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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.**	Case No. S205145

SUPREME COURT
FILED

JUN 11 2013

Frank A. McGuire Clerk

Deputy

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

REPLY BRIEF

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ARGUMENT

I. THE TRIAL COURT HAD NO SUA SPONTE DUTY TO INSTRUCT WITH CALCRIM NO. 358

Defendant's extrajudicial, oral statements constituted the charged acts of making criminal threats under Penal Code section 422.

As argued in respondent's brief on the merits, it is both redundant and confusing to instruct a jury to view corpus statements "with caution" pursuant to CALCRIM No. 358. In such circumstances, the instruction should not be given.

Appellant argues her threatening statements were used as evidence supporting another crime: the attempted murder of Eduardo Morales. Appellant contends that because her statements were evidence of that additional charge, the trial court erred in not instructing the jury to view the statements with caution. This argument is beyond the scope of the question on which review was granted. Moreover, the argument is mistaken.

Whether a statement-crime (such as a criminal threat) is charged alone or is joined for trial with another crime, imposing on the trial court the duty of giving CALCRIM No. 358 sua sponte poses an unacceptable risk of confusing the jury. Indeed, the potential confusion that might arise in the context of a sua sponte duty (meaning that the instruction must be given even over the objection of the defendant) creates a situation that the defendant might well claim as error in the event the jury convicts on the statement-crime.

With respect to a jury trial involving only a charged statement-crime, CALCRIM No. 358 should not be given. And when a statement-crime is joined with another charge on which the prosecution relies on extrajudicial statements of the defendant, CALCRIM No. 358 should only be given at the defendant's request. In this situation, the instruction should also be tailored to apply exclusively to nonstatement-crimes. In this manner, the

defendant may elect to receive the benefit—or, if she chooses, avoid any undesirable effects—of the instruction's "consider with caution" language. At the same time, the cautionary instruction would not apply to charged statement-crimes, thereby eliminating confusion and avoiding any potential for the defendant to complain of the interplay between the constitutional burden of proof and the language of CALCRIM No. 358.

A. When the Defendant's Statements Constitute the Charged Crimes, Other Instructions Obviate the Sua Sponte Duty to Instruct with CALCRIM No. 358

CALCRIM No. 358 instructs the jury to "consider with caution" a witness's account of the defendant's inculpatory statement. This Court has consistently held the instruction and its CALJIC predecessors are intended "to help the jury to determine whether the statement attributed to the defendant was in fact made." (*People v. Dickey* (2005) 35 Cal.4th 884, 905, quoting *People v. Pensinger* (1991) 52 Cal.3d 1210, 1268; see also *People v. D'Arcy* (2010) 48 Cal.4th 257, 307 [same]; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200 [same]; *People v. Beagle* (1972) 6 Cal.3d 441, 456 ["[t]he purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made"], overruled on other grounds as recognized by *People v. Castro* (1985) 38 Cal.3d 301, 307-313.) In other words, to ensure a defendant's statement "was in fact made," the instruction admonishes the jury to apply an extra level of scrutiny to accounts of those statements. This concern for factual certainty is highlighted by language of the instruction itself, which only requires caution when the statements were not "written or otherwise recorded." (CALCRIM No. 358.)

However, when the defendant's statements are the charged crimes (such as the criminal threats at issue here), the extra level of scrutiny provided by CALCRIM No. 358 is obviated—indeed, as a federal

constitutional matter, it is superseded—by the instructions concerning the state's burden of proof, and by the instructions regarding witness credibility. Thus, when the defendant's statement is the charged crime, CALCRIM No. 358 is redundant. (See *People v. Bolden* (2002) 29 Cal.4th 515, 556-550 [trial court not required to give instructions that are redundant or included in other instructions].)

In that situation, the jury is required to decide the existence of the defendant's statement in light of the People's burden to prove the charge beyond a reasonable doubt. Reasonable doubt embodies "the highest standard of factual certainty" provided a criminal defendant. (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1022.) Application of this standard guarantees—in a manner CALCRIM No. 358's general admonitory "consider with caution" language cannot—that, as required by federal due process, the jury will decide whether the defendant's out-of-court statements constituting the charged crime were "in fact made." (See *Dickey*, *supra*, 35 Cal.4th at p. 905.)

