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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KRYSTAL CURRY WOMACK, Defendant and Appellant.	B226007 (Los Angeles County Super. Ct. No. NA080775)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles D. Sheldon, Judge. Reversed in part and affirmed in part.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Krystal Curry Womack appeals the judgment entered following her conviction by jury of shooting at an inhabited dwelling, accessory after the fact and four counts of assault with a firearm. (Pen. Code, §§ 246, 32, 245, subd. (a)(2).)[1]

Womack contends the trial court erroneously refused to instruct the jury on duress, the trial court gave incorrect and misleading responses to questions the jury asked during deliberations, former CALJIC No. 3.00 on aiding and abetting compounded the jury's confusion, CALJIC No. 2.62 was not warranted, the cumulative effect of these errors requires reversal even if each one alone is insufficient, and the accessory conviction must be reversed because it is based on the same conduct underlying the assault convictions.

We agree the accessory after the fact conviction must be reversed because it is based on the same conduct that gave rise to the assault convictions. (See *In re Eduardo M.* (2006) 140 Cal.App.4th 1351, 1354.) In all other respects, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

1. *The prosecution's evidence*.

a. *The shooting*.

On the evening of January 12, 2009, Pedro G. and his family lived in the 5200 block of Orange Avenue in Long Beach. At about 8:00 p.m., Pedro G., his son Oscar G. and Oscar's girlfriend, Neda G., heard gunshots outside the house. At approximately 10:00 p.m., they were advised a window of Pedro G.'s truck had been damaged and went outside to inspect the truck which was parked in the driveway. As they stood outside, a four-door white Dodge Neon drove past. Neda G. saw a hand come out the front passenger's window and heard two shots.

Oscar G. heard two gunshots that sounded like BB shots which he believed were fired straight up into the air from the white car. Oscar G. testified the car continued northbound then returned a few minutes later driving southbound with its headlights off and two or three more shots were fired. Oscar G. grabbed Issiah G., his younger brother who was standing inside the front door, and threw him to the ground.

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[1] Subsequent unspecified statutory references are to the Penal Code.

Pedro G. also heard one or two gunshots coming from the white four-door car. Pedro G. testified the white car passed driving southbound, then parked at a corner north of the residence, turned the headlights off, then passed a third time and again shots were fired.

After the shooting, there was a bullet hole in the front wall of the residence next to the front door and an expended shell casing was found on the street.

At approximately 10:45 p.m., Long Beach Police Officer Brent Woods stopped a white four-door Dodge Neon being driven by Womack on 53rd Street near Atlantic Avenue. Dante Morris was in the front passenger seat. Womack's sister was in the middle of the rear seat with Christian Floyd and Travon Washington seated on either side of her. Woods found a BB gun in the car. Another officer found a loaded .22 caliber rifle under the driver's seat. The grip of the rifle had been removed and replaced with a pistol grip. The rifle was a "couple of feet" in length.

A criminalist determined the casing found at the scene had been fired from the .22 caliber rifle found in Womack's car.

b. *Womack's statement to Officer Castro*.

Long Beach Police Officer Joshua Castro interviewed Womack at the scene of the traffic stop while she was handcuffed in the backseat of Castro's patrol car. Womack waived her constitutional rights and said Morris "was her boyfriend." Earlier that evening, she and her sister were with Morris and Floyd at an apartment in the area of 59th Street and Atlantic Avenue. They drove around downtown Long Beach in Womack's car. As they drove back to North Long Beach on Orange Avenue near 52nd Street, Morris and Floyd got into an argument with a group of male Hispanics standing in front of a residence. The male Hispanics yelled, "North Side Longos," and Morris and Floyd yelled, "Bricc Boyz." After this incident, Womack drove to an apartment at 59th Street and Atlantic Avenue where Travon Washington got into the car. While there, an unknown male placed a rifle in the car. They then drove back to 52nd Street and Orange Avenue.

As they drove toward the location, Morris, Floyd and Washington described "how they were going to shoot up the North Side Longos." When they arrived, Floyd leaned across the car and attempted to shoot the rifle at a group of people standing on a porch but the rifle failed to fire. Washington then shot a BB gun at the location several times. Morris told her to go back. Morris took the rifle and fired two or three shots out the window toward the people on the porch. Castro asked why Womack drove past a second time when she knew the males in the car were going to shoot but she did not respond.

c. *Gang evidence*.

