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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RUDY SANTOS NISSEN, Defendant and Appellant.	D040430 (Super. Ct. No. SCS165116)

APPEAL from a judgment of the Superior Court of San Diego County, Wesley R. Mason, Judge. Affirmed.

A jury found Rudy Santos Nissen guilty of assault with a deadly weapon with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)),[1] and battery with serious bodily injury (§ 243, subd. (d)). The jury also found true the allegations that in committing those crimes Nissen inflicted great bodily injury (§§ 12022.7, subd. (a),

1 All further statutory references are to the Penal Code unless otherwise specified.

1192.7, subd. (c)(8)), used a deadly or dangerous weapon (§§ 12022, subd. (b)(1), 1192.7, subd (c)(23)), and acted in furtherance of a criminal street gang (§ 186.22, subd. (b)(1)). Thereafter, the court found true a prior prison term allegation (§ 667.5, subd. (b)), a prior serious felony conviction (§ 667, subd. (a)(1)), and a prior "strike" conviction (§ 667, subds. (b)-(i)). Nissen was sentenced to a term of 24 years in state prison, consisting of the midterm of three years for the assault conviction, doubled to six years based upon the prior strike conviction, with a consecutive term of three years for the great bodily injury enhancement, a consecutive term of 10 years for the criminal street gang enhancement, and a consecutive term of five years for a prior serious felony enhancement. The sentence on the battery conviction was stayed pursuant to section 654.

On appeal Nissen asserts that (1) the court violated his Sixth Amendment right to confront witnesses by admitting evidence of codefendant Rashad Mann's change of plea;[2] (2) there is insufficient evidence to support the criminal street gang enhancement; (3) the jury instruction on the criminal street gang enhancement was deficient; and (4) the jury instruction under CALJIC No. 17.41.1 was improper. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *People's Case*

Armando Franco grew up in Chula Vista until he was 15 years old, when he moved to Imperial Beach with his mother. He associated with an Imperial Beach gang

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2 Mann was originally charged, together with Nissen, with attempted robbery, assault with a deadly weapon and battery. However, as will be discussed, *post*, he pleaded guilty to assault with a deadly weapon and was not tried with Nissen.

known as the "Imperials" from that time until he moved away when he was 18. Franco was 21 at the time of his testimony at Nissen's trial.

Franco's father was one of the founders of the gang. All of Franco's family members on his father's side were gang members.

Franco was not highly regarded within the gang for a variety of reasons. One was that the majority of members grew up in Imperial Beach and had known each other since elementary school, while Franco had only moved there recently. Another was that he had not been "jumped into" the gang because of the high status of Franco's father in the gang. To be "jumped in" means to be beaten up by other gang members before being admitted. On one occasion Mann, also an Imperial Beach gang member, and three others beat up Franco and a friend and stole his friend's hat and money. Franco told his father about the incident and there was animosity between Franco's family and Mann after that.

Franco's father died as a result of an altercation with a rival gang. A few months after his father's death, Franco went to a party where Mann was present. Mann gave Franco a "dirty look" and approached him throughout the night, asking him, "Who got your back now?" Franco believed that this was a reference to his father's death and the fact there was no longer anyone to protect him. Franco believed that Mann was angry over Franco telling his father about his prior altercation with Mann.

Franco stopped associating with the gang when he turned 18 years old. In order to leave the gang, individuals usually had to be "jumped out" in the same manner that they entered the gang. Franco did not go through this process and merely left the gang. Franco moved from Imperial Beach because he knew that sooner or later he was "going

to get knocked out." Family members informed Franco that he was no longer welcome in Imperial Beach.

However, Franco occasionally went to Imperial Beach because his mother and other family members still lived there. Prior to Christmas 2001, Franco had been away from San Diego for a long time because he was working a construction job in El Centro. The job ended shortly before Christmas and he spent the holiday with his mother in Imperial Beach. On December 27, 2001, Franco was taking his cousin Megan Romero to her home in Imperial Beach when he saw Nissen and Mann standing on a street corner.[3] They were wearing clothing worn by Imperial Beach gang members. Mann and Nissen gestured at Franco to stop, but he ignored them and continued driving. After Franco dropped his cousin off at their grandmother's house, he drove back and saw Nissen at the same location. Nissen again motioned him to stop. Franco did not stop, but instead made a left turn and drove to his mother's house.

