IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and respondent,

vs.

EDUARDO MIL, JR.,

Defendant and appellant.

No. S182365

Court of Appeal
No. F056605

Superior Court No.
BF116677B

Appeal from a judgment of the Superior Court
of the State of California
for the County of Kern,
Hon. Kenneith C. Twisselman II, Judge

APPELLANT'S PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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APPELLANT'S PETITION FOR REVIEW

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The appellant respectfully petitions for review of a decision of the Court of Appeal, Fifth District, in an opinion filed on June 17, 2010. In this unpublished opinion the Court of Appeal affirmed a criminal judgment entered following a jury trial. A petition for rehearing was denied on July 13, 2010. (Please see the Appendix for opinion and order.)

QUESTIONS PRESENTED

1. Is the failure to instruct on two elements of the special circumstance that the felony-murder was committed during the course of a robbery and burglary susceptible to harmless error analysis and, if so, was that failure harmless beyond a reasonable doubt? Did the Court of Appeal incorrectly use the "substantial evidence rule" in assessing harmless error?
2. Did the trial court commit California hearsay error and federal constitutional error when it admitted testimony of an officer to a

statement of a witness who recalled the officer's having interviewed her and recalled having overheard the absent co-defendant talking on a bus but could not recall the substance of the statements?

3. Did the trial court commit California and federal error when it admitted police testimony to a statement of the separately prosecuted co-defendant who invoked her right against self-incrimination for the trial?

NECESSITY FOR REVIEW

In *People v. Jones* (2003) 30 Cal. 4th 1084, 1117-1120, this court found an error in not instructing that an accomplice had to have an intent to kill for the special circumstance to apply to be harmless beyond a reasonable doubt because the evidence demonstrated Jones had to be the actual killer.

In footnote 5 it noted the crime had preceded the enactment of subdivision (d) of Penal Code section 190.2, which now provides: "Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets . . . the commission of a felony . . . which results in the death of some person or persons" is subject to the death penalty. (*Ibid.*)

Similar "overwhelming evidence" results are often reached in regard to errors having to do with an intent to kill. (E.g., *People v. Bolden* (2002) 29 Cal. 4th 515, 560, and cases cited.) Among those cases are *People v. Flood* (1998) 18 Cal.4th 470, 479-480; *People v. Williams* (1997) 16 Cal.4th 635, 689, *People v. Osband* (1996) 13 Cal.4th 622, 681, and *People v. Johnson* (1993) 6 Cal.4th 1, 45-46, cited by the Court of Appeal at page 19 of its slip opinion.

All of these have in common the omission of instruction on intent to

kill. In *Osband, supra,* at page 681, the opinion pointed out that intent has the meaning of "a purpose or goal," and the method of killing precluded any inference that it was accidental or unintentional. There was no possible goal other than to kill and no facts in the case on which the jurors could have inferred otherwise. (*People v. Osband, supra*, 13 Cal. 4th 622, 681.)

The issues in the current case are quite different, and if possible even more in need of resolution. Specifically, the omissions here were not "intent to kill" but were whether the defendant acted (1) with "reckless indifference to human life" and (2) "as a major participant" in the commission of the underlying felony. The differences include not only the need for an jury to determine recklessness and evaluate the participation but also the fact that there are more than one element.

Neither this court nor the United States Supreme Court, as explained further in argument I and as explained to the Court of Appeal in the Petition for Rehearing, have approved the use of harmless error analysis where multiple elements have been omitted. Such a holding has no stopping place.

Coupled to the substantial evidence rule, it amounts to the appellate court's belief that the prosecution case is sufficient overall, and any reasonable jury would convict, because the prosecution case covered all the elements. The withholding of multiple elements in the present case eviscerated the main special circumstance issues because this case was one tried with the understanding there was no intent to kill and Mr. Mil was not the actual killer but at most an accomplice to a robbery or theft.

The question of whether appellate judgment can substitute for multiple elements not submitted to a jury is one of statewide importance, and it involves policy determinations that this court uniquely can make.

The remaining two issues involve unreasonable applications of

California hearsay statutes and the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

The issues nonetheless have importance because this case illustrates how there is no longer any significant burden of proof for the admission of statements once a witness states she does not remember nor any meaningful foundational limitation on the scope of the statements admitted. (Compare *People v. Sam* (1969) 71 Cal.2d 194; see also *California v. Green* (1970) 399 U.S. 148; cf. *People v. Green* (1971) 3 Cal.3d 981.) (Question 2).

On the matter of the officer who related the absent co-defendant's accusation to him that the idea to rob the victim originated with the appellant, the Court of Appeal noted that Evidence Code section 356 trumped the Confrontation Clause problem (see *Bruton v. United States* (1968 391 U.S. 123; *Douglas v. Alabama* (1965) 380 U.S. 415), but that ultimately it did not need to decide whether the statement was admissible under that section. Instead, it found the error to be non-prejudicial under either *Chapman v. California* (1967) 386 U.S. 18, 24, or *People v. Watson* (1956) 46 Cal.2d 818, 836. This was so because other of the co-defendant's and the defendant's statements showed there was a haphazard plan, the prosecutor's argument relied on the defendant's statements, and the defendant was convicted of felony-murder as an aider and abetter so it did not matter whose plan was involved. Appellant respectfully must disagree in that it was still a use of a co-appellant statement, the prosecutor's argument did not solve errors but merely did not add to them, and whether or not the defendant was an aider and abetter depended on his prior knowledge and intent on which the statement was directly and powerfully inculpatory. (Question 3.)

STATEMENTS OF CASE AND FACTS

The Court of Appeal opinion sets forth a summary of the case and facts in a manner adequate for the purpose of this petition. (Appendix Opinion pages 2-5.) For question 2 (Opinion pp. 5-11), it also fairly summarizes the facts in support of its decision at pages 7-10. For question 3 (Appendix Opinion pages 13-17), its summary at pages 13-14, and footnote 3 on page 16, is also sufficient as a background of the evidence favoring the ruling for purposes of this petition.

As for question 1, the opinion correctly finds at pages 17-18 that the trial court erred in omitting the following requirements for special circumstance determinations:

> "If you find that a defendant was not the actual killer of a human being, [or if you are unable decide . . .,] you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of murder in the first degree, or with reckless indifference to human life and as a major participant [aided etc.] in the commission of the [underlying] crime which resulted in the death of a human being."

The opinion also correctly and fairly observes no other instruction provided this information. (Opinion pages 18-19.) It fairly and correctly notes its agreement with the prosecutor that the evidence did not show harboring or knowledge of premeditation and deliberation or homicidal intent by the co-defendant who was the one who killed. (Opinion page 20, fn. 4.)

The appellant does <u>not</u> agree with the conclusions drawn on pages 22

to 23 or that those conclusions are supported as the only ones the jury reasonably could draw when the question of prejudice is viewed in light of the entire record. Appellant set forth the additional facts in his Petition for Rehearing at pages 6 through 8, and there pointed out at pages 9 through12 that the Court of Appeal was using the "substantial evidence rule" rather than properly assessing prejudice. The matters pointed out in the Petition for Rehearing are those included in the following argument.

ARGUMENT

THE ERROR IN FAILING TO INSTRUCT ON THE TWO ELEMENTS OF THE SPECIAL CIRCUMSTANCES WAS REVIEWED USING THE WRONG STANDARD AND THE ANALYSIS WAS BASED ON A MISAPPLICATION OF THE SUBSTANTIAL EVIDENCE RULE.