But the redundancy of the cautionary instruction is the least of its vices when a statement-crime is charged. The instruction could potentially confuse the jury by implying that either (1) if the charged act is believed to exist after the jury uses "caution," the People have met their burden of proof, or (2) proof beyond a reasonable doubt is satisfied by less cautious scrutiny of evidence of a nonstatement-crime than evidence of a statement-crime. In claiming that the trial court has a sua sponte duty to give CALCRIM No. 358 when an extrajudicial statement constitutes the charge crime, appellant overlooks these problems.

Appellant contends "there are certain types of evidence that warrant caution due to their very nature," for the reason that "jurors are not particularly knowledgeable about the real world deficiencies of some forms of evidence." (ABM 23.) The implication of appellant's argument is that

the instruction alerts jurors to such deficiencies in a way the reasonable doubt standard and witness credibility instructions do not. First, this Court has never suggested the instruction requires the jury to do more than consider evidence of a defendant's statements with caution.[1] (See *D'Arcy*, *supra*, 48 Cal.4th at p. 307 [instruction intended to ensure jury believes statement "was in fact made"].) Caution by the jury is guaranteed when the statement at issue is measured against the reasonable doubt standard.

Second, independent of CALCRIM No. 358, jurors, in fact, do recognize the importance of a defendant's out-of-court statements. The instruction "states a mere commonplace within the general knowledge of jurors." (*People v. Wardrip* (1903) 141 Cal. 229, 232 [discussing predecessor to CALCRIM No. 358], overruled on other grounds in *People v. Dail* (1943) 22 Cal.2d 643, 656.) "'It is a matter of common knowledge that the statements of a witness to the verbal admissions of another are liable to be erroneous, and for that reason should be received with caution." (*Ibid.*, citation omitted.) CALCRIM No. 358 directs the jury to apply particular scrutiny to certain evidence, but it does not introduce a previously-unknown element of suspicion into the jury's deliberations.

Third, and most importantly, appellant is mistaken when he argues CALCRIM No. 358 complements the reasonable doubt standard for a statement-crime. He asserts that the instruction permits a juror to "consider the witness'[s] motive to lie and other factors such as the witness'[s] opportunity to hear the statement and the amount of time that had passed since the statement was supposedly made," before proceeding to a

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[1] The People acknowledge CALCRIM No. 358 reflects in part a concern that testimony regarding a defendant's admissions is "subject to error and abuse" by "unscrupulous witnesses." (*People v. Bemis* (1949) 33 Cal.2d 395, 399.) However, the instruction addresses this concern by asking the jury to view the testimony with caution, nothing more.

consideration of the defendant's guilt. (ABM 24.) These considerations (and any implied sequence of decisionmaking during deliberations) are merely imputed to CALCRIM No. 358 by appellant; they are not contained in the text of the instruction itself. Moreover, the standard instruction on witness testimony already directs jurors to these factors. (CALCRIM No. 226 ["Among the factors you may consider are: [¶] How well was the witness able to remember and describe what happened? [¶] Was the witness's testimony influenced by a factor such as bias or prejudice"].)

In sum, when the defendant's statement is itself a crime, the "consider with caution" aspect of CALCRIM No. 358 adds nothing to the jury's deliberations. On the other hand, it potentially can confuse jurors, by implying that viewing a statement with caution can support conviction for a statement-crime. The instruction also can imply that proof beyond a reasonable doubt can be satisfied by viewing a nonstatement-crime with "caution," even when the same standard does not apply to a statement-crime. No instruction untangles that knot.

Appellant's analogies to other cautionary instructions are unpersuasive. She maintains "it has never been suggested 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." (ABM 23.) By extension, appellant argues, the reasonable doubt instruction cannot compensate for a failure to give CALCRIM No. 358. (ABM 23-24.) However, accomplice and in-custody informant testimony is offered to *support* charged crimes. The statements are not the *crimes themselves*, subject to proof beyond a reasonable doubt.

