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Court of Appeal, Third District, California.

The PEOPLE, Plaintiff and Respondent,

v.

Aaron William ATENCIO, Defendant and Appellant.

No. C059437.
(Super.Ct.No. 05F8778).
May 7, 2010.

Office of the State Attorney General, Sacramento, CA, for Plaintiff and Respondent.

Scott Concklin, Attorney at Law, Redding, CA, for Defendant and Appellant.

SCOTLAND, P.J.

*1 Defendant Aaron William Atencio was convicted of first degree murder by means of lying in wait (Pen.Code, §§ 187, subd. (a), 189, 190.2, subd. (a)(15)) and conspiracy to commit murder (Pen.Code, §§ 182, subd. (a)(1), 187, subd. (a); further section references are to this code unless otherwise specified). The jury also found that he was armed with a firearm (§ 12022, subd. (a)(1)) and used a deadly weapon (§ 12022, subd. (b)(1)) during the commission of the offenses. Defendant was sentenced to life in prison without the possibility of parole for the murder, plus two consecutive one-year terms for the weapons enhancements. A term of 25 years to life was stayed (§ 654) for the conspiracy conviction. The court imposed a $10,000 restitution fine (§ 1202.4) and another $10,000 restitution fine stayed unless parole is revoked (§ 1202.45).

On appeal, defendant contends his confession was "coerced by implied threats and promises of leniency which rendered [it] involuntary"-thus, it should not have been introduced into evidence; certain out-of-court statements made by codefendant Victoria S. were inadmissible hearsay that should have been excluded; and the trial court committed instructional and sentencing error.

We shall modify the judgment by striking the section 1202.45 fine and by staying execution of one of the weapons enhancements, and shall affirm the judgment as modified.

FACTS

On November 20, 2005, Joe Krauter, Chris Medina, and defendant left Bakersfield to drive to Redding in Krauter's Toyota 4-Runner. Their mission was to kill Leo Rapp, a man whom defendant believed had threatened defendant's friend, Breanne Eldredge, and had harmed Eldredge's friend, Victoria S.

Defendant was armed with a .380 semi-automatic handgun and a six-inch fixed blade knife, and had purchased duct tape and zip ties for the purpose of restraining the intended victim prior to death. En route to Redding, defendant and his companions bought six gallons of muriatic acid, disposable respirator masks,

safety gloves, and a tarp. The purpose of the muriatic acid was to dispose of the body after the murder. The masks and gloves were obtained to protect the men from the harmful effects of the acid. The tarp was intended to help them transport the body from the murder site to the disposal site, which would be in a remote location where they would dig a burial hole, slowly pour the acid over the body, and then cover the body with earth.

The events that set defendant on this murderous path are fairly complicated.

In October 2004, Victoria began accusing her former boyfriend, Leo Rapp, of a series of rapes. Victoria and Eldredge were close friends. About a month before the murder, Victoria mentioned to Eldredge that she wished "something could be done about [Rapp]." Eldredge proposed defendant as a possible solution. Eldredge had met defendant through the internet and, during their online conversations, defendant professed to be a "freelance bounty hunter ." During one chat room exchange, defendant mentioned that he was a "hit man" and wanted to murder someone who had "affronted" another member of the chat room.

*2 About a week before the murder, Eldredge called defendant, explained the situation, and asked if defendant would be willing to help Victoria; defendant responded that he would need money and wanted to talk to Victoria himself. Eldredge passed the phone to her, who told defendant that Rapp had been raping and physically abusing her, and that Rapp had also threatened to rape and beat up Eldredge. Victoria provided defendant with Rapp's description and his place of employment, a list of places frequented by Rapp, and a description of some of his friends. She also mentioned that Rapp had a knife collection.

Through a series of phone calls among defendant, Eldredge, and Victoria, a plan emerged: defendant would drive up to Redding with two friends; Victoria, who worked at a group home for the mentally disabled, would lure Rapp to the group home late at night by telling him she had the money she owed him; defendant's friends would pose as security guards and escort Rapp from the road to the group home in order to ensure that he was alone; and defendant would have the task of ending Rapp's life.

The original price for the hit was $2,000. But when Victoria told defendant that she could not pay, defendant decided to complete the job for free as "a personal favor" because Rapp had threatened Eldredge. Defendant told Eldredge during one phone call, "Any man [who] threatens you is a dead man walking." Four days before the murder, defendant convinced Krauter and Medina to accompany him to Redding to help carry out the killing.

At roughly the same time as the negotiations between defendant and Victoria, her boyfriend, Alan Edenfield, was driving from Ohio to Redding in order to move in with Victoria. During the drive, he received a call from Victoria, who said that Rapp had raped her again, but that Edenfield should not "worry about it because she knew somebody that was going to take care of it." The day before the murder, after Edenfield had reached Redding, Victoria told him that Rapp had raped her a third time. During this conversation, she specified that defendant was the person who would be taking Rapp's life, and that the murder would take place the following night at the group home.

The day of the murder, as planned, Victoria called Rapp and told him to meet her late that night at the group home to collect money she owed him. Defendant and his friends, Krauter and Medina, left Bakersfield at around 3:00 p.m. so they would arrive in Redding by around 10:00 p.m. Defendant picked up body disposal supplies prior to leaving Bakersfield. That evening, Victoria and Edenfield drove to Eldredge's apartment to discuss the murder. After Edenfield said he did not want any part in Rapp's demise, Victoria told him that he did not have to be at the group home when the murder took place, but that she needed him "down the road." At roughly 9:00 p.m., Eldredge and Edenfield dropped Victoria off at the group home and returned to Eldredge's apartment. A short time later, Eldredge received a phone call from defendant telling her that he and his friends had arrived. Eldredge and Edenfield then met defendant, Krauter, and Medina at a high school, and had the men follow them to the group home.