Long Beach Police Officer Chris Zamora testified as a gang expert. Bricc Boyz is a small gang identified with the Carmelitos housing complex on 52nd Street in North Long Beach between Atlantic and Orange Avenues. The main rival of the Bricc Boyz is the North Side Longos, an Hispanic gang whose territory is north of the Carmelitos complex. North Side Longo gang members live in the residence next to Pedro G.'s home. From the street, the two residences appear to be a single home. Morris, Floyd and Washington are admitted members of the Bricc Boyz. Zamora opined Womack was a Bricc Boyz "associate" because she dated Morris, she has photographs of Bricc Boyz gang members displaying gang signs on her Myspace page, and she was an active participant in a gang related crime.

2. *Defense evidence*.

Womack testified in her own defense. In January of 2009, she lived in San Pedro with her mother and her younger sister. On the evening of January 12, 2009, Womack drove her sister to the home of a friend in Long Beach. Morris, Womack's friend who lived at 53rd Street and Atlantic Avenue, telephoned Womack and asked for a ride. Womack drove to 59th Street and Atlantic Avenue to pick up Morris. Morris got into the front seat and his friend, whom Womack did not know, got into the back seat with her sister. Morris asked Womack to pick up another friend. Womack did not notice that anyone who got into the car was carrying anything and she heard no discussion of confronting rival gang members or criminal activity. Womack denied she ever had a dating relationship with Morris and denied involvement in any gang activities.

As Womack drove in a residential neighborhood, Morris "stuck a gun" out of the front passenger seat window without warning and "started shooting." This surprised and scared Womack. Morris told Womack to "keep going." Womack stopped the car "close around the corner" from the scene of the shooting and said, "You have to get out of my car . . . ." However, Morris said, "I'm not going to get out until you take me" to another location, which Womack could not recall. Womack testified Morris "said he's not going to get out unless I go." When asked why she did not get out of the car, Womack testified: "Because I was scared to leave my car there. And I didn't want to leave my sister in the back seat because she was in between two boys, and there wasn't going to be a way for her to get out." Womack did not remember if she turned the headlights off. When the shooting started, Womack was afraid for the people outside the car and for herself.

Womack denied that Officer Castro advised her of her rights or questioned her. When asked whether she was driving up and down the street at the direction of Morris, Womack replied affirmatively. Womack stated she never heard any gang slogans shouted from her car. She denied that Morris was depicted on her Myspace page and claimed Craig Brown was her boyfriend in January of 2009.

3. *Verdicts.*

The jury acquitted Womack of four counts of attempted murder but convicted her of four counts of assault with a firearm, one count of shooting at an inhabited dwelling and one count of accessory after the fact. The jury found criminal street gang enhancement allegations not true.

DISCUSSION

1. *The evidence did not warrant an instruction on duress.*

a. *Relevant background.*

At the jury instruction conference, the prosecutor objected to an instruction on duress, noting Womack "did not provide any evidence that she was threatened in any way, shape, or form. All she stated was that a firearm was present in the car and that she was scared. She never said that the firearm was pointed at her or her sister. She never

indicated that any of the gang members in the car . . . made any threats toward her or her sister. . . ."

Defense counsel responded Morris's possession of a gun he had just fired out the window, combined with Womack's testimony she was afraid to leave the car with her sister in the back seat between two gang members constituted sufficient evidence of menace to warrant the instruction. Defense counsel argued, "I believe that when you have an individual in the car who is firing a firearm and you ask that they get out of the car and they refuse to get out of the car, in fact, order you to drive the car, and you. . . feel like that's the only alternative that you have, that is duress."

The trial court refused the instruction, indicating it was "not very satisfied this instruction applies in this case on the testimony that the defendant gave." The trial court noted the defense could still argue Womack "did not have the intent to do anything except against her will."

b. *Womack's arguments re instruction on duress.*

Womack contends her testimony was sufficient to support an instruction on duress. She described herself as "scared" and worried "there wasn't going to be a way for [her sister] to get out" of the car, and agreed she would not leave her sister in a "life-threatening situation." Womack claims the reasonable inference from her testimony was that Morris was prepared to shoot Womack if she did not comply with his orders or would harm her sister if Womack abandoned her in the car.

