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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ALFREDO MONTEZ VALENZUELA, Defendant and Appellant.	B227823 (Los Angeles County Super. Ct. No. GA054170)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lance A. Ito, Judge. Affirmed with directions.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In the early morning hours of July 26, 2003 Bernice and Clark Shaum were murdered in their home on Duarte Road in Monrovia. Mrs. Shaum died from blunt and sharp force trauma. She suffered more than 40 stab wounds to her neck, ear, face, clavicle, chest, back, and abdomen. Thirteen of her stab wounds were fatal. Mrs. Shaum also suffered blunt force injuries to her face, hands, arms, and legs, and defensive wounds on her hands. Mr. Shaum died from multiple sharp force injuries. He suffered 113 stab wounds to his face, head, neck, chest, and back. Nine of his wounds were fatal. Mr. Shaum also suffered blunt force trauma to his face, legs and arms, sustained defensive wounds on his hands and arms, and endured bone fractures to his jaw, ribs, and sternum.

In an information the People charged defendant Alfredo Montez Valenzuela and co-defendant Shawna Lenora Robles with the Shaums' murders (Pen. Code,[1] § 187, subd. (a); counts 5 & 6), first degree residential robbery (§ 211; count 7), first degree burglary (§ 459; count 8) and unlawful driving of a vehicle (Veh. Code, § 10851, subd. (a); count 9).[2] In counts 5 and 6, the People included multiple murder (§ 190.2, subd. (a)(3)) and felony murder special circumstance allegations (*id.*, subd. (a)(17)). In counts 5, 6, 7 and 8 the People alleged that defendant and Robles personally used a deadly weapon, a knife (§ 12022, subd. (b)(1)). Finally, in counts 5 through 9, the People alleged that defendant had served one prior prison term (§ 667.5, subd. (b)).

The trial court had intended to try defendant and Robles together, with each having a separate jury. During jury selection, which commenced in 2008, the trial court granted defendant's motion for a mistrial on the ground that defendant was unable to

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

[2] The People also charged Robles with two counts of second degree commercial burglary (§ 459; counts 1 & 3) and two counts of forgery (§ 470, subd. (d); counts 2 & 4).

proceed for medical reasons.[3] Robles' trial continued and the jury found her guilty of multiple charges, including special circumstance murders. During the penalty phase the jury chose life without the possibility of parole. Robles appealed, and we affirmed the judgment of conviction with directions to strike a parole revocation fine. (*People v. Robles* (Oct. 14, 2010, B209120) [nonpub. opn.], review den. Jan. 12, 2011, S188032.)

Defendant's trial commenced in May 2010. The jury found defendant guilty on all counts and convicted defendant of the murders, the robbery, and the burglary in the first degree. The jury also found true the felony-murder and multiple-murder special circumstance allegations, as well as the allegations that defendant personally used a deadly weapon. At the conclusion of the penalty phase the jury set defendant's penalty for the murders at life imprisonment without the possibility of parole.

On counts 5 and 6 the trial court imposed consecutive indeterminate sentences of life imprisonment without the possibility of parole. On counts 7, 8 and 9, the court imposed and stayed determinate prison sentences of 7 years, 16 months and 8 months, respectively. The court also imposed various fees and fines and issued two direct victim restitution orders. Defendant appealed.

CONTENTIONS

Defendant makes the following contentions on appeal:

1. The trial court deprived defendant of due process in violation of *In re Sakarias* (2005) 35 Cal.4th 140 when the court allowed the People to argue inconsistent factual theories by switching their theory of culpability from Robles to defendant.

2. The trial court deprived defendant of his constitutional right to mount a complete defense by excluding expert testimony on brain traumas as shown by CAT scans.

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[3] While in custody defendant was severely beaten and required medical attention.

3. The trial court committed multiple evidentiary errors that deprived defendant of a fair trial and due process.

4. The trial court deprived defendant of due process and his right to trial by jury by rejecting requests for instructions that were supported by the evidence.

5. The People failed to establish the requisite elements of murder because evidence of mental defect and voluntary intoxication established that defendant did not intend to commit the crimes.

6. Defendant is entitled to a new trial because of cumulative prejudice created by multiple errors on the issue of intent that deprived defendant of a fair trial, and because his conviction constitutes a miscarriage of justice.

In the event we affirm his conviction, defendant also argues:

7. The $10,000 parole revocation fine imposed pursuant to section 1202.45 should be stricken.

8. The abstract of judgment should be amended to reflect joint and several liability for the restitution orders.

We affirm the judgment. We also direct the trial court to prepare an amended abstract of judgment striking the parole revocation fine.

FACTUAL BACKGROUND

A. *The Shaums and Their Neighbors*

The Shaums were long-time residents of Monrovia. At home Mr. Shaum often socialized with his neighbors and friends in a small detached garage. He typically parked his white pickup truck in front of his house.

David McCool and Jimmy Woods lived nearby and often socialized with Mr. Shaum in his garage. Defendant's father, Felipe Valenzuela, Sr., (Felipe Sr.), was also a friend of Mr. Shaum and drank beer with him. Felipe Sr. sometimes borrowed money from Mr. Shaum, which Felipe Sr. repaid. In 1997, Felipe Sr. was hit by a car and died.

In 2002 defendant was paroled from prison and moved into his family's house (the Valenzuela residence) with his sister, Sarah Valenzuela (Sarah), his brother Felipe Jr., and Sarah's boyfriend David Enriquez. At the time of the crimes, defendant's mother was working out of town and was not living in the home.

In the six months before the Shaums were killed, defendant often visited with Mr. Shaum in his garage. Defendant's girlfriend Robles accompanied him. When defendant spoke to Mr. Shaum about his father, defendant often became emotional, stating, "I'm nothing without my father." On two occasions, defendant told Mr. Shaum, "If you would have took my father to buy beer, he would be living." Defendant threatened to kill Mr. Shaum, but his threats did not bother Mr. Shaum. Defendant often asked Mr. Shaum for money, including the day before the murders, and at least two times defendant did borrow money from him. On one occasion, when Mr. Shaum told defendant he did not have any money, defendant mumbled, "I'm going to kill you."

The day before the murders McCool stopped by Mr. Shaum's garage and heard defendant and Robles ask Mr. Shaum for money. Mr. Shaum said he did not have any money and was not going to give defendant any more. Defendant appeared upset and poured a can of beer on the floor of the garage. Mrs. Shaum said, "We told you we're not going to loan you any more money, give you any more money." Mrs. Shaum asked McCool to make defendant and Robles leave because they frightened her. When defendant said he had some jewelry to sell, McCool offered to help him sell it at a liquor store, and the three of them left. McCool later returned to the Shaums' home. Mrs. Shaum thanked him and stated that she hoped defendant and Robles did not return because defendant scared her.

B. *Defendant's Relationship with Robles*

About one week after defendant had been released from prison and had returned to the Valenzuela residence, Robles moved into the home at defendant's invitation. Robles was a member of the 18th Street Gang and had multiple gang tattoos, including "18th Street" and her gang moniker "Loca." Defendant's friend, Steve Williams (Williams),

knew Robles well, and described her as a streetwise, tough, manipulative person who never backed down and always got what she wanted.

Robles controlled defendant, told him what to do, and took his paycheck when he worked. Still, defendant loved her and would do anything for her. Robles was bigger than defendant and was very strong physically, and would pick defendant up and throw him in the swimming pool. Williams believed that although defendant could hold his own in a fight, Robles could take defendant in a fistfight or fight him to a draw. Williams did not like Robles because she led defendant around by the nose. Robles also knew that defendant had a drinking problem. At first she tried to prevent defendant from drinking beer, but, after awhile, she brought hard liquor into the home.

