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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DORA DIAZ,** **Defendant and Appellant.**

SUPREME COURT
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Case No. S205[illegible]

Sixth Appellate District, Case No. H036414
Santa Clara County Superior Court, Case No. CC954415
The Honorable Ron Del Pozzo, Judge

OPENING BRIEF ON THE MERITS

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ISSUES

The Court granted appellant's petition for review, deemed the People the petitioner for purposes of this proceeding, and directed briefing and argument only on these issues:

(1) Did the trial court err by failing to instruct the jury sua sponte that it must consider defendant's extrajudicial oral statements with caution when the statements constituted the criminal act?

(2) If so, did the Court of Appeal correctly conclude that the trial court's failure to instruct was harmless error?

INTRODUCTION

A trial court has no sua sponte obligation to instruct the jury to view with caution an oral statement constituting the charged act. In that circumstance, the defendant's rights are fully protected by the court's instructions to the jury on the charge, the elements of the crime, and the prosecution's burden of proving the charge beyond a reasonable doubt.

Alternatively, if appellant's jury should have been instructed to view her oral statements with caution, the Court of Appeal correctly found the state law error harmless in this case. Accordingly, the judgment of the Court of Appeal should be affirmed.

STATEMENT OF THE CASE

A. Trial Evidence

Eduardo Morales lived in an apartment in San Jose with his mother Marta Rosales, sister-in-law Indira Pineda, brother Carlos Morales, Ms. Rosales's husband Alvaro Hernandez, and Mr. Hernandez's brother, Cesar Hernandez. (1 RT 32-33, 138-139.) For three or four years, Eduardo had a romantic relationship with appellant, a married woman. He also had a friendly relationship with her four children including 16-year-old Luis. (1 RT 34-38.)

In early September 2009, appellant broke up with Eduardo, telling him that she no longer loved him and did not want to be with him any longer. (1 RT 38.) Eduardo did not see her again until 1:00 or 1:30 a.m. on September 5, 2009, when he woke to knocking at his door and window. (1 RT 39.) He peeked out and saw appellant with two other women yelling at him, "Come out you fucking asshole." (1 RT 39-41; 2 RT 276.) They smashed the front window. (1 RT 41-42.) Eduardo opened the door and said, "Why are you doing this to me?" (1 RT 42.) The women grabbed Eduardo by the hair and pulled him out of the apartment. (1 RT 43; 2 RT 278.) They hit him with fists and kicked him with feet. (1 RT 43.) They called Eduardo a "fucking asshole." (1 RT 44.) He covered up to protect himself from the assault. (1 RT 45.)

Appellant stepped back, snapped her fingers twice, and whistled. (1 RT 44-46.) Another woman said, "Puro catorce," a Norteno street gang term and continued beating Eduardo. (1 RT 46-47.) As Eduardo tried to reenter his apartment, three men in gang attire suddenly crossed the street and began beating him. (1 RT 47-48, 53.) The three women and three men all hit and kicked him. (1 RT 48.) Eduardo tried to stand, but the assailants pushed him back down every time. (1 RT 245.) Eduardo tried to defend himself and cover up. One man stabbed him several times, using a knife with a four-to five-inch blade. (1 RT 48-50.) Eduardo put up his hands to protect himself from being stabbed. (1 RT 51.)

His mother, Marta Rosales, came out and pleaded with the people to stop beating her son. (1 RT 48.) Eduardo told his mother that he had been stabbed, and she called the police. (1 RT 49.) He felt very weak. (1 RT 49.) Some assailants dispersed and got into a dark colored Lincoln Town Car, but appellant stayed behind, walked up to Eduardo, and lifted up his shirt. (1 RT 52.) Seeing his stab wounds, appellant called Eduardo a "fucking asshole," laughed, and argued with Rosales and Eduardo's sister-

in-law Indira Pineda. (1 RT 52.) Appellant told Eduardo that if he did not die this time, she would kill him the next time and would finish off his entire family, and she called Pineda a "Bitch, fucking bitch." (1 RT 55, 58.) Appellant joined the others in the Lincoln, and they left. (1 RT 58.)

