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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LYNDA KAY GOSS, Defendant and Appellant.	D083652 (Super. Ct. No. SCE411051)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed; remanded to correct abstract of judgment.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance W. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, Collette C. Cavalier and Nora S. Weyl, Deputy Attorneys General, for Plaintiff and Respondent.

Lynda Kay Goss appeals a judgment following convictions of murder, gross vehicular manslaughter while intoxicated, and several lesser offenses. She concedes the manslaughter conviction was warranted, but contends the murder conviction was not supported by sufficient evidence and was tainted by an erroneous jury instruction. The Attorney General disagrees, and so do we. Thus we affirm. In addition, to correct a clerical error in the abstract of judgment, we remand the matter to the trial court with instructions to conform the abstract to the sentence orally pronounced at the sentencing hearing.

I. BACKGROUND

A. Collision

The evidence pertinent to this appeal is largely undisputed. On a clear dry Sunday afternoon in the winter of 2022, Eva von Stohl and her mother, Cecelia Hampton, were traveling south in a minivan on a curving two-lane road in rural San Diego county. The posted speed limit was 50 miles per hour. According to von Stohl's testimony:

> "A. As I was coming around one of the corners, I saw a vehicle coming from the opposite direction right into my lane. [¶] I was trying to see if the person would correct and get into their proper lane. [¶ . . . ¶] I was trying to slow down and—because I didn't know which way they were going to go, if they were going to correct or not. [¶] I couldn't go to the right because of the embankment. So basically, at the last second, I turned to the left.
>
> "Q. And was . . . the . . . oncoming vehicle still in your lane[ ] of traffic?
>
> "A. Yes.
>
> "Q. What was the next thing that happened after you turned your vehicle to the left?

"A. I saw that the car was correcting right into me."

The two cars collided, and von Stohl lost consciousness. When she came to, she heard her mother saying she was unable to breathe.

Paramedics responded to the scene and rendered assistance to von Stohl, to Hampton, and to the driver of the other car—Goss. Von Stohl and Goss were transported to hospitals and treated, but Hampton died at the scene.

Inside Goss's car, investigating officers found cannabis edibles, a glass pipe, and seven or eight 50 milliliter (1.7 ounce) plastic liquor bottles. Two of these bottles were unopened. The others were empty or nearly empty. An additional such bottle was found on the ground below the passenger side door of Goss's car.

B. Charges

Goss was charged with two offenses under the Penal Code in connection with the death of Hampton: murder in violation of section 187, subdivision (a) (count 1); and gross vehicular manslaughter while intoxicated in violation of section 191.5, subdivision (a) (count 2).

In addition she was charged with three offenses under Vehicle Code section 23153 with respect to von Stohl: driving under the influence of alcohol, causing bodily injury, in violation of section 23153, subdivision (a) (count 3); driving with a 0.08 percent BAC, causing bodily injury, in violation of Vehicle Code section 23153, subdivision (b) (count 4); and driving under the combined influence of alcohol and drugs, causing bodily injury, in violation of Vehicle Code section 23153, subdivision (g) (count 5).[1]

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1 Several of the counts included enhancements. But the enhancements are not pertinent to the issues on appeal.

C. Evidence at Trial

Twenty-six witnesses testified at trial. Two of these witnesses (a patrol officer and a collision reconstructionist) each testified that the two lanes comprising the road on which the collision had occurred were separated by painted double yellow lines into which were embedded a textured rumble strip; and a third witness (a paramedic) testified that he had detected the smell of alcohol on Goss at the scene of the collision.

A toxicologist testified that alcohol testing performed on a blood sample drawn from Goss about one hour after the collision revealed a blood alcohol concentration (BAC) of between 0.29 and 0.40 percent at the time of the collision and that these levels corresponded to between 7.5 and 10.5 standard drinks worth of alcohol circulating in her system at the time of the collision. This toxicologist further testified that a person with a BAC of between 0.29 and 0.39 percent would be impaired for the purposes of driving and that a BAC of .40 percent would be "fatal . . . for the average individual."