*3 The group home was located down a steep hill at the end of a sparsely populated dead-end street, Harpole Road. Final preparations for the killing occurred in the garage. Defendant pulled out his knife and removed the duct tape and plastic ties from the 4-Runner, informing Krauter and Medina that they could

use those to bind Rapp's hands. Telling Edenfield that he "was going to be down the road acting as a lookout for when [Rapp] was to show up," Victoria had him change from his bright orange shirt into a darker blue shirt and leather jacket. She then told Krauter and Medina to have Rapp park at the top of the hill when he arrived and to escort him down to the garage. Victoria also had Eldredge write Rapp's personal information on a piece of notebook paper inside a white binder, and handed the binder to the pseudo security guards so they could pretend to "check [Rapp] in" before bringing him down the hill. She then told Eldredge to act as a lookout with Edenfield in case any of Rapp's friends showed up. Eldredge and Edenfield complied with Victoria's directions, walking up the hill and down the street to oversee the events from afar.

Shortly before 11:00 p.m., Rapp's friends, Michael Turner and Jenen Stoutamore, went to Harpole Road in Turner's truck to scope out the scene prior to Rapp's arrival. Stoutamore was armed with a large Bowie knife and a smaller pocket knife. The men parked the truck and radioed to Rapp that all appeared quiet. Rapp arrived a few minutes later and was met at the top of the hill by Krauter and Medina, who had Rapp sign his name in the binder and then escorted him down the hill. As Rapp walked down the hill, Turner called his cell phone to make sure everything was fine. Rapp responded, "Yeah, seems okay."

When they reached the garage, Rapp yelled out to Victoria, who was inside the home, "Victoria, what the fuck? Come out here[.] [W]hat are you doing? What's going on?" Defendant, Krauter, and Medina then grabbed Rapp, and the men "grapple[d]" briefly in the garage before defendant pulled out his knife and stabbed Rapp in the neck. The blade sliced through some of the muscle and fatty tissue of the neck, but did no damage to any vital structures. Defendant, Krauter, and Medina then wrapped Rapp in the tarp they had brought, secured him with duct tape, and placed him in the back of the Toyota 4-Runner, which had been backed up to the garage.

Meanwhile, Stoutamore was trying unsuccessfully to reach Rapp through his cell phone, and came down the hill to investigate. At one point, Stoutamore saw Victoria come to a window, look out with a "half panicked" expression, and then shut the curtains again. When he got closer to the garage, he heard what sounded like duct tape being peeled, and saw the tarp being loaded into the 4-Runner. He also saw Victoria, now in the garage, pouring liquid on the floor and using a broom as though she was "trying to clean up some sort of mess."

Noticing someone was standing at the top of the hill, defendant and his friends jumped into the 4-Runner and drove it off the road in search of an alternate escape route. Stoutamore followed on foot. As defendant attempted to drive it up a hill, the 4-Runner crashed and ended up on its side in a ditch. Stoutamore ceased pursuit and went back for Turner. Defendant and Medina kicked out the front window of the 4-Runner to allow the men to climb out of it. Krauter and Medina disappeared into the woods, while defendant dragged Rapp's deceased body out of the back of the wrecked vehicle.[FN1]

FN1. The cause of death was asphyxia caused by suffocation.

*4 At this point, Stoutamore and Turner arrived at the crash site and saw Rapp's body lying on the tarp behind the 4-Runner. Turner saw the "large gash on his neck" and yelled to Stoutamore "that [Rapp's] neck was cut and he was not alive." Stoutamore punched defendant in the face. Defendant stumbled backward and reached for his gun. Stoutamore then tackled defendant and yelled, "Gun, gun, gun." A struggle for the firearm ensued. Stoutamore pulled out his Bowie knife and hit defendant in the back of the head with the hilt while Turner managed to remove the gun from defendant's grasp. Turner then took the gun to a nearby house, placed it on the porch, and told the residents to call 9-1-1.

When law enforcement officers arrived a short time later, Turner was yelling at defendant: "You killed my fucking friend. You shouldn't have done that. You've killed my friend." Defendant, lying on the ground with blood coming from the back of his head, did not respond. Defendant's knife was recovered and discovered to have blood on it. Six gallons of muriatic acid were found in the overturned 4-Runner. A box of latex gloves was found under the tarp, and a single latex glove with a red stain was found next to the tarp. Police also found a new roll of duct tape, zip ties, and a shopping bag containing respirator masks.

Defendant was taken to the hospital, where he was treated for his head injury and was interviewed by detectives. Defendant was then taken to the station for further questioning. Ultimately, he confessed to the murder plot and explained that, "for a very good reason," he was the person responsible for ending Rapp's life. The reason, according to defendant, was that he "was blessed and cursed with the talent of raw war."

DISCUSSION

I

Defendant claims his confession was "coerced by implied threats and promises of leniency which rendered [it] involuntary." Not so.

A

Defendant was initially interviewed by detectives at the hospital following treatment for his head injury. After being advised of his rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (hereafter *Miranda*)), defendant delivered his first account of events.

According to defendant, he and friends Krauter and Medina drove to Redding from Bakersfield to visit defendant's friend, Breanne Eldredge. While they were driving around looking for a good place to see the stars, the 4-Runner ended up in the ditch. After climbing out of the wrecked vehicle, they discovered a dead body. They had a tarp and pool cleaning supplies in the back of the 4-Runner, and decided to move the body with the tarp. As they were moving the body, two men showed up with flashlights, and one of the men hit defendant in the face.

At this point in defendant's statement, a detective commented that he believed some of what defendant was saying was true, but that he did not want defendant "to be caught being the guy that's not being completely honest." The detective told defendant that, if Krauter and Medina were being honest with the police, defendant would be "the odd-man out" and "left in the cold." After defendant said he understood, one of the detectives stated, "I mean, I'm trying to be real straight with you. We're here as much to help you as we can and part of that is being real honest with ya."

*5 When defendant continued with his tale of stumbling across the body after crashing the 4-Runner, a detective said to defendant, "We're here trying to get something going for you. [¶] ... [¶] ... But, right now, you're not being honest with us. It's time to start thinking straight, being smart, and as ugly as that may sound, tell us what happened tonight. 'Cause if you aren't doing it, [Krauter] is, or [Medina] is, or the girl at the house is; somebody's talking to the police right now, okay, and the only way you can help yourself, is to tell us what happened. Okay, what was going through your head, why all this bad shit happened, and it's not something you wanted to happen, okay, but from the part where we left Bakersfield, to go see [Eldredge], I think we've kind of gone astray."