A. Error in standard of prejudice.

The opinion correctly perceives the error to be one of federal magnitude as well as of state law. It then goes on incorrectly on two grounds to see if the evidence was such that it overwhelmed all else and "the jury returning the special circumstances finding could have no reasonable doubt the defendant possessed the necessary mental state (see, e.g., *People v. Johnson* (1993) 6 Cal.4th 1, 45-46....)" (Slip opinion p. 19.)

People v. Johnson, supra (*Johnson*) was a case where the element upon which instruction was omitted was the specific intent to kill. Johnson relied on *People v. Odle* (1988) 45 Cal.3d 386, 414-415.) *Odle* concluded a federal harmless error analysis was to be used "in cases involving failure to instruct on an element of a special circumstance. *Odle* reasoned that there is no constitutional right to a jury trial on the issue of a defendant's eligibility for the death penalty, an issue which, but for the mandate of a

state statute, would be a sentencing issue. (45 Cal.3d at pp. 411-412.)" (*Johnson, supra*, at p. 45.) The 1993 *Johnson* case noted this court had repeatedly declined to reexamine its holding in *Odle*. It cited several cases, and for our purposes most tellingly cited "see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1302, and fn. 45, 1313-1314 [18 Cal.Rptr.2d 796, 850 P.2d 1] [acknowledging *Odle*'s distinction between failure to instruct on element of an offense, and failure to instruct on element of a special circumstance allegation].)" (*Johnson, supra.*)

Cummings, however, was not a case in which the trial court failed to instruct on elements of the special circumstances. Rather, at the cited location in the body of the opinion, it was discussing a contention that the evidence was insufficient, and at the cited footnote it referenced *Odle* in that context. The other issue at that location was whether the elements were stated with sufficient clarity, but the court was clear that the proposed "element" (imminent arrest) was not a requirement at all. It was also clear: "The trial court instructed on each element of the special circumstance." (*People v. Cummings, supra*, 4 Cal. 4th 1233, 1300.) The cited footnote was dicta and merely referenced *Odle* as a source of harmless error in the situation where there has been a failure to instruct on an element..

What *Cummings* actually held was that there is "a clear distinction between instructional error that entirely precludes jury consideration of an element of an offense and that which affects only an aspect of an element." It continued that none of its decisions "suggests that a harmless error analysis may be applied to instructional error which withdraws from jury consideration substantially all of the elements of an offense and did not require by other instructions that the jury find the existence of the facts necessary to a conclusion that the omitted element had not been proved."

Finally, despite the fact the appellant had not disputed the existence of the predicate facts and "that the evidence overwhelming established all the elements," thirteen counts were reversed. (*Cummings, supra*, at 1314-1315.)

Odle's discussion was premised on what was then the recent case of *Rose v. Clark* (1986) 478 U.S. 570, which as the dissent pointed out and the majority had to distinguish, was disapproved of in *Yates v. Evatt* (1991) 500 U.S. 391. Times have changed since *Odle*. The basis of *Odle*'s reasoning specifically adopted by *Johnson* was that *Odle* reasoned that there is no constitutional right to a jury trial on the issue of a defendant's eligibility for the death penalty, an issue which, but for the mandate of a state statute, would be a sentencing issue. Of course, that has now been clarified by cases such as *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington* (2004) 542 U.S. 296, such that the Fourteenth, Fifth, and Sixth Amendments preclude such reasoning in the present circumstances.

In the present case it is important to recognize that the error was not a misdescription of an element, it was the omission of multiple elements. In *Sullivan v. Louisiana* (1993) 508 U.S. 275 (misleading instruction on reasonable doubt) the court stated that structural error requires reversal because the error could at best be evaluated for what the jury would do if it were properly instructed.

This court has concluded that "an instructional error that improperly describes or omits an element of an offense, or that raises an improper presumption or directs a finding or a partial verdict upon a particular element, generally is not a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal under the federal Constitution. Indeed, the high court never has held that an erroneous instruction affecting a single element of a crime will amount to structural

error [citation omitted], and the court's most recent decisions suggest that such an error, like the vast majority of other constitutional errors, falls within the broad category of trial error subject to *Chapman* review." (*People v. Flood* (1998) 18 Cal. 4th 470, 502-503, emphasis added.)

The emphasis on the omission of a single element above reflects the *Flood* opinion's caution the case did not "decide whether there may be some instances in which a trial court's instruction removing an issue from the jury's consideration will be the equivalent of failing to submit the entire case to the jury--an error that clearly would be a 'structural' rather than a 'trial' error." (*People v. Flood, supra*, 18 Cal. 4th 470, 503.) In footnote 20, the *Flood* opinion contrasted "*People v. Cummings, supra,* 4 Cal. 4th 1233, 1315 (no instructions on "substantially all" of the elements of an offense)" with the omission of an uncontested element of little relevance. (*People v. Flood, supra*, 18 Cal. 4th 470, 504 fn. 20.)

The United States Supreme Court also restricts application of *Chapman* to cases where there is a single element. (See *Neder v. United States* (1999) 527 U.S. 1, 19-20, and see also *id.* at p. 33, dissenting opinion of Scalia, J., noting the majority opinion does not allow discussion of harmlessness when more than one element has been removed.; see also *Flood, supra*; *Cummings, supra*; *People v. Kobrin* (1995) 11 Cal.4th 416, 429.)

Thus, even if the evidence were "overwhelming", the judgment would still have to be reversed because the error is "structural" involving multiple elements. (*Neder, supra*; *Cummings, supra.*)

B. Error in application standards.

Here, there were two elements missing. The jury was not asked to find if the defendant was a major participant in the robbery, and the jury

was not asked to find if he behaved with reckless indifference to human life. This is not a case where these were uncontested. Cases finding harmless error beyond a reasonable doubt – even when only a single element is omitted – still require that the element not actually be in issue. (*Neder, supra.*) The defendant here did not question his presence, but he did question who actually killed the victim (and it was accepted that he did not) and he questioned just what role he played (the victim startled to find him in the room engaged him in a fight and he fled at the first opportunity) and he questioned whether his actions were done with reckless indifference to human life (he had no intent to kill and did not know the victim was stabbed).

Co-defendant Eyraud said she did the stabbing and the defendant had nothing to do with it. (3RT 333.)

The defendant said he wanted drugs and arranged with Eyraud to have a cigarette signal. When he did not see the cigarette, he knocked on the door and it opened (there was evidence the latch was ineffective). He entered to take Eyraud home. Coe started rising from the chair, and Mil hit him. Both men asked Eyraud what was going on as they fought. Coe managed to get up, and Eyraud got between them. Coe and Mil fell. Mil got up and said to run, and they did.

Before he entered, Eyraud told him she already had gotten the money from Coe (1SCT 141.) She was to have her things and some money, and they would quickly leave. (1SCT 72, 141, 148, Tr. 71, 121.) Mil denied that he ever said they should "jack" or "roll" Coe. (1SCT 144, Tr. 117.) Mil went up to the door and knocked gently, discovering that the door was not fully shut. (1SCT 64, 70.) He pushed it open, and Eyraud said to come inside. When Mil entered, Coe began to rise, and the fight started. (1SCT

70-75.) He thought Eyraud let him inside because she was going to get her bags and things and they were supposed to just leave. (1SCT 68.)

When he entered, Eyraud was on the bed. The man was seated on a couch-like chair, looked at Mil, and asked, "Is this the guy? Is this the mother-fucker [sic]?" (1SCT 64.) Eyraud just looked at them. Coe reached for something and started to get up off the chair. Mil hit him with his hands as they both were yelling to Eyraud asking what was wrong with her, what was going on, and the two of them were fighting. (1SCT 65, 66, 70-75.) Mil told her to tell the man to calm down and leave. She had said to come in and she would get Mil his dope. (1SCT 67.) Mil hit Coe first because Coe was getting up as soon as Mil walked into the room. (1SCT 67.) Mil felt if he held Coe down Eyraud would take advantage of it to leave. (1SCT 95.)