Womack claims the failure to instruct on the affirmative defense of duress must be analyzed under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]. (See *People v. Salas* (2006) 37 Cal.4th 967, 984.) Womack asserts the failure to instruct on the defense theory of the case cannot have been harmless beyond a reasonable doubt because this was a close case as evidenced by the questions during deliberation, the acquittal on several of the charges and the jury's rejection of the gang enhancements. (See *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295; *People v. Washington* (1958) 163 Cal.App.2d 833, 846.) Further, even if this court applies the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, reversal is necessary

because there is a reasonable probability Womack would have obtained a more favorable verdict if the jury had been instructed on duress.

c. *Legal principles*.

"The defense of duress is available to defendants who commit crimes, except murder, 'under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.' [Citations.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 331.) The defense is also applicable where the threats or menaces cause the defendant to believe that the life of another person would be endangered if the defendant refused to commit the crime. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 100.) The defense may not be asserted, however, unless the threat is immediate. (*People v. Perez* (1973) 9 Cal.3d 651, 657-658.) "Because of the immediacy requirement, a person committing a crime under duress has only the choice of imminent death or executing the requested crime. The person being threatened has no time to formulate what is a reasonable and viable course of conduct nor to formulate criminal intent. The unlawful acts of the person under duress are attributed to the coercing party who supplies the requisite mens rea and is liable for the crime. [Citation.]" (*People v. Condley* (1977) 69 Cal.App.3d 999, 1012.) " 'The common characteristic of all the decisions upholding [a duress defense] lies in the immediacy and imminency of the threatened action: each represents the situation of a present and active aggressor threatening immediate danger . . . .' " (*People v. Vieira* (2005) 35 Cal.4th 264, 290.)

d. *Womack failed to present substantial evidence of duress.*

Here, Womack testified she stopped the car and told Morris to exit the vehicle but he refused and told Womack to take him to another location. When asked why she did not get out of the car, Womack testified: "Because I was scared to leave my car there. And I didn't want to leave my sister in the back seat because she was in between two boys, and there wasn't going to be a way for her to get out." Womack also testified that, when the shooting started, Womack was afraid for the people outside the car and for herself.

However, Womack did not testify she was in fear for her own or her sister's life and did not testify there was an immediate or imminent threat if she refused to continue driving the car. There was no evidence anyone aimed the rifle or the BB gun at Womack or her sister. (See *People v. Wilson, supra*, 36 Cal.4th at pp. 331-332 [duress instruction properly refused where the defendant testified the codefendant pointed a gun at him and told him to drive but conceded he never actually saw the gun]; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 125 [the defendant's vague and unsubstantiated assertion to the police that the Columbian Mafia had threatened to kill him and members of his family if he did not commit the charged offense did not constitute substantial evidence warranting a duress instruction]; *People v. Petznick* (2003) 114 Cal.App.4th 663, 676-678 [defendant was aware the accomplices had killed but this did not amount to a "gun to his head" and did not suggest the defendant was coerced by an imminent threat to his life].)

Because there was no evidence of a "present and active aggressor threatening immediate danger" (*People v. Vieira, supra*, 35 Cal.4th at p. 290), the trial court properly refused to instruct the jury on duress.

2. *No reversible error in the trial court's handling of the jury questions*.

a. *Relevant background*.

The jury began deliberations at 11:35 a.m. The clerk's transcript indicates the jury "buzze[d]" with questions at 2:30 p.m., 3:40 p.m., and 4:05 p.m. "On all three occasions the court and counsel confer[red] and return[ed] a handwritten response."

(1) *The first question*.

At 2:30 p.m., the jury requested clarification of the assault instruction. The trial court indicated it had discussed the question with counsel and both counsel agreed it would be appropriate to ask the jury what part of the instruction needed clarification. The trial court asked counsel to "hold tight in case they give us another note."

The jury responded it wished clarification of the phrase, "present ability to apply physical force to the person of another." Defense counsel asked the trial court to advise the jury the instruction referred to "the ability at the time the assault was being committed to apply physical force on the person or persons being assaulted." At 3:20 p.m., the trial

court submitted to the jury a written response: "It means that a principal who committed the assault had the ability to apply physical force upon the intended victim. In other words, did a principal have the means to cause physical contact with the victim?"

(2) *The attempted murder question.*

At 3:40 p.m., the jury asked: "Is it attempted murder when shots are fired at an occupied dwelling?" The trial court indicated the prosecutor had suggested the response be: "Not unless there is a person or persons that the shooter intended to kill by their shots."

Defense counsel conceded the prosecutor's suggestion was a "true statement" but urged the trial court not to give the prosecutor's "fact specific" answer to the question. Defense counsel suggested the jury be advised: "It is the responsibility of the jury to make that decision based upon the facts as you determine them to be." Defense counsel argued "the attempted murder instruction speaks for itself."

