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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. VIKRAM GILL BILLA, Defendant and Appellant.	C037717 (Super. Ct. No. R47469)

APPEAL from a judgment of the Superior Court of Placer County, Robert P. McElhany, J. Affirmed as modified.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Stephen G. Herndon and David Andrew Eldridge, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts VI through XII.

In a plan to collect on an insurance policy, defendant Vikram Gill Billa and two accomplices set fire to defendant's truck. As they were doing so, one of the accomplices was severely burned and later died. Defendant was sentenced to state prison after a jury found him guilty of second degree murder (Pen. Code, §§ 187, 189; further section references are to the Penal Code unless otherwise specified), arson causing great bodily injury (§ 451, subd. (a)), and making a false or fraudulent insurance claim (§ 550, subd. (a)(4)).

Defendant raises numerous challenges to his convictions and sentence. His primary claim of error is that, under the rationale of *People v. Ferlin* (1928) 203 Cal. 587 (hereafter *Ferlin*) and decisions that have followed *Ferlin*, he cannot be held liable for murder based upon the accidental death of an accomplice to arson. As we shall explain in the published portion of this opinion, the *Ferlin* rule does not apply to the facts of this case. Because defendant was present and an active participant in the dangerous felony of arson that caused the accomplice's death, he is liable under the felony-murder rule. For reasons that follow, we also reject defendant's other arguments against application of the felony-murder rule.

In the unpublished parts of this opinion, we conclude that the sentence imposed for a fraudulent insurance claim must be stayed pursuant to section 654, and that defendant is entitled to one additional day of presentence conduct credit.

Accordingly, we will modify the judgment and affirm as modified.

FACTS

In April 1997, defendant bought a truck identified as a Freightliner model FLD 120 tractor. To do so, he entered into a conditional sale contract by which he borrowed the sum of $17,927.08. After he obtained insurance coverage for liability, damage to the truck, and damage to any trailer or cargo he might be hauling, defendant began working as an independent owner/operator for Divine and Company Trucking (hereafter Divine Trucking).

By August 1997, defendant was experiencing difficulties, and both he and Divine Trucking were notified that defendant's insurance was to be cancelled for nonpayment. Defendant last drove for Divine Trucking on August 22, 1997; the company required its owner/operators to carry insurance with the company as an additional insured, and its dispatcher told defendant that he would not be allowed to drive for the company after August 22, at least until he corrected his insurance problem. It also appears the Department of Motor Vehicles suspended defendant's driver's license.

On August 15, 1997, defendant contacted John Kilgus of Associates Insurance Company to purchase physical damage insurance for the truck. Defendant asked for the insurance coverage to commence on August 15, 1997, with the first premium due on August 26 to coincide with his next payday. Defendant did not purchase liability or cargo insurance, which Divine Trucking would require for a return to work.

On August 26, 1997, defendant drove his truck to the Yuba City home of his friend, Parmod Kumar. At some point, Kumar's brother-in-law, Manoj Bhardwaj, joined them. Later that night, the trio drove toward Sacramento with defendant and Bhardwaj in defendant's truck and Kumar following in his car. Near the City of Wheatland, defendant drove his truck onto a gravel road. He drove down the road about two-tenths of a mile and around a bend. There, the evidence establishes, defendant, Kumar, and Bhardwaj set the truck on fire.

In burning the truck, the trio used a fuel oil, either kerosene or diesel.[1] During the event, Bhardwaj somehow managed to get portions of his clothing saturated with the fuel oil. His clothing caught fire, and he was severely burned. After dousing the fire on Bhardwaj, the trio left the scene in Kumar's car.

Kumar drove defendant to his home in Elk Grove, and then Kumar and Bhardwaj returned to Kumar's home in Yuba City. When Kumar's wife, Sushma Bhardwaj, learned of her brother's injuries the next day, she contacted another brother, Davinder Bhardwaj, and he took

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[1] A Department of Justice criminalist who tested samples obtained during the investigation testified that the tests could not distinguish between kerosene and diesel. She explained that kerosene is lighter than diesel and will evaporate more readily, but that it is the lighter elements of kerosene that evaporate. Thus, the residue left when kerosene evaporates resembles diesel too closely for distinction. While she could not determine whether the substance was kerosene or diesel, she testified that it definitely was not gasoline.

him to the hospital. Manoj Bhardwaj died from his injuries on September 10, 1997.

On the afternoon of August 27, 1997, the day after the fire, defendant called insurance agent Kilgus in Seattle and reported that the truck was stolen. He said it was taken from a truck stop where he had parked it. Kilgus told defendant that the claim would have to be filed with the claims unit in Irving, Texas, and that defendant would have to file a police report. The next day, Kilgus referred the claim to Dora Thomas in the company claims unit. When Thomas contacted defendant, he reiterated the theft story, stating that he had left the truck parked for a few days and that it was gone when he returned. According to defendant, he reported the theft to the police but did not have a case number. Thomas referred defendant's claim to Deborah Simmons, an insurance investigator. Simmons contacted defendant, who repeated his story about the truck being stolen. Simmons then referred the matter to Drew Adams, an independent investigator with a company that specializes in truck theft investigations.