It was roughly an even contest. Coe said, "okay," and Mil got up and ran. Mil did not see Eyraud stab the man. (1SCT 66.) Eyraud appeared to intervene and then went back toward the bed, and by this time Mil was getting up and pushing her out of the way. He had tunnel vision and just wanted her out of the way because he had to get out of there. (1SCT 79, Tr. 52.) He ran. He called to Eyraud to come and saw she was picking up something. (1SCT 75.) He got onto his bike and rode away. (1SCT 75.) He did not see Eyraud with a knife. (1SCT 49.)

What is required to imprison without hope of parole or to execute the defendant is "major participation in the felony committed, combined with reckless indifference to human life." (*Tison v. Arizona* (1987) 481 U.S. 137, 158; Pen. Code § 190.2(d).) "Reckless indifference" means "subjective awareness of the grave risk to human life created by [the particular accused's] participation in the underlying felony." (*People v. Estrada* (1995) 11 Cal. 4th 568, 578; *People v. Proby* (1998) 60 Cal. App. 4th 922, 928.)

The opinion of the Court of Appeal points out that in *Proby* the evidence was sufficient to show *Proby* was a major participant with reckless indifference because he provided the weapons, knew the victim was wounded but went to the safe and took the money. From an earlier robbery he knew the principle actor was prone to violence. Actually, in *Proby*, the evidence was sufficient to support such a finding if the jury made it. That has nothing to do with instruction on the elements.

In any event, here there was no evidence Mil provided the weapon and he denied knowing the victim was wounded and denied that he took any money. He knew Eyraud was a prostitute, and arguably knew that she had stolen goods already and needed aid to carry them away (which would make him an accessory rather than an accomplice); however, he testified these things took place prior to his entry–carrying away from the victim's presence might be robbery but his part in "the felony committed" was not necessarily major participation in the robbery–but this jury had no reason to make that particularly social judgment, it "merely" had a basis for doing so or for reaching the opposite conclusion.

The opinion also notes that in *People v. Bustos* (1994) 23 Cal.App.4th 1747, Bustos was the actual killer, the two criminals had planned the robbery, and after stabbing the victim they fled with the proceeds and left the victim to die. Mr. Mil was agreed not to be the actual killer, and in his statement he denied planning a robbery, and his flight inferentially was without knowledge the victim was or would be stabbed by Eyraud. *Bustos* is inapposite and dealt with sufficiency.

In *People v. Hodgson* (2003) 111 Cal.App.4th 566 the defendant opened a gate to facilitate escape of the fellow gang member who robbed and shot the victim. However, the court found he was the only gang helper

which made his act more notable and essential than if the others of the gang had been present.

Appellant pauses here to note his disagreement with this as a general proposition of law–a person could be of immense help but not be aware of the importance of his act. Also, the claim has no particular relation to there only being two people, for example in *People v. Smith* (2005) 135 Cal. App. 4th 914, 928, the number was expanded to only three people ["The jury could have found beyond a reasonable doubt that Taffolla's contributions were "notable and conspicuous" because he was one of only three . . . ."]. Further, the defendant in *Hodgson* was aware of the fact there would be a robbery and that it would be accomplished by use of a firearm and so was aware of a high risk of danger to human life.

Here, the defendant was not aware of the presence of the knife nor that the victim was mortally wounded or even that he was stabbed at all.

However, the real problem with the approach of the Court of Appeal is that each of these cases involved questions of whether the evidence was sufficient to uphold the finding. That is, they are all applications of the substantial evidence rule.

This led the court below in its opinion to recite the evidence as though it were making a substantial evidence determination. (See slip opinion 22–23.)

This is a grave, if altogether too common, error made by appellate courts in investigating prejudicial error. Of course, the error will not be prejudicial if one looks only to the prosecution's case and assumes its truth. That "substantial evidence" rule is not the proper rule to apply, especially not for federal or state instructional error.

The state test rule is quite the opposite of the Court of Appeal's rule,

no matter what the error was:

> "We have stated at the outset of this opinion that we find substantial error in this record. That being so, it is no longer our obligation to consider the evidence, with all its inferences, in the light most favorable to respondent (i.e., the 'substantial evidence' rule). (*Crawford v. Southern Pac. Co.* (1935) 3 Cal.2d 427, 429 [45 P.2d 183].) On the contrary, where substantial error is found it becomes an appellate court's duty to review the entire record, weighing to some extent conflicting evidence, to determine whether there has been a miscarriage of justice requiring reversal. (*Alarid v. Vanier* (1958) 50 Cal.2d 617, 625 [327 P.2d 897].)"

(*People v. Henry* (1972) 22 Cal.App.3d 951, 955 fn 3.)

> "It must be obvious that when we have found error and test the question of reversibility under the principles just stated we no longer apply the "substantial evidence rule" as a basis to uphold the verdict. A reweighing of all the evidence is our inevitable obligation. (*People v. Watson, supra,* 46 Cal.2d 818, 836; *Aldabe v. Aldabe*, 209 Cal.App.2d 453, 457 [26 Cal.Rptr. 208]; 3 Witkin, *Cal. Procedure* (1954) Appeal §§ 100, p. 2269.) Fulfilling that obligation, we have considered evidence which might be said to favor the defense. . . . . ."

(*People v. Wheelwright* (1968) 262 Cal. App. 2d 63, 71.)

Even the very lenient collateral review test of state questions on federal habeas corpus actions refuses the type of test the opinion here used. For example:

> "The Nevada Supreme Court considered the case as though it were an appeal in which the sufficiency of the evidence for conviction were challenged. The court looked to what evidence supported the conviction apart from the guilty plea erroneously admitted. There is no basis in our law for such a review of constitutional error committed by a state trial court. 'There is a striking difference between appellate review to determine whether an error affected a judgment and the usual appellate review to determine whether there is substantial evidence to support a judgment.' Roger Traynor, The Riddle of Harmless Error, 27 (1970). Review for harmless error

> 'requires the most painstaking examination of the record and the most perceptive reflections as to the probabilities of the effect of error on a reasonable trier of fact.' Id. at 30. This duty of a meticulous review of the record becomes particularly significant in application of the Kotteakos standard. Brecht, --- U.S. at ----, 113 S.Ct. at 1722-25. (Stevens, J., concurring)."

(*Standen v. Whitley* (9th Cir. 1993) 994 F.2d 1417, 1423.)

And *id.* at 1426, Nelson, J., concurring, pointed out:

"[W]hen the Nevada Supreme Court had the chance to correct the error in 1985, it applied the wrong test. There was substantial evidence to support the verdict. Unfortunately, this was not the question which was posed by Standen, but it was the one which that Court answered."

(Accord *Ghent v. Woodford* (9th Cir. 2001) 279 F.3d 1121, 1127; *United States v. Oaxaca* (9th Cir. 2000) 233 F.3d 1154, 1158; *United States v. Harrison* (9th Cir. 1992) 34 F.3d 886, 892; cf. *Chapman v. California, supra,* (1967) 386 U.S. 18, 23 noting the California standard contained a risk of over-emphasis of the notion of "overwhelming evidence.")

