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**SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DORA DIAZ,

Defendant and Appellant.

No. S205145

(Court of Appeal No.
H036414)

(Santa Clara County
Superior Court No.
CC954415)

APPELLANT'S ANSWER BRIEF ON THE MERITS

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
COUNTY OF SANTA CLARA, STATE OF CALIFORNIA,
THE HONORABLE RON DEL POZZO, JUDGE PRESIDING

SIXTH DISTRICT APPELLATE PROGRAM

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STATEMENT OF THE CASE

On May 13, 2010, appellant was charged in an information filed in the Superior Court for Santa Clara County. (2 CT 231-235.) In Count 1, appellant was charged with attempted premeditated murder (Penal Code sections 187 and 664). (2 CT 232.) Count 2 charged only co-defendant Adrian Bonilla. (2 CT 232.)^{1/} In count 3, appellant was charged with making a criminal threat against Indira Pineda (Penal Code section 422). (2 CT 233.) In count 4, appellant was charged with making a criminal threat against Marta Rosales. (2 CT 233.) In count 5, appellant was charged with making a criminal threat against Eduardo Morales. (2 CT 233-234.)

On September 2, 2010 a jury trial commenced. (2 CT 274.) On

¹Mr. Bonilla did not stand trial with appellant. His case was resolved prior to appellant's trial. (1 RT 12.)

September 14, 2010, appellant was convicted on all counts. (2 CT 354-355.)

On November 22, 2010, appellant was sentenced to life with the possibility of parole for her conviction for attempted premeditated murder. (2 CT 384.) A determinate term of 3 years, 4 months was imposed for the Penal Code section 422 convictions. (2 CT 386.) The midterm of 2 years was imposed on count 3 and consecutive sentences of 8 months each were imposed on counts 4 and 5. (2 CT 386, 2 RT 568-569.)

On December 17, 2010, a notice of appeal was filed. (2 CT 383.) On December 29, 2010, an amended notice of appeal was filed. (2 CT 383A.)

On August 1, 2012, the Court of Appeal affirmed the judgment. The court held that the trial court had erred by failing to give CALCRIM No. 358 *sua sponte*. (Opinion, pp. 32-36.) However, the court concluded that the error was harmless. (Opinion, pp. 36-38.)

On September 18, 2012, appellant filed a petition for review. On November 20, 2012, review was granted. This court limited the issues to: (1) whether the trial court had erred by failing to give CALCRIM No. 358; and (2) if so, whether the error was prejudicial.

STATEMENT OF FACTS

OVERVIEW

Appellant was a married women with four children. In 2005 or 2006, appellant commenced a romantic relationship with Eduardo Morales who was a teenager at the time. According to Mr. Morales, appellant broke off the relationship in August 2009.

In the early morning hours of September 5, 2009, appellant and two other women went to Mr. Morales' home and called him out. The three women assaulted Mr. Morales. When appellant snapped her fingers, three men came forward. One of the men stabbed Mr. Morales and inflicted serious injuries. According to Mr. Morales, appellant told him that if he "did not die this time, that [he] surely would the next time" (1 RT 55.)

During the assault, Mr. Morales' mother (Marta Rosales) and sister-in-law (Indira Pineda) came outside. Both women reported that appellant uttered threats to kill them and family members. The supposed threats were not audible on the audiotape of the 911 call that Ms. Rosales made while appellant was still at the scene.

Appellant was arrested several hours later and was severely inebriated. During closing argument, defense counsel contended that there was no showing that appellant had a motive to kill Mr. Morales nor was there any

evidence that she knew that Mr. Morales would be stabbed. Counsel also argued that appellant had not made any threats since the audiotape of the 911 call did not reflect any such threats.

A. Dating Relationship of Eduardo Morales and Appellant

Eduardo Morales, age 21 at the time of trial, dated appellant for three or four years. (1RT 34, 36, 73.) He knew appellant was older than him, but he did not know her exact age. (1RT 36.) He also knew that appellant was married, and that she had four children. (1RT 35.)

Mr. Morales lived in an apartment on North 6th Street along with his mother and several adult relatives. (1RT 32-33.) It was a two-bedroom apartment, and he slept on a couch in the living room. (1RT 33-34.)

According to Mr. Morales, appellant broke up with him in late August of 2009, telling him over the phone that she “didn’t want to be with [him] any more.” (1RT 38-39.) Mr. Morales had been in love with appellant, and he had even obtained a tattoo of her name over his heart. (1RT 72-73.)

B. The Assault on Mr. Morales

Mr. Morales was asleep on the couch in the early morning hours of September 5, 2009. (1RT 39.) Between 1:00 a.m. and 1:30 a.m., he heard a hard knock on the door and window. (1RT 39-40.) He peeked out and saw appellant along with two other females, whom he did not recognize. (1RT 40-

41.) The three women were telling Mr. Morales to come outside and calling him a “fucking asshole.” (1RT 41.)

Mr. Morales put on his shoes and went outside. (1RT 41.) On his way out, he saw that the living room window had been broken. (1RT 41.) Standing in the doorway with one foot in the house and one foot outside, Mr. Morales stopped and asked, “Why are you doing this to me?” (1RT 42.)

The three women came towards Mr. Morales and pulled him outside to the driveway. (1RT 43.) They hit and kicked him. (1RT 43.) During the beating, Mr. Morales was covering himself with his hands, and the women were calling him a “fucking asshole.” (1RT 45-46.) The women also said “puro catorce,” meaning “14.” (1RT 46.)

Appellant backed up, snapped her fingers, and whistled. (1RT 43.) Three men, including someone who looked like appellant’s son, approached and joined in the beating. (1RT 44, 47-48, 54.) Mr. Morales felt a stabbing in his right stomach area and saw a five- or six-inch knife or blade. (1RT 48-50.) He put his hand out to stop the stabbing, and the knife hit his arm. (1RT 49, 51.) While the men were attacking him, Mr. Morales heard the phrase “puro norte,” meaning “north.” (1RT 54.) After Mr. Morales was stabbed five times, appellant lifted Mr. Morales’ shirt, called him a “fucking asshole,” and laughed. (1RT 52, 59-60.)

