Filed 5/14/18 P. v. Davis and Battle CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DANIIA DAVIS and FREDDIE BATTLE, Defendants and Appellants.	B275820 (Los Angeles County Super. Ct. No. NA096767)

APPEAL from judgments of the Superior Court of Los Angeles County, James D. Otto, Judge. Affirmed in part, reversed in part and remanded.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant Daniia Davis.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant Freddie Battle.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

Freddie Battle and Daniia Davis (collectively appellants) were convicted by jury of three counts each: count 1, first degree murder (Pen. Code, § 187)[1]; count 2, first degree burglary (§ 459); and count 3, attempted first degree robbery (§§ 664/211). The jury found true allegations that the murder was committed while appellants were accomplices in the commission of burglary and robbery (§ 190.2, subd. (a)(17)). We reverse the special circumstance findings and remand for resentencing as to Battle and affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Prosecution Evidence*

The Offense

Leam Sovanasy was 76 years old and lived in a house in Long Beach with her husband, Lek Lot, her daughter, Samantha Bunma, her son-in-law, Thongphean Bunma, her granddaughter, Tamatha Bunma, and her grandson.[2] Leam's son, Chad Sovanasy, lived in a house at the back of the same property.

Around 1:00 p.m. on January 30, 2009, a Long Beach police officer conducted a traffic stop on a car registered to Davis, approximately two blocks from Leam's street. Battle was the driver and sole occupant of the car.

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[1] Unspecified statutory references are to the Penal Code.

[2] We will refer to the individuals involved by their first names because of common last names.

Chad checked on Leam around 11:00 p.m. on January 30, 2009, and saw that she was in her bedroom with Lot. The room looked clean, with no drawers opened or clothes strewn about. Chad left through the back door, locking the door on his way out.

Samantha arose to get ready for work around 5:30 a.m. on January 31. She left for work after checking on Leam.

Around 10:00 a.m. on January 31, Lot woke up Thongphean and told him to take a water heater to the temple. Thongphean did not see Leam, but he heard her chanting in her bedroom. Thongphean left for the temple around 10:30 a.m. The only people left at home were Leam, Tamatha, and Thongphean's son.

Tamatha was awakened by the doorbell around 10:30 a.m. She heard Leam "shuffling" down the hallway to answer the door, so she went back to sleep.

Chad went to check on Leam around 11:00 a.m. and noticed that the door was unlocked. He found Leam dead on the floor of her room.

Tamatha heard Chad screaming and found him in Leam's room, holding Leam's body. Tamatha noticed the water was running in the bathroom sink, so she turned it off.

Police Investigation

Two Long Beach police officers responded to the scene around 11:00 a.m. on January 31, 2009. They saw Leam on the floor with a pool of blood around her head and bruises on her neck, arm, and legs. There was a pink cloth bag on the floor next to her. The bedroom

appeared to have been ransacked. The family noticed that cash, a locked purse, and several gold necklaces were missing.

Officers found a knife on the living room couch and one on the living room table. A meat cleaver that was usually kept in the kitchen was found on Samantha and Thongphean's bed. Toilet paper with what appeared to be blood stains was found on the living room floor.

The screen on a kitchen window was partially removed and damaged. A forensic specialist swabbed the kitchen windowsill in the area she believed a person crawling through the window would touch. The DNA obtained from the swab was a mixture of a major contributor and a second person. The DNA of the major contributor was entered into a database to be searched.

On February 17, 2011, Detective Teryl Hubert learned that Battle was a possible match with the DNA of the major contributor to the DNA found on Leam's windowsill. Davis could not be excluded or included as a contributor to the mixture. DNA reference samples were obtained from Davis in August 2011 and from Battle in December 2011 and February 2015.

The prosecution introduced evidence about a burglary at a different location around 2:00 a.m. on July 19, 2013. When Long Beach police officers responded to the location, they saw three men in the living room of an apartment. The men ducked down, and officers then heard someone climbing over a fence. The officers detained Battle and Leslie King. The woman who lived in the apartment arrived and identified Battle as her "play cousin," but said he did not have permission to be in her apartment. The resident went inside with the

officers and found that drawers, cabinets, and windows had been opened. The officers arrested King but released Battle because the resident knew him.

In July 2013, Detective Hubert obtained a wire tap of Battle's phone. On July 23, 2013, Detective Hubert conducted a "stimulation," which is an action to try to stimulate conversation for the wire tap. The police department distributed flyers with a picture of a white Chevy Caprice that might have been involved in the incident.

The following day, police listened to a call in which Battle asked his sister to send him "the picture." Battle's sister sent him a text message with a photograph of the police flyer. A few minutes later, Battle called Davis and said he needed to talk to him about something important, but not over the phone. Davis said he was watching the news and was not worried.

On July 25, 2013, Battle called Gerald Bolden, also known as Drake. Battle told Drake the police were passing out flyers with a picture of a white Caprice regarding "that bullshit they try to get me for, the little murder." Battle said he was worried because his description was on the flyer even though he had nothing to do with it.

Detective Hubert conducted another stimulation by releasing a sketch of Davis on July 25, 2013. Around August 12, 2013, police began a wire tap of Davis' phone and released a flyer with a sketch of Davis. Police officers took a copy of the flyer to Drake's apartment, but Drake was not home so they spoke with other individuals in the area.

Drake called Battle and told him the police were passing out flyers with a picture of Davis. Drake sent Battle a text message with a picture of the flyer.

A few minutes later, Battle spoke on the phone with Davis. Battle told Davis the police were passing out a flyer with his picture on it. Davis said that he had seen the sketch and was not worried. On August 14, 2013, Davis left a message for appellant saying that he had spoken with a lawyer, who told him not to talk about the case.

