoval spoke privately with Pineda. She also appeared to be in a state of shock and terrified. The officer briefly spoke separately in private with Alvaro Hernandez and Cesar Hernandez, who were both still shaken up but had not seen the actual stabbing.

Dan Collins, a San Jose police officer, was asked to assist in locating suspects in a stabbing incident and was on the lookout for suspect Diaz, whose description he had been given, and a dark Lincoln Town Car. Officer Collins and San Jose Police Officers Joseph Njoroge and Guy Ezard proceeded to 903 East Julian Street, the address of a Lincoln registered to Diaz and Diaz's last known mailing address. The front door of the corner house located at that address faced East Julian and its garage faced the cross-street.

The officers parked and approached the house at 903 East Julian Street on foot at about 3:30 a.m. Someone on the porch turned toward the officers and then went down the stairs, and started to run westbound on East Julian Street, away from the officers. Officers Collins and Njoroge pursued, identified themselves as law enforcement, and ordered the person, who appeared to be female, to stop. Officer Njoroge described her as a short, heavy-set female wearing flip-flops. She was trying to run, but it was more of a fast-paced walk. Officer Njoroge testified that she had an unsteady gait and appeared intoxicated.

The fleeing female crossed an intersection and then, about mid-block, she stumbled and fell and the officers caught up with her. At that point, Officer Collins

observed that she was a Hispanic female who matched the description of suspect Diaz, who had been described as a short Hispanic female, approximately 200 pounds. After being asked her name in Spanish, the woman identified herself as "Dora Diaz." She was wearing dark jeans.

Officer Collins could not recall whether Diaz had smelled of alcohol and he did not conduct a field sobriety test. Officer Njoroge testified that he smelled alcohol on Diaz, her speech was slurred, she had "red bloodshot watery eyes" and she appeared heavily intoxicated. But Officer Njoroge acknowledged at trial that Diaz had been responsive to police commands and questions. Officers Collins and Njoroge each identified defendant Diaz at trial as the female who had tried to flee.

As the officers were attempting to obtain more information from Diaz, a dark Lincoln Town Car drove past them eastbound on East Julian Street, slowing to a near stop against a green light and then turning north onto 19th Street. Officer Collins put out a broadcast regarding the vehicle.

Officer Ezard, who had remained watching the residence at 903 East Julian, saw a male look out the front door, look at him, and close the front door. The officer called for additional officers to set up a "perimeter" of the house. As additional resources were arriving, a dark Lincoln Town Car, which matched the description of the vehicle seen leaving the stabbing incident, pulled up near the residence's garage. Derrick Antonio, a San Jose police officer who arrived about that time, saw the vehicle arriving. Officer Ezard told the driver to stop the vehicle.

Officer Antonio ordered the occupants, a Hispanic male driver and a Hispanic female passenger, to get out of the car. He ordered the male to the ground. The male had numerous tattoos, including a star tattoo on his face. Officer Njoroge described the female as a 15 or 16 year old who was intoxicated. When Officer Njoroge examined the interior of the vehicle, he noticed what appeared to be blood in the back passenger

compartment. When Officer Ezard looked inside the car after the occupants had been removed, he saw some blood smear stains on the rear, passenger-side door.

Jason Cook, a San Jose police officer who was assisting with the investigation, was reassigned to a perimeter position to secure 903 Julian Street, which was in the "JSP" or "Julian Street Posse" gang area. Officers Cook and Antonio assisted in the search of the residence. All areas of the home were being used as sleeping quarters. The living room had two bunk beds and was messy. Approximately eight individuals were inside the house.

Officer Cook first spoke with a 38-year-old male, Gerardo Sosa. The officer also spoke to L.S., one of his two teenage sons who were present. L.S. was approximately 17 years old and he had no immediately visible tattoos. The other son, Guillermo Rodriguez, an 18-year-old Hispanic male, had "SJ" tattooed on his left arm and "ES" tattooed on his right arm. Rodriguez was wearing a red belt with a buckle with the letter "S" on it and another buckle with the letter "J" on it. Officer Antonio spoke with Rodriguez. Inside the residence, Officer Antonio found a cell phone with photographs of Rodriguez. The cell phone's screen said "VBW."

Joseph Kalsbeek, a San Jose police officer assigned to process evidence and take photographs, went to the residence at 903 East Julian on the corner of 19th. He confirmed that the photographs taken accurately depicted what he had seen. A number of photographs showed the suspect Lincoln sedan that had parked at that location. The officer saw blood inside the vehicle on the rear passenger door, seat, and door handle and on the front passenger seat. At trial, Morales identified the vehicle in the photographs as the car from behind which the three men emerged and which left the area after the stabbing. Cesar Hernandez identified the vehicle in the photographs as the car that he saw that night.

A photograph showed the initials "JSP" in very large letters spray painted on the street in front of the house at 903 East Julian Street. Inside the residence, Officer Kalsbeek located some blood on the wall and the light switch near the front door. There was also a blood stain on the inside of the front door of the house and on the carpet or cement.

Officer Kalsbeek was directed to bloody clothing and shoes under a bottom bunk in the living room area, which other officers had discovered. He photographed a white T-shirt with some red design and lettering, white Nike shoes, and a tan Dickies shirt.

Officer Klasbeek returned to the stabbing scene at the apartment complex and took photographs documenting it. A number of the apartment units, including apartment one which was closest to the street, opened onto a driveway. There was a broken window next to the front door of apartment one and a large amount of blood on the ground in front of that apartment. There was some bloody clothing, which had holes consistent with puncture wounds, in front of apartment one. A blood trail led westbound on the driveway in front of apartments two and three. There was blood on the wall and door of apartment three and a trail of blood going from apartment three to a fence across the driveway facing the apartment. There was blood at the base of the fence and on the fence itself. The officer noticed shoe patterns in the blood. A bloody cell phone, in several pieces, was found at the scene. On cross-examination, Officer Klasbeek acknowledged that he had been unable to match the shoe tread of Diaz's shoes to any shoe pattern in the blood.

At some point, Officer Klasbeek received and photographed Diaz's jeans, which had blood stains on the left upper thigh and the left rear pocket. He also received a cell phone that had a red shark logo as wallpaper.

The following items of evidence that had been collected were submitted to the Santa Clara County Crime Lab for DNA analysis: victim Morales's clothing, Diaz's shoes

and clothing, and the white T-shirt, the tan Dickies brand shirt, and the Nike Cortez shoes found under the bed at 903 East Julian. A blood sample was taken from defendant Diaz and a cheek swab was taken from Morales for DNA analysis. Ashley Elliott, a DNA analyst from the Santa Clara County Crime Lab, did a preliminary screening on all the evidence. Both defendant Diaz's shoes and her jeans reacted positively to the presumptive test for blood. The white T-shirt, the tan Dickies shirt, and the white Nike shoes from under the bed produced a presumptive positive for blood. Cuttings were taken from each item for further DNA analysis.

Cathleen Trowbridge, a criminologist at the Santa Clara County Crime Lab, testified as an expert in DNA analysis. She tested items received from Ashley Elliott. Two cuttings from Diaz's clothing produced DNA from a single source, Morales. A swab from Diaz's shoes produced a mixture of DNA from at least four individuals, including Morales and Diaz. The three cuttings taken from clothing found under the bed and swabs from the shoes found under the bed produced DNA from a single source, Morales.