Another toxicologist testified that drug testing performed on the sample revealed the presence in Goss's blood of lorazepam, a benzodiazepine that would have had the effect of depressing Goss's nervous system.[2] Questioned about the effect that a benzodiazepine might have had on the behavior of a driver, this toxicologist testified that:

> "[I]t could cause someone to be drowsy or not be alert. They may have difficulty focusing their attention in more than one place. Driving does require an individual to focus on their speed, their lane of travel, anything that pops up

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[2] This toxicologist also testified that a metabolite known as carboxy THC (a cannabinoid) was detected in Goss's blood sample, but that its presence was not factored into her opinion because it was inactive.

> in order for them to respond appropriately. So all of those things can be delayed, which can impair driving."

Each toxicologist expressed an opinion that, based on the concentration of alcohol alone (i.e., without factoring in the effects of the lorazepam) Goss was impaired for the purposes of driving.

A plea agreement from a misdemeanor DUI matter in which Goss had been involved during 2012 (nine and a half years before the collision involving von Stohl and Hampton) included a page on which Goss's signature appeared immediately below the statement "My blood alcohol reading was .18,"[3] and on which her initials appeared beside this statement:

> "I understand [that] . . . [b]eing under the influence of alcohol or drugs, or both, impairs my ability to safely operate a motor vehicle, and it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If I continue to drive while under the influence of alcohol or drugs, or both, and as a result of my driving, someone is killed, I can be charged with murder.

Two employees of a three-month DUI education and counseling program in which Goss participated during 2012, and an employee of a DUI presentation she attended during 2017, testified collectively to at least five occasions on which Goss would have been explicitly warned to the effect that, "if . . . you're out driving under the influence and there's a crash that results in death, you may be charged with . . . murder" or that "[i]f you continue to drive while under the influence of alcohol or drugs or both, and as a result of that driving someone is killed, you can be charged with murder."

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[3] "It is unlawful for a person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle." (Veh. Code, § 23152, subd. (b).)

According to video and audio of a bedside interview of Goss that a police officer with a body worn camera had recorded in the hospital the day following the collision, Goss replied, "I don't know" when asked if she had been told during any of those programs "that . . . , if you were involved in a crash and somebody died, . . . you could be charged with murder," and "No" in response to the question: "Were you drinking before the crash . . . ?"

D. Verdict and Sentence

The jury convicted Goss of the offenses charged in counts 1 and 2, (murder of Hampton and gross vehicular manslaughter while intoxicated); acquitted her of the offenses charged in counts 3 through 5 (alleging Goss had caused bodily injury to von Stohl); and instead convicted her of the lesser included offenses of: driving under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a); driving with a measurable amount of alcohol in her blood in violation of Vehicle Code section 23152, subdivision (b); and driving under the combined influence of alcohol and drugs in violation of Vehicle Code section 23152, subdivision (g).[4] The trial court then sentenced Goss, and Goss timely appealed.

II. DISCUSSION

A. Sufficiency of the Evidence

Goss's first contention on appeal is that "the record is legally insufficient to support her conviction for implied malice murder under [*Watson*]" because [t]he evidence . . . failed to show [she] engaged in conduct that demonstrated a high degree of probability death would result."

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[4] The jury also made true findings with regard to enhancements, but those findings are not pertinent to the issues on appeal.

1. *Standard of Review*

"In evaluating a claim that a conviction lacks sufficient evidence, ' "we review the whole record to determine whether . . . [there is] substantial evidence to support the verdict . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." ' " (*People v. Wear* (2020) 44 Cal.App.5th 1007, 1019 (*Wear*).) " ' "In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." ' " (*Ibid.*) " ' "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." ' " (*People v. Davis* (2024) 107 Cal.App.5th 500, 509–510.)

As has often been said: " '[T]he power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court*"—or, in this case, the jury—"*believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion*.' " (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1363 (*Ortiz*).)

"[R]eversal is required only if ' "it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " ' " (*Wear, supra*, 44 Cal.App.5th at p. 1020.)

"Given this deferential standard of review, a 'defendant bears an enormous burden in claiming there is insufficient evidence' to support a conviction." (*Wear, supra*, 44 Cal.App.5th at p. 1020.) "Nevertheless, there must be 'substantial evidence,' that is, evidence that is ' " 'reasonable . . . , credible, and of solid value.' " ' " (*Ibid.*) "In particular, a reasonable inference from the evidence ' " 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.' " ' " (*Ibid.*)

Applying the standard of review just discussed to the murder conviction in this case, we begin with a brief overview of implied malice murder involving drunk driving (or, as it is colloquially referred to, *Watson* murder), focusing on legal principles that pertain to the actus reus element of the offense.