Rosales testified that she was in bed when she heard a commotion outside, appellant yelling at the front for Eduardo to come out, and the apartment window breaking. (1 RT 142-143.) Rosales immediately called 911 and came out of her bedroom while talking to the police on the phone as Eduardo partially opened the front door of the apartment. (1 RT 142-143.) Appellant and two women grabbed Eduardo by the hair and pulled him out. (1 RT 143-144.) Rosales only knew appellant, who was from the same area of Guatemala as her. (1 RT 140 ,146.) Rosales had not approved of her son's romantic relationship because appellant was a married woman. (1 RT 140-141.) Appellant and the other two women punched and hit Eduardo right outside the front door. (1 RT 145.) Appellant hit Eduardo in the face and stomach. (1 RT 147.) Eduardo was hunched over with his hands covering the sides of his head. (1 RT 147.) Appellant called Eduardo a son of a bitch in Spanish. (1 RT 148.) Rosales pleaded with the women to let her son go, but they just shoved her back. (1 RT 149-150.) Rosales asked the police to come immediately. (1 RT 145.) Appellant stopped hitting Eduardo, snapped her fingers, and whistled. (1 RT 151, 243-244.) Three men suddenly appeared and joined the women attacking Eduardo. (1 RT 151.) One man had a knife and stabbed Eduardo with a knife about six inches long. (1 RT 151, 153-154.) Blood gushed from Eduardo's body. (1 RT 151.) Appellant noticed Eduardo bleeding, lifted his shirt, and said, "If you don't die from this one, you'll die next time around. Die, die, die." (1 RT 155, 159; 2 RT 315.) As appellant went to join her cohorts, she assaulted Rosales's pregnant daughter-in-law, Indira Pineda. (1 RT 156.)

Pineda had heard the commotion and come out to plead with appellant to let Eduardo go. (1 RT 156, 243.) Pineda and appellant were neighbors in Guatemala, but Pineda did not know her very well. (1 RT 236.) Appellant tried to hit Pineda, who put up her hands to prevent it. (1 RT 156-157, 248-249.) Pineda pleaded for appellant not to attack her because she was pregnant. (1 RT 247-249.) Appellant said, "You're going to pay for this." (1 RT 157.) She threatened to kill Rosales and Pineda as well as to kill every member of Eduardo's family. (1 RT 157-158, 247; 2 RT 297.) Appellant left at the sound of a siren. (1 RT 160.)

The police found Eduardo on the curb in a pool of blood. He was bleeding heavily from his left arm and his right side. His clothing was soaked in blood; his sweatshirt and T-shirt had five punctures. (1 RT 226-227, 2 RT 305-307.) A stab wound went all the way through his arm. (2 RT 306.) Four other stab wounds were in his abdomen. (2 RT 306.) He was bleeding from all the wounds. (2 RT 306-307.) A large amount of blood was also in front of the apartment. (1 RT 210; 2 RT 352-354.) The front window was broken. (1 RT 210.) Blood was on the building and on the fence line in front of the building. (1 RT 211.) A broken bloody cell phone was in front of the building. (1 RT 211-212.)

Eduardo suffered acute blood loss and required a transfusion. (2 RT 408.) He was in the hospital five days. (1 RT 59.) He was on pain medication for a month and a half. One stab wound had punctured his lung. (1 RT 61.) The knife also struck a nerve and severed tendons in his hand. He had residual numbness on his right side. He was unable to fully extend his fingers and lost strength in his hand. (1 RT 61.) The injuries affected his ability to work. (1 RT 61.)

Around 3:30 a.m., Officer Dan Collins and other police officers, armed with appellant's description and her address in a gang area, responded to the corner of Julian and 19th Street and observed appellant on

the front porch of her house. (1 RT 123-124; 2 RT 362, 326-327.) She saw the police and fled. (1 RT 124, 2 RT 341.) The officers ordered her to stop. (1 RT 124.) She ran a short distance, stumbled, fell, and was arrested. (1 RT 125-126, 2 RT 343.)