In terms of state instructional error, an even stronger rejection of the substantial evidence rule favoring the prosecution applies. Contrasting the situation where the substantial evidence rule applies properly, the inferences to be drawn from improper instruction have been explained by this Court. "[W]ith respect to our review of the issues relating to improper jury instructions and the question of their prejudicial impact [citation omitted], we are not required to make such inferences in plaintiff's favor. To the contrary, we must assume that the jury, had it been given proper instructions, might have drawn different inferences more favorable to [appellant] Michigan Millers and rendered a verdict in its favor on the issues as to which it was misinstructed. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674 [].)" (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 322 [emphasis added].)

Therefore, respectfully, appellant requests review be granted of both

- (A) the standards being used for prejudice from not instructing on multiple elements which are the defining portion of an accomplice's liability for special circumstances

and

- (B) the use of the substantial evidence rule to apply any standard of prejudice.

CONCLUSION

For the foregoing reasons, it is respectfully requested that review of the questions presented by this case be granted.

Date: July 20, 2010.

Respectfully submitted,

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APPENDIX
Opinion of the Court of Appeal
Order denying rehearing

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EDUARDO MIL, JR.,

Defendant and Appellant.

F056605

(Super. Ct. No. BF116677B)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Peter H. Smith and Craig S. Meyers, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a jury trial, Eduardo Mil, Jr. (appellant) was found guilty of first degree murder (Pen. Code, § 187, subd. (a)).[1] The jury found true the special circumstance allegations that the murder was committed during a robbery and burglary (§ 190.2, subd. (a)(17)(A) & (G)). In a bifurcated proceeding, the trial court found true two prior prison term allegations (§ 667.5, subd. (b)). The court sentenced appellant to a prison term of life without the possibility of parole, plus two years for the prison priors.

On appeal, appellant contends the trial court (1) abused its discretion by admitting evidence of a trial witness's prior statements to a police officer and (2) erred when it overruled his objection to a witness's statement. He claims both errors violated the confrontation clause of the Sixth Amendment to the United States Constitution. He also alleges prejudicial instructional error occurred. We disagree and affirm.

FACTS

On October 23, 2006, Rolland Coe rented room No. 11 at a motel in Bakersfield. He parked his van adjacent to the room. That evening, Michael McLane, the part-time motel manager, saw Crystal Eyraud in Coe's room. Eyraud was the stepdaughter of McLane's friend, Carl Cowen, a parolee who stayed at the motel and did odd jobs around the place.

Appellant was Eyraud's boyfriend. Appellant was seen at the motel arguing with Eyraud the day before Coe arrived and the following day and evening. At one point, McLane overheard appellant say to Eyraud, "I'm going to rob the mother fucker."

Between midnight and 2:00 a.m. on October 24, 2006, Cowen saw appellant in front of room No. 5 with a person he introduced as Kevin. Appellant said he was looking for Eyraud, who he thought was with a man in room No. 11. If she was, appellant said, he was going to "beat the hell out of the guy and rob him." Cowen told appellant to leave but, an hour later, he saw appellant (without Kevin) talking to Eyraud.

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[1]The statutory references are to the Penal Code unless otherwise stated.

Another half hour later, Cowen again saw appellant and again told him to leave. Appellant once more threatened to beat and rob "the man in room No. 11." When Cowen demurred, appellant again said that he would beat the man and then he left.

Later, Cowen noticed the lights were on and the door to Coe's room was partially opened. He went to the room next door, where McLane's daughter stayed, and got a golf club. When he returned to Coe's room, the door was completely open and Coe was lying in the doorway. Cowen went to notify McLane and arrived to find him awake.

McLane had been awakened at 5:00 a.m., when he heard the sound of male voices shouting. He was dressing when Cowen arrived. The two went to Coe's room, where they found Coe lying across the doorway. At the time, Coe was still moving. McLane called the police.

Detective Bret Lackey arrived around 5:50 a.m., before sunrise. Coe had already been taken to the hospital, where he later died of multiple stab wounds to the chest. He also had stab wounds to his leg and bruising and abrasions on his face. Inside Coe's room, Lackey saw blood on the bed, the blanket, the carpet, and in the bathroom. A complete, unsmoked cigarette was found lying on top of Coe's van. A knife was found in a trash bin about a block away from the motel.

Sergeant Michael Bonsness interviewed appellant later that evening. The interview was recorded, and the prosecution later played the recording for the jury at trial. Appellant stated that he had known Eyraud for about six months and that she often supplied him with drugs or with money to buy drugs. She was a prostitute. The night of Coe's murder, appellant went to the motel to talk to Eyraud because he wanted drugs. Eyraud said she was going to give the man in room 11 some sleeping pills to knock him out. Then she would "roll" him. She mentioned that a "pregnant girl" was going to help her. She told appellant she would give him drugs if he would steal a car she could use to transport items she planned to take (or already had taken) from the man's room. Appellant refused to steal a car. He just wanted drugs and did not think what he would get would be worth the trouble of stealing a car. He left the motel, but later he came back

and again tried to convince Eyraud to give him money or drugs. Eventually, Eyraud told him to "come back in about an hour or so and I'll have some money for you, just knock on the door." He was used to Eyraud supplying his needs.

Still being recorded, appellant related that he told Eyraud to leave a cigarette on the van outside room 11 if she was in the room and could give him some money. Appellant knew that Eyraud planned to "roll" the man in room 11. He thought the man would be asleep from drugs administered by Eyraud.

When appellant later went to room 11, however, things went awry. First, he failed to see the cigarette that Eyraud had left on the van. Then, when he knocked on the door and Eyraud opened it, he discovered that Coe was awake and belligerent. Coe shouted; Eyraud shouted; appellant hit Coe, thinking Coe was going to hit him. Eyraud shouted to "'Get his wallet!'"

Appellant maintained that he did not stab Coe, did not intend to rob him, intended only to go into the room, get money from Eyraud, and leave. He did not see anyone stab Coe and did not do so himself. He did not even see a knife, though he did know that Eyraud was in the habit of carrying "big old steak knives with her...." As soon as he could, he ran. He took nothing from the room with him. Eyraud "pick[ed] up a couple of things" and also ran.

A few months after the murder, Cowen, who had been arrested for absconding from parole, was on a jail transport bus with appellant and Eyraud. Cowen testified at trial that, while in the bus, seated two seats behind appellant and Eyraud, he overheard appellant tell Eyraud that she should take "the rap" for the murder since she was "retarded" and she would likely get nine to 12 months in an institution. Appellant recounted how he had beaten Coe until he was unconscious and then stabbed him several times. As they exited the bus, Cowen called appellant a "piece of crap." Appellant then appeared to recognize Cowen and said, "I was just trying to help [Eyraud] out." Later in a holding cell, appellant threatened Cowen and told him to "stay out of it" as he had friends "that could take care of" Cowen either in prison or on the streets.

Raquel Rodriquez met Eyraud while they were in the same pretrial pod at the county jail. Rodriquez testified at trial that she also was on the bus with appellant and Eyraud and overheard a conversation. Rodriquez claimed, however, that she did not remember what appellant said to Eyraud during the ride. District attorney investigator Eusebio Garza (also referred to as Chevy Garza) then testified that he had spoken to Rodriquez while she was in custody and that she had told him she heard appellant try to convince Eyraud to "take a plea" since she had some mental issues and would go to a hospital, whereas appellant would get either life in prison or the death penalty. Rodriquez said she had heard appellant tell Eyraud that he had gone crazy because he thought she was having sex with the man so he "stuck him and kept sticking him and couldn't stop." Rodriquez also had overheard appellant threaten to kill Cowen. Garza stated that Rodriquez expressed concern about having to come to court to testify. Garza confirmed that the Kern County Sheriff's Office jail log showed that appellant, Eyraud, Cowen, and Rodriquez were all on the same transport bus on January 17, 2007.