Appellant's citations to *People v. Carpenter* (1997) 15 Cal.4th 312, and *People v. Bunyard* (1988) 45 Cal.3d 1189, are inapposite. (See ABM 19-20.) The People already explained the manner in which the court below, and now appellant, misinterpreted *Carpenter*. (OBM 12-14.)

Bunyard, in turn, addressed the trial court's failure to instruct with CALJIC Nos. 2.71 and 2.71.1, the predecessors to CALCRIM No. 358. (43 Cal.3d at p. 1224.) In *Bunyard*, a capital murder case, the defendant paid another man to kill the defendant's wife. (*Id.* at pp. 1200-1201.) On appeal, the defendant contended the trial court erred when it did not sua sponte instruct that his solicitations to commit the murder were "oral admissions and statements" that should be viewed with caution. (*Id.* at p. 1224.) This Court held it was harmless error not to give the instructions. (*Ibid.*)

Appellant argues that insofar as *Bunyard*'s statements "were the actus reus of his role in the murder," *Bunyard* requires a trial court to give a cautionary instruction "when an oral statement qualifies as an element of the offense." (ABM 19.) This reasoning is flawed on two related levels. First, *Bunyard*'s statements were not in fact the actus reus of the murder (the actus reus, of course, was the killing), nor were the statements crimes in themselves. Instead, they provided support for the prosecution's theory the defendant harbored the requisite intent for murder by showing he directed someone else to commit the killings. (See *Bunyard*, *supra*, 45 Cal.3d at p. 1206 [defendant's solicitations "highly probative of defendant's intent to kill his wife and plan for so doing"].) This distinction is critical because, as already discussed, the fact the statements merely served as supporting evidence meant their veracity did not have to be established beyond a reasonable doubt. Unlike here, there was no assurance the jury would view the statements with particular caution.

Second, the instructions in question concerned a defendant's out-of-court "admissions." (*Bunyard*, *supra*, at p. 1224 [discussion limited to "admissions"].) Pursuant to the instructions, an admission was "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." (CALJIC No. 2.71, emphasis added.) Therefore, *Bunyard* and other CALJIC-era cases relied on by appellant are limited to situations in which the statements "tend[ed] to prove" the defendant's guilt. (See also Use Note to CALJIC No. 2.71 [instruction applied only to admissions, not confessions].) They do not inform the situation here, where the statements themselves are the crime.

Significantly, the relevant portion of CALCRIM No. 358 also only applies to statements "tending to show [the defendant's] guilt." (CALCRIM No. 358.) Although the language of CALCRIM No. 358 is broader than that of CALJIC No. 2.71, it nonetheless echoes CALJIC No. 2.71's exclusive focus on admissions. (CALJIC No. 2.71.) The instruction's limited application implies that, as with the preceding CALJIC instructions, CALCRIM No. 358 should not be given outside the context of statements that support, rather than constitute, the charged crimes.

B. When a Defendant Is Charged with Both Statement-Crimes and Other Crimes, CALCRIM No. 358 Should Only Be Given on Request

Appellant and her cohorts beat and stabbed Eduardo Morales. As Eduardo lay on the ground afterward, appellant made several threatening statements. Among these were appellant's statements that she "was going to kill him," that if he did not "die this time, [he] surely would next time[,]" and "die, die, die." (1 RT 55, 243; 2 RT 315.) These statements, among others, were offered as evidence appellant committed the crime of making criminal threats. They were also evidence appellant intended to kill Eduardo, as required to prove her mental state for the attempted premeditated murder charge.

Appellant argues that the trial court had a sua sponte duty to instruct these statements should be considered with caution, because they supported

the attempted murder count. (ABM 26-27.) As an initial matter, this argument is beyond the scope of review ordered by this Court. The Court's order limits briefing to the issue of appellant's statements "when the statements constituted the criminal act[,]" i.e., the criminal threats charges. (See Cal. Rules of Court, rule 8.516.) This does not fairly encompass an issue of the cautionary instruction's application to charges on which the statements do not constitute the criminal act, such as the attempted murder.