The trial court gave the jury a written response that stated: "Not unless there is a person or persons the shooter intended to kill by the shots."

(3) *The driving/assault question.*

At 4:05 p.m., the jury asked: "By mere fact that someone is driving a vehicle, does that make them willful in the act assult [*sic*]?" The reporter's transcript indicates: "Any discussion regarding a third question was done off the record."

At 4:15 p.m., the trial court submitted the following written response to the jury: "You are the persons who determine what the proved facts are in this case. You decide what occurred in this case. You decide in this case how the facts apply to law."

Also at 4:15 p.m., the jury returned verdicts. At 4:30 p.m. the jury entered the courtroom for the reading of the verdicts.

b. *Relevant principles.*

Section 1138, provides as relevant: "After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, . . . the information required must be given . . . ." "The [trial] court has a primary duty to help the jury understand the legal principles it is asked to apply." (*People v. Thompkins*

(1987) 195 Cal.App.3d 244, 250-251.) "Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97; *People v. Smithey* (1999) 20 Cal.4th 936, 985.) "A violation of section 1138 does not warrant reversal unless prejudice is shown. [Citation.]" (*People v. Beardslee*, *supra*, at p. 97.)

c. *Acquittal on the attempted murder counts renders any error associated with the attempted murder question harmless.*

In order to convict Womack as an aider and abettor, the prosecution was required to show Womack was aware that individuals planned to commit a criminal act and that she intended to facilitate that act. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) Womack contends the jury's attempted murder question demonstrated it did not understand the mental state the prosecution needed to prove. Also, the response to the question, that an attempted murder conviction was not appropriate unless "there is a person or person that *the shooter intended to kill* by their shots," was misleading in that Womack's guilt on the counts of aiding and abetting attempted murder did not depend on the shooter's intent. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117-1122.) Womack notes she could have lacked criminal intent, even if the shooter intended to kill. (*People v. Nero* (2010) 181 Cal.App.4th 504, 515-516.) Thus, the trial court's response failed to dispel the jury's confusion about specific intent and suggested the prosecution's burden was to prove the shooter's intent, rather than Womack's intent.

The People argue the trial court's response correctly reinforced the standard attempted murder instruction, CALJIC No. 8.66, which advised the jury that attempted murder required proof the "person committing the act" harbored "express malice aforethought," defined as a "specific intent to kill unlawfully another human being."

However, even assuming the trial court's response was incomplete or incorrect, the jury acquitted Womack on all counts of attempted murder. Thus, Womack is unable to show the trial court's response to the attempted murder question prejudiced her in any way. (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 97.)

d. *The response to the driving/assault question was not an abuse of discretion and, in any event, the jury did not have sufficient time to have considered the trial court's response to the question.*

Womack contends the driving/assault question demonstrated the jury did not understand the specific intent required to convict and it incorrectly believed the prosecution's burden was to show Womack took "willful" action. However, conduct is "willful" when a defendant acts purposefully or intentionally.[2] Here, there was no dispute as to whether Womack "willfully" had driven the car and merely proving Womack acted willfully did not establish that she aided and abetted the shooters. (See *People v. Beeman*, *supra*, 35 Cal.3d at p. 560.) Womack asserts the trial court should have referred the jury to CALJIC 3.01 on aiding and abetting which sets forth the relevant mental state.

Womack argues the trial court's failure to correct the jury's misunderstanding of "willful" renders it likely the jury used the inappropriate analysis suggested by its question to convict, thereby violating her right to due process and to jury trial under the federal Constitution. (*People v. Nero*, *supra*, 181 Cal.App.4th at pp. 518-519.) Womack further claims the trial court's response had the effect of misinstructing the jury. (*Id.* at p. 518.) Womack concludes that, because the jury applied a legal standard that failed to hold the prosecution to its burden, reversal is required regardless of the standard of review. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d 818.)

The People argue that, because the trial court's response to the driving/assault question was virtually identical to defense counsel's suggested response to the attempted murder question, it is reasonable to conclude defense counsel did not object to the trial

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[2] As given in this case, CALJIC No. 1.20 stated: "The word 'willfully' when applied to the intent with which an act is done or omitted means with a purpose or willingness to commit the act or to make the omission in question. The word 'willfully' does not require any intent to violate the law, or to injure another, or to acquire any advantage."

court's response to the driving/assault question. Thus, any error associated with the response must be seen as forfeited. (*People v. Cleveland* (2004) 32 Cal.4th 704, 754.)