In his defense, appellant introduced evidence of several interviews and conversations Sergeant Bonsness had with Eyraud. In the first interview, at headquarters, Eyraud told Bonsness she stayed with Coe but that appellant was her boyfriend. Then, while in a patrol car, Eyraud confessed that she was the one who stabbed Coe but said that appellant was present. She took the officer to the trash bin where she had thrown the knife. The officer and Eyraud then walked back to the motel, where he had parked the patrol car. Eyraud's mother was at the motel and Eyraud yelled to her, "I did it, I did it," and "I stabbed him, I stabbed him, [appellant] didn't do it."

Back at headquarters, Eyraud told Sergeant Bonsness that appellant was punching Coe when she jumped in to separate them. Coe kicked Eyraud in the stomach. She was pregnant and thought Coe might have hurt her baby. She lost control, grabbed a knife from her bag, and stabbed Coe. Eyraud claimed to have stabbed Coe only once though, in a later interview, she admitted she might have stabbed him more than that. According to Eyraud, it was appellant's idea to steal from Coe.

DISCUSSION

1. Did the trial court abuse its discretion by admitting evidence of Rodriquez's prior statements to Garza?

Appellant contends the trial court abused its discretion when it admitted evidence of Raquel Rodriquez's statement to Investigator Garza under the prior inconsistent statement exception to the hearsay rule (Evid. Code, § 1235). He argues Rodriquez's prior statement was not inconsistent with her trial testimony. We review the trial court's decision to admit that evidence for an abuse of discretion. (*People v. Vieira* (2005) 35 Cal.4th 264, 292.)

Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Evidence Code section 770 provides:

> "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

In *People v. Green* (1971) 3 Cal.3d 981, 988-989, disapproved on another point in *People v. Chavez* (1980) 26 Cal.3d 334, 357, the California Supreme Court held a witness's prior statement was properly admitted as an inconsistent statement, even though the witness testified at trial that he could not remember the event, because the record showed the witness was deliberately evasive at trial. The Supreme Court stated:

> "In normal circumstances, the testimony of a witness that he does not remember an event is not 'inconsistent' with a prior statement by him describing that event. [Citation.] But justice will not be promoted by a ritualistic invocation of this rule of evidence. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness. In contrast to [*People v.*] *Sam* [(1969) 71 Cal.2d 194], in which the witness has no recollection whatever of the prior incident, here [the witness] admittedly remembered the events both leading up to and

> following the crucial moment when the marijuana came into his possession, and as to that moment his testimony was equivocal. For the reasons stated above, we conclude that [the witness]'s deliberate evasion of the latter point in his trial testimony must be deemed to constitute an implied denial that defendant did in fact furnish him with the marijuana as charged. His testimony was thus materially inconsistent with his preliminary hearing testimony and his extrajudicial declaration to [a law enforcement officer], in both of which he specifically named defendant as his supplier. Accordingly, the two prior statements of this witness were properly admitted pursuant to Evidence Code section 1235." (*People v. Green*, *supra*, 3 Cal.3d at pp. 988-989, fn. omitted.)

More recently, in *People v. Ledesma* (2006) 39 Cal.4th 641, 710-711, the court rejected the defendant's challenge to the admission of a witness's prior statements as inconsistent statements where the witness testified at trial that she could not remember what the defendant had told her, what she had stated to the police, or what her prior testimony was in the case. The court stated:

> "'[W]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" statements are evasive and untruthful, admission of his or her prior statements is proper. [Citation.]' [Citation.] The requisite finding is implied from the trial court's ruling. [Citation.]" (*Id.* at p. 711.)

In the case before it, the court reasoned,

> "[a]lthough [the witness] consistently denied at trial being able to remember anything that defendant had told her, what she had told the police, or her prior testimony, the record provides a reasonable basis to conclude she was being evasive. [Citation.] She had been a friend of defendant's and admitted she was reluctant to testify and had failed to appear at a previous hearing. She claimed that even reading her prior testimony in full and listening to a tape recording of her police interview did not refresh her recollection." (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 712.)

In this case, Rodriquez testified at trial that she met Eyraud in jail and that she remembered being with her and some other individuals on a bus where she overheard a conversation. Rodriquez was sitting "in a little cage" with Eyraud, and the other person was, she thought, "a couple of cages over." Rodriquez remembered Eyraud talking with

someone, but she did not know his name. When asked if she saw that individual in the courtroom, she referred to appellant and said, "He looks a little different. I don't know if it's the same person" but it "might be him."

The following then occurred between the prosecutor and Rodriquez:

"Q. Okay. Did you hear him having a conversation with [Eyraud]?

"A. Yeah.

"Q. And do you recall what sort of things they were talking about?

"A. No.

"Q. Okay. Did he say anything to [Eyraud] about what he was charged with?

"A. No.

"Q. Okay. Now I am going to take you back. You spoke with an individual from the Public Defender's Office, an investigator named Larry Smith. [¶] Do you remember that?

"A. I don't remember his name.

"Q. Okay. Did he tell you he worked for [Eyraud]?

"A. I don't remember.

"Q. Okay. He spoke with you, and you gave him a statement about talking or overhearing a conversation between [Eyraud] and another person on the bus. Do you remember that?

"A. That I heard them two talking?

"Q. Yes.

"A. I don't remember really what I talked to him about.

"Q. You don't remember what you talked to Mr. Smith about?

"THE COURT: You have to say 'yes' or 'no', ma'am.

"THE WITNESS: I don't remember.

"BY [PROSECUTOR]:

"Q. Okay. More recently you spoke with an investigator named Chevy Garza. Do you remember that?

"A. I don't remember his name, but I remember talking to somebody.

"Q. Okay. That was back about June of this year?

"A. Okay. Yeah.

"Q. Okay. And do you remember talking to him about overhearing a conversation between [Eyraud] and this other gentleman?

"A. Like I said, I don't remember what I talked to him about.

"Q. Okay. Did you understand or did you hear the conversation between [Eyraud] and [appellant] or the individual?

"A. I didn't understand it.

"Q. Okay. Did you hear this other individual tell [Eyraud] what to do or what to say about the crime she was charged with?

"A. Did I hear it?

"Q. Yes.

"A. No.

"Q. You did not hear it?

"A. I don't remember any of this. I don't remember talking to the D.A., what I talked to him about, or I don't remember.

"Q. Okay. You don't remember specifically talking to Chevy Garza on June 19 of this year?

"A. I remember talking to him, but I don't remember what I talked to him about. And I don't remember the stuff I told him.

"Q. Okay. Do you remember telling ... Investigator Garza that you overheard this person talking to [Eyraud] about a stabbing? [¶] ... [¶]

"THE WITNESS: I don't remember.

"Q. You don't remember?

"A. No."

Respondent then called Investigator Garza and asked him about his conversation with Rodriquez. The trial court overruled appellant's objection made on grounds of hearsay and lack of foundation. Garza then testified that Rodriquez told him she heard appellant trying to convince Eyraud to "take a plea" and that he had "gone crazy" because he thought Eyraud was having sex with Coe and he "stuck him and kept sticking him and couldn't stop." Investigator Garza also stated that Rodriquez expressed concern about having to come to court and testify.

Appellant subsequently made a motion for mistrial based on the introduction of Rodriquez's statements to Investigator Garza. Appellant argued that the statements were not inconsistent with Rodriquez's testimony that she did not remember what she had overheard or what she had said on that subject to Garza. Appellant also argued that introduction of the evidence was a violation of his constitutional right to confront and cross-examine witnesses.

