IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. NORMA CORTEZ, Defendant-Appellant.	Case No. S211915

Second Appellate District, Division Eight, Case No. B233833
Superior Court of Los Angeles County, Case No. BA345971
Honorable Dennis J. Landin, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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Table of Contents

Page

Table of Authorities

CASES **Page**

JURY INSTRUCTIONS

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INTRODUCTION

Norma Cortez, a 43-year-old medical assistant and mother of three, lived in the same neighborhood as co-appellant Rodrigo Bernal, a gang member. Cortez performed community service and outreach through her church. She and Bernal sometimes did favors for each other. For example, Cortez helped Bernal edit his resume, and Bernal carried Cortez's groceries. On September 3, 2008, Bernal asked Cortez for a ride to pick up money and in exchange provide her with gas money. Cortez agreed. While they were driving, Bernal saw two teenagers walking through the territory of a rival gang, got out of the car, and shot at the teenagers, killing one. Cortez was convicted as an aider and abettor and sentenced to 50 years to life. Cortez testified she was surprised when Bernal began shooting, and the question at trial was whether Cortez knew of and shared Bernal's criminal purpose before the shooting occurred.

The Court of Appeal reversed Cortez's convictions on three grounds: The prosecutor misstated the beyond-a-reasonable-doubt standard during closing argument, the trial court instructed the jury it could consider Cortez's failure to explain or deny evidence against her, although there were no such failures; and the

trial court admitted hearsay statements by Bernal as statements against his penal interest, where these statements were not sufficiently reliable to be admissible against Cortez.

STATEMENT OF THE CASE

Cortez and co-appellant Rodrigo Bernal were charged with the murder of Miguel Guzman in Count 1 (§ 187 subd. (a)), the premeditated attempted murder of Emmanuel Zuniga in Count 2 (§§ 664/187 subd. (a)), and firearm and street gang allegations as to both counts. (§§ 186.22 subd. (b)(1)(C), 12022.53 subd. (b)–(e).)

A jury found both defendants guilty as charged. (2 CT 476–477, SCT[1] 147–148.) Cortez was sentenced to 25 years to life on Count 1, plus an additional 25 years to life on the firearm discharge enhancement, (§ 12022.53, subd. (e)(1)), and a concurrent life term on count 2. Cortez's total term of imprisonment is 50 years to life. (2 CT 522–526; 9 RT[2] 6909–6914.)

Cortez filed a timely notice of appeal. (2 CT 542.) The Court of Appeal reversed Cortez's convictions in an unpublished opinion filed May 30, 2013. (Opin.)

STATEMENT OF FACTS

I.

PROSECUTION EVIDENCE

On September 3, 2008, at approximately 4:15 p.m., David Ramos was outside washing his car when he heard a vehicle slam on its brakes. (2 RT 640, 950–951.) Ramos saw two occupants of the car yelling at a young Latino male on the street. (2 RT 952, 956, 989.) The driver of the car was later identified as Cortez, and the front passenger as Bernal. (2 CT 305, 2 RT 1020, 3 RT 1290, 4 RT 1887, 1900, 5 RT

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[1]"SCT" denotes "Supplemental Clerk's Transcript."

[2]"RT" denotes "Reporter's Transcript."

2419.) Although Ramos testified there was only one person on the street, other evidence established both Emanuel Zuniga and Miguel Guzman were there. (2 RT 657, 3 RT 1264–1265.) The two groups argued with each other. (2 RT 956, 989.) Bernal and Cortez were talking over each other and Ramos could not hear exactly what they were saying. (2 RT 957.) The argument lasted five to seven seconds. (2 RT 975.)

After the verbal exchange, Bernal got out of the car and drew an automatic gun from his waist. (2 RT 957, 987.) According to Ramos, the young Latino male looked scared and put his hands up. (2 RT 960.) Bernal fired five or six shots. (2 RT 958.) Zuniga ran inside a building; Guzman was struck in the chest and died. (2 RT 960, 3 RT 1270, 5 RT 2705.) Bernal ran back to the car and yelled "Let's go, let's go." (2 RT 1014–1015.) Cortez began driving without Bernal, but Bernal yelled at Cortez who stopped, allowing Bernal to get back into the car. (2 RT 961.) A different eyewitness did not see the car pull away without Bernal. (3 RT 1238.)

After the shooting, Zuniga looked out from the building and saw Guzman laying on the ground, surrounded by paramedics. (3 RT 1272–1273.) Zuniga remained in the building for several hours and did not talk to police until approximately one week later when he encountered police at Guzman's house. (3 RT 1272, 1278–1279.) According to Zuniga, he and Guzman were walking along a residential street when Zuniga heard someone say, "Where you guys from?" (2 RT 657, 3 RT 1264–1265.) Although the voice was low-pitched, Zuniga thought it sounded like a woman. (2 RT 1293.) Zuniga turned and saw a woman driving a car with two male passengers. (3 RT 1265.) There were no other cars in the area. (3 RT 1265.) He and Guzman kept walking and did not reply. (3 RT 1266.) The car drove past them at slower than normal speed, then stopped. Zuniga heard the woman say, "Let them have it." (3 RT 1266–1267, 1292, 1305.) The front passenger got out of the car, drew a gun from his waistband, and started shooting over the top of the car. (2 RT 957, 986–987, 3 RT

1266, 1270.)

A witness called 9-1-1 and described Cortez's car and license plate number. (2 RT 962–963.) Los Angeles Police Officer Justin Stewart heard the radio call and recognized the area where the shooting occurred as 18th Street gang territory. Suspecting the shooting was perpetrated by the Rockwood gang, an 18th Street rival, Stewart drove into Rockwood territory. (2 RT 657.) He found Cortez's vehicle double parked with its hazard lights on and Cortez in the driver's seat. (2 RT 658, 662, 902.) A live round recovered from the passenger side of Cortez's automobile was the same caliber and brand as several casings recovered near the scene of the shooting. (2 RT 683, 686.)

The day after the shooting, police interviewed Oscar Tejada, Bernal's nephew. (3 RT 1512, 1513–1515.) The interviewing officer lied to Tejada and told him Bernal had already confessed to the shooting. (4 RT 2113.) Tejada said Bernal was a member of the Rockwood gang. (3 RT 1520.) Tejada had seen Cortez socializing with Bernal and other Rockwood members. (3 RT 1532–1533.)

Tejada's taped interview was played for the jury. (3 RT 1544.) In it, he stated Bernal stopped by his house the day after the shooting to drop off some marijuana because Bernal did not want to get caught with it. (2 CT 275–276, 291.) While at the house, Bernal told Tejada he shot at two 18th Street gang members the day before, while Cortez was driving. (2 CT 277, 281, 305, 307.) Tejada stated, "He just told she [sic] came and, that woman, went in her car, and they went to shoot at some 18s." (2 CT 293.) After the shooting, they went to another gang member's building. Bernal watched from inside as Cortez was arrested. (2 CT 302.) Cortez was friends with Bernal, and Tejada thought she was dating another Rockwood gang member. (2 CT 296.) At trial, Tejada said he fabricated the conversation with Bernal because he felt it was what police wanted to hear, and had learned before the interview that Cortez was suspected as the driver. (3 RT 1529–1531.)

Gang expert Antonio Hernandez testified the Rockwood and 18th Street gangs are rivals and have adjacent territories. (5 RT 2491–2492, 2499.) Rockwood's primary activities are robberies, assaults, extortion, criminal threats, felony vandalism, and narcotics sales. (5 RT 2497.) Bernal was a Rockwood member with the aliases "Woody" and "Scoobie." (5 RT 2498.) Rockwood and 18th Street members would not casually enter each other's territories. (5 RT 2499, 2731.) Hernandez was not familiar with Cortez. (5 RT 2499.) Hernandez opined Guzman and Zuniga were not gang members. (5 RT 2505.)

Gang members say "Where you from?" to initiate confrontations; it is not intended as a real question. (5 RT 2717.) In Hernandez's opinion, given the prosecution's version of events, the crime would benefit the Rockwood gang. (5 RT 2718–2719.)

While in jail, Bernal attempted to send Jose Birrueta, a Rockwood gang member, a letter asking Birrueta to dissuade Cortez and Tejada from testifying against him. (4 RT 2209, 2216–2217, 2220.)

II.

DEFENSE EVIDENCE

In 2008, Cortez, a 43-year-old medical assistant, lived in the same neighborhood as co-appellant Rodrigo Bernal. (2 CT 361, 3 RT 1329, 1331, 7 RT 3304, 3382.) Cortez and Bernal did favors for each other; Bernal helped carry Cortez's groceries; Cortez edited Bernal's resume and notified him of job opportunities. (7 RT 3307, 3287, 3382, 3402.) Through her church, Cortez performed community service and outreach, including helping gang members get off the streets. (7 RT 3621, 3624, 3629, 3633.) Cortez grew up around gangs and saw Rockwood gang graffiti in her neighborhood, but did not think Bernal was a gang member. (7 RT 3384, 3393, 3409, 3452.) She was aware Bernal had been in fights and thought he

carried a gun, but was not afraid of him. (7 RT 3448.)

Kimi Lent, a gang intervention specialist, testified most Rockwood gang members are between the ages of 12 to late 20s, and it would be unusual for an older, non-gang member to be included in a crime. (6 RT 3152–3153.) Gang members pass through rival territories on their way to other destinations. (6 RT 3158.) When gang members do not conceal themselves during a crime, it most likely means they performed a "crash dummy"—an unplanned, spontaneous crime. (6 RT 3161.)