The emergency room physician at the Regional Medical Center diagnosed Morales with multiple stab wounds, two to the left mid-forearm, two to the right mid-chest, and two to the lower back. He was also diagnosed with traumatic right hemathorax (blood in the lungs), liver laceration, and right pulmonary contusion. He suffered acute blood loss resulting in anemia. His treatment required a blood transfusion, a chest tube to drain blood from the lung, and suturing. In addition, Morales had lacerations and soft tissue contusions to the left arm and lacerations to the right back and flank. His injuries were considered life threatening and he was admitted to the intensive care unit.

Roughly two or three hours later after Officer Magalang had responded to the scene, the officer spoke with Morales at the hospital for five to 10 minutes. Morales's

wounds were dressed and bandaged. He was heavily medicated and very groggy. The officer spoke in English and the victim answered in broken English.

Francisco Hernandez, a city of San Jose police officer, spoke Spanish and was a certified bilingual officer. On September 8, 2009, Officer Hernandez spoke with Rosales for about 10 minutes. Rosales reported that Diaz had said, "I hope you die from this. If you don't, you will next time" and "Die, die, die." She said that Diaz had been dating her son.

Sometime after his discharge, Morales returned to the hospital for the removal of stitches and staples. He took pain medication for about a month and a half. At the time of trial, he was still experiencing numbness in his right, middle chest and was not able to fully extend his fingers. He still did not have his usual hand strength. He still had scars.

Morales acknowledged that he had asked the prosecutor to drop charges against Diaz when he came into court in November 2009. Morales told the prosecutor that Diaz did not hurt him. At trial, Morales explained that he had spoke out of fear and was afraid that some of Diaz's relatives might go to his house where children were present and hurt someone.

Morales spoke with private investigator Claudia Silva in November 2009 and he then said that Diaz had nothing to do with the assault on him. At trial, Morales explained that he had spoken out of fear because he did not want anything to happen to his family. The next day, Morales went to speak to investigator Silva again and told her that he was retracting what he had said the previous day and that Diaz did in fact assault him.

Morales spoke with Sergeant Alfonso sometime after speaking with the prosecutor. Morales then said that Diaz did not break the window. Morales remembered that, during the same conversation, he told the sergeant that Diaz was not one of people who stabbed him and he indicated that another person had stabbed him and defense

counsel had "used the name Bonilla in talking about that person." At trial, Morales testified that the person that had actually stabbed him looked like Diaz's son L.S.

Morales was afraid of Diaz at the time of the attack and was still afraid of her at the time of trial. He was scared that people would be looking for him and he was worried for his family and did not want anything to happen to his mother's children. Since the incident, he had continued to feel nervous and traumatized and he said that he fearfully looked around every time he went out and was not sleeping as well as he used to. Rosales testified that she is still afraid whenever she goes out. Pineda was also still afraid at the time of trial.

At trial, Morales testified that he was not a gang member, he did not have friends who were gang members, and he did not hang around people who were gang members. He hung out with people who were from Guatemala like him and spent most of his time with his family. He had never before had any sort of problems with the group that attacked him.

Morales acknowledged that he knew Diaz was married when he began dating her. He admitted that he had been very much in love with Diaz and had her name tattooed over his heart about six months before the incident. Morales had other tattoos in addition to the "Dora" tattoo. Those included tattoos of his father's name, a bird, a rose, a cross, and a virgin. He also had a tattoo of the Spanish word for "love," a letter on each finger. He obtained all the tattoos, except the "Dora" tattoo, while in Guatamala prior to dating Diaz.

Anthony Alfonso, a San Jose police officer, was a detective with the family violence unit of the police department during September 2009. He had previously worked for three years as a detective in the gang investigation unit investigating all crimes committed by Nortenos. At the time of trial, he was a patrol supervisor.

Detective Alfonso testified as an expert regarding gangs, gang activity and gang investigation.

Detective Alfonso had spoken with Morales, through a Spanish-speaking detective, four or five times after the incident. He first spoke with Morales at Morales's home on September 9, 2009. They spoke for a couple of hours. In Detective Alfonso's opinion, none of Morales's tattoos were gang tattoos.

Detective Alfonso explained that the general purpose of a gang is to commit crimes, to intimidate and control their neighborhood, and use violence to enhance the gang's reputation. If an assailant calls out the name of a gang during an assault, the information that a gang is responsible spreads quickly to the streets and bolsters the gang's reputation and an individual gang member's status. Groups of gang members may attack members of other gangs or individuals who are not gang members but live in their neighborhood in order to control the neighborhood.

According to the detective, Nortenos claim northern California and San Jose is consider a Norteno City. Norteno gangs associate with the color red and the letter "N" and the number "14" because "N" is the fourteenth letter of the alphabet. They use the Spanish word for 14, "catorce," four dots, "anything with San Jose or 'San Ho' " or the San Jose Sharks, the northern star or anything associated with north, or the "408" area code. Displaying a gang's colors or symbols shows allegiance to and pride and membership in the gang and the display is used to intimidate others.

Gang members may be identified by self admission, tattoos, clothing, or other gang members. Norteno tattoos could include, for example, the Spanish word for north, "norte," the "408" area code, a San Jose zip code, a red Sharks fin, or a star.

Respect is very important in gang culture. A gang member will typically have to react with violence to maintain status if he is disrespected by a rival gang member.

Specific neighborhood Norteno gangs come under the umbrella of the Nortenos. Sometimes San Jose gang members will be connected to, and will tattoo themselves with, a reference to a geographic location within the city, such as "NSSJ" ("North Side San Jose") or "ESSJ" ("East Side San Jose"). Sometimes a gang will take the name of a street or an apartment. "JSP" stands for Julian Street Posse, which started as a tagging crew in 2000 and evolved into a Norteno criminal street gang.

When someone yells out "puro norte" or "puro catorce" while committing violence, the victims and witnesses will know that Nortenos are responsible. That information enhances the reputation of the gang and the members involved and also serves as a warning to those who might want to cooperate with police.

Detective Alfonso was familiar with the star tattoo visible in the photograph of the Hispanic male driver of the Lincoln He explained that "the star or the northern star can be associated to Norteno, along with other things." In his opinion, a person with a star tattoo, a four dots tattoo, a 408 tattoo, and a San Jose Sharks tattoo would be a Norteno gang member. He confirmed that red clothing may signify gang membership or affiliation, depending upon the totality of circumstances. A red Sharks logo on a person's cell phone may also identify the person as Norteno, depending upon the totality of circumstances for that individual.

Based on information received from other officers, Detective Alfonso believed that the house at 903 East Julian Street was a Norteno hangout. The discovery of clothing with red lettering in that residence would reinforce that opinion.

When asked about Rodriguez's tattoos, belt and belt buckles, Detective Alfonso explained that "ESSJ" stood for "East Side San Jose" and indicated Norteno gang membership. He said a red belt was common and indicated that the buckles' "S" and "J" stood for San Jose, which is deemed a Norteno city. When asked about the cell phone

displaying "VBW," the detective stated that the initials stood for "Varrio Bloody Waters," which was a tagging crew aligned with the Nortenos but not yet a criminal street gang.

In the opinion of Detective Alfonso, L.S. was a gang member. His belief was based on L.S.'s tattoos and admissions. L.S. had "NSSJ," which stands for "North Side San Jose," tattooed on his knuckles. L.S. had the number 14 tattooed on his hand. L.S. had admitted to being a member of the Julian Street Posse during at least four police contacts. When L.S. was arrested for a probation violation about a month after the stabbing incident and he had a knife in his possession, L.S. told officers that the knife was for protection against rival gang members.

Even though L.S. is Diaz's son, there were insufficient indicia for Detective Alfonso to conclude that Diaz was a gang member. He agreed that Diaz's husband was not a gang member. He acknowledged that it is quite common for gang members to live with other family members who are not affiliated with the gang.