Nissen got in his car and followed Franco to his mother's house. Franco parked in front of his mother's house, although she was not home. After Franco parked, he called his girlfriend on his cell phone to tell her what was happening. As he was talking to his girlfriend, Nissen opened the passenger door of Franco's car and got inside.

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[3] The reporter's transcript refers to Mann as "Cornell." However, this appears to be a transcribing error of Mann's gang moniker "Conejo."

Nissen asked Franco what he was doing there. Nissen stated that "Conejo" (Mann) had told Franco he was not supposed to be in Imperial Beach. Franco responded, "Who the fuck is Conejo to tell me not to visit my mother."

Nissen handed Franco a cell phone he was carrying. Mann was on the phone. Mann asked Franco about an old debt and told Franco to stay out of Imperial Beach. Franco denied that he owed any money. Mann told Franco to give his own cell phone to Nissen. Franco refused. Mann then told Franco to put Nissen back on the line.

Franco handed Nissen's cell phone back to him. Franco overheard Mann tell Nissen, "Just take his phone . . . ." Nissen ended the call and demanded that Franco give him his cell phone. Franco refused.

Nissen then hit Franco on the side of the head with his fist. Franco and Nissen then exited the car and began fighting in the street. Nissen punched Franco in the ribs three times, and Franco hit Nissen in the face, knocking him down. At that point, Franco noticed that Nissen had a knife in his hand and that the punches to his ribs were actually stabs. Franco saw that he was bleeding in the area of his ribs. He felt "real wet and kind of cold" and looked down and saw "blood all over." As Nissen got up, he said, "Oh, you're dead." Nissen charged at Franco again, but Franco managed to get in his car and drive off.

Franco then saw that Nissen was following him in his own car. Franco was able to eventually lose Nissen. Franco drove to his grandmother's house. When he arrived, his mother and grandmother were there. When he pulled into the driveway and exited the car, he fainted. His mother asked him what happened. Franco told his mother he had

been stabbed by some "homeboys" named "Curly" (Nissen) and "Conejo" (Mann). They called the police and paramedics, and Franco was transported to the hospital by ambulance. Franco sustained a four-inch deep wound to the right side of his torso, as well as a superficial puncture wound on his arm.

Carlos Farias, a gang unit detective with the San Diego County Sheriff's Department, testified that Nissen and Mann were members of the Imperial Beach street gang and went by the monikers of "Curly" and "Conejo," respectively. Mann was the primary Imperial Beach gang member enforcing the "keep-out-of-Imperial-Beach" rule.

Michael Speyrer, also a gang unit detective with the San Diego County Sheriff's Department, testified that the Imperial Beach gang is a documented street gang that has been in existence for nearly 50 years. The gang is primarily Latino, but a few members from other races are permitted. The gang has several subgroups or cliques, divided by age. The younger groups are the ones primarily responsible for committing crimes and gaining respect for the gang by instilling fear in people. Detective Speyrer testified that Nissen and Mann were documented members of the "Dukes" clique of the Imperial Beach gang.

Detective Speyrer stated that membership in the gang had to be earned either by being "jumped in" or backing up a gang member during a fight or crime. Members who did not earn their entry into the gang would not be trusted. Detective Speyrer stated that the Imperials have been involved in various types of crimes, including several homicides.

Detective Speyrer was familiar with the facts of this case from reading the reports and interviewing Franco. Detective Speyrer testified that in his opinion the charged

crimes were gang related. He based his opinion in part on the fact that Franco had been "ranked out" of the gang because he left. Attacking a ranked-out member who returns to the neighborhood serves to "keep the rest of the members in line." Detective Speyrer's opinion was also based upon the fact that Mann claimed Franco owed him $80 and directed Nissen to take his cell phone as payment. Assisting a fellow gang member collect on a debt is considered beneficial to the gang.

Nissen's codefendant Mann entered a plea of guilty to the charge of assault with a deadly weapon prior to trial. In his change of plea form, he admitted that he "aided and advised codefendant Nissen in an assault likely to produce great bodily injury by instigating and encouraging codefendant Nissen via telephone to take victim Franco's cell phone." The People called Mann as a witness at trial. However, Mann refused to testify, invoking his Fifth Amendment right against self-incrimination. Mann was declared an unavailable witness, and, over Nissen's Sixth Amendment confrontation clause objection, his change of plea form was admitted under the theory that it was a statement against penal interest.