When Adams received the case, he ran the truck's vehicle identification number (VIN) through the National Crime Information Computer and learned that the truck had not been reported stolen. On September 2, 1997, Adams interviewed defendant. This time, defendant said the truck had burned; he claimed he was driving from Yuba City to Sacramento when the engine overheated and the truck caught fire. On September 5, 1997, he was interviewed by Kenneth Hale, a captain with the California Department of Forestry

and Fire Protection. Defendant reiterated his story about the truck catching fire and burning.

At the conclusion of the interview, Hale placed defendant under arrest for arson. Defendant obtained his release on bail and left for Canada. Eventually, he was extradited to stand trial. Kumar left the country to return to India, and remained at large at the time of defendant's trial.

DISCUSSION

I

Defendant's conviction for murder was based upon the felony-murder rule. Asserting that Bhardwaj was an accomplice, defendant argues that he cannot be held liable for murder based upon the accidental death of an accomplice to arson. (Citing *Ferlin, supra,* 203 Cal. 587 and decisions that have followed *Ferlin*.)

In *Ferlin*, it appeared the appellant had agreed to pay another person, Walter Skala, to burn a building. In setting the fire, Skala caused an explosion, was seriously burned, and eventually died from his injuries. (*Ferlin, supra,* 203 Cal. at pp. 590-594.) *Ferlin* held that the appellant was not liable for murder under these circumstances. The court reasoned that Skala could not be held liable for murder for accidentally killing himself, and that his accidental death was not part of the common design of the conspiracy in which the appellant and Skala engaged. (*Id.* at pp. 596-597.)

Defendant argues that, like the appellant in *Ferlin*, he cannot be held liable for murder based upon the accidental death of his accomplice. But the broad interpretation of the *Ferlin* decision

urged by defendant is inconsistent with the established reach of the felony-murder rule. Where the commission of a dangerous felony is causally related to a death, the felony-murder rule applies regardless of whether the death was accidental. (*People v. Coefield* (1951) 37 Cal.2d 865, 868; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287.) And a participant in a dangerous felony may be held liable under the felony-murder rule where the person killed was an accomplice. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658; *People v. Cabaltero* (1939) 31 Cal.App.2d 52, 58.)

The distinctive factors in *Ferlin* were (1) the appellant was an aider and abettor before the fact and was neither present nor actively participating in the arson when it was committed; (2) the accomplice acted alone in actually perpetrating the arson; and (3) the accomplice killed only himself and not another person or persons.

These factors have been emphasized in decisions that follow *Ferlin*. In *Woodruff v. Superior Court* (1965) 237 Cal.App.2d 749, the court said: "We believe the rationale of [*Ferlin*] to be that section 189 was inapplicable because there was no killing by the accused felon and no killing of another by one for whose conduct the accused was vicariously responsible." (*Id.* at p. 751.) In *People v. Earnest* (1975) 46 Cal.App.3d 792, the court stated about *Ferlin*: "It is not the fact that the accomplice killed himself that precludes application of the theory of vicarious responsibility, but the fact that his was the sole human agency involved in his death." (*Id.* at pp. 796-797; see *People v. Antick* (1975) 15 Cal.3d 79, 87-88 [where the defendant's liability is

solely vicarious, the accomplice must cause the death *of another human being* for the felony-murder rule to apply], disapproved on another ground in *People v. McCoy* (2001) 25 Cal.4th 1111, 1123.)

These factors also have been noted in decisions which rejected application of the *Ferlin* rule in differing circumstances. Thus, in *People v. Cabaltero, supra*, 31 Cal.App.2d 52, the court refused to apply *Ferlin* where one accomplice accidentally killed another. The court found the situation in *Ferlin* "entirely different from the one here presented, for the reason that there the conspirator killed himself while he alone was perpetrating the felony he conspired to commit; whereas, here the coconspirator was killed by one of his confederates while all were perpetrating the crime they conspired to commit." (*Id.* at pp. 59-60; see also *People v. Johnson, supra*, 28 Cal.App.3d at p. 658.) In *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, the court held that a conspirator who was not present at the commission of the acts causing the death of an accomplice could be liable for murder where other conspirators actively participated in the acts causing death. (*Id.* at p. 846.)[2]

In this case, Bhardwaj did not act alone in perpetrating the arson that was the cause of his death. Defendant was present and an active participant in the crime. And his active conduct was a direct cause of Bhardwaj's death. In short, regardless of whether

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[2] Defendant's citation and reliance upon a passage from *People v. Slaughter* (1984) 35 Cal.3d 629, at page 655, is misplaced because it comes from a two justice dissent that was rejected by the majority of the Court.

the death was accidental or not, defendant's act of arson killed Bhardwaj. Under the circumstances, *Ferlin* is inapposite, and the felony-murder rule may be applied to defendant's conduct.[3]

We also reject defendant's contention that the trial court had a duty to instruct sua sponte on the *Ferlin* rule. The holdings in *Ferlin* and its progeny addressed the sufficiency of evidence to support a charge of murder. Although decisions considering the sufficiency of evidence do not necessarily establish principles that should be the subject of jury instructions (*People v. Lucero* (1988) 44 Cal.3d 1006, 1021), we assume for purposes of argument that jury instructions on the *Ferlin* rule should be given in an appropriate case. (See *People v. Montoya* (1994) 7 Cal.4th 1027, 1047 [a court's instructional duties extend to "general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case"].) However, in this case there is no evidence that the deceased acted alone in setting the fire which caused his death or that defendant was not present and