The detective agreed that gang members are known to carry weapons. Gang members must have their weapons readily available since they do not know when they will be needed given "the very nature of what they do and their violent lifestyle and the rivalries . . . ." Some gang members carry weapons at all times while others hide them nearby. A knife is the most common weapon for gang members because it is extremely easy to get, it is easy to use, and easily concealed.

B. *The Defense Case*

The defense presented no evidence.

II

Discussion

A. *Admission of Gang Evidence*

Defense counsel moved in limine to exclude evidence of gang membership or affiliation on grounds that defendant Diaz had not been charged with a gang crime and no

gang enhancement had been alleged. The defense specifically sought to exclude evidence that defendant Diaz resided in a Norteno house, her son was a validated member or associate of the Julian Street Posse, and her former codefendant, Adrian Bonilla, was a Norteno. The defense contended that the evidence should be excluded under Evidence Code section 352. At the hearing, defense counsel argued that the gang evidence was highly prejudicial and Diaz would not get a fair trial. Counsel contended that it was a domestic violence, not a gang, case and the gang evidence would inflame the jury against Diaz.

The prosecutor argued that gang evidence was relevant and admissible with regard to the issue of Diaz's knowledge that a knife would be used, her intent to aid and abet attempted murder, and the fear element of the section 422 counts (criminal threats). It was the People's theory that Diaz's son was the stabber and the evidence regarding his gang membership and their residence in a known Norteno house tended to "corroborate the fact that she orchestrated this attack" and "she was aware of what was going to happen during the attack." The prosecutor told the court that defendant appeared to orchestrate the attack and signaled a second group to join in the beating by whistling or gesturing. She insisted that the gang evidence was relevant to the People's aiding and abetting theory in that Diaz was associating with gang members who are known to be violent and carry weapons and the evidence tended to show that Diaz knew someone was going to use a weapon in the attack and she possessed the specific intent to kill. The prosecutor asserted that evidence that the victim of, and witnesses to, the stabbing believed the perpetrators of the attack were affiliated with a gang bore on whether their fear was actual, reasonable, and sustained.

The court remarked that a stipulation or testimony that Diaz was not a gang member would lessen the possibility of undue prejudice. Upon the court's inquiry, the

prosecutor indicated her willingness to ask the People's gang expert whether Diaz was a gang member and stated that it did not appear that Diaz was a gang member.

Defense counsel argued that the gang evidence was improper because the prosecution could not show that Diaz had any direct knowledge "of how a gang is going to operate or what a gang is going to do." The prosecutor countered that Diaz was living in a known Norteno home and "there has to be some reasonable inference that mother has some knowledge as to what her children are up to."

The court told defense counsel that the defense could "certainly elicit facts that would be inconsistent with having a gang do her dirty work . . . ." The court determined that the gang evidence was relevant to elements of section 422 and defendant's specific intent to kill. It concluded the evidence was far more probative than prejudicial because the prosecutor's theory is that Diaz intends to kill and "[i]t's a group of people that she can count on to complete the job." The court also observed that Diaz's threats were "going to be taken more seriously when she's got a gang of people behind her . . . as opposed to random individuals . . . ." The court indicated that the defense was free to thoroughly argue that Diaz had "no control over these people . . . because she's not a member of the gang."

On appeal, defendant maintains that the gang evidence was irrelevant and prejudicial and its admission violated her federal due process rights. Since she did not object in the trial court to the admission of gang evidence on due process grounds, she "may not argue on appeal that due process required exclusion of the evidence for reasons other than those articulated in [her] Evidence Code section 352 argument." (*People v. Partida* (2005) 37 Cal.4th 428, 435.) She may only contend that "the asserted error in admitting the evidence over [her] Evidence Code section 352 objection had the additional legal consequence of violating due process." (*Ibid*.)

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) In general, "all relevant evidence is admissible." (Evid. Code, § 351.) "[E]vidence related to gang membership is not insulated from the general rule that all relevant evidence is admissible if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192; see also *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; Evid. Code, §§ 210, 351.)" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167.) "Although evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged-and thus should be carefully scrutinized by trial courts-such evidence is admissible when relevant . . . if its probative value is not substantially outweighed by its prejudicial effect. (*People v. Williams* (1997) 16 Cal.4th 153, 193.)" (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) A trial court's ruling on the admission of gang evidence is reviewed for abuse of discretion. (*Ibid*.)

Here, the gang evidence had some tendency in reason to show that defendant Diaz lived with gang members in a known gang house, inferably knew that her son L.S. was a gang member, and she enlisted him, and possibly other gang members, to help carry out the attack on Morales. The gang expert testified that gang members are known to carry weapons and commonly carry knives and engage in violence. The gang evidence, together with other evidence indicating Diaz was orchestrating the attack on Morales and intended for him to die, tended to counter the defense's argument that she had no knowledge that Morales would be stabbed and no intent to kill Morales at the time of the stabbing. "[T]he facts from which a mental state may be inferred must not be confused with the mental state that the prosecution is required to prove." (*People v. Beeman* (1984) 35 Cal.3d 547, 558.) "Mental state and intent are rarely susceptible of direct proof

and must therefore be proven circumstantially. (*People v. Smith* (2005) 37 Cal.4th 733, 741; *People v. Beeman* (1984) 35 Cal.3d 547, 558–559.)" (*People v. Thomas* (2011) 52 Cal.4th 336, 355.)

Defendant also asserts that the gang evidence was irrelevant to the criminal threat charges. We reject her contention that, since there was no "evidence that the victims knew that any of the assailants were gang members," "the victims could not have feared [her] on that basis." Morales indicated that the male perpetrators were dressed like "cholos," meaning that they were gang members. He also understood "puro catorce" to refer to a Norteno gang. During the 911 call, his mother Rosales said that "she came with many cholos." The evidence that gang involvement was made known during the attack on Morales was relevant to whether Diaz's threats caused any of the criminal threat victims "reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety . . . ." (§ 422, subd. (a).) The circumstances surrounding commission of an alleged criminal threat may be circumstantial evidence of the basis for and reasonableness of a victim's fear. (Cf. *People v. Holt* (1996) 15 Cal.4th 619, 690 [direct proof of a robbery victim's fear is not necessary; fear may be inferred from the circumstances].)

The gang evidence was relevant and not cumulative of other evidence on key issues. Accordingly, the trial court did not abuse its discretion in admitting the challenged gang evidence over the Evidence Code section 352 objection. "[R]ejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases . . . ." (*People v. Boyer* (2005) 38 Cal.4th 412, 441, fn. 17.) Defendant Diaz's claim of federal constitutional error must also be rejected.

B. *Instructions*

1. *"Equally Guilty" Aiding and Abetting Instruction*

The court instructed substantially in accordance with CALCRIM No. 400: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. Two, he or she may have aided and abetted someone else who committed the crime. In these instructions, I will call the other person the perpetrator. [¶] *A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it*." (Italics added.) The italicized statement is generally consistent with section 31, which extends criminal liability in a crime to "[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission . . . ." (See *People v. Samaniego, supra,* 172 Cal.App.4th at p. 1163 ("*Samaniego*") ["CALCRIM No. 400 is generally an accurate statement of law"].)