Defendant continued with his original story, but the detectives decided to take a "quick break" to allow defendant to "think about things." Before leaving defendant to his thoughts, a detective said, "There's a lot of people out being talked to and by the end of the night, I think we'll put this story together. [¶] ... [¶] You do not want to be the odd man out, you want your story to be heard, okay, so think about that for [a] minute[.]"

When the detectives returned, they reminded defendant that "the story just doesn't work" and that he "need[ed] to be straight." At this point, defendant began his second account of events. In his words, "The reason why I came to Redding today, was to see about persuading, so to speak, a Mr. [Rapp], about laying off raping his ex-girlfriend, on multiple such occasions." According to defendant, his "sole intention" was to "administer a simple beating," but when he began to grapple with Rapp in the garage, Rapp managed to gouge one of defendant's eyes, which "engendered such an instinctual ... rage" in defendant that he pulled out his knife and stabbed Rapp. As defendant described it, "You feel life, you know, the seeping of it and you feel the depth of which the flesh caves and the bones give[ ] and the muscle tears. And I felt those things give instantaneously, before I even knew they had and I knew that the damage was completely irreparable, at least I was certain of it."

Defendant then explained that he had driven from Bakersfield to Redding to meet up with Eldredge, and that Eldredge's friend, Victoria, was the one Rapp was accused of raping. The plan was for Rapp to come to the group home where Victoria worked, ostensibly to collect money from her, and then Rapp would be led "dubiously" by Krauter and Medina, posing as security guards, to the garage where defendant would be waiting to administer the beating. According to defendant, things went according to plan until Rapp "tried to gouge [his] eye out," and it was "just kind of a bad coincidence that [the knife] ended up in his throat."

The interview continued at the police station following defendant's discharge from the hospital. One of the detectives asked defendant to "go through [his] statement one more time." Defendant agreed but wanted to know what he was being charged with. The detective explained he was not the lead investigator, but his understanding was that Rapp was dead. The detective then reiterated they were "trying to help" defendant portray the "human side" of the story, and also reminded defendant of his *Miranda* rights. Defendant indicated he remembered and understood those rights.

*6 Defendant then recounted the same second version of events that he had described at the hospital. Indeed, he did so with some philosophical flourishes. After explaining that he "was in no personal mood to go so far as to kill the man," he expounded on the nature of death. "[D]eath is a very painful experience.... [I]t's hard to describe it without the use of the own word itself in the statement of the description[.] [I]t's the death of enlightenment. You know, life is its own statement of sentient enlightenment and death is, you know, the crossing ... almost, not necessarily, a void thereof, but the reverse of it, you know, a vacuum that sucks it back into a void[.]"

Later in the interview, after defendant explained that he and his companions bought the muriatic acid to clean a driveway when they got back to Bakersfield, one of the detectives said that he had "been able to compare notes" regarding defendant's statement and the statements given by Krauter and Medina, and that Krauter and Medina had confessed the purpose of the trip was to "whack" Rapp and the purpose of the muriatic acid was "for body disposal." Defendant responded, "That's some pretty interesting stuff right there." The detective then told defendant that Krauter and Medina had admitted "a price was negotiated up front" but, "in the end, they actually agreed that, ... we're not going to do this for money, this guy needs to have his ass whacked, not kicked, but whacked, and we'll just do it."

Defendant was then told, "[I]f you stay on a story that isn't a hundred percent accurate, you know, and claim responsibility for the whole thing, they're not gonna, they look at all the players, they're gonna say, well, [Krauter] was straight, [Medina] was straight, but [defendant] is still saying this was just a big accident, big misunderstanding, you know? So I'm not, I don't, you know, can't even venture to guess how much movement the [District Attorney's] Office has on a case like this, you know? It's not a lot, if any. But again, I think you're getting left out in the cold because you're the one that's not acknowledging what I believe, is the truth, you know? I ... hope you don't think I'm a stupid person." Defendant responded, "the one most unexpected thing that happened today ... was me killing [Rapp]." The detective stated, "I, for some strange reason, believe that may be the case, but I think the end result was that somebody was supposed to kill [Rapp], be it Victoria, [Krauter], or [Medina], somehow [he] was supposed to die yesterday."

Defendant then told the detectives his third account of events. The purpose of the trip was to kill Rapp, but defendant doubted whether he would be able to go through with the murder until Rapp gouged defendant's eye, "at which point the doubts were kind of moot." The original price for the hit was $2,000, but when Victoria said she could not pay, defendant decided to do it for free because he believed that Rapp had also threatened Eldredge. The purpose of the duct tape and zip ties was to restrain Rapp prior to the murder. The purpose of the muriatic acid was to dispose of the body, while the masks and gloves were designed to protect the men from the acid. The tarp was intended to help the men transport the body from the murder site to the disposal site without leaving forensic evidence in the 4-Runner.

*7 The trial court denied defendant's pretrial motion to suppress the confession. Finding the confession to have been delivered voluntarily, the court explained the conversations took place in a "relaxed environment," there were no "inappropriate threats by the police or any inappropriate promises," and

defendant was given *Miranda* warnings at the start of the hospital interview and appeared to "completely understand those warnings." Indeed, demonstrating he understood the warnings, defendant explained that, when the detectives read him his rights, he could have said, "[A]ll right, fine, get the hell out of my room, I'll take a lawyer," or "I'll just take the [F]ifth and say the hell with all of you." Throughout the interviews, defendant "professe [d] frequently to be a smart guy, appear[ed] to be intelligent and articulate and understanding of the entire process," and "seemed to enjoy the attention that he was getting and seemed to enjoy talking about himself and being very philosophic during the interview, both at the hospital and in the interview room." The court also pointed out that frequent breaks were taken, defendant was given refreshments, and he was "clearly not nervous" and, "in fact, appear [ed] to enjoy the interview."