2. *Legal Principles Pertaining to the Actus Reus Element of* Watson *Murder*

"Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (Pen. Code, § 187, subd. (a).) Such "malice may be express or implied." (*Id.,* § 188, subd. (a).) Malice is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*Id.,* § 188, subd. (a)(2).)

For many years, courts have expressed concern that " '[t]he statutory definition of implied malice . . . is far from clear in its meaning.' " (*People v. Pierce* (2025) 114 Cal.App.5th 508, 525 (*Pierce*).) "In response to this concern, ' "[t]wo lines of decisions developed, reflecting judicial attempts 'to translate this amorphous anatomical characterization of implied malice into a tangible standard a jury can apply.' " ' " (*Ibid.*) One such line of cases derived from *People v. Thomas* (1953) 41 Cal.2d 470, 480 (*Thomas*). It defined the actus

reus component[5] (as distinguished from the mens rea component[6]) of the elements required to establish implied malice as an act " '*that involves a high degree of probability that it will result in death*' " (*Pierce,* at p. 525, italics added, quoting *Thomas*, at p. 480) (the *Thomas* definition, *Thomas* formulation, or *Thomas* test). The other line of cases derived from *People v. Phillips* (1966) 64 Cal.2d 574 (*Phillips*). It defined the actus reus component of the elements required to establish implied malice as an act " '*with natural consequences 'dangerous to life*' " (*Pierce,* at p. 525, italics added, quoting *Phillips*, at p. 587]) (the *Phillips* definition, *Phillips* formulation, or *Phillips* test).

In *People v. Watson* (1981) 30 Cal.3d 290 (*Watson*), "the leading case on vehicular murder involving implied malice" (*Pierce, supra*, 114 Cal.App.5th 508, 523), the high court harmonized the *Thomas* and *Phillips* lines of cases by holding that, despite the difference in phraseology, "the two definitions of implied malice which had evolved from the foregoing cases actually articulated one and the same standard." (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 104 (*Nieto Benitez*); accord *Knoller, supra*, 44 Cal.4th at p. 152.) And in *People v. Reyes* (2023) 14 Cal.5th 981 (*Reyes*), the court further clarified and harmonized the two definitions by holding that, irrespective of the definition, formulation, or test used, implied malice requires conduct that is not just dangerous to life in some vague, speculative, or remote sense, but

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5 The actus reus component is sometimes referred to as the objective component of *Watson* murder. (See, e.g., *People v. Knoller* (2007) 41 Cal.4th 139, 157 (*Knoller*).)

6 The mens rea component is sometimes referred to as the subjective component of *Watson* murder. (See, e.g., *Knoller, supra*, 44 Cal.4th at p. 157.)

instead involves a high degree of probability that death will result. (*Reyes,* at p. 989; see also *Pierce,* at pp. 526–527.)

Watson not only harmonized the *Thomas* and *Phillips* lines of cases; it also held that, depending on the circumstances, a defendant could be convicted of murder in a situation involving drunk driving. (*Watson, supra*, 30 Cal.3d at pp. 300–301.) "Since *Watson*, appellate courts have upheld numerous murder convictions in cases involving a defendant driving under the influence of alcohol." (*Pierce, supra*, 114 Cal.App.5th at p. 524 [citing *People v. Wolfe* (2018) 20 Cal.App.5th 673, 682 (collecting cases)].)

" 'Generally, these opinions "have relied on some or all of the following factors" that were present in *Watson*: "(1) blood-alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving." ' " (*Pierce, supra*, 114 Cal.App.5th at p. 524.) "However, 'courts have recognized that there is no particular formula for analysis of vehicular homicide cases, instead requiring a case-by-case approach.' " (*Ibid*.)

3. Analysis

In challenging the sufficiency of the evidence to support her conviction of murder, Goss in essence argues that, irrespective of whether substantial evidence supported a conclusion that her conduct culminating in the collision constituted an act with natural consequences dangerous to life, it did not support a conclusion that that conduct constituted an act involving a high degree of probability that death would result.

