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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALLEN WILLIAMS et al., Defendants and Appellants.	B267836 (Los Angeles County Super. Ct. No. BA404510)

APPEAL from judgments of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed with directions.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant Allen Williams.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant Yvonne D. Keith.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Shawn McGahey Webb and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Defendant Yvonne D. Keith and defendant Allen Williams planned the murder of Erik Poltorak with Michael Thomas (Michael). Michael wanted Poltorak killed because Poltorak was scheduled to testify that Michael robbed him. Jessicha Thomas (Jessicha), Michael's niece, was with Williams when he shot and killed Poltorak. After killing Poltorak, Keith, Williams, and Jessicha visited Michael, who was incarcerated, and confirmed that Poltorak had been killed. After being arrested, Williams and Keith confessed to the killing, and Keith also confessed when she testified at trial.

Defendants Keith and Williams raise numerous challenges to their convictions. Michael and Jessicha were not tried with Keith and Williams and are not parties to this appeal. We direct the trial court to modify the abstract of judgments to reflect the trial court's order that Keith and Williams bear the restitution costs jointly and severally. In all other respects, we affirm the judgments.

BACKGROUND

On August 31, 2011, Michael and another man robbed Poltorak. On August 30, 2012, Michael was arrested for the robbery. Poltorak was scheduled to testify against Michael. On October 31, 2012, Poltorak was shot and killed. The 12-guage shotgun used to kill Poltorak was found at the beach in Venice. A video of Poltorak's residence the night of the killing showed the killer wearing a costume.

1. Recorded Call with Williams, Keith and Michael

On September 2, 2012 (prior to the Poltorak killing), Michael spoke to Williams and Keith. Michael asked Williams, "[Y]ou about ready to put in some work?" Williams responded, "[Y]eah, what's up?" Michael then told Keith to talk to Williams. Michael later said, "Okay, if I could bail out then I could—I could fight this case a whole lot easier. But since I'm not out there then somebody else—somebody else has got to fight this case for me on the streets." He continued, "this shit gotta disappear."

2. Keith's Pretrial Confession

After they had been arrested, Jessicha and Keith conversed in jail. Keith explained that they "got caught up" because they loved Michael and did not want him incarcerated for the rest of his life. "Allen stepped up to the plate on his own after Psycho [(a person Michael hired to kill Poltorak)] ran off . . . ." Keith told Jessicha that she confessed that Jessicha was present when Poltorak was killed. Keith also told police Michael promised her a house and Williams a car. Jessicha said, "We shouldn't have did that shit."

Jessicha said that Williams volunteered for the killing. Poltorak "actually came out and looked at us because we were both wearing our costumes." During her recorded conversation with Keith, Jessicha said that Williams drank half a bottle and was drunk. Jessicha speculated that if Williams had not been drinking he would not have shot Poltorak.

Jessicha explained that no one wanted to kill Poltorak but Michael harassed Keith. Keith agreed and said Michael was wrong for requesting they kill Poltorak. Jessicha stated: "Conspiracy and all that shit. That's what we did, man. We conspired to end that man's life, and we did it." Keith agreed.

Jessicha and Keith agreed that they would have never taken a person's life without Michael's influence. They agreed that they should have known better.

Jessicha worried about what charges would be brought against her. She explained that she was there but she did not shoot Poltorak. She was there "when he was getting rid of the shit." She went to the beach after the killing. Both Keith and Jessicha worried that Williams would be "slam[med]" even though "Michael Thomas did it."

3. Keith's Trial Testimony

Keith testified at trial in her defense. She testified that she was in a car outside Poltorak's house when Michael and another man robbed Poltorak. Once incarcerated, Michael repeatedly called her telling her that she was responsible for ensuring Poltorak's death. Michael asked her if she was "do[ing] her homework," meaning studying Poltorak's habits. She agreed to kill Poltorak because she loved Michael. She also was afraid that her failure to accede to Michael's wishes would anger him and cause him either to report her role in the robbery or to physically harm her. Keith acknowledged this potential harm was *not* immediate because Michael was incarcerated.

Prior to the Poltorak killing, Keith purchased costumes for Jessicha and Williams to wear. She told Jessicha and Williams to burn their costumes after killing Poltorak. Keith asked her sister to rent a car for them to use when they drove to Poltorak's house.