We decline to conclude Womack has forfeited this particular error. In an order denying Womack's request for a settled statement to clarify the asserted discrepancy between the clerk's and reporter's transcripts, we ruled Womack would not be foreclosed from challenging the trial court's response to the driving/assault question on forfeiture grounds. However, the claim fails on the merits.

In addition to instructing the jury on the definition of "willfully" (CALJIC No. 1.20), the trial court also gave the jury the standard instruction on an aider and abettor liability which states: "Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting" (CALJIC No. 3.01). Because the standard instructions on the definition of "willfully" and aider and abettor liability provided an answer to the jury's driving/assault question, the trial court did not abuse its discretion in providing a neutral answer to the question. (*People v. Beardslee, supra,* 53 Cal.3d at p. 97.)

In any event, Womack is unable to show prejudice. The record indicates the jury reached verdicts at the same time, 4:15 p.m., as it received the trial court's handwritten response to the driving/assault question. The jury could not have read the trial court's response to the question, taken a vote on the charged offenses and announce it had reached verdicts within a minute. Thus, it is apparent the jury reached verdicts without considering the trial court's response to the driving/assault question.

Womack's assertion the near simultaneous response to the question and the rendition of verdicts demonstrates the jury decided the case based on the theory stated in the driving/assault question amounts to speculation. CALJIC No. 3.01 advised the jury a person aids and abets when he or she, "[w]ith knowledge of the unlawful purpose of the perpetrator, and . . . [w]ith the intent or purpose of committing or encouraging or facilitating the commission of the crime, . . . [b]y act or advice, aids, promotes, encourages or instigates the commission of the crime." Consistent with this instruction, the prosecutor stated in closing argument that, in order to prove Womack was an aider

and abettor, the People had to show she had knowledge of the unlawful purpose and she assisted with the intent or purpose of committing, encouraging, helping, facilitating the commission of a crime.

"Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) The driving/assault question does not convince us the jury ignored the relevant instructions. In sum, Womack fails to show error or prejudice in the trial court's response to the driving/assault question.

e. *The trial court conferred with defense counsel before responding to the driving/assault question.*

Womack contends the trial court responded to the driving/assault question without consulting with defense counsel thereby denying her the right to assistance of counsel, the right to be personally present and the right to due process. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 67-69.) Womack bases this argument on the reporter's certification that "any discussion regarding a third question was done off the record."

We decline Womack's invitation to assume the trial court did not consult with defense counsel before responding to the jury. The clerk's transcript indicates that, as to each jury question, "the court and counsel confer[red] and return[ed] a handwritten response." The reporter's transcript is not inconsistent with this statement. Rather, it indicates any discussion regarding the final question "was done off the record." Given the statement in the clerk's transcript, we presume the trial court conferred with counsel before responding to the final question.

Further, given the similarity between the trial court's response to the driving/assault question and defense counsel's suggested response to the attempted murder question, it is reasonable to assume defense counsel approved of the trial court's response to question. Thus, Womack was not denied the right to assistance of counsel with respect to the driving/assault question. To the extent Womack suggests defense counsel rendered ineffective assistance in failing to suggest a response that addressed the manner in which the jury appeared to be evaluating the evidence, even assuming deficient

performance, Womack fails to establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674].) As noted above, the jury reached verdicts before it had time to consider the trial court's response to the driving/assault question. Thus, even assuming defense counsel should have suggested a more effective response, Womack is unable to demonstrate prejudice.

With respect to Womack's right to be personally present, "A criminal defendant charged with a felony has a due process right under the Fifth and Fourteenth Amendments to the United States Constitution, as well as a right to confrontation under the Sixth Amendment, to be present at all critical stages of the trial." (*People v. Romero* (2008) 44 Cal.4th 386, 418.) However, a defendant is not entitled "to be personally present 'either in chambers or at bench discussions that occur outside of the jury's presence on questions of law . . . .' " (*People v. Waidla* (2000) 22 Cal.4th 690, 742.) Thus, Womack's absence from the discussion regarding the trial court's response to the driving/assault question did not violate her right to be personally present. Although a trial court's response to a jury question is a critical stage (*People v. Romero, supra*, at pp. 417-419), the trial court did not address the jury in open court but submitted written responses which were delivered to the jury in the deliberation room.

