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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSUE FARFAN et al., Defendants and Appellants.	B277516 (Los Angeles County Super. Ct. No. TA136699)

APPEALS from a judgment of the Superior Court of Los Angeles County. Michael Shultz, Judge. Affirmed as modified.

George L. Schraer, under appointment by the Court of Appeal, for Defendant and Appellant Josue Farfan.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant Edgar Farfan.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Josue Farfan and his brother Edgar Farfan (defendants) were convicted by jury of murder (Pen. Code, § 187, subd. (a)), kidnapping for robbery (§ 209, subd. (b)(1)) and second degree robbery (§ 211).[1] The jury found true the special circumstances allegation that the murder was committed while the defendants were engaged in the commission of a robbery. (§ 190.2, subd. (17).) The trial court sentenced both defendants to life in prison without the possibility of parole (LWOP) plus five years for the robbery conviction. The court stayed the sentence for the kidnapping conviction pursuant to section 654.

Defendants appeal from the judgment of conviction. Josue contends the trial court erred in compelling his wife, Jennifer Medina to testify and also erred in admitting Edgar's pretrial statement to police. Josue also contends the abstract of judgment must be corrected to match the trial court's oral pronouncement of sentence. Edgar filed a notice of joinder in Josue's argument concerning Medina's testimony and his request for correction of the abstract of judgment.

Edgar contends the trial court failed to instruct the jury sua sponte on the lesser offense of involuntary manslaughter; that the felony-murder special-circumstance provision of section 190.2 violates the Eighth and Fourteenth Amendments by failing to provide a meaningful distinction between those felony murderers who deserve LWOP and those who do not; and that assuming this special circumstance provision is constitutionally valid, there is insufficient evidence to show he had an intent to kill or was a major participant who exhibited reckless

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Since defendants share a surname we will refer to them by their first names. We mean no disrespect.

indifference to human life. Josue has filed a notice of joinder in these arguments.

Medina did not assert a marital privilege not to testify against Josue, and the trial court had no duty to honor a privilege not asserted. Edgar's pretrial statement was not offered against Josue and was admissible under well-established United States Supreme Court precedent. Assuming the trial court had a duty to instruct on involuntary manslaughter, the record demonstrates there is no reasonable probability that defendants would have received a more favorable result if the instruction had been given. We order the abstract of judgment be modified to show the sentence for the robbery conviction was stayed pursuant to section 654. In all other respects we affirm the judgment.

BACKGROUND

In December 2014, Kamell Heno was employed by Cartons to Go, a company that bought and sold cigarettes. One of his duties was to deliver cigarettes using a large white box truck. On the morning of December 4, Heno left the job site in the truck, drove to Cigar Cartel and made a delivery. He then drove to Giant Wholesale in Sunland and Costco in Burbank and picked up cigarettes worth $217,000. Heno was scheduled to take the cigarettes to Cartons to Go in LaVerne. He never arrived. Heno's brother, who also worked for Cartons to Go, called police.

At 3:00 or 3:30 p.m. the same day, Juan Morales was working as a gardener in the area of 101st Street and Grand Avenue. He noticed a gray truck or SUV with custom rims and "limousine" glass driving slowly down the street. The passenger looked back and then looked at Morales, which caused Morales some concern. The vehicle turned onto 103rd Street and accelerated.

Morales and two coworkers were using leaf blowers when they turned their attention to a white box truck parked near the

corner of 102nd Street. The truck had been parked there when Morales arrived. The passenger side window was rolled down, and a person's knee was visible. The gardeners approached the truck, intending to warn the occupant to close the window so that dust or debris would not be blown into the truck.

When Morales reached the truck, he realized that the person's head was covered with a red cloth. Morales talked to the person and then yelled, but received no response. The men went to the police station to report the situation.

The parties stipulated: "Kamell Heno was pronounced dead on the scene located on the 10200 block of South Grand Avenue, in the city of Los Angeles by Los Angeles City Firefighter Paramedic Rodriguez at 4:10 p.m. on December 4, 2014." (People's exhibit72.) Rodriguez did not testify at trial.