Keith admitted that she previously had been convicted of robbery.

Keith testified that her father verbally abused her, and her husband (not Michael) abused her. She had been raped three

times. Keith met Michael in a recovery program. He was controlling and once abused her.

A defense expert testified that Keith suffered from intimate partner violence, also known as battered women's syndrome. She acknowledged that any harm Keith faced from Michael was *not* imminent. Jurors were instructed on battered women's syndrome or intimate partner battering.[1]

4. Williams's Pretrial Confession to a Confidential Informant

Williams told a confidential informant that he committed a hit for "a homie." Williams explained that he carried out the killing on Halloween; he was wearing a costume and was in a rental car. He shot Poltorak twice in the back of the head. Poltorak had been robbed by Williams's "homeboy." Williams threw the gun in the ocean after the killing.

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[1] Jurors were instructed: "You have heard testimony from Dr. Nancy Kaiser-Boyd regarding the effect of battered women's syndrome and/or intimate partner battering. [¶] Dr. Kaiser-Boyd's testimony about battered women's syndrome and/or intimate partner battering is not evidence that defendant Keith committed any of the crimes charged against her. [¶] You may consider this evidence only in deciding whether defendant Keith actually believed that she needed to defend herself against an *immediate* threat of great bodily injury or death, and whether that belief was reasonable or unreasonable. *The defense of intimate partner battering does not apply to fear of future danger to a person.* Evidence of intimate partner battering, if believed by the jury, may be relevant in determining whether or not defendant Keith formed the intent or mental state required for the crime of murder." (Italics added.)

5. Recorded Conversation Between Michael, Jessicha, Williams and Keith

After Poltorak was killed, in a recorded conversation, Michael asked Williams if he had confirmation of the killing, and Williams answered affirmatively. Michael said, "well, always remember, the first motherfucking, the first hit ever." Jessicha said that she was there. Michael exclaimed: "So I'll be home. When I get home, after this is all said and done, when this is all said and done, I'll be home . . . ." "[T]his will be over and everything will be good. . . . I'll be home soon. I love you."

6. Other Evidence

Keith's sister testified that on Halloween 2012, she rented a car for Keith.

When Keith, Williams, and Jessicha visited Michael to let him know Poltorak had been killed, Michael showed a piece of paper stating: "Understand me and pay close attention. Never say anything to the police nor anyone else about our . . . family business, not even other members of your family. Never. There is going to be an intense investigation. If they ever come at you, all you say is 'talk to my lawyer,' period, nothing else. On 10/31/12 at home playing zombies all night."

Before Williams killed Poltorak, Michael had asked Marco Menendez (also known as Psycho) to commit the murder. Michael told Menendez that he did not want Poltorak to go to court. Ultimately Menendez decided he did not want the job. Keith told Jessicha that she told officers about Menendez.

Williams did not testify at trial.

7. Verdict and Sentence

Williams and Keith were convicted of murder. Two special circumstances—lying in wait and killing a witness to a crime—

were found true. Jurors further found that Williams personally and intentionally discharged a firearm and that Keith had a prior conviction for a serious or violent felony.

Keith and Williams each were sentenced to life in prison without parole. Williams was sentenced to an additional 25 years to life for the use of a firearm. Keith was ordered to serve an additional five-year sentence for the prior strike conviction. Defendants were ordered to jointly and severally pay $11,183 in restitution.

DISCUSSION

1. Williams Does Not Show an Additional Competency Hearing Was Required

Williams argues that the trial court should have reinstated competency proceedings, and its failure to do so amounted to a denial of his right to due process. We first provide additional background and then explain why Williams's argument lacks merit.

a. Background

On November 4, 2013, the date set for the preliminary hearing, the court ordered a hearing on Williams's mental competence. Criminal proceedings were suspended. Dr. David Rad examined Williams on April 25, 2014, and found that he was not then able to understand the proceedings against him or assist in his defense in a rational manner. Dr. Rad further opined that, with medication, Williams likely would regain competency.

Dr. Kristin Ochoa also examined Williams and concluded that although Williams was malingering, he appeared to have a genuine psychotic disorder. She concluded that additional assessment was necessary to elucidate whether Williams could cooperate with counsel.

On April 25, 2014, the court found Williams incompetent to stand trial.