B

For reasons to follow, we reject defendant's claim that "one must conclude [his] statements were coerced by implied threats and promises of leniency which rendered those statements involuntary."

"An involuntary confession may not be introduced into evidence at trial," and "[t]he prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made." (*People v. Carrington* (2009) 47 Cal.4th 145, 169; *People v. McWhorter* (2009) 47 Cal.4th 318, 346.)

"In determining whether a confession was voluntary, ' "[t]he question is whether defendant's choice to confess was not 'essentially free' because his [or her] will was overborne." ' [Citation.] Whether the confession was voluntary depends upon the totality of the circumstances. [Citations.]" (*People v. Carrington, supra,* 47 Cal.4th at p. 169; *People v. Massie* (1998) 19 Cal.4th 550, 576; *Lynumn v. Illinois* (1963) 372 U.S. 528, 534 [9 L.Ed.2d 922, 926].) " 'On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review.' " (*People v. Holloway* (2004) 33 Cal.4th 96, 114.)

A confession is involuntary "if it is obtained by threats or promises of leniency, whether express or implied, however slight, or by the exertion of any improper influence." (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1201.) " 'However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary.... Thus, "[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct," the subsequent statement will not be considered involuntarily made. [Citation.] On the other hand, "if ... the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible...." ' [Citation.]" (*People v. Holloway, supra,* 33 Cal.4th at p. 115; *People v. Carrington, supra,* 47 Cal.4th at pp. 170-171.)

*8 Having examined the interviews, we discern no implied threats or promises of leniency. As defendant points out, detectives told him they were "trying to get something going" for him and trying to "help" him to put his "best foot forward" by providing a statement that honestly explained "why all this bad shit happened" and showed "some remorse" for Rapp's death. However, this cannot be construed as an implied promise of leniency. In the context of the interview, the detectives were doing nothing more than exhorting defendant to tell the truth and permissibly offering to help him explain his side of the story to the district attorney. (See *People v. Ramos, supra,* 121 Cal.App.4th at p. 1204 ["no improper promise of leniency" where the detective "promised only to present evidence of [defendant's] cooperation to the district attorney"].) The detectives "did not suggest they could influence the decisions of the district attorney," but simply informed defendant that providing an honest account of events might be beneficial in an unspecified way. (*People v. Carrington, supra,* 47 Cal.4th at p. 174.) Indeed, immediately before he confessed to the murder plot, the detectives specifically told him the district attorney would be responsible for charging him and there probably was not a lot of "movement," "if any," as far as which crimes would be charged against him. Consequently, offering to help him explain his side of the story to the district attorney cannot be construed as an implied promise of leniency.

Defendant also faults the detectives for warning him against "being the guy that's not being completely honest" and being the "odd-man out" and "left out in the cold," and for telling him the only way he could help himself was to tell them what happened. According to defendant, these statements constituted a threat that he was in a hopeless situation and would suffer dire consequences unless he confessed. He also complains the statements were repeated after he was told Krauter and Medina had confessed to the murder plot. Thus, he suggests, "the threat that [he] would be 'left out in the cold' if he did not confess to the murder plan like the others ha[d] done was meant to imply that all of the other participants who freely admitted participation in the murder plot would be receiving a more favorable outcome, and that he would be denied a similar benefit because of his refusal to admit the plan to commit murder."

On the contrary, far from threatening defendant, the detectives were simply explaining the natural consequences that would flow from his lying to them, should his coconspirators suffer a crisis of conscience and confess. We have no doubt that, when those words of the detectives were repeated after they informed defendant that Krauter and Medina had confessed, the words carried greater weight in defendant's mind and likely led to the confession that followed immediately. But the fact that a strategy was effective does not make it unconstitutional. "No constitutional principle forbids the suggestion by authorities that it is worse for a defendant to lie in light of overwhelming incriminating evidence." (*People v. Carrington, supra,* 47 Cal.4th at p. 174.) This is all that the detectives did in this case. They did not, as defendant claims, imply that Krauter and Medina would receive a more favorable outcome because they confessed, or that defendant would be denied a favorable outcome unless he also confessed.

*9 Contrary to defendant's claim, the statement that the only way for him to help himself was to tell the truth did not constitute "both a threat and a promise." The fact this exhortation to tell the truth was coupled with a suggestion that evidence of guilt was strong and, thus, telling the truth would be a better strategy than denial, does not make it either a threat or a promise of leniency. (See *People v. Andersen* (1980) 101 Cal.App.3d 563, 583 ["when evidence of guilt is strong, confession and avoidance is a better defense tactic than denial"].)

The cases upon which defendant relies are entirely inapposite.

In *People v. McClary* (1977) 20 Cal.3d 218, overruled on another point in *People v. Cahill* (1993) 5 Cal.4th 478, 509, footnote 17, officers ignored a juvenile's repeated requests for counsel, implied she would be charged only as an accessory if she admitted knowledge of the murder, and falsely told her she would face the death penalty unless she changed her statement. (*People v. McClary, supra,* 20 Cal.3d at p. 229.) Here, defendant was not deprived of the right to counsel and was never promised, expressly or impliedly, a lesser charge if he confessed.

In *People v. Johnson* (1969) 70 Cal.2d 469, officers told Johnson that any information he gave would not be admissible in court and did not tell him he had the right to remain silent. (*Id .* at p. 474.) Here, defendant understood his rights and understood the detectives were collecting information to use against him at trial.

In *People v. Cahill* (1994) 22 Cal.App.4th 296, an officer gave a deceptive account of the law, telling Cahill that he could avoid a first degree murder charge in a felony-murder case by admitting to an unpremeditated killing. (*Id.* at pp. 314-315.) Here, the detectives engaged in no such deception.