While there were some cartons of cigarettes in the truck's cargo area, according to the owner of Cartons to Go, this represented only about 10 percent of the cigarettes Heno collected at Costco.

Los Angeles Police Department (LAPD) Officer Iris Romero arrived at the scene about 8:20 p.m. She observed Heno on his back on the floor between the truck's two bucket seats. A red stained cloth covered his head and there was duct tape on his right wrist. The passenger window was broken and shattered glass was on the floor of the cab. There was a fire extinguisher inside the truck, and white residue from a fire extinguisher was visible in various locations.

At trial Officer Romero was asked: "Do you see any other duct tape on his body at that time when you looked in?" She replied, "At that time, from what I recall, I saw just the cloth over

his head."[2] The prosecutor next asked the officer, "Did you ever see personally this person's face without the cloth on his head?" She replied, "Eventually, with the photographs of the coroner's office." The prosecutor then asked the officer to describe what she saw. She stated, "there's duct tape wrapped around the victim's face. And it was wrapped around, I would say, a suction [*sic*] from the forehead to the lower part of the nose and then there was also tape high above the nose at around the mouth area. And it was duct taped all around."

The parties stipulated that the Los Angeles County Coroner performed an autopsy on 57-year-old Heno on December 7, 2014, and Dr. Kennedy of that office found "Cause of death ascribed to Asphyxia do [*sic*] to or as a consequence of Suffocation. Scene and circumstances are indicative of smothering, a form of suffocation." Dr. Kennedy found that Heno suffered three projectile wound injuries, on the top of his head, right lateral scalp and right thumb. These wounds were "not rapidly fatal." In addition the doctor found multiple abrasions, lacerations and bruising to Heno's head, neck, upper extremities and left foot. (People's exhibits 72, 42, 43, 48.) Evidence taken from inside the truck showed that the projectiles were BB's. Dr. Kennedy did not testify at trial.

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[2] When the prosecutor later showed the detective People's exhibit 32, he asked her if she recognized it. She did, and explained, "That's the upper torso of the victim in the center of the box truck." The prosecutor responded, "Okay. And there appears to be some type of cloth over his head; is that correct?" She replied, "Yes." The prosecutor then asked, "Is that what you saw on that December 4th night?" She again replied, "Yes." People's exhibit 32 shows that Heno's entire head was covered by a cloth.

At trial, Officer Romero authenticated a number of coroner photographs of Heno's head, including exhibits 34 and 35. These two photos show that Heno's upper lip was covered by duct tape, which touched the bottom of his nose. (People's exhibits 34 & 35.) The photos also show that a portion of his nose was duct taped across the bridge, extending up over Heno's eyes.

Surveillance tapes along Heno's route on December 4 were reviewed. Video from Cigar Cartel shows an SUV with heavily tinted windows drive by the location two or three times around 8:23 a.m. The SUV appears to be a gray Toyota 4Runner. The video shows Heno driving the box truck into the parking lot of Cigar Cartel. At that point, the 4Runner is close behind the truck, but pulls up and parks by the gate to the parking lot. When Heno leaves about 9:02 a.m., the video shows the 4Runner make a U-turn and follow Heno's truck.

The surveillance video from Costco shows Heno driving into the rear parking lot at 9:36 a.m., followed by the 4Runner at 9:38 a.m. The 4Runner drove away at 9:47 a.m., and returned at 10:13 a.m. At 10:23 a.m., the video shows Heno driving the truck out of the parking lot, toward Interstate 5. At 10:27 a.m., the 4Runner backed up and drove off in the same direction as Heno's truck.

Surveillance videos from the Magic Carpet motel, near the location where Heno's body and the truck were found, shows the truck driving by at 12:18:58 p.m., then a gray SUV that looked like a 4Runner drove by at 12:19 p.m. The tape's time was about six minutes behind the actual time.