In sum, Womack's contentions regarding the denial of the right to assistance of counsel, the right to be personally present and the right to due process uniformly fail.

3. *Instruction in the words of former CALJIC No. 3.00 does not require reversal.*

Womack contends former CALJIC No. 3.00, given here, was "confusing" and "misleading" in stating that "[e]ach principal, regardless of the extent or manner of participation is equally guilty."[3] (*People v. Nero, supra*, 181 Cal.App.4th at p. 518.)

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[3] As given, former CALJIC No. 3.00 stated: "Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: 1. Those who directly and actively commit or attempt to commit the act constituting the crime, or 2. Those who aid and abet the commission or attempted commission of the crime."

She asserts the jury's questions demonstrated it did not understand the mental state required for aiding and abetting and the trial court's responses to the jury's questions compounded the confusion and suggested the shooter's mental state, rather than Womack's, was the relevant factor for the jury to consider. Womack claims former CALJIC No. 3.00 violated Womack's right to due process and to jury trial under the Sixth and Fourteenth Amendments to the federal Constitution. (*People v. Nero, supra,* at pp. 518-519.)

We conclude Womack forfeited this contention by failing to object to former CALJIC No. 3.00, claim the instruction was incomplete or request clarification. (*People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 [addressing similar language in former CALCRIM No. 400].) However, even if the merits of the argument are reached under section 1259, no reversible error appears.

In *Nero*, a codefendant was accused of aiding and abetting a murder based on the act of handing the perpetrator the knife used to kill the victim. The jury asked if it could find the aider and abettor guilty of a lesser offense than the perpetrator. The answer to the jury's question should have been affirmative. (See *People v. McCoy, supra,* 25 Cal.4th 1111.) However, the trial court misinstructed the jury by rereading former CALJIC No. 3.00, including the "equally guilty" language, twice in response to the jury's question. *Nero* found the error required reversal of the aider's murder conviction. (*People v. Nero, supra*, 181 Cal.App.4th at p. 518.) *Nero* concluded former CALJIC No. 3.00 "can be misleading" even in "unexceptional circumstances." (*People v. Nero, supra,* at p. 518.)

In *Samaniego*, there was no evidence indicating which of the codefendants committed the charged murders. Because the defendants argued they had different states of mind, the use of former CALCRIM No. 400, stating an aider and abetter was "equally

guilty" of the crime committed by a principal, was "misleading" in the context of the case. (*People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1163.)[4]

Here, the jury acquitted Womack of attempted murder. Thus, the primary issue confronting the jury was whether Womack aided and abetted Morris's commission of assault with a firearm. The evidence indicated either Womack participated unwillingly at Morris's direction or that she shared his intent. Thus, with respect to the conviction of assault with a firearm, the instruction did not mislead or confuse the jury or cause Womack prejudice.

Womack claims the jury apparently believed willful driving of the vehicle was sufficient to support a conviction on an aiding and abetting theory. However, we rejected that assertion in connection with Womack's contentions related to the jury's questions and see no basis upon which to reach a different result in this context.

Finally, we note the jury properly was instructed on the definition of "willfully" (CALJIC No. 1.20), the definition of aider and abettor (CALJIC No. 3.01), termination of liability of an aider and abettor (CALJIC No. 3.03), criminal intent necessary to make one an accomplice (CALJIC No. 3.14), concurrence of act and general criminal intent as to the assault charges (CALJIC No. 3.30), assault (CALJIC No. 9.00), assault with a firearm (CALJIC No. 9.02), and shooting at an inhabited dwelling (CALJIC No. 9.03).

The parties dispute which standard of review should be applied to the asserted error. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d 818.) However, because any error in giving former CALJIC No. 3.00 was harmless beyond a reasonable doubt in the circumstances presented here and when viewed with all the instructions given, reversal is not warranted.

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[4] CALJIC No. 3.00 and CALCRIM No. 400 have been modified to state an aider and abetter is not necessarily "equally" guilty with other principals if the prosecution does not meet its burden of showing an equally culpable mental state. (See CALJIC No. 3.00, CALCRIM No. 400.)

4. *Any error in giving CALJIC No. 2.62 was harmless*.

The trial court instructed the jury in the words of CALJIC No. 2.62 regarding a defendant's failure to explain or deny evidence.[5] Although defense counsel indicated Womack had no objection to the instruction, Womack asserts she may raise the error on appeal because it affected her substantial rights. (§ 1259.) Alternatively, Womack claims defense counsel rendered ineffective assistance in failing to object to the instruction.