C. *Events Leading up to the Murders*

Early in July 2003 Sarah and Enriquez noticed a change in defendant's behavior. Defendant had been spending time with a drug dealer, and drinking alcohol and using methamphetamine. While on drugs, defendant was less active and more withdrawn. Defendant began wearing camouflage clothing and changing his clothes often. While on methamphetamine, defendant drew pictures. He was agitated, twitchy, and perspired even though it was not hot.

In the ten days before the murders, defendant behaved bizarrely. He used drugs, drank alcohol, did not sleep for a full week, and did not eat. His eyes were very red. To protect Monrovia from all four directions, defendant wore four hats at a time, with each bill pointing in a different direction. Defendant tried to ride his bicycle off the roof, but Sarah stopped him. Defendant also repeatedly rode his bicycle into the pool. He said that he was trying to protect himself and Robles from ninjas that were after them. On one occasion Robles was in the bathroom and defendant began pounding on the door and asking Robles if she was all right. When Robles asked him what he was talking about, defendant told her, "There's Ninjas out there." When he was inside, defendant would look out of a small bathroom window and say that he thought ninjas would enter through the window. When he was outside, defendant would act paranoid and look over the fence

in search of ninjas. Defendant locked himself in the garage for days at a time and did not go to work.

Meanwhile, Robles needed money to pay storage fees to prevent the sale of her belongings. Several days before the murders, Robles asked Sarah and Felipe Jr. for $200 or $250 to pay her storage bill, but they were unable to loan her the money. Robles told Sarah and Enriquez that she was going to a club to seduce men and rob them. Robles repeatedly badgered defendant to get the money she needed to pay her storage bill. She called defendant "a punk bitch" and a piece of shit and told him he was "worthless" in order to get the money. Defendant suggested that he and Robles rob the Shaums because defendant did not want Robles to carry out her threat to roll a patron of a billiards bar in Monrovia to get the money.

D. *Discovery of the Bodies*

On July 26, 2003 the Shaums' daughter, Patricia Smith (Patricia), and her husband, William Smith (William), had plans to go to the Shaums' house. Mr. Shaum and William were going to wait for an installer from Direct TV. Patricia and her mother were going shopping.

Patricia drove by her parents' home at approximately 1:00 p.m. on the way to run some errands but did not see her father's truck. Patricia returned at approximately 2:45 p.m. and found her husband waiting. She became concerned when her parents were not home and drove around for about 15 minutes looking for her father's truck. Patricia returned to her parents' home and opened the front screen door. Patricia saw a black glove wedged between the door frame and the front door, which was locked.

Patricia and William walked to the window of the front bedroom where her mother sometimes slept. The window was closed, but the screen was missing. William opened the window. Inside, Patricia saw that the sheets had been removed and there was blood covering the mattress. Patricia screamed when she saw her mother on the floor, wrapped in a sheet and covered with blood. William entered through the window and discovered that his mother-in-law was dead. William yelled to Patricia not to come in.

William walked into the hallway where he found his father-in-law dead on the floor, and then called 911.

E. *The Investigation*

Officers and detectives from the Monrovia Police Department arrived within minutes, cleared the Shaums' house, and secured the crime scene. Detective David Carver from the Los Angeles County Sheriff's Department directed the collection of evidence and the videotaping of the scene.[4] The bedroom window screen had been cut off and there were shoe prints in the planter under the window.

Woods observed police around the Shaums' home. He approached Detective Carver and told him that someone he knew as "Felipe," who had just been released from prison, was a possible suspect. When Detective Carlos Calderon showed Woods a photograph of defendant, Woods identified defendant as the man he knew as "Felipe."

Lance Errickson, a resident of Monrovia, knew the Shaums, where they lived, and that Mr. Shaum drove a white Chevrolet truck. On July 26 at approximately 11:00 or 11:30 a.m., Errickson was driving home from work when he saw Mr. Shaum's truck parked on a residential street behind the Ranch Market. This struck Errickson as odd because he had never before seen Mr. Shaum's truck in this area.

Later that evening Errickson was watching the news and learned about the murders. He recognized the area depicted on the news and drove to the Shaums' residence. Upon his arrival, he approached the police and told them where he had seen Mr. Shaum's truck. Officers went to recover it.

On July 27, at approximately 2:20 a.m., a police dog picked up a scent from the driver's seat of the truck. Using this scent, the dog led officers to the Valenzuela residence on Magnolia Street.

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[4] The City of Monrovia's police department is small and lacks the resources to investigate homicides. Monrovia has contracted with the Los Angeles County Sheriff's Department to handle homicide investigations in Monrovia.

F. *The Searches of the Valenzuela Residence*

At approximately 3:00 a.m. on July 27 Detectives Calderon and Carver, along with other officers, went to the Valenzuela residence to investigate the homicides. Sarah met the detectives and told them that defendant was inside the house. Sarah went inside, after which Felipe Jr., Robles, and defendant came outside. Detective Carver observed Felipe Jr. put a gold watch in his pocket. Investigators later determined that the watch had been taken from the Shaums' residence.

Detective Carver observed that defendant's hands appeared swollen, consistent with injuries received after punching. There was a cut on defendant's right palm, consistent with a knife injury caused by a poor quality blade. Defendant had a bandage on his right knee that was seeping blood, and he was wearing shorts with bloodstains. He also had a swollen lip. Defendant claimed he had sustained his injuries when he was "jumped by four Black guys in Monrovia." Defendant removed an ATM card with Mr. Shaum's name on it from his pocket. The detectives handcuffed defendant and took him to the Monrovia Police Department for questioning.

In the attic of the Valenzuela residence, officers found a bag containing bank and other documents bearing the Shaums' names. Near the pool, officers found clothes hanging up to dry, including a pair of khaki pants and two T-shirts with dried blood on them. In a bathroom in the garage officers found a plastic bottle with what appeared to be bloodstains, a wet wallet belonging to defendant containing photographs of Robles, and keys to Mr. Shaum's pickup truck.

On July 28 at 11:00 a.m. officers returned to the Valenzuela residence to serve a search warrant in connection with an unrelated burglary. Robles approached Detective Calderon outside the house and said she needed to speak with him privately. Robles told Detective Calderon that she was having trouble with defendant's family members, who had accused her of being a "snitch" and bringing the police to their home. Robles said she felt unsafe and asked if the officers could take her to her mother's house in Hesperia. Detective Calderon warned the members of the Valenzuela family not to intimidate anyone.

Robles returned to the house and came back carrying a purse. She gave the purse to Detective Calderon and said it came from "the Duarte house," which the detective understood to refer to the site of the Shaums' murders. The purse, which Robles said defendant had taken from the Shaums' house, contained a checkbook, canceled checks, a gold plated bracelet, and a wedding ring set.[5] The wedding ring had Mrs. Shaum's name inscribed on it. Robles also showed Detective Calderon a bloodstained blue sweatshirt, bloodstained black sweatpants, and a black pair of Fila shoes that she said she wore when she was with defendant on the night of the murders. Robles said that defendant got blood on her sweatshirt when he grabbed her arm. Robles told Detective Calderon that she knew the location of the shoes defendant wore. Sarah then told Detective Calderon to ask Robles about the VCR that she brought into the house.