In re Shawn D. (1993) 20 Cal.App.4th 200 involved an officer who repeatedly told a juvenile suspect that a truthful statement would benefit the suspect's girlfriend and that the juvenile would not be tried as an adult if he confessed (*id.* at pp. 213-216). And *In re J. Clyde K.* (1987) 192 Cal.App.3d 710, disapproved on another point in *People v. Badgett* (1995) 10 Cal.4th 330, 349, involved an officer who told juvenile suspects that lying about stealing certain boxes would result in jail time, but admitting to the theft would result only in a citation (*In re J. Clyde K., supra,* at p. 714). Here, defendant was an adult who was not promised any benefit in exchange for his confession other than that which flows naturally from a truthful and honest course of conduct. (*People v. Holloway, supra,* 33 Cal.4th at p. 115; *People v. Carrington, supra,* 47 Cal.4th at pp. 170-171.)

Defendant asserts that because of his youth (22 years old when he was interrogated) and his "emotional state" (he had been hit on the head and was in the hospital when the interviews began), he was "particularly vulnerable to improper inducements." The record defeats this suggestion. As the trial court correctly observed, defendant's comments and responses during the interviews showed that he was intelligent, articulate, understood his right to remain silent, and willingly spoke with detectives, "in fact, appear[ed] to enjoy the interview." His comments and responses to questions also demonstrated that his injury had not caused any mental or emotional impairment.

*10 Finally, the record supports the trial court's observations that frequent breaks were taken during the interviews, defendant was given refreshments, he understood his rights to remain silent and to counsel, he answered the detectives' questions intelligently and articulately, and he seemed to enjoy the opportunity to discuss his intelligence and philosophical views with the detectives. These facts support the finding that defendant's confession was voluntary. (*People v. McWhorter, supra*, 47 Cal.4th at p. 358 ["The 'mental level and intelligence' of the accused is a factor to be considered when assessing the voluntariness of incriminating statements"].)

In sum, the trial court did not err in ruling that defendant's statements were voluntary and thus were admissible at trial to prove that he committed the charged offenses.

II

We also reject defendant's assertion that statements made by Victoria to Edenfield about the plot to kill Rapp were inadmissible hearsay, not falling within the coconspirator exception to the hearsay rule, and that the introduction of those statements violated defendant's constitutional right of confrontation.

"Hearsay statements by coconspirators" may "be admitted against a party if, at the threshold, the offering party presents 'independent evidence to establish prima facie the existence of ... [a] conspiracy.' [Citations.] Once independent proof of a conspiracy has been shown, three preliminary facts must be established: '(1) that the declarant was participating in a conspiracy at the time of the declaration; (2) that the declaration was in furtherance of the objective of that conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating or would later participate in the conspiracy.' [Citation.]" (*People v. Hardy* (1992) 2 Cal.4th 86, 139; Evid.Code, § 1223; see also *In re Hardy* (2007) 41 Cal.4th 977, 996.)

" 'Only prima facie evidence of a conspiracy is required to permit the trial court to admit evidence under the coconspirator's exception. This fact need not be established beyond a reasonable doubt, or even by a preponderance of the evidence.... The conspiracy may be shown by circumstantial evidence and "the agreement may be inferred from the conduct of the defendants mutually carrying out a common purpose in violation of a penal statute." ' [Citation.]" (*People v. Jeffery* (1995) 37 Cal.App.4th 209, 215; *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1402-1403.)

Defendant claims that, when Victoria made the challenged statements to Edenfield, there was no independent evidence that established a prima facie case of conspiracy to commit murder. Defendant complains of three such statements. The first statement was made the day before the murder, when Victoria informed Edenfield that Rapp had raped her a third time and that defendant was going to kill him. The second statement was made roughly 30 minutes after the first statement; Victoria told Edenfield the murder would take place at her work the following night. When Edenfield said he did not want any part in the murder, Victoria said that was "fine." The third statement was made the evening of the murder at Eldredge's apartment, when Victoria again told Edenfield that defendant would be killing Rapp that night. This time Victoria also told Edenfield that she "may need" him, but that he would not have to be at the group home where Rapp was to be killed, but could "stay down the road."

*11 Defendant's specific contentions are there was no independent evidence that defendant and Victoria had agreed to kill Rapp prior to these statements and, at the time of these statements, there had been no overt act taken in furtherance of any agreement to kill Rapp. Defendant is mistaken.

A prima facie case of conspiracy to commit murder can be found in defendant's statements to police following the murder, which were corroborated by defendant's presence at the crime scene and evidence recovered there. Defendant admitted that, during the week prior to the murder, he and Victoria spoke on the telephone several times and planned Rapp's "demise." They settled on a price for the hit "at the very beginning" of the conversations, but he ultimately agreed to kill Rapp "pro bono" because defendant believed that Rapp had threatened Eldredge. Four days before the murder, defendant talked to Krauter and Medina about accompanying him on the trip to Redding. And defendant admitted buying duct tape, zip ties, muriatic acid, respirator masks, safety gloves, and a tarp, all for the purpose of restraining Rapp prior to the murder and disposing of the body immediately thereafter.

Looking no further than defendant's own admissions, there was an agreement to kill Rapp occurring a week before the actual murder, well before the challenged statements. And, as we shall explain, there were several overt acts occurring prior to those statements.

An overt act is " 'an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime.' " (*People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8, citing *Chavez v. United States* (9th Cir.1960) 275 F.2d 813, 817.) "This act need not 'constitute the crime or even an attempt to commit the crime which is the conspiracy's ultimate object. Nor is it required that such a step or act, in and of itself, be a criminal or unlawful act.' [Citations .]" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 244.) Moreover, "internal discussions and arrangements between coconspirators can easily constitute overt acts in furtherance of the conspiracy." (*Id.* at pp. 244-245 [alleged overt acts consisted of "solicitation of additional conspirators," "requests for information regarding the victim and the plan," "payments to secure a coconspirator's assent to the conspiracy," and "numerous phone conversations laying out the manner in which the conspiracy would be carried out"].)

Here, prior to the challenged statements, arrangements were made between defendant and Victoria, and defendant had solicited Krauter and Medina to assist in the plot to kill Rapp. In short, defendant's statements to detectives, corroborated by defendant's presence at the crime scene and the evidence recovered there, were sufficient to provide a prima facie case of conspiracy to commit murder.