Regardless, even though the statements were relevant to the intent required for the premeditated attempted murder charge, there was no sua sponte duty to instruct with CALCRIM No. 358. Such a duty should be evaluated in the context of appellant's argument that because she was also charged with making statement-crimes, the trial court had to simultaneously instruct the jury (1) to decide beyond a reasonable doubt whether she uttered the threatening statements, and (2) "consider with caution any statement made by [the] defendant" and "decide how much importance to give the statement[s]" per CALCRIM No. 358.

As previously discussed, when given at the same time, these instructions are confusing and potentially misleading. (OMB 15-18; *ante*, pp. 2-5; see also *People v. Zichko* (2004) 118 Cal.App.4th 1055, 1060.) The danger is that CALCRIM No. 358 could confuse the jury and potentially alter its perception of the burden of proof as applied to statements that are charged as a criminal threat and that are, independently, offered as evidence of intent with respect to another crime like the attempted murder charge. Although the cautionary instruction conceivably might have benefitted appellant with regards to the attempted murder count, it could also create confusion on the criminal threats charges and raise a question in the jury's mind whether the constitutional burden of proof. The potential exists for serious claims of instructional error by the defendant if the cautionary instruction is given in such cases.

A tension thus exists between the confusion engendered when CALCRIM No. 358 is applied to statement-crimes, and the need for a cautionary statement vis-à-vis other crimes. Ultimately, the need to ensure the defendant receives the full protection of the constitutionally mandated reasonable doubt instruction trumps the state law cautionary instruction. The importance of avoiding confusion as to the reasonable doubt standard for a statement-crime overrides any sua sponte obligation by the court to give CALCRIM No. 358.

To resolve this tension, when both statement and nonstatement-crimes are charged, a court should only provide the cautionary instruction upon request. And this instruction should consist of a tailored version of CALCRIM No. 358 applying solely to the nonstatement-crimes. This approach permits the defendant to decide whether she is more advantaged by the instruction's cautionary aspect, or disadvantaged by its potential to confuse the jury. At the same time, it relieves the trial court of a sua sponte duty to provide an ambiguous instruction. (See *People v. Dunkle* (2005) 26 Cal.4th 861, 898 [in light of ambiguous effect instruction could have at competency phase of trial, predecessor to CALCRIM No. 358 only required on defense request], overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Livaditis* (1992) 2 Cal.4th 759, 782-784 [same, at penalty phase of capital trial].) In the instant matter, the trial court had no sua sponte duty to instruct with CALCRIM No. 358.

II. ANY ERROR IN OMITTING CALCRIM NO. 358 WAS HARMLESS

In the event the trial court had a sua sponte duty to instruct with CALCRIM No. 358, the Court of Appeal properly held the failure to do so was harmless. (Typed opn. pp. 36-37; see also OBM 18-21.) It is not reasonably probable that had the court provided the instruction, appellant

would have received a more favorable verdict. (*Dickey*, *supra*, 35 Cal.4th at p. 905 [applying "reasonably probable" standard of prejudice].)

If the court had a sua sponte duty to instruct with CALCRIM No. 358 regarding the attempted murder charge, the error was not prejudicial. For reasons already discussed, the court had no duty to provide CALCRIM No. 358 concerning *the criminal threats charges*. And, because the jury convicted appellant of making criminal threats, it necessarily found beyond a reasonable doubt she uttered the threatening statements. In light of this finding (made independently of the attempted murder charge), failing to direct the jury to view the statements with caution vis-à-vis the attempted murder was not prejudicial.

Likewise, even if the court had a duty to provide the cautionary instruction for both the murder *and* the threats charges, there was no prejudice. As already discussed, with regards to the threats allegations, the reasonable doubt and witness testimony instructions fully instructed the jury on the principles articulated in CALCRIM No. 358, rendering any omission harmless. Thus, even were the court required to have given CALCRIM No. 358, the jury would have found appellant guilty of making criminal threats. In this situation as well, the jury's findings appellant made the criminal threats were not tainted. Again, this rendered harmless any instruction to view the statements with caution when considering the attempted murder charge.