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[3] We reject the argument in defendant's reply brief based on *People v. Gunnerson* (1977) 74 Cal.App.3d 370, at page 378, that there is no "killing" when an accomplice dies accidentally. The felony-murder rule applies so long as a death is a direct causal result of the commission of a dangerous felony. (*People v. Hernandez, supra*, 169 Cal.App.3d 282, 287.) While there is no killing "of another" when an accomplice acts alone in causing his own death, there is a killing upon which murder liability may attach when the defendant or other accomplices actively participate in the events causing death. (*People v. Superior Court (Shamis), supra,* 58 Cal.App.4th at p. 846; *People v. Cabaltero, supra,* 31 Cal.App.2d at pp. 59-60.)

an active participant in the event. Hence, the *Ferlin* rule has no application to the facts of this case and the trial court was under no duty to instruct on it. (*People v. Perez* (1992) 2 Cal.4th 1117, 1129-1130.)

II

Defendant contends that the act of setting fire to his truck causing bodily injury is not a crime which will support a conviction for second degree murder under the felony-murder rule because "the abstract elements of the offense do not show it to be inherently dangerous to human life[.]" This is so, he argues, because (1) a person "can willfully and maliciously burn property in a highly controlled setting without posing a serious risk to human life," and (2) the fact the arson actually caused great bodily injury "does not make the offense inherently dangerous . . . in the abstract" since "[o]ne cannot look to a result-element of an offense to determine the abstract risks posed by the proscribed element." The argument requires some explication.

Section 189 provides in pertinent part: "All murder . . . committed in the perpetration of, or attempt to perpetrate, arson . . . is murder of the first degree." Section 451 states in part that "[a] person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property. . . ." In this context, the word "property" means "real property or personal property, other than a structure or forest land." (§ 450, subd. (c).) Pursuant to this unambiguous statutory language, a person who willfully and maliciously sets

fire to or burns a motor vehicle is guilty of arson and is subject to the first degree felony-murder rule.

It was not always so. Prior to 1979, Penal Code provisions dealing with fire-related offenses made distinctions based upon the nature of the property burned. Former section 447a dealt with such things as inhabited house cars or campers, dwelling houses, and adjoining structures. (Stats. 1977, ch. 690, § 2, p. 2220.) Former section 448a dealt with certain other types of structures. (Stats. 1976, ch. 1139, § 199, p. 5118.) Motor vehicles were included in former section 449a, with a lengthy list of other types of personalty. (Stats. 1976, ch. 1139, § 200, p. 5119.) In said statutory scheme, the only provision specifically using the word "arson" was section 447a.

In *People v. Nichols* (1970) 3 Cal.3d 150 (hereafter *Nichols*), the appellant set fire to his wife's car, and the resulting conflagration caused the death of two persons. (*Id.* at pp. 154-155.) The Supreme Court considered whether the crime described in former section 449a would support a first degree murder conviction under section 189. The court concluded "the Legislature did not intend the word 'arson' as used in . . . section 189 to apply to the burning of those items enumerated in [former] section 449a." (*Id.* at p. 162.)[4] However, the court determined that "the wilful and malicious burning of a motor vehicle calls into play the second

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[4] Acknowledging that its conclusion was "not free from doubt," the court resolved the doubt in favor of appellant. (*Nichols, supra,* 3 Cal.3d at p. 162.)

degree felony-murder rule" because "the burning of a motor vehicle, which usually contains gasoline and which is usually found in close proximity to people, is inherently dangerous to human life." (*Id.* at p. 163.)

Thereafter, in 1979, the Legislature revised the Penal Code provisions relating to unlawful burnings. Now all willful and malicious burnings are expressly defined to be arson. Nonetheless, whether in reliance on *Nichols, supra*, 3 Cal.3d 150, or out of a belief that a charge of first degree murder would be unduly harsh under the circumstances, the prosecutor charged defendant with second degree murder.

Defendant argues the reasoning of *Nichols* has been undermined by the holding in *People v. Henderson* (1977) 19 Cal.3d 86 (hereafter *Henderson*), and no longer supports the conclusion that the second degree felony-murder rule may be predicated upon the willful and malicious burning of a motor vehicle.

In *Henderson, supra*, 19 Cal.3d 86, the Supreme Court held that felony false imprisonment is not an inherently dangerous felony that will support application of the felony-murder rule. (*Id.* at p. 90.) The court noted that the determination of whether a felony is inherently dangerous depends upon the elements of the crime in the abstract rather than the particular facts of the case in which the issue is presented. (*Id.* at p. 93.) Because the governing statute made false imprisonment a felony when it was committed by violence, menace, fraud or deceit, the court concluded that false imprisonment can be committed in ways not inherently dangerous to human life. (*Id.* at pp. 93-94.) The court rejected

the People's argument, based upon the reasoning of *Nichols*, that false imprisonment should support a felony-murder charge when it is committed by violence or menace. (*Id.* at pp. 95-96.) As the court explained, the argument lacked merit because the "Legislature has not drawn any relevant distinctions between violence, menace, fraud, or deceit" with respect to false imprisonment, i.e., the Legislature has not distinguished types of false imprisonment in that manner. (*Id.* at p. 95.) The court went on to say "any suggestion in *Nichols* inconsistent with the views expressed in [*Henderson*] should not be followed." (*Henderson, supra*, 19 Cal.3d at p. 96.)