In September 2013, Detective Hubert created a false FBI report as a ruse to show Davis his DNA was found at the crime scene, even though it was not, in an effort to stimulate conversation. After Davis was shown the report, he was placed in a jail cell that contained recording devices. Davis did not know that the other two inmates in the cell were informants. Excerpts of the conversation were admitted into evidence.

In the excerpts played for the jury, Davis told the informants about the DNA report and said it seemed fake. The informants asked Davis if the victim scratched or grabbed him, or if he forgot to wear gloves, and he said no. After asking if the two informants were "the police," and being reassured they were not, Davis confessed, "it's not my first time putting somebody to sleep." He stated that he kicked, stabbed, and slapped the victim while she was on the ground. The informants asked what he did with the knife, and Davis said that he washed it off in the sink. One of the informants said that when he stabs someone, he sometimes gets cut, but Davis said that he did not get cut because he wore thick gloves. The informants asked if Davis went

through the door. Davis responded that he went through the window with gloves on. They also asked if he got rid of his clothes, and Davis said that he did.

Pawn Shop Transactions

Davis sold items to a pawn shop in Long Beach from July 2007 to October 2010, selling mostly jewelry and receiving a total of $21,953. Battle sold jewelry to the same pawn shop and received a total of $11,312.

Prior Burglary by Davis

On May 9, 2008, police officers responded to a burglary call in the City of Long Beach. The kitchen window was opened, a window next to the door had been shattered, and the house had been ransacked. Davis was found in a nearby alley and arrested.

II. *Defense Evidence*[3]

Battle's defense was based on the theory that his DNA was found at the crime scene because of secondary transfer of DNA, in which DNA is transferred from an object or person to another by an intermediary object or person.

Battle's mother testified that Battle had undergone surgery on his left eye after a serious injury. Ever since the surgery, Battle's eye had

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[3] Davis did not present any witnesses.

watered continuously, requiring him to wipe it frequently. Detective Hubert noticed that Battle's left eye was watering when she interviewed him in 2013, although she acknowledged that Battle was crying during the interview.

Marc Taylor, an expert in forensic DNA, testified about secondary transfer of DNA. He testified that studies confirmed that DNA could be transferred through contact such as shaking hands. He described studies showing that DNA could be transferred, for example, from one person to another and then to a pair of gloves. Battle's counsel posed a hypothetical situation in which someone has an eye condition that causes him to wipe his eye constantly and is a friend of another person and drives that friend's car occasionally. Taylor opined that it was possible for the person's DNA to be transferred to his friend and then to a house.

III. *Procedural Background*

Appellants were charged by information with murder (count 1), first degree burglary (count 2), and attempted first degree robbery (count 3). The jury found appellants guilty on all three counts and found true allegations that the murder was committed while they were engaged in the commission of the crimes of attempted robbery and burglary, and that Davis personally used a deadly weapon. The trial court found true the allegation that Davis suffered a prior conviction for burglary.

The trial court sentenced Battle to life imprisonment without the possibility of parole (count 1), 6 years concurrent, imposed and stayed

under section 654 (count 2), and 3 years concurrent, imposed and stayed under section 654 (count 3). The court imposed and stayed a parole revocation restitution fine.

The court sentenced Davis to life imprisonment without the possibility of parole, plus one year for the deadly weapon allegation and five years for his prior conviction (count 1), 13 years concurrent, imposed and stayed under section 654 (count 2), and 7 years concurrent, imposed and stayed under section 654 (count 3).

DISCUSSION

Battle's Claims[4]

I. *Exclusion of Davis' Jailhouse Statements*

A. *Procedural Background*

The prosecutor sought to exclude on hearsay grounds excerpts from Davis' jailhouse conversation with the informants that exonerated Battle. The prosecutor contended the five excerpted statements were not admissible because they were not declarations against Davis' penal interest. Battle's trial counsel argued that Davis' statements needed to be heard in the context of the entire conversation and as such the statements were against Davis' interest because he implied his own involvement by saying that Battle was not involved. Battle's counsel

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[4] Battle and Davis join into all arguments raised by the other's briefs. (Cal. Rules of Court, rule 8.200(a)(5).)

also relied on Evidence Code section 356 to support his request to include the excerpts.[5]

Battle's counsel requested that four of the five excerpts from Davis' conversation that the prosecutor had excluded be given to the jury. The four statements were as follows.

First: "[Informant:] 'The thing he was with you, right?' Mr. Davis responds 'Nah.' [Informant:] says, 'How the fuck is he up there telling you (inaudible)? You see what I'm saying? That's what I don't understand this shit.'"

Second: "[Informant:] 'Was that fool there with you?' [Davis:] 'Uh-huh.' [Informant:] 'So how the fuck is the DNA there?' [Davis:] 'I don't know. I don't know where the fuck they get this shit from.'"

Third: "[Informant:] 'That fool, that snitch, did he drive you there?' [Davis:] 'Nah.' [Informant:] 'Well, my thing is, how the fuck is he—so how does he know so much?' [Davis:] 'It's like, I mean, I told him about doing shit.' [Informant:] 'You told?' [Davis:] 'Yeah, I told.'" [Informant:] 'That's where you fucked up. You should have never

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[5] Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." We do not address his argument based on this statute because we conclude the statements should have been admitted as declarations against Davis' interest.

say—' [Davis:] 'I should have never told.'

Four: "[Davis:] 'So they go in, gone for about 10, 20 minutes. Come back. Got my name, my name Freddie Battle's name. . . . Then she tell me we got some . . . other stuff on Freddie too. I'm saying, yeah, that nigga wasn't there. What the fuck you all got? She say she got shit on this nigger that wasn't there.'"

The trial court examined the statements and found that they were not trustworthy nor against Davis' penal interests.