As police spoke to her, a dark-colored Lincoln Town Car drove very slowly past the residence. (1 RT 127, 2 RT 328, 344, 377.) Officer Collins believed the vehicle matched the getaway car's description and broadcast an alert. (1 RT 127-128.) The vehicle was stopped. The driver and passenger, a Hispanic male and female respectively, initially did not respond to the order to exit the car. (2 RT 330, 378.) The police ordered the driver to lie on the ground, but he acted as if was going to jump up and run. (2 RT 379.) He had numerous tattoos on his body, including a star on his face. (2 RT 379.) Police found blood on the rear passenger door, rear passenger seat, rear passenger door handle, and the front passenger seat of the vehicle. (1 RT 198-201, 2 RT 331, 346.)

Gang graffiti on the outside of appellant's house included the letters "JSP." (2 RT 202-203.) Eight persons, including appellant's son Luis Sosa and other male teenagers, were inside. (2 RT 364-365, 468.) The men wore gang clothing and were adorned with gang tattoos, including "SJ" and "ES." (2 RT 368, 382-384.) Blood was near a light switch, on the carpet, and on the front door. (1 RT 202-204.) Bunk beds were in the living and dining rooms. (2 RT 363.) Under a bunk bed in one bedroom was bloodstained clothing, including a white T-shirt, white Nike "Cortez" shoes, and a tan Dickie shirt. (1 RT 206-208.)

Forensic testing revealed Eduardo Morales's blood on appellant's clothing. (2 RT 417-418.) His blood was also on the clothing seized under the bunk bed. (2 RT 419.)

Officer Anthony Alfonzo testified that the purpose of a gang is to commit crimes, to intimidate and control their neighborhoods, and to

enhance the gang's reputation. (2 RT 443.) Gangs use violence to control a neighborhood and to enhance the gang's reputation. (2 RT 443-444.) Assaulting someone and calling out the name of the gang enhances the gang's reputation. Word spreads quickly to the streets, and everyone soon knows that the particular gang is responsible for the stabbing or shooting. (2 RT 444.) A strong reputation helps the gang recruit more members. (2 RT 444.) Gang members use violence to improve their status in the gang. (2 RT 444.) The more violent a member, the higher the esteem the member has within the gang. (2 RT 444.) Gangs prey on the weak and work in a pack. (2 RT 444-445.) Members get together to look to attack others. (2 RT 445.) The aim is for everyone in the neighborhood to be afraid of the gang so they can control the neighborhood. (2 RT 445.) A knife is the most commonly carried weapon by gang members. (2 RT 466-467.) It is easily concealed and easily used. (2 RT 467.) Yelling "Puro Norte" or "Puro Catorce" while committing a violent act declares that Nortenos are responsible for the attack. (2 RT 460.) The tactic serves to intimidate any witnesses who may think about cooperating with the police and is a method of instilling fear in the people in the neighborhood. (2 RT 460.)

Gangs use graffiti as another intimidation tactic. (2 RT 454.) The "JSP" graffiti outside the Julian Street residence stands for Julian Street Posse, a Norteno criminal street gang. (2 RT 459.) The Julian Street residence is a known Norteno gang hangout. (2 RT 462-463.) It is used to facilitate criminal activity. (2 RT 463.) Officer Alfonzo opined that the individual stopped in the Lincoln was a Norteno gang member, as was appellant's son, Luis Sosa. (2 RT 464-465.) Officer Alfonzo did not believe appellant was a gang member because she had no gang tattoos or prior gang contacts with the police. (2 RT 467.) Nevertheless, family members who are not affiliated with the gang may live in a residence where gang activity is going on. (2 RT 468.)

B. Trial Court Proceedings

Appellant did not request a jury instruction to consider her oral statements with caution.

The trial court instructed on the charges and defined the elements of making a criminal threat under section 422. (2 RT 543-544.) The court also instructed the jury that the People had the burden to prove appellant guilty beyond a reasonable doubt and that they had to prove each element of the offense beyond a reasonable doubt. (2 RT 481.) Additionally, the court 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." (2 RT 483.)