Sarah eventually brought the VCR out of the house, showed it to Detective Calderon, and stated, "This is the VCR and red box that Shawna [Robles] brought in on Saturday." Sarah told Detective Calderon that Robles had given her a gold chain, three religious pendants, and a heart pendant. Sarah also told Detective Calderon about statements that Robles had made to her the prior evening in which Robles had admitted that she stole the checks from the Shaums' house. Sarah told the detective that Robles had told her that she had cashed one check at the Ranch Market and purchased some groceries and unsuccessfully tried to cash a second check, and that she had found $80 in quarters at the Shaums' residence.[6]

Sarah also told Detective Calderon that Robles had told her that she had entered the Shaums' residence through the front door after defendant opened it for her, and that

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[5] Robles had tried to sell the bracelet at a pawnshop, but the pawnshop rejected the bracelet because it was not gold but only "dipped in gold," and refused to give Robles the amount she wanted for the wedding rings.

[6] The cashier of the Ranch Market testified that Robles cashed a check with Mr. Shaum's name on it for $275.15, and received $25 in store credit and the rest in cash. The cashier testified that Robles returned "two or three hours later" with a second check, but she and her coworkers refused to cash it.

once inside Robles asked defendant, "Where is Clark, did you kill him?" Defendant said he did not know where Mr. Shaum was. Sarah also told Detective Calderon that Robles had admitted that she "stabbed the Black guy in the face and in his ass," and had laughed and told Sarah, "I had your brother's back."

Detective Robert Manuel drove Robles to an alley off South Ivy where Robles said she would show the detectives some property of interest in a dumpster. Robles pointed to a brown suitcase and a dark plastic trash bag. The suitcase contained wet clothing, a soda can, a pair of Skechers shoes, and a pair of bolt cutters. The trash bag contained wet clothes, a Stanley work glove that matched the glove found at the Shaums' residence, hats, a towel, and a pillowcase wrapped around three knives. The clothing appeared to have bloodstains. Inside a nearby laundry room located in the back of the parking garage of the South Ivy dwelling, officers located a compressor, tools, a battery charger, and a flashlight.

The police showed several of the items recovered to Patricia and William. Patricia recognized a Tupperware knife as resembling one that she had given to her parents. Patricia also identified the pillowcase, purse, and wedding ring as belonging to her mother. William identified the VCR and the brass bracelet as belonging to the Shaums. William also recognized the compressor and battery charger that he had given to his father-in-law as gifts.

G. *Robles' Statement to the Police*

Robles admitted in a statement to the police that she participated in the burglary and that she wore a blue sweatshirt, black sweatpants, and Fila shoes. She said that defendant wore camouflage pants and shirt.

Robles explained to the police that she needed money to pay her storage bill, and that she had planned to go to a club and trick some drunken men into giving her money. Defendant did not want her to do that and told her he knew where there was a safe. Robles protested, stating that she would rather get the money from drunks. Defendant stated he had to "collect" from a man who "did [his] dad wrong."

Robles said that sometime after 1:00 a.m. she and defendant went to the Shaums' residence. Defendant brought a pair of bolt cutters, a butterfly knife, and landscaping gloves. Defendant attempted to get into the house, but the doors were locked. When Robles said they should leave, defendant told her to shut up. Defendant cut a bedroom window screen and climbed inside the house. About 10 minutes later Robles heard a muffled scream, and then defendant opened the front door for Robles. Defendant's clothes were covered in blood, and he was wearing a single glove. When Robles walked inside, she saw Mr. Shaum's dead body. Defendant told her to check out the house. Robles gave defendant a pillowcase, and the two of them collected items throughout the house and garage. Defendant dropped the butterfly knife, one glove, and his hat at the house, and took two knives from a kitchen drawer.

Defendant and Robles left in Mr. Shaum's truck and returned home. Defendant jumped into the pool to wash off the blood. Robles collected the bloody wet clothes and put them in a suitcase, which they took to a dumpster. They then parked Mr. Shaum's truck near the Ranch Market and walked to Jennifer Admunson's apartment on South Ivy where defendant fell asleep. Robles admitted that the story about four men jumping defendant was contrived. Robles denied hitting Mr. Shaum in the head with bolt cutters. The detectives did not believe Robles' story or that she was fearful of defendant. At no time during her interview with police did Robles claim that she or defendant had ingested methamphetamine on the night of the murders.

H. *Williams' Statement to the Police*

During an interview with Detective Carver, Williams stated that he, defendant, and Felipe Jr. were close childhood friends, but that Williams had not seen defendant for a while prior to July 2003 due to "jail commitments." Williams said that the day before the murders Robles had asked to borrow $150 to help pay for her storage fees, and that when Williams refused Robles offered to give him a "'blow job'" in exchange for the money. Williams again refused. Later, defendant asked Williams for the money on behalf of

Robles. Williams refused again, believing that Robles "was trying to play both him and his friend."

Sometime after midnight on July 26, Williams received a call from Robles. She said that defendant had been stabbed by four gang members and that she had stabbed one of defendant's attackers with a knife. Williams later learned that Robles had lied. He called a contact from the gang that purportedly had attacked defendant and found out that no such attack had occurred.

Later that morning, around 5:30 a.m., Williams went to defendant's house where he observed blood in and around the pool. Williams told Detective Carver that "blood was everywhere." When Williams walked inside the house, he saw that defendant was unconscious. Robles admitted giving defendant a large quantity of pain medication. Defendant had cuts on both of his hands and feet, and his hands were wrapped in shirts. The cuts on his hands resembled cuts created by a knife slipping during a vicious stabbing. Williams explained that "blood becomes a very good lubricant once on a knife handle."

Williams confronted Robles with her lie about the attack. In response, Robles said that defendant "went nuts and forced her at knifepoint to go to the Shaum residence where [he] killed the couple and ransacked the house." Robles told him that she and defendant went to the Shaums' house and defendant climbed in through a front window. When Mrs. Shaum woke up, defendant killed her. Defendant then opened the front door for Robles. Once inside, Robles hit Mr. Shaum in the head with a pair of bolt cutters. Robles stabbed Mr. Shaum in the back, but defendant did most of the stabbing and killed him too. After the murders Robles gathered valuables from the house and garage, including jewelry and $200 in quarters. They left in Mr. Shaum's truck, which Robles later parked at the Ranch Market.

Williams did not believe that defendant had forced Robles with a knife to go to the Shaums' house. According to Williams, anyone who knew the two of them would know the incident could never have happened the way Robles had described it.

Williams advised Robles to wipe down the truck and get rid of the Shaums' property in the truck. Robles took Williams to a location where she and defendant had hidden knives and smaller items in a dumpster. Williams helped Robles in order to help defendant. Williams never told Detective Carver that Robles had told him that she or defendant was high on methamphetamine during the commission of the crimes.

I. *Defendant's Statements to the Police*

Detective Carver conducted a videotaped interview of defendant at 10:00 a.m. on July 27. Defendant did not appear to be under the influence of methamphetamine or suffering symptoms of withdrawal. The detective, however, did not ask if defendant had been using drugs prior to the murders or take a blood sample to test for drugs.

Defendant initially claimed that he received the cuts on his hands and knees when he was assaulted by four men two days earlier. Defendant stated that the Shaums were friends of his father and like family to him, and that he drank beer with the Shaums in the past but had not seen them for a couple of months. He expressed surprised when Detective Carver told him that they were dead. Defendant said that he found Mr. Shaum's credit card in an alley and that Mr. Shaum had let him borrow his truck the day before the murders.

When Detective Carver informed defendant that Robles had implicated him in the murders, defendant said that Robles participated in committing the crimes. Defendant stated that they went to the Shaums' home because Robles needed money to pay her storage fees. Defendant did not want to do it, but he did not want to lose Robles. He loved her and wanted to help her as she kept pressuring him.

Defendant stated that he had not intended to hurt the Shaums and acknowledged that what he did was wrong. He explained that he cut the screen with a knife. When he entered the room, Mrs. Shaum woke up. He was scared. He did not want to go back to prison and knew she could identify him, so he stabbed her. After Robles entered the house, Mr. Shaum woke up in the back bedroom and walked into the hallway. Defendant took knives from the kitchen. Defendant hit and stabbed Mr. Shaum a "lot of times"

because he "wouldn't die." During the struggle, Robles stabbed Mr. Shaum a few times in the back. Defendant, however, "did all the damage."