Defendant Diaz argues that "[t]he effect of the 'equally guilty' language was to impermissibly instruct the jury that it was required to presume that appellant shared the stabber's intent."[4] She states that "at least two appellate case have strongly criticized the

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[4] The People assert that defendant forfeited this contention by failing to ask the trial court to modify or clarify CALCRIM No. 400. The People rely on the principle that "[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. [Citation.]" (*People v. Lang* (1989) 49 Cal.3d 991, 1024.) But here defendant is claiming that the instruction was not "correct in law" given the evidence and violated her right to due process. We address the merits of her claim since any instruction affecting a defendant's substantial rights is reviewable on appeal without objection (§ 1259; see *People v. Wallace* (2008) 44 Cal.4th 1032, 1074, fn. 7) and defendant is arguing that CALCRIM No. 400 was misleading with respect to the general principles of aiding and abetting in the context of this case. Therefore, we do not reach the defendant's alternative claim that defense counsel's failure to object constituted ineffective assistance.

'equally guilty' language" based on the California Supreme Court case of *People v. McCoy* (2001) 25 Cal.4th 1111 ("*McCoy*"). She points to *People v. Nero* (2010) 181 Cal.App.4th 504 ("*Nero*") and *Samaniego*, *supra*, 172 Cal.App.4th 1148.

In *McCoy*, the California Supreme Court resolved the question "whether an aider and abettor may be guilty of greater homicide-related offenses than those the actual perpetrator committed." (*McCoy*, *supra*, 25 Cal.4th at p. 1114.) The court concluded: "[W]hen a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea. If that person's mens rea is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator." (*Id*. at p. 1122, fn. omitted.) The court explained: "The statement that an aider and abettor may not be guilty of a greater offense than the direct perpetrator, although sometimes true in individual cases, is not universally correct. Aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea. If the mens rea of the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator." (*Id*. at p. 1120.)

In *Samaniego*, *supra*, 172 Cal.App.4th 1148 three co-defendants were each convicted of two counts of first degree murder. (*Id*. at pp. 1152-1153.) One victim "died of multiple gunshot wounds, having sustained five likely-fatal wounds" (*id*. at p. 1157) and the other victim "died of a single gunshot wound to the head." (*Id*. at p. 1160.) "[T]here were no eyewitnesses to the actual shooting of [the two victims] and therefore no evidence as to which appellant was the direct perpetrator." (*Id*. at p. 1162.)

McCoy was invoked in *Samaniego*, which determined that it was error to give an "equally guilty" aiding and abetting instruction in that case: "Though *McCoy* concluded that an aider and abettor could be guilty of a greater offense than the direct perpetrator, its

reasoning leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state. [Citation.] Consequently, CALCRIM No. 400's direction that '[a] person is *equally guilty* of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it' (CALCRIM No. 400, italics added), while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified." (172 Cal.App.4th at pp. 1164-1165.) Nevertheless, it found the instructional error to be harmless beyond a reasonable doubt because the jury necessarily resolved the intent and mental state issues under other proper instructions. (*Id*. at p. 1165.)

In *Nero*, *supra*, 181 Cal.App.4th 504, two defendants, a brother and his older sister, were both tried for murder for a fatal stabbing committed by the brother. (*Id*. at p. 507.) The prosecution's theory of the case was that the older sister, Lisa Brown, aided and abetted the brother, Bennie Nero, by handing him the knife. (*Ibid*.) During deliberations, the jury asked whether it could find the aider and abettor less culpable or more culpable than the direct perpetrator. (*Id*. at pp. 509, 511.) The court told the jury that the aider and abettor could not bear greater responsibility than the direct perpetrator. (*Id*. at p. 511.) When the jury foreperson asked whether an aider and abetter could bear less responsibility, the court responded that the jury may find the alleged aider and abettor not guilty. (*Id*. at p. 511.) The trial court twice reread former CALJIC No. 3.00, stating that each principal, including aiders and abettors, are "equally guilty." (*Id*. at pp. 509-510, 518.) The jury then found both defendants guilty of second degree murder. (*Id*. at p. 513.)

On appeal in *Nero*, the reviewing court agreed that "an aider and abettor may be found guilty of *lesser* homicide-related offenses than those the actual perpetrator committed." (*Id*. at p. 507.) The court was aware that "*McCoy* emphasized, repeatedly,

that an aider and abettor's mens rea is personal, that it may be different than the direct perpetrator's: 'guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state' (*id*. at p. 1117 . . .); an aider and abettor's 'mental state is her own; she is liable for her mens rea, not the other person's' (*id*. at p. 1118 . . .); aider and abettor liability is 'premised on the combined acts of all the principals, but on the aider and abettor's own mens rea' (*id*. at p. 1120 . . .)." (*Id*. at p. 514.)

The court found the "equally guilty" instruction to be prejudicial error in *Nero*. (*Id*. at pp. 518-520.) The error was not harmless beyond a reasonable doubt because, under the evidence in that case, the source of the murder weapon's owner was unclear, the jury was impliedly considering whether Brown was less culpable than her brother Nero, and the court's erroneous instruction foreclosed the jury from finding Brown was less culpable than Nero. (*Id*. at pp. 519-520.)

Unlike the jury in *Samaniego* or *Nero*, the jury in this case was not deciding the guilt or degree of culpability of more than one defendant. Further, even assuming the court erred by giving the "equally guilty" instruction, the error was harmless under other properly given instructions.

As to specific intent, the trial court instructed in this case: "In connection with the charges of count 1, 3, 4, and 5 requiring specific intent, the people have the burden of proving beyond a reasonable doubt that the defendant acted with a specific intent. The specific intent required in count 1 is intent to kill . . . ."

The court also instructed: "If you find the defendant guilty of attempted murder under count 1, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully and with deliberation and premeditation. [¶] The defendant Dora Diaz . . . acted willfully if she intended to kill when she acted. The defendant Dora Diaz deliberated if she carefully weighed the

considerations for and against her choice and knowing the consequences decided to kill. And the defendant Dora Diaz premeditated if she decided to kill before acting. [¶] . . . A decision to kill made rashly and impulsively or without careful consideration of the choice and its consequences is not deliberate and premediated." The court told the jury: "The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find the allegation has not been proved." The jury found true that Diaz acted willfully, deliberately and with premeditation in attempting the murder of Morales.

On the record before us, we can say beyond a reasonable doubt that Diaz would have been found guilty of attempted murder in the absence of the "equally guilty" instruction.

2. *Voluntary Intoxication Instruction*

a. *No Prejudicial Error*

The trial court instructed the jury regarding voluntary intoxication as follows: "You may consider evidence[,] if any[,] of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with the specific intent required by any crime. A person is voluntarily intoxicated . . . by willingly using an intoxicating drug, drink or other substance knowing that it can produce an intoxicating effect or willingly assuming the risk of that effect." After instructing regarding specific intent elements, the court told the jury: "You may not consider evidence of voluntary intoxication for any other purpose. If you conclude the defendant was intoxicated at the time of the alleged crime, you may consider this evidence in deciding whether the defendant . . . knew the perpetrator with the knife intended to kill and intended to aid and abet the perpetrator with the knife in attempting to kill."

Diaz contends that the trial court erred by failing to instruct the jury that voluntary intoxication may negate premeditation and deliberation and the error was prejudicial and violated her federal due process rights. She asserts that the jury's rejection of the theory that she was too intoxicated to form the specific intent to kill does not mean that the jury would also have rejected the theory that she was too intoxicated to premeditate and deliberate.

First, defendant was not entitled to an instruction that voluntary intoxication may "negate" premeditation or deliberation. Evidence of voluntary intoxication is not admissible "to negate the capacity to form any mental states." (§ 22, subd. (a).) It is "admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (§ 22, subd. (b).)