The jury convicted appellant as charged of one count of willful, deliberate and premeditated attempted murder (Pen. Code, §§ 664, 187, 189, further statutory citations are to this code) and three counts of criminal threats (§ 422). (2 CT 231-235, 349-352, 356.)[1]

The trial court sentenced appellant to an indeterminate term of life imprisonment consecutive to a three year four month term. (2 CT 382-387.)

C. Court of Appeal Decision

Appellant appealed the judgment, claiming trial errors. Among those claims, she asserted prejudicial error, under *People v. Carpenter* (1997) 15 Cal.4th 312 (*Carpenter*),[2] in the trial court's failure to instruct sua sponte

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[1] Adrian Bonilla was charged with attempted murder and felony assault (§ 245, subd. (a)(1)). (2 CT 231-234.) He resolved his case prior to trial. (See 2 RT 12.)

[2] *Carpenter* was superseded by Proposition 115 on other grounds as recognized in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.

that the jury must consider her extrajudicial, oral statements with caution, as explained by CALCRIM No. 358.[3] (Typed opn. at p. 33.)

Addressing this claim, the Court of Appeal, in an opinion by Justice Elia, acknowledged that *People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057 (*Zichko*) held no sua sponte duty exists to give a cautionary instruction in a criminal threats case. (Typed opn. at pp. 33; see Judicial Council of Cal., Crim. Jury Instns. (Fall 2012 ed.) Bench Notes to CALCRIM No. 358, p. 148 [citing *Zichko* for this point].) The reasoning of *Zichko*, the court remarked, "is not convincing." (Typed opn. at pp. 34.) The court said *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." (*Ibid.*) The court also quoted this statement in *People v. Clark* (2011) 52 Cal.4th 856, 957: "We have long recognized that this cautionary instruction is sufficiently broad to cover all of a defendant's out-of-court statements." The court reasoned further:

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[3] CALCRIM No. 358 provides:

> You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s].
>
> [Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]

(Judicial Council of Cal., Crim. Jury Instns. (Fall 2012 ed.) CALCRIM No. 358, p. 148.)

> *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, 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. 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).

(Typed opn. at p. 35, footnotes omitted.)

The Court of Appeal concluded: "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." (Typed opn. at p. 36.)

Utilizing the harmless error test for state law error in *People v. Watson* (1956) 46 Cal.2d 818, 836-837, the Court of Appeal concluded that any error in failing to give such a cautionary instruction was harmless. (Typed opn. at pp. 36-37.) "There is no reasonable probability that the jury would have reached a result more favorable to defendant had the cautionary instruction been given." (*Id.* at p. 38.)

SUMMARY OF THE ARGUMENT

A trial court generally has a sua sponte duty to instruct the jury to view a defendant's oral out of court statement with caution to assist the jury in determining whether the statement was made. However, consistent with *People v. Zichko*, *supra*, 118 Cal.App.4th 1055, the instruction is not required when the oral statement is the charged act the jury must find in order to convict the defendant of a crime. When the statement is itself the act charged, the jury is properly instructed that the prosecution bears the

burden of proving its charge by showing the elements of the crime beyond a reasonable doubt. No additional protection is necessary or warranted.

The Court of Appeal erred in finding the trial court had a sua sponte duty to provide a cautionary instruction in this case because the extrajudicial oral statements at issue on review are the acts charged against her as violations of section 422. As a result, rather than the People having a burden of producing evidence sufficient to overcome jury caution in deciding whether appellant made the statements, their burden was to produce evidence overcoming the presumption of innocence sufficient to prove beyond a reasonable doubt that she violated the statute by making criminal threats. However, the Court of Appeal correctly concluded that, even if such a sua sponte instructional duty existed, the failure to give the cautionary instruction was harmless in this case.

ARGUMENT

I. THE TRIAL COURT HAD NO SUA SPONTE OBLIGATION TO INSTRUCT THE JURY THAT IT MUST CONSIDER APPELLANT'S EXTRAJUDICIAL ORAL STATEMENTS WITH CAUTION

A trial court ordinarily has a sua sponte duty to instruct the jury to view a defendant's extrajudicial oral statements with caution. (*People v. Dickey* (2005) 35 Cal.4th 884, 905; *People v. Carpenter, supra,* 15 Cal.4th at p. 392; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1224.) The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made. (*People v. Carpenter, supra*, 15 Cal.4th at p. 393; *People v. Beagle* (1972) 6 Cal.3d 442, 456.)