After he had killed the Shaums, defendant drank a soda from the refrigerator and then he and Robles went to the garage. Robles collected the valuables because defendant was exhausted. They dropped off Mr. Shaum's truck at the market and walked home.

During his interview with Detective Carver, defendant did not mention any methamphetamine use. Detective Carter testified that had defendant volunteered such information, he would have asked additional questions and taken a blood sample.

Defendant consented to a second interview on July 31 but did not want the detectives to record it. Defendant said that after he killed Mrs. Shaum he opened the front door to let Robles into the house. Mr. Shaum appeared, after which Robles hit him in the head and chest with bolt cutters, knocking him to the ground. Defendant then jumped on Mr. Shaum and stabbed him repeatedly. Although defendant claimed that Robles had stabbed Mr. Shaum 10 or 15 times, defendant admitted that he had inflicted most of the injuries on Mr. Shaum. Robles collected most of the property they stole from the Shaums because defendant was exhausted from stabbing the Shaums so many times.

When the detectives told defendant about the clothes they had recovered from the dumpster, defendant smiled and admitted that he had been wearing the camouflage pants and shirt. Defendant said that when he returned home, he had jumped into the pool to get the blood off his clothes and body. Defendant also admitted that he took the three knives the police had found in the dumpster from the Shaums' residence, that he used the knives in the murders, and that he cut himself with the knife he found in the kitchen sink.

Defendant told Detective Carver that the burglary was Robles' idea and again stated that they committed the crime because she needed money to pay her outstanding storage bill. When confronted with Robles' statement that she had denied touching or assaulting either of the victims, defendant said, "She is lying. Check [Mr. Shaum]. He was stabbed with two knives. That will prove what I am saying." When Detective Carver took a DNA swab from defendant, defendant stated, "You have the things, but fuck it, I already told you I killed them. Why do you need this?"

J. *Blood and Footprint Evidence*

Kenneth Howard, a supervising criminalist in the Los Angeles County Sheriff's Department's Forensic Biology Section of the Scientific Services Unit, testified that blood collected from the lower right front of Robles' blue sweatshirt contained DNA that matched Mr. Shaum's DNA, and blood collected from the upper left sleeve of the sweatshirt, the sweatpants, the glove, and the Skechers shoes contained DNA that matched defendant's DNA. The DNA analysis of the blood found on a paring knife was inconclusive, but Howard stated that there were "genetic profiles that indicated a mixture of at least two people again, and both [Mr. Shaum and defendant] were included as contributors to the mixture."

The DNA collected from the butterfly knife and Fila shoes matched Mrs. Shaum's DNA. The Fila shoes also contained DNA that matched the DNA of defendant and Mr. Shaum. Blood on Mr. Shaum's cap, a bedroom dresser, and the refrigerator handle matched defendant's DNA The DNA samples excluded Robles as a contributor to the samples collected and analyzed.

Bill Posey, a forensic toxicologist with Central Valley Toxicology called by defendant, analyzed nine bloodstains taken from items recovered from the crime scene to determine whether methamphetamine was present. Posey's methodology required a positive test result on each of three distinct tests before he would conclude that there was methamphetamine in the sample. A sample taken from a glove, a sample from a blood stain on the refrigerator door, four samples from a blue jersey sweatshirt, and a sample from a Fila shoe all tested positive for methamphetamine. The two remaining samples taken from a blood stain found on Mr. Shaum's right heel and a bloodstain on a nightstand tested positive in only two of the three tests. Posey acknowledged on cross-examination that the clothing or the site could have been contaminated with methamphetamine, resulting in a positive result for methamphetamine. Posey also admitted that the tests did not reveal the level of methamphetamine in the contributor's blood or when the methamphetamine was ingested, and that the presence of

methamphetamine in the contributor's blood shed no light on the effect of the methamphetamine on contributor's thought processes.

A bloody shoeprint found on the bathroom floor matched defendant's Skechers shoes. Casts made of footprints in the planter box under the window where the screen had been removed were made by a pair of Fila shoes, as were footprints traveling toward the front door.

K. *Effects of Intoxication and Sleep Deprivation*

Dr. Ari Kalechstein, a neuropsychologist called by defendant, testified about the effects of alcohol intoxication, methamphetamine intoxication, and sleep deprivation. Dr. Kalechstein explained that the brain's frontal lobe controls decisionmaking, regulates mood and behavior, and inhibits anger. Methamphetamine and long-term alcohol users are at risk for frontal lobe impairment, resulting in uninhibited behavior and impaired judgment, which sleep deprivation can exacerbate. Methamphetamine use also can induce increased aggression.

Dr. Kalechstein admitted on cross-examination that a person who uses methamphetamine still can engage in goal-directed behavior, although his judgment may be impaired, and that a person using methamphetamine can still intend to commit an act yet be unable to consider the consequences of the act. Kalechstein also admitted that deciding to wear gloves while committing a crime to avoid detection or taking bolt cutters to aid in the commission of the crime constitutes evidence of thinking before acting.

L. *Rebuttal Testimony of Paul Martinez*

Paul Martinez, a jailer for the Monrovia Police Department, booked defendant into jail at 12:22 p.m. on July 27, 2003. As was his custom when processing arrestees, Martinez filed out a Monrovia medical screening form and a Los Angeles County inmate intake screening form, which, among other things, require the jailer to observe the inmate's consciousness level. Martinez noted that defendant was "not impaired."

Martinez also noted that defendant did not exhibit obvious symptoms suggesting the need for emergency medical care, did not appear to be under the influence of alcohol or drugs, and did not exhibit any visible signs of alcohol or drug withdrawal or mental disorder. Although Martinez had not had any formal training in recognizing whether a person was under the influence of drugs, Martinez had seen inmates who were under the influence of drugs and inmates who were going through withdrawal. In his experience, individuals under the influence of methamphetamine suffered from dry mouth, exhibited twitching of the eyes, and made "jumpy movements." Individuals going through withdrawal after using methamphetamine exhibited shakiness, experienced nausea, perspired, vomited, and complained of headaches.

Although the screening forms did not require jailers to inquire whether the arrestee was taking or withdrawing from any drug, Martinez stated that he generally asked inmates these questions because Martinez did not want inmates to become sick in his custody. If defendant had admitted to taking drugs, Martinez would have reflected this fact in the documents, and Martinez had made no such notation. Martinez also recalled asking defendant when he had last used drugs. Martinez testified that he did not write down defendant's answer, but that he believed defendant had said he had not used drugs and had no medical problems. Martinez also observed that defendant had small cuts on both hands.

DISCUSSION

A. *Inconsistent Theories of Culpability*

Defendant's primary argument is based on *In re Sakarias*, *supra*, 35 Cal.4th 140 (*Sakarias*). Defendant contends that the trial court deprived him of due process by permitting the People to switch their factual theory of culpability from Robles, in her trial, to defendant, in his trial. Defendant's reliance on *Sakarias* is misplaced.

Sakarias involved two defendants, Waidla and Sakarias, who were tried separately by the same prosecutor for the same murder. Both defendants were convicted and

sentenced to death. Although the evidence showed that both defendants participated in the fatal attack on the victim with a knife and hatchet, in each trial the prosecutor argued that the defendant then on trial had inflicted all three chopping wounds to the victim's head with a hatchet. (*Sakarias*, *supra*, 35 Cal.4th at pp. 144-145.) Both of their convictions were affirmed on appeal. (*Id*. at p. 144; see *People v. Sakarias* (2000) 22 Cal.4th 596; *People v. Waidla* (2000) 22 Cal.4th 690.) Waidla, who was tried first, and Sakarias sought habeas relief on the ground that the prosecutor had presented a factual theory inconsistent with the theory presented in the other defendant's trial. (*Sakarias*, *supra*, at p. 144.)