B. *Analysis*

In *People v. Grimes* (2016) 1 Cal.5th 698 (*Grimes*), which was published after the trial in this case, the California Supreme Court addressed the admissibility of codefendant statements that exonerate the defendant. Its analysis is instructive and leads us to conclude that the statements should have been admitted.

"Although hearsay statements are generally inadmissible under California law (Evid. Code, § 1200, subd. (b)), the rule has a number of exceptions. One such exception permits the admission of any statement that 'when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.' (Evid. Code, § 1230.) As applied to statements against the declarant's penal interest, in particular, the rationale underlying the exception is that 'a person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement against that interest,' thereby

mitigating the dangers usually associated with the admission of out-of-court statements. [Citation.]" (*Grimes*, *supra*, 1 Cal.5th at pp. 710–711.)

"We review a trial court's decision whether a statement is admissible under Evidence Code section 1230 for abuse of discretion. [Citation.] Whether a trial court has correctly construed Evidence Code section 1230 is, however, a question of law that we review de novo. [Citations.]" (*Grimes*, *supra*, 1 Cal.5th at pp. 711–712.)

The defendant in *Grimes* was charged with participating in the burglary, robbery and murder of a 98–year–old victim. "The actual killer was apprehended shortly after the murder and committed suicide before trial. The defendant offered, as statements against penal interest, statements the killer made to third parties before and after his apprehension in which he stated that the defendant and another participant in the burglary had not taken part in the killing; according to the defendant's offer of proof, the killer told one of the third parties that, after he killed the victim, the other two looked at him "'as if they were saying, what in the hell are you doing, dude.'" [Citation.]" (*People v. Smith* (2017) 12 Cal.App.5th 766, 788.) As here, the trial court admitted into evidence the killer's statements in which he admitted to the killing but excluded the statements in the same conversation that exonerated the defendant as not being against the killer's interest.

Grimes stated that "[t]he trial court's ruling reflects a misunderstanding of the law governing the admission of statements against interest." (*Grimes*, *supra*, 1 Cal.5th at p. 712.) The court

explained that, although our caselaw has "bar[red] admission of those portions of a third party's confession that are self-serving or otherwise appear to shift responsibility to others," "we have permitted the admission of those portions of a confession that, though not independently disserving of the declarant's penal interests, also are not merely 'self-serving,' but 'inextricably tied to and part of a specific statement against penal interest.' [Citation.]" (*Id.* at p. 715.)

The court summarized as follows: "the nature and purpose of the against-interest exception does not require courts to sever and excise any and all portions of an otherwise inculpatory statement that do not 'further incriminate' the declarant. Ultimately, courts must consider each statement in context in order to answer the ultimate question under Evidence Code section 1230: Whether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that 'a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true.' . . . [S]uch a statement is more likely to satisfy the against-interest exception when the declarant accepts responsibility and denies or diminishes others' responsibility, as in the example "'I robbed the store alone,'" as opposed to attempting to assign greater blame to others, as in the example, "'I did it, but X is guiltier than I am.'" [Citation.]" (*Grimes*, *supra*, 1 Cal.5th at p. 716.) The court thus concluded that the killer's statements exonerating the defendant were declarations against interest because, when considered in context, the statements "form part of [the killer's] admission of responsibility for killing [the victim] and thus, for purposes of Evidence Code section

1230, are not practically separable from the remainder of the statements." (*Id.* at p. 717.)

Similar to the statements exonerating the defendant in *Grimes*, which were part of the entire conversation in which the killer admitted responsibility for the murder, the excluded statements here, read in context, formed part of Davis' admission of responsibility.[6] Davis' statements bore none of the characteristics indicating untrustworthiness discussed in *Grimes*. They were not self-serving; they did not inculpate an accomplice and attempt to deflect culpability away from himself; nor were they "'an attempt to avoid responsibility or curry favor'" or shift blame. (*Grimes*, *supra*, 1 Cal.5th at p. 715.) Instead, by insisting that Battle was not there with him, Davis was taking responsibility for the offense himself.

In each of the excluded statements, Davis took sole responsibility for the offense. In the first statement, when the informant asked, "The thing he was with you, right? Mr. Davis responds 'Nah.'" In the second, Davis replied in the negative when the informant asked if "the fool" was there with him, and when asked how Battle's DNA could have been found there, Davis said he did not know.[7] In the third, the informant

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[6] The entire transcript of the recorded jailhouse conversation is not in the record, but, as indicated by the parties at the hearing, the excluded statements were taken from various pages of the transcript and thus were interspersed throughout the conversation.

[7] Respondent argues that Davis' actual response was "'Uh-huh,'" and that this is unclear. However, it is evident from the rest of the

asked if "that snitch" drove Davis to the scene, and Davis again said no. The informant asked how Battle knew about the offense if he was not involved, and Davis said that he told Battle about it—another acknowledgment that he committed the offense. In the fourth, Davis wondered how the detective could "say she got shit on this nigger that wasn't there." All of Davis' statements thus "assumed sole responsibility" "rather than attempting to minimize his responsibility or shift blame to others." (*Grimes*, *supra*, 1 Cal.5th at p. 717.) Thus, as in *Grimes*, "under any conceivable interpretation of the statement[s], [they] tended to underscore [Davis'] responsibility for the crime, rather than diminish it." (*Ibid.*)

We disagree with respondent's contention that Davis' statements were untrustworthy because Davis and Battle were friends. The excluded excerpts showed that Davis was angry with Battle because he thought Battle had snitched on him. As Battle's trial counsel argued, it did not make sense for Davis to exonerate Battle "to people he thinks are fellow inmates." There is no dispute that Davis did not know the other inmates were police informants.