C. The Various Statements Supposedly Uttered By Appellant.

According to Mr. Morales, appellant remained behind after the other assailants departed. (1 RT 52, 55.) Appellant told Mr. Morales that if he “did not die this time, that [he] surely would the next time and that she was going to finish off [his] whole family.” (1 RT 55.)

Ms. Rosales recalled that appellant lifted Mr. Morales’ shirt and said “if you don’t die from this one, you’ll die next time around.” (1 RT 155.) Ms. Rosales also told Officer Francisco Hernandez that appellant said “die, die, die.” (2 RT 315.) However, at trial, Ms. Rosales did not recall hearing such a statement. (1 RT 160, 183.)

Ms. Rosales testified that she made a 911 call before Mr. Morales exited the residence. (1 RT 142, 161, 184-185.) Ms. Rosales remained on the phone throughout the assault and until appellant left the scene. (1 RT 185, 191.)

Ms. Rosales indicated that appellant told her that “she would kill every member of [her] family one by one.” (1 RT 157.) Appellant yelled the threat in a loud voice. (1 RT 191.)

Ms. Pineda reported a number of statements made by appellant. During the initial assault before the men became involved, appellant told Mr. Morales that she “was going to kill him.” (1 RT 243.) After Mr. Morales was stabbed,

appellant told Mr. Morales that “if he didn’t die from this one, he would die from the next one.” (2 RT 242.) Subsequently, Ms. Pineda tussled with appellant. (1 RT 262.) Appellant stated “I’m going to kill you” and “you’re going to pay for this.” (1 RT 248.) Appellant also indicated that she was going “to kill each one of us.” (1 RT 247.)

For his part, Mr. Morales recalled only that appellant had said “bitch, fucking bitch” to Ms. Pineda. (1 RT 58.) He could not recall if any threatening comments had been made to Ms. Pineda and Ms. Rosales. (1 RT 58-59.)

Cesar Hernandez is the brother of Ms. Rosales’ husband. (2 RT 275.) Mr. Hernandez came outside and heard appellant say that “she wasn’t garbage that she could be left so easily.” (2 RT 282.)

Alvaro Hernandez is Ms. Rosales’ husband. (2 RT 295.) He came outside and heard appellant say that she “was going to kill everyone.” (2 RT 297.)

D. Appellant’s Arrest.

At about 3:30 a.m., three police officers went to appellant’s residence at 903 East Julian. (1RT 123-124, 325.) The three officers parked about a block or two away and approached by foot. (2RT 325, 341.) Appellant was sitting on the porch, but she began running west on Julian when the officers

were a few houses away. (1RT 124, 2RT 326, 341.) The officers pursued her a short distance (about one-half of a block) and told her to stop. (1RT 124-125, 2RT 327.) Appellant stumbled and fell – she appeared to be intoxicated. (1RT 125, 2RT 327, 334.) She also stumbled as she was escorted to the patrol car. (1RT 134.) She identified herself in response to questions from the officers and was cooperative. (1RT 126, 131.) Appellant smelled of alcohol, her eyes were bloodshot and watery, and her speech was slurred. (2RT 335.) In the opinion of one officer, she was “heavily intoxicated.” (2RT 337.)

While appellant was being contacted by the police, a dark-colored Lincoln drove by, then slowed down to about five miles per hour or less. (1RT 127, 2RT 328-329, 375-376.) The vehicle, which contained a male and a female, stopped in front of appellant’s residence. (2RT 328-330, 344.) The two occupants of the Lincoln were detained. (2RT 378-379.) The male had a star tattoo on his face and numerous tattoos on his body. (2RT 379.) The Lincoln was subsequently searched. (1RT 198.) There was blood inside the car, as well as on the outside. (1RT 201.)

The residence at 903 East Julian was also searched. (1RT 201.) Near the front door, there was blood on the wall and on a light switch. (1RT 201.) Carpet and clothing in the residence had blood on it. (1RT 201-202, 204, 2RT 369.)

It was apparent that a lot of people lived in the Julian Street residence; there were even bunk beds in the living room. (2RT 363, 380.) Several people were present in the residence at the time, including at least three male teenagers, two children, two middle-aged males, and two adult females. (2RT 364-365.) The males included appellant's son Luis Sosa, and Guillermo Rodriguez. (2RT 365, 468.) Mr. Rodriguez had some tattoos on his arms, including "SJ" and "ES," and he wore a red belt with "SJ" on the buckle. (2RT 368, 383.)

E. Mr. Morales' Injuries.

Mr. Morales spent three days in the intensive care unit of the hospital. (2RT 408-409.) He suffered two stab wounds in his forearm, two in his right chest and two to his lower back. (2RT 408.) One of the stab wounds went through his lung, and he had blood in his lungs. (1RT 61; 2RT 408.) Mr. Morales also had a liver laceration and a pulmonary contusion. (2RT 408.) He required a blood transfusion, sutures, and a chest tube to drain the blood from his lungs. (2RT 408.) Mr. Morales' injuries were "life threatening." (2 RT 409.) At the time of trial in September 2010, Mr. Morales still had numbness in his chest area and could not fully extend his fingers. (1RT 61.)

F. Forensic Evidence.

The parties stipulated that blood was found on appellant's shoes and jeans when she was arrested. (2 RT 407.) A DNA test revealed that the blood was that of Mr. Morales. (2 RT 417.)

Blood spattered khaki pants, Nike shoes and a white t-shirt were found under a bed at 903 E. Julian Street. (2 RT 385-386.) Mr. Morales' DNA was found on the clothing. (2 RT 419.)