The California Supreme Court held that "fundamental fairness does not permit the People, without a good faith justification, to attribute to two defendants, in separate trials, a criminal act only one defendant could have committed. By doing so, the state necessarily urges conviction or an increase in culpability in one of the cases on a false factual basis, a result inconsistent with the goal of the criminal trial as a search for truth." (*Sakarias*, *supra*, 35 Cal.4th at pp. 155-156.) Thus, "in the absence of a good faith justification, '[c]ausing two defendants to be sentenced to death by presenting inconsistent arguments in separate proceedings . . . undermines the fairness of the judicial process and may precipitate inappropriate results.' [Citation.]" (*Id*. at p. 156; see *Nguyen v. Lindsey* (9th Cir. 2000) 232 F.3d 1236, 1240 ["a prosecutor's pursuit of fundamentally inconsistent theories in separate trials against separate defendants charged with the same murder can violate due process if the prosecutor knowingly uses false evidence or acts in bad faith"].) The court noted, however, "that where . . . the available evidence points clearly to the truth of one theory and the falsity of the other, only the defendant against whom the false theory was used can show constitutionally significant prejudice." (*Sakarias*, *supra*, at p. 156.) Because the false theory was presented only against Sakarias, the Supreme Court granted habeas relief only as to him.

Prior to trial in this case, defense counsel, citing *Sakarias*, argued that the trial court should not allow the prosecutor, Deputy District Attorney Brook White (White), to argue a theory of the case different from the theory argued by Deputy District Attorney

Ana Lopez, who had prosecuted Robles. The trial court concluded, however, that *Sakarias* was distinguishable because in this case, unlike in *Sakarias*, different prosecutors had tried the two defendants, and the second prosecutor (White) had the advantage of having the opportunity to review the transcript of Robles' trial. The court noted that there was no dispute that the motivation for committing the burglary was Robles' need for money to pay her storage fees, and that defendant was "clearly the main player as far as the actual killing of the Shaums is concerned." Therefore, the court ruled that "White can argue his own good faith belief of what this evidence shows as far as the culpability of Mr. Valenzuela shows."

After the evidentiary portion of the guilt phase, defendant again raised the *Sakarias* issue. In response, White argued that he should be allowed to argue all the evidence in the record and that he had independently concluded that defendant and Robles' relationship was different than what the prosecutor in Robles' trial had argued. Specifically, White believed the evidence showed that defendant did not want Robles to go to a nightclub in an attempt to get money, that it was defendant's idea to go to the Shaums' home, and that he "was calling the shots that night" and "threatening her."

Defense counsel argued that "Robles was a person that the L.A. District Attorney's Office not only prosecuted for these murders, but attempted to get the death penalty. And now he's taking the position that Shawna Robles wasn't the person that instigated the acts that wound up with the murders of the Shaums, it was the defendant that did it, and that is a violation of [*Sakarias*]. That is simply taking the gun out of one person's hand and putting it in the other person's hand because the advantage they have is that they were not fortuitously tried together, and that is simply wrong. Because he disagrees with Miss Lopez about the role of Shawna Robles in this offense is of no account. If that were the case, you could simply put a . . . different . . . deputy district attorney on every case who would have a different view, and that would be very easy." After further argument, the trial court overruled defendant's renewed *Sakarias* objection.

Defendant argues that the holding of *Sakarias* is broad enough to encompass the alleged inconsistencies in this case. We disagree. *Sakarias* held "that the People's use of

irreconcilable theories of guilt or culpability, unjustified by a good faith justification for the inconsistency, is fundamentally unfair, for it necessarily creates the potential for—and, where prejudicial, actually achieves—a false conviction or increased punishment on a false factual basis for one of the accuseds." (*Sakarias*, *supra*, 35 Cal.4th at pp. 159-160.) Because the prosecution in this case did not use a "false factual basis" to obtain "a false conviction or increased punishment," we reject defendant's assertion that the inconsistencies in this case fall within the reach of *Sakarias*.

The inconsistencies defendant points to involve the issues of who formulated the plan to burglarize the Shaums and who was the more dominant person in the relationship. These differences do not alter the culpability of either defendant or Robles, who acted in concert. At no time did the People, without good faith justification, attribute to the two defendants, in separate trials, a criminal act that only one of them could have committed. With respect to the manner in which the defendant and Robles committed the crimes, the People's theories of guilt and culpability were consistent in both trials. The evidence in both cases showed that the motivation for the burglary was Robles' need for money to pay for her storage fees. Together, she and defendant burglarized the Shaums' home in order to obtain the money Robles needed to save her belongings. Defendant entered the residence through Mrs. Shaum's bedroom window while Robles waited outside. When Mrs. Shaum woke up, defendant killed her. Defendant subsequently opened the front door of the house and let Robles inside. When Mr. Shaum woke up, defendant killed him with Robles' help. In *Sakarias* the prosecution did not merely argue inconsistent theories based on the same evidence, but presented different evidence in separate trials to support different theories. Here the evidence at the two trials was essentially the same.

The prosecutors in defendant's trial and in Robles' trial did not rely on irreconcilably inconsistent factual theories of culpability for defendant and Robles. The prosecutors argued consistently that Robles was the motivation for the burglary and assisted defendant in killing the Shaums, but that defendant did the killing. As in *People v. Richardson* (2008) 43 Cal.4th 959, "[u]nlike *Sakarias* . . . the prosecutor did not argue at defendant's trial that defendant alone had killed [the victim] and then, inconsistently at

[the other defendant's] trial, that [the other defendant] had killed [the victim]. The prosecutors in both cases proceeded on the theory that defendant was the killer and [the other defendant] aided and abetted him. Variations in emphasis where, as here, the underlying theory of the case was consistent at both trials, does not amount to inconsistent and irreconcilable theories." (*Id.* at p. 1017, citing *Sakarias, supra,* 35 Cal.4th at p. 161, fn. 3.) Defendant's *Sakarias* argument fails.

B. *Right to Mount a Complete Defense*

Defendant contends that the trial court deprived him of his constitutional right to mount a complete defense by excluding expert testimony on brain traumas revealed by CAT scans. This contention lacks merit.

During his police interview, defendant wondered whether he committed the crimes because he had suffered head injuries. After Dr. Ari Kalechstein testified, jurors submitted a number of questions for Dr. Kalechstein. One of these questions was: "Besides a paper test to determine if an alcoholic's frontal lobes is the same as normal, can you do a SPECT or CAT scan to validate the paper test to determine how much of the frontal lobe remains?"

Responding to this juror question outside the presence of the jury, defense counsel stated: "We have a report from Dr. Gold, who is a neurologist, and he examined CAT scans that were done. At his request, we supplied Dr. Kalechstein with this report. Counsel has a copy of it. We gave it to him a long time ago. And in the report, referring to page 3, under the term 'impression,' it defined three things. And it says, history of multiple episodes of head trauma, history of drug and alcohol abuse, and three, abnormal SPECT scan brain. So the answer to that question is that, yes, he is aware of that. And he would have to refer to this report that has been supplied to him."

Back in open court with the jury, the trial court asked Dr. Kalechstein if he had examined any CT scans or MRIs of defendant's brain. Dr. Kalechstein stated, "Although I'm an expert in brain functioning, my expertise does not permit me to actually read brain scans. So I can't look at the film itself and offer an interpretation of it. I am qualified to

utilize the information obtained by radiologists or neurologists who have conducted brain scans, and in fact, I did review the . . . results of a brain scan that was conducted by Dr. Michael Gold."