Consequently, defendant claims not all willful and malicious burnings can be considered inherently dangerous and, therefore, viewing the arson statute in the abstract and in its entirety, no violations of the statute can support his conviction for second degree murder pursuant to the felony-murder rule. We reject the argument for several reasons.

First, in determining whether a felony is inherently dangerous for purposes of the felony-murder rule, we may not deem controlling the possibility that in some particular instance a perpetrator of the crime may be able to exercise care to avoid or reduce the risk to human life. The ostensible purpose of the felony-murder rule is to deter those engaged in crime from killing negligently or accidentally. (*Henderson, supra*, 19 Cal.3d at p. 93.) Hence, the felony-murder rule presupposes the perpetrator of a crime can exercise care to avoid the loss of life. Accordingly, we analyze

the crime to determine whether it creates an inherent risk and not an inevitable result.

Second, our conclusion must give effect to the intent of the Legislature to the extent such legislative intent can be determined. (*People v. Patterson* (1989) 49 Cal.3d 615, 625; *Henderson, supra*, 19 Cal.3d at p. 95; *Nichols, supra,* 3 Cal.3d at p. 162.) As we have noted, in 1979, the Legislature substantially revised the Penal Code provisions dealing with unlawful fires. The Legislature now regards all willful and malicious burnings as sufficiently dangerous to warrant the appellation "arson" and the application of the felony-murder rule. (§§ 189, 451.) That is compelling evidence of the Legislature's view of the matter.

Third, fire is dangerous. It is unpredictable, easily gets out of control, and is indiscriminate as to the persons, places, and things it attacks. Fire can, and often does, overtake and overcome the unaware; and it precipitates what can be dangerous suppression and rescue efforts by government workers and members of the public. In tort law, certain activities and articles, while having legitimate uses, are so inherently dangerous that "the standard of care required of the reasonable person when dealing with such dangerous articles is so great that a slight deviation therefrom will constitute negligence." (*Warner v. Santa Catalina Island Co.* (1955) 44 Cal.2d 310, 317.) Fire is such an article. (*Ibid.*)

The legislative experience indicates the dangers inherent in fire. A reference to LARMAC reflects a multitude of statutory provisions scattered throughout California's codes dealing with

fire, fire prevention, and fire safety. (Parker's 2002 LARMAC Consolidated Index to the Constitution and Laws of California, pp. 466-467.) The judicial experience is similar. The decisional authorities of this state, and of others, are replete with examples of judicial efforts to deal with the aftermath of the spread of fire. (See, e.g., Annot., Liability for Spread of Fire Intentionally Set for Legitimate Purpose (1994) 25 A.L.R. 5th 391.)

The Legislature has determined that all willfully and maliciously set fires are inherently dangerous. In view of the legislative experience, the judicial experience, and common sense, we cannot gainsay that determination. Hence, we reject defendant's assertion that willful and malicious burning of property, in this case a motor vehicle, will not support application of the felony-murder rule.

III

Defendant contends the so-called merger doctrine precludes application of the felony-murder rule in the circumstances of this case. We disagree.

In *People v. Ireland* (1969) 70 Cal.2d 522, the Supreme Court held that application of the felony-murder rule cannot be based upon a felony which is an integral part of the homicide. (*Id.* at p. 539.) That case involved aggravated assault, and the court concluded it would be inappropriate bootstrapping to uphold a conviction of murder based upon assault without consideration of malice aforethought. In *People v. Wilson* (1969) 1 Cal.3d 431, the court applied this merger rule to a charge of burglary felony murder where the only reason the entry was felonious was because

the defendant entered with the intent to assault the victim. (*Id.* at p. 440.)

In this case, defendant's crime caused great bodily injury, and he was convicted under section 451, subdivision (a), which specifies the punishment for arson causing great bodily injury. Defendant argues that great bodily injury is an integral part of homicide and, thus, the merger rule precludes application of the felony-murder rule.

The argument pushes the merger rule beyond its appropriate scope. A similar argument was made and rejected in *People v. Burton* (1971) 6 Cal.3d 375 (hereafter *Burton*), which limited the decision in *People v. Wilson, supra,* 1 Cal.3d 431 to its specific facts. (*Burton, supra,* 6 Cal.3d at p. 388.) The appellant in *Burton* contended that armed robbery necessarily includes assault with a firearm and, therefore, it cannot support application of the felony-murder rule. The Supreme Court drew a distinction between (1) situations in which the purpose of the criminal conduct was the assault that resulted in death and (2) conduct with an independent felonious purpose which happens to be accomplished through an assault that results in death. (*Id.* at p. 387.) The inquiry must focus on the purpose of the criminal conduct. (*Ibid.*)

In this light, the merger rule is limited in application to situations in which the purpose of inflicting violent injury is the single purpose or single course of conduct in which the perpetrator engages. (*Burton, supra,* 6 Cal.3d at p. 388.)

Here, defendant's purpose in burning his truck was to avoid his obligations under the conditional sale contract and to secure

for himself any residual insurance benefits. The offense did not require, and there was no evidentiary suggestion, that defendant burned the truck for the single purpose of inflicting injury on the victim. Consequently, the merger rule is inapplicable.

IV

Arson is a general intent crime. (*People v. Atkins* (2001) 25 Cal.4th 76, 79.) However, application of the felony-murder rule requires that the accused have the specific intent to commit the underlying felony, regardless of whether it is otherwise a general intent crime. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1085, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Hernandez* (1988) 47 Cal.3d 315, 346.)