The trial court denied the motion, stating:

> "I have considered the arguments of counsel. And I have also—both in my recollection of what Ms. Rodriquez said, I have also reviewed my notes with regard to what she said. I do not find that the answers elicited from Ms. Rodriquez were based solely on a lack of recollection. She did, in fact, recall being on the bus with Crystal Eyraud, talking to someone who resembled [appellant]. And she had a memory of where the people were in the bus; that she overheard [Eyraud] talking to that person. And it was only when she was asked to recall specifics of what the two people were discussing that Ms. Rodriquez stated that she no longer recalled.
>
> "And I am going to find, ... that at that point Ms. Rodriquez became evasive in her answers. And, again, I'm basing that upon the words that she spoke .... So I do find this is a situation where there's a combination of evasive denials and 'I don't remember' answers. I do find it's sufficient to establish implied inconsistencies. And the motion for mistrial is denied. I do not find there's been a miscarriage of justice."

We first note that Rodriquez actually testified twice in ways that were explicitly inconsistent with what she told Investigator Garza. First, she said "no" when asked by the prosecutor whether the individual who "might be" appellant had said "anything to [Eyraud] about what he was charged with." Second, she answered "no" when asked

"[d]id you hear this ... individual tell [Eyraud] what to do or what to say about the crime she was charged with."

We also conclude the trial court had a reasonable basis for finding Rodriquez's trial testimony was evasive and untruthful. Rodriquez remembered being on the bus and where individuals were seated on the bus; she remembered overhearing a conversation between Eyraud and another individual; she remembered talking to two investigators; but she did not remember "any of this" or what she said to the investigators. And Investigator Garza confirmed that Rodriquez expressed concern about having to come to court to testify.

The trial court did not abuse its discretion by admitting Garza's testimony regarding Rodriquez's prior statements.

2. Did admission of evidence of Rodriquez's prior statement violate the confrontation clause?

Appellant contends the admission of Rodriquez's prior inconsistent statements not only was hearsay error but also violated his Sixth Amendment right to confrontation. We disagree.

In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court "depart[ed] from the high court's established Sixth Amendment jurisprudence." (*People v. Rincon* (2005) 129 Cal.App.4th 738, 754.)

> "Prior to *Crawford*, ... 'the Supreme Court had held that an unavailable witness's out-of-court statement against a criminal defendant could be admitted consistent with the [Sixth Amendment's] confrontation clause if it bore "adequate 'indicia of reliability.'" [Citation.] To qualify under that test, evidence had either to fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." [Citation.]'" (*People v. Geier* (2007) 41 Cal.4th 555, 597.)

In *Crawford*, the Supreme Court abandoned this approach and held that the confrontation clause prohibits "admission of testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had

had a prior opportunity for cross-examination." (*Crawford, supra*, 541 U.S. at pp. 53-54; see *People v. Geier, supra*, 41 Cal.4th at p. 597.)

The court, in *Crawford*, specifically addressed whether admission of prior statements of a trial witness violated the confrontation clause:

> "[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. [Citation.] It is therefore irrelevant that the reliability of some out-of-court statements '"cannot be replicated, even if the declarant testifies to the same matters in court."' [Citation.] The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." (*Crawford, supra*, 541 U.S. at p. 59, fn. 9.)

In *People v. Gunder* (2007) 151 Cal.App.4th 412, 419, the appellate court rejected the defendant's argument that "a witness who appears at trial but feigns a lack of memory should nonetheless be considered unavailable," thereby rendering such a witness's prior statements inadmissible under the confrontation clause. The defendant in *Gunder* had argued that, unlike a witness with genuine memory loss who is considered available for cross-examination, "a witness who refuses to answer questions through a feigned memory loss should be deemed the equivalent of a witness who entirely refuses to answer questions." (*Ibid.*) The appellate court held that the admission of a trial witness's prior statement after the witness feigned memory loss did not violate the confrontation clause, stating:

> "The circumstance of feigned memory loss is not parallel to an entire refusal to testify. The witness feigning memory loss is in fact subject to cross-examination, providing a jury with the opportunity to see the demeanor and assess the credibility of the witness, which in turn gives it a basis for judging the prior hearsay statement's credibility. '[W]hen a hearsay declarant is present at trial and subject to unrestricted cross-examination ... the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements.' [Citation.] In the face of an asserted loss of memory, these protections 'will of course not always achieve success, but successful cross-examination is not the constitutional guarantee.' [Citation.]" (*People v. Gunder, supra*, 151 Cal.App.4th at p. 420; cf. *People v. Butler* (2005) 127 Cal.App.4th 49, 59 [witnesses at trial who

denied making prior inconsistent statements were available for cross-examination]; *People v. Perez* (2000) 82 Cal.App.4th 760, 765-766 [in pre-*Crawford* case, court rejects argument that witness's claimed inability to remember denied defendant the right to confrontation].)

Rodriquez was present at trial and available for cross-examination by appellant. Rodriquez did not refuse to testify but, instead, feigned memory loss with regard to specific aspects of the events that transpired on the jail transport bus and her subsequent interviews with investigators. The admission of Rodriquez's prior statements, therefore, did not violate the confrontation clause.

3. Did the trial court err when it overruled appellant's hearsay objection to Eyraud's statement that it was appellant's idea to rob Coe?

Appellant contends that the trial court committed prejudicial error when it overruled his hearsay objection to Sergeant Bonsness's testimony that Eyraud told him it was appellant's idea to rob Coe. Appellant also argues the error implicated his Sixth Amendment right to confrontation. We disagree.

The defense intended to call Eyraud as a witness, but she informed the court that she would assert her Fifth Amendment privilege and refuse to answer any questions regarding the case. The court then found Eyraud unavailable due to her assertion of her right to remain silent. The court also ruled that, although evidence of Eyraud's plea of no contest to voluntary manslaughter was irrelevant, the court would allow appellant to present evidence that someone else, including Eyraud, committed or aided and abetted in the crime. At defense counsel's request, the trial court informed the jury that Eyraud was unavailable as a witness.

The defense then called Sergeant Bonsness to the stand and asked him about his interviews with Eyraud on the morning of the murder. Bonsness testified that Eyraud told him that, when appellant and Coe fought, she jumped in and tried to separate them. When she did, Coe kicked her in the stomach. Concerned about her unborn child, Eyraud "lost it." She then grabbed a knife and stabbed Coe. Bonsness confirmed that Eyraud never said appellant did the stabbing.

In response to the prosecutor's question on cross-examination, Sergeant Bonsness testified that Eyraud said "it was [appellant's] idea" to rob Coe.[2] Defense counsel objected on hearsay grounds, arguing the statement was not a declaration against interest, but the trial court overruled the objection. It is this question and answer of which appellant complains here.

Tacitly, respondent concedes that Eyraud's statement that it was appellant's idea to rob Coe was otherwise inadmissible hearsay. Respondent justifies admission of the evidence, however, under Evidence Code section 356, which provides:

> "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in

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[2]The following colloquy occurred with regard to the word "rob":

"[PROSECUTOR:] Q. Did she ever tell you that she was, in fact, robbing Mr. Coe?

"[SERGEANT BONSNESS:] A. Um —

"Q. Well, or stealing from him.

"A. Yes.

"Q. Do you recall what words she used when she said she was stealing from him or robbing him?

"A. I believe she used the word 'rob.'

"Q. And did she indicate to you whether she had left any cigarettes out on the van as a signal?

"A. Yes.

"Q. What did she say with regard to that?

"A. She said she would leave a cigarette on the front of the van for [appellant] to return.

"Q. And was that just so he could have a cigarette or was that some kind of a signal?