Turning to the requirements of Evidence Code section 1223,[FN2] both Victoria and defendant were participating in the conspiracy at the time Victoria made the challenged statements to Edenfield. Defendant asserts, however, the statements were not in furtherance of the conspiracy. He likens them to statements made in *People v. Roberts* (1992) 2 Cal.4th 271, 303-304 [conspirator remarked to two men, without asking for their help, that he would be going with a coconspirator to resolve a dispute with the murder victim], and *People v. Morales* (1989) 48 Cal.3d 527, 552 ["mere boasting to a girlfriend"]. On the contrary, the trier of fact could reasonably have inferred that, through each of these statements, Victoria was attempting to secure the assistance of Edenfield. Indeed, in the third statement, Victoria specifically told Edenfield that she might need him to act as a lookout. And in her next statement, also brought out through Edenfield's testimony (and which defendant does not challenge), Victoria told Edenfield that he was in fact going to be a lookout, and directed him to change his shirt and report to the top of the hill with Eldredge.

FN2. Evidence Code section 1223 states: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; [¶] (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

*12 The trial court did not err in allowing introduction of these statements under the coconspirator exception to the hearsay rule.

We also reject defendant's assertion that the admission of these statements violated his Sixth Amendment right "to be confronted with the witnesses against him." (U.S. Const., 6th Amend.)

"Only [testimonial statements] cause the declarant to be a 'witness' within the meaning of the Confrontation Clause. [Citation .] It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (*Davis v. Washington* (2006) 547 U.S. 813, 821 [165 L.Ed.2d 224, 237].) "Testimonial statements are 'statements, made with some formality, which, *viewed objectively,* are for the *primary purpose* of establishing and proving facts for possible use in a criminal trial.' [Citation.] An 'informal statement made in an unstructured setting' generally does not constitute a testimonial statement. [Citation.]" (*People v. Garcia* (2008) 168 Cal.App.4th 261, 291; *People v. Cage* (2007) 40 Cal.4th 965, 984, fn. 14.)

Victoria's statements to Edenfield were made during casual and informal conversations with her boyfriend. Viewed objectively, they were not given primarily for the purpose of proving "some past fact for possible use in a criminal trial" (*People v. Cage, supra,* 40 Cal.4th at p. 984), i.e., that defendant was conspiring with Victoria to kill Rapp. Instead, they were given to tell Edenfield of the plan with a view to enlisting his assistance. In short, they were not "out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial" and, therefore, not subject to the Confrontation Clause. (*Ibid.*)

III

We now turn to defendant's claim that the trial court erred prejudicially by instructing the jury with CALCRIM Nos. 563 and 418.

CALCRIM No. 563, as given by the trial court, instructed the jury: "The defendants are charged in Count 2 with conspiracy to commit murder. To prove that a defendant is guilty of this crime, the People must prove the following. One, the defendant intended to agree and did agree with one or more of the other defendants or co-participants to intentionally and unlawfully kill. Two, at the time of the agreement, the defendant and one or more of the other alleged members of the conspiracy intended that one or more of them would intentionally and unlawfully kill. Three, the defendant or one of the co-participants committed at least one of the following overt acts alleged to accomplish the killing." The court then listed the alleged overt acts. Continuing with the elements, the court instructed: "Element four ... is that at least one of these overt acts was committed in California. [¶] To decide whether a defendant committed these overt acts, consider all of the evidence presented about the overt acts. To decide whether a defendant and one or more of the other alleged members of the conspiracy intended to commit murder, please refer to instruction 520 which defines the crime of murder. I've already read to you instruction 520.[¶] The People must prove that the members of the alleged conspiracy had an agreement and intent to commit murder. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit that crime. [¶] An agreement may be inferred from conduct, if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime. An overt act is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed-upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself. [¶] You must all agree that at least one alleged overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to agree-all agree on which specific overt act or acts were committed or who committed the overt act or acts. [¶] You must make a separate decision as to whether each defendant was a member of the alleged conspiracy. A member of a conspiracy does not have to personally know the identity or roles of all the other members. Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy. [¶] Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough by itself to prove that the person was a member of the conspiracy."

*13 CALCRIM No. 418, as given by the court, instructed the jury: "In deciding whether the People have proved that the defendants committed the crimes charged, you may not consider any statement made out of court by co-conspirators unless the People have proved by a preponderance of the evidence the

following. One, some evidence other than the statement itself establishes the conspiracy to commit a crime existed when the statement was made. Two, either Defendants Breanne Eldr[e]dge or Alan Edenfield were members of and participating in the conspiracy when they made the statement. Three, either of the Defendants Breanne Eldr[e]dge or Alan Edenfield made the statement in order to further the goal of the conspiracy. And four, the statement was made before or during the time that the Defendants Breanne Eldr[e]dge or Alan Edenfield were participating in the conspiracy. [¶] A statement means an oral or written expression or nonverbal conduct intended to be a substitute for an oral or written expression. Proof by a preponderance of the evidence is a different standard of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not the fact is true. [¶] You may not consider statements made after the goal of the conspiracy had been accomplished."

According to defendant, these instructions "erroneously permitted the jury to consider Victoria's statement to [Edenfield] [the day before the murder] under the conspiracy hearsay exception even though there was no valid overt act existing at the time the statement was made." Having not objected to these instructions at trial, defendant can prevail only if he demonstrates that the instructions resulted in a miscarriage of justice under the standard of error articulated in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.)

We find no error, much less a miscarriage of justice.

As we have explained, overt acts existed at the time Victoria made the first statement to Edenfield concerning the murder plot, and the trial court did not err in allowing such evidence under the coconspirator exception to the hearsay rule. CALCRIM Nos. 563 and 418, as given to the jury, are accurate descriptions of the crime of conspiracy and the coconspirator exception to the hearsay rule. There was no instructional error.