Second, the court did not have a duty to instruct sua sponte that the jury could consider voluntary intoxication evidence with respect to the issue whether the defendant premeditated and deliberated. "As [the California Supreme Court] explained in *People v. Saille* (1991) 54 Cal.3d 1103, 1120 . . . , an instruction on voluntary intoxication, explaining how evidence of a defendant's voluntary intoxication affects the determination whether defendant had the mental states required for the offenses charged, is a form of pinpoint instruction that the trial court is not required to give in the absence of a request. (See also *People v. Lewis* (2001) 25 Cal.4th 610.)" (*People v. Bolden* (2002) 29 Cal.4th 515, 559.)

In *People v. Saille* (1991) 54 Cal.3d 1103, the defendant was convicted of the first degree murder of one victim and the attempted murder of another victim. (*Id*. at p. 1107; see § 189 [a willful, deliberate, and premeditated murder is murder of the first degree].) "[T]he instructions given (CALJIC No. 4.21) related voluntary intoxication only to the question of whether defendant had the specific intent to kill." (*Id*. at p. 1117.) The

defendant contended that "the trial court erred in failing to instruct sua sponte that the jury should consider his voluntary intoxication in determining whether he had premeditated and deliberated the murder." (*Ibid.*; see *id*. at p. 1108.) The Supreme Court held that an instruction that relates the evidence of the defendant's intoxication to an element of a crime, such as premeditation and deliberation, is a "pinpoint" instruction, which the defense must request, and not a "general principle of law," upon which a trial court must instruct sua sponte. (*Id*. at p. 1120.) It concluded that the trial court did not err. (*Ibid*.)

Here, the record does not disclose that Diaz's counsel requested a pinpoint instruction relating involuntary intoxication to premeditation and deliberation. It follows that the trial court did not err in failing to give one. Nevertheless, on appeal, defendant argues that the given instruction was legally incorrect because it improperly limited the jury's consideration of the evidence of involuntary intoxication, citing *People v. Castillo* (1997) 16 Cal.4th 1009.

In *Castillo*, the jury convicted the defendant of the first degree murder of one victim and the assault with a firearm of another victim. (*Id*. at p. 1013.) The trial court had instructed the jury to consider the defendant's voluntary intoxication in determining whether the defendant had the requisite specific intent or mental state. (*Id*. at p. 1014.) On appeal, the defendant contended that his "defense counsel was ineffective for not requesting that the instruction specifically tell the jury it should consider the intoxication evidence in deciding whether he *premeditated* the killing." (*Ibid*.)

The Supreme Court in *Castillo* rejected the defendant's ineffective assistance claim. It found that, under the totality of instructions, "[a] reasonable jury would have understood deliberation and premeditation to be 'mental states' for which it should consider the evidence of intoxication as to either attempted murder or murder." (*Id*. at p. 1016.) It also observed that "[t]he court's instructions did not hinder defense counsel

from arguing that defendant's intoxication affected all the necessary mental states, including premeditation" and, in fact, "[c]ounsel tied the intoxication evidence to the issue of premeditation and deliberation, even calling the jury's attention to the instructions . . . ." (*Id*. at pp. 1017-1018.) The court determined that "competent counsel could reasonably conclude that the instructions adequately advised the jury to consider the evidence of intoxication on the question of premeditation, and that an additional instruction stating the obvious-that premeditation is a mental state-was unnecessary." (*Id*. at p. 1018.)

In this appeal, defendant Diaz points to the following dicta in *Castillo*: "The court gave CALJIC Nos. 4.21 and 4.21.1 [on voluntary intoxication] as adapted to this case. . . . The Court of Appeal found the instructions inadequate and misleading. It believed they caused the jury to conclude it should consider the evidence of intoxication on the question of intent to kill but could not consider it on the question of premeditation. Were that correct, the issue would not solely be one of ineffective assistance of counsel. If the trial court's instructions were indeed misleading, the issue here would implicate the court's duty to give legally correct instructions. Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly. 'Although we might hesitate before holding that the absence of any instruction on voluntary intoxication in a situation such as that presented in this case is prejudicial error, when a partial instruction has been given we cannot but hold that the failure to give complete instructions was prejudicial error.' (*People v. Baker* (1954) 42 Cal.2d 550, 575-576, and quoted in *People v. Saille*, *supra*, 54 Cal.3d at p. 1119.)" (*Id*. at p. 1015.)

Castillo did not overrule *Saille* despite its dicta and we are still bound by *Saille*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The California Supreme Court more recently explained that *Saille* was "a murder case in which we held the trial court was not required to instruct on its own motion that the jury should consider

the defendant's voluntary intoxication in determining whether defendant premeditated and deliberated. (*Id*. at pp. 1117–1120 . . . .)" (*People v. Rogers* (2006) 39 Cal.4th 826, 878.) Thus, in the absence of a defense request, the court was not required to give an instruction informing the jury that it may consider evidence of voluntary intoxication in deciding whether the defendant premeditated and deliberated.

People v. Baker (1954) 42 Cal.2d 550, which was quoted in *Castillo*, was obviously taken into consideration in *Saille*, which also quoted it and nevertheless found the trial court had no sua sponte duty to give a more complete instruction regarding intoxication. Also, the situation in *Baker* was different than the situation in this case.

In *Baker*, "there was ample evidence of intoxication in the record" in that "[t]here was evidence that defendant had voluntarily taken an overdose of both dilantin and phenobarbital on the night of the killing" and both drugs were "hypnotics," which had the "effect of removing the inhibitions of the person taking them, and as having an intoxicating effect similar to that of alcohol." (*Id*. at p. 573.) The trial court had instructed based on former section 22 that " '[n]o act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition.' " (*Id*. at p. 572; see § 22, subd. (a).) Defendant Baker contended on appeal that "the court erred in not giving an instruction based on the second sentence of [former] section 22: 'But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury must take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.' " (*Id*. at p. 572, fn. omitted.) The California Supreme Court determined that, by telling the jury that the "defendant's drugged condition could not influence their decision on any issue submitted to them," the trial court "completely negatived" the defendant's defense on the theory of intoxication. (*Id*. at p. 573.)

In this case, the defense's theory was that stabber was a gang member out to enhance his own "street credibility" and the gang's reputation and Diaz had no knowledge of the stabber's intent and she did not intend to kill or have a motive to kill. Defense counsel described Diaz's conduct as domestic violence and contended that Diaz was intoxicated when she went over to Morales's apartment. Counsel stated, "I think what is logical is she was drunk when she went over to his apartment that night and that would explain the banging, the irrational behavior, the pulling on his hair and using dirty language." Defense counsel pointed out that Diaz had not arrived with a knife. She claimed there was no evidence that Diaz told or asked anyone to kill Morales, no evidence that Diaz handed anyone a knife, and no evidence that Diaz had any knowledge that someone would use a knife. Counsel maintained that there was no evidence of intent to kill or of premeditation and deliberation.

Defense counsel asserted that there was "no nexus between what she's thinking and what these men decide to do." Counsel told the jury: "Even if you believe every single witness that was brought to court and you believe every single thing they said, you cannot find premeditation and deliberation, you just can't get there. Even if you believe every single thing you heard." Counsel also argued that if the jury somehow found that Diaz intended for the stabbing to occur, voluntary intoxication negated her specific intent to kill.