An established exception to this instructional requirement dictates that the jury must not exercise caution but instead apply the constitutional burden of proof to statements that constitute the charged act.

A. The Cautionary Instructions Is Not Required When the Defendant's Statement Is the Act Constituting the Charged Offense

When the defendant's statement is itself the act constituting the crime—such as when the defendant is charged with making a criminal threat under section 422—the jury is instructed that the prosecution must prove the act beyond a reasonable doubt, just as it must proof the other elements of the crime. (*Zichko, supra,* 118 Cal.App.4th at pp. 1059-1060.) This represents the highest burden of proof and the strongest protection available to the defendant. Given that the defendant receives the fullest protection of due process, including the application of the beyond-a-reasonable doubt standard in deciding whether the proof establishes the charged act, the cautionary instruction is superfluous and potentially confusing in such cases.

Zichko correctly recognized this distinction, whereas the Sixth District Court of Appeal erroneously found the distinction meaningless. In *Zichko*, the defendant walked into a bank and told the teller that "he wanted to withdraw enough money to go buy a gun and a clip with enough bullets to shoot everyone." (*Zichko, supra,* 118 Cal.App.4th at p. 1058.) When the teller asked Zichko if he wanted to close his account, he said, "'Do you want to make me angry so I can come back here and shoot you all in the head?'" (*Ibid.*) The jury convicted Zichko of making a criminal threat, but found him not guilty by reason of insanity. (*Id.* at p. 1057.) On appeal from the order of commitment, Zichko argued, under *Carpenter*, *supra*, 15

Cal.4th 312, that the trial court ought to have instructed the jury to view his statements to the teller with caution.[4] (*Id.* at pp. 1057-1058.)

In *Carpenter*, the capital defendant was convicted of rapes and murders. Evidence showed Carpenter told one victim, "I want to rape you." The victim responded, "No, I'm not going to let you." Both statements were heard by the victim's companion just before Carpenter shot him in the neck and shot the victim twice in the head, killing her. (*Carpenter, supra,* 15 Cal.4th at pp. 345-346.) An issue before the Supreme Court on automatic appeal was the trial court's refusal to instruct the jury to view Carpenter's statement with caution. The Court first considered whether Carpenter's statement was the sort that required a cautionary instruction. Noting that it had previously made no distinction between "'actual admissions and pre-offense statements of intent'" the Court concluded that a cautionary instruction should have been given. (*Id.* at p. 392, quoting *People v. Beagle, supra*, 6 Cal.3d at p. 455, fn. 5, citations omitted.) The Court then considered the impact of the error and found it harmless. (*Id.* at p. 393.) Thus, it was in the context of admissions and preoffense statements of intent that the Court stated the cautionary

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[4] At issue in *Zichko* was CALJIC No. 2.71, the precursor of CALCRIM No. 358, which provided:

> An admission is 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.
>
> You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part.
>
> [Evidence of an oral admission of [a][the] defendant not made in court should be viewed with caution.]

instruction "would apply to any oral statement of the defendant, whether made before, during, or after the crime." (*Ibid.*)

Zichko found *Carpenter* inapposite because "[t]he statement by Carpenter that he wanted to rape the victim was part of the crime in the sense that the statement acknowledges and 'tends to prove' the mental state necessary to the commission of the attempted murder [*sic*] and was made during the commission of that crime. Making the statement, however, was not the criminal act of attempted rape." (*Zichko, supra,* 118 Cal.App.4th at p. 1059.) In contrast, "Zichko's verbal threat to shoot [the bank teller] and others in the bank was the act of making a criminal threat. The statements constituted the crime, not admissions of the crime within the meaning of CALJIC No. 2.71." (*Ibid.*) The court found the difference between an admission (or preoffense statement of intent), which admits or acknowledges something tending to prove the offense, and a statement that actually constitutes a crime, to be determinative:

> Unlike an admission that acknowledges something tending to prove guilt or a confession that acknowledges guilt, the statements in this case constituted the criminal act charged against Zichko. It would have been an admission, for example, if before the offense Zichko told someone that he planned to threaten people at the bank. And it would have been an admission or a confession if, after the offense, Zichko repeated to a friend what he had said to the bank teller.[] But making the threat to the bank teller did not acknowledge the crime; making the threat was the crime.
>
> The difference between a statement that is a criminal act and an admission is made evident by the language of CALJIC No. 2.71 itself. The instruction advises the jurors that they "are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part." But, it is immaterial whether Zichko's threat to shoot everyone was true. A threat may be a crime "even if there is no intent of actually carrying it out." (§ 422.) There would be no reason to instruct a jury that it must determine whether Zichko's statements were "true in whole or in part."

(118 Cal.App.4th at pp. 1059-1060, footnote omitted.)

The opinion of the Court of Appeal below described *Zichko* as creating a "false dichotomy between a statement that constitutes a crime and a statement that is evidence of a crime." (Typed opn. at p. 35.) In making its criticism, the appellate court relied on *Carpenter*'s broad statement regarding the applicability of the cautionary instruction, without giving import to the context within which it was made. (*Id.* at pp. 33-35.) As shown, *Carpenter* concerned a preoffense statement of intent that tended to prove the crime of attempted rape. This Court not having considered the applicability of the cautionary instruction to a statement that *is* the crime, the holding in *Carpenter* neither encompasses such cases nor validates the Court of Appeal's rejection of *Zichko*.

"'It is axiomatic that cases are not authority for propositions not considered.'" (*People v. Jennings* (2001) 50 Cal.4th 616, 684, quoting *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.) "The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or its reasoning." (*Ibid.*, quoting *McGee v. Superior Court* (1985) 176 Cal.App.3d 221, 226.)

Zichko, unlike the Sixth District's opinion, correctly recognized oral extrajudicial statements that the jury may choose to consider in deciding the defendant's guilt are viewed with caution, but statements that are the charged act must be viewed under the prism of due process and the presumption of innocence. *Zichko* correctly concluded that *Carpenter* was inapposite to the latter category of statements.

B. The Cautionary Instruction Is Misleading And Should Not be Given Sua Sponte When the Statement Is the Charged Act

When evaluating a claim of instructional error, this Court reviews the instructions as a whole. (*People v. Roybal* (1998) 19 Cal.4th 481, 526-527; *People v. Cain* (1995) 10 Cal.4th 1, 36.)

It would be incongruous to instruct a jury that (1) oral statements of the accused constituting the charged act of making a criminal threat must be proved beyond a reasonable doubt, but (2) "it is up to [the jury] to decide how much importance to give to the statement[s]" and that the jury should "[c]onsider with caution any statement made by (the/a) defendant tending to show (his/her) guilt," per CALCRIM No. 358. (See fn. 3, *ante*.)

The appellate court in *Zichko* rightly concluded that the cautionary instruction in a case like this one is potentially confusing to the jury when analyzed in light of the instructions on the reasonable doubt standard applied to the elements of the crime. (118 Cal.App.4th at p. 1060.)

> The purpose of CALJIC No. 2.71 is to direct the jury to use caution in deciding whether an admission was made. Here, as the trial court instructed, the People had the burden of proving Zichko guilty beyond a reasonable doubt and that he must be found not guilty unless the elements of the crime were proven beyond a reasonable doubt. Therefore, a guilty verdict required the jury to conclude beyond a reasonable doubt that Zichko made the threatening statements. To also instruct the jury that the statements "should be viewed with caution" (CALJIC No. 2.71) would have been at least superfluous and may have been confusing to the jury. It could have misled the jury into believing that it could find Zichko guilty even if it did not conclude beyond a reasonable doubt that the statements were made, as long as the jury exercised "caution" in making its determination.

(*Ibid.*) Accordingly, *Zichko* found no error in the trial court's omission of the cautionary instruction and held "that the cautionary instruction is not to

be given when defendant's words constitute the crime itself." (*Id.* at p. 1057.)