IV

Defendant also did not object to CALCRIM No. 335, which warned the jury to view accomplice testimony with caution and informed the jurors that a conviction cannot be based on accomplice testimony alone, but must be supported by independent corroborating evidence that need only be slight. Nevertheless, he now contends the trial court erred prejudicially by providing this instruction to the jury. Defendant can prevail only if he demonstrates that the instruction resulted in a miscarriage of justice. (*People v. Anderson, supra*, 152 Cal.App.4th at p. 927.)

*14 According to defendant, the fact this instruction told the jury such independent corroborating evidence "may be slight" undermined the presumption of innocence by stating a lesser burden of proof than proof beyond a reasonable doubt. We disagree.

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof...." (§ 1111.) The purpose of the corroboration requirement is "to ensure that a defendant will not be convicted solely upon the testimony of an accomplice because an accomplice is likely to have self-serving motives." (*People v. Davis* (2005) 36 Cal.4th 510, 547.)

"To corroborate the testimony of an accomplice, the prosecution must present 'independent evidence,' that is, evidence that 'tends to connect the defendant with the crime charged' without aid or assistance from the accomplice's testimony. [Citation.] Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime. [Citations.] ' "[T]he corroborative evidence may be slight and entitled to little consideration when standing alone." [Citation.]' " (*People v. Avila* (2006) 38 Cal.4th 491, 562-563 .) However, while corroborating evidence need only be slight, "it is not sufficient to merely connect a defendant with the accomplice or other persons participating in the crime. The evidence must connect the defendant with the crime, not simply with its perpetrators." (*People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543.)

In accordance with these principles, the jury was instructed with CALCRIM No. 335 as follows: “If the crimes of murder, conspiracy to commit murder[,] and/or any lesser included offenses thereto were committed, then Breanne Eldr[e]dge and Alan Edenfield were accomplices to those crimes. [¶] You may not convict the defendants of murder, conspiracy to commit murder, ... and/or any lesser included offenses thereto based on the statement or testimony of an accomplice alone. You may use the statement or testimony of an accomplice to convict the defendant only if, one, the accomplice's statement or testimony is supported by other evidence that you believe. Two, that ... supporting evidence is independent of the accomplice's statement and/or testimony. And three, that supporting evidence tends to connect the defendant to the commission of the crimes. [¶] Supporting evidence, however, may be slight. It does not need to be enough by itself to prove that the defendant is guilty of the charged crime and it does not need to support every fact mentioned by the accomplice in the statement or about which the witness testified. [¶] On the other hand, it is not enough that the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime. The evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice.... [¶] Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves, after examining it with care and caution and in light of all the other evidence.”

*15 This instruction provided the jury with an accurate statement of the law, and did not, as defendant argues, “undermine[ ] the presumption of innocence” or “ ‘suffocate[ ]’ the requirement of proof beyond a reasonable doubt.”

In making this claim, defendant relies on a line of cases holding it to be “reversible error to charge a jury that, once the government has shown the existence of a conspiracy, it may connect a particular defendant to it by ‘slight evidence,’ rather than by evidence proving the connection beyond a reasonable doubt.” (*United States v. Cooper* (3d Cir.1977) 567 F.2d 252, 253; *United States v. Partin* (5th Cir.1977) 552 F.2d 621, 628-629; *United States v. Hall* (5th Cir.1976) 525 F.2d 1254, 1255-1256; *United States v. Brasseaux* (5th Cir.1975) 509 F.2d 157, 162.) Obviously, the presumption of innocence requires the prosecution to prove beyond a reasonable doubt that a defendant charged with conspiracy was a part of the alleged conspiracy. In other words, defendant's participation in the conspiracy is an element of the offense which must be proved beyond a reasonable doubt; and instructing the jury that “slight evidence” is enough to connect the defendant to the conspiracy, while an accurate statement of the “appropriate standard for appellate review of the sufficiency of the evidence,” is reversible error because it might lead the jury “ ‘to conclude that a defendant's participation in the alleged conspiracy need not be proved beyond a reasonable doubt.’ “ (*United States v. Partin, supra*, 552 F.2d at p. 628.)

Here, the jurors were not instructed that they could convict defendant of the crime of conspiracy based on “slight evidence” that he was connected to the conspiracy. They were instructed on the prosecution's burden of proving each element of the charged offenses beyond a reasonable doubt. CALCRIM No. 335 accurately informed the jury that a conviction cannot be based on accomplice testimony alone, but must be supported by independent evidence that tends to connect the defendant to the commission of the crime, but that this supporting evidence “may be slight.”

In other words, the instruction accurately informed the jury that, because accomplice testimony is inherently unreliable, this testimony alone would be insufficient to prove defendant guilty of the charged offenses beyond a reasonable doubt; something else was required, namely, independent evidence, even though slight, that connected defendant to the commission of the crimes.

Carmell v. Texas (2000) 529 U.S. 513 [146 L.Ed.2d 577] (hereafter *Carmell*) does not support defendant's argument because that case merely held a newly-enacted state law that changes the quantum of evidence required to convict a defendant cannot be applied in a trial for crimes committed before the law's effective date. (*Id.* at pp. 516, 530 [146 L.Ed.2d at pp. 584-585, 593].) There, at the time of certain alleged sexual offenses, the law required both the victim's testimony and other corroborating evidence in order for defendant to be convicted. By the time of trial, however, the law had been amended to authorize conviction based on the victim's testimony alone. (*Id.* at pp. 516-520 [146 L.Ed.2d at pp. 584-587].) Holding that

application of the new law to those offenses violated the ex post facto clause, the Supreme Court explained, "Under the law in effect at the time the acts were committed, the prosecution's case was legally insufficient and petitioner was entitled to a judgment of acquittal, unless the State could produce both the victim's testimony *and* corroborative evidence. The amended law, however, changed the quantum of evidence necessary to sustain a conviction; under the new law, petitioner could be (and was) convicted on the victim's testimony alone, without any corroborating evidence." (*Id.* at p. 530 [146 L.Ed.2d at p. 593].)