The trial court excluded Davis' statement to the informants in which Davis said he told the detective that Battle was not involved. The court found the exculpation of Battle untrustworthy, because it recounted a statement to the detective. The statement in its entirety, however, was not merely a recital of Davis' words to the detective.

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conversation that Davis replied that Battle was not there because the informants then asked how Battle's DNA was there.

Rather, immediately after repeating to the informants what he said to the detective, Davis told the informants, "She say she got shit on this nigger that wasn't there." Davis thus was not merely telling the informants that he told the detective Battle was not there, but telling them directly that Battle was not there (and, by implication, Davis himself was).

Pursuant to *Grimes*, we conclude that the trial court abused its discretion in excluding the portions of the recorded jailhouse conversation. "Under California law, the effect of a trial court's erroneous ruling on the admissibility of evidence is ordinarily measured by the standard first described in *People v. Brown* (1988) 46 Cal.3d 432, 448: '[W]e will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred.' This reasonable possibility test "'is the same, in substance and effect'" as the test for errors that violate the federal Constitution, which requires reversal unless the reviewing court can say beyond a reasonable doubt that the error was harmless. [Citation.]" (*Grimes*, *supra*, 1 Cal.5th at pp. 721–722.)

We conclude that the error was harmless beyond a reasonable doubt. Battle was included as a possible contributor to the DNA found on the kitchen windowsill, where the screen was off and partially damaged, indicating the entry point for the perpetrators. A Los Angeles County Sheriff's Department criminalist testified that the probability of a person being included in the DNA profile was one in 3.6 million. Battle's only explanation for the presence of his DNA was an extremely

tenuous transfer theory: Battle had a watery eye following surgery; he might have rubbed the eye and transferred his DNA to Davis' car (he was driving it the day before the crime); from the car, Battle's DNA might have been transferred to Davis on the night of the burglary and killing; and then Davis might have transferred Battle's DNA to the windowsill when Davis alone broke in. To state the theory is to dismiss it as speculation, and not a reasonable possibility. The only reasonable inference from the presence of Battle's DNA on Leam's windowsill is that he participated in the burglary, and this inference is simply overwhelming. It is also supported by the evidence that Battle previously had participated in at least one burglary, as well as by the evidence of his numerous pawn shop transactions. Given this evidence, there is no reasonable possibility the jury would have reached a different verdict had Davis' statements been introduced. (*Grimes*, *supra*, 1 Cal.5th at pp. 721-722.)

II. *Severance of Trial*

After the trial court denied Battle's counsel's request to include the excerpts of Davis' recorded statements regarding Battle, counsel asked to sever the trial and continue Battle's trial until Davis' case was complete so Davis could be called as a witness. The trial court denied the request. We conclude that the court did not abuse its discretion in denying the motion to sever.

"Authorization to hold a joint trial of two or more defendants is provided by section 1098, which states in pertinent part that '[w]hen two or more defendants are jointly charged with any public offense,

whether felony or misdemeanor, *they must be tried jointly, unless the court order separate trials*.' (Italics added.) This law thus establishes a legislative preference for joint trials, subject to a trial court's broad discretion to order severance." (*People v. Thompson* (2016) 1 Cal.5th 1043, 1079.)

"When defendants are charged with having committed 'common crimes involving common events and victims,' as here, the court is presented with a "'classic case'" for a joint trial. [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40.) "'An appellate court reviews a trial court's ruling on a motion for separate trials for abuse of discretion.' [Citation.] 'Under Penal Code section 1098, a trial court *must* order a joint trial as the "rule" and may order separate trials only as an "exception."' [Citation.]" (*People v. Cleveland* (2004) 32 Cal.4th 704, 726.)

"In *People v. Isenor* (1971) 17 Cal.App.3d 324, 332 (*Isenor*), the court set forth the following six factors to be considered in determining whether to sever based on a claim that a codefendant will give exonerating testimony: '(1) Does the movant desire the testimony of the codefendant; (2) will the testimony be exculpatory; (3) how significant is the testimony; (4) is the court satisfied that the testimony is bona fide; (5) on the basis of the showing at the time of the motion, how strong is the likelihood that, if the motion were granted, the codefendant will testify; and (6) what is the effect of granting in terms of judicial administration and economy? [Citation.]'" (*People v. Conerly* (2009) 176 Cal.App.4th 240, 250 (*Conerly*).) "Absence of corroboration [of the

proposed testimony] weighs against severance. [Citations.]" (*Id.* at p. 251.)

Battle satisfies the first three factors set forth in *Isenor*: he desires Davis' statements that he was not involved, and the statements are exculpatory and significant. However, he cannot satisfy the next three factors. There is no corroboration of Davis' statements and, more importantly, even if the court had severed the trials, there was no guarantee Davis would testify at Battle's trial. As Battle's trial counsel conceded, if the court granted the motion to sever, Battle's trial would have had to be continued until Davis' case was final. (See *Conerly*, *supra*, 176 Cal.App.4th at p. 252 [no guarantee codefendant would testify if trials were severed because finality of codefendant's conviction "might not have been achieved until the conclusion of a lengthy appeal"].) As in *Conerly*, "there was substantial uncertainty" Davis would testify on Battle's behalf, even if the trials were severed. (*Ibid.*) "Finally, concerns about judicial efficiency weighed against severing the trials." (*Ibid.*) The trial court did not abuse its discretion in denying Battle's motion to sever.

III. *Sufficiency of Evidence to Support Special Circumstance Allegations*

Battle challenges the sufficiency of the evidence to support the jury's true finding on the special circumstance allegations under section 190.2, subdivision (a)(17) that the murder was committed during the

commission of an attempted robbery and burglary.[8] "In the case of first degree felony murder, 'every person, not the actual killer, who, with reckless indifference to human life and as a major participant' aids or abets the crime may be convicted of special circumstance murder. (§ 190.2 [, subd.] (d).) The statute thus imposes both a special actus reus requirement, major participation in the crime, and a specific mens rea requirement, reckless indifference to human life." (*People v. Banks* (2015) 61 Cal.4th 788, 798 (*Banks*).)