Defense counsel then questioned Dr. Kalechstein further:

"[DEFENSE COUNSEL:] Dr. Kalechstein, in the report that you reviewed from Dr. Gold, did Dr. Gold indicate that there were defects in the right . . . orbital frontal lobe, right anterior, lateral, prefrontal region, right temporal region and the right parietal region, as well as more global defects diffusely in the right frontal and parietal regions?

"[PROSECUTOR:] Objection. I can't cross-examine that off of that report, so that's hearsay.

"THE COURT: Sustained.

"[DEFENSE COUNSEL:] Did you form any opinions about the condition of Mr. Valenzuela's brain as a result of reading Dr. Gold's report?

"[DR. KALECHSTEIN:] Yes.

"[DEFENSE COUNSEL:] And what was your opinion?

"[DR. KALECHSTEIN:] Dr. Gold's report provided demonstrative evidence to show how Mr. Valenzuela's brain was affected by the conditions that had insulted it.

"[DEFENSE COUNSEL:] Meaning head trauma injury?

"[PROSECUTOR:] Objection. Calls for hearsay.

"THE COURT: Sustained.

"[DEFENSE COUNSEL:] Did that include alcohol and methamphetamine damage?

"[PROSECUTOR:] Your Honor, I'm going to object. I don't object to the witness making independent evaluation of the data he saw, but allowing him just to repeat another witness' —

"THE COURT: Sustained. Rephrase the question.

"[DEFENSE COUNSEL:] Did Dr. Gold's — after reading Dr. Gold's report, were any of your opinions supported? Did you feel more support for your opinions?

"[DR. KALECHSTEIN:] Dr. Gold's report provided information which was consistent with what I would have expected, given Mr. Valenzuela's addiction history.

"[DEFENSE COUNSEL:] And would the fact that a person who had used methamphetamine, alcohol and been sleep deprived, that that person, after he stopped taking the drugs, slept for 24 hours, would that be consistent with a person who had used drugs and alcohol?

"[DR. KALECHSTEIN:] Let me make sure I understood that. Somebody goes on a binge using alcohol and drugs, they stop using, and they sleep for 24 hours straight?

"[DEFENSE COUNSEL:] Yes.

"[DR. KALECHSTEIN:] Completely consistent."

Later during the trial, defense counsel asked for permission to recall Dr. Kalechstein. In response to the trial court's inquiry, defense counsel stated: "Let me clarify that, your Honor. We don't necessarily have to have Dr. Kalechstein recalled. There was certain testimony that Dr. Kalechstein gave that stated which insults to the brain Dr. Michael Gold found in his scans. The court allowed some of that testimony, but didn't allow what he had said those insults were, and he identified them and then [the prosecutor] objected. You sustained that objection. We would be satisfied if the court would reconsider that objection in light of section 804 of the Evidence Code, . . . We don't have to call . . . Dr. Kalechstein back for that because it's already in the record." The prosecutor argued that the court had properly permitted Dr. Kalechstein to testify that he relied on Dr. Gold's report in rendering his opinion and that Dr. Gold's report "was consistent with his evaluation of the defendant and provided demonstrative evidence of it," but had properly precluded Dr. Kalechstein from testifying about "the results of another witness' examination, which I can't cross-examine on."

When asked by the trial court to identify the evidence he was seeking to admit, defense counsel referenced the following question that he had asked Dr. Kalechstein: "In the report that you reviewed from Dr. Gold, did Dr. Gold indicate that there were defects in the right . . . orbital frontal lobe, right anterior, lateral prefrontal region, right temporal region and the right parietal region, as well as more global defects profusely in the right

frontal and parietal region?" Defense counsel noted that Dr. Kalechstein never answered the question because the court had sustained the prosecutor's objection. Defense counsel continued: "But if there's no question that that is in the report and we can show that to you, and if the court would accept a yes on that answer with that question, we would be satisfied." Following additional argument, the court stated its previous ruling would stand.

A trial court's decision to exclude expert testimony is reviewed for abuse of discretion. (*People v. McDowell* (2012) 54 Cal.4th 395, 425-426; *People v. Lindberg* (2008) 45 Cal.4th 1, 45.) A trial court does not abuse its discretion unless the court's "'decision is so irrational or arbitrary that no reasonable person could agree with it.'" (*McDowell*, *supra*, at p. 430, quoting *People v. Carmony* (2004) 33 Cal.4th 367, 377.)

"[A]lthough qualified experts may rely upon and testify to the sources on which they base their opinions, including hearsay of a type reasonably relied upon by professionals in their field [citation], they may not relate the out-of-court statement of another as independent proof of the facts asserted in the out-of-court statement [citation]. Nor may a court rely on hearsay as related by an expert as the basis for his or her opinion as independent proof of the facts asserted in the hearsay statement: '[A] witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into "independent proof" of any fact. [Citations.]' [Citations.]" (*People v. Baker* (2012) 204 Cal.App.4th 1234, 1246; accord, *People v. Bell* (2007) 40 Cal.4th 582, 608.)

In this case, the trial court properly precluded defense counsel from eliciting from Dr. Kalechstein the specific findings Dr. Gold made in his report. While Dr. Kalechstein could testify that his opinion was based in part on the opinions in Dr. Gold's report, Dr. Kalechstein could not testify about the hearsay contents of Dr. Gold's report. "Although it is appropriate for a physician to base his or her opinion in part upon the opinion of another physician [citations], it generally is not appropriate for the testifying expert to recount the details of the other physician's report or expression of opinion. [Citations.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 137-138.) The trial court did not

abuse its discretion by excluding Dr. Kalechstein's testimony about the details of Dr. Gold's report of the brain scan.

Moreover, "'[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' [Citation.]" (*People v. Dement* (2011) 53 Cal.4th 1, 52; *People v. Blacksher* (2011) 52 Cal.4th 769, 821; see *People v. Riccardi* (2012) 54 Cal.4th 758, 809 ["The routine and proper application of state evidentiary law does not impinge on a defendant's due process rights."]; *People v. Hovarter* (2008) 44 Cal.4th 983, 1010 ["The 'routine application of state evidentiary law does not implicate [a] defendant's constitutional rights.'"].) The trial court's ruling sustaining the People's hearsay objection to Dr. Kalechstein repeating Dr. Gold's findings and opinions "'did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense.' [Citations.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 473.) Defendant was able to present Dr. Kalechstein's opinion (and the fact that his opinion was based in part on Dr. Gold's report), and Dr. Kalechstein was able to tell the jury that Dr. Gold's report was consistent with his opinion and "provided demonstrative evidence" showing the condition of defendant's brain. If defendant wanted to present more of the details of Dr. Gold's report, nothing precluded defendant from calling Dr. Gold to give his opinion and relate his specific findings to the jury. The trial court did not deprive defendant of his constitutional right to mount a complete defense.

C. *Claims of Evidentiary Error*

Defendant claims that the trial court made four additional erroneous evidentiary rulings. First, he asserts that his statement to Robles, "I'm never going to forgive you," should have been admitted as a spontaneous utterance. Second, defendant asserts that the trial court should have admitted school records showing the disparity in intelligence between him and Robles. Third, he challenges the trial court's decision to allow Martinez to testify about methamphetamine intoxication even though he had never received any training on detecting methamphetamine intoxication or drug withdrawal.