G. Mr. Morales Retracts His Accusation

In November 2009, Mr. Morales asked the District Attorney to drop the charges against appellant, asserting that she had not hurt him. (1RT 100-101.) Mr. Morales also denied appellant's involvement during a conversation with a private investigator around the same time. (1RT 101-102.) Mr. Morales said he had blamed appellant because he was "nervous." (1RT 102.) However, the following day, he returned to the private investigator's office and indicated that appellant had attacked him. (1RT 103.) At trial, he blamed his brief retraction on his fear that appellant's relatives might do something to his family. (1RT 102, 113.)

H. Gang Evidence

Mr. Morales denied being a gang member or associating with gang members. (1RT 54.) He had several tattoos, but they were not gang-related.

(1RT 104, 2RT 439.) He testified that appellant has a red butterfly tattoo on her back. (1RT 88.)

“JSP” was spray painted on the street outside 903 East Julian. (1 RT 202-203.) A cell phone in the residence had a screen saver or wallpaper that said “Bloody Waters.” (2RT 383-384.) The residence was in a “known JSP gang area,” referring to a gang called the Julian Street Posse. (2RT 362.)

The prosecution was permitted to present testimony from a gang expert, Sergeant Anthony Alfonzo. (2RT 426, 431.) He defined gang for the jury and explained that the purpose of gangs is to commit crimes, intimidate people and control neighborhoods. (2RT 443.) Sergeant Alfonzo testified about the two primary rivalries within California gangs: Nortenos and Surenos. (2RT 447-448.) East Side San Jose, or “ESSJ,” is a local Nortento gang. (2RT 451.) Julian Street Posse, or “JSP,” is another. (2RT 459.) The group Vario Bloody Waters, or “VBW,” is not quite a gang yet but they align with Nortenos. (2RT 464.)

Nortenos identify with the number 14 – sometimes said in Spanish as “catorce” – and the color red. (2RT 447.) They also identify with the City of San Jose, and a particular symbol for Nortenos is a red San Jose Sharks logo. (2RT 447.) A star tattoo may be a Norteno tattoo, particularly if the person has other Norteno gang tattoos such as four dots or the number 408. (2RT 461.)

According to Sergeant Alfonzo, it is not unusual for females to participate in gang activities, including initiations. (2RT 458.) Yelling the phrase “puro norte” or “puro catorce” during a criminal act notifies witnesses that Nortenos are responsible. (2RT 460.) This enhances the reputation of the gang and the participating members in particular. (2RT 460.)

Sergeant Alfonzo testified that Luis Sosa (appellant’s son and one of the men inside the Julian Street residence at the time it was searched) was a gang member. (2RT 465, 468.) One month after the charged incident, Mr. Sosa was arrested and found to be in possession of a knife. (2 RT 465.) Mr. Sosa said he had the knife as protection against rival gang members. (2RT 465.)

Sergeant Alfonzo opined that appellant herself was not a gang member. (2RT 467.) He did not believe she had any tattoos, she had not been wearing any gang clothing, and she had never admitted gang membership. (2RT 467.) He further testified it is common for family members who are not gang members to live at a residence with relatives who are gang members. (2RT 468.)

I. The Defense Theory Of the Case.

The defense did not present any evidence. During closing argument, defense counsel made several critical points.

First, with regard to the charge of attempted murder, counsel observed that appellant had no motive to kill Mr. Morales. (2 RT 522.) Moreover, counsel noted the absence of any evidence that appellant was aware that anyone had brought a knife to the scene. (2 RT 528.)

Second, counsel asked the jury to consider appellant's state of intoxication. (2 RT 525.) Counsel argued that the degree of intoxication was sufficient to negate the elements of intent to kill and premeditation. (2 RT 525, 528.)

Third, counsel urged the jury to find that Mr. Morales, Ms. Rosales and Ms. Pineda were not truthful in their reporting of appellant's alleged statements. (2 RT 520-521.) Counsel argued that appellant did not make any of the reported statements since she could not be heard on the 911 audiotape even though she was supposedly yelling out the threats. (2 RT 521, 529.)

SUMMARY OF ARGUMENT

When the People introduce evidence of a defendant's unrecorded oral extrajudicial statements, the trial court must instruct *sua sponte* that the statements are to be treated "with caution." (*People v. Beagle* (1972) 6 Cal.3d 441, 455.) The instructional requirement is premised on the reality that oral statements constitute unreliable evidence since witnesses often suffer innocent misrecollection of what was said and unscrupulous witnesses may lie about the contents of the statements. (*People v. Bemis* (1949) 33 Cal.2d 395, 399.)

This court has previously held that the cautionary instruction must be given regardless of whether the oral statement was "made before, during, or after the crime." (*People v. Carpenter* (1997) 15 Cal.4th 312, 393.) Insofar as a witness' testimony about an oral statement is inherently suspect, the cautionary instruction must be given if the statement constitutes the actus reus of an offense such as making a criminal threat under Penal Code section 422. Indeed, the cautionary instruction is especially required when the statement is so important that it is offered as proof of an element of the offense charged.

In *People v. Zichko* (2004) 118 Cal.App.4th 1055, the Court of Appeal held that a cautionary instruction need not be given when an oral statement constitutes the actus reus of a charged offense. *Zichko* should be overruled

since it is inconsistent with both *Carpenter* and the underlying rationale for mandating a cautionary instruction with respect to oral statements.

The omission to give a cautionary instruction was prejudicial in this case with regard to all of appellant's convictions. In order to obtain a conviction for attempted murder, it was the People's burden to show that appellant maintained the specific intent to kill. This was a difficult task since a third party stabbed the victim and there was no evidence that appellant knew that the assailant possessed a knife. Since appellant's statements at the scene were used by the People to prove the specific intent element, the attempted murder conviction must be reversed. (*People v. Ford* (1964) 60 Cal.2d 772, 799-800 [murder conviction reversed where a cautionary instruction was not given as to the several statements used to prove the defendant's mental state].)