"A. She said that would be a signal.

"Q. Did she tell you whose idea it was to rob Mr. Coe?

"A. Yes.

"Q. And what did she say?

"A. That it was [appellant]'s idea."

> evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

Appellant protests this section does not justify admission of the evidence because, during direct examination, his attorney limited use of the interview to a specific portion (Eyraud's admission that she stabbed Coe) that was unrelated to the prosecutor's later question and answer implicating appellant.

The scope of Evidence Code section 356 has been described as follows:

> "Section 356 is sometimes referred to as the statutory version of the common law rule of completeness. [Citation.] According to the common law rule: '"[T]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." [Citation.]' [Citation.]" (*People v. Parrish* (2007) 152 Cal.App.4th 263, 269, fn. 3.)

"The statute is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting on confrontation clause grounds to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood. [Evidence Code s]ection 356 is founded not on reliability but on fairness so that one party may not use 'selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.' [Citations.]" (*People v. Parrish*, *supra*, 152 Cal.App.4th at pp. 272-273.)

Consequently, "'"[i]n applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. 'In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some *bearing upon, or connection with*, the admission or declaration in evidence....' [Citation.]"' [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 334-335; accord, *People v. Parrish*, *supra*, 152 Cal.App.4th at p. 274.)

Here, the defense elicited the statement from Eyraud, through Sergeant Bonsness's testimony of his interview with her, in which she admitted that she stabbed Coe. Appellant argues that the additional statement by Eyraud—that it was appellant's idea to rob Coe—was unnecessary to an understanding of Eyraud's admission that she did the stabbing. Respondent, on the other hand, asserts that because Eyraud's admission that she stabbed Coe potentially presented a misleading picture of her motivation for the stabbing, the prosecutor was permitted to offer evidence to make that out-of-context statement understood: that Eyraud stabbed Coe because he resisted during a robbery planned by both Eyraud and appellant. Where a defendant elicits evidence that places his or her culpability in a favorable light, the prosecution is entitled to rebut that inference with evidence from the entire conversation to show the defendant's evidence in context. (*People v. Wharton* (1991) 53 Cal.3d 522, 592-593.)

We need not decide between these competing assertions, however, because even assuming that the trial court erred in admitting Eyraud's statement that it was appellant's idea to rob Coe, the error would not be prejudicial under either federal or state standards. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The jury heard statements from both Eyraud and from appellant. The statements confirmed the haphazard fashion in which the crime against Coe was "planned." The prosecutor, during argument to the jury, made no use of Eyraud's statement that appellant planned the crime. In fact, the prosecutor relied almost exclusively on appellant's own statement to convince the jury of his guilt. Further, appellant was convicted of felony murder.[3] Under Eyraud's other hearsay statements, he was not the direct perpetrator but, instead, an aider and abettor. Under those

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[3]Though the jury was instructed on premeditated first degree murder, the prosecutor argued only the felony-murder theories. In closing, the prosecutor said he was not arguing premeditated or even intentional murder: "That's not what the evidence shows. [¶] The evidence shows that he aided and abetted in an underlying dangerous felony, and that is the felony murder rule."

circumstances, we see no reason why it made any difference whether it was appellant or Eyraud who planned the crime. Appellant suggests nothing that convinces us otherwise.

4. Did the trial court err when it instructed the jury on felony-murder special circumstance?

Appellant was convicted of first degree murder and the jury found true the special circumstance allegations that the murder was committed while appellant was engaged in the commission of a robbery and a burglary. At trial, over defense objection, the trial court instructed the jury with CALJIC instructions instead of the more recently approved Judicial Council of California Criminal Jury Instructions (CALCRIM). Appellant now contends that the given CALJIC instructions on aider and abettor liability for the felony-murder special circumstances were inadequate and that the court should have given CALCRIM No. 703, which defines the mental state required for a felony-murder special circumstance when the defendant is not the actual killer.

Section 190.2, the special circumstances statute, specifies a punishment of death or imprisonment in the state prison for life without the possibility of parole for a person who is the "actual killer" of a victim during the commission of a burglary or robbery (§ 190.2, subd. (b)); for a person, not the actual killer, who, "with the intent to kill," aids, abets, ... or assists any actor in the commission of murder in the first degree" during a burglary or robbery (§ 190.2, subd. (c)); or for a person, "not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, ... or assists in the commission of a [burglary or robbery] which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor" (§ 190.2, subd. (d)). These latter two alternative prerequisites are embodied in CALCRIM No. 703, which provides, in pertinent part,

> "In order to prove (this/these) special circumstance[s] for a defendant who is not the actual killer but who is guilty of first degree murder as (an aider and abettor/[or] a member of a conspiracy), the People must prove either that the defendant intended to kill, or the People must prove all of the following: [¶] 1. The defendant's participation in the crime began before or during the killing; [¶] 2. The defendant was a major participant in the

crime; AND [¶] 3. When the defendant participated in the crime, (he/she) acted with reckless indifference to human life."

The CALJIC instruction that mirrors CALCRIM No. 703 is CALJIC No. 8.80.1, which provides in relevant part,

> "If you find [the] defendant in this case guilty of murder of the first degree, you must then determine if [one or more of] the following special circumstance[s] [are] true or not true: murder in the commission or attempted commission of robbery or burglary. [¶] The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true. [¶] ... [¶] [*If you find that a defendant was not the actual killer of a human being, [or if you are unable to decide whether the defendant was the actual killer or [an aider and abettor] [or] [co-conspirator],] you cannot find the special circumstance to be true ... unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] any actor in the commission of the murder in the first degree] [.] [, or with reckless indifference to human life and as a major participant, [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] in the commission of the crime of (Penal Code, § 190.2(a)(17) crime) which resulted in the death of a human being ....*] [¶] ... [¶] [You must decide separately each special circumstance alleged in this case. If you cannot agree as to both of the special circumstances, but can agree as to one, you must make your finding as to the one upon which you do agree.] [¶] In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously." (Italics added.)

The trial court here, however, neglected to give the italicized portion of CALJIC No. 8.80.1. It is, in essence, this omission of which appellant complains.

Trial courts have a sua sponte duty to instruct on all general principles of law relevant to the case. This sua sponte duty includes instructions on all of the elements of a charged offense or special circumstance allegation. (See, e.g., *People v. Rubalcava* (2000) 23 Cal.4th 322, 333-334.) It is clear, therefore, that the trial court erred. Respondent contends the failure to instruct, however, was harmless. We agree.

> "Under established law, instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States

and California Constitutions." (*People v. Flood* (1998) 18 Cal.4th 470, 479-480.)

Thus, when a trial court fails to instruct on an element of a special circumstance allegation, the prejudicial effect of the error must be measured under the *Chapman v. California*, *supra*, 386 U.S. 18 standard. (*People v. Williams* (1997) 16 Cal.4th 635, 689; *People v. Osband* (1996) 13 Cal.4th 622, 681.) Applying the *Chapman* test, an error is harmless only when it is shown beyond a reasonable doubt that the error did not contribute to the verdict.

As our Supreme Court discussed in *People v. Williams*, *supra*, 16 Cal.4th at pages 689-691, error in failing to instruct on an intent element of a special circumstance allegation has been found harmless in two situations: (1) when the appellate court was able to conclude from all of the instructions given that the jury necessarily found the intent element under other properly given jury instructions (see, e.g., *People v. Hardy* (1992) 2 Cal.4th 86, 192); or (2) when evidence that the defendant acted with the requisite mental state was overwhelming and the jury returning the special circumstance finding could have had no reasonable doubt the defendant possessed the necessary mental state (see, e.g., *People v. Johnson* (1993) 6 Cal.4th 1, 45-46, abrogated on another ground in *People v. Rogers* (2006) 39 Cal.4th 826, 879). Employing these guidelines, we conclude the instructional error in this case was harmless beyond a reasonable doubt.