Cortez testified. On the day of the shooting, Bernal asked her for a ride to pick up some money Bernal was owed. Cortez was low on gas, but Bernal assured her it would be a quick trip and agreed to help her with gas money after he was paid. (7 RT 3372, 3412.) Cortez drove and Bernal gave her directions. (7 RT 3373, 3376.) Bernal directed Cortez to stop in front of some apartments. A young man, approximately age 16, got into the backseat behind Bernal. (7 RT 3374–3375.) As Cortez continued, she was unable to drive more than 10 miles per hour because of traffic. When they neared the intersection of 5th and Bonnie Brae, Cortez saw two men, approximately 20 years old, making hand gestures and shouting "18th Street." One of the men reached inside his t-shirt as if drawing a gun. Cortez turned to look at Bernal, but he was not in the car and the front passenger door was open. Cortez heard gunshots and continued driving. Bernal got back in the car and said, "Let's go." Cortez asked him, "What the fuck are you doing?" (7 RT 3376–3379, 3400, 3424–3425, 3427, 3430.)

Cortez knew something bad happened, but did not ask questions because she was scared. (7 RT 3431, 3385, 3439.) Bernal directed her back to the building where they had picked up the boy in the backseat. Cortez parked and Bernal and the boy went into the building. Cortez put her hazard lights on and waited. (7 RT 3381, 3385.) After about five minutes, police arrived and arrested her. (7 RT 3386.)

Cortez was interviewed by police and the interview was played for the jury. (7 RT 3636, 2 CT 357.) Cortez initially told police Bernal and the other passenger got

out at 3rd and Bonnie Brae and told her to keep driving and they would catch up. Cortez did as she was told, driving slowly down the street. She heard gunshots, then Bernal and the other passenger reappeared and got back into the car. (2 CT 385, 393.) After police told her eye-witnesses saw her during the shooting, Cortez stated the person in the backseat remained in the car throughout the incident. (2 CT 428–429.) She described Bernal as an "associate" of Rockwood, and said she knew him to carry a gun. (2 CT 399, 421.)

Throughout the interview, Cortez emphatically denied she knew what would happen. (2 CT 431.) She denied knowing Bernal and the other passenger intended to "do something stupid," and only "realized it was a gang incident" after Bernal, Zuniga, and Guzman yelled gang names at each other. (2 CT 425, 447–448.) When asked if she expected someone to die, she answered, "No, my god, no." (2 CT 426.) Cortez stated, "I didn't know anything." (2 CT 427.)

Schuyler McBride was married to Cortez from approximately 1980 to 1997. (6 RT 3007, 3012.) Cortez was not a gang member, but they lived in a neighborhood with many gang members and socialized with some gang members. (6 RT 3008–3009.) Cortez drank beer and had fun with her friends, including gang members, but did not engage in criminal activity. (6 RT 3010.) Cortez and McBride shared custody of their children and remained in regular contact after their divorce. McBride was not aware of Cortez ever engaging in gang activity. (6 RT 3013–3012.)

Cortez's son, Steven McBride, lived with her from February, 2008 until September, 2008. (7 RT 3303.) Cortez does not take drugs and McBride never saw her engage in gang-related behavior. She went to church on Wednesdays and had a clean lifestyle. (7 RT 3306.)

Susana Rodriguez, Cortez's friend from church, testified Cortez was an active church member who attended services, outreach programs, and bible study. (7 RT 3620–3621.) Rodriguez worked with gang members through the church's outreach

programs, and never believed Cortez was involved with gang members. (7 RT 3623–3624.)

Troy Nakama, Cortez's pastor and bible study leader, testified Cortez usually attended church on Wednesday and Friday, and sometimes Sunday. (7 RT 3628–3629.) Members of the church are very active in outreach, including helping gang members get off the streets. (7 RT 3633.)

ARGUMENT

I.

THE PROSECUTOR MISREPRESENTED THE "BEYOND A REASONABLE DOUBT" STANDARD LOWERING THE BURDEN OF PROOF AND DEPRIVING CORTEZ OF DUE PROCESS

The Court of Appeal held the prosecutor misstated reasonable doubt when, during rebuttal argument, the prosecutor stated: "The court told you that proof beyond a reasonable doubt is not proof beyond all possible doubt or imaginary doubt. Basically, I submit to you what it means is you look at the evidence and you say, 'I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me.'" Trial counsel objected to these comments as misstating the law, but the trial court overruled the objection. (Opin. p. 11; 9 RT 4594.)

A. The Prosecutor's Comments Misstated the Beyond A Reasonable Doubt Standard of Proof.

"Although counsel have 'broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law. [Citations.]' In particular, it is misconduct for counsel to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citations.]" (*People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1266 [misconduct where prosecutor

illustrated reasonable doubt as a jigsaw puzzle with pieces missing.]) There is no requirement a prosecutor act intentionally to commit misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 822.)

Appellate courts have repeatedly found error when trial courts or prosecutors have juxtaposed the reasonable doubt standard with ordinary observations or decisions. (*See*, e.g., *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36 [marriage, changing lanes]; *People v. Johnson* (2004) 119 Cal.App.4th 976, 985 ["The thing that you're doing is kind of decisions you make every day in your life[.]"]) Here, the prosecutor did not argue by analogy, but instead explicitly told the jurors the reasonable doubt standard was met if they could say, "I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me[.]" According to the prosecutor, proof beyond a reasonable doubt required no more than a simple belief, so long as that belief was not based on speculation or imagination. As explained by the Court of Appeal, the statement "I believe I know what happened based on the evidence in front of me" can be supported by a preponderance of the evidence, or even a strong suspicion. (Opin., p. 11.) Despite the plain meaning of the statements, respondent advances several arguments that the statements correctly described proof beyond a reasonable doubt.

Distinguishing other cases, respondent argues the prosecutor did not compare the case to a specific everyday decision, place any affirmative burden on the defendant, or numerically quantify the standard, and states, "Accordingly, his argument was appropriate." (RB 51.) But an argument is not appropriate merely because it does not fall into one these categories. Numerous courts have recognized the precise meaning of "beyond a reasonable doubt" is best left to the jury, and even slight modifications to the reasonable doubt instruction must be made with care. (*People v. Brigham* (1979) 25 Cal.3d 283, 308 (conc. opn. of Mosk, J.) [Citing authority]; *People v. Light* (1996) 44 Cal.App.4th 879, 887–888 [Noting the "peril" of

modifying the standard instructions.]) There are numerous ways to misdescribe proof beyond a reasonable doubt—a statement is not permissible merely because it does not fall into one of the three categories listed by respondent.

Respondent attempts to construe the comment as reminding the jury that imaginary doubts are not reasonable doubts. (RB 51.) But the prosecutor's comments did not tell the jury their *doubts* had to be non-imaginary—the prosecutor stated that a non-imaginary *belief* satisfied the burden of proof. Respondent simply cannot escape the plain-English meaning of the prosecutor's statements: "[W]hat [proof beyond a reasonable doubt] means is you look at the evidence and you say, 'I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me.'" (9 RT 4594.) Far from telling the jury the prosecution had to eliminate all but imaginary doubts, this statement told the jury that as long as they could form a belief about what happened in the case without resorting to speculation or imagination, the prosecution had met its burden.

Respondent also emphasizes that the comments came in rebuttal argument, after defense counsel's comments on reasonable doubt. (RB 51.) The objectionable comments did not respond specifically to defense counsel's comments, however, and nothing about defense counsel's earlier comments changed their meaning. Defense counsel illustrated the presumption of innocence by arguing that while people tend to assume a stranger accused of a crime is guilty, they do not make this same assumption when the accused is someone they know and trust, like a family member. The proof sufficient to remove this presumption is proof beyond a reasonable doubt. (9 RT 4513–4514.) The prosecutor responded directly to these comments by stating that friends or family members would be biased, and not allowed to serve on a jury for someone they knew. (9 RT 4594.) The prosecutor then purported to offer a general description of proof beyond a reasonable doubt: "The court told you that proof beyond a reasonable doubt is not proof beyond all possible doubt or imaginary doubt.

Basically, I submit to you what it means is you look at the evidence and you say, 'I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me.'" (*Ibid.*) These comments made no reference to defense counsel's comments and were not qualified by them in any way. Instead, the prosecutor told the jury the *court's instruction* on reasonable doubt required only a non-imaginary belief based on evidence. The trial court appeared to agree, overruling Cortez's objection that the prosecutor misstated the law. The trial court erred by overruling Cortez's objection.

B. The Error Was Not Harmless Under Any Standard.

Cortez was prejudiced by the error. Prosecutorial misconduct "require[s] reversal under the federal Constitution when [the misconduct] infect[s] the trial with such unfairness as to make the resulting conviction a denial of due process. [Citation.]" (*People v. Katzenberger*, supra, 178 Cal.App.4th at 1266.) Misconduct which lowers the burden of proof deprives the defendant of due process: "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' [Citation.]" (*In re Winship* (1970) 397 U.S. 358, 363.) Reversal is required unless the error was harmless beyond a reasonable doubt. (*Id.* at 1269, citing *Chapman v. California* (1967) 386 U.S. 18, 24.)