Finally, defendant argues that the court erred in sustaining objections to hypothetical questions posed to Dr. Kalechstein, even though prosecutors routinely pose hypothetical questions to their expert witnesses "of the same stripe." As noted above, the trial court has broad discretion to admit or exclude evidence. (*People v. Clark* (2011) 52 Cal.4th 856, 932; *People v. Hartsch* (2010) 49 Cal.4th 472, 497.)

1. Spontaneous Declaration

Defendant claims that a key component of his defense "was that he was so strung out on alcohol and [meth]amphetamine, so sleep deprived, that he would never have done what he did without Robles' insistence." In an offer of proof to the court, defense counsel explained that the morning after the murders, after defendant had sobered up and was at home in bed, witnesses heard him tell Robles that "he would never forgive her for what she had done." The trial court sustained the prosecutor's hearsay objection to this statement because it lacked sufficient indicia of trustworthiness, was an ambiguous statement, and was made substantially after the crimes had been committed.

Defendant contends that his statement should have been admitted pursuant to the spontaneous declaration exception to the hearsay rule, even though defendant made the statement the day after the murders. (See Evid. Code, § 1240; *People v. Raley* (1992) 2 Cal.4th 870, 893 ["'[n]either lapse in time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance'"]; *People v. Gutierrez* (2000) 78 Cal.App.4th 170, 178, fn. 9 ["Although the length of time between the act observed and the declarant's statement is only a factor to be considered, it is 'an important factor because a spontaneous statement must be made under the immediate influence of the event so as to negate any probability of reflection or fabrication.'"]; *People v. Trimble* (1992) 5 Cal.App.4th 1225, 1235-1236 [two day "lapse of time between the described event and the statement, although a factor in determining spontaneity" under Evidence Code section 1240, was "not determinative"].)

We do not need to determine whether the statement qualifies as a spontaneous declaration under Evidence Code section 1240 because defendant did not offer the statement for the truth of the matter asserted and therefore the statement is not hearsay. Defendant offered the statement to Robles "I will never forgive you" not to prove that he actually never would forgive Robles, but to show that Robles was responsible for convincing defendant to commit the crimes. The court's erroneous exclusion of the statement, however, was unquestionably harmless given its ambiguity and the strength of the evidence establishing defendant's guilt, including his confessions. (See *People v. Homick* (2012) 55 Cal.4th 816, 872 [erroneous admission of hearsay statement "nonprejudicial in light of the strong evidence of defendant's guilt"]; *People v. Richardson*, *supra*, 43 Cal.4th at p. 1001 ["the erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a miscarriage of justice"]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103 [harmless error standard applies to erroneous exclusion of hearsay evidence].)

2. School Records

In an attempt to bolster his position that Robles led him to commit the crimes and "his defense of diminished actuality in terms of relative intelligence and how easily he would have been led," defendant sought to introduce into evidence his and Robles' school records. These records revealed that defendant was a D and F student when he dropped out of school in the tenth grade, while Robles graduated from high school and received an AA degree from a junior college. The People objected to this evidence on the grounds that it was not relevant and would be "confusing to a jury."

The trial court sustained the People's objection. The court found that the school records were incomplete and "so remote, more than 10 years prior to the situation that's covered here. And the defendant, in his statement, the jury knows that he dropped out of high school. The jury also knows that Shawna Robles graduated from junior college. So the disparity in the educational background is apparent."

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; see *People v. Garcia* (2008) 168 Cal.App.4th 261, 275.) "Evidence Code section 352 rulings '"will not be overturned on appeal in the absence of a clear abuse of . . . discretion, upon a showing that the trial court's decision was palpably arbitrary, capricious, or patently absurd, and resulted in injury sufficiently grave as to amount to a miscarriage of justice." [Citation.]' [Citation.]" (*People v. Nguyen* (2013) 212 Cal.App.4th 1311, 1331-1332.)

The trial court did not abuse its broad discretion here. The trial court noted that "the Monrovia School District doesn't appear to have very complete records" and that the "last record we have here is 8-6-87, which is a number of years prior to . . . the events that we're talking about here." Moreover, the probative value of the high school records was slight because there was already evidence in the trial of the disparity of the educational backgrounds of defendant and Robles. The trial court acted well within its discretion in excluding the school records of defendant and Robles.

3. Jailer's Testimony

As detailed above, Martinez was the jailer for the Monrovia Police Department who booked defendant following his arrest. Defendant objected to Martinez's observation that defendant was not under the influence of drugs or experiencing withdrawal symptoms when Martinez booked him, on the ground that Martinez was not qualified to make such an observation. Following an Evidence Code section 402 hearing, the trial court ruled: "I am going to overrule the objection because what we are talking about here is withdrawal symptoms, not the actual ingestion. Also, whether or not somebody is under the influence or in withdrawals is a key question that jailers always have to attend to. So this is part of normal booking procedure."

Before the jury, Martinez testified that, in response to inquiries on a screening form, he noted that defendant did not appear under the influence of alcohol or drugs and

that defendant did not exhibit any visible signs of withdrawal or mental disorder. Although Martinez admitted that he had no formal training in recognizing whether a person was on drugs, Martinez had seen inmates under the influence of drugs and inmates experiencing symptoms of withdrawal. Martinez had sufficient on-the-job training and experience to give this testimony. (See *People v. Williams* (1988) 44 Cal.3d 883, 915 [detective and jailor could give opinions that defendant was not "strung out" on drugs, and the "manifestation of drug intoxication and withdrawal are no less subtle than those of alcohol intoxication, and, unfortunately may be sufficiently common today that lay persons are capable of recognizing them"]; *People v. Mack* (1959) 169 Cal.App.2d 825, 830-831 [arresting officer "well qualified to express an opinion as to whether" minor to whom defendant had sold drugs "was under the influence of heroin"]; *People v. Moore* (1945) 70 Cal.App.2d 158, 165 [police officer who "had seen people under the influence of narcotics 'on numerous occasions'" was qualified "to express the opinion that [a witness] was, on the morning in question, under the influence of narcotics"]; see also *People v. Navarette* (2003) 30 Cal.4th 458, 493 ["Lay opinion regarding drug intoxication is admissible so long as the party eliciting the evidence establishes a foundation."].) Martinez also had a specific conversation with defendant about when he had last used drugs and whether he was experiencing any withdrawal symptoms. Again, defendant has failed to demonstrate that the trial court abused its discretion in overruling defendant's objection to Martinez's testimony.

4. Defense Hypothetical Questions

Defense counsel posed the following hypothetical question to Dr. Kalechstein:

"Let's say that we have a person who has been a long-time methamphetamine user and alcoholic, a long-time alcoholic, who has a period of time, week or 10 days, when they're using methamphetamine, drinking large quantities of alcohol and not sleeping, and that person is placed in a situation or places themselves in a situation where they commit a crime, and in the crime that they committed where they go through the window of a house and murder two people, and the murders are 40 stab wounds to one person and

113 stab wounds to another person. The first question is, is there anything about the – if they are using alcohol, methamphetamine and sleeplessness, is there anything about that combination of those three items that could affect their ability to form specific intent?"

The prosecutor objected to defense counsel asking the witness to give an opinion about specific intent in response to this hypothetical question, and the trial court sustained the objection. Defense counsel then asked: "Can you tell us what impact all those things would have on the person's ability to think through what they're doing?" The court overruled the prosecutor's objection on the same ground and rephrased the question as, "What impact does that have on a human being?" When Dr. Kalechstein began to restate the facts of the case from defense counsel's hypothetical, the trial court interrupted to limit the question and stated to defense counsel, "You can ask him concerning the impact of methamphetamine use combined with alcohol combined with sleep deprivation, what impact would that have on a human being. As it relates to the specifics of this case, I am going to sustain the objection." The court then precluded defense counsel from asking any further hypothetical questions that included the specific facts of this case, stating that the facts were for the jury to decide.[7]

Defendant contends that the trial court erred by preventing Dr. Kalechstein from answering these hypothetical questions. We disagree.