B. *Defense Case*

Officer Pedro Diaz of the Chula Vista Police Department was one of the first officers to arrive at the scene of the crime. Franco's mother told him that Franco had told her that he had been attacked by four Hispanic males.

Ericka Mancillas has been friends with Franco for about eight years. She lives around the corner from Franco's house and next door to Nissen. On December 27, between 2:00 and 3:00 p.m., she was walking home from a friend's house and Franco

gave her a ride home. When Franco dropped her off at her house, Nissen was standing outside his house in the front yard, talking on his cell phone. Franco waved to Nissen and Nissen walked up to Franco's car. Nissen got in Franco's car, handed his cell phone to Franco, and said, "Rashad wants to talk to you." After Franco talked to Mann on the phone, he appeared to be upset. Franco said to Nissen, "You know what, you want to go for the F'ing money that I owe Rashad." Franco then sped away with Nissen still in the car and the passenger side door open.

Mancillas walked to the corner to see where Franco's car went. When the car stopped, Franco and Nissen got out of the car and began talking and moving their hands. She saw no fighting or weapons. After that, Nissen walked back down to Mancilla's house and they had pizza.

Nissen's cousin Maria Nissen was at Nissen's house on December 27. After Nissen arrived, they played video games in his room. He told Maria that he had been in an argument.

Nissen testified in his own defense. On December 27, Nissen first saw Franco when he was dropping off Mancillas at her house on the corner. When Franco drove by, Nissen was standing in his front yard talking to Mann on the telephone. Nissen told Mann that Franco had just driven by. Mann told Nissen that he wanted to talk to Franco.

Nissen walked over to Franco's car, which was in front of Mancilla's house, and told Franco that Mann wanted to talk to him. Nissen handed his cell phone to Franco and sat down on the passenger seat with his feet outside the open door. Franco spoke to Mann on the phone. After Franco was finished, he and Nissen argued about a debt.

During the argument, Franco drove off with Nissen's door still open and his feet outside the car. Nissen pulled his feet inside and closed the car door. Franco drove around the corner, down the street, around another corner and stopped in front of Franco's mother's house. Franco drove in a reckless manner and kept reaching under the seat for something.

When they stopped in front of Franco's mother's house, Franco pulled out a knife and made a motion toward Nissen with it. Nissen tried to calm Franco down and Franco said, "I'm tired of this shit." As Franco faced Nissen and got closer, Nissen grabbed Franco's hand and Franco grabbed Nissen's neck. The two struggled back and forth, with the knife between them for a few seconds. Nissen managed to push Franco away and get out of the car. Franco got out of the car and came after Nissen. Nissen and Franco swung at each other outside the car and Franco then got back in his car and took off. Nissen never knew Franco had been stabbed as a result of the struggle.

DISCUSSION

I. *Admission of Change of Plea Form*

Nissen asserts that the court violated his Sixth Amendment right to confront witnesses by admitting the asserted hearsay change-of-plea form of his codefendant Mann. We reject this contention.

"Evidence of declarations against penal interest is admissible as an exception to the hearsay rule." (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1677.) This exception is codified in Evidence Code section 1230, which provides:

> "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

To fall within this statutory exception to the hearsay rule, a declaration against penal interest "must be 'distinctly' against the declarant's penal interest and must be 'clothed with indicia of reliability.' [Citation.]" (*People v. Jackson, supra*, 235 Cal.App.3d at pp. 1677-1678.) The Legislature has entrusted to the trial court's sound discretion the determination of the admissibility of evidence under the declaration-against-interest exception. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1250-1251, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

The party claiming an out-of-court statement is admissible as a declaration against penal interest must show the declarant is unavailable, the declaration was against the declarant's penal interest, and the declaration was sufficiently reliable to allow its admission despite it being hearsay. (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) In deciding whether the statement is sufficiently trustworthy to allow its admission the court "may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (*People v. Frierson* (1991) 53 Cal.3d 730, 745.) The court's determination

of whether a statement is admissible as against the declarant's interest is reviewed on an abuse of discretion standard. (*Ibid*.)