Thus, it was *not* the defense's theory that defendant Diaz had intended to kill Morales but she had not actually premeditated or deliberated in her intoxicated state. Rather, the defense maintained that Diaz had no intent to kill Morales. The court's instruction permitted the jury to consider defendant Diaz's voluntary intoxication in deciding whether she had the intent to kill, she knew the perpetrator with the knife intended to kill, and she intended to aid and abet the perpetrator with the knife in

attempting to kill. If the jury had entertained a reasonable doubt that Diaz intended to kill him, it would not have reached the issue of premeditation or deliberation.

We recognize that a criminal defendant has a right to present a complete defense. (See *California v. Trombetta* (1984) 467 U.S. 479, 485 [104 S.Ct. 2528] [the Fourteenth Amendment due process clause's standard of fundamental fairness "require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense"]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [93 S.Ct. 1038] ["The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"].) Unlike the voluntary intoxication instruction in *Baker*, however, the voluntary intoxication instruction in this case, even if incomplete or abstractly inaccurate, did not interfere with or negate the defense's theory of the case or Diaz's fundamental right to present a defense. Thus, even if we were to assume arguendo that the court's instruction incorrectly prohibited jurors from considering evidence of voluntary intoxication on the issues of premeditation and deliberation, there was no error of federal constitutional dimension.

The instructional error, if any, was a state law error subject to California's *Watson* standard of review. (See *People v. Watson* (1956) 46 Cal.2d 818, 836-837; see also *People v. Flood* (1998) 18 Cal.4th 470, 490; Cal. Const., art. VI, § 13.) There is no reasonable probability that the jury would have found that Diaz had not premeditated or deliberated if it had received an instruction on voluntary intoxication as to those issues as well. Although there was evidence that Diaz was intoxicated hours after the stabbing when she tried to run from police, there was no direct testimony from the victim or witnesses of the incident that Diaz was intoxicated at the time of the stabbing. The jury found that Diaz intended to kill Morales despite the intoxication evidence. Given the evidence that Diaz orchestrated the attack on Morales, it is not reasonably probable that a

result more favorable to defendant would have been reached in the absence of the alleged instructional error.

b. *Ineffective Assistance of Counsel Claim*

Defendant Diaz alternatively argues that defense counsel's failure to request a voluntary intoxication instruction that also related voluntary intoxication to premeditation and deliberation constitutes ineffective assistance of counsel. She maintains that there was no possible tactical reason for not making such a request.

Defense counsel impliedly made a strategic decision to focus on arguing that Diaz lacked foreknowledge of the stabbing and intent to kill. Counsel could have reasonably believed that additional instruction on voluntary intoxication was unnecessary, especially since it was highly unlikely that the jury would find that Diaz had the intent to kill but had not premeditated or deliberated given the circumstances of the attack. In any case, for the same reasons that any instructional error with regard to voluntary intoxication was not prejudicial, there is no reasonable probability that the result of the proceeding would have been different had defense counsel requested a further instruction relating voluntary intoxication to premeditation and deliberation. We reject defendant's ineffective assistance claim. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 [104 S.Ct. 2052]; *Harrington v. Richter* (2011) ___ U.S. ___ [131 S.Ct. 770].)

3. *Cumulative Effect of Foregoing Instructional Errors*

Defendant argues that her Fourteenth Amendment due process right to a fair trial was violated by the cumulative effect of "telling the jury that [she] was 'equally guilty' as the direct perpetrator and by failing to tell the jury that [her] voluntary intoxication could negate a finding of premeditation and deliberation." We find no instructional errors cumulatively denying her a fundamentally fair trial.

4. *Failure to Instruct Jury to Consider Defendant's Oral Statements with Caution*

Defendant asserts that the trial court erred by failing to instruct sua sponte that the jury must consider her extrajudicial, oral statements with caution, as explained by the

standard CALCRIM No. 358. When warranted by the evidence, a trial court must give a cautionary instruction regarding a defendant's oral admissions sua sponte. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 392, abrogated by Proposition 115 on other points as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.) The bench notes for CALCRIM No. 358 presently observe that *People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057 holds that a court has no sua sponte duty to give such a cautionary instruction in a criminal threats case. (Bench Notes to CALCRIM No. 358 (2012 ed.), p. 134.)

Defendant states that "[e]ven if the words of a threat are not, legally speaking, an admission, it does not follow that there is no need for jurors to consider with caution a statement that is alleged to constitute a criminal threat." She points to *People v. Carpenter*, *supra*, 15 Cal.4th 312 and suggests that *Zichko* may have been wrongly decided.

In *Carpenter*, during an attempted rape and the killing of a victim, the defendant said to the victim, "I want to rape you." (*Id*. at p. 345.) Although the Supreme Court recognized that the defendant's statement was "part of the crime itself," the court concluded that the trial court should have given the cautionary instruction as to that statement. (*Id*. at pp. 392-393.) It explained: "The rationale behind the cautionary instruction suggests it applies broadly. 'The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made.' (*People v. Beagle* [(1972) 6 Cal.3d 441,] 456 . . . .) This purpose would apply to any oral statement of the defendant, whether made before, during, or after the crime." (*Ibid*.)

In *Zichko*, the defendant made a criminal threat in connection with demanding to withdraw money from a bank but he was found not guilty by reason of insanity. (*People v. Zichko*, *supra*, 118 Cal.App.4th at pp. 1057-1058.) The court held that the cautionary instruction regarding oral admissions "is not to be given when defendant's words constitute the crime itself." (*Id*. at p. 1057, fn. omitted.) The court's reason was that

Zichko's statements "constituted the crime [of criminal threats], not admissions of the crime." (*Id*. at p. 1059.) The *Zichko* court concluded that *People v. Carpenter*, *supra*, 15 Cal.4th 312 was "inapposite" to the case because defendant Carpenter's statement, "I want to rape you," was "not the criminal act of attempted rape." (*Id*. at p. 1059)

Zichko's reasoning is not convincing. An admission has been described as a defendant's "recital of facts tending to establish guilt when considered with the remaining evidence in the case. [Citations.]" (*People v. McClary* (1977) 20 Cal.3d 218, 230, disapproved on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17.) But the Supreme Court in *Carpenter* indicated that the cautionary instruction applied to all oral, out of court statements made by a defendant and did not restrict its application to only oral statements that admit or acknowledge a fact. In *Carpenter*, the Supreme Court mentioned *People v. Ford* (1964) 60 Cal.2d 772, 780-784, 799, in which it had found that the trial court "should have given the cautionary instruction regarding evidence of defendant's statements during the entire course of the events surrounding the crime, including some just before and some just after the fatal shooting." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 392.) In fact, CALCRIM No. 358 refers to evidence of a defendant's statements and never uses the term "admission."[5] The Supreme Court has more recently stated: "We have long recognized that this cautionary instruction is sufficiently broad to cover all of a defendant's out-of-court statements. [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 957.)

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[5] Similarly, CALJIC Nos. 2.70 and 2.71 (Fall 2011 ed.) at pages 112 and 114 broadly define an "admission" for purposes of those cautionary instructions as "a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence."

Zichko seems to have created a false dichotomy between a statement that constitutes a crime and a statement that is evidence of a crime. In *Zichko*, the evidence of the defendant's statements in the bank were direct evidence of the fact of those statements, an element of the criminal threats offense,[6] whereas, in *Carpenter*, the defendant's statement to the victim was direct evidence of his state of mind, also an element of the crime of attempted rape.[7] We discern no real legal distinction between a statement that is "the crime itself" (*People v. Zichko*, *supra*, 118 Cal.App.4th at p. 1059) and a statement that is "part of the crime itself" (*People v. Carpenter*, *supra*, 15 Cal.4th at pp. 392-393).