In support of this argument Goss focuses: (1) on evidence that might support an inference that she was comporting herself prudently (or at least less imprudently than might otherwise be the case) in the run up to the collision; and (2) on the absence of certain types of evidence that might support an inference to the contrary. Thus, for example, she points to

testimony of one of the collision reconstructionists, who opined that the likely speed at which Goss's car was traveling at the moment of impact was approximately 33 miles per hour—17 miles per hour below the posted speed limit. (To this point we might add testimony by the cell phone technology/transmission analyst that a cell phone recovered from Goss's car was not used to make calls or send texts during the approximately 20-minute period of time that Goss was driving on the day of the collision; and testimony by von Stohl and a highway patrol officer that, on the day of the collision, the weather was clear and dry.) In addition, Goss argues that "there was no evidence of any bad driving by [her] prior to the collision," either on the day of the collision or at any other time since the DUI incident in which she had been involved nine and a half years earlier.[7] But, for three reasons, we are not persuaded.

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[7] The circumstances on which Goss draws to support an inference that her conduct did not involve a high degree of probability that death would result also include matters pertaining to the status of Hampton's health before the collision. Examples of such matters include: (i) evidence that Hampton had a heart condition and diabetes; (ii) an acknowledgment by the forensic pathologist who reviewed her autopsy report that the heart condition would have contributed to her death; and (iii) the fact that Goss was acquitted on the counts that alleged she was responsible for injuries sustained by von Stohl. But, even assuming it might sometimes be appropriate in a *Watson* murder case to consider the health status of a victim that is unknown to the defendant (a matter as to which we express no opinion here), we conclude Hampton's diagnoses did not represent a departure from the health of the population as a whole that would materially affect the degree of probability that Goss's conduct would result in death.

First, the test on a sufficiency-of-the-evidence challenge is not whether substantial evidence supports a finding that the appellant *wishes* had been made at trial, but rather whether such evidence, contradicted or not, supports findings that *actually* were made at trial. (*Adoption of A.B.* (2016) 2 Cal.App.5th 912, 925.) Thus, if substantial evidence to support a finding that a high degree of probability that death would result from Goss's conduct appears in the record, then (as noted *ante*) " '*it is of no consequence that the* [*jury*] *believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion*.' " (*Ortiz, supra*, 208 Cal.App.4th at p. 1363; see also *Pierce, supra*, 114 Cal.App.5th at p. 530 ["On appeal, we are required to review the evidence in the light most favorable to the judgment [citation], and we do not resolve evidentiary conflicts [citation]. We may not reverse the judgment simply because some circumstances might reasonably be reconciled with a contrary finding." [Citation.] We therefore are not required to address defendant's contentions, which arise from conflicts in the

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Goss also asserts "Ms. Hampton was seated in a wheelchair inside the van"; however, there was substantial evidence, in the form of testimony by von Stohl, to the contrary. Be this as it may, von Stohl also testified that the middle row of the minivan had been removed to accommodate an electrically powered wheelchair and that a conventional wheelchair stowed near Hampton's seat had not been secured to the minivan at the time of the collision. From this, one might infer that Hampton's death was attributable in part to negligence on the part of Hampton and von Stohl. But, even assuming it might sometimes be appropriate in a *Watson* murder case to take into consideration the environment inside a vehicle struck by the defendant's vehicle (a matter as to which we express no opinion here), we conclude the possibility that loose objects will be present in a vehicle is a matter as to which the drivers of other vehicles sharing the road should be presumed to be on notice.

evidence or alternative theories regarding the inferences to be drawn therefrom."].)

Second, there was substantial evidence to support a finding beyond a reasonable doubt that a high probability of death would result from Goss's conduct. This evidence pertained to road conditions and to Goss's conduct in the context of such conditions.

With regard to *road conditions*, the evidence included testimony that: the road was curving; it consisted of only two lanes (one in each direction); and in some stretches it was bordered by an embankment that limited options for evasive maneuvering in the event of a hazard. The evidence also included testimony that the road's two lanes were divided, not only by a double yellow line, but also a rumble strip, and this testimony supported an inference that the road was considered to be sufficiently hazardous to warrant the implementation of additional safety precautions, beyond the ordinary, to reduce the risk of a car drifting into the oncoming lane.