"When reviewing a challenge to the sufficiency of the evidence, we ask "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" [Citation.] Because the sufficiency of the evidence is ultimately a legal question, we must examine the record independently for "'substantial evidence—that is, evidence which is reasonable, credible, and of solid value'" that would support a finding beyond a reasonable doubt. [Citation.] These same standards apply to challenges to the evidence underlying a true finding

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[8] The statute provides: "(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: [¶] . . . [¶] (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit," among other felonies, robbery and burglary. (§ 190.2, subd. (a)(17)(A) & (G).)

on a special circumstance. [Citation.]" (*Banks*, *supra*, 61 Cal.4th at p. 804.)

Because Battle was not the actual killer, the special circumstance finding can be upheld only if the evidence establishes he was a major participant who acted with reckless indifference to human life. (§ 190.2, subd. (d).) "Section 190.2[, subdivision] (d) was designed to codify the holding of *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*), which articulates the constitutional limits on executing felony murderers who did not personally kill." (*Banks*, *supra*, 61 Cal.4th at p. 794.) An application of the principles set forth in *Banks* and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), to the evidence here leads us to the conclusion that the evidence is insufficient to support the special circumstance allegations as applied to Battle.

Banks addressed the imposition of the death penalty on an aider and abettor for felony murder under section 190.2, subdivision (d), relying extensively on *Tison* and *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*).[9] In *Banks*, Lovie Troy Matthews waited in a car while Leon Banks and two accomplices entered a marijuana dispensary armed with guns and tied up the employees. Banks shot and killed the dispensary's security guard in the course of escaping. The gunmen jumped into the car being driven by Matthews, and Matthews drove

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[9] *Banks* "note[d] the standards we articulate, although developed in death penalty cases, apply equally to cases like this one involving statutory eligibility under section 190.2(d) for life imprisonment without parole." (*Banks*, *supra*, 61 Cal.4th at p. 804.)

away. Matthews was sentenced to life without the possibility of parole after the "jury found [him] guilty of first degree murder under a felony-murder theory and found true a felony-murder special circumstance." (*Banks*, *supra*, 61 Cal.4th at p. 794.)

The court explained that "[w]hether a category of crimes is sufficiently dangerous to warrant felony-murder treatment, and whether an individual participant has acted with reckless indifference to human life, are different inquiries. Section 189 cannot be read as attempting to conflate them, and in any event under *Enmund* and *Tison* it would be impermissible for a state legislature to declare all participation in broad classes of felony murders, such as burglaries or robberies, punishable by death without further inquiry into each individual defendant's mental state. [Citations.]" (*Banks*, *supra*, 61 Cal.4th at p. 810.)

Banks concluded that there was insufficient evidence as a matter of law to support the special circumstance finding, stating that the evidence "show[ed] simply that he acted as a getaway driver." (*Banks*, *supra*, 61 Cal.4th at p. 807.) The court reasoned that "[t]here was evidence from which the jury could infer Matthews knew he was participating in an armed robbery. But nothing at trial supported the conclusion beyond a reasonable doubt that Matthews knew his own actions would involve a grave risk of death. There was no evidence Matthews intended to kill or . . . knowingly conspired with accomplices known to have killed before. Instead, . . . Banks's killing of [the victim]

was apparently a spontaneous response to armed resistance from the victim [of the armed robbery]." (*Id.* at p. 807.)

The California Supreme Court returned to the issue of special circumstance allegations in *Clark*, *supra*, 63 Cal.4th 522. William Clinton Clark surveilled a computer store and told someone he was planning a crime there. He obtained a fraudulent driver's license for someone to rent a truck and paid her to rent the truck and park it near the computer store. During the robbery, while Clark waited in a car in the parking lot, his accomplice shot and killed someone. The accomplice ran to Clark's car, but Clark drove off and left the accomplice in the parking lot. The court held that "the evidence was insufficient to uphold a finding that [Clark] acted with reckless indifference to human life" and thus "vacate[d] the robbery-murder and burglary-murder special-circumstance findings."[10] (*Clark*, *supra*, 63 Cal.4th at p. 611.)

Pursuant to *Banks* and *Clark*, major participation requires that a "defendant's personal involvement . . . be substantial, greater than the actions of an ordinary aider and abettor to an ordinary felony murder." (*Banks*, *supra*, 61 Cal.4th at p. 802.) "Among the relevant factors in determining this question, we set forth the following: 'What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using

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[10] A witness subsequently was murdered. The court therefore upheld Clark's death sentence because the vacating of the robbery-murder and burglary-murder special circumstances did not affect the jury's multiple-murder special-circumstance finding. (*Clark*, *supra*, 63 Cal.4th at p. 624.)

lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?' [Citation.]" (*Clark*, *supra*, 63 Cal.4th at p. 611.) "Requiring only 'the intentional assumption of some responsibility for the completion of the crime' would sweep in essentially every felony murderer . . . whether an actual killer or not." (*Banks*, *supra*, 61 Cal.4th at p. 803.) The allegation thus may not be based solely on "vicarious responsibility for the underlying crime. [Citations.]" (*Id.* at p. 801.)

"Reckless indifference to human life 'requires the defendant be "*subjectively* aware that his or her participation in the felony involved a grave risk of death."' [Citation.]" (*Banks*, *supra*, 61 Cal.4th at p. 807.) "Awareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient; only knowingly creating a 'grave risk of death' satisfies the constitutional minimum. [Citation.]" (*Id.* at p. 808.)