Police obtained defendants's cell phone records and information from cell phone towers. Edgar's phone made a call at 9:05 a.m. which used a tower several blocks from Cigar Cartel. Edgar's phone made two calls in the area of the Burbank Costco at 9:57 a.m. and 9:59 a.m. Heno's phone was active at 9:57 and

9:59 a.m. in that same area. Edgar's phone made a call at 10:49 a.m. using a tower near the 134 freeway. The phone then was used for calls at 10:57, 11:01 and 11:03 a.m., using a tower near the 210 freeway in East Pasadena, followed by calls at 11:36 a.m., 11:57 a.m., 12:22 p.m. and 12:23 p.m., using a tower along the 110 freeway. The 12:23 p.m. call was made near the area where Heno's body was found. Edgar's phone made calls at 12:36, 12:38 and 12:47 p.m., using a tower located just north of the crime scene.

Josue's phone made a call at 8:21 a.m. using a cell phone tower near Cigar Cartel. It made another call at 11:11 a.m., using a tower along the 210 freeway. The phone then made two outgoing calls at 12:31 and 12:37 p.m., using a cell tower north of the crime scene.

Josue's wife, Jennifer Medina, testified under a grant of immunity after negotiating a plea agreement for second degree murder. (People's exhibit 65.) According to Medina, Heno did not know about and was not an accomplice in the robbery. She and defendants had an agreement to commit the robbery with two other men, Carlos Almeida and Miguel Garcia, who were initially codefendants in this case.

On the morning of December 4, Medina rode with Edgar (driver) and Josue (front passenger) in Edgar's SUV to Cigar Cartel, where they parked in front. When a white box truck left Cigar Cartel, Edgar followed it onto the freeway and then to Costco, where Edgar parked in the rear parking lot. When the truck left Costco, Edgar followed it onto the freeway. Acting according to a preconceived plan, Edgar hit the truck with his SUV. The plan was to steal cigarettes from the truck after it stopped.

When the truck pulled over, Heno got out. Edgar got out of the SUV, ostensibly to exchange information with Heno. Medina

told police that Edgar had a BB gun, but at trial stated that she did not remember. Josue then got out of the SUV. Edgar shoved Heno into the passenger side of the truck, and Josue got in as well. Defendants drove off in the truck with Heno; Medina followed in the SUV.

At some point, defendants exited the freeway, drove into a neighborhood and parked. Medina followed in the SUV. Medina could not see what happened inside the truck, but she did see window glass shatter on the truck's driver's side. Medina and defendants then moved boxes of cigarettes from the truck to the SUV. When the SUV was full, they drove off.

Medina testified on direct examination that she drove the SUV to a nearby neighborhood and parked. They tried to get a taxi, but when that failed they all took a bus home. Medina never saw the SUV or the cigarettes again, but she believed that both were sold. She told police that Edgar sold the cigarettes. On cross-examination, Medina acknowledged that she drove the SUV to a storage facility and unloaded the cigarettes before going home.

Josue testified at trial. He denied that Edgar was in the SUV during the crime. Josue said he, Medina and "Jose" were in the SUV that followed Heno. Jose was a friend of former codefendant Garcia. Josue became involved when another person failed to show up and Medina asked him to help by driving. Medina told Josue that Heno knew about and had been involved in the scheme from the beginning. Medina carried both defendants' cell phones during the crimes.

Josue claimed that he drove the SUV and followed the truck throughout the morning. Once both vehicles were on the freeway, Medina signaled to Heno and he drove off the freeway and parked. There was no collision. Medina got into Heno's truck. The truck and the SUV were driven to a storage facility.

There, Heno gave Medina a key to the truck, and she and Jose moved boxes of cigarettes from the truck to a storage facility.

Heno and Medina then drove the truck to the area of 101st Street and Grand Avenue, followed by Josue and Jose in the SUV. Once the vehicles stopped, Josue saw Medina fighting with Heno and putting tape on him. Josue waited in the SUV for about 15 minutes while Medina and Heno fought. Josue saw Medina throw a fire extinguisher through a window in the truck. Medina then returned to the SUV and Josue, Medina and Jose left.