Regarding the merits, Womack contends the trial court should not have given the instruction because she did not fail to explain or deny any evidence against her. Rather, she presented an account of the shooting that differed from the prosecution's version and she denied making any statement to Officer Castro. Thus, she did not fail to explain or deny evidence against her. (*People v. Mask* (1986) 188 Cal.App.3d 450, 455; *People v. Roehler* (1985) 167 Cal.App.3d 353, 393.) Womack notes CALJIC No. 2.62 should only be given when there is "evidence in the People's case which is within the defendant's particular knowledge to explain and to which no explanation is offered." (*People v. Marsh* (1985) 175 Cal.App.3d 987, 994.)

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[5] As given in this case, CALJIC No. 2.62 provides: "In this case defendant has testified to certain matters. If you find that the defendant failed to explain or deny any evidence against her introduced by the prosecution which she can reasonably be expected to deny or explain because of facts within her knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable.

"The failure of a defendant to deny or explain evidence [against] her does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

"If a defendant does not have the knowledge that she would need to deny or to explain evidence against her, it would be unreasonable to draw an inference unfavorable to her because of her failure to deny or explain this evidence."

Womack claims the error was prejudicial because CALJIC No. 2.62 suggested Womack failed to counter the prosecution's case and encouraged the jury to view her testimony with skepticism. Womack concludes there is a reasonable probability she would have obtained a more favorable outcome if this instruction had not been given.

We find Womack forfeited this claim by failing to object to the instruction in the trial court. We address the merits of the contention to forestall Womack's claim of ineffective assistance of counsel.

As Womack points out, CALJIC No. 2.62 should be given only where there is evidence that would support a finding by the jury that the defendant failed to explain or deny prosecution facts or evidence within his or her knowledge. (*People v. Saddler* (1979) 24 Cal.3d 671, 682; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469.) However, discrepancies between the defendant's testimony and prosecution's evidence are not a failure to explain or deny that warrant instruction with CALJIC No. 2.62. (*People v. Saddler, supra,* at pp. 682-683.)

Here, it does not appear there were any facts in the prosecution's case within Womack's knowledge which she did not explain or deny. The People assert the instruction properly was given based on Officer Castro's testimony that, when he asked Womack "why she continued to drive past the house if she knew that they were going to shoot up the location[,]" Womack "didn't respond." However, Womack denied making any statement to Castro. Thus, she did not fail to counter the prosecution's evidence on this point. We therefore agree CALJIC No. 2.62 was not warranted in this case. However, the error was harmless.

As noted in *People v. Lamer,* error in giving CALJIC No. 2.62 normally is harmless because "the text of the instruction itself tells the jury that it would be *unreasonable* to draw an adverse inference if the defendant lacks the knowledge needed to explain or deny the evidence against him [or her]. As the court in *People v. Ballard* (1991) 1 Cal.App.4th 752, 756, noted: 'CALJIC No. 2.62 does not direct the jury to draw an adverse inference. It applies only if the jury finds that the defendant failed to explain or deny evidence. It contains other portions favorable to the defense (suggesting when it

would be unreasonable to draw the inference; and cautioning that the failure to deny or explain evidence does not create a presumption of guilt, or by itself warrant an inference of guilt, nor relieve the prosecution of the burden of proving every essential element of the crime beyond a reasonable doubt).' In addition, courts have noted that the fact that juries are instructed, pursuant to CALJIC No. 17.31, to 'disregard any instruction which applies to a state of facts which you determine does not exist,' also mitigates any prejudicial effect related to the improper giving of CALJIC No. 2.62. [Citation.]" (*People v. Lamer*, *supra*, 110 Cal.App.4th at p. 1472.)

Here, the People's evidence was strong, Womack's denial of her incriminating statement to Castro was self-serving and suspect, the prosecutor made no reference to CALJIC No. 2.62 during closing argument or to Womack's failure to explain certain evidence or facts, and the jury was given CALJIC No. 17.31. Also, because the record reflects Womack did not fail to explain or deny any evidence, we must assume the jury followed the instructions and refrained from drawing an inference adverse to Womack. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

In sum, it is not reasonably probable Womack would have obtained a more favorable verdict had the trial court not instructed with CALJIC No. 2.62. Based on this conclusion, Womack cannot demonstrate the prejudice necessary to prevail on a claim of ineffective assistance of counsel. (*Strickland v. Washington, supra*, 466 U.S. at p. 694.) We therefore reject Womack's claim of reversible error.