We must also determine whether admission of the statement satisfies Nissen's right to confrontation and cross-examination under the Sixth Amendment. We review this issue independently. (*Lilly v. Virginia* (1999) 527 U.S. 116, 136 (*Lilly*).)

"'The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant "to be confronted with the witnesses against him." The right of confrontation includes the right to cross-examine witnesses.'" (*People v. Fuentes* (1998) 61 Cal.App.4th 956, 963-964, quoting *Richardson v. Marsh* (1987) 481 U.S. 200, 206.) "'The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" (*Lilly, supra*, 527 U.S. at pp. 123-124, quoting *Maryland v. Craig* (1990) 497 U.S. 836, 845.) The against-penal-interest exception is not based on the assumption that the statements are without the typical dangers of hearsay, but founded on the assumption that "'a person is unlikely to fabricate a statement against his own interest at the time it is made.'" (*Lilly, supra*, 527 U.S. at pp. 126-127, quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 299.) Although hearsay rules and the confrontation clause generally are designed to protect similar values, they are not totally congruent. A statement admissible under a hearsay exception may be prohibited from evidence by the confrontation clause. (*People v. Rios* (1985) 163 Cal.App.3d 852, 863; *Ohio v. Roberts* (1980) 448 U.S. 56, 66.) "[T]he veracity of hearsay statements is sufficiently dependable

to allow the untested admission of such statements against the accused when (1) 'the evidence falls within a firmly rooted hearsay exception' or (2) it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." (*Lilly, supra*, 527 U.S. at pp. 124-125, quoting *Ohio v. Roberts, supra,* 448 U.S. at p. 66.)

Declarations against penal interest define a large class of situations. Usual circumstances include admissions used against the declarant himself, exculpatory evidence offered by the defendant who claims the declarant committed the offense, and evidence offered by the prosecution to establish the guilt of an accomplice of the declarant. (*Lilly, supra,* 527 U.S. at p. 127.) Each of these circumstances involve different considerations, but generally the mere fact that an accomplice's admission qualifies as a statement against his penal interest does not justify its use as evidence against a third person under principles of the confrontation clause. (*Id*. at p. 128.) Further, "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." (*Id*. at p. 134, fn. omitted.)

There is a presumption that accomplice' confessions that shift or spread the blame to a defendant at a criminal trial are unreliable and violate the confrontation clause. (*Lilly, supra,* 527 U.S. at pp. 133-137.) However, if the statement has "particularized guarantees of trustworthiness" (*Ohio v. Roberts, supra,* 448 U.S. at p. 66), that presumption may be rebutted and the statement admitted. (*Lilly, supra,* at pp. 135-137.) "When a court can be confident . . . that 'the declarant's truthfulness is so clear from the

surrounding circumstances that the test of cross-examination would be of marginal utility,'" the statement is admissible. (*Id.* at p. 136.)

Here, Nissen asserts that Mann's change of plea form was not so reliable that it could substitute for his Sixth Amendment right to confront Mann as a witness. Specifically, Nissen asserts that Mann's statements shifted the blame in this matter to him and that therefore the statement was unreliable, prejudicial, and should not have been admitted. In support of this proposition, Nissen relies on *Lilly, supra,* 527 U.S. 116. However, that case is inapposite.

In *Lilly*, one of three codefendants in a series of robberies and murders made a 50-page confession, implicating himself in some aspects of the crime, exculpating himself in other aspects, and inculpating his codefendants in several respects. (*Lilly, supra,* 527 U.S. at pp. 118-122.) The United States Supreme Court held that the statements placing blame on the other defendants were inherently unreliable and violated the codefendants' cross-examination and confrontation rights. (*Lilly, supra,* 527 U.S. at pp. 136-139.) The high court held that such statements were particularly unreliable where, as there, the declarant had a motive to lie in exculpating himself and shifting blame to others. (*Ibid.*)

The high court also rejected the proposition that the presumptive unreliability of the statement could be rebutted in that case by the circumstances surrounding the confession. In doing so, the high court focused on the fact that (1) the declarant was in police custody for serious crimes when he confessed; (2) the confession was the result of leading questions by officers; and (3) he was under the influence of alcohol at the time. (*Lilly, supra,* 527 U.S. at p. 139.) Under these circumstances the high court found that

the confessor "had a natural motive to attempt to exculpate himself as much as possible." (*Ibid.*)