In rebuttal, the prosecutor offered a portion of Josue's pretrial statement to police in which he acknowledged that he was in the SUV sometime in December to make a delivery with Edgar. Josue did not mention Medina.

The trial court permitted the prosecution to reopen its case-in-chief and play recorded excerpts from Edgar's pretrial statement to police. During the interview, Edgar said the 4Runner shown in exhibit 71 belonged to him. He mentioned following a truck and going to the Costco in Burbank. He also said the person in the truck looked to be about 60 to 65 years old.

DISCUSSION

I. Marital privilege (Josue)

On the date set for trial to begin, Medina pled no contest or guilty to second degree murder. She also entered an "immunity" agreement with the prosecution which provided that Medina's testimony in this matter would not be used against her in any proceeding brought by the Los Angeles County District Attorney. The agreement further provided that if Medina testified truthfully at trial, she would be sentenced to 15 years to life for second degree murder. (People's exhibit 65.)

During trial, the court informed both defense attorneys that Kessler, Medina's attorney, told the court and the prosecutor

that Medina was refusing to testify. During a subsequent hearing Kessler explained only that Medina "does not want to testify." He indicated that she wanted out of the plea bargain and could accomplish that by not testifying, and "we're back to square one . . . I think she would still have a right against self-incrimination, assuming that the plea bargain is going to go away." Kessler at no point indicated that Medina was claiming a spousal privilege not to testify. There was no mention of any spousal privilege during the discussions.

Ultimately, the court found that Medina did not have a privilege against self-incrimination due to the immunity agreement. The court told Medina that she would be held in contempt if she refused to testify. Medina testified.

Josue contends that Medina retained her spousal privilege not to testify and the trial court erred in telling Medina that she would be held in contempt if she refused to testify.[3] We disagree. By failing to assert it, Medina waived this privilege.

A. Law

"[A] married person has a privilege not to testify against his [or her] spouse in any proceeding." (Evid. Code, § 970.) "The spousal privilege is personal to the spouse seeking to avoid testifying." (*People v. McWhorter* (2009) 47 Cal.4th 318, 374 (*McWhorter*).) However, "the other spouse has standing to raise as error a trial court's refusal to recognize an assertion of the

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[3] Edgar joins in this claim, and states that the argument made in Josue's opening brief fully set forth all legal and factual bases necessary. Because Josue's claim is based on marital privilege, Edgar has no standing to assert a marital privilege claim. Because he has made no independent argument, we treat the claim as waived as to Edgar. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363-364.)

[marital] privilege ([Evid. Code,] § 918)." (*People v. Petrilli* (2014) 226 Cal.App.4th 814, 823.)

"[A] trial court does not have a duty to advise a witness of the spousal privilege. [Citation.]" (*McWhorter, supra,* 47 Cal.4th at pp. 374-375.) However, nothing precludes defense counsel from directly informing a defendant's spouse of the privilege. (*Id.* at p. 375.)

"Unless erroneously compelled to do so, a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceedings, does not have a privilege under this article in the proceeding in which the testimony is given." (Evid. Code, § 973, subd. (a).) Merely answering a few questions on direct examination waives the privilege. (*McWhorter, supra*, 47 Cal.4th at p. 375.)

B. Analysis

There is nothing in the record to indicate that Medina or her attorney asserted her marital privilege. The trial court did not have a duty to advise Medina of this privilege.

In his reply brief, Josue, in effect contends that once a witness refuses to testify, the trial court is required to evaluate on its own whether the witness had any possible privileges not to testify. If the court determines the witness has a privilege then, Josue argues, the court is required to "honor" that privilege. However, the law does not require a trial court to advise a witness of her spousal privilege not to testify. (*McWhorter, supra,* 47 Cal.4th at pp. 374-375.) Consequently, a court is not required to "honor" a privilege that it need not disclose to the witness. Accordingly, Josue's claim fails.

II. Edgar's statement to police (Josue)

Josue contends Edgar's pretrial statement to police is inadmissible testimonial hearsay under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and the trial court erred in

admitting the statement. He contends the admission of the statement violated his rights under the Confrontation Clause and was prejudicial. Edgar was not a witness against Josue for purposes of the Confrontation Clause and so the trial court did not err in admitting the statement.