Under state law, a prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct even when those actions do not result in a fundamentally unfair trial. (*People v. Katzenberger*, supra, 178 Cal.App.4th at 1266.) Even if the error violated only state law, reversal is required if it is "reasonably probable that a result more favorable to [Cortez] would have been reached in the

absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) A reasonable probability does not mean "more likely than not," but rather "a reasonable chance, more than an abstract possibility." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

The error was prejudicial under either standard. As explained by the Court of Appeal, "the case against Cortez was close and not particularly strong." (RB 19.) This is confirmed by the jurors' deliberations. The case focused on a single issue: Cortez's mental state. On this single question, the jury deliberated for one full day and most of another. (2 CT 471–474, 476.) The jurors' request to review Cortez's testimony confirms the jury was focusing on this very issue. (2 CT 475.) The jury had a difficult time deciding this question; in this context, any significant error would have been prejudicial.

Respondent rehashes the prosecution evidence, arguing Cortez asked, "Where you from?" and could only have intended to start a confrontation. But whether Cortez and Bernal said "Where you guys from" was a disputed point. Cortez denied it, (7 RT 3379,) and the independent witnesses could not hear what was said. (2 RT 953.) The only evidence Cortez and Bernal stated "Where you guys from?" came from Zuniga, who described hearing a low-pitched but feminine sounding voice. (2 RT 1293.) Even assuming the voice belonged to Cortez, Zuniga's testimony was suspect—Cortez testified Guzman and Zuniga initiated the confrontation with Bernal by making gang signs and yelling "18th Street," and this testimony was corroborated by neutral eyewitnesses who described both groups arguing. (7 RT 3424, 2 RT 975.) Zuniga, however, testified he and Guzman did not say anything during the confrontation, and Zuniga behaved suspiciously by hiding from police after the incident. (3 RT 1266, 1272, 1278–1279.) There was reason to suspect Zuniga was lying about his own issuance of gang challenges, and his claim that a low-pitched but female voice said "Where you guys from" was not unimpeachable. Zuniga's testimony that Cortez said

"Let them have it" before Bernal started shooting is suspect for the same reasons. Moreover, Cortez told police (before she ever heard Zuniga's testimony) that she said "Let it go" immediately before Bernal started shooting, which could also explain what Zuniga heard. (2 CT 435.)

Respondent also argues Bernal's statement to his nephew that "we went" to do the shooting proves Cortez was in on the plan. (RB 33.) As described more fully below, there is no evidence Bernal was aware of Cortez's mental state, and it was not even clear Bernal actually used the words "we went." This evidence was so devoid of probative value that it should have been excluded, and is certainly not overwhelming evidence of Cortez's guilt rendering other serious errors harmless.

Respondent argues the error was harmless because Bernal's letter asking Birrueta to dissuade Cortez from testifying proved she was a knowing participant in the crime. (RB 33.) Nothing about the letter, however, suggested Cortez was anything other than a witness to the crime. Bernal asked Birrueta to "brainwash" Cortez into giving favorable testimony, and also asked Birrueta to talk to Zuniga. (4 RT 2216–2217.) The letter no more proved Cortez participated in the crime than Zuniga, and in fact suggested Cortez was *not* a participant, because if she had willingly participated in the crime she would not need to be "brainwashed" into participating in the cover-up.

This was a close case focused on a single issue, Cortez's mental state. Any significant error would have been prejudicial. The prosecutor's characterization of proof beyond a reasonable doubt as simply "believing [one] know[s] what happened" permitted the jury to convict appellant when a contrary and innocent interpretation of the evidence was reasonable.

Furthermore, the error was not remedied by the court's instructions. The court instructed the jury prior to closing arguments, and the prosecutor was purporting to clarify the court's reasonable doubt instruction: "*The court told you* that proof beyond

a reasonable doubt is not proof beyond all possible doubt or imaginary doubt. Basically, I submit to you what it means is[...]" (9 RT 4594, emphasis added.) Trial counsel objected as "misstat[ing] the law," and the prosecutor replied "that's proof beyond a reasonable doubt." The trial court overruled the objection—implying the prosecutor's interpretation was correct. In *Katzenberger, supra,* the prosecutor also misrepresented reasonable doubt, but the Court of Appeal found the error harmless because the trial court impliedly told the jury to refer to the instructions rather than the prosecutor's misrepresentation: "Although the trial court overruled defendant's objection to the Power Point presentation [misrepresenting reasonable doubt], allowing the presentation to go forward, the court later told the jury (after defendant vigorously contended during his argument that the presentation [] did not represent reasonable doubt at all) that it would 'clarify' the issue by reading the jury instruction on reasonable doubt. The court proceeded to instruct the jury with the correct definition of reasonable doubt. Under these circumstances, the jury was alerted to the dispute regarding the presentation and impliedly told by the trial court to rely on the jury instruction." (*People v. Katzenberger*, *supra*, 178 Cal.App.4th at 1268–1269.)

Here, rather than alerting the jury to the dispute over reasonable doubt and explicitly clarifying it by rereading the instruction, the trial court impliedly endorsed the prosecutor's gloss on the reasonable doubt instruction by overruling appellant's objection. Moreover, unlike *Katzenberger*, the prosecutor's comments here came during rebuttal, and appellant could not respond to highlight the dispute.

In a close case centered on a difficult issue—appellant's subjective knowledge and intent—the prosecutor was permitted to lower the burden of proof. The error was not harmless under any standard.

II.

WHERE A DEFENDANT EXPLAINS THE EVIDENCE AGAINST HER, A JURY SHOULD NOT BE INSTRUCTED ON THE DEFENDANT'S FAILURE TO EXPLAIN OR DENY EVIDENCE BASED ON A DETERMINATION THE EXPLANATION IS NOT CREDIBLE OR CONTRADICTS THE PROSECUTION'S CASE

A. Introduction.

This Court, along with the Courts of Appeal, have unanimously held that an instruction on a defendant's failure to explain or deny evidence is warranted only where the defendant completely fails to explain a specific, significant piece of evidence against her. Such an instruction is not justified merely because a defendant's explanation conflicts with other evidence, or because the jury may ultimately disbelieve the defendant's testimony. (*See, People v. Saddler* (1979) 24 Cal.3d 671, 682 (*Saddler*) ["a contradiction is not a failure to explain or deny[.]"]; *People v. Peters* (1982) 128 Cal.App.3d 75, 86 ["While the jury may have chosen to disbelieve his explanation for other reasons, Peters nonetheless did not fail to explain or deny the evidence presented against him."].)

In describing this standard, some Courts of Appeal have noted that a defendant's explanation may be so "bizarre or implausible" as to amount to no explanation at all, such as when it fails to account for undisputed physical evidence or long gaps of time. (*See, e.g. People v. Mask* (1986) 188 Cal.App.3d 450, 455 [failure to explain where defendant's "story was inherently implausible"]). Seizing on this language, respondent argues the Courts of Appeal are split over when such an instruction may be given, and this Court should reject cases requiring a specific and significant defense omission and instead sanction the instruction whenever a defendant's testimony is in some vague sense "implausible." (RB 17.) Even cases

using the "bizarre or implausible" language, however, approve the instruction only where the defendant's testimony contained complete failures to explain specific and significant pieces of evidence. This Court should reaffirm this rule.

B. Background.

During the conference on jury instructions, the prosecutor requested the trial court give CALCRIM No. 361 on failure to explain or deny adverse testimony. (8 RT 4026.) The prosecutor explained the request: "Suffice it to say, she failed to explain why she—at least argumentatively—why she drove him into that neighborhood. She failed to explain why she stopped her car, why witnesses heard her screaming from the car, why she waited for him various times. She just kept saying, 'I was scared, I was scared,' which is not an explanation." (8 RT 4027.)

Trial counsel replied, "I disagree. I think there was an explanation of why she drove into the neighborhood. She explained that. That is just preposterous. I understand she indicated she didn't fully stop her car, that he just got out." (8 RT 4027.)

The trial court ruled: "You don't have to argue it now. I think, in fairness to the people, I should include it. Then you can argue that there's no such evidence of that." (8 RT 4027.)

The trial court instructed the jury: "If the defendant Norma Cortez failed in her testimony to explain or deny evidence against her and if she could reasonably be expected to have done so based on what she knew, you may consider her failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The people must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny [it] is up to you to decide the meaning and importance of that failure." (8 RT 4227–4228; 2 CT 489.)

The Court of Appeal held Cortez explained or denied each fact cited by the

prosecutor. (Opin., pp. 14–15.) Cortez explained she drove Bernal into the neighborhood because he needed to pick up some money, and gave her directions as she drove. Cortez was low on gas, but Bernal assured her it would be a quick trip and agreed to help her with gas money after he was paid. (7 RT 3372, 3411–3412.) When asked whether she stopped the car, Cortez stated, "No, I didn't stop." (7 RT 3425.) Cortez denied she yelled anything from the car: "Q: And you never yelled out anything from the car, did you? A: No, sir, I didn't." (7 RT 3428.) Cortez explained she waited for Bernal "because he asked me to. [. . .] he asked me to wait for him. I was scared. I didn't know what to do." (7 RT 3440) Respondent contends Cortez's explanations were implausible, warranting the instruction. (RB 17–20.)

Cortez provided explanations for all the matters raised by respondent. These explanations were not so "implausible" as to reasonably allow a jury to consider them as a failure to explain or deny. There was no evidentiary basis for the instruction, and it should not have been given.