*16 Defendant asserts that, like the statute at issue in *Carmell,* "section 1111 creates a corroboration requirement that is part of the quantum of evidence necessary to convict" and that, because of this, "the fact of corroboration must be proved beyond a reasonable doubt." Not so. *Carmell* says nothing about the amount of corroboration that would have sufficed under the law in effect at the time the crimes were committed. *Carmell* simply stands for the proposition that if, at the time of the alleged offense, the law required both victim testimony and corroboration for conviction, a later amendment that removes the corroboration requirement cannot be applied without violating the prohibition against ex post facto laws. Cases are not authority for propositions not considered. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620; *Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 58.)

Simply put, corroboration of an accomplice's testimony is not an element of the crime of murder or conspiracy to commit murder, and thus does not have to be proved beyond a reasonable doubt; such evidence need only " 'connect the defendant with the crime charged' without aid or assistance from the accomplice's testimony," and " ' "may be slight and entitled to little consideration when standing alone." [Citation.]' " (*People v. Avila, supra,* 38 Cal.4th at pp. 562-563; *People v. Richardson* (2008) 43 Cal.4th 959, 1024.)

CALCRIM No. 335 did not impermissibly inform the jury that it could convict defendant of the crimes of murder and conspiracy to commit murder based on "slight evidence" that he was connected to these crimes. Instead, the instruction permissibly informed jurors that they could *not* find defendant guilty of those crimes beyond a reasonable doubt based on accomplice testimony unless the accomplice testimony was supported by some independent evidence connecting defendant to the crimes. Accordingly, the instruction did not lessen the prosecution's burden of proof.

V

Defendant raises a related assertion that CALCRIM No. 335 failed to adequately convey the requirement that corroborating evidence must tend to connect the defendant with the commission of the crime "in such a way as may reasonably satisfy the jury that the accomplice is telling the truth."

Defendant correctly points out that corroborating evidence " 'is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth' " (*People v. Lewis* (2001) 26 Cal.4th 334, 370, quoting *People v. Fauber* (1992) 2 Cal.4th 792, 834); but he is mistaken to believe that section 1111 requires the jury to be instructed such evidence "must *both* (1) connect the defendant with the commission of the crime *and* (2) must satisfy the jury that the accomplice is telling the truth." Section 1111 simply provides "[a] conviction cannot be had upon the testimony of an accomplice *unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense*." (Italics added.) The reason is simple. When independent evidence connects the defendant to the crime, thereby corroborating an accomplice's testimony, the jury can reasonably draw the inference that the accomplice is telling the truth. Defendant cites no authority, and we have found none, holding these are distinct elements that must be put before the jury in the form of an instruction.

*17 *People v. MacEwing* (1955) 45 Cal.2d 218 does not stand for such a proposition; that decision merely disapproved of a case declaring "the test of corroboration of an accomplice is whether the evidence connects the defendant with the crime 'or' whether it satisfies the jury that the accomplice is telling the truth," and held that an instruction telling the jury as much was error because it "permitted the jurors to treat the corroborative evidence as sufficient, even though it did not connect defendants with the offenses charged, if they were satisfied that the [accomplice] was telling the truth." (*Id.* at pp. 223-224.) Indeed, far

from supporting defendant's contention, the decision confirms the requirement of section 1111 that the corroborating evidence connect defendant to the offenses charged.

The jury was so instructed in this case. There was no error.

VI

We do agree with defendant that the trial court erred by not giving an accomplice instruction regarding out-of-court statements made by co-defendant Victoria S. But the error was harmless.[FN3]

FN3. Throughout his opening brief, defendant asserts that the cumulative effect of the trial court's errors requires reversal. He has forfeited this assertion by "failing to brief it properly under a separate heading" and by "failing to provide adequate legal analysis." (*300 DeHaro Street Investors v. Department of Housing & Community Development* (2008) 161 Cal.App.4th 1240, 1257.) In any event, the claim fails on the merits. Defendant has shown a single error, which was harmless. Thus, there is no cumulative effect to consider.

Section 1111 defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." As the Attorney General concedes, codefendant Victoria S. certainly qualifies. And while section 1111 specifically refers to accomplice "testimony," and Victoria did not testify at trial, this provision "applies 'to an accomplice's out-of-court statements when such statements are used as substantive evidence of guilt.' [Citation.]" (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1083.) Accordingly, an accomplice instruction should have been provided with respect to Victoria's out-of-court statements.

However, the " 'failure to instruct on accomplice liability under section 1111 is harmless if there is "sufficient corroborating evidence in the record." [Citation.]' " (*People v.. Richardson, supra*, 43 Cal.4th at p. 1024.) And as we have already explained, to corroborate an accomplice's testimony, the prosecution must present evidence that tends to connect the defendant with the crime charged without aid from the accomplice's testimony. Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime. It may be slight and entitled to little consideration when standing alone. (*Ibid*.)

Here, the corroborative evidence is overwhelming. Defendant's own statements to detectives following the murder connect him to the successful plot to murder Rapp. Defendant was also arrested outside the overturned 4-Runner that contained six gallons of muriatic acid, zip ties, duct tape, respirator masks, and protective gloves. And Rapp's dead body was found outside the 4-Runner wrapped in a tarp purchased by defendant.

Because Victoria's out-of-court statements were adequately corroborated by independent evidence connecting defendant to the commission of the charged offenses, the court's failure to provide an accomplice instruction with respect to Victoria's statements was harmless.

VII

*18 Defendant and the Attorney General agree that defendant's sentence must be modified in two respects: the parole revocation fine (§ 1202.45) must be stricken because defendant is not eligible for parole (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183); and one of the weapons enhancements must be stayed (§ 1170.1, subd. (f); *People v. Jones* (2000) 82 Cal.App.4th 485, 492-493; *People v. Crites* (2006) 135 Cal.App.4th 1251, 1255-1256).

We agree and shall so modify the judgment.

DISPOSITION

The judgment is modified by striking the $10,000 parole revocation fine imposed pursuant to section 1202.45, and staying the execution of the one-year enhancement imposed pursuant to section 12022, subdivision (a)(1).

As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment accordingly and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

We concur: HULL and BUTZ, JJ.

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(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

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