Zichko's reasoning and holding apply here. Appellant, like Zichko, was charged with making a criminal threat in violation of section 422. The jury here, like the jury in *Zichko*, heard the witness's firsthand account of the defendant's out-of-court statements. In neither case was there evidence that the statement was not actually made. And in neither case was the statement an admission offered for its truth to prove an offense. Rather, in both cases, the statement itself (regardless of its truth) was the crime. As in *Zichko*, there was no good reason here to instruct the jury to view the truth of appellant's charged statements with "caution" and excellent reason not to so instruct the jury.

The evident tension between the cautionary instruction and the reasonable doubt instruction dictates against giving the cautionary instruction sua sponte in such cases. The appellate court below did not address *Zichko*'s discussion of that point. It inaptly quoted this statement in *People v. Clark, supra,* 52 Cal.4th 856: "We have long recognized that this cautionary instruction is sufficiently broad to cover all of a defendant's out-of-court statements." That observation referenced the generality of the caution as to "admissions" in CALJIC No. 2.71, which, when given, renders harmless the failure to give a more specific caution (CALJIC No. 2.71.7) respecting preoffense statements of intent, plan, motive, or design. (See *ibid.*)

Clark's reference to the generality of the cautionary language in CALJIC No. 2.71 supports *Zichko*'s insight that the instruction is at least confusing and potentially misleading in cases like the present one. By logical extension, *Clark* lends supports to our submission that CALCRIM No. 358 should not be given sua sponte with respect to oral statements constituting the charged act. We recognize that unlike CALJIC No. 2.71,

CALCRIM No. 358 neither refers to "admissions," nor instructs, "You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part." The pattern CALCRIM cautionary instruction refers to oral or written out of court statements and is more general than the CALJIC instruction.

Consequently, the CALCRIM instruction is potentially even more confusing than the CALJIC instruction when the defendant's oral statement before trial is the charged act. This is so because a jury arguably might be able to discern a distinction between the charged act and an "admission" as defined in CALJIC No. 2.71—if only because in a section 422 case the truth or falsity of the statement is irrelevant and, hence, the jury may percieve no reason to decide whether the statement is true in whole or part. (See fn. 4, *ante*.)

But the jury would be hard pressed to draw the same distinction under CALCRIM No. 358. That instruction speaks broadly of any oral or written statement before the trial tending to show guilt. A jury likely would understand the CALCRIM instruction as directing it to view with "caution" and to "decide how much importance to give" to a charged act that it simultaneously is instructed to presume defendant is innocent of committing unless the People prove the statement (and every other element of a criminal threat) beyond a reasonable doubt. (See *Zichko*, *supra*, 118 Cal.App.4th at p. 1060.) Worse, the cautionary instruction could mislead the jury into believing it could find the defendant guilty of making a criminal threat even if the prosecutor failed to prove beyond a reasonable doubt that she made the statements so long as the jury exercised caution in making its determination. (See *ibid.*)

CALCRIM No. 358 admonishes the jury to decide for itself how much "importance" to give to the extrajudicial statement of the accused. That may benefit the defendant when the prosecution offers oral

extrajuducial statements for consciousness of guilt, a preoffense statement of intent, or similar purposes. But when the statement is the charged act, the reasonable doubt instruction provides the jury the exact, constitutionally required measure by which to judge the statement's "importance." There is no sound basis for introducing into the jury room dissonant principles on how the jury decides the charge—one leaving up to the jury "to decide how much importance to give" to the charged act (so long as it does so "with caution"), and another requiring the jury to acquit unless the charged act is proved beyond a reasonable doubt. To assign the jurors both tasks is, in the words of Learned Hand, the "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." (*Nash v. United States* (2d Cir. 1934) 54 F.2d 1006, 1007.)

The Sixth District's misplaced reliance on *Carpenter* and its failure to address the tension between the cautionary instruction and the reasonable doubt standard undermine its reasoning on the first question on review. This Court should adopt the holding in *Zichko*. The trial court did not err by failing to instruct the jury sua sponte that it must consider defendant's extrajudicial oral statements with caution.