A. Law

"A criminal defendant has the right under both the federal and state Constitutions to confront the witnesses against him. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.)" (*People v. Wilson* (2005) 36 Cal.4th 309, 340.) As the United States Supreme Court has made clear, the Confrontation Clause "applies to 'witnesses' against the accused." (*Crawford, supra,* 541 U.S. at p. 51.)

"Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant. This accords with the almost invariable assumption of the law that jurors follow their instructions [citation], which we have applied in many varying contexts." (*Richardson v. Marsh* (1987) 481 U.S. 200, 206 (*Richardson*).) As the court explained, "In *Bruton* [*v. United States* (1968) 391 U.S. 123], however, we recognized a narrow exception to this principle: We held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury in instructed to consider the confession only against the codefendant. We said: [¶] '[T]here are some contexts in which the risk that the jury will, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.'" (*Id.* at p. 207.)

The *Bruton* exception is truly narrow. It does not apply to a codefendant's confession which has been "redacted to eliminate not only the defendant's name, but any reference to his or her existence." This is true even when the confession is incriminating "when linked with evidence introduced later at trial (the defendant's own testimony)." (*Richardson, supra,* 481 U.S. at pp. 208, 211.) Thus, "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (*Id*. at p. 211.)

B. Analysis

Josue argues that *Crawford*'s holding barring testimonial hearsay applies whether or not a testimonial hearsay statement "accuses" a defendant. The defendant in *Crawford* was tried alone, so any hearsay statement admitted at trial was necessarily admitted against the defendant. The issue before the court in *Crawford* was the scope and application of the Confrontation Clause to out-of-court statements. Nothing in *Crawford* abrogates the long-standing rule, repeated in *Crawford*, that the Confrontation Clause "applies to 'witnesses' against the accused." (*Crawford, supra*, 541 U.S. at p. 51) As the court explained, "the principal evil at which the clause was directed was the . . . use of ex parte examinations as *evidence against the accused*." (*Id*. at p. 50, italics added.)

Further, nothing in the reasoning of the court in *Crawford* calls into question the long-standing rule that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (*Richardson, supra,* 481 U.S. at p. 211.)

Edgar's statement did not make any reference to Josue's existence. The trial court instructed the jury in pertinent part: "You have heard evidence that defendant Edgar Farfan made a statement before trial. You may consider that evidence only against him, not against any other defendant." Thus, admission of the statement did not violate Josue's rights under the Confrontation Clause. (Cf. *People v. Song* (2004) 124 Cal.App.4th 973, 984 [noting that if only those hearsay statements of codefendants which did not directly incriminate defendant had been admitted at trial, it would be reasonable to presume the jury followed the limiting instruction and defendant's rights to confrontation were not implicated].)

III. Failure to instruct on involuntary manslaughter (Edgar)

Edgar contends the trial court erred in failing to instruct the jury sua sponte on involuntary manslaughter on the theory that the killing occurred during the commission of a grand theft. He contends that if the trial court did not have a sua sponte duty to instruct, his counsel's failure to request such an instruction constituted ineffective assistance of counsel. Josue joins in these contentions.

We will assume for the sake of argument that the trial court had a sua sponte duty to instruct the jury on involuntary manslaughter, on the theory that the killing occurred during the commission of grand theft, and that this duty applied to both defendants. There is no reasonable probability that defendants would have received a more favorable outcome in the absence of the error. (See *People v. Breverman* (1998) 19 Cal.4th 142, 165 ["the failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility . . . [and] such misdirection of the jury is not subject to reversal unless an

examination of the entire record establishes a reasonable probability that the error affected the outcome"].)