On June 17, 2014, Williams was transported to Patton State Hospital. After substantial observation and assessment, the medical director of Patton State Hospital reported that he and his clinical staff agree that Williams was able to understand the nature of the criminal proceedings and assist counsel in conducting his defense. Staff observed Williams 24 hours a day. He was diagnosed as malingering and suffering from an antisocial personality disorder, an adjustment disorder, and an alcohol use disorder. He had not adjusted well to the jail environment. He was treated with medication.

When Williams was not aware that he was being observed he did "not display a consistent picture of clinical pathology." Further, his test scores suggested malingering because they were so low that they were consistent with a person suffering from "end stage" dementia. When given items routinely identified by five-year-old children, Williams was able to identify only one of 10. Other tests further indicated that Williams was malingering. His fabrications of his deficits were verified by multiple objective psychological tests, which were validated for forensic use. "The probability that Mr. Williams indeed suffers from any disorder of significance nears statistical impossibility."

On August 19, 2014, Dr. Ochoa reexamined Williams. She concluded that Williams "*is* competent to stand trial." She explained: "When I initially provided a report on 3/12/14, I concluded that Mr. Williams was at least partially malingering, but due to the seriousness of his case and the consequences if convicted, as well as the recent emergence of what appeared to be an authentic mental disorder, I recommended that he be

thoroughly evaluated in the State Hospital. I agree with Patton Hospital staff now that his presentation of psychotic symptoms and memory impairment is entirely feigned. I do not believe that Mr. Williams has a mental disorder that prevents him from understanding the proceedings against him or participating rationally in the preparation of his legal defense with his attorney."

On September 12, 2014, the court found Williams mentally competent to stand trial.

On April 23, 2015, at a pretrial scheduling conference before a different bench officer, the court expressed concern that Williams may be asleep. Defense counsel indicated that Williams was looking down but his eyes were open. The court stated that Williams was dressed in yellow, a color which indicated that a deputy sheriff believed Williams had some mental issues. Defense counsel reported that Williams refused to see counsel.

On May 19, 2015, the court stated that its bailiff had concerns about Williams's competency but later acknowledged that he was not a mental health evaluator. The court stated that Williams appeared to be in a "catatonic stance" with his eyes closed. The court believed Williams should be evaluated. The court stated, "Obviously, if he's doing this on his own and this is his plan, then—if it's voluntary, then that's one thing. But if there is an issue that has arisen, for whatever reason, I'd like to know about it." Ultimately, it appears the court concluded that Williams was malingering.

On July 28, 2015, defense counsel reported that Williams refused to be reexamined.

Trial started September 8, 2015. The court noted that Williams was found malingering. The court indicated that

Williams was trying "to subvert the trial and to . . . create error in this record." Defense counsel did not request a competency hearing. Defense counsel stated that Williams frequently refused to talk to him. When defense counsel asked Williams if he wanted to wear civilian clothes, Williams did not answer.

Williams was not in the courtroom for most of the trial. Williams acknowledged that he had the right to be present and was choosing not to be present in the courtroom during the trial. When asked why he chose to absent himself, Williams responded, ". . . I just don't like being in here 'cause like a lot of stuff I don't remember and I don't want to—I don't want to cry in court." Williams's counsel reaffirmed that it was Williams's decision to remain in the back, outside the courtroom. Williams indicated that he understood that he could return to the courtroom anytime he wanted.

b. Analysis

" ' "[T]he criminal trial of an incompetent defendant violates due process." ' " (*People v. Lightsey* (2012) 54 Cal.4th 668, 690 (*Lightsey*).) "A defendant is deemed incompetent to stand trial if he lacks ' " 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [or] a rational as well as factual understanding of the proceedings against him.' " ' " (*Ibid.*)

"[A] trial court is obligated to conduct a full competency hearing if substantial evidence raises a reasonable doubt that a criminal defendant may be incompetent. This is true even if the evidence creating that doubt is presented by the defense or if the sum of the evidence is in conflict. The failure to conduct a hearing despite the presence of such substantial evidence is reversible error." (*Lightsey, supra*, 54 Cal.4th at p. 691.)

Whether a second competency hearing is required is determined under the same standard. (*People v. Kaplan* (2007) 149 Cal.App.4th 372, 376 (*Kaplan*).)