II. THE COURT OF APPEAL CORRECTLY CONCLUDED THAT APPELLANT SUFFERED NO PREJUDICE FROM THE ABSENCE OF THE CAUTIONARY INSTRUCTION

Assuming cautionary instruction should have been given, the Court of Appeal correctly concluded the failure to do so was harmless in this case. (Typed opn. p. 36-37.)

The standard of review for the assumed error is whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given. (*Carpenter, supra,* 15 Cal.4th at p. 393; accord, *People v. Dickey, supra,* 35 Cal.4th at p. 905 [failure to instruct was not federal constitutional error and was harmless where jury in

other respects was thoroughly instructed on judging credibility of witnesses].)

Where there is no conflict in the evidence about the exact words used, their meaning, or whether the words were repeated accurately, this Court has found the omission of the cautionary instruction harmless. (*People v. Dickey*, *supra*, 35 Cal.4th at pp. 905-906.) That is the state of the evidence here. Appellant presented no evidence. There was no dispute regarding her statements. There is no reasonable probability that the result would have been any different if the instruction had been given. The omission was therefore harmless. (*Ibid*; *Carpenter, supra,* 15 Cal.4th at p. 393; *People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Beagle, supra,* 6 Cal.3d at p. 455.)

The trial court thoroughly instructed the jury regarding the presumption of innocence, the prosecutor's burden of proof, evaluation of witness credibility, and reliance on circumstantial evidence. The trial court instructed on credibility as follows:

> Consider the testimony of each witness and decide how much of it you believe. In evaluating a witness'[s] 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'[s] behavior while testifying? Did the witness understand the questions and answer them directly? Was the witness'[s] 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?

(2 RT 485.)

With regard to circumstantial evidence, the court instructed the jury:

> You must decide whether a fact in issue has been proved based on the evidence. 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.

(2 RT 483-484.)

The court also instructed the jury, "[a]n 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 finding that the defendant did not; you must conclude that the required intent was not proved by the circumstantial evidence." (2 RT 484.)

The jury could reasonably infer from the evidence that appellant orchestrated the attack upon Morales. Pineda heard appellant tell Morales as he was being dragged outside by the hair, "I'm going to kill you son of a bitch." (1 RT 241.) A different witness heard appellant angrily yell that "she wasn't garbage that she could be left so easily." Morales, Rosales, and Pineda each heard appellant's statement to Morales to the effect that if he

did not die now, he would die the next time. (1 RT 55, 155, 157, 241-242, 247-248, 250.) Rosales told an officer essentially the same thing a few days after the incident. (1 RT 159.) These witnesses' accounts were corroborated by Cesar Hernandez and Alvaro Hernandez. (2 RT 280, 297.) Indeed, Alvaro testified that appellant threatened to kill everyone. (2 RT 297.) The evidence was consistent that appellant issued her death threats after the stabbing, though no single witness recalled at trial every word appellant said. Any error was harmless.

CONCLUSION

The People respectfully requests that the judgment of the Court of Appeal should be affirmed.

Dated: February 14, 2013

Respectfully submitted,

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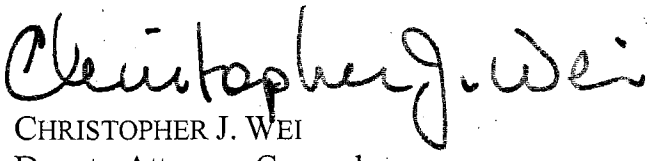

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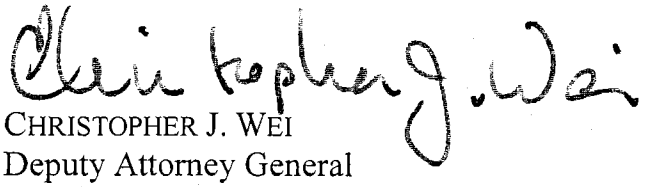
CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 6,243 words.

Dated: February 14, 2013

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Diaz**
No.: **S205145**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 14, 2013, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 14, 2013, at San Francisco, California.

B. Wong
Declarant

B. Wong
Signature

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