Here, we are confronted with an out-of-court statement that, while it does not shift blame to Nissen, does inculpate him. However, based upon the text of that statement and the surrounding circumstances, we conclude that any inherent unreliability has been rebutted in this case. First, in this case, the declarant (Mann) did not attempt to minimize his role or shift blame to Nissen. The change of plea form merely set forth his crime, which was aiding and abetting Nissen in the assault and encouraging him to steal Nissen's cell phone. There is no contention here that Mann was actually at the scene and was later trying to distance himself from the crime. Mann could not have been charged with the crimes Nissen was, but only the ones resulting from the statements made via telephone. Nissen does not assert that Mann actually played a greater role in the crimes or that Mann was in anyway trying to exculpate himself. There was nothing to be gained by Mann by lying in the change of plea form. Further, the statement was reliable because it was signed under penalty of perjury and with advice of counsel, not under questioning by police. Thus, the statement made in the change of plea form that was the factual basis for his plea did not have the same indicia of unreliability that was present in *Lilly*. In sum, the court did not violate Nissen's right of confrontation by admitting Mann's statement contained in his change of plea form.

II. *Sufficiency of Evidence That Crime Was "Gang Related"*

Nissen asserts that there is insufficient evidence to support the criminal street gang enhancement as there was no showing that the crimes were committed for the benefit of a criminal street gang. This contention is unavailing.

A. *Standard of Review*

In reviewing the sufficiency of the evidence, "'the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the trial court's findings." (*Estate of Leslie* (1984) 37 Cal.3d 186, 201.)

B. *Analysis*

Section 186.22, subdivision (b)(1) provides in part:

> " . . . [A]ny person who is convicted of a felony *committed for the benefit of, at the direction of, or in association with any criminal street gang*, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] . . . [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years." (Italics added.)

Here, contrary to Nissen's assertion, substantial evidence supports the criminal street gang enhancement. Franco was not welcome in Imperial Beach because he left the Imperials gang. He had been told through family members that he was not safe there. On the date of the crimes both Nissen and Mann indicated to Franco that he was not welcome in Imperial Beach. Thereafter, Nissen attacked Franco. As the People's gang

expert testified, beating or attacking a "ranked out" member that reenters the neighborhood benefits the gang because it keeps "the rest of the members in line."

Further, to the extent the attack was as a result of a perceived debt owed by Franco to Mann, the attack was either at the direction of, or for the benefit of, the gang. Mann instructed Nissen to take Franco's cell phone. When Franco refused, Nissen attacked him. Thus, the attack was at the direction of another gang member. Further, the People's gang expert testified that assisting another gang member in the collecting of a debt served to benefit the gang. Substantial evidence supports the criminal street gang enhancement.

III. *Instruction Under CALJIC No. 17.24.2*

Nissen contends that the court improperly instructed the jury on the criminal street gang enhancement because it did not state that the jury must find that the appellant had the specific intent to promote, further or assist the criminal activities of the gang. This contention is unavailing.

The court instructed the jury under CALJIC No. 17.24.2 as follows:

> "It is alleged in Counts 1, 2 and 3 of the Information that the charged felony was committed for the benefit of, at the direction of, or in association with a criminal street gang *with the specific intent to promote, further, or assist in any criminal conduct by gang members*. [¶] . . . [¶] In order to prove this allegation, each of the following elements must be proved: [¶] 1. The crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang; and [¶] 2. These crimes were committed *with the specific intent to promote, further, or assist any criminal conduct by gang members*." (Italics added.)

Although Nissen acknowledges that CALJIC No. 17.24.2 did require that the jury find the crimes were committed with the specific intent to promote, further or assist

criminal conduct by gang members, he asserts that it is deficient because it does not specifically state that *Nissen* had to have that specific intent. However, Nissen was the only defendant standing trial and the only person charged with these crimes. He was the direct perpetrator of these crimes. Therefore, it would be obvious to any juror that the specific intent referred to was Nissen's. Nissen's challenge to the court's instruction under CALJIC No. 17.24.2 is unavailing.