The Penal Code section 422 convictions must also be reversed. Appellant presented the substantial defense that she did not utter any threats to the alleged victims. The jury demonstrated that it gave serious consideration to the defense since it requested a rereading of the testimony concerning some of the statements. Since the jury had no clue that it was required to treat the purported statements with caution, reversal is required. (*People v. Bemis*, *supra*, 33 Cal.2d 395, 400-401 [reversal ordered where a

cautionary instruction was not given and the defendant denied that he made the incriminating statements reported by the police].)

I.

THE TRIAL COURT ERRED WHEN IT FAILED TO GIVE
CALCRIM No. 358 SUA SPONTE.

The prosecutor presented a plethora of extrajudicial statements that were allegedly uttered by appellant during and immediately after the assault on Mr. Morales. The statements served double duty. The prosecutor employed the statements as both evidence of appellant's specific intent to kill Mr. Morales and as evidence in support of the Penal Code section 422 counts involving Mr. Morales, Ms. Rosales and Ms. Pineda.

In the Court of Appeal, appellant argued that the trial court erred by failing to give CALCRIM No. 358 *sua sponte*^{2/}. (AOB 47-53.) Appellant

²CALCRIM 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.]”

contended that the omission was prejudicial on all counts of conviction since the jury was not afforded the critical guidance that it was to view evidence of appellant's purported statements "with caution." (AOB 51-53.)

The People responded that the trial court had no obligation to give No. 358 since the bulk of the statements constituted the actus reus of the section 422 charges. (RB 25-28.) The People urged the Court of Appeal to follow *People v. Zichko*, supra, 118 Cal.App.4th 1055 which held that the jury need not be instructed to consider the defendant's extrajudicial statements "with caution" when the statements constitute an element of the charged offense.

The Court of Appeal agreed with appellant. (Opinion, pp. 32-36.) The court held that CALCRIM No. 358 must be given as to any incriminating extrajudicial statement made by the defendant. (Opinion, pp. 33-36.) The court rejected the reasoning of *Zichko* as creating a "false dichotomy between a statement that constitutes a crime and a statement that is evidence of a crime." (Opinion, p. 34.)

In this court, the People again rely on *Zichko* and take the position that No. 358 was not a necessary instruction in this case since appellant's statements constituted the actus reus of the section 422 counts. (RBOM 10-18.) As will be demonstrated below, the People's position is meritless. This court should overrule *Zichko*.

A. CALCRIM No. 358 Must Be Given As To Statements That Constitute The Actus Reus Of A Crime.

In 1872, the Legislature enacted Code of Civil Procedure section 2061, subdivision 4 which required a trial court to instruct the jury that oral admissions of a party are to be treated with caution. (*People v. Dail* (1943) 22 Cal.2d 642, 654-655.) Consistent with the statute, this court has long held that the admission into evidence of an extrajudicial statement of a defendant is “conditional on the giving of a cautionary instruction. [Citation].” (*People v. Bemis*, supra, 33 Cal.2d 395, 399.)

In 1967, the Legislature repealed section 2061. (*People v. Beagle*, supra, 6 Cal.3d 441, 455, fn. 4.) Nonetheless, this court maintained the settled rule that a trial court must instruct *sua sponte* that the oral extrajudicial statements of a defendant are to be treated with caution. (*Id.* at p. 455.)

The rationale for the rule is twofold: (1) it is difficult to remember exactly what someone said; and (2) an unscrupulous witness can easily manipulate a jury since there is no concrete proof of what was said.

“It is a familiar rule that verbal admissions should be received with *caution* and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or

commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself.' [Citation.]" (*Bemis*, supra, 33 Cal.2d at p. 399.)

Given the concerns which warrant the use of a cautionary instruction, it necessarily follows that the instruction must be given as to *any* incriminating statement made by a defendant regardless of whether the statement relates to an element of the offense charged. Indeed, two cases from this court implicitly support this proposition.

In *People v. Bunyard* (1988) 45 Cal.3d 1189, the defendant was charged with the murder of his wife and the wife's full-term fetus. The evidence showed that Earlin Popham had committed the murders. It was the People's theory that the defendant had hired Mr. Popham. On these facts, this court held that the trial court erred by failing to instruct *sua sponte* that defendant's oral "solicitations" to Mr. Popham to kill his wife should be treated with caution. (*Id.* at p. 1224.) Insofar as the defendant's statements were the actus reus of his role in the murder, the implicit holding in *Bunyard* is that the cautionary instruction is required when an oral statement qualifies as an element of the offense.

People v. Carpenter, supra, 15 Cal.4th 312 is similarly on point. There, the defendant was charged with the attempted rape and murder of Ellen Hansen. According to a percipient witness, the defendant looked at Ms.

Hansen and said “I want to rape you.” (*Id.* at p. 392.) This court held that the cautionary instruction was required since the “rationale” underlying the instruction is to assist the jury in determining if the statement was made. (*Id.* at p. 393.) Given this purpose, the instruction must be given whether the defendant’s statement was made “before, during, or after the crime.” (*Ibid.*)

Notwithstanding *Bunyard* and *Carpenter*, the Court of Appeal held in *People v. Zichko*, supra, 118 Cal.App.4th 1055 that a cautionary instruction is unnecessary in a Penal Code section 422 case where the “defendant’s words constitute the crime itself.” (*Id.* at p. 1057.) In reaching this conclusion, the court relied on a semantical analysis of the term “admission.”

At the time of the *Zichko*, case, CALJIC No. 2.71 provided that the jury was to treat evidence of a defendant’s “oral admission” with caution. (*Zichko*, supra, 118 Cal.App.4th at p. 1058, fn. 2.) The court reasoned that a statement which constitutes the actus reus of an offense is not an “admission” and that a cautionary instruction is therefore not required. (*Id.* at pp. 1059-1060.) This analysis fails for two separate reasons.