Clark set forth several factors which are relevant in determining if a defendant acted "with reckless indifference to human life." Those factors are: (1) knowledge of weapons, and use and number of weapons; (2) physical presence at the crime and opportunities to restrain the crime and/or aid the victim; (3) duration of the felony; (4) defendant's knowledge of cohort's likelihood of killing; and (5) defendant's efforts to

minimize the risks of the violence during the felony. (*Clark*, *supra*, 63 Cal.4th at pp. 618–622.)

The requirements for being a major participant and having reckless indifference to human life often overlap and do so in this case. (*Clark*, *supra*, 63 Cal.4th at pp. 614–615.) We therefore consider the factors together. Doing so, we conclude that the evidence is insufficient to establish that Battle was a major participant and acted with the requisite reckless indifference to life.

A. *Role in Planning*

There was no evidence presented that Battle played any role in planning the burglary. There is no evidence such as that presented in *Clark*, where Clark told someone he was planning a crime, surveilled the target of the robbery, helped an accomplice obtain a false driver's license and then directed her to rent a truck and park it near the target. Based on this evidence, the court found substantial evidence that Clark "was the mastermind who planned and organized the attempted robbery and who was orchestrating the events at the scene of the crime." (*Clark*, *supra*, 63 Cal.4th at p. 612.)

The evidence also was sufficient to support the felony-murder special circumstance true finding in *People v. Price* (2017) 8 Cal.App.5th 409 (*Price*), where there was testimony that the defendant not only was the actual shooter, but that she set up the robbery by taking the victim to a park late at night, taking a gun with her, and pointing the gun at the victim's chest. (*Id.* at pp. 453-454.) Because the evidence showed

that she "played the most prominent role" in planning the robbery and that she actually intended to kill the victim, the court held the evidence was "more than sufficient to support the jury's true finding . . . on the felony-murder special circumstance." (*Ibid.*; see also *People v. Gonzalez* (2016) 246 Cal.App.4th 1358, 1365, review granted July 13, 2016, S234377 (*Gonzalez*) [sufficient evidence defendant Alfonso Garcia was a major participant where he was present during the planning of a robbery and when his codefendant called the victim to set up the robbery, and he volunteered to act "as a lookout"].) There was no such evidence presented here.

Respondent points to Battle's stop by the police two streets away from Leam's house the day before the offense, his prior burglary, and his pawn shop transactions. None of this constitutes ""substantial evidence—that is, evidence which is reasonable, credible, and of solid value"' that would support a finding beyond a reasonable doubt" that Battle helped plan this burglary. (*Banks*, *supra*, 61 Cal.4th at p. 804.)

B. *Supply, Use, or Knowledge of Weapons*

There was no evidence presented about Battle's role in supplying or using lethal weapons. (*Banks*, *supra*, 61 Cal.4th at p. 803; compare *Tison*, *supra*, 481 U.S. at pp. 151-152 [defendants intentionally brought "an arsenal of lethal weapons" into a prison "to arm the murderers"].) This case is unlike *People v. Medina* (2016) 245 Cal.App.4th 778 (*Medina*), in which the evidence presented at trial showed that, although Anthony Arturo Medina was not the shooter (Brandon Morton

was), he "pulled out a gun and used it" by pointing it at the victims and walking them across the street at gunpoint. (*Id.* at p. 791.) The evidence further established that codefendant David Whitehead pulled a gun on the victim. (*Id.* at p. 783.) There was no such evidence here.

Respondent argues that Battle had a gun at a prior burglary, but this does not constitute evidence that Battle supplied or used the lethal weapon here. There is simply no evidence in the record of Battle's supply, use, or knowledge of lethal weapons.

C. *Awareness of Particular Dangers*

Nor was any evidence presented that Battle should have been aware of any "particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants." (*Banks*, *supra*, 61 Cal.4th at p. 803.) There was no evidence that either Battle or Davis brought a weapon with them to the crime scene. (Compare *In re Loza* (2017) 10 Cal.App.5th 38, 49-50 (*Loza*) [evidence that petitioner was responsible for supplying gun to the killer supported special circumstance allegation].)

Nor was there any evidence that Battle knew Davis was likely to use deadly force in the commission of the burglary. Although there was evidence Davis and Battle separately had committed prior burglaries, there was no evidence presented at trial of violent conduct in the commission of those prior burglaries and thus no evidence that Battle had "knowledge of factors bearing on a cohort's likelihood of killing." (*Clark*, *supra*, 63 Cal.4th at p. 621.)

In *Medina*, the prosecution presented evidence that, a few days before the attempted robbery that resulted in the murder, Brandon Morton handed Medina a gun to shoot at a passing car. The evidence thus showed that Medina was aware Morton was willing to use deadly violence. (*Medina, supra*, 245 Cal.App.4th at pp. 791-792.) As to codefendant Whitehead, the evidence showed that when he left the scene of the attempted robbery, he knew Morton was visibly angry at the victim and holding him at gunpoint, showing his subjective awareness that his participation "involved a grave risk of death. [Citation.]" (*Medina*, *supra*, 245 Cal.App.4th at pp. 791-792; see also *Gonzalez*, *supra*, 246 Cal.App.4th at p. 1365 [evidence that Garcia was told the victim of the planned robbery was violent showed that Garcia could have foreseen a deadly result].)