Edgar bases his theory of involuntary manslaughter on Josue's testimony that the victim was involved in the plan to steal the merchandise and so the offense was only grand theft. As Edgar acknowledges, the jury was instructed on both robbery and the lesser included offense of grand theft as to Josue. Josue's attorney argued that Heno was involved in the theft, and the plan was to tie up Heno to give the appearance of a robbery, but "something happened." He suggested that Medina went "a little haywire and put too much tape on this man and kill[ed] him. She had no problem with pleading in [*sic*] the second degree murder."

The jury found Josue guilty of robbery. Josue's testimony was the only evidence to support a conviction for grand theft, and the jury's verdict demonstrates that it did not find that testimony credible. There is no reasonable probability that a jury would have convicted Josue of involuntary manslaughter based on grand theft if instructed on that offense.

Josue testified that Medina told him that Heno was in on the theft. He did not testify that she told this to anyone else, or that anyone was present when she told him. Even assuming for the sake of argument that the jury could have understood Josue's testimony as indicating that Edgar was present when Medina told him of Heno's involvement, the jury did not believe Josue's testimony that Medina told him that Heno was involved. Thus, there was no rational basis for the jury to find that Medina told Edgar that Heno was involved in the theft and that Edgar intended to commit only grand theft.

IV. Sufficiency of the evidence (Edgar)

Murder committed while the defendant was engaged in the commission or attempted commission of a robbery is a special circumstance which permits the punishment of death or LWOP.

(§ 190.2, subd. (a)(17)(A).) If a defendant is not the actual killer, death or LWOP may be imposed if there is proof that he intended to kill or was a major participant who acted with "reckless indifference to human life and as a major participant" in the commission of a robbery, burglary or certain other enumerated felonies which results in death. (§ 190.2, subd. (d).)

Edgar contends the evidence is insufficient as a matter of law to establish his intent to kill Heno or that he acted with reckless indifference to human life. Josue joins in this claim. We agree that there is no direct evidence showing which defendant put the duct tape on Heno, and no evidence from which a reasonable jury could infer the identity of the actual actor who taped Heno. Thus, as the prosecutor acknowledged, both defendants must be considered aiders and abettors.

We also agree that there is no evidence that defendants intended to kill Heno. As the prosecutor argued in closing, "I'm not saying they intended to kill [Heno] because I don't think they did. When you look at the way he was taped up, they didn't cover his nose. They just covered his mouth so he couldn't talk. They covered his eyes so he couldn't see, okay? For me to say otherwise, okay, I would be speculating, all right?"[4]

The prosecutor argued that defendants acted with reckless indifference to human life because their plan involved a grave risk of death. The prosecutor described this risk as existing because defendants planned to get into a traffic accident on the

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[4] The prosecutor had earlier argued that Heno struggled with defendants inside the box truck, but was overcome and "[t]hat's when they took the opportunity to duct tape him. They brought duct tape to this plan. And they duct taped his eyes so [Heno] could not look at where they were going or who they were. And they duct taped his mouth because you don't want him screaming for help or making any noise."

freeway and then to kidnap Heno, and they were prepared to subdue Heno if he resisted, and brought a BB gun and duct tape to do so. The prosecutor argued that Edgar brought the gun and was the one who actually caused the traffic accident, but otherwise did not differentiate between the two men.

On appeal, respondent makes essentially the same argument to show the sufficiency of the evidence to support the jury's finding of reckless indifference, but maintains that Heno was "mouth and nose duct-taped" and that Edgar "obviously had knowledge that Heno's ability to breathe was obstructed due to duct tape [covering] his nose and mouth" and "he obviously made no effort to assure that Heno could breathe either through his nose or mouth" and "[h]e must have seen Heno duct taped yet made no effort to allow Heno to breathe." We will presume that respondent would make the same argument for Josue. Respondent relies also on the testimony of Officer Romero that when she saw Heno at the scene, his head was covered with a cloth. Her description of the duct tape on his head was based on her memory of viewing coroner's photographs of Heno. The photographs themselves were entered into evidence and considered by the jury.

Under the framework established by our Supreme Court in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), we find sufficient evidence to show that defendants acted with reckless indifference to human life and thus sufficient evidence to support the true finding on the felony-murder special-circumstance allegation.