Defendant was found guilty of arson that caused great bodily injury under section 451, subdivision (a). Thus, he argues that, for application of the felony-murder rule, it must be shown he had the specific intent to inflict great bodily injury and, since such proof is lacking, his murder conviction cannot stand. For reasons that follow, we reject the argument.

The underlying felony supporting the murder conviction was arson. The fact the arson caused great bodily injury was a factor that served to increase the potential prison term for the offense, but it was not an essential element of the crime of arson. Where arson is the underlying felony for purposes of the felony-murder rule, the specific intent which must be shown is the intent to set the fire that resulted in the victim's death. (*Nichols, supra*, 3 Cal.3d at pp. 164-165.) Defendant's specific intent to set the

fire that resulted in Manoj Bhardwaj's death is amply established by the evidence.

For this same reason, we reject defendant's contention that the court erred in instructing the jury that the felony-murder rule would apply whether the death was intentional, unintentional, or accidental. (See CALJIC No. 8.32.) The decision in *People v. Jones* (2000) 82 Cal.App.4th 663, upon which defendant relies, is inapposite. There, the court considered whether a violation of Vehicle Code section 2800.3 (evasion of a police officer causing death or serious bodily injury) will support application of the felony-murder rule. Evasion of a police officer is not a felony unless death or serious bodily injury results. (Veh. Code, §§ 2800.1-2800.3.) Accordingly, unless a person who evades a police officer does so with the specific intent to cause death or serious bodily injury, the person does not have the specific intent to commit a felony and the felony-murder rule cannot apply. In contrast, the underlying felony here, arson, is a dangerous felony regardless of whether the enhancing factor of great bodily injury occurs or is intended; it is enough that defendant intended to set the fire that caused the victim's death. As we have noted, substantial evidence supports the jury's finding that defendant intended to set the fire that resulted in death.

V

In defendant's view, arson that causes great bodily injury within the meaning of section 451, subdivision (a), should be construed in a manner consistent with the *Ferlin* rule. He argues the bodily injury referred to must be bodily injury to another

which, in defendant's view, does not occur when an accomplice injures himself.

We need not consider whether the *Ferlin* rule should apply to section 451, subdivision (a), in appropriate circumstances. As explained in part I, *ante*, that rule and similar limitations on criminal responsibility apply only where the accomplice is the sole active cause of the accomplice's injury or death. Where the defendant and/or other participants in the criminal endeavor actively participate in the events that cause injury or death, all of the participants in the criminal endeavor may be held liable for an injury or death regardless of whether the injured person was an accomplice whose conduct contributed to his own injury or death. (See *People v. Superior Court (Shamis)*, *supra*, 58 Cal.App.4th at p. 846.) This was the circumstance here.

VI*

The trial court instructed the jury that arson is committed where a person "willfully and maliciously sets fire to or burns or causes to be burned or aids[,] counsels [or] procures the burning of any property . . ." The court further instructed that "[t]he words 'willfully and maliciously' mean an intent to set fire to, or burn, or cause to be burned, any structure, forest land, or property." Defendant contends this instruction omitted the element of malice.

In *People v. Atkins*, *supra*, 25 Cal.4th 76 (hereafter *Atkins*), the Supreme Court held that arson requires a general criminal intent rather than a specific intent. (*Id.* at p. 84.) The court said "willfully" requires only that the act or omission occur

intentionally, without regard to motive or ignorance of the prohibited character of the act. (*Id.* at p. 85.) "Maliciously" means "'a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act . . . .'" (*Ibid.*; see § 450, subd. (e).) This requires the defendant to perform an intentional wrongful act, without any justification, excuse, or claim of right. (*Atkins, supra*, 25 Cal.4th at p. 88.) Taken together, the willful and malicious requirement means the setting of the fire must be a deliberate and intentional act, rather than an accidental or unintentional ignition. (*Ibid.*)

The instruction given the jury in this case was derived from CALJIC No. 14.80. When the instruction was drafted, and at the time of defendant's trial, there was somewhat of a conflict in the appellate courts regarding the mental state required for arson. CALJIC No. 14.80 incorporated alternate definitions of the mental element of the crime. The trial court utilized the definition that was based on decisions of this court in *In re Stonewall F.* (1989) 208 Cal.App.3d 1054 (hereafter *Stonewall F.*) and *People v. Fabris* (1995) 31 Cal.App.4th 685 (hereafter *Fabris*). In *Atkins, supra*, 25 Cal.4th 76, the Supreme Court disapproved those decisions to the extent they are inconsistent with its opinion in *Atkins*. (*Id.* at p. 90, fn. 5.)

Based upon *Atkins*, we agree with defendant that the trial court erred in utilizing the portion of CALJIC No. 14.80 that was based on the decisions in *Stonewall F.* and *Fabris*. But we reject defendant's assertion that the error requires reversal.

The federal Constitution and our state Constitution do not require that instructional error omitting or misstating a single element of an offense should be subject to automatic reversal. (*Neder v. United States* (1999) 527 U.S. 1, 15 [144 L.Ed.2d 35, 51]; *People v. Sakarias* (2000) 22 Cal.4th 596, 625; *People v. Flood* (1998) 18 Cal.4th 470, 503.) Rather, the jury's verdicts may be affirmed despite the erroneous instruction if it appears beyond a reasonable doubt that the error did not contribute to the verdicts. (*People v. Sakarias, supra*, 22 Cal.4th at p. 625 ["In particular, we may affirm despite the error if the jury that rendered the verdict at issue could not rationally have found the omitted element unproven; the error is harmless, that is, if the record contains no substantial evidence supporting a factual theory under which the elements submitted to the jury were proven but the omitted element was not"].)