Unlike *Tison*, in which the defendants could have foreseen the use of lethal force when they brought "an arsenal of lethal weapons" to an imprisoned convicted murderer whose previous escape attempt had resulted in murder (*Tison*, *supra*, 481 U.S. at pp. 151-152), there is no evidence Battle had any reason to know of Davis' willingness "to employ potentially deadly violence." (*Medina*, *supra*, 245 Cal.App.4th at p. 792.) Instead, similar to *Clark*, no evidence was presented at trial that Davis "was known to have a propensity for violence, let alone evidence indicating that [Battle] was aware of such a propensity." (*Clark*, *supra*, 63 Cal.4th at p. 621.) Nor was there any evidence that Battle had an "opportunity to observe anything in [Davis'] actions just before the

[killing] that would have indicated that [Davis] was likely to engage in lethal violence." (*Ibid.*)

The evidence that Davis armed himself with a knife is not sufficient to support the special circumstance findings as to Battle. There was no evidence that Battle knew Davis was armed and, even if there were, "felony murderers . . . who simply had awareness their confederates were armed and armed robberies carried a risk of death, lack the requisite reckless indifference to human life." (*Banks*, *supra*, 61 Cal.4th at p. 809; see also *Clark*, *supra*, 63 Cal.4th at p. 617 ["while the fact that a robbery involves a gun is a factor beyond the bare statutory requirements for first degree robbery felony murder, this mere fact . . . is not sufficient to support a finding of reckless indifference to human life for the felony-murder aider and abettor special circumstance"].) Thus, in *Banks*, where there was evidence Matthews knew his accomplices were armed with guns and that he drove them away after the armed robbery, the court nonetheless concluded that "nothing at trial supported the conclusion beyond a reasonable doubt that Matthews knew his own actions would involve a grave risk of death." (*Banks*, *supra*, 61 Cal.4th at p. 807.)

There is no evidence in the record to support a finding that Battle was aware of any particular dangers posed by the nature of the crime, past experience, or Davis' conduct.

D. *Presence, Ability to Facilitate/Prevent the Murder*

Nothing in the record establishes whether Battle was in the bedroom where the killing occurred, whether he was in a position to

facilitate or prevent the murder, whether his actions or inactions played a role in the murder, or what he did after the murder. (*Banks*, *supra*, 61 Cal.4th at p. 803.)

In *Loza*, the petitioner held the door of a convenience store open to allow the killer to escape after the robbery, watched the killer threaten to shoot the store clerks if they did not give him money in five seconds, and watched him shoot them after counting to five. (*Loza*, *supra*, 10 Cal.App.5th at p. 51.) The evidence further showed that he fled with the killer after the shooting and instructed an accomplice waiting in the car to drive away. (*Ibid.*) The evidence thus showed the petitioner's presence at the murders, his failure to try to prevent the murders, and his failure to render aid after the murders.

In *Gonzalez*, 246 Cal.App.4th 1358, the prosecution presented evidence that Garcia either was the shooter or accompanied the shooter, who walked up to the car and shot the victim. (*Id.* at p. 1367.) The evidence showed that he made no attempt to prevent the shooting, fled with the shooter instead of rendering aid, and accompanied his codefendant when he disposed of the murder weapon. (*Id.* at pp. 1385-1386; see also *Medina*, *supra*, 245 Cal.App.4th at p. 783 [evidence showed Medina, Morton, and Whitehead leaving in cars after the shooting]; *Price*, *supra*, 8 Cal.App.5th at p. 418 [evidence showed Price drove away from park after shooting the victim and later texted that "she did what she had to do" by shooting the victim].)

There was no evidence presented here of Battle's presence when Davis killed Leam, what Battle did after the killing, or that he helped dispose of a weapon.

The prosecutor's argument regarding the evidence of Battle's reckless indifference for purposes of the special circumstance allegation was based solely on appellants' commission of the burglary. She argued: "We know that the defendants know when someone calls the police in response to a burglary, they respond and they chase. [¶] They also know that if somebody is home, there's potentially a risk for a confrontation. [¶] They know that there is a grave risk of danger to human life when they commit these types of crimes. [¶] That's acting with a reckless indifference to human life. [¶] We know that defendant Battle was a major participant. He climbed in the window. He took part in the burglary." The argument thus was based on Battle's participation in the burglary, which is not sufficient to support the special circumstance allegation.

On appeal, respondent again argues that Battle acted with reckless indifference because of his commission of a residential burglary. However, the allegation may not be based solely on the defendant's "vicarious responsibility for the underlying crime. [Citations.]" (*Banks*, *supra*, 61 Cal.4th at p. 801.) *Banks* instructs that it is not sufficient simply to have committed one of the enumerated felonies. (*Id.* at p. 810.)

There is no evidence Battle "knew lethal force was appreciably more likely than that inherent in a 'garden-variety [burglary], where death might be possible but not probable . . . .' [Citation.]" (*In re Miller*

(2017) 14 Cal.App.5th 960, 967; see also *Clark*, *supra*, 63 Cal.4th at pp. 610-611 [vacating robbery-murder and burglary-murder special-circumstance findings where "[t]here was no evidence presented from which the jury could find that defendant intended to kill [the victim]"].) The evidence here is insufficient to support a finding that Battle was a major participant or that his mental state rose to the level of reckless indifference to human life. To conclude otherwise on this record would erroneously conflate special-circumstance murder with the felony-murder rule. (*Banks*, *supra*, 61 Cal.4th at p. 810.) Because "the evidence was insufficient as a matter of law to support the special circumstance [allegations], [Battle] is statutorily ineligible for life imprisonment without parole."[11] (*Id.* at p. 794.)

Davis' Claims

I. *Failure to Instruct Jury Not to Use Battle's Pretrial Statements Against Davis*

The trial court instructed the jury pursuant to CALCRIM No. 305, stating, "You have heard evidence that defendant . . . Davis made a statement before trial. You may consider that evidence only against

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[11] In light of our holding, we need not address Battle's argument that the trial court erroneously imposed a parole revocation restitution fine. We note, however, that respondent concedes the fine was erroneously imposed. (See *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819 ["A parole revocation fine may not be imposed for a term of life in prison without possibility of parole, as the statute is expressly inapplicable where there is no period of parole."].)

him, not against any other defendant." Davis contends the trial court erred in failing to give a similar instruction that the jury could not consider Battle's statements against him. Respondent contends Davis forfeited the claim by failing to raise it in the trial court.