A. Law

"'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the

evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see *People v. Smith* (2005) 37 Cal.4th 733, 738-739.)

The requirement that a defendant be a major participant who acted with reckless disregard for human life arises directly from the United States Supreme Court's decision in *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*). (*People v. Estrada* (1995) 11 Cal.4th 568, 575.) The California Supreme Court has set forth several factors which are relevant in determining if a defendant is a "major participant" within the meaning of *Tison*. (*Banks, supra,* 61 Cal.4th at p. 803, fn. omitted.)

Generally, recklessness involves both subjective and objective elements. It requires the defendant be "'"*subjectively* aware that his or her participation in the felony involved a grave risk of death."' [Citations.]" (*Banks*, *supra*, 61 Cal.4th at p. 807.) "[It] encompasses a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions." (*Clark, supra,* 63 Cal.4th at p. 617.) Recklessness "encompasses both subjective and objective elements." "The subjective element is the defendant's conscious disregard of risks known to him or her." (*Ibid.*) "[R]ecklessness is also determined by an objective

standard, namely what 'a law-abiding person would observe in the actor's situation.' [Citation.]" (*Ibid.*)

The California Supreme Court has set forth several factors which are relevant in determining if a defendant acted "with reckless indifference to human life" within the meaning of *Tison*. 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; (5) defendant's efforts to minimize the risks of the violence during the felony. (*Clark, supra,* 63 Cal.4th at pp. 618-622.) As was the case with "the factors concerning major participant status in *Banks*, '[n]o one of these considerations is necessary, nor is any one of them necessarily sufficient.' [Citation.]" (*Clark*, at p. 618.) "There is significant overlap between being a major participant and having reckless indifference to human life. [Citation.]" (*In re Loza* (2017) 10 Cal.App.5th 38, 48; see also *id.* at p. 52 ["factors demonstrating petitioner's role as a major participant are highly relevant to the analysis of whether he acted with reckless indifference"].)

B. Analysis

1. Knowledge and use of weapons

"The mere fact of a defendant's awareness that a gun will be used in the felony is not sufficient to establish reckless indifference to human life. [Citation.]" (*Clark, supra*, 63 Cal.4th at p. 618.) However, a defendant's discharge of a firearm, even if the defendant does not kill the victim, can be significant to the analysis of reckless indifference to human life. (*Ibid.*)

Here, there was evidence that Edgar brought a BB gun to the robbery. We infer that Josue, like Medina, was aware of the gun. Although there was no expert testimony about the capabilities of a BB gun, the evidence shows that it was not the

cause of death here. The gun discharged while Josue, Edgar and Heno were in the truck cab. Three BB's hit Heno, two in the head, and those caused only very small wounds. Standing alone, the fact of the gun's presence and use does not support an inference that either defendant was acting with reckless indifference to human life. However, when considered together with the fact that duct tape was also brought to the crime, the combination suggests, at a minimum, planning to use both items for restraint and possible physical violence.

2. Physical presence and opportunities to restrain the crime or aid the victim

Physical presence can be significant when "the murder is a culmination or a foreseeable result of several intermediate steps, or where the participant who personally commits the murder exhibits behavior tending to suggest a willingness to use lethal force." (*Clark, supra*, 63 Cal.4th at p. 619.)

Here, there is evidence that both defendants were present throughout the crimes, although Edgar was the more active of the two through the time when he shoved Heno, who he believed to be 60 to 65 years old, into the truck, setting in motion the restraint of Heno by use of duct tape, resulting in his death by asphyxiation from suffocation.

While each defendant had the opportunity to restrain the other or to aid the victim, their failure to do so also supports a finding of reckless indifference to human life. The prosecutor argued that defendants should have made sure that Heno could breathe. They did not, and Heno died.[5]

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[5] In cases decided before *Banks*, courts have concluded that leaving a victim to die after being beaten and stabbed or being shot by a codefendant is reckless indifference. (See *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754-1755 & *People v. Mora* (1995) 39 Cal.App.4th 607, 611, 616-617.)