With regard to *Goss's conduct* in the context of these road conditions, the evidence included testimony that Goss was driving *on the wrong side of the road in the face of oncoming traffic*, with a BAC more than 3.5 times, and perhaps as high as 5 times, the legal limit, and with, not only alcohol, but also an additional central nervous system depressant—lorazepam—in her blood. The evidence also included testimony supporting an inference that Goss's level of impairment was so profound, and rendered her so inattentive to the environment around her, that (assuming without deciding that her last-moment return to the correct lane was intentional) it unduly delayed her taking evasive action notwithstanding the existence of sensory cues that were not only visual (double yellow lines) but also haptic (rumble strip) and audible (rumble strip).

True, there was no evidence to indicate that Goss had been driving in excess of the speed limit, that the weather had been inclement, that Goss had been using her phone, or that other circumstances were present that would have made Goss's conduct more hazardous than it was. But this observation does not render the *other* evidence discussed above insufficient to permit a jury to determine that her conduct was sufficiently hazardous to warrant a conclusion beyond a reasonable doubt that it involved a high degree of probability that death would result.

Third, the evidence and lack of evidence that Goss cites in her defense is susceptible of inferences that substantially reduces its value to her. Thus, for example, the highway patrol officer who testified that the likely speed at which Goss's car was traveling at the moment of impact was approximately 33 miles per hour also testified that he had been unable to determine "whether or not there was any sort of braking" before the moment of impact. That is to say, his testimony left open the possibility that Goss's car had been traveling at a speed greater than 33 miles per hour as she approached the minivan. Similarly, the absence of any evidence that Goss drove unsafely between the date of her 2012 DUI incident and the moments that preceded the collision with the minivan nine and a half years later does not establish either that she was a safe driver generally or that she drove safely on that day.

Thus we conclude substantial evidence supported a finding beyond a reasonable doubt that the natural and probable consequences of Goss's conduct were dangerous to the lives of people other than Goss in more than a vague or speculative sense and involved a high degree of probability that death would result.

B. Alleged Instructional Error

The second of Goss's two contentions on appeal is that the trial court erred in not instructing the jury that conviction on the murder count required proof that Goss's conduct involved a high degree of probability that death would result (in other words, that the court erred in not including the *Thomas* formulation (see *ante*) in its instructions to the jury for the offense of murder).[8] We review claims of instructional error de novo. (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1378; *People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

1. *Reyes* and the Evolution of CALCRIM No. 520

Goss's contention that the trial court erred in not instructing the jury that conviction of murder required proof that Goss's conduct involved a high degree of probability that death would result is rooted in a passage from our Supreme Court's opinion in *Reyes, supra*, 14 Cal.5th 981 and in revisions that the Judicial Council made to CALCRIM 520 (titled "First or Second Degree Murder With Malice Aforethought) following publication of *Reyes*.

As summarized in *Pierce, supra*, 114 Cal.App.5th at pp. 526–527:

> "*Reyes* involved the high court's review of a petition for resentencing brought pursuant to [Penal Code] section 1172.6. The defendant was one of several gang members or affiliates present when a killing occurred but was not the shooter. He had been prosecuted under a theory that he was guilty of murder as an aider and abettor to either assault or disturbing the peace, and that murder was a natural and probable consequence of those offenses.

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8 In addition to contending the trial court erred in failing to include the *Thomas* formulation in its instructions to the jury, Goss also contends such error caused her prejudice. But, inasmuch as we find no instructional error (see *post*), we need not address the contention that Goss suffered prejudice.

> [Citation.] On the petition, the trial court determined the defendant had committed an act dangerous to human life sufficient to support a finding of implied malice, inasmuch as the defendant 'travel[ed] "along with several other gang members, one of which [was] armed, . . . to rival gang territory." ' [Citation.]
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> "[R]eturn[ing] to the *Thomas* test[,] . . . the high court held that the defendant's act could not support a finding of implied malice: 'To suffice for implied malice murder, the defendant's act must not merely be dangerous to life in some vague or speculative sense; it must " 'involve[ ] a high degree of probability that it will result in death.' " ' [Citation.] However, the high court also once again cited with approval to case law explaining that an act with natural consequences ' " ' "dangerous to life" ' " ' is the same as an act with a ' " 'high degree of probability' " ' to result in death. [Citation.] Accordingly, *Reyes* seemingly clarified that, while these formulations mean the same thing, implied malice under either formulation requires an act that is not merely dangerous to life in some vague, speculative, or remote sense, but one that has a high degree of probability of resulting in death."