In this case, the jurors were instructed and found that defendant acted with the intent of setting fire to, burning, or causing to be burned, the truck. Having found that defendant acted intentionally, the jurors necessarily would have found that his conduct was willful and malicious had they been instructed in accordance with the holding in *Atkins*. This is so for several reasons. First, the truck was not his to do with as he pleased. The conditional sale contract gave him possession and an equitable interest in the truck, but legal title and the greater interest remained with the lender. Thus, the act of intentionally burning the truck interfered with the rightful interest of the lender. Second, as to the fraudulent insurance claim (§ 550, subd. (a)(4)),

the jury was instructed and found that defendant acted with the specific intent to defraud. Although this finding related to the submission of the insurance claim, it is inconceivable the jurors could have found that defendant acted with intent to defraud then but not at the time he intentionally burned the truck. And there was no evidence of any nature that would support a finding that defendant's act of intentionally burning the truck was anything but willful and malicious. Accordingly, the instructional error was harmless beyond a reasonable doubt.

VII*

Defendant contends the trial court erred in failing to instruct sua sponte that his extrajudicial oral admissions should be viewed with caution. It has been said that the reason for such an instruction is "'[w]itnesses having the best motives are generally unable to state the exact language [of a defendant's extrajudicial] admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. [And] [n]o other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury . . . .'" (*People v. Bemis* (1949) 33 Cal.2d 395, 399.) Hence, where extrajudicial oral admissions are introduced, a cautionary instruction must be given on the court's own motion, unless the statements were tape-recorded and there can be no doubt of what was said. (*People v. Mayfield* (1997) 14 Cal.4th 668, 776.) However, the omission of such an instruction does not require reversal unless it appears reasonably probable that a result more favorable to the

defendant would have obtained in the absence of the error. (*People v. Beagle* (1972) 6 Cal.3d 441, 455.)

Defendant claims a cautionary instruction was warranted with respect to three matters.

As to the first matter, Sushma Bhardwaj testified as follows: Her husband, Kumar, and defendant were at Sushma's apartment on the afternoon or evening before the fire. They talked about their work and something about getting traffic tickets. She stated they did not talk in front of her, and she could not remember them talking about insurance. However, a detective who interviewed Sushma after the fire testified that she said defendant and Kumar were getting ready to go to work and they were talking about their trucks, tickets, and insurance.

The second matter was a recorded telephone interview between defendant and Drew Adams, an insurance investigator. For purposes of the interview, defendant enlisted the assistance of Varinder Singh, a local insurance agent, to act as translator. It was on this occasion that defendant changed his story from theft of the truck to an accidental burning. Defendant argues a cautionary instruction was required with respect to the interview, despite the fact it was recorded, because his words were translated into English by Singh, who could have interpreted incorrectly.

The third matter was the recorded interview between defendant and fire captain Hale. To assist in translation, Hale used a firefighter and a sheriff's deputy who are bilingual. In the interview, defendant repeated his story of an accidental burning. As with the Adams interview, defendant contends the use of

interpreters required a cautionary instruction despite the recording of the interview.

The statements attributed to defendant and Kumar by Sushma Bhardwaj were of marginal significance at best. She did not purport to know what they were saying, and could state only that they were talking about their trucks, tickets, and insurance. Other evidence established that these matters were of concern to defendant because his license had been suspended, his liability and cargo insurance were being cancelled, and he had lost his job due to cancellation of his insurance. In light of this other evidence, the absence of a cautionary instruction with respect to Sushma Bhardwaj's testimony regarding defendant's extrajudicial statements could have made no difference in the outcome of the trial.

The Adams and Hale interviews were significant because they reflected a change in defendant's story from theft to accidental burning. However, the fact that defendant changed his story was uncontroverted. After the prosecution introduced the statements, it was the defense that made primary use of them. The statements were the only way that the defense was able to put the theory of accidental burning before the jury. Moreover, in argument defense counsel asserted that on those occasions defendant was telling the truth. Under the circumstances, an instruction telling the jury to view defendant's extrajudicial statements with caution would likely have been more detrimental than beneficial to the defense. In any event, based upon the whole record, there is no reasonable

probability that defendant would have obtained a more favorable result if the cautionary instruction had been given.

VIII*

Defendant asserts the trial court erred in allowing the prosecutor to introduce evidence of a tape-recorded conversation between defendant and Deborah Simmons.

On the day after the fire, defendant called John Kilgus, the Seattle agent from whom defendant had purchased insurance, and reported the truck stolen. Kilgus referred the matter to the claims unit in Texas. Dora Thomas, a claims representative, contacted defendant and was told the theft story. Thomas then referred the matter to Simmons, who was an in-house investigator. Simmons called defendant and was told the theft story. As was her custom, Simmons recorded the conversation. She did not tell defendant that she was doing so.

Defendant moved to exclude the recording and transcripts of the recording pursuant to section 632. Subdivision (a) of that section makes it unlawful for a person to use an electronic amplifying or recording device to eavesdrop upon or to record a confidential communication without the consent of all parties to the confidential communication. Subdivision (d) of the section provides: "Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding."