IV. *Instruction Under CALJIC No. 17.41.1*

Nissen contends the court erred by instructing the jury under CALJIC No. 17.41.1. Nissen asserts that this instruction impermissibly infringed on his federal and state constitutional rights to a fair trial by eroding the privacy and secrecy of jury deliberations, thereby chilling the free exchange of jurors' views and their independent judgment, and pressuring minority jurors to acquiesce in the views of the majority jurors. We reject these contentions.

The court instructed the jury under CALJIC No. 17.41.1 (1998 New) (6th ed. 1996) as follows:

> "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation."

The issue of the constitutionality of CALJIC No. 17.41.1 was decided by the California Supreme Court on July 18, 2002, in the case *People v. Engelman* (2002) 28 Cal.4th 436 (*Engelman*). In that case, the court concluded that CALJIC No. 17.41.1

"does not infringe upon [a] defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict . . . ." (*Engelman, supra*, at pp. 439-440.) Nevertheless, the high court also held that "CALJIC No. 17. 41.1 should not be given in the future. The law does not require that the jury be instructed in these terms, and the instruction, by specifying at the outset of deliberations that a juror has the obligation to police the reasoning and decisionmaking of other jurors, creates a risk of unnecessary intrusion on the deliberative process." (*Engelman, supra,* at p. 441.)

In rejecting the defendant's assertion that CALJIC No. 17.41.1 violated his right to a trial by jury and a unanimous jury verdict by impairing the free and private exchange of views by jurors in the deliberation process, the court stated that "although the secrecy of deliberations is an important element of our jury system" (*Engelman, supra,* 28 Cal.4th at p. 443), there is no authority for the proposition that "the federal constitutional right to trial by jury (or parallel provisions of the California Constitution, or other state law) requires absolute and impenetrable secrecy for jury deliberations in the face of an allegation of juror misconduct, or that the constitutional right constitutes an absolute bar to jury instructions that might induce jurors to reveal some element of their deliberations." (*Ibid*.) "[A] juror is required to apply the law as instructed by the court, and refusal to do so during deliberations may constitute a ground for discharge of the juror. [Citation.] Refusal to deliberate also may subject a juror to discharge [citation], even though the discovery of such misconduct ordinarily exposes facts concerning the deliberations, if, after reasonable inquiry by the court, it appears 'as a "demonstrable

reality" that the juror is unable or unwilling to deliberate.' [Citation.]" (*Id.* at pp. 443-444, italics omitted.)

The court also rejected the defendant's claim that instructing the jury under CALJIC No. 17.41.1 violated his right to a unanimous jury verdict and to the independent and impartial decision of each juror because "[t]he instructions as a whole fully informed the jury of its duty to reach a unanimous verdict based upon the independent and impartial decision of each juror." (*Engelman, supra,* 28 Cal.4th at p. 444.) The court also found that the giving of CALJIC No. 17.41.1 was not overly coercive to deadlocked juries or a holdout juror, as it "is not directed at a deadlocked jury and does not contain language suggesting that jurors who find themselves in the minority, as deliberations progress, should join the majority without reaching an independent judgment. The instruction does not suggest that a doubt may be unreasonable if not shared by a majority of the jurors, nor does it direct that the jury's deliberations include such an extraneous factor." (*Engelman, supra,* at pp. 444-445.)

However, after rejecting the defendant's constitutional claims, the high court went on to criticize CALJIC No. 17.41.1 as unnecessary and creating at least a risk of the type of problems the defendant highlighted : "There is risk that the instruction will be misunderstood or that it will be used by one juror as a tool for browbeating other jurors. The instruction is given immediately before the jury withdraws to commence its deliberations and, unlike other instructions cautioning the jury against misconduct such as visiting the scene of the crime or consulting press accounts, it focuses on the process of deliberation itself. We believe it is inadvisable and unnecessary for a trial court to create

the risk of intrusion upon the secrecy of deliberations or of an adverse impact upon the course of deliberations by giving such an instruction." (*Engelman, supra,* 28 Cal.4th at p. 445.) The court also noted that juries are already given adequate instructions that guard against juror misconduct and explain the jury's duty to follow the law as given in the instructions . (*Id.* at pp. 448-449.) Therefore, the court concluded that while CALJIC No. 17.41.1 was not constitutionally infirm, in the future courts are directed not to instruct juries with this provision. (*Engelman, supra*, at p. 449.)