At the time that *Reyes* was published, and at the time that the jury in the present case was instructed, the language in CALCRIM No. 520 pertaining to the actus reus element of implied malice murder included only the *Phillips* formulation. It read: "The defendant had *implied malice* if: [¶]. (2) [t]he natural and probable consequences of the (act/[or] failure to act) were dangerous to human life." (Judicial Council of California Criminal Jury Instns. (2021 ed.) CALCRIM No. 520 (new Jan. 2006).) It was this

formulation that the trial court in the present case used to instruct the jury on the murder charge against Goss.[9]

In 2024, following publication of *Reyes*, the Judicial Council revised CALCRIM No. 520 to incorporate *both* the *Phillips* formulation and the *Thomas* formulation. As a result of this revision, CALCRIM was amended to read: "The defendant had implied malice if: [¶] (2) [t]he natural and probable consequences of the (act/[or] failure to act) were dangerous to human life in that the (act/[or] failure to act) involved a high degree of probability that it would result in death." (Judicial Council of California Criminal Jury Instns. (2024 ed.) CALCRIM No. 520 (new Jan. 2006).) Then, in 2025, the Judicial Council revised the instruction *again*, such that the pertinent language now reads: "The defendant had *implied malice* if: [¶] (2) [t]he natural and probable consequences of the (act/[or] failure to act) were dangerous to human life [¶]. An (act/[or] failure to act) is dangerous to human life if it involved a high degree of probability that it would result in death." (Judicial Council of California Criminal Jury Instns. (2025 ed.) CALCRIM No. 520 (new Jan. 2006).)

2. Analysis

Citing *Reyes* and the 2024 revision to CALCRIM 520, Goss argues *Reyes* redefined implied malice murder in such a way as to require that trial courts include the *Thomas* formulation in their instructions on the offense of implied malice murder. This is precisely the same argument that the defendant made—and that a panel of the Fifth District rejected last year—in

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9 The precise language the trial court used was: "The defendant acted with implied malice if: [¶] (2) [t]he natural and probable consequences of the act were dangerous to human life."

Pierce. (See *Pierce, supra*, 114 Cal.App.5th at p. 531 [rejecting defense contention that "the high court in *Reyes* 'changed its position' . . . and 'redefin[ed] "dangerous to human life" ' to require a high probability that the defendant's act would result in death"; and that "his conviction for second degree murder must be reversed because the jury was not instructed that ' "dangerous to human life" . . . ' means 'the act must be one that involves "a high degree of probability that it will result in death." ' " (*Id.* at pp. 532–533.)].

As the *Pierce* court held: "Contrary to defendant's argument, the requirement that an act carry a 'high probability' of death is not new, and *Reyes* itself noted the equivalence of the *Thomas* and *Phillips* formulations." (*Pierce, supra*, 114 Cal.App.5th at p. 531; see also *Reyes, supra*, 14 Cal.5th at p. 989 [citing *Knoller, supra*, 41 Cal.4th at p. 152 for the proposition that, " ' " 'dangerous to life' " ' means the same thing as a ' "high degree of probability that" ' the act in question ' "will result in death" ' "]. Reinforcing this statement of the law the *Pierce* court cited the high court's opinions in several additional cases, including: *People v. Dellinger* (1989) 49 Cal.3d 1212, 1215, 1219 (*Dellinger*), in which the high court said that "*Watson* . . . made it abundantly clear that the two definitions of implied malice which evolved in the aforementioned cases articulated one and the same standard" and that "the better practice . . . is to instruct juries solely in the straightforward language of the [*Phillips*] definition"); and *Nieto Benitez, supra*, 4 Cal.4th at p. 111, in which the court rejected an argument that the absence of the *Thomas* formulation in CALJIC No. 8.31's[10] constituted a misstatement of

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10 CALJIC No. 8.31 is the CALJIC analog to CALCRIM No. 520.

law, and held instead that " 'the two linguistic formulations— "an act, the natural consequences of which are dangerous to life" and "an act [committed] with a high probability that it will result in death"[—]are equivalent and are intended to embody the same standard." (See *Pierce, supra*, 114 Cal.App.5th at p. 535.)