Simmons resides in Texas, works in Texas, and was in Texas when she recorded the telephone conversation with defendant. The prosecutor established that under Texas law (Texas Penal Code, § 16.02) a conversation can be intercepted or recorded so long as one of the parties consents.[5] The trial court admitted the tape because recording the conversation was not unlawful in the place in which Simmons acted.

Defendant argues that, for purposes of section 632, it does not matter whether Simmons was a resident of another state, acting within her home state, and acting consistent with the laws of her home state. We are not persuaded.

Section 632 specifies criminal penalties, civil penalties, and an exclusionary sanction for violation of the statute. (§ 632, subds. (a), (d); § 637.2.) However, an exclusionary sanction is a disfavored remedy with respect to state criminal proceedings in California. "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court." (Cal. Const., art. I, § 28, subd. (d).) Accordingly, although the Legislature has the authority to provide for the exclusion of evidence, we may not

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[5] In this respect, Texas law is consistent with federal law. (See 18 U.S.C. § 2511(c),(d); see *People v. Otto* (1992) 2 Cal.4th 1088, 1097.)

employ an exclusionary rule in the absence of a clear expression of legislative intent to do so. In section 632, subdivision (d), the Legislature provided for the exclusion of evidence obtained "in violation of this section." Because Simmons, acting in Texas, did not violate section 632, the trial court properly refused to exclude evidence of the tape-recorded conversation between Simmons and defendant.

In any event, it is not reasonably probable that defendant would have obtained a more favorable result if the evidence had been excluded. (Cf. *People v. Epps* (2001) 25 Cal.4th 19, 29; *People v. Clark* (1993) 5 Cal.4th 950, 997, fn. 22.) In his conversation with Simmons, defendant reiterated his truck theft story, which was a story that he told to at least four witnesses before he began to claim the truck was accidentally burned. In view of the cumulation of witnesses who were told the truck theft story, the recording and introduction of the conversation with Simmons could not have been prejudicial. Defendant disagrees, asserting the prosecutor was able to use the tape recording to show that defendant was in financial distress at the time, and thus to demonstrate motive. It is true that the conversation included a brief reference to defendant's financial situation; he wanted to know how long he would have to pay for the truck and said he had too many bills, around $2,000 worth. But defendant's financial distress was well established by independent evidence. He had received notice that his insurance would be cancelled for nonpayment; he had been told that he would not be allowed to drive for Divine Trucking until he corrected his insurance problems; and

his license had been suspended. In these circumstances, and in light of the whole record, we perceive no reasonable probability of a more favorable result if the recording had been excluded.

IX*

Defendant contends the trial court erred in instructing the jury 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." (See CALJIC No. 17.41.1.)

The contention has been rejected by the California Supreme Court in an opinion decided after the filing of the briefs in this case. (*People v. Engelman* (2002) 28 Cal.4th 436.) In any event, we are convinced beyond a reasonable doubt that defendant was not prejudiced by the instruction.

According to defendant, at least one of the jurors in this case was upset by application of the felony-murder rule. While arguing for leniency at the time of sentencing, defendant's counsel pointed out the death was that of a coconspirator by accident or misadventure, and counsel stated several jurors were upset by this. In response, the prosecutor said he had talked to the jurors after the verdict, and there was only one who was upset by application of the felony-murder rule. Defendant argues that even one juror upset

by application of the felony-murder rule precludes a finding that giving CALJIC No. 17.41.1 was harmless. We disagree.

First, as is usually the case with arson, the evidence was largely circumstantial. (*People v. Beagle, supra*, 6 Cal.3d at p. 449.) Nevertheless, viewed in its entirety, the evidence was overwhelming. Second, a criminal defendant has no right to have a juror disregard the law and establish his or her own standard of criminal culpability. (*People v. Williams* (2001) 25 Cal.4th 441, 460.) Finally, the record does not reflect that the jury had any difficulty applying the law to the facts and reaching its verdicts. After argument and instructions, the jury retired to deliberate at 2:59 p.m. At 4:10 p.m., the jury returned to ask the difference between a perpetrator and a principal. The court answered the jury's inquiry, and the jury returned to deliberations at 4:45 p.m. At 5:04 p.m., the jury returned with its verdicts. Thus, the jury reached its verdicts after approximately one and one-half hours of deliberation. This is consistent with the overwhelming nature of the evidence. It also satisfies us, beyond a reasonable doubt, that defendant was not prejudiced by CALJIC No. 17.41.1.

X*

Defendant was sentenced to 15 years to life on the murder conviction. The court stayed service of sentence for arson and imposed a three-year consecutive sentence for insurance fraud.

Defendant contends the sentence for insurance fraud must be stayed pursuant to section 654. Under the peculiar circumstances of this case, we agree.

At the time of defendant's crimes, section 654 provided in pertinent part: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one . . . ." Over the years, this provision has acquired a judicial gloss. It is applicable not only where there is but one act in the ordinary sense, but also where there is a course of conduct that violates more than one statute but that is nevertheless an indivisible transaction. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Ibid.*; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

"Because of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an 'act or omission,' there can be no universal construction which directs the proper application of section 654 in every instance." (*People v. Beamon* (1973) 8 Cal.3d 625, 636; see also *People v. Perez* (1979) 23 Cal.3d 545, 551.) However, some general principles can be distilled from the cases.