First, we have examined all of the instructions given to the jury and have found none under which the jury would necessarily (or even likely) have found the intent element that was missing from the special circumstance instructions. A review of the whole record, however, does indicate that the jury convicted appellant as an aider and abettor and not as the actual killer. (Cf. *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [in examining the question of prejudice from instructional error, appellate court should look to entire record, including evidence and arguments of counsel].) Though the prosecutor did discuss alternative theories, he ultimately described the evidence as showing appellant's guilt through a theory of aiding and abetting a felony murder. Neither did the

prosecutor suggest that appellant (or Eyraud, for that matter) had intended the death of Coe. In fact, the prosecutor's argument was to the contrary.[4]

The question we must examine, therefore, is whether the jury could have had any reasonable doubt that appellant acted with the last of the alternative mental states: reckless indifference to human life by a major participant in the crime. The evidence, we believe, overwhelmingly demonstrates that appellant was a major participant and did act with reckless indifference to human life. There is thus no reasonable possibility that, had the instructional error not occurred, the jury would have reached a different result.

A "major participant" in a robbery is one who plays a notable or conspicuous part or is one of the more important members of the robbery group. (*People v. Proby* (1998) 60 Cal.App.4th 922, 930-931.) The phrase "reckless indifference to human life" is commonly understood to mean that the defendant was subjectively aware that his or her participation in the underlying felony involved a grave risk of death. (*People v. Estrada* (1995) 11 Cal.4th 568, 578.) The United States Supreme Court has noted that "reckless disregard for human life [is] implicit in knowingly engaging in criminal activities known to carry a grave risk of death ...." (*Tison v. Arizona* (1987) 481 U.S. 137, 157.) And, as the court in *Tison* observed, the "major participant" and "reckless indifference" requirements often overlap. "[T]here are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding." (*Id.* at p. 158, fn. 12.)

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[4]We agree with the prosecutor's following statement: "The only way that you can find [appellant] guilty of first-degree murder with premeditation and deliberation or second-degree murder without deliberation and premeditation or voluntary manslaughter is if you believe that Crystal Eyraud committed the murder, but that this [appellant] knew that she was going to commit the murder and that he specifically intended her to commit the murder and he aided and abetted her in the murder. But that's not what I'm arguing. That's not what the evidence shows. [¶] The evidence shows that he aided and abetted in an underlying dangerous felony, and that is the felony murder rule."

In *People v. Bustos* (1994) 23 Cal.App.4th 1747, the codefendant Loretto entered a restroom alone and unarmed to rob the victim, but he knew that Bustos was waiting outside with a knife. (*Id.* at pp. 1751, 1754.) Although it was Bustos who ran in and stabbed the victim when she resisted, the two men had planned the robbery together. (*Ibid.*) The defendants then fled together with the robbery proceeds, leaving the victim to die. (*Id.* at p. 1754.) The appellate court held that the evidence supported the finding that codefendant Loretto was "a major participant who acted with reckless indifference to human life." (*Id.* at p. 1755.)

In *People v. Proby, supra,* 60 Cal.App.4th 922, the defendant Proby and codefendant Vines were both armed when they participated in a robbery at a restaurant where Vines previously had worked. Proby provided the guns, although it was Vines who shot the victim in the back of the head. Proby realized the victim was wounded but made no attempt to assist or determine if the victim was still alive. Instead, Proby and Vines went to the safe, took the money, and left. A few days earlier, Proby and Vines had participated in a similar armed robbery, in which Proby waited outside but knew the restaurant employees would be trapped in a walk-in freezer for several hours. The appellate court held that Proby knew of Vines's willingness to do violence. (*Id.* at p. 929.) The court found this evidence sufficient to support the special circumstance that the murder was committed in the furtherance of a robbery, that Proby was a major participant, and that he acted with a reckless indifference to human life. (*Ibid.*) The appellate court rejected Proby's argument that his involvement was more passive than the culprit in *People v. Bustos*, who actually perpetrated the strong-armed robbery: "Nevertheless, despite these distinctions, the facts in this case still add up to [Proby's] being a major participant with a reckless indifference to human life." (*Proby, supra,* at p. 930.)

In *People v. Hodgson* (2003) 111 Cal.App.4th 566, the defendant held open an electric gate of an apartment complex underground parking garage to facilitate the escape of his fellow gang member who had robbed and shot to death a woman just after she

opened the gate with her key card. (*Id.* at p. 568.) While the court found that the evidence of the defendant's involvement was not as extensive as the cases it had summarized, it found the evidence sufficient to uphold the special circumstance. It found the defendant was a major participant, even though he did not supply the gun, was not armed, and did not personally take the property. As one of only two people involved in the crime, the defendant's role "was more 'notable and conspicuous'—and also more essential—than if the shooter had been assisted by a coterie of confederates.... Because [the defendant] was the only person assisting ... in the robbery murder his actions were both important as well as conspicuous in scope and effect." (*Id.* at pp. 579-580.) And the court found that the defendant acted with reckless indifference to human life because he must have been aware that the use of a gun during a robbery presents a grave risk of death, and, after the victim was first shot, the defendant did not aid the victim but instead chose to assist his fellow gang member to escape. (*Id.* at p. 580.)

Here the conclusion that appellant was a major participant is beyond doubt. He was one of only two participants in a burglary and robbery. He was aware long in advance that his coperpetrator intended to commit the crime. It was he who first used force when he and Eyraud's plans went awry. That use of force resulted in Coe's vulnerability to Eyraud's attack with the knife.

The conclusion that appellant acted with reckless indifference to human life also is beyond doubt. By his own admission, appellant entered a small residence (a motel room) in the middle of the night, without the consent of the resident. By his own admission, appellant engaged in a violent attack on that resident—an older and smaller man. While appellant contended in his statement that he fought with Coe only to protect himself, the jury's verdict on the robbery element of the robbery-murder special circumstance shows that the jury concluded otherwise. Although appellant claimed not to have noticed Eyraud stab Coe, it is clear that appellant left the motel room along with Eyraud knowing that Coe was down and in need of assistance. Appellant acknowledged in his statement

that Eyraud liked to carry "big old steak knives with her" and professed that he was not surprised that Eyraud had stabbed Coe.

In short, we conclude that the evidence, much of it from appellant's own mouth, showed that, even if appellant was not the actual killer, and even if his intent to kill was not resolved under other properly given instructions, he was a major participant in the robbery and burglary who acted with reckless indifference to human life. In sum, we find the instructional error harmless in this case.

DISPOSITION

The judgment is affirmed.

DAWSON, J.

WE CONCUR:

WISEMAN, Acting P.J.

CORNELL, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

Fifth Appellate District

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO MIL, JR., Defendant and Appellant.	F056605 (Kern Super. Ct. No. BF116677B)

The petition for rehearing filed by appellant in the above entitled action is denied.

DAWSON, J.

WE CONCUR:

WISEMAN, Acting P.J.

CORNELL, J.

DECLARATION OF SERVICE People v. Mil, F056605

I, the undersigned, declare as follows:I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is PMB 513, Suite D, 44489 Town Center Way, Palm Desert, CA 92260. On July 20, 2010, I served the attached material in an envelope addressed shown below, by the United States Mail in Palm Desert, California, with postage prepaid.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 20, 2010, at Palm Desert, California.

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