3. Duration of the felony

"Where a victim is held at gunpoint, kidnapped, or otherwise restrained in the presence of perpetrators for prolonged periods, 'there is a greater window of opportunity for violence' [citation], possibly culminating in murder." (*Clark, supra,* 63 Cal.4th at p. 620.)

Here, the duration of the felony was prolonged. Heno was kidnapped by defendants, which increased his risk of harm. Defendants' decision to move the truck with a resisting victim in the cab also carried a degree of risk. However, Heno was not harmed by the movement of the truck, instead, 57-year-old Heno was left in a residential neighborhood, bloodied, duct taped and restrained to fend for himself. Under these circumstances, the duration of the felony supports a finding of reckless indifference.

4. Defendants' knowledge of cohort's likelihood of killing

There is no evidence that either defendant had a history of violence or had ever killed another person. Thus, this factor has no application.

5. Defendants' efforts to minimize the risks of violence during the felony

This factor was raised by the defendant in *Clark* in mitigation. The *Clark* court recognized that a defendant's efforts could be relevant. Here, there was no evidence of mitigation, thus this factor has no application.

6. Conclusion

This case involved an uncommon form of robbery and an unusual manner of death. Though it does not fit the paradigm of an armed robbery considered in *Banks*, *Clark* and other related cases, this robbery was of significant duration and involved the movement of a victim, both of which increased the risk to the victim. But most significantly, this robbery included shooting

BB's at the victim's head, beating and restraining him, as well as duct taping much of his face, including parts of his mouth near his nose. The 57-year-old victim was bleeding from his head, neck and arms and was left with his head covered by a cloth, alone on the floor of the abandoned van. (See exhibits 32, 33, 34, 35.) Any reasonable person would have foreseen that defendants' plans carried a grave risk of death. Defendants are clearly culpable for this death under the felony-murder rule. In addition, their conduct rises to the level of reckless indifference to human life. The true finding on the special circumstances allegation is affirmed as to both defendants.

V. Application of section 190.2

Edgar claims that "the jury's general verdicts provide no clue as to whether it found that special circumstance true as to Edgar based on his role as the actual killer *or* as an aider/abettor." This claim lacks merit.

The jury was adequately instructed on the difference between felony murder and the robbery-murder-special circumstance by way of CALCRIM Nos. 703, 730 and related instructions.

In addition the jury had overwhelming evidence that Heno was murdered unnecessarily during the commission of a robbery targeting the cigarettes in his delivery truck. While there is no evidence in the record that Edgar (or Josue) was the actual killer, there is however ample evidence to support each defendant's conviction of felony murder on an aiding and abetting theory, as set forth more fully above. Further, the evidence that the killers were major participants in the crime before the killing occurred and that each acted with reckless indifference to the human life

of Heno, was also established (also discussed in detail above) in support of the special circumstance of robbery-murder finding.[6]

VI. Robbery sentence

At the sentencing hearing, the trial court stated that it was imposing "the low term of five years" for the robbery conviction but staying the sentence pursuant to section 654. The abstract of judgment does not reflect that the sentence for robbery is stayed. We order that correction.

Josue points out, correctly, that five years is the high term for second degree robbery; the low term is two years. (§ 213, subd. (a)(2).) He requests that we "correct" the abstract of judgment to show the low term of two years. Such a change would be more than a mere clerical correction. It is clear the trial court misspoke, but we have no basis to conclude that the court intended to impose a two-year term, particularly since the trial court found all 13 aggravating factors in the probation report to be true. If Josue had objected in the trial court, the court would have had the opportunity to clarify the sentence. He did not object and so has forfeited the claim. (*People v. Scott* (1994) 9 Cal.4th 331, 351-353.)

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6 To the extent Josue joins in this claim, he has forfeited same by failing to develop it on appeal (*People v. Bryant* (2014) 60 Cal.4th 335, 363-364).

DISPOSITION

The clerk of the superior court is instructed to prepare an amended abstract of judgment showing that defendants' five-year term on the robbery conviction is stayed pursuant to section 654. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.