5. *The cumulative impact of the foregoing errors does not require reversal.*

Womack contends that, even if reversal is not warranted based on the individual claims of error, their cumulative impact deprived Womack of the right to due process. Womack argues the jury was not permitted to consider whether Womack acted under duress and it apparently convicted Womack of assault because she willfully drove the vehicle. Also, the jury was given an inaccurate and confusing legal framework for evaluating the defense arguments and the prosecution's burden of proof regarding mental state was reduced. Finally, instructional error encouraged the jury to dismiss Womack's testimony in a case that was a credibility contest between Womack and Officer Castro.

Womack's claim of cumulative error fares no better than her individual claims. The instruction on duress properly was denied, the attempted murder question was not prejudicial as Womack was acquitted on those counts, the jury did not consider the trial court's response to the driving/assault question, the trial court conferred with defense counsel before responding to the final jury question, and there is no basis upon which to conclude the jury ignored the instructions on aiding and abetting and convicted Womack of assault with a firearm because she willfully drove the vehicle.

This leaves only the finding that CALJIC No. 2.62 should not have been given. However, as noted in *Lamer*, no published opinion has ever reversed a judgment based on erroneous instruction in the words of CALJIC No. 2.62. (*People v. Lamer, supra*, 110 Cal.App.4th at p. 1472.) Certainly that error standing alone is insufficient to result in a denial of due process. We therefore reject Womack's claim of cumulative error. (See *People v. Booker* (2011) 51 Cal.4th 141, 186.)

6. *The conviction of accessory after the fact must be reversed.*

Womack contends the accessory conviction must be stricken because it was based on the same acts that formed the basis of the convictions of assault with a firearm. (See *In re Eduardo M., supra*, 140 Cal.App.4th at p. 1354 [defendant who aided two felony assaults "cannot also be convicted of being an accessory to those felonies solely on the basis of his immediate flight from the scene and later denials of his own involvement, even if that conduct incidentally helped the shooter escape"].)

It appears this contention is well taken.

Section 32 states: "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony." (§ 32.)

"[T]here is no bar to conviction as both principal and accessory where the evidence shows distinct and independent actions supporting each crime. When a felony has been completed and a person knowingly and intentionally harbors, conceals or aids

the escape of one of the felons, that person is guilty as an accessory to a felony under section 32, whatever his or her prior participation in the predicate felony. [Citation.]" (*People v. Mouton* (1993) 15 Cal.App.4th 1313, 1324-1325.)

However, as noted in *Eduardo M.*: "Attempting to escape after committing a felony is an inherent part of committing the felony, involving in most cases acting on a previously formed intent. Thus escaping does not create greater criminal culpability. Indeed, although Penal Code section 32 does not expressly so state, California long has recognized that a principal to a felony cannot become an accessory to that felony by attempting to make his own escape. [Citations.]" (*In re Eduardo M., supra,* 140 Cal.App.4th at p. 1360.) *Edward M.* noted that, were the rule otherwise, "every felon who tried to escape apprehension by fleeing from the crime scene thereby would become an accessory to his own felony, a result that would turn nearly every felony into two separate crimes and thus expand accessory liability beyond any reasonable relation to increased criminal culpability or societal harm." (*Ibid*.)

In re Eduardo M., *supra*, 140 Cal.App.4th 1351 concluded dual liability cannot be based on the mere fact that a person aided an assault and then fled after the commission of the assault, "even if that conduct incidentally helps other principals to escape." (*Id.* at p. 1359.) Similarly, *In re Malcolm M.* (2007) 147 Cal.App.4th 157, 171, found, "[i]n order to find someone to be an accessory after the fact to a felony in the commission of which the person is also a principal by virtue of his or her having aided and abetted its commission, the acts constituting that felony must have ceased at the time of the conduct that violates section 32. Otherwise, the conduct of aiding or concealing a principal with the intent that he or she avoid arrest (§ 32) is subsumed into the conduct of aiding the commission of the crime with the intent or purpose of facilitating commission of the offense . . . ." (*Ibid.*)

The reasoning of *Eduardo M.* applies here because there was no evidence Womack did anything to assist the shooters after the shooting other than continue to drive the car. Because there is nothing in the record that supports a conviction as an accessory, that conviction must be reversed.

DISPOSITION

The conviction of accessory after the fact (count 12) is reversed.

In all other respects, the judgment is affirmed

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.