Based upon this direction from the California Supreme Court, we must also conclude that CALJIC No. 17.41.1 is not constitutionally infirm. The court thus did not err in instructing the jury under this provision in the instant case.

Further, even if it had been improper for the court to instruct the jury under CALJIC No. 17.41.1, any such error would have been harmless beyond a reasonable doubt. No juror was reported to the court by another juror. There is no evidence any juror was coerced or pressured. There is no evidence that any juror refused to follow the law. Because there is no evidence "that CALJIC No. 17.41.1 had any effect on this case whatsoever," any error by the court in instructing the jury under CALJIC No. 17.41.1 did not constitute reversible error. (*People v. Brown* (2001) 91 Cal.App.4th 256, 271; *People v. Molina* (2000) 82 Cal.App.4th 1329, 1335.)

DISPOSITION

The judgment is affirmed.

NARES, J.

I CONCUR:

HUFFMAN, Acting P. J.

AARON, J., Concurring:

I disagree with section I of the majority opinion because I believe the admission of Mann's change of plea form—an out-of-court statement made by an accomplice that implicates Nissen in criminal activity—violated Nissen's Sixth Amendment confrontation rights. As the majority notes, "'The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" (*Lilly v. Virginia* (1999) 527 U.S. 116, 123-124 (*Lilly*), quoting *Maryland v. Craig* (1990) 497 U.S. 836, 845.) Nissen never had the opportunity to subject Mann's statement to such testing and, in my view, the "presumptive unreliability" of the statement was not otherwise rebutted. (*Lilly, supra*, 527 U.S. at p. 137.) However, I concur in the result because the error was harmless beyond a reasonable doubt.

Mann's change of plea form was clearly not admissible against Nissen as a statement against Mann's penal interest, since "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence," (*Lilly, supra*, 527 U.S. at p. 134), and the majority so concludes. Therefore, as the majority acknowledges, in order to have been properly admitted as substantive evidence against Nissen under the Confrontation Clause, Mann's statement must contain "'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything

to the statement['s] reliability." (*Id*. at p. 125, quoting *Ohio v. Roberts* (1980) 448 U.S. 56, 66.)

The majority notes that if the accomplice's incriminating statement has "particularized guarantees of trustworthiness," the presumption of unreliability of the statement may be rebutted and the statement admitted. The majority then quotes the following statement from *Lilly*: "When a court can be confident . . . that 'the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility,'" the statement is admissible. (*Lilly, supra*, 527 U.S. at p. 136.) The majority asserts that in this case, "any inherent unreliability has been rebutted . . . ." (Maj. Opn. at p. 14.)

In reaching this conclusion, the majority relies on the following factors: 1) Mann did not attempt to minimize his role or shift blame to Nissen; and 2) the statement was signed under penalty of perjury and with advice of counsel, and not under questioning by police. The majority essentially concludes that because Mann's statement does not have the same indicia of unreliability as were present in *Lilly*, it was reliable and therefore, admissible. However, *Lilly* does not purport to provide an exhaustive list of indicia of unreliability. Rather, it reaffirms that unless "particularized guarantees of trustworthiness" are present, the unreliability of inculpatory accomplice statements is presumed. In my view, no such guarantees were present in this case.

With respect to the majority's attempt to distinguish this case from *Lilly* on the basis that Mann's statement does not shift blame to Nissen, as the majority acknowledges, the statement does inculpate Nissen. Under *Lilly*, the statement need not specifically shift

blame in order to be deemed inherently unreliable. The *Lilly* court made clear that inculpatory accomplice statements are "suspect" not only if they shift or spread blame, but more generally, "insofar as they inculpate other persons." The *Lilly* court concluded that "confession[s] by an accomplice which incriminate[ ] a criminal defendant" are "inherently unreliable." (*Lilly*, *supra*, 527 U.S. at pp. 130-131, 139.) In a concurring opinion in *Lilly*, Justice Scalia remarked that the prosecution's introduction in evidence of an out-of-court statement of an accomplice, without making the accomplice available for cross-examination, constitutes a "paradigmatic Confrontation Clause violation." (*Id*. at p. 143.) Far from being "inherently trustworthy," Mann's statement is, in my view, inherently untrustworthy, and its admission constituted a clear violation of Nissen's rights under the Confrontation Clause.[1]