First, as has been discussed above, the cautionary instruction serves the necessary purpose of advising the jury that unrecorded oral statements must be treated cautiously since they are so often erroneously reported. Plainly, this rationale applies to any incriminating statement regardless of whether the

statement is direct or circumstantial evidence of an element of the offense. Indeed, the need for the instruction is presumably even greater when the statement is deemed to be sufficiently important to constitute the actus reus of the crime.

Second, the court erred in concluding that a statement which constitutes the actus reus of an offense is not an “admission.” In the context of a cautionary instruction, an “admission” is “‘any statement by an accused relative to the offense charged’ [citation].” (*People v. Ford*, supra, 60 Cal.2d 772, 799.) Under this definition, a threat that falls under section 422 is an “admission.” This is so since the statement, standing alone, is not sufficient to establish guilt. Rather, the People must still marshal evidence of several additional elements including the defendant’s specific intent and the effect of the statement on the listener. (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 [stating the five elements of section 422].)

Although the case did not address the point in detail, this court’s decision in *People v. Clark* (2011) 52 Cal.4th 856 provides further support for appellant’s position. In *Clark*, the defendant argued that the trial court had erred by failing to give CALJIC No. 2.71.7 which would have advised the jury to treat his preoffense statements of criminal intent with caution. This court held that any error was cured by the use of No. 2.71 which was deemed

“sufficiently broad to cover all of a defendant’s out-of-court statements. [Citation.]” (*Id.* at p. 957.) The plain import of *Clark* is that the term “admission,” as used in CALJIC No. 2.71, served to direct the jury “to view with caution *any* statement by defendant that was offered to establish his guilt.” (*Ibid.*, emphasis added, fn. omitted.)

It is important to note that the present cautionary instruction, No. 358, does not use the word “admission.” Rather, the instruction advises the jury to treat “with caution any statement” This language is, of course, consistent with this court’s most recent pronouncements. (*Clark*, supra, 52 Cal.4th 856, 957; *Carpenter*, supra, 15 Cal.4th 312, 392-393.)

In an attempt to support the holding in *Zichko*, the People posit essentially two theses: (1) when the defendant’s statement is an element of the offense, the standard instruction on the reasonable doubt standard is sufficient to protect the defendant; and (2) the use of No. 358 is “superfluous and confusing” when the statement is offered to prove an element of the offense. These arguments are unpersuasive.

The People assert that an instruction on the reasonable doubt standard provides adequate protection to the defendant when his oral statement is an element of the offense: “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.” (RBOM 9-10.) This argument is unconvincing since it takes no account of the purpose of the cautionary instruction.

As the People entirely ignore, there are certain types of evidence that warrant caution due to their very nature. For example, it has long been the rule that jurors are to be instructed to treat accomplice testimony with caution. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569; see CALCRIM No. 335.) Similarly, the jury must be instructed to treat the testimony of an in-custody informant with caution. (Penal Code section 1127a; see CALCRIM No. 336.) These instructions are required since jurors are not particularly knowledgeable about the real world deficiencies of some forms of evidence. Unless the jury is instructed to be cautious before it accepts inherently questionable evidence, we can have no guarantee that the jury will intelligently apply the reasonable doubt standard.

Insofar as appellant is aware, it has never been suggested that an instruction on the reasonable doubt standard is an adequate substitute for a cautionary instruction regarding suspect evidence like accomplice or in-custody informant testimony. There is no reason to seriously consider the

People's suggestion here that the reasonable doubt instruction is sufficient to cure the omission to give No. 358.

The People next claim that the use of No. 358 is "superfluous and potentially confusing" when the statement in question is an element of the offense. (RBOM 11.) This claim is based on the *Zichko* court's assertion that a cautionary instruction is "inconsistent with the reasonable doubt standard of proof." (*People v. Zichko*, supra, 118 Cal.App.4th 1055, 1060.) This is supposedly so since the jury could be misled "into believing that it could find [the defendant] 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.*) This analysis is entirely illogical.

There is nothing "inconsistent" about a cautionary instruction and an instruction on the reasonable doubt standard. The two are entirely complementary. A rational juror would proceed as follows. First, the juror would cautiously examine the testimony of the witness who reported the oral statement. Such an examination would consider the witness' motive to lie and other factors such as the witness' opportunity to hear the statement and the amount of time that had passed since the statement was supposedly made. Second, after completing this process, the juror would then apply the beyond

a reasonable doubt standard to the evidence of the statement *and* the remaining evidence regarding the other elements of the offense.

The last point is critical. Even when a statement constitutes the actus reus of the offense, the jury cannot return a conviction until it determines that *all* of the elements of the offense are proven beyond a reasonable doubt. There is quite simply no reason to believe that a cautionary instruction will cause the jury to dilute its application of the reasonable doubt standard.

At the risk of redundancy, appellant once again notes that no one has suggested that the cautionary instructions on accomplice and in-custody informant testimony mislead juries about the reasonable doubt standard. The unsound analysis in *Zichko* should be rejected.

Finally, the People set up and knock down a straw man. The People note that No. 358 directs the jury to exercise its decisionmaking power regarding the degree of “importance” to give to an oral statement. The People charge that the use of the term “importance” also serves to dilute the reasonable doubt standard. (RBOM 17-18.) While this claim should be rejected for the reasons already stated, it is also beside the point.

The issue before the court is whether the “with caution” language of No. 358 was a required instruction. If, as the People say, the “importance” language is misleading, it can be deleted from the instruction. However, such

a deletion scarcely serves as a reason to also hold that the “with caution” instruction should not be given.

This court has appropriately held that a cautionary instruction regarding a defendant’s extrajudicial oral statement must be given when the statement was uttered “during” the crime. (*People v. Carpenter*, supra, 15 Cal.4th 312, 393.) This principle should be enforced in this case.