Ordinarily, a crime requires both an act and a culpable mental state. (See § 20 ["In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence"]; *People v. Anderson* (2011) 51 Cal.4th 989, 994.) In general, a crime may be proved by direct or circumstantial evidence, or a combination of both. (See

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[6] "In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]" (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

[7] "The crime of attempted rape has two elements: (1) the specific intent to commit the crime of rape and (2) a direct, although ineffectual, act toward its commission. (§ 21a; *People v. Rundle* (2008) 43 Cal.4th 76, 138 . . . ; *People v. Carpenter* (1997) 15 Cal.4th 312, 387 . . . .) A defendant's specific intent to commit rape may be inferred from the facts and circumstances shown by the evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067 . . . .)" (*People v. Clark* (2011) 52 Cal.4th 856, 948.)

People v. Calhoun (1958) 50 Cal.2d 137, 144 ["It is settled that a conspiracy may be established by direct evidence or circumstantial evidence, or a combination of both"]; *People v. Reed* (1952) 38 Cal.2d 423, 431 ["Circumstantial evidence is as adequate to convict as direct evidence. [Citations.]"]; see also CALCRIM No. 223; Evid. Code, §§ 140, 210, 410, 600, subd. (b); Law Revision Com. com., 29B Pt. 1A West's Ann. Evid. Code (2011 ed.) foll. § 210, p. 41.) Evidence of a defendant's statement might be direct evidence of a crime, circumstantial evidence of a crime, or both.

Accordingly, we assume for purposes of this appeal that *Carpenter* did require the court to give a cautionary instruction with respect to defendant Diaz's extrajudicial oral statements and the court's failure to instruct sua sponte was error. "We apply the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 94; *People v. Beagle*, *supra*, 6 Cal.3d at p. 456.) . . . Mere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 71-75 [112 S.Ct. 475, 481-484, 116 L.Ed.2d 385].) Failure to give the cautionary instruction is not one of the ' "very narrow[]" ' categories of error that make the trial fundamentally unfair. (*Id*. at p. 73.)" (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 393.)

In this case, the evidence of defendant Diaz's threatening statements made immediately following the stabbing were both direct and circumstantial evidence. The evidence of those oral statements was direct evidence that the statements were made and circumstantial evidence of Diaz's intent and state of mind. Defendant contends that the lack of a cautionary instruction "encouraged the jury to regard as credible the allegations that [she] threatened" Morales, Rosales and Pineda and this omission was prejudicial error since the alleged victims' testimony was the only evidence of the threats. She also

argues that the instructional error was prejudicial because her "statements were important to establishing . . . intent to kill—particularly her alleged statement that [Morales] would either die this time or another time."

Based upon the record before us, we conclude that any error in failing to give a cautionary instruction with respect to the evidence of defendant's statements was harmless. The court thoroughly instructed the jury regarding the presumption of innocence, the prosecutor's burden of proof, evaluation of witness credibility,[8] and reliance on circumstantial evidence.[9] The jury could reasonably infer from the evidence

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[8] With regard to credibility, the court instructed in part: "Consider the testimony of each witness and decide how much of it you believe. In evaluating a witness' testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are how well . . . could the witness see, hear or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember what happened? What was the witness' behavior while testifying? Did the witness understand the questions and answer them directly? Was the witness' testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case or a personal interest in how the case is decided?"

[9] As to reliance on circumstantial evidence, the jury was instructed: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also before you may rely on circumstantial evidence to prove the defendant guilty, you must be convinced the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence." The jury was also told: "An intent may be proved by circumstantial evidence. Before you may rely on circumstantial evidence to conclude that a fact necessary to prove the defendant guilty has been proved, you must be convinced the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also before you may rely on circumstantial evidence to conclude that the defendant had the required intent, you must be convinced the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have a required intent and the other reasonable conclusion supports a

that Diaz orchestrated the attack upon Morales. Pineda heard Diaz tell Morales as he was being dragged outside by the hair, "I'm going to kill you son of a bitch." A different witness heard Diaz angrily yell that "she wasn't garbage that she could be left so easily." Morales, Rosales and Pineda each heard Diaz tell Morales something to the effect that if he did not die, he would die the next time. Rosales told an officer essentially the same thing a few days after the incident. The evidence was consistent that Diaz was speaking threateningly after the stabbing even though each person present apparently did not hear or recall at trial everything Diaz said. Defendant Diaz failed to establish that any threatening statements that she made after the stabbing would necessarily have been captured in the recording of the 911 call. Consequently, their absence from the recording has little, if any, probative value with respect to whether the threats were actually made. There is no reasonable probability that the jury would have reached a result more favorable to defendant had the cautionary instruction been given.

C. *Booking Fee*

At the time of sentencing, the court orally imposed a $129.75 booking fee payable to the City of San Jose pursuant to Government Code section 29550 et seq., which governs recovery of criminal justice administration fees (CJAF) from convicted criminal defendants. Government Code section 29550, subdivision (c), generally entitles a county, whose officer or agent arrested a person, to recover a criminal justice administration (CJA) fee for administrative costs it incurred in conjunction with the person's arrest if the person is convicted of any criminal offense related to the arrest. If a criminal defendant was arrested by a city employee and brought to the county jail for booking or detention, a county may impose a fee upon the city for "reimbursement of county expenses incurred with respect to the booking or other processing" of the arrestee

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finding that the defendant did not; you must conclude that the required intent was not proved by the circumstantial evidence."

up to "one-half" of the "actual administrative costs" (Gov. Code, § 29550, subd. (a)) as statutorily defined[10] (Gov. Code, § 29550, subd. (e)). Government Code section 29550.1 entitles a city, whose officer or agent arrests a person, "to recover any criminal justice administration fee imposed by a county from the arrested person if the person is convicted of any criminal offense related to the arrest."[11] Unlike some other CJAF provisions, Government Code section 29550.1 contains no "ability to pay" requirement.[12]

In this case, the court ordered defendant Diaz to pay a $129.75 booking fee to the city. It then immediately stated: "She has no ability to pay from looking at her statement of assets form, the court security fee or criminal conviction assessment fees. Those won't be ordered nor will attorney fees."

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[10] The language limiting the amount of the fee charged by a county specifically states: "For the 2005 -06 fiscal year and each fiscal year thereafter, the fee imposed by a county pursuant to this subdivision shall not exceed one-half of the actual administrative costs . . . incurred in booking or otherwise processing arrested persons." (Gov. Code, § 29550, subd. (a)(1).)

[11] Subdivision (b) of Government Code section 29550 sets forth a number of exemptions from the fee chargeable by a county pursuant to subdivision (a) but states: "The exemption of a local agency from the payment of a fee pursuant to this subdivision does not exempt the person arrested from the payment of fees for booking or other processing."

[12] Government Code section 29550, subdivision (d), provides in pertinent part: "When the court has been notified in a manner specified by the court that a criminal justice administration fee is due the agency: . . . (2) The court shall, as a condition of probation, order the convicted person, *based on his or her ability to pay*, to reimburse the county for the criminal justice administration fee, including applicable overhead costs." (Italics added.) Government Code section 29550.2, subdivision (a), provides in pertinent part: "Any person booked into a county jail pursuant to any arrest by any governmental entity not specified in Section 29550 or 29550.1 is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. . . . *If the person has the ability to pay*, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person . . . ."

Defendant Diaz maintains that "an ability to pay" requirement must be read into Government Code section 29550.1, as a matter of both statutory interpretation and equal protection of the laws. She asserts that the booking fee imposed upon her must be stricken because the appellate record lacks evidence of her ability to pay and of the actual cost of booking. The People argue that defendant's contentions on appeal were forfeited by failing to object in the trial court. The People present no argument regarding the merits of defendant's statutory construction, equal protection, or the sufficiency of the evidence claims.