"When there is less than substantial evidence, the trial court still has discretion whether to order a competency hearing. [Citation.] The trial court's decision whether to order a competency hearing under such a circumstance is given deference because the court 'has the opportunity to observe the defendant during trial.' " (*Kaplan, supra*, 149 Cal.App.4th at p. 383.) " ' " 'An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper.' " ' " (*Ibid*.)

" 'Evidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations.' " (*Kaplan, supra*, 149 Cal.App.4th at p. 383.) " 'More is required than just bizarre actions or statements by the defendant to raise a doubt of competency.' " (*Ibid*.) "If a psychiatrist or qualified psychologist . . . , who has had a sufficient opportunity to examine the accused, states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel, the substantial-evidence test is satisfied.' " (*People v. Welch* (1999) 20 Cal.4th 701, 738, overruled on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 91.)

Here, Williams argues that there was substantial evidence of his incompetency, and the court therefore was required to hold a competency hearing. Williams cites concern over his mental

state mentioned by the court, bailiff, and jail staff and his refusal to speak to his lawyers. His argument is not persuasive.

Williams fails to show that there was substantial evidence of incompetency requiring another hearing. Williams's unwillingness to sit in the courtroom or to speak with his attorneys was not probative of an inability to assist in his defense or cooperate with counsel. Williams explained that he did not want to be present because it might make him cry. Even though he chose to avoid counsel, there was no evidence Williams was *unable* to assist counsel. All of the experts ultimately concluded that Williams was malingering, and no new evidence countered that assessment. Like the experts, the court ultimately concluded that Williams was malingering, and the belief of the bailiff or jail staff was essentially irrelevant because they were not trained to assess competence. In short, Williams's argument that there was substantial evidence he was incompetent at the time of trial lacks merit.

People v. Jones (1991) 53 Cal.3d 1115 (*Jones*) supports this conclusion. In *Jones*, the defendant may have suffered from schizophrenia, and a defense expert testified that he was subject to delusions, hallucinations, and paranoia. (*Id*. at p. 1126.) In pretrial proceedings, defendant was found competent to stand trial. (*Id*. at p. 1153.) After the jury returned its verdict including a death sentence, defense counsel asked the court to conduct a competency hearing. (*Id*. at p. 1152.) Counsel indicated that defendant had been unable to assist in the preparation of his defense, and a psychiatrist was ready to testify to that assessment. (*Ibid*.) Our high court concluded that "[a]lthough counsel asserted that defendant was unable to cooperate with his attorneys, he offered no facts to support that

claim." (*Id*. at p. 1153.) The proposed psychiatrists' testimony failed to cast doubt on the prior finding of competence or demonstrate a substantial change in circumstance. (*Id*. at p. 1154.)

Here, the showing was less than that found inadequate in *Jones*. Defense counsel expressed only Williams's refusal to communicate with them, not his inability. No psychiatrist was prepared to testify, and there was no evidence of a change circumstance since Williams had been declared competent to stand trial. Contrary to Williams's argument, the trial court was not required to hold a second competency hearing.

2. Alleged Confrontation Clause Violation (Keith)

Keith argues that her right under the confrontation clause was violated because the court admitted Williams's recorded conversation, which implicated her.

A confidential informant was placed in Williams's cell, and their discussion was recorded. In addition to the statements summarized above, Williams told the confidential informant that Michael was discussing the killing with "his girl," meaning Keith. According to Williams, when they visited Michael, who was incarcerated, he and Keith were passing notes. Williams said that Michael "and his girl," pressured him. Keith told Williams to "knock that dude down." Williams said that Keith "was the one making everything happen." She provided the weapon, the costume, and the location.

As Keith concedes, her argument is forfeited because Keith did not object at trial that the admission of Williams's statement violated her right to confront witnesses. (*People v. Redd* (2010) 48 Cal.4th 691, 730.) Keith, however, argues that she received the ineffective assistance of counsel because her counsel did not

argue the admission of the recorded conversation violated Keith's right to confront witnesses. Because Keith was not prejudiced by the admission of the evidence she cannot show that her counsel rendered the ineffective assistance of counsel in failing to object. (*In re Welch* (2015) 61 Cal.4th 489, 514 [a defendant claiming ineffective assistance of counsel must show prejudice].)