B. CALCRIM No. 358 Was Required In This Case Since Many Of Appellant’s Supposed Statements Were Employed By The Prosecutor As Circumstantial Proof Of The Mental State Elements Of Attempted Premeditated Murder.

If this court should hold that No. 358 is not required when a statement is offered as the actus reus of a charged offense, the reality remains that the instruction was still required in this case since the prosecutor used various of appellant’s statements as proof of her intent to kill and premeditation. The most important of these statements were: (1) Ms. Pineda’s account that appellant told Mr. Morales that she “was going to kill him” (1 RT 243); (2) Mr. Morales’ testimony that appellant promised to kill him in the future if he did not die this time (1 RT 55); and (3) Officer Hernandez’s report that Ms. Rosales told him that appellant said “die, die, die” to Mr. Morales (2 RT 315).

Pursuant to *People v. Carpenter*, supra, 15 Cal.4th 312, there is no question that the referenced statements required the court to give No. 358 *sua*

sponte. In *Carpenter*, this court held that the defendant’s statement – “I want to rape you” – warranted a cautionary instruction since the evidence directly related to the specific intent element of the charged offense of attempted rape. (*Id.* at pp. 392-393.) Plainly, the identical result is proper here since the alleged statements were offered as proof of appellant’s intent to kill and premeditation.

Should there be any doubt on this score, one need only examine the prosecutor’s closing argument where she repeatedly cited appellant’s statements as proof of the mental state elements. (2 RT 491-492, 503, 531, 540.) On this record, No. 358 was a required instruction. (*Carpenter*, *supra*, 15 Cal.4th at pp. 392-393.)

II.

THE OMISSION TO GIVE CALCRIM NO. 358 CONSTITUTES REVERSIBLE ERROR.

The failure to give CALCRIM No. 358 constitutes state law error. The governing test is whether there is a reasonable probability that the jury would have reached a different result absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Under this test, a reasonable probability “does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]” (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, *emphasis in original*.) Or, stated otherwise, prejudice must

be found when a reviewing court lacks “confidence” that the result would have been the same absent the error. (*Ibid.*)

For purposes of clarity, appellant will separately analyze the question of prejudice as it relates to the attempted murder and Penal Code section 422 convictions. As will be amply shown, all of appellant’s convictions must be reversed.

A. The Attempted Murder Conviction Must Be Reversed.

The primary contested issue at trial was whether appellant maintained the specific intent to kill. Insofar as the undisputed evidence showed that an assailant other than appellant stabbed Mr. Morales, the People bore the difficult burden of circumstantially showing that: (1) appellant was aware that the assailant had a knife; and (2) appellant intended that the assailant would kill Mr. Morales. Without doubt, appellant’s alleged statements at the scene constituted critical evidence on these issues.

The relevant statements were: (1) Ms. Pineda’s account that appellant told Mr. Morales that she “was going to kill him” (1 RT 243); (2) Mr. Morales’ testimony that appellant promised to kill him in the future if he did not die this time (1 RT 55); and (3) Officer Hernandez’s report that Ms. Rosales told him that appellant said “die, die, die” to Mr. Morales (2 RT 315). Significantly, the testimony regarding these purported statements was less than consistent.

To start, Ms. Rosales was the only witness who heard the comment that appellant intended to kill Mr. Morales. According to Ms. Rosales, the statement was made after the women had knocked Mr. Morales to the ground and before the male assailants came forward. (1 RT 243.) Obviously, there is a reason to doubt that the comment was made since Mr. Morales did not report it. Indeed, Mr. Morales denied that appellant said anything when the women were beating him. (1 RT 46-47.)

Mr. Morales did testify that appellant told him that “if [he] did not die this time, that [he] surely would the next time and that she was going to finish off [his] whole family.” (1 RT 55.) Significantly, Ms. Rosales remembered the statement differently. Ms. Rosales recalled the statement as being “if you don’t die from this one, you’ll die next time around.” (1 RT 155.) Moreover, although Mr. Morales testified that the statement was made as appellant was leaving, Ms. Rosales recalled that the statement was made as appellant lifted Mr. Morales’ shirt to examine his wounds. (1 RT 55, 155.)

With regard to appellant’s supposed comment of “die, die, die,” the People’s showing was less than persuasive. Ms. Rosales did not recall the statement at trial. (1 RT 160, 183.) Instead, the People introduced Ms. Rosales’ extrajudicial statement to Officer Hernandez that she had heard such a statement. (2 RT 315.)

The foregoing resume of the record reveals that there were stark conflicts in the People's evidence regarding appellant's alleged statements. On this record, reversal is required.

People v. Ford, supra, 60 Cal.2d 772 is on point. In *Ford*, the defendant was charged *inter alia* with first degree murder for shooting a deputy sheriff. The shooting occurred during the course of a lengthy criminal episode where the defendant kidnapped a man and woman and then spent many hours riding around with them in a car. During the course of the day, the defendant made several comments regarding the police in general and the deputy sheriff that he later killed. This court found that the omission to give a cautionary instruction was prejudicial with regard to the murder conviction.

“These statements bore directly on the issue of defendant's capacity to deliberate and premeditate sufficiently to commit first degree murder. They constituted a substantial part of the evidence offered to establish the prosecution's theory that the shooting of Stahl was deliberate and premeditated because defendant had formed an intent to kill any police officer who might interfere with his plans. *Yet each such statement was reported by hostile witnesses whose testimony showed a number of obvious conflicts and apparent inconsistencies.*” (*Ford*, supra, 60 Cal.2d at pp. 799-800, emphasis added.)

The case at bar is closely parallel to *Ford*. Here, as in *Ford*, the defendant's oral statements were critical to the People's showing regarding attempted murder. In addition, all of the statements were reported by “hostile”

witnesses who were inconsistent in their accounts about the statements. *Ford* requires reversal.