C. Instruction with CALCRIM No. 361 is Warranted Only Where the Defendant Omits Significant and Specific Facts.

CALCRIM No. 361[3] is the subject of heavy criticism, leading one Court of Appeal to recommend "it should not even be requested by either side unless there is some specific and significant defense omission that the prosecution wishes to stress or the defense wishes to mitigate." (*People v. Haynes* (1983) 148 Cal.App.3d 1117, 1119–1120; *See also, People v. Lamer* (2003) 110 Cal.App.4th 1463, 1470 ["Appellate courts have frequently warned that trial courts should carefully consider whether CALJIC No. 2.62 should be given."]) This Court has also held the instruction must be used with care, because it has the potential to infringe on a defendant's right

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[3]Most cases on the topic actually address CALJIC No. 2.62. The substance of the instructions is essentially the same. (*See, People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1067 [applying an analysis of CALJIC No. 2.62 to CALCRIM No. 361.])

to silence if it refers to matters outside the scope of cross examination, and because giving it without evidentiary support raises irrelevant issues and confuses the jury. (*People v. Saddler* (1979) 24 Cal.3d 671, 678–679 (*Saddler*).)

This Court has held the instruction is not warranted merely because the defendant's testimony conflicts with other evidence. (*Saddler*, supra, 24 Cal.3d at 682 ["a contradiction is not a failure to explain or deny[.]"]; *See also*, *People v. Marks* (1988) 45 Cal.3d 1335, 1346 ["Defendant contends he did not fail to explain or to deny any important evidence against him and that he testified extensively to a version of the events that contradicted the prosecution's case in all important respects. Defendant's contention is persuasive."]) And numerous Courts of Appeal have held the instruction is warranted only in response to a true omission in the defendant's testimony—an explanation that conflicts with other evidence, or is otherwise unsatisfactory, is not a "failure to explain." (*People v. Haynes, supra,* 148 Cal.App.3d at 1119–1120; *People v. Kondor* (1988) 200 Cal.App.3d 52, 57 [Predecessor instruction to CALCRIM No. 361 "unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear."]; *People v. Lamer*, *supra*, 110 Cal.App.4th at 1469 ["[T]he test for giving the instruction is not whether the defendant's testimony is believable."; citing *People v. Kondor, supra*, 200 Cal.App.3d 52]; *People v. Peters* (1982) 128 Cal.App.3d 75, 86 ["While the jury may have chosen to disbelieve his explanation for other reasons, Peters nonetheless did not fail to explain or deny the evidence presented against him."].) The Court of Appeal here held it was error to give CALCRIM No. 361 since Cortez explained or denied all facts or evidence within her personal knowledge, and concluded respondent's arguments to the contrary were "simply incorrect[.]" (Opin., p. 15.)

Respondent argues the above cases conflict with this Court's opinions in

People v. Belmontes[4] (1988) 45 Cal.3d 744, 784, (*Belmontes*) and *People v. Redmond* (1981) 29 Cal.3d 904, 911 (*Redmond*). (RB 15–16.) Both cases, however, involved the defendant's complete failure to explain certain evidence against them—in other words, a specific and significant defense omission.

In *Belmontes*, undisputed physical evidence showed multiple rooms throughout the crime scene had been damaged and ransacked, and the victim suffered extensive violence. The defendant did not offer an implausible explanation for this evidence; his account of events simply did not account—plausibly or not—for the state of the evidence. There, the victim was found unconscious in her residence, and later died of "cerebral hemorrhaging due to 15 to 20 gaping wounds to her head which cracked her skull. The pathologist testified there would have been sounds 'like a cracked pot' associated with the blows which fractured the skull, and blood would have splattered in a manner consistent with the blood patterns found on the door jambs next to where she was found. A single contusion on [the victim's] right temple was caused by blunt trauma of lesser force and did not lacerate the skin. It alone would not have caused death and—if it had been the first blow—would not likely have caused unconsciousness. Numerous defensive bruises and contusions on her arms, hands, legs and feet evidenced a struggle. All wounds were consistent with having been made by the metal dumbbell bar in evidence at trial. [The victim's] stereo components were missing. The lock on the rear bedroom door was broken in. The master bedroom was ransacked; traces of blood were found splattered on the walls, door jambs and a chest of drawers in that room." (*Belmontes*, *supra*, 45 Cal.3d at pp. 760–761.) The defendant testified he struck the victim only once, then ran through the house looking for items to steal for "a matter of seconds" before returning to find his co-perpetrator standing over the victim. This was not merely an implausible explanation for how the

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[4]Overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.

victim came to be severely injured and the house ransacked; this version of events, which left the co-perpetrator only "a matter of seconds" to savagely beat the victim and ransack multiple rooms of the house completely failed to explain the state of the evidence. (*Id.* at pp. 783–784.) *Belmontes* does not sanction giving CALCRIM No. 361 in a case where the defendant's explanations account for the evidence against her, but the prosecutor urges the jury to reject those explanations.

Furthermore, *Belmontes* was a death penalty case with no extended analysis of the instructional issue. Although the *Belmontes* court noted discrepancies in the defendant's testimony, the Court did not hold these discrepancies support instruction with CALCRIM No. 361. (*Ibid* [e.g., The defendant said the co-perpetrator did not open the trunk of the car before entering the house; the co-perpetrator and another witness said he did.]) Indeed, this Court has long held that "a contradiction is not a failure to explain or deny[.]" (*Saddler, supra,* 24 Cal.3d at 682; *Marks, supra,* 45 Cal.3d at 1346.)

Likewise in *Redmond*, the defendant's version of events failed to explain indisputable physical evidence: The defendant testified the victim fell on a knife, which could not explain the physical wound to the victim, which went "downward and inward." (*Redmond, supra*, 29 Cal.3d at p. 911.) The defendant also did not explain why he waited two months to reveal the location of the knife, and why he did not call an ambulance. (*Ibid.*) *Redmond*—like *Belmontes*—was not a situation where the defendant's explanation was responsive to the evidence against her, but (according to the prosecution) implausible. This Court has never held a defendant's explanations that may not be credible to a jury warrant instruction with CALCRIM No. 361.

Respondent further argues several Courts of Appeal hold CALCRIM No. 361 is warranted where a defendant's testimony "contains logical gaps or is implausible[,]" and argues these cases conflict with the cases cited above. (RB 16.) But although these cases use the word "implausible," the explanations are

"implausible" in the sense that they fail to account for indisputable physical evidence or fail to describe what happened during long periods of time—in other words, they fail to explain the evidence. None support respondent's position that CALCRIM No. 361 is warranted where a defendant's explanation is "implausible" in the sense that it represents an arguably less likely interpretation of the evidence. Whether the defendant's testimony is believable is not the test. (*People v. Lamer*, *supra*, 110 Cal.App.4th at 1469.) To warrant CALCRIM No. 361, an explanation must be so implausible or bizarre as to be no explanation at all.

In *People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1030 (*Sanchez*), the defendant admitted he killed the victim, but argued he was unconscious due to voluntary intoxication. He claimed not to remember the killing, despite describing other events from that afternoon in detail. He testified he was too weak to lift the victim, but did not explain how she was found wrapped in a tarp and then covered by a blanket. He did not explain why he drove the victim's car to an ATM and withdrew $200 using her ATM card, why he did not seek help for the victim after he realized what had happened, and did not explain "what appeared to be his murder checklist." (*Id.* at p. 1030.)

In *People v. Mask*, *supra*, 188 Cal.App.3d 450, the defendant attempted to explain his presence at the crime scene by stating his mother dropped him off at a friend's house at 8 p.m. He waited 15 minutes, rode his bike one mile to another house, then walked to another destination six blocks away and passed the crime scene at midnight. "Even if we assume defendant took an inordinately long time in his travels, there are approximately three hours for which defendant was *unable to account*." (*Id.* at p. 455, emphasis added.)

In *People v. Roehler* (1985) 167 Cal.App.3d 353, the defendant and two victims were riding in a small boat. The defendant testified the boat capsized, he was trapped under it for approximately 30 seconds, and when he surfaced he found the

victims non-responsive. This explanation did not account for undisputed physical evidence of premortem head and neck injuries to both victims. (*Id.* at p. 393–394.)

The final case cited by respondent, *People v. Haynes* (1983) 148 Cal.App.3d 1117, does not even address the question. There, some parts of the defendant's testimony were true failures to explain—when asked why he checked into a motel with a fake name, the defendant essentially replied, "People do that," without explaining why *he* did that. (*Id.* at p. 1121.) Others points were simply implausible: the defendant claimed not have noticed a "big sign out in front of the motel [to which he had taken his school girl companion] that says, 'Adult Movies[.]'" (*Id.* at pp. 1120–1121.) The Court of Appeal noted it would be difficult to "divine" which points were "mere contradictions" and which were failures to explain or deny, then declined to do so because any error was harmless. (*Id.* at p. 1122.)

As described above, CALCRIM No. 361 is justified by an "implausible" explanation only if the explanation fails to account for undisputed physical evidence or long gaps of time—in other words, if it is not really an "explanation" at all. No case holds CALCRIM No. 361 is warranted merely because the defendant's explanation involves an arguably less likely interpretation of the evidence.