Given Keith's testimony in this case, the admission of portions of Williams's confession implicating Keith even if erroneous, was harmless beyond a reasonable doubt. Keith testified that she was present when Michael and another man robbed Poltorak. She testified that she and Michael planned the killing of Poltorak over the phone. She understood that Poltorak would die. Keith testified that she purchased the costumes that she, Jessicha and Williams wore. Keith admitted that she caused her sister to rent the car used to drive to Poltorak's home. She then discussed the murder when they visited Michael after killing Poltorak. Williams merely confirmed Keith's own sworn testimony. His statements were cumulative and did not prejudice Keith.

Keith's claim that Williams's statements undermined her defense of battered women's syndrome is particularly unpersuasive. First, battered women syndrome applies only to defend against imminent death.[2] Keith testified that she was not

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[2] "Battered women's syndrome evidence is generally relevant in murder cases in one of two different ways. First, it may be relevant to establish self-defense, i.e., that the defendant actually and reasonably believed in the need to defend against imminent death or serious bodily injury. [Citation.] Second, battered women's syndrome evidence may be relevant to establish 'imperfect self-defense,' i.e., that the defendant actually believed in the need to defend against imminent death or serious bodily

afraid of "immediate" harm because Michael was incarcerated. She also testified that if she reported the killing to police, "it would take Mr. Thomas some time to find out." Moreover, her expert testified that there was no imminent harm. Williams's statements to the confidential informant did not bear on this critical component of Keith's defense and therefore could not undermine it. Keith therefore fails to show her counsel was ineffective for failing to object to it.[3]

3. Alleged Instructional Error

Keith and Williams raise several claims of instructional error. None requires the reversal of the judgments of conviction.

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injury, but the belief was objectively unreasonable. [Citations.] In both versions of self-defense, battered women's syndrome evidence may be relevant to establish 'defendant's actual, subjective perception that she was in danger and that she had to kill her husband to avoid that danger.' " (*People v. Erickson* (1997) 57 Cal.App.4th 1391, 1399.)

[3] Keith's defense was questionable for another reason. Keith planned the killing of Poltorak to prevent Poltorak from testifying. Keith was not on trial for killing her batterer but for killing an innocent third person. "A person can always choose to resist rather than kill an innocent person. The law must encourage, even require, everyone to seek an alternative to killing." (*People v. Anderson* (2002) 28 Cal.4th 767, 777-778.) As our high court explained " '[i]t is not acceptable for a defendant to decide that it is necessary to kill an innocent person in order that he [or she] may live, particularly where, as here, [the defendant's] alleged fear related to some future danger.' " (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 106.)

a. CALCRIM No. 703 (Keith)

Keith argues that the trial court lessened the prosecution's burden of proof when it modified CALCRIM No. 703. The court instructed jurors as follows:

"If you decide that a defendant is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstances of killing of a witness and lying in wait you must also decide whether the defendant acted either with intent to kill or with reckless indifference to human life.

"In order to prove these special circumstances for a defendant who is not the actual killer but who is guilty of first degree murder as an aider and abettor or a member of a conspiracy, the People must prove either that the defendant intended to kill, or the People must prove all of the following:

"1. The defendant's participation in the crime began before or during the killing;

"2. The defendant was a major participant in the crime;

"AND

"3. When the defendant participated in the crime, she acted with reckless indifference to human life.

"A person acts with reckless indifference to human life when she knowingly engages in criminal activity that she knows involves a grave risk of death.

"If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that she acted with either the intent to kill or with reckless indifference to human life and was a major participant in the crime for the special circumstances of killing of a witness or lying in wait to be true. If the People have not met this burden, you must find these

special circumstances have not been proved true for that defendant."

Keith argues that under this instruction, jurors could find the lying-in-wait special circumstance and the killing-a-witness special circumstance without finding intent to kill. We agree. The instruction allows jurors to find the special circumstances based only on reckless indifference to human life, a standard lower than the necessary burden of proof for these special circumstances charged here. (*People v. Casares* (2016) 62 Cal.4th 808, 848 [lying-in-wait special circumstances requires intentional murder]; *People v. Ledesma* (2006) 39 Cal.4th 641, 725 [witness-killing special circumstance applies to intentional murder].)