While there is authority holding that the forfeiture rule applies to appellate challenges to the imposition of a booking fee (*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1352, 1357 [defendant sought to challenge a $156 booking fee imposed pursuant to Government Code section 29550.2]), this court held in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 that the forfeiture rule does not apply to insufficiency of the evidence claims raised against the imposition of a $259.50 CJA fee payable to county that was imposed pursuant to Government Code section 29550 or 29550.2. (*Id*. at p. 1397, see *id*. at p. 1399, fn. 6.)[13] Defendant Diaz couches her arguments in terms of evidentiary sufficiency and primarily relies upon the *Pacheco* decision.

This case is distinguishable from *Pacheco* in that a different code section, Government Code section 29550.1, is at issue here. As defendant Diaz recognizes, this

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[13] A CJAF case involving application of the forfeiture rule is now pending before the California Supreme Court. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513.) The Supreme Court has described the issue presented in that case as follows: "Did defendant forfeit his claim that he was unable to pay the $270.17 jail booking fee (Gov. Code, § 29550.2) imposed by the trial court at sentencing, because he failed to object at the time?" (<http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1977285&doc_no=S192513>[as of March 27, 2012].)

section "says nothing about the arrestee's ability to pay." Further, no issue of equal protection was before the court in *Pacheco*.

Defendant is in reality raising multiple arguments, each of which must be separately analyzed with regard to application of the forfeiture rule. Her insufficiency of the evidence claim as to her "ability to pay" is entirely dependent upon this court first reaching, and then resolving in her favor, either her statutory construction or equal protection contention. We find both contentions were forfeited.

" 'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 677, 88 L.Ed. 834 (1944)." (*U.S. v. Olano* (1993) 507 U.S. 725, 731 [113 S.Ct. 1770].) "The forfeiture doctrine is a 'well-established procedural principle that, with certain exceptions, an appellate court will not consider claims of error that could have been—but were not—raised in the trial court. [Citation.]' [Citations.] Strong policy reasons support this rule: 'It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided. [Citations.]' [Citation.] ' " ' "The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal." ' " [Citation.]' [Citation.]" (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) Equal protection contentions, like other claims of error, may be lost by failing to raise and develop them in the trial court below. (See e.g. *People v. Fuiava* (2012) 53 Cal.4th 622, 731; *People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14.)

Courts have the discretion to not apply the forfeiture doctrine but that discretion "should be exercised rarely and only in cases presenting an important legal issue. [Citations.]" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) "The appellate courts typically have engaged in discretionary review only when a forfeited claim involves an important issue of constitutional law or a substantial right. [Citations.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7.) While an appellate court may review a forfeited claim, "[w]hether or not it should do so is entrusted to its discretion. [Citation.]" (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

We decline to consider defendant's statutory construction argument, finding that, in addition to not being raised below, it has been inadequately raised on appeal since defendant cites no supporting authority and provides no meaningful argument. (See *People v. Catlin* (2001) 26 Cal.4th 81, 133 [refusing to reach appellate claim where appellant "fail[ed] to offer any authority or argument in support of this claim"]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1182 [refusing to reach appellate claim because it was "not properly raised" in that appellant failed to support it "with adequate argument"].) We also decline to review defendant's equal protection contention.

Defendant's equal protection argument is perfunctory. Where rational basis review applies to a state statute challenged on equal protection grounds, "[it] is presumed constitutional [citation]," the state's Legislature is not required to articulate a purpose or rationale supporting the statute's classification, the state "has no obligation to produce evidence to sustain the rationality of a statutory classification," and " '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' [citation], whether or not the basis has a foundation in the record." (*Heller v. Doe by Doe* (1993) 509 U.S. 312, 320-321 [113 S.Ct. 2637].) Here, defendant baldly states that "there is no rational reason to limit the scope of an ability to pay

provision based merely on the identity of the arresting agency" without sufficient analysis or discussion.

As to defendant's separate claim that the evidence of the actual cost of booking was insufficient to support the imposition of a booking fee, she maintains that this contention is not subject to forfeiture, again citing *Pacheco*, *supra*, 187 Cal.App.4th 1392. As a general rule, no objection is necessary to preserve insufficiency of the evidence claims. (See *People v. Butler* (2003) 31 Cal.4th 1119, 1126 [no forfeiture of challenge to the sufficiency of the evidence to support finding of probable cause pursuant to section 1202.1, subdivision (e)(6), with regard to an AIDS testing order], quoting *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17 ["Generally, points not urged in the trial court cannot be raised on appeal. [Citation.] The contention that a judgment is not supported by substantial evidence, however, is an obvious exception to the rule"]; *People v. Rodriguez* (1998) 17 Cal.4th 253, 262 [no waiver of right to challenge the sufficiency of the evidence to support strike allegation].)

At the time of sentencing in this case, however, former subdivision (a)(2) of Government Code section 29550 stated: "Any increase in a fee charged pursuant to this section [for booking and processing arrested persons] shall be adopted by a county prior to the beginning of its fiscal year and may be adopted only after the county has provided each city [and other specified entities] 45 days written notice of a public meeting held pursuant to Section 54952.2 on the fee increase and the county has conducted the public meeting." (Stats. 2006, dn. 78, § 2, p. 1548.) This CJAF provision suggested that the "actual administrative costs" of receiving a person arrested by an employee of a city and brought to the county jail for booking were formally established by a county in extrajudicial procedures and did not necessarily require proof each time a CJA or

booking fee payable to a city was imposed upon a defendant pursuant to Government Code section 29550.1.[14]

In this case, the preprinted, standard criminal minute order of the County of Santa Clara, Superior Court provided for imposition of a CJA fee: "CJAF $129.75/259.50 $_____" Here, the probation officer's report recommended that a CJA fee of $129.75 payable to the City of San Jose be imposed. The reasonable inference is that, at the time of judgment, the County of Santa Clara had set the CJA fee at $259.50, it had set the fee chargeable under Government Code section 29550, subdivision (a), at half that amount ($129.75) for booking or processing a person arrested by an employee of a city (or other specified entity), and the City of San Jose whose officer or agent had arrested a defendant was entitled to recover $129.75 from the defendant upon conviction of any criminal offense related to the arrest. (See Gov. Code, §§ 29550, subds. (a) and (b), 29550.1; see also Santa Clara County Ordinance Code, Div. A14, Ch. X, Sec. A14-56 [establishment of CJA fees].)

Under these circumstances, if defendant Diaz wished to challenge the amount of the booking fee payable to the City of San Jose, it was incumbent upon her to object that the CJA fee recommended in the probation report and CJA fees stated in the preprinted, standard criminal minute order did not correctly reflect the amount of the CJA or booking fee that had been established by the County of Santa Clara and provide some evidentiary support for her claim. " 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the

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[14] We do not consider in this case whether there must be evidence of the "actual administrative costs" when a court imposes a CJA fee payable to a county. We are aware that *Pacheco* stated: "There is no evidence in this record of either Pacheco's ability to pay a booking fee, particularly as a condition of probation, or of the actual administrative costs of his booking. Accordingly, the $259.50 criminal justice administration or booking fee cannot stand." (*Pacheco*, *supra*, 187 Cal.App.4th at p. 1400.)

record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The record contains no evidence that the amount of the standardized booking fee recoverable by the City of San Jose was not $129.75.

DISPOSITION

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.