This Court should not adopt such a standard now. Respondent complains that, unless CALCRIM No. 361 applies to allegedly implausible explanations as well as true failures to explain or deny, the instruction will rarely be used. (RB, p. 19.) But respondent does not explain why this is a problem; there is no reason to prefer an instruction be used with any particular frequency. To the contrary, there are good reasons to limit CALCRIM No. 361 to those cases in which it truly applies: as noted in *Saddler,* where CALCRIM No. 361 is based on the defendant's failure to explain or deny facts not within the scope of valid cross examination, the instruction is an impermissible comment on the defendant's right to silence. (*People v. Saddler*, *supra*, 24 Cal.3d at pp. 678–679.) Furthermore, where the court gives instructions not

supported by the evidence, it raises irrelevant issues and confuses the jury. (*Ibid.*) Absent a specific, conspicuous failure to explain or deny evidence, an instruction that the jury may consider a defendant's failure to explain or deny anything "she could reasonably be expected to have [explained or denied] based on what she knew" invites the jury to speculate without limit about what the defendant should have said on the stand, including matters outside the scope of cross examination, infringing on the defendant's Fifth Amendment rights.

Furthermore, there is no need for CALCRIM No. 361 in the majority of cases. (*People v. Haynes*, *supra*, 148 Cal.App.3d at 1120 ["In the typical case it will add nothing of substance to the store of knowledge possessed by a juror of average intelligence."]) Where an explanation is "implausible" in respondent's sense, another instruction applies: As respondent notes, when the defendant offers an explanation but the jury rejects it, CALCRIM No. 362 on false or misleading statements permits "the same, if not a more negative," inference as would CALCRIM No. 361. (RB 30–31.) Respondent's rule would result in redundant, confusing instructions likely to send the jury searching for failures to explain or deny where there were none. Respondent's arbitrary preference for frequent use of CALCRIM No. 361 does not outweigh these concerns.

This Court should hold, consistent with Court of Appeal below and numerous published opinions, that CALCRIM No. 361 is warranted only in response to specific, significant defense omissions.

D. Cortez did not Fail to Explain or Deny any Evidence Against Her.

Cortez did not fail to explain or deny evidence against her—either explicitly or by offering an explanation that was so implausible as to amount to no explanation at all. Respondent lists several purported failures to explain or deny, beginning with Cortez's "general" response to the charges—i.e.., her entire defense. (RB 21–22.)

Respondent criticizes the entire premise that Cortez, "a mature woman," would associate with Bernal at all. But this circumstance was explained— Cortez and Bernal lived in the same apartment complex and they had social interaction common among neighbors. (6 RT 3008–3010.) Cortez was also involved in community outreach through her church - the church reached out to "the gang members, the drug addicts[.]" (7 RT 3621.) Cortez helped Bernal apply for jobs, Bernal helped her carry groceries, and this was how they "developed [] a friendship." (7 RT 3307, 3382.) Cortez's account of the day in question—that she was helping him run an errand, and he was going to help her with gas money—was entirely consistent with this relationship. Moreover, it is not Cortez' version of events that is "generally" implausible, but respondent, who argues that a 43-year-old medical assistant and mother of three, who was not a gang member, would suddenly agree to participate in a drive-by shooting. (2 CT 363–363, 5 RT 2499, 7 RT 3303–3304, 3402.)

Respondent's attempt to characterize Cortez's entire defense as "implausible" and a failure to explain or deny evidence illustrates the danger of giving CALCRIM No. 361 except in response to specific, significant omissions. In every case where the defendant testifies, the general thrust of that testimony will likely be a denial of the charges, in conflict with the prosecution's interpretation of the evidence and therefore arguably "implausible." As this Court has noted, giving CALCRIM No. 361 in the wrong circumstances risks raising irrelevant issues, confusing the jury, and violating the defendant's Fifth Amendment rights. (*People v. Saddler*, *supra*, 24 Cal.3d at pp. 678–679.) Respondent's position would result in CALCRIM No. 361 being given in nearly every case where a defendant testifies, realizing these dangers in many cases.

In any event, Cortez's defense was not implausible, nor did it contain any significant omissions. Respondent argues it was implausible that Cortez would accept turn-by-turn directions from Bernal without knowing their final destination. (RB 22.) Respondent does not explain why this is implausible; drivers routinely are directed by

their passengers. Once Cortez verified the trip would be "quick," it is not implausible she would prefer Bernal to direct her because she was unfamiliar with the area. (7 RT 3372, 3375.) Respondent attempts to construe Cortez's account of the drive as lasting three hours, but this distorts the record. Cortez did not testify the drive took three hours; respondent makes three hours from Cortez's estimate of when the events occurred, and the actual time of her arrest. As explained by the Court of Appeal, Cortez explained that her estimates must have been mistaken. (Opin., pp. 14–15.) Furthermore, Cortez had no reason to lie about when the events occurred. This was not an alibi case—Cortez admitted she was present when the shooting occurred. It made no difference whether it was at 1 o'clock or 4 o'clock. Cortez's initial testimony that the events happened earlier in the afternoon—which she later explained was mistaken—was not a failure to explain or deny evidence against her.

Respondent argues Cortez did not explain why she let one of Bernal's friends get into the car. Cortez testified Bernal asked her to stop in front of a house, then Bernal got out of the car and returned with a friend. Cortez assumed the friend had something to do with the money Bernal was owed. Bernal introduced the friend to Cortez, then they continued driving. Cortez testified she did not see anything wrong with letting the friend into the car. (7 RT 3374–3375, 3415.)

Cortez denied yelling from the car. (7 RT 3428.) Respondent notes contrary evidence from Zuniga and Ramos, claiming this is analogous to the defendant in *Redmond, supra*, whose account of events did not account for undisputed physical evidence. (RB 22, citing *Redmond, supra,* 29 Cal.3d at p. 911.) Zuniga and Ramos's testimony was not equivalent to undisputed physical evidence. Zuinga testified he heard a low-pitched voice, but thought it sounded like a woman. (2 RT 1293.) Ramos testified both groups yelled at one another, but his testimony was wrong on other points, including that only one person was on the street. (2 RT 657, 3 RT 1264–1265.) Furthermore, Zuniga's and Ramos's testimony also contradicted one another: Zuniga

claimed he and Guzman did not reply to the people in the car, while Ramos said the person on the street did reply. (2 RT 956, 3 RT 1266.) Several witnesses remembering events differently does not establish a failure to explain or deny; this Court has clearly established that "a contradiction is not a failure to explain or deny[.]" (*Saddler, supra,* 24 Cal.3d at p. 682.)

Respondent faults Cortez's explanation that she was driving less than 10 miles per hour, and Bernal was able to get out of the car without stopping. Driving at this speed would not have prevented witnesses from seeing Cortez's face or recording her license plate, as respondent claims. (RB 23.) Furthermore, Cortez's testimony was partially corroborated by eyewitnesses who saw Cortez begin to drive away without Bernal. (2 RT 961.) In any event, the variance between Cortez's account of not stopping the car, and other witnesses who said she did, is a contradiction and not a failure to explain or deny. (*Saddler, supra,* 24 Cal.3d at p. 682.)

Respondent next claims Cortez's testimony she did not believe Bernal was the shooter amounts to a "logical gap," emphasizing that Bernal fired the gun from the roof of Cortez's car. (RB 24.) But this does not contradict Cortez's testimony that she did not see a gun. Cortez testified that she "heard a lot of gunshots"—consistent with the gun being fired from above her car. (7 RT 3378.) Cortez did not testify Bernal was *not* the shooter, only that she did not see him with a gun, had no personal knowledge he was the shooter, and thus could not say it was him:

Q: Well, did you believe—did you see him with a gun?

A: No, I never saw him with a gun.

Q: Do you believe he was the shooter?

A: No. I can't say that, no.

(7 RT 3431.)

As she explained in her police interview, Cortez assumed Bernal was the shooter although she had not seen it herself:

A: I don't know who he was firing [at], cause I didn't actually see him.

Q: Did you assume he was firing at somebody?

A: Yes, I assumed.

(2 CT 447.)

Respondent also argues Cortez would have seen the gun as Bernal got in or out of the car. (RB 24.) Cortez, however, would have been looking at Zuniga and Guzman—away from Bernal. Moreover, the record does not support respondent's assertion Bernal was pulling the gun out as he exited the car. Respondent cites a portion of the record where Ramos testified Bernal reached toward his waist as he turned toward Ramos. (RB 24, citing 2 RT 973–974.) Ramos gave conflicting testimony whether Bernal turned after he exited the car, or as he exited the car. (2 RT 973 [after]; 2 RT 974 [as].) Regardless of when Bernal reached for his waist, Ramos testified he did not see a gun until Bernal "pulled it out." (2 RT 974.) Ramos testified this happened after Bernal exited the car:

Q: Did he get out of the front passenger side of the vehicle?

A: Yes, he did.

Q: What happened next?

A: He pulled out a gun from his waist.

(2 RT 957.)

Respondent also claims Cortez would have seen Bernal with a gun because Bernal chased Guzman. (RB 24.) The prosecution's own evidence, however, conflicted on this point. (2 RT 989 [Q: "Did he run after anybody?" A: "No, he didn't."]) In any event, whether Cortez saw the gun was not evidence calling for an *explanation*—Cortez either saw the gun or did not. She testified she did not, and her testimony on this point cannot be characterized as a failure to explain or deny.

Respondent faults Cortez's testimony because, "although an unexpected shooting had just occurred, in which she and Bernal were at least witnesses and

possibly intended victims, there was no discussion in her car of what happened." (RB 24.) Again, it is unclear why this evidence calls for an explanation or denial. In any event, respondent misreads the record. Although her recollection had to be refreshed with a police report, Cortez testified that after Bernal got back in the car she asked him, "What the fuck are you doing?" (7 RT 3400.)