Even assuming the failure to instruct with CALCRIM No. 358 compromised the jury's criminal threats verdicts (such that the jury would not have convicted her of the crimes), the error had no effect on the attempted murder charge. Appellant contends that without evidence of appellant's threats, the prosecution was unable to show appellant possessed the specific intent to kill required to support the conviction for attempted murder. (ABM 28-38; see also *People v. Stone* (2009) 46 Cal.4th 131, 136

[mental state required for attempted murder].) However, independent of her words, appellant's actions demonstrated a specific intent to kill Eduardo.

The assault began in the middle of the night when appellant and two other women broke a window at the victim's house, dragged him outside by his hair, and began to beat him. (1 RT 43-46.) Appellant then backed up, snapped her fingers and whistled, and summoned three more men (1 RT 44, 47.) The beating continued, with six assailants beating one victim "very hard" while he lay on the ground. (1 RT 48.) One of the men repeatedly stabbed Eduardo. (1 RT 49-53.) Both sets of assailants made gang-related statements during the attack. (1 RT 46, 54.)

Appellant apparently instigated the trip to the victim's house and the initial assault. She certainly summoned an additional three assailants to more effectively attack Eduardo. (See *People v. Perez* (1992) 2 Cal.4th 117, 1125 [planning and manner of assault support premeditation].) The violence of the attack and the number of attackers also show an intent to kill. In addition, fatal violence is particularly common in gang-related encounters. (See *People v. Medina* (2009) 46 Cal.4th 913, 923-924.)

Appellant's reliance on *Bemis*, *supra*, 33 Cal.2d 395, and *People v. Ford* (1964) 60 Cal.2d 772 (overruled on other grounds in *People v. Satchell* (1964) 6 Cal.3d 28, 37), is misplaced. (See ABM 30-31.) First, *Bemis* and *Ford* are outliers, and their findings of prejudicial error for failure to give a version of CALCRIM No. 358 are unique in the modern era. (See, e.g., *People v. McKinnon* (2011) 52 Cal.4th 610, 680 [no prejudicial error]; *Dickey*, *supra*, 35 Cal.4th at p. 907; *Slaughter*, *supra*, 27 Cal.4th at p. 1200; *Carpenter*, *supra*, 15 Cal.4th at p. 393; *People v. Stankewitz* (1990) 51 Cal.3d 72, 94; *Beagle*, *supra*, 6 Cal.3d at p. 456.)

In addition, *Bemis* and *Ford* addressed situations not present here. In *Bemis*, the defendant's own testimony directly contradicted witness

accounts of his pretrial statements. (*Bemis*, *supra*, 33 Cal.2d at p. 400.) In light of this conflict, the Court found prejudice because "the jury was faced with the difficult task of deciding which version was correct." (*Id.* at p. 401.) Here, there was no such conflict; the jury was not offered with competing versions of appellant's threats. (See *McKinnon*, *supra*, 52 Cal.4th at p. 680 [no prejudice for failure to instruct when the "defendant simply denied making the statements"]; *Dickey*, *supra*, 35 Cal.4th at pp. 905-906 [failure to give instruction harmless when no conflict about nature of defendant's statements].)

In *Ford*, *supra*, 60 Cal.2d at page 799, the trial court failed to give a prior version of CALCRIM No. 358. This Court found the error was prejudicial, in large part because testimony regarding the defendant's statements "showed a number of obvious conflicts and apparent inconsistencies." (*Id.* at p. 800.) Here, in contrast, the testimony concerning appellant's statements was remarkably consistent, particularly when the witnesses' testimony is viewed in the light of the stress and violence of the event. Three witnesses recounted highly similar accounts of appellant's "if you don't die now, you'll die later" threat. (1 RT 55, 155, 159, 242.) In addition, the remaining testimony concerning appellant's statements was undisputed in the evidence. The concerns that motivated the finding of prejudice in *Ford* are not present here. The Court of Appeal correctly found any error arising from the failure to give CALCRIM No. 358 was harmless.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: June 10, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Reply Brief uses a 13 point Times New Roman font and contains 3,646 words.

Dated: June 10, 2013

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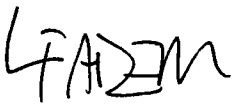

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I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the 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.

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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 June 11, 2013, at San Francisco, California.

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