The instructional error, however, was harmless beyond a reasonable doubt. (*People v. Odom* (2016) 244 Cal.App.4th 237, 257 ["Our task is to review 'the trial evidence to determine "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element". . . .' "].) Under other instructions jurors were told that they had to find intent to kill to find the special circumstance true.[4] Thus, jurors necessarily found that Keith intended to kill Poltorak.

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[4] Jurors were instructed as follows: "The defendants are charged with the special circumstance of murder of a witness in violation of Penal Code section 190.2(a)(10). [¶] To prove that this special circumstance is true, the People must prove that: [¶] 1. The defendant intended to kill Erik Poltorak; [¶] 2. Erik Poltorak was a witness to a crime; [¶] 3. The killing was not committed during the commission of the crime to which Erik Poltorak was a witness; [¶] AND [¶] 4. The defendant intended that Erik Poltorak be killed to prevent him from testifying a criminal proceeding."

Moreover, Keith admitted that she harbored the requisite intent. She testified Michael told her that Poltorak "got to go," and it was her responsibility to set up the killing. She understood Poltorak would die. She studied Poltorak's habits and then purchased the costumes used in the killing. She also asked her sister to rent a car to use for the killing. Given Keith's confession, no reasonable juror could conclude that she did not intend to kill Poltorak.

b. CALCRIM No. 702 (Keith)

Keith argues that the court should have instructed jurors with CALCRIM No. 702.[5] CALCRIM No. 702 "pertains only to

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Jurors also were instructed: "The defendants are charged with the special circumstance of murder committed by means of lying in wait in violation of Penal Code section 190.2(a)(15). [¶] To prove that this special circumstance is true, the People must prove that: [¶] 1. The defendant intentionally killed Erik Poltorak; [¶] AND [¶] 2. The defendant committed the murder by means of lying in wait."

Jurors were further instructed that "[t]he lying in wait does not need to continue for any particular period of time, but its duration must be substantial and must show a state of mind equivalent to deliberation or premeditation. [¶] A defendant acted deliberately if he or she carefully weighed the considerations for and against his or her choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he or she decided to kill before committing the act that caused death."

[5] CALCRIM No. 702 provides:

"If you decide that (the/a) defendant is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstance[s] of _____ <*insert only special circumstance[s] under Pen. Code, §§ 190.2(a)(2), (3), (4), (5) or*

those other special circumstances that do not include an *explicit* intent to kill requirement and essentially supplies one." (*People v. Odom, supra*, 244 Cal.App.4th at p. 252.) Here, the instruction was not warranted because the special circumstances include an explicit intent to kill requirement. Section 190.2, subdivision (a)(10) provides for a special circumstance when "[t]he victim was a witness to a crime who was *intentionally* killed for the purpose of preventing his or her testimony in any criminal . . . proceeding . . . ." (Italics added.) Section 190.2, subdivision

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(6)>, you must also decide whether the defendant acted with the intent to kill.

"In order to prove (this/these) special circumstance[s] for a defendant who is not the actual killer but who is guilty of first degree murder as (an aider and abettor/ [or] a member of a conspiracy), the People must prove that the defendant acted with the intent to kill.

"[The People do not have to prove that the actual killer acted with the intent to kill in order for (this/these) special circumstance[s] to be true. [If you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer, then, in order to find (this/these) special circumstance[s] true, you must find that the defendant acted with the intent to kill.]]

"If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that (he/she) acted with the intent to kill for the special circumstance[s] _____ <*insert only special circumstance[s] under Pen. Code, §§ 190.2(a)(2), (3), (4), (5) or (6)*> to be true. If the People have not met this burden, you must find (this/these) special circumstance[s] (has/have) not been proved true [for that defendant]."

(a)(15) provides a special circumstance when "[t]he defendant intentionally killed the victim by means of lying in wait."

c. Proposed Instruction on Voluntary Intoxication (Williams)

Williams argues that the trial court erred in rejecting his proposed instruction on voluntary intoxication. His argument is not persuasive.

i. Background

Williams cites the following evidence as indicative of his voluntary intoxication. When conversing with Keith, Jessicha said Williams "took a big ass fucking drink and went out there and did that shit. He did not want to do it." Jessicha also told Keith that Williams "drank like half that bottle before he went and did that shit. It's like he was, 'gulp, gulp., gulp.' Like, 'gulp, gulp, gulp.' [He] was so drunk." Jessicha further said, "If he hadn't have been drinking, like, we should have just stayed at the house and fucking drink that bottle and been faded."