First, when the defendant engaged in conduct that caused violent injury to more than one person, he may be punished for crimes against each victim. (*People v. McFarland* (1989) 47 Cal.3d 798, 803-804.) This is so regardless of whether the crimes were

simultaneous, and regardless of whether violent injury was intended. (*Ibid.*) In other situations, the fact that the defendant's crimes involved different victims is a factor to consider, but it is not necessarily controlling. (*People v. Bauer* (1969) 1 Cal.3d 368, 377-378; *People v. Guevara* (1979) 88 Cal.App.3d 86, 90-91.)

Second, the time interval between the crimes is a significant, but not invariably controlling, factor. Thus, in *People v. Beamon, supra,* 8 Cal.3d 625, the Supreme Court said: "It seems clear that a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment." (*Id.* at p. 639, fn. 11.) Other courts have found a temporal separation between offenses sufficient to support multiple punishment in the circumstances that were presented. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253.) But, while a temporal separation may, in some contexts, make the legal separation of acts more apparent (*In re Hayes* (1969) 70 Cal.2d 604, 609), the fact one crime was technically complete before another began does not automatically permit multiple punishment. (*People v. Bauer, supra,* 1 Cal.3d at p. 377.) "It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Finally, the inquiry is directed to the defendant's *criminal* intent and objective. (*In re Hayes, supra*, 70 Cal.2d at p. 607.) We cannot focus on any act, omission, or intent that the offenses have in common, but must look to what makes the conduct criminal. (*Ibid.*; see also *In re Michael B.* (1980) 28 Cal.3d 548, 556.)

And in this respect, we must look for the defendant's intent and objective with some degree of specificity. A broad and amorphous intent and objective, such as the desire for sexual gratification with respect to sexual offenses or a desire to obtain money with respect to theft-related offenses, cannot preclude multiple punishment for separate offenses. (*People v. Perez, supra*, 23 Cal.3d at p. 553; *People v. James* (1977) 19 Cal.3d 99, 119.)

In this case, all of defendant's offenses were pursuant to one criminal intent and objective. He has been found guilty and sentenced for murder, but the offense was murder under the felony-murder rule because he had the intent to commit arson. Nothing in the record would indicate that defendant had an intent or objective of injuring or killing Bhardwaj. Defendant burned his truck to make a fraudulent insurance claim, and his claim was fraudulent because he burned the truck. It thus appears that, throughout the incident, defendant's sole intent and objective was to have the insurance company pay the remaining loan balance on the truck and pay any residual benefits to defendant. His entire course of conduct was directed to this end.

The People argue the offenses should be separately punishable because they were separated in time. However, we have noted that temporal separation is a factor but is not invariably controlling. Here, the temporal separation was not significant. The truck was burned in the early morning hours of August 27, 1997, and defendant called in his fraudulent insurance claim during working hours on August 27, 1997. When we focus on defendant's criminal intent and objective, as we must, we perceive but one indivisible course of

conduct despite the minor temporal separation of the particular offenses. Accordingly, we agree with defendant that the sentence for the fraudulent insurance claim must be stayed pursuant to section 654.

XI*

In awarding credit for presentence time served, the court limited defendant's good behavior/worktime credit to 15 percent of actual time served. It did so pursuant to subdivision (c) of section 2933.1, which applies to certain specified felons, including murderers.

In defendant's view, because the punishment for murder was enacted by statutory initiative, the Legislature could not alter his entitlement to presentence good behavior/worktime credits by enacting a statute not approved by the voters.[6]

After the opening brief was filed, the Supreme Court rejected this contention in *People v. Cooper, supra*, 27 Cal.4th 38, and defendant concedes that the decision in *Cooper* is dispositive. Hence, his claim of error fails.

XII*

Lastly, defendant contends, and the People concede, that an amended abstract of judgment is required. We agree.

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[6] At the Primary Election on June 2, 1998, the voters passed Proposition 222, which approved the legislative amendment of section 190 and the legislative enactment of section 2933.2. Those sections now deny presentence conduct credits and postsentence worktime credits to persons convicted of murder. They do not apply to defendant because his crimes were committed in 1997. (*People v. Cooper* (2002) 27 Cal.4th 38, 40-41, fn. 2.)

First, the abstract of judgment states the indeterminate sentence of 15 years to life was imposed on all three counts; actually, it was imposed on count one alone. Second, the court awarded presentence credits after a hearing subsequent to the imposition of sentence, and the abstract does not reflect the award of credits. Third, as the People point out, the award of conduct credits was one day too few.[7] Finally, the amended abstract of judgment must reflect our modification of the judgment staying the service of sentence on count three. [End of part XII.]

DISPOSITION

The judgment is modified to stay, pursuant to section 654, the service of sentence imposed on count three, insurance fraud in violation of section 550, subdivision (a)(4), and to award defendant a total of 476 days of presentence conduct credit (414 days of actual custody credit and 62 days of good conduct credit). As modified, the judgment is affirmed.

The trial court is directed to amend the abstract of judgment to reflect these modifications and to state that the indeterminate term of 15 years to life is imposed on count one only. The court

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[7] Defendant was awarded 414 days of actual presentence credit and 61 days of conduct credit. Fifteen percent of 414 days is 62.1 days, entitling defendant to 62 days of conduct credit.

is further directed to forward to the Department of Corrections a certified copy of the amended abstract of judgment.

SCOTLAND, P.J.

We concur:

SIMS, J.

MORRISON, J.