Respondent also argues Cortez failed to explain the bullet found on the passenger-side floorboard of her car. (RB 25.) Cortez testified she did not know how it got there. (7 RT 3434.) But there was no evidence she should have known. The evidence showed Bernal was sitting in the passenger seat, with a gun tucked into his waistband. When police later searched the car, they found a bullet. There was no evidence when or how the bullet fell out, or that Cortez (or Bernal) knew it occurred. Cortez cannot be faulted for failing to explain the bullet, if there is no evidence she should have been able to do so. (*Saddler, supra,* 24 Cal.3d at p. 683.)

Respondent notes Cortez did not answer when asked whether Bernal's friend was "dressed like a gang member[,]" although respondent concedes this was a "minor point." (RB 27.) As explained by the Court of Appeal, Cortez began to answer but the prosecutor cut her off and asked another question. (Opin., p. 15; 7 RT 3416 .)

Finally, respondent claims Cortez did not explain why she waited for Bernal after the shooting. (RB 25–26.) Cortez did explain this: Bernal told her to wait, and she was scared. (7 RT 3439–3450.) Respondent criticizes Cortez's account of her thoughts as she waited: Cortez believed she had not done anything wrong, guessed Bernal went into the apartments to get the money they discussed at the beginning of the trip, and was not sure if police were there because of her. CALCRIM No. 361 only applies to a defendant's failure to explain or deny evidence against her. Cortez was asked why she waited for Bernal, and she answered. Her imperfect understanding of what was happening and why is not a failure to explain evidence against her. Furthermore, her answers are problematic only if one assumes she is guilty. Cortez

testified she was surprised when the shooting occurred, was frightened, and did not know what happened. Her failure to understand exactly what was happening as she waited for Bernal is consistent with this defense. Moreover, that she was confused and did not understand the gravity of her situation is corroborated by independent evidence—when police found her, she was double parked with her hazard lights on. (2 RT 658.) Activating flashing lights on one's car while supposedly fleeing from the police is the behavior of a confused and scared citizen, not a getaway driver escaping from a planned murder.

As stated by the Court of Appeal, "Respondent is simply incorrect when it asserts Cortez failed to explain a number of thing within her knowledge." (RB 14.) It was error to give CALCRIM No. 361.

E. The Error was Prejudicial Under Any Standard.

The instruction permitted the jury to consider any matter appellant "could reasonably be expected to [explain or deny] based on what she knew." (8 RT 4227–4228.) In the absence of any obvious failures to explain or deny, the instruction invited the jury to speculate about other things Cortez should have said, including those outside the scope of cross examination, violating her Fifth Amendment rights and requiring reversal unless harmless beyond a reasonable doubt. (*People v. Saddler*, *supra*, 24 Cal.3d at pp. 678–679.)

Even if the error violated only state law, reversal is required there is "more than an abstract possibility" appellant would have obtained a more favorable result absent the error. (*College Hospital, Inc. v. Superior Court, supra,* 8 Cal.4th at 715.)

The error was not harmless under either standard. As described above, the evidence against Cortez was weak, and the jury struggled to determine the only real

issue before it: Cortez's intent. Any significant error would have been prejudicial. Respondent argues the error was harmless because it was a "permissive instruction"—if the jury found no failure to explain or deny, it would not have applied the instruction. (RB 28.) As this Court explained in *Saddler*, however, giving an instruction on a failure to deny evidence where there is no such failure raises irrelevant issues and confuses the jury. The instruction encouraged the jury to view Cortez's testimony more skeptically, speculating about any matter—outside the scope of cross examination or not—which Cortez should have explained or denied. This was especially true in this case, where the prosecutor was critical of appellant's behavior throughout the incident and after her arrest, and her lifestyle prior to the shooting. The prosecutor repeatedly insisted that an "innocent minded person" would not have behaved or lived as appellant did. (8 RT 4280–4284.) By requiring appellant to explain or deny anything she "could reasonably be expected to," the instruction shifted the burden to appellant to defend all her actions in a general sense—not "specific and significant defense omission[s]" which the instruction requires. (*Haynes, supra,* 148 Cal.App.3d 1120.)

III.

BERNAL'S OUT-OF-COURT STATEMENTS WERE INSUFFICIENTLY RELIABLE TO BE INTRODUCED AGAINST CORTEZ, SHOULD HAVE BEEN EXCLUDED UNDER EVIDENCE CODE SECTIONS 352 AND 1230, AND VIOLATED CORTEZ'S RIGHT TO CONFRONT AND CROSS EXAMINE WITNESSES

A. Background.

Before trial, Cortez objected to admission of Bernal's statements to Tejada against Cortez. Cortez argued the portions of the statements implicating Cortez were not against Bernal's penal interest, and violated the Confrontation Clause of the Sixth

Amendment, relying on *Bruton v. United States* (1968) 391 U.S. 123. (ART[5] 25–28.) The trial court ruled the statements were non-testimonial and thus did not violate the Confrontation Clause, and determined the statements were "reliable in that they were made within a short period of time after the events and with some particularity." (ART 41–42.)

Tejada's taped interview was played for the jury. (3 RT 1544.) Tejada stated Bernal did not go into much detail and Tejada could not remember exactly what was said, but in essence Bernal said Cortez drove him to a location where he shot at two members of the 18th Street gang. (2 CT 277, 281, 291, 293, 305, 307.) When specifically asked, Tejada stated Bernal did not explain Cortez's role in the shooting: Q: "What did she do? Did he tell you? Was she—" A: "No." (2 CT 308.)

At trial, Tejada said he fabricated the conversation with Bernal because he felt it was what police wanted to hear, and Cortez was suspected to be the driver before the interview. (3 RT 1529–1531.)

The prosecutor argued that the specific words used by Bernal proved Cortez's mental state: "And when the nephew talked to police about what his uncle told him, he repeatedly said that his uncle told him that *we went, we went* and shot at some 18ths. That is how you know she had the knowledge of his purpose going there and she had the intent to assist him." (8 RT 4297, emphasis added.) The Court of Appeal held the statements were not reliable for this purpose, and should not have been admitted against Cortez. (Opin., p. 18.)

B. The Statements Were Not Sufficiently Reliable to be Admitted Against Cortez.

To be admissible, a declaration against interest must meet two requirements: "[A] declaration against interest may be admitted in a joint trial so long as the

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[5]"ART" denotes "Augmented Reporter's Transcript."

statement satisfies the statutory definition *and* otherwise satisfies the constitutional requirement of trustworthiness." (*People v. Cervantes*, *supra*, 118 Cal.App.4th at p.177, emphasis added; *See also, People v. Gonzales* (2011) 51 Cal.4th 894, 933 ["'[E]ven when a hearsay statement runs generally against the declarant's penal interest and redaction has excised exculpatory portions, the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission...' [Citation.]"]) The Court of Appeal correctly held the statements did not meet the second requirement. (Opin., p. 18.)

The Court of Appeal held the statements were unreliable as to Cortez because "Bernal could not speak from personal knowledge in describing Cortez's state of mind. His statements in that respect were speculation and hence not trustworthy. [Citation.]" (Opin. p. 18.) Respondent argues Bernal's statements merely describe observable actions, not Cortez's mental state. (RB 42.) This argument is duplicitous. First, although arguing the statements were admissible despite Bernal's lack of personal knowledge, respondent hints Bernal may have in fact had personal knowledge of Cortez's mental state, because he "knew what they did or did not discuss about their plans." (RB 44.) There was no evidence of any such discussion; this is precisely the speculation noted by the Court of Appeal. Furthermore, the statements were not used merely to show "only what [Cortez and Bernal] did." The prosecutor below argued the statements proved Cortez's mental state, (8 RT 4297) and respondent argues the statements permitted an inference that Cortez *planned* to commit the crime. (RB 42.) If the statements show "only what they did," they permit this inference to the same extent as other evidence showing Cortez was driving while Bernal committed the crime—facts overwhelmingly established by other evidence and admitted by Cortez. If this was the full import of the statements, they were cumulative to other evidence, lacked probative value, and should have been excluded under evidence code section 352 as argued more fully below. The statements had significant

probative value only as far as they purported to describe Cortez's subjective mental state—a purpose for which they were unreliable.

In addition to Bernal's lack of personal knowledge, the statements were unreliable to prove Cortez's intent because it was unclear precisely what the statement said. When the interviewing officer asked Tejada, "What does he say exactly?" Tejada replied, "Well, I don't remember how he told me exactly." (2 CT 291.) At the prodding of the interviewing officer, Tejada paraphrased Bernal multiple times, each time with a slightly different wording:

- "He said that he went shooting with some—somebody at some woman I think. I'm not sure." (2 CT 277.)
- "He went with some lady to go shoot somebody. He was shooting." (2 CT 279.)
- "We went shooting some—some gang member. Other gang members." (2 CT 280.)
- "We went and we shot at two 18s. [...] She was the one driving, this woman. And he went with her and he was the one shooting." (2 CT 281.)
- "Then he told me, he's like, oh, yeah, I went yesterday, like, and I shot (inaudible) I went shooting some 18-year-old with this girl[.]" (2 CT 286.)
- "I went there in her car and he's like, and we went to shoot at two 18s." (2 CT 289.)
- "He's like, we went, me and this woman, don't know her name—we went shooting some, like at some 18s." (2 CT 291.)
- "Q: So he told you this woman was driving?