Williams's counsel initially requested the following instruction:

"You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill or the defendant acted with deliberation and premeditation.

"*The defendant has been prosecuted for first degree murder under two theories: (1) 'the murder was willful, deliberate, and premeditated' and (2) 'the murder was committed by lying in wait[.]'*

"A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using an intoxicating drug, drink, or

other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

"You may not consider evidence of voluntary intoxication for any other purpose." (Italics added.)

As Williams requested, the trial court instructed jurors on voluntary intoxication. But the court's instruction did not include the italicized language, which initially was requested.[6] Williams's defense counsel ultimately stated: "I'm ok with the court taking that out. I just need the instruction."

ii. Analysis

The issue of whether the italicized language should have been included has been forfeited. (*People v. Bolin* (1998) 18 Cal.4th 297, 326.) Although he originally requested additional language, Williams's counsel expressly agreed to the given instruction.

In any event, Williams's argument lacks merit. He is concerned that jurors could have convicted him of first degree murder based on a theory of lying in wait even if it found that he

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[6] The court instructed jurors as follows:

"You may consider evidence, if any, of a defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation.

"A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

"You may not consider evidence of voluntary intoxication for any other purpose."

was voluntarily intoxicated. But, the omitted italicized language does not instruct jurors that it could consider evidence of voluntary intoxication to determine whether Williams was lying in wait. It simply asserts that there are two basis for finding first degree murder.

Moreover—the omitted italicized language was included in other instructions. Jurors were instructed specifically on that point: "The defendants have been prosecuted for first degree murder under two theories: (1) the murder was willful, deliberate, and premeditated and (2) the murder was committed by lying in wait." Thus, the language requested by defendant was given, albeit in a different instruction.

Finally, assuming the court should have instructed jurors that it could consider voluntary intoxication in connection with lying-in-wait theory of first degree murder and the lying-in-wait special circumstance, Williams cannot demonstrate he suffered prejudice. In order to find the special circumstance of lying in wait true, jurors were required to find that "defendant intentionally killed Erik Poltorak." Thus, jurors necessarily concluded that notwithstanding any evidence of intoxication, Williams formed the intent to kill Poltorak. To the extent Williams is arguing he could have formed the intent to kill but not the intent to kill by surprise attack, he cites no evidence to support that conclusion and we find none. Williams therefore fails to demonstrate he suffered any prejudice from the assumed error.

4. Issues Related to the Death Penalty (Keith and Williams)

To pass constitutional muster, a capital sentencing scheme must " 'genuinely narrow the class of persons eligible for the

death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' " (*People v. Ledesma, supra*, 39 Cal.4th 641, 725.) Neither Keith nor Williams were sentenced to the death penalty. Therefore, as respondent points out, it is questionable whether they have standing to raise a claim based on the death penalty. Additionally, the cases appellants cite have no relevance to this case because this case does not involve the death penalty. In any event, their arguments lack merit.

Keith argues that the proliferation of special circumstances render the death penalty law unconstitutional. Keith's argument that the proliferation of special circumstances renders California's death penalty law unconstitutional lacks merit. (*People v. Farley* (2009) 46 Cal.4th 1053, 1133; *People v. Zamudio* (2008) 43 Cal.4th 327, 373.) Keith acknowledges that her argument runs afoul of authority from our high court, which this court is required to follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Williams argues that if the death penalty had been applied, such application would violate the Eighth Amendment because the construction of the lying-in-wait special circumstance is indistinguishable from murder based on a lying-in-wait theory. Our Supreme Court has already decided it against him. (*People v. Casares, supra*, 62 Cal.4th at p. 849; *People v. Cage* (2015) 62 Cal.4th 256, 281.) As noted, we are required to follow our high court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

5. Joint and Several Restitution (Keith and Williams)

The trial court ordered Keith and Williams to be jointly and severally liable for restitution. As the parties agree, the

abstracts of judgment should be modified to reflect joint and several liability.

DISPOSITION

The case is remanded for the trial court to correct the abstract of judgments to reflect the joint and several restitution liability. In all other respects, the judgments are affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.