Further, the fact that Mann's statement was signed under oath does not satisfy the requirements of the Sixth Amendment. A central purpose of the confrontation clause was to abolish "a particular abuse common in 16th- and 17th-century England: prosecuting a defendant through the presentation of ex parte affidavits, without the affiants ever being produced at trial." (*White v. Illinois* (1992) 502 U.S. 346, 352.) As the *Lilly* plurality

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1 It is interesting to note that, with respect to the admission in evidence of Mann's change of plea form, the trial court was required to give CALJIC No. 3.18, "Testimony of Accomplice to be Viewed with Care and Caution," which instructs the jury that an accomplice's testimony that tends to incriminate the defendant should be viewed with caution. This instruction applies to the out-of-court statement of an accomplice as well as to an accomplice's in-court testimony. (See CALJIC No. 3.11.) It is difficult to reconcile this required jury instruction with the majority's conclusion that Mann's out-of-court statement implicating Nissen is "inherently trustworthy."

observed: "This abuse included using out-of-court depositions and 'confessions of accomplices.' [Citations.]" (*Lilly, supra*, 527 U.S. at p. 124.) Thus, the fact that an accomplice's out-of-court statement is made under oath clearly does not supply the indicia of reliability required by the Confrontation Clause.

The majority fails to heed the warning of the *Lilly* court that, "[T]he historical underpinnings of the Confrontation Clause and the sweep of our prior confrontation cases offer one cogent reminder: It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old ex parte affidavits practice—*that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing*." (*Lilly, supra*, 527 U.S. at p. 137, italics added.)

This is precisely the situation in this case. It is clear the government was involved in the production of the factual basis of Mann's change of plea form, since the statement was the product of plea negotiations with the prosecution. Further, it is obvious upon examining the form that the handwritten factual basis for the plea is not Mann's own statement. It appears that Mann's attorney wrote the first portion of the factual basis, and that the prosecutor—apparently not satisfied with what Mann's attorney had written—wrote the remainder of it, and then had Mann initial the additional language. Finally, the statement describes past events, and was never subjected to adversarial

testing since Mann invoked his Fifth Amendment privilege against self-incrimination and did not testify.

The record contains no information about the circumstances under which Mann's statement was produced. It is therefore not possible, in my view, to conclude that the statement is "inherently trustworthy." Because Mann was not subject to cross-examination, we do not know whether he was coerced in any way to initial the language that was added to the factual basis set forth in his plea form. We do not know what incentives, if any, were offered to Mann during plea negotiations in exchange for implicating Nissen. We do not know who authored the factual basis that appears in the change of plea form, or the circumstances under which it was amended. Further, Mann recanted the statement in its entirety in his discussions with the probation officer, telling the probation officer that he pled guilty only because his attorney told him that if he were to do so, he would receive a probationary sentence. These facts cast significant doubt on the trustworthiness of Mann's statement, and would have provided Nissen's attorney with a rich source of material for cross-examination. Under these circumstances, I cannot conclude that Mann's statement "contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statement['s] reliability," (*Lilly, supra*, 527 U.S. at p. 125, citing *Ohio v. Roberts, supra*, 448 U.S. at p. 66) or that Mann's truthfulness is "so clear from the surrounding circumstances" that cross-examination would have been of marginal utility. (*Lilly, su*pra, 527 U.S. at p. 136.) In my view, the inherent unreliability of Mann's statement was not rebutted.

However, I concur with the result reached by the majority because the admission of Mann's statement was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) The factual basis in Mann's change of plea form states, "I . . . aided and advised co-defendant Nissen in an assault likely to produce great bodily injury by instigating and encouraging codefendant Nissen via telephone to take victim Franco's cell phone." While the statement mentions the assault, it is relevant only to the attempted robbery charge -- a charge of which Nissen was acquitted -- in that the statement tends to prove that Nissen intended to steal Franco's cell phone. With respect to the offenses of which Nissen was convicted -- assault with a deadly weapon and battery with serious bodily injury -- Franco's testimony and the other evidence presented at the trial constitutes independent evidence that is more than sufficient to support the convictions, and Mann's statement neither corroborates nor contradicts this testimony. Further, the court allowed in evidence the probation report, in which Mann recanted the statement contained in his change of plea form, thereby diminishing the evidentiary weight of the statement.

AARON, J.