When the parties and the court discussed the jury instructions, the court listed them by CALCRIM number and asked if there were any objections. There was no objection to giving CALCRIM No. 305.

The trial court is not required to give a limiting instruction in the absence of a request. (*People v. Manning* (2008) 165 Cal.App.4th 870, 880 (*Manning*); see *People v. Chism* (2014) 58 Cal.4th 1266, 1308 ["Because the trial court was not obligated to provide a limiting instruction, defendant forfeited the issue by failing to request either a correction of the given instruction or a new instruction that applied specifically to the charges against defendant."]; Evid. Code, § 355 ["When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."].)

Even if the court erred, any alleged error was harmless because "it is not reasonably probable a different result would have been reached had such an instruction been given. [Citation.]" (*Manning*, *supra*, 165 Cal.App.4th at p. 880.) The most damning evidence against Davis was his own recorded jailhouse conversation in which he confessed to the murder. It is not reasonably probable a different result would have been reached had the jury been instructed not to consider Battle's pretrial statements in his recorded phone calls against Davis. Any

alleged error thus was harmless.[12] (*Manning*, *supra*, 165 Cal.App.4th at p. 880.)

II. *Marsden Hearing*

At a May 18, 2016, hearing after the verdicts were returned but prior to the court trial on Davis' prior conviction, Davis was represented by Peter Larkin, who was appearing for Davis' trial counsel, Steve Hauser. Larkin informed the court that "[Davis] would like me to put on the record when Mr. Hauser is here he would like to have a *Marsden* hearing and depending on what happens possibly represent himself." (*People v. Marsden* (1970) 2 Cal.3d 118.) The court replied, "Okay. I've noted that." The matter was not raised at the next hearing, held on June 15, 2016, at which Hauser appeared on Davis' behalf. Davis contends the trial court erred in failing to hold the requested *Marsden* hearing. We conclude that Davis forfeited the issue by failing to raise the issue when Hauser appeared at the June 15 hearing.

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[12] Davis briefly contends that severance is required if the People want to rely on the statement of a non-testifying codefendant. However, he also concedes that severance was not required because Battle's statements were not "accusations," arguing instead that "while joint trials are important to the judicial system, concern for both defendants requires that the normal rules for the conduct of trial may be require[d] to be altered." (See *People v. Arceo* (2011) 195 Cal.App.4th 556, 571 ["the confrontation clause has no application to out-of-court nontestimonial statements [citations], including statements by codefendants"].) We reject his argument.

"Although a formal motion is not required, the trial court's duty to conduct an inquiry into the reasons the defendant believes his or her attorney is incompetent arises only when the defendant (or in some instances counsel) provides "'at least some clear indication'" that the defendant wishes to substitute counsel. [Citations.]" (*People v. Martinez* (2009) 47 Cal.4th 399, 418.) Here, although Davis stated that he would like the court to hold a *Marsden* hearing when Hauser returned, he did not ask Hauser to raise the issue at the next hearing nearly a month later.

People v. Vera (2004) 122 Cal.App.4th 970 (*Vera*), offers guidance in this situation. There, the trial court denied the defendant's post-plea *Marsden* motion without prejudice after hearing some of his concerns. The court informed the defendant he could renew his motion, but the court was under time pressure because a jury was coming in a different case. The defendant did not renew his *Marsden* motion at the subsequent hearing. On appeal, he contended the trial court failed to elicit and evaluate all the bases for his *Marsden* motion. The appellate court concluded that, "while a trial court is required by *Marsden* to inquire into all of a defendant's complaints about his appointed counsel, the inquiry need not occur at a single hearing. . . . When a trial court runs out of time to continue hearing a defendant's complaints, the court may deny substitution of counsel based on the stated complaints so long as the defendant is afforded a later opportunity to articulate his yet-unstated complaints." (*Id.* at p. 981.)

As pertinent here, *Vera* further stated that "the trial court offered defendant the opportunity for a further hearing. Defendant's failure to take advantage of this offer can only be interpreted as an abandonment of his unstated complaints." (*Vera*, *supra*, 122 Cal.App.4th at p. 981.)

Here, the court "noted" Davis' desire for a *Marsden* hearing when Hauser returned. However, the court could not hold a hearing in Hauser's absence, and neither Davis nor Hauser raised the issue when Hauser returned. "[T]he trial court is not obliged to initiate a *Marsden* motion sua sponte. [Citation.]" (*People v. Lara* (2001) 86 Cal.App.4th 139, 158.) Similar to the defendant in *Vera* who did not raise his *Marsden* issue at the subsequent hearing, Davis abandoned the issue by failing to raise it at the hearing when the trial court could have addressed it.[13]

Even if Davis did not abandon his request, "*Marsden* does not establish a rule of per se reversible error. [Citation.]" (*People v. Washington* (1994) 27 Cal.App.4th 940, 944.) Davis has made no showing "either that his *Marsden* motion would have been granted had it been heard, or that a more favorable result would have been achieved had the motion in fact been granted." (*Ibid.*)

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[13] Davis relies on *People v. Lewis* (1978) 20 Cal.3d 496, but that case is distinguishable because the defendant there unequivocally asked the court to address his request.

DISPOSITION

The judgment of conviction is affirmed as to Davis. As to Battle, the burglary and attempted robbery special circumstance findings on count 1 are reversed, the corresponding life without the possibility of parole sentence is vacated, and the matter is remanded for resentencing. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.