A review of the prosecutor's closing argument shows to a certainty that the error was prejudicial. The prosecutor started her summation as follows:

“Die, die, die. If you don't die this time, you will certainly next time. I'm going to kill you. I'm going to kill your whole family one by one.’

“That's what the defendant said in the early morning hours of September 5, 2009. That's what the defendant meant and that's what she went there with her son and his gang member friends to do.” (2 RT 491.)

Subsequently, the prosecutor cited the “die, die, die” comment three additional times. (2 RT 503, 531, 540.) As practically the final words of her rebuttal argument, the prosecutor told the jury that appellant had set up the incident to watch Mr. Morales “be stabbed and then to dance around him in glee when it was over telling him ‘die, die, die.’” (2 RT 540.)

The prosecutor's exploitation of appellant's statements clearly reveals the harm flowing from the omission to give No. 358. As in *Ford*, the evidence was “‘vitally important’” and its likely effect on the jury cannot be ignored. (*Ford*, supra, 60 Cal.2d 772, 800; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 444 [the best way to understand the likely impact of evidence is “by taking the word of the prosecutor” as expressed during closing argument]; *People v. Cruz* (1964) 61 Cal.2d 861, 868 [when the prosecutor emphasizes

evidence during closing argument, there is no reason why a reviewing court should treat evidence “as any less ‘crucial’ than the prosecutor – and so presumably the jury – treated it.”].)

Another aspect of the prosecutor’s closing argument establishes the prejudice flowing from the instructional error. In a moment of candor, the prosecutor admitted that the witnesses’ accounts regarding appellant’s statements were in some disarray.

“Now, there has been some inconsistencies in the evidence with respect to exactly what the threat was. All three victims of those threats Mr. Morales, Ms. Pineda and Ms. Rosales, they were each threatened and they all remember the threats a little bit differently.” (2 RT 492.)

Given the prosecutor’s concession, the absence of No. 358 was plainly prejudicial. Insofar as the prosecutor admitted the existence of “inconsistencies,” it is reasonable to conclude that the jury would have been inclined to disregard the statements if they had been told to view them with caution.

In their attempt to preserve the attempted murder conviction, the People make essentially two claims: (1) the jury was otherwise properly instructed with the standard CALCRIM instructions on how to evaluate evidence; and (2) the witness accounts about appellant’s statements were consistent. (RBOM 19-21.) These contentions are meritless.

Presumably, all of the standard instructions cited by the People were also given in *Ford*. Yet, this court found reversible error since the jury was not instructed on the vital principle that evidence of the defendant's oral statements was to be viewed with caution. (*Ford*, supra, 60 Cal.2d at pp. 799-800.) The same result is proper here.

The People contend that prejudice is absent given "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." (RBOM 20-21.) The People also claim that the "witnesses' accounts were corroborated by Cesar Hernandez and Alvaro Hernandez." (RBOM 21.) Several responses are in order.

First, it is true that Mr. Morales, Ms. Rosales and Mr. Pineda all offered versions of appellant's supposed statement that Mr. Morales would die the next time. (1 RT 55, 155, 242.) However, there were differences between Mr. Morales' account and that of the other two witnesses. For example, Mr. Morales' version added the statement that appellant threatened to "finish" his whole family. (1 RT 55.) Neither of the other witnesses recalled this statement. Similarly, Mr. Morales' account used the word "surely" whereas the other two did not. (1 RT 55, 155, 242.)

Second, contrary to the People's claim, Cesar and Alvaro Hernandez did not corroborate the testimony of the other two witnesses. Neither witness testified regarding the supposed statement that Mr. Morales would die next time if he did not die this time.

Third, the People have entirely ignored the prosecutor's closing argument. As was discussed above, the prosecutor placed heavy reliance on the alleged "die, die, die" statement. (2 RT 491, 503, 531, 540.) However, Ms. Rosales denied that she had heard such a comment. (1 RT 159-160.) The statement only came into evidence when Officer Hernandez reported that Ms. Rosales had mentioned it during an interview. (2 RT 315.) Obviously, there is a grave question as to whether the statement was made.

The People cite *People v. Dickey* (2005) 35 Cal.4th 884 for the proposition that prejudice should not be found when "there is no conflict in the evidence about the exact words used, their meaning, or whether the words were repeated accurately" (RBOM 19.) *Dickey* also says that affirmance is warranted when there is no "conflict in the evidence, but simply a denial by the defendant that he made the statements attributed to him" (*Id.* at p. 906; accord, *People v. McKinnon* (2011) 52 Cal.4th 610, 680.) Two comments are in order.

First, it is not at all clear why the omission to give No. 358 would necessarily be harmless if the defendant “simply denies that he made the statements. [Citation].” (*McKinnon*, supra, 52 Cal.4th 610, 680.) As was discussed above, a cautionary instruction is required since “unscrupulous witnesses” might “commit open perjury” in recounting oral statements. (*People v. Bemis*, supra, 33 Cal.2d 395, 399.) Since an “unscrupulous” witness might fabricate a statement that was never made, a defendant is in a highly disadvantaged situation if his only retort is that the statement is a sheer fabrication. In this posture, the omission to give the cautionary instruction is *highly* prejudicial since the jury is unable to fairly determine whether the supposed statement constitutes believable evidence.

Second, although *Dickey* and *McKinnon* seem to state the unqualified principle that prejudice cannot be found when there is a mere denial by the defendant that the statement was made, a careful reading of the cases yields the conclusion that the rule is actually far more nuanced. The analysis starts with *People v. Bunyard*, supra, 45 Cal.3d 1189 on which *Dickey* relied. (*Dickey*, supra, 35 Cal.4th at p. 906.)