Thereafter, the *Pierce* court stated its conclusion with regard to the claim of instructional error as follows:

> "We disagree with defendant's contention that CALCRIM No. 520, as given [i.e., without the *Thomas* formulation], was incorrect under *Reyes*. *Reyes* did not involve jury instructions or hold that trial courts must instruct that the act required to support a finding of implied malice must involve a high probability that death will result. Nor did *Reyes* purport to overrule or abrogate *Nieto Benitez*. To the contrary, the court reaffirmed its long-standing precedent that the *Thomas* and *Phillips* tests articulate the same standard. Because *Reyes* did not decide an instructional issue and did not overrule or disapprove of the high court's prior cases, we are bound by its decision in *Nieto Benitez*. We therefore find no error in the implied malice instruction given at defendant's trial." (*Pierce, supra*, 114 Cal.App.5th at pp. 535–536 [acknowledging the 2024 revision to CALCRIM No. 520, but concluding, "[f]or the reasons stated, . . . [that] the instruction under the former version of CALCRIM No. 520 remains a correct statement of law, notwithstanding any clarification in *Reyes*"].)

We see no reason to depart from the well-reasoned holding in *Pierce*.[11] Thus we conclude the trial court did not err in instructing the jury with a version of CALCRIM No. 520 that did not include the *Thomas* formulation.

C. Abstract of Judgment

As a final matter, we address the fact (brought to our attention by the Attorney General) that, due to what appears to have been a clerical error, the abstract of judgment applicable to the conviction on count 2 omits the duration of the prison term for that conviction that the trial court pronounced orally from the bench during the sentencing hearing.

At that hearing, the court sentenced Goss to the midterm of six years of imprisonment for the conviction on count 2 and stayed that sentence pursuant to Penal Code section 654. The minute order from the hearing matches the oral pronouncement, page one of the abstract of judgment for that conviction correctly indicates that Goss was convicted and sentenced to the midterm, and page two of the abstract correctly indicates that the "6 years M Term" is "stayed pursuant to PC654."

But the box on page one in which the number of years imposed for that conviction is supposed to have been inserted is empty, and the box on that

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11 Goss contends circumstances unique to this case demonstrate that, but for the "the lack of jury instructions focusing the jury's attention on the . . . 'high degree of probability of death' " formulation of implied malice, Goss would have been acquitted on count 1 (the count in which she was charged with *Watson* murder). In support of this contention, she correctly points out that the jury initially deadlocked on count 1 and did not return a verdict on that count until after the trial court had furnished clarification regarding the meaning of CALCRIM 520. But the record reveals that the element of CALCRIM 520 as to which the jury was deadlocked was not the element that is the subject of this appeal, but rather the element requiring the defendant to have "deliberately acted with conscious disregard for human life."

same page in which the "total time" imposed for that conviction is supposed to have been inserted is filled in with a "0" rather than with the number "6."

Inasmuch as it is the oral pronouncement of sentence that controls (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324 ["it is the *oral pronouncement of sentence* that constitutes the judgment;" "the abstract of judgment ' "cannot add to or modify the judgment which it purports to digest or summarize" ' "]; *People v. Zackery* (2007) 147 Cal.App.4th 380, 385), we exercise our authority (*Scott*, at p. 1324 ["[a]s with other clerical errors, discrepancies between an abstract and the actual judgment as orally pronounced are subject to correction at any time, and should be corrected by a reviewing court when detected on appeal"]; *People v. Alford* (2010) 180 Cal.App.4th 1463, 1473; *People v. Felix* (2009) 172 Cal.App.4th 1618, 1631) to order that the abstract be amended to conform to the sentence pronounced at the sentencing hearing.

III. DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court with instructions to amend the abstract of judgment for the conviction on count 2 by inserting on page one the number "6" both in the box for number of years imposed and in the box for "total time" imposed for that count.

KELETY, J.

WE CONCUR:

MCCONNELL, P. J.

BUCHANAN, J.