  "A: Yeah.

  "Q: And he was the right front passenger? Right?

  "A: I think he was in the passenger seat. He didn't tell—like, he didn't go into too much detail. He just told me she came and, that woman, went in her car,

and they went to shoot at some 18s. That's it." (2 CT 293.)

- "She was driving and he was the one shooting." (2 CT 313.)

Some of the statements Tejada attributed to Bernal agree with the prosecutor's construction, but others merely stated that Bernal rode with Cortez on his way to the shooting—for example the statement, "I went yesterday, like, and I shot (inaudible) I went shooting some 18-year-old with this girl[.]" (2 CT 286.) It was impossible to determine the precise wording used by Bernal. Nor was it clear whether Tejada was quoting Bernal, or merely summarizing the conversation. This point could not be clarified because, by the time of trial, Tejada denied the conversation with Bernal ever occurred. Furthermore, Tejada specifically stated Bernal did not describe Cortez's role: Q: "What did she do? Did he tell you? Was she—" A: "No." (2 CT 308.)

Respondent argues the statements were admissible even though it was unclear precisely what Bernal said. (RB 42.) In each case cited by respondent, however, the wording of the statement was clear. In *People v. Guerra* (2006) 37 Cal.4th 1067, the defendant was speaking with a bailiff about his home country and stated, "In my country, I do this, no problem, I go home tonight." The trial court held the meaning of "I do this" was for the jury to determine, and this Court agreed. (*Id.* at 1122; overruled on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) In *People v. Riel* (2000) 22 Cal.4th 1153, the defendant was part of a group of three men; one of the group—apparently speaking for all three—told a witness "they" did certain acts, which defendant did not deny. This Court held the statement was admissible as an adoptive admission, and it was for the jury to decide whether "they" included the defendant. (*Id.* at p. 1189.) In *People v. Blacksher* (2011) 52 Cal.4th 769, this Court addressed instructions telling the jury how to treat certain hearsay evidence, and held the instruction correctly informed the jury that it was their duty to weigh the evidence. (*Id.* at p. 834.) These cases cited hold ambiguity in the meaning of a statement does not necessarily require exclusion, if the jury can resolve the ambiguity. Here, it was

not only ambiguous what the words in the statement meant, it was ambiguous what words it used. Unlike the cases cited by respondent where the jury was equipped to interpret the meaning of the statements, the jury would have no way to determine which words Bernal used.

Ambiguity in the words used would not render a statement inadmissible in all circumstances, but it is fatal to the reliability of these statements in this case. Whether a statement against interest is sufficiently reliable is based on the totality of the circumstances. (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 177; *People v. Gonzales* (2011) 51 Cal.4th 894, 933.) Here, as argued by the prosecutor during closing argument, the precise wording of Bernal's statement was crucial: "And when the nephew talked to police about what his uncle told him, he repeatedly said that his uncle told him that *we went, we went* and shot at some 18ths. That is how you know she had the knowledge of his purpose going there and she had the intent to assist him." (8 RT 4297, emphasis added.) But it was not clear Bernal even used the words "we went." Without knowing the wording of the statement, it was insufficiently reliable to prove anything about Cortez's mental state. The Court of Appeal correctly held the statements were not sufficiently reliable to be admitted against Cortez.

C. Bernal's Statement to Tejada Included Portions Which Were Not Against Bernal's Penal Interest and Were Inadmissible Against Cortez.

Although the Court of Appeal based its holding on the unreliability of Bernal's statements as to Cortez, the statements were also inadmissible because the portions referring to Cortez were not against Bernal's penal interest. Only those portions of the statement which are "specifically disserving" to the interests of the declarant are admissible. (*People v. Duarte* (2000) 24 Cal.4th 603, 612.) A trial court's determination whether a statement is against a defendant's penal interest is reviewed de novo. (*Cervantes*, *supra*, 118 Cal.App.4th at 174 [applying a de novo standard but

noting "there is some disagreement as to whether the trial court's ruling on this issue should be reviewed for an abuse of discretion or de novo."])

Here, police had Tejada repeat Bernal's statement numerous times, but in essence Bernal said he went to shoot at 18th Street gang members, and that he was accompanied by Cortez. (2 CT 277, 279, 280, 281, 286, 289, 291, 293, 313.) Bernal's statement that Cortez was with him was not specifically disserving to Bernal, and should have been excluded.

Respondent argues the portions referring to Cortez are admissible because they did not attempt to shift blame to Cortez, and contends extrinsic portions of a statement against interest are admissible *unless* the declarant is attempting to shift blame away from himself. According to respondent, this Court has ruled that "a declaration against interest, which also incriminates a non-testifying defendant, may be admitted in its entirety as long as the portion incriminating the defendant is not 'exculpatory, self-serving, or collateral.'" (RB 38, citing *People v. Samuels* (2005) 36 Cal.4th 96, pp. 120–121 (*Samuels*).) This is not the law. Neutral statements which neither inculpate or exculpate the declarant are not statements against interest, and must be excluded. As stated by this Court: "[W]e construe the exception to the hearsay rule relating to evidence of declarations against interest set forth in section 1230 of the Evidence Code to be inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant." (*People v. Leach* (1975) 15 Cal.3d 419, 441; See also, *People v. Vasquez* (2012) 205 Cal.App.4th 609, 622 [portions of statement describing co-defendant's actions were inadmissible].) *Leach* has been cited to exclude statements which are in part inculpatory and in part exculpatory. (*See, e.g., People v. Duarte, supra,* 24 Cal.4th at p. 612.) This does not mean only exculpatory collateral statements are inadmissible—as stated in *Leach,* section 1230 is inapplicable to "*any* statement or portion of a statement" which is not "*specifically* disserving to the interests of the declarant." (*Leach, supra,* 15 Cal.3d at

441, emphasis added.) *Samuels*, cited by respondent, distinguished a case in which portions of a statement against interest were excluded because they were self-serving to the declarant—it did not hold that collateral, neutral statements are admissible if made in conjunction with a statement against interest. (*Samuels*, *supra*, 36 Cal.4th at p. 120.) *Samuels* applied the rule that only portions of a statement specifically disserving to the declarant are admissible. In that case, the declarant stated that the defendant paid him to commit murder. These statements were specifically disserving to the defendant, because they "intimated he had participated in a contract killing—a particularly heinous type of murder—and in a conspiracy to commit murder. Under the totality of the circumstances presented here, we do not regard the reference to defendant incorporated within this admission as itself constituting a collateral assertion[.]" (*Id.* at p. 121.)

The present case is similar to *People v. Lawley* (2002) 27 Cal.4th 102, 153–154, the case distinguished in *Samuels*. There, the defense sought to introduce statements made by the declarant to a prison cellmate in which the declarant admitted he had killed a man in Modesto, that he had been hired to commit the murder by the Aryan Brotherhood for $6,000, and that an innocent person (presumably, Lawley) was incarcerated for it. (*Id.* at 151–152.) This Court held it was proper to exclude portions of the statement not specifically disserving of the declarant's interest. (*Id.* at p. 154.) "Nothing about *who* hired [the declarant to commit the murder] made [the declarant] more culpable than did the other portions of his statement." (*Ibid.*) Here, even if Bernal was not attempting to shift blame to Cortez, his statements regarding Cortez were not specifically disserving to his penal interests. As in *Lawley*, nothing about who accompanied Bernal made him more or less culpable in the shooting. That portion of the statements should have been excluded.

D. The Probative Value of the Statements was Substantially Outweighed By the Danger of Undue Prejudice.

Even if the statements were subject to a hearsay exception, their minimal probative value was outweighed by the potential for undue prejudice. As argued by trial counsel: "The problem with those statements is I think [they] are easily misconstrued to implicate Ms. Cortez as being somehow involved in the planning or the underlying conduct or the planning or participation or knowledge of the shooting, that the shooting was going to occur." (*Ibid.*) The trial court ruled the statements were "certainly [...] prejudicial, but I don't think it's unduly prejudicial given the facts of this case." (ART 42–43.)

"Under [Evidence Code] section 352, a trial court may 'exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time.' [Citations] 'Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.' [Citations.]" (*People v. Dement* (2011) 53 Cal.4th 1, 36.) A trial court's ruling under Evidence Code section 352 is reviewed for abuse of discretion. (*People v. Holford* (2012) 203 Cal.App.4th 155, 167–168.)

Here, as argued above, Tejada was uncertain what Bernal told him. This circumstance led to undue prejudice because the statements could be misconstrued as stating Cortez shared Bernal's purpose, when the only sure statement made by Bernal was that he rode with Cortez to the location of the shooting—a fact overwhelmingly established by other evidence. The danger of undue prejudice was increased because by the time of trial, Tejada had disavowed Bernal ever made the statements. He claimed he could not remember the conversation during the preliminary hearing, (3 RT 1537,) and by the time of trial denied it occurred. (3 RT 1518, 1531.) Without the ability to clarify the precise wording used by Bernal, the danger of undue prejudice

and confusion increased. (*See, Douglas v. Alabama* (1965) 380 U.S. 415, 420 ["[E]ffective confrontation of Loyd was possible only if Loyd affirmed the statement as his."]) The prosecutor used the statements for precisely the prejudicial effect described by trial counsel: Although Tejada said he could not remember Bernal's exact words, the prosecutor argued Bernal, by saying "we went," told Tejada Cortez shared his purpose. (8 RT 4297.)