In *Bunyard*, two People’s witnesses (Johnson and Popham) testified that the defendant had solicited them to murder his wife. The defendant testified and denied that he made the statements in question. The error in failing to give

a cautionary instruction was deemed harmless since the jury was instructed to treat accomplice testimony with caution and to consider Johnson's prior felony conviction as it bore on his credibility. (*Bunyard*, supra, 45 Cal.3d at pp. 1224-1225.) Thus, *Bunyard* may be fairly understood as holding that other instructions implicitly required the jury to treat defendant's oral statements with caution.

Dickey provides similar reasoning. There, two People's witnesses (Buchanan and Goldman) testified to statements made by the defendant. The jury learned that both witnesses were drug addicts and that a \$5000 reward was available for information about the case. (*Dickey*, supra, 35 Cal.4th at p. 907, fn. 8.) The jury also knew that Buchanan had a motive to seek revenge against the defendant and Goldman had initially lied to the police. (*Ibid.*) Insofar as the jury was instructed on the factors that might be considered in resolving the credibility of witnesses, this court found that the omission to give the cautionary instruction was harmless error. (*Id.* at pp. 906-907.)

People v. McKinnon, supra, 52 Cal.4th 610 is a close copy of *Bunyard*. There, Mr. Black, Mr. Hunt and Ms. Hawkins testified to incriminating statements made by the defendant. Mr. Black was an in-custody informant and the jury was instructed to treat his testimony "with caution and close scrutiny." (*Id.* at p. 680, fn. 44.) In light of this instruction and others, it was held that the

failure to give a cautionary instruction regarding defendant's statements was harmless since "the instructions given sufficiently alerted the jury to view the testimony of Hawkins, Hunt, and Black with caution." (*Id.* at p. 680.)

The case at bar is substantially different from *Dickey*, *Bunyard* and *McKinnon*. Here, the jury was not given *any* cautionary instruction about the People's witnesses. In addition, the jury was not provided any significant impeachment evidence about the witnesses. As a result, the omission to give No. 358 was prejudicial since the jury was not provided the essential guidance that it was to treat appellant's oral statements with caution.

People v. Bemis, supra 33 Cal.2d 395 appears to be the case was closely on point. In *Bemis*, a police officer testified that the defendant gave a detailed statement in which he admitted that he had committed a burglary by using a screwdriver. The defendant also admitted that he had been in the company of the co-defendant immediately before the burglary. For his part, the defendant testified and denied the entirety of the police version except for the fact that he was acquainted with the co-defendant. On this record, this court found reversible error since the jury was not given adequate guidance in performing "the difficult task of deciding which version was correct." (*Id.* at p. 401.)

There was a substantial question in this case as to whether appellant uttered certain of the statements specified by the People's witnesses. Per *Bemis*, the failure to give a cautionary instruction prejudiced appellant.

The bottom line is a simple one. Absent exploitation of appellant's oral statements, the People could not have established that she intended to kill Mr. Morales. The conviction for attempted murder must be reversed.

B. The Penal Code Section 422 Convictions Must Be Reversed.

Appellant will not repeat the analysis set forth above. However, there are two additional points which are applicable solely to the Penal Code section 422 convictions.

First, the defense vigorously contended that appellant had not issued any post-assault threats to Mr. Morales, Ms. Rosales and Ms. Pineda since appellant could not be heard on the 911 audiotape. (2 RT 521, 529.) This argument had a firm factual basis since Ms. Rosales testified that appellant was yelling loudly as she made her 911 call. (1 RT 191.)^{3/}

^{3/}The audiotape was entered into evidence as People's Exhibit 2 and was played for the jury. (1 RT 164, 2 RT 470.) Screaming can be heard on the tape. During her closing argument, the prosecutor conceded that appellant's statements did not appear on the tape. (2 RT 536.) According to the prosecutor, this fact was explainable by the common experience that "a lot of times you don't hear everything on a cell phone." (2 RT 536.)

Second, the record shows that the jury was seriously considering the defense position. While it was deliberating, the jury sent a note in which it requested a rereading of testimony that bore on the threats allegedly made to Ms. Rosales.

“We would like clarification from transcripts on the statements/threats Dora made toward Marta during Eduardo & Marta’s testimony.” (2 CT 348.)

In response to the request, the court directed the court reporter to reread those portions of the testimony of Mr. Morales and Ms. Rosales where threats made to Ms. Rosales were mentioned. (2 RT 552-553, 2 CT 353.)

As is well settled, a jury’s request for a rereading of testimony provides objective evidence that the case was close. (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [“[j]uror questions and requests to have testimony reread are indications the deliberations were close. [Citations.]”].) Here, the record shows that the jury was concerned that at least part of the evidence regarding appellant’s statements was questionable. If the jury had been instructed with No. 358, it is reasonably probable that a different result would have obtained as to the Penal Code section 422 convictions.

CONCLUSION

For the reasons expressed above, this court should reverse the entire judgment.

Dated: April 19, 2013

Respectfully submitted,



DALLAS SACHER
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CERTIFICATE OF COUNSEL

I certify that this brief contains 8549 words.

Dated: April 19, 2013



DALLAS SACHER
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PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 100 N. Winchester Blvd., Suite 310, Santa Clara, California 95050. On the date shown below, I served the within **APPELLANT'S ANSWER BRIEF ON THE MERITS** to the following parties hereinafter named by:

X **BY ELECTRONIC TRANSMISSION** - I transmitted a PDF version of this document by electronic mail to the party(s) identified on the attached service list using the e-mail address(es) indicated.

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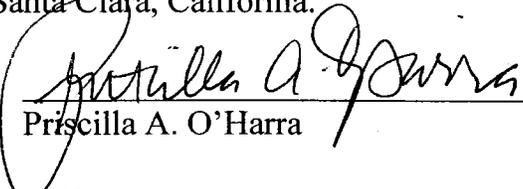
X **BY MAIL** - Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct. Executed this 22nd day of April, 2013, at Santa Clara, California.


Priscilla A. O'Harra