Respondent's arguments illustrate the substantial danger of undue prejudice compared to their minimal probative value. In arguing the statements are reliable, respondent construes the statements to show "only what [Bernal and Cortez] did." But "what they did" was that Bernal shot at rival gang members while Cortez drove. The question was not what Cortez did, it was what she knew. Tejada could not remember precisely what Bernal said, and specifically stated Bernal did not describe Cortez's role in the offense. (2 CT 308 [Q: "What did she do? Did he tell you? Was she—" A: "No."].) Although admitting the statements were reliable only to answer the former question, respondent argues they were probative to the latter. Respondent argues the wording of the statements—which was not reliably established—proves Cortez's mental state, and speculates Bernal had personal knowledge of this fact. (RB 42, 43.) These were the precise dangers Cortez highlighted in the trial court. (ART 42.)

The danger of undue prejudice and confusion substantially outweighed the minimal probative value of the statements. The trial court abused its discretion by admitting the statements.

E. Admission of the Statements Against Cortez Violated Her Right to Confront and Cross Examine Witnesses Under the Sixth Amendment.

Admission of Bernal's statements violated the Confrontation Clause of the Sixth Amendment, as Cortez argued at trial. (ART 25–28.) "A criminal defendant has a right, guaranteed by the confrontation clause of the Sixth Amendment to the United States Constitution, to confront adverse witnesses. The right to confrontation includes

the right to cross-examination. [Citation.] A problem arises when a codefendant's confession implicating the defendant is introduced into evidence at their joint trial. If the declarant codefendant invokes the Fifth Amendment right against self-incrimination and declines to testify, the implicated defendant is unable to cross-examine the declarant codefendant regarding the content of the confession." (*People v. Lewis* (2008) 43 Cal.4th 415, 453.)

The question of whether a codefendant's confession at a joint trial is admissible was addressed in *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*). "Broadly stated, the rule of *Bruton v. United States*—which is rooted in the confrontation clause and accordingly governs state as well as federal prosecutions [citation]—declares that a nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given. [Citation.]" (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120, superseded by statute with respect to the felony-murder special circumstance as stated in *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 163, fn. 20.)

For years, *Bruton* was understood to apply to all co-defendant statements, regardless of whether they were made in a testimonial setting. (*See, e.g. People v. Schmaus* (2003) 109 Cal.App.4th 846, 854–856 [statements to cell mate]; *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1645 [same].)

Recently, the United States Supreme Court held the Confrontation Clause applies only to "testimonial" statements. (*Davis v. Washington* (2006) 547 U.S. 813, 821 (*Davis*) ["Only [testimonial statements] cause the declarant to be a 'witness' within the meaning of the Confrontation Clause."]; *Crawford v. Washington* (2004) 541 U.S. 36, 51 (*Crawford*).) Although *Bruton* is "rooted" in the Confrontation Clause, the Supreme Court has not addressed the precise effect of the testimonial/non-testimonial distinction on *Bruton* and its progeny. Some Court of Appeal have held

that where statements are non-testimonial, *Bruton* is satisfied so long as the statements are admissible under a hearsay exception. (*Cervantes, supra,* 118 Cal.App.4th at 172, 176; *People v. Arceo* (2011) 195 Cal.App.4th 556, 571–572, 575.) The Court of Appeal in this case followed these decisions. (Opin. p. 16.)

Cortez respectfully submits that to the extent *Cervantes* and *Arceo* conflict with *Bruton* and the Sixth Amendment, they are wrongly decided. *Bruton* is rooted in the Confrontation Clause, the central concern of which "is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. [Citation.] When the government seeks to offer a declarant's out-of-court statements against the accused, and, as in this case, the declarant is unavailable, courts must decide whether the Clause permits the government to deny the accused his usual right to force the declarant 'to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth."'" (*Lilly v. Virginia* (1999) 527 U.S. 116, 123–124.)

The rule of *Bruton* is "that a nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination[.]" (*Anderson, supra,* 43 Cal.3d at 1120.)

Bruton recognized that co-defendant statements, more so than other types of hearsay, implicate the values protected by the Confrontation Clause: "Not only are the incriminations [from a co-defendant] devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed." (*Bruton, supra*, 391 U.S. at 136.)

The Supreme Court's recent cases limiting the Confrontation Clause to testimonial statements have not addressed statements from co-defendants. (*Crawford, supra,* 541 U.S. at 38 [statements from defendant's wife who witnessed assault]; *Davis,* supra, 547 U.S. at 817 [911 call from victim]; *Whorton v. Bockting* (2007) 549 U.S. 406, 411 [child sexual abuse victim's prior statements]; *Michigan v. Bryant* (2011) ___ U.S. ___, 131 S.Ct. 1143, 1150 [fatally wounded victim's statements to police officers].)

Because of the special nature of co-defendant statements, the Supreme Court has held that measures which might suffice to render other types of hearsay admissible are not sufficient in the case of co-defendant statements. (*Bruton, supra* [jury instructed to ignore statements]; *Gray v. Maryland* (1998) 523 U.S. 185, 195 [statements inadmissible even when mentions of the non-declarant defendant superficially redacted.]) Whether a co-defendant's statements are testimonial or not, they remain uniquely devastating and inherently unreliable—unreliability which is "intolerably compounded" by the lack of cross examination. As stated in *Bruton*, this is the type of threat against which the Confrontation Clause was directed. (*Bruton, supra*, 391 U.S. at 136.)

Co-defendant statements "create[] a special, and vital, need for cross-examination[.]" (*Gray v. Maryland, supra,* 523 U.S. 194.) Admission of co-appellant Bernal's statements implicating Cortez, without an opportunity for Cortez to cross examine Bernal, violated the Confrontation Clause regardless of whether the statements were testimonial.

F. The Error Was Prejudicial Under Any Standard.

Because admission of Bernal's statements deprived Cortez of the right to confront and cross examine the witnesses against her under the Sixth Amendment, reversal is required unless admission of the statements was harmless beyond a

reasonable doubt. (*People v. Burney* (2009) 47 Cal.4th 203, 232, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) Even if the statements did not violate *Bruton* and were inadmissible only on hearsay grounds, the Sixth Amendment was still implicated. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334 [declaration against interest may be admitted in a joint trial only when statement satisfies the statutory definition and otherwise satisfies the constitutional requirement of trustworthiness.]; *See also, Lilly v. Virginia, supra*, 527 U.S. at p. 136 [Sixth Amendment's residual "trustworthiness" test permits admission only of reliable statements, such as those within a firmly rooted hearsay exception.])

Admission of the statements also violated due process by rendering Cortez's trial fundamentally unfair. (*Jamal v. VanDeKamp* (9th Cir. 1991) 926 F.2d 918, 919 [state court evidentiary rulings can render a trial fundamentally unfair.]) It was fundamentally unfair to force Cortez to defend against Bernal's statements where no one was sure exactly what those statements were, and effective cross examination of the person through whom the statements were admitted was impossible.

Even if the error violated only state law, reversal is required because there is "more than an abstract possibility" appellant would have obtained a more favorable result absent the error. (*College Hospital, Inc. v. Superior Court, supra,* 8 Cal.4th at 715.)

The error was not harmless under any standard. It went directly to the sole dispute issue as to Cortez: her state of mind. Bernal's hearsay statements to Tejada were central to the prosecution's case. The prosecutor argued the statements amounted to testimony from Bernal that Cortez shared his purpose, stating, "*That is how you know* she had the knowledge of his purpose going there and she had the intent to assist him." (8 RT 4297, emphasis added.) This Court should attach the same meaning to the statements as did the prosecution. (*People v. Powell* (1967) 67 Cal.2d 32, 57 ["Indeed, we have seen how important these statements were to the People's case, and 'There is

no reason why we should treat this evidence as any less "crucial" than the prosecutor—and so presumably the jury—treated it.'"].)

Bernal's purported statements were the sole direct evidence Cortez shared Bernal's criminal intent—as stated by the prosecution, the statements were "how you know" Cortez had the necessary mental state to make her guilty. Their introduction was not harmless under any standard.

IV.

CONCLUSION

As described above, the Court of Appeal correctly held three errors occurred below. Although the Court of Appeal engaged in a cumulative error analysis, each error was independently prejudicial. Cortez's convictions must be reversed.

Respectfully submitted,

Dated: February 10, 2014

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Certificate of Word Count

I, Robert E. Boyce, counsel for appellant certify pursuant to the California Rules of Court, that the word count for this document is 11,441 words, excluding the tables, this certificate, and any attachment permitted under rule 14(d). This document was prepared in Word Perfect with 13 point Times New Roman font, and this is the word count generated by the program for this document.

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Robert Boyce

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Case No. S211915

I, the undersigned, say: I am over 18 years of age, a resident of the County of San Diego, State of California, not a party in the within action, my business address is 934 23rd Street, San Diego, County of San Diego, State of California 92102; on this date I mailed the **APPELLANT'S ANSWER BRIEF ON THE MERITS** addressed as follows:

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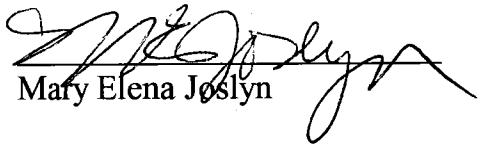

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