Under Evidence Code section 801, an expert may generally give opinion testimony on the basis of facts in a hypothetical question that asks the expert to assume

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[7] Defense counsel stated that he wanted to get to "the OCD part of this" "when somebody who is under these conditions" would engage in "a repeated act without thought[.]" The court stated: "Do you really think that's a good question, where you have a statement by the defendant saying that he stabbed Clark Shaum many times because, quote, the guy wouldn't die? [¶] . . . [¶] . . . What's the take-home message on that? [¶] . . . [¶] . . . I mean, do you really want to categorize multiple stab wounds as a compulsive action consistent with OCD? [¶] . . . [¶] . . . Seriously?" Defense counsel responded that there were "studies that have shown that a lot of violent crimes have been committed by people who are under the influence of methamphetamine, where they have done a lot of repetitive actions without thinking."

the truth of the facts in the question. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946.) Such a hypothetical question must be rooted in facts shown by the evidence. (*Ibid*.) "Expert opinion testimony is not inadmissible merely 'because it embraces the ultimate issue to be decided by the trier of fact.' (Evid. Code, § 805.) As the California Supreme Court explained, 'There is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case. "We think the true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved. . . . Oftentimes an opinion may be received on a simple ultimate issue, even when it is the sole one, as for example where the issue is the value of an article, or the sanity of a person; because it cannot be further simplified and cannot be fully tried without hearing opinions from those in better position to form them than the jury can be placed in."' [Citation.] [¶] Nonetheless, expert opinion testimony may not invade the province of the jury to decide a case. [Citations.] Thus, expert opinion testimony that merely expresses a general belief as to how the jury should decide the case is not permissible. [Citation.]." (*People v. Lowe* (2012) 211 Cal.App.4th 678, 684, petn. for review filed Jan. 11, 2013, S207940; see *People v. Humphrey* (1996) 13 Cal.4th 1073, 1099 ["the expert must not usurp the function of the jury"]; *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183 ["Expert opinions which invade the province of the jury are not excluded because they embrace an ultimate issue, but because they are not helpful (or perhaps too helpful)."].)

The hypothetical questions disallowed by the court in this case, which asked the expert to give an opinion about defendant's specific intent, included very specific factual details of the crime scene and the Shaums' murders, including a person going through the window of a house to murder two people by inflicting 40 and 113 stab wounds, respectively. The trial court acted well within its "large" discretion in sustaining the objection to some of the hypothetical questions.

D. *Claim of Instructional Error*

Defendant claims the trial court deprived him of due process by rejecting his request for a specific instruction on hallucinations. We disagree.

Defendant's defense was diminished actuality based on a mental disease caused by his use of methamphetamine, consumption of alcohol, and lack of sleep. As detailed above, defendant introduced evidence that in the days before he committed the crimes, he engaged in some bizarre behavior—looking out for ninjas, wearing four hats with the bills pointing in each direction to protect Monrovia, and riding his bicycle into the pool. Based on this evidence, defendant asked the court to give the jury the following instruction:

"A hallucination is a perception not based on objective reality. In other words, a person has a hallucination when that person believes that he is seeing or hearing or otherwise perceiving something that is not actually present or happening.

"You may consider evidence of hallucinations, when deciding whether the defendant acted with deliberation and premeditation.

"The People have the burden of proving beyond a reasonable doubt that the defendant acted with deliberation and premeditation.

"If the People have not met this burden, you may not find the defendant guilty of first degree murder based on the theory of premeditation and deliberation."

The trial court refused to give this instruction because defendant never claimed that he was hallucinating at the time he committed the crimes. We review de novo defendant's claim that this refusal constituted instructional error. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1215; *People v. Johnson* (2009) 180 Cal.App.4th 702, 707.)

A "'defendant has a constitutional right to have the jury determine every material issue presented by the evidence.'" (*People v. Cole*, *supra*, 33 Cal.4th at p. 1215.) "'In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case.' [Citation.] That duty extends to '"instructions on the defendant's theory of the case, including instructions 'as to defenses "'that the defendant

is relying on . . . , or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'"'"' [Citation.] But '"when a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, a defendant is not presenting a special defense invoking *sua sponte* instructional duties. While a court may well have a duty to give a 'pinpoint' instruction relating such evidence to the elements of the offense and to the jury's duty to acquit if the evidence produces a reasonable doubt, such 'pinpoint' instructions are not required to be given *sua sponte* and must be given only upon request."' [Citation.]" (*People v. Anderson* (2011) 51 Cal.4th 989, 996-997.) A trial court may refuse a defendant's request for a particular instruction if that instruction "'incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation].'" (*People v. Burney* (2009) 47 Cal.4th 203, 246.)

"Diminished actuality" is the defense of "actual failure to form a specific intent." (*People v. Mills* (2012) 55 Cal.4th 663, 671.) "To support a defense of 'diminished actuality,' a defendant presents evidence of voluntary intoxication or mental condition to show he 'actually' lacked the mental states required for the crime. [Citation.]" (*People v. Clark*, *supra*, 52 Cal.4th at p. 880, fn. 3.) Evidence of hallucinations is admissible to negate premeditation and deliberation, thereby reducing murder from first degree to second degree. (*People v. Padilla* (2002) 103 Cal.App.4th 675, 679-680.) "A hallucination is a perception with no objective reality." (*Id.* at p. 678.)

Although defense witnesses testified that defendant had engaged in some bizarre behavior in the days preceding the crimes, there was no evidence that defendant was hallucinating at the time he committed the crimes. When the police interviewed defendant on two separate occasions, defendant admitted killing the Shaums, described how he did it, and why he did it. Defendant never claimed that he was experiencing hallucinations when he killed the Shaums. In the absence of substantial evidence that defendant was hallucinating at the time he committed the crimes, the trial court acted well within its discretion in refusing to give defendant's proffered instruction on

hallucinations. (See *People v. Bivert* (2011) 52 Cal.4th 96, 120 [trial court may refuse an instruction offered by defendant if it is not supported by substantial evidence].)

E. *Effect of Mental Defect and Voluntary Intoxication*

Defendant contends that the People failed to prove the requisite elements of murder because the evidence of mental defect and voluntary intoxication established that he did not have an intent to commit the crimes. Defendant claims that "he did not actually intend to commit the crimes but did so due to a mental defect triggered by prior brain trauma, alcohol and methamphetamine intoxication, coupled with sleep deprivation and hallucinations." He maintains that the prosecutor failed to prove beyond a reasonable doubt that he actually deliberated, premeditated, and intended to commit the crimes. The jury found otherwise, and we conclude that substantial evidence supports the jury's finding.

When the defendant challenges the sufficiency of the evidence supporting a conviction, "we view the evidence in the light most favorable to the verdict and determine whether *any* rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653.) In so doing, we presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. (*People v. Clark, supra*, 52 Cal.4th at p. 943.) We do not, however, "reweigh the evidence nor reevaluate the credibility of witnesses." (*People v. Jennings* (2010) 50 Cal.4th 616, 638.) "If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Id*. at p. 639.)

Dr. Kalechstein testified at length regarding the negative effects that methamphetamine intoxication, alcohol intoxication, and sleep deprivation have on the brain's frontal lobe functions. He explained that the frontal lobe of the brain controls decisionmaking, regulation of mood, response inhibition, reasoning, and judgment. It is the area of the brain that enables an individual "to put the brakes" on his or her behavior.

Dr. Kalechstein testified that methamphetamine use and addiction, alcohol intoxication and alcoholism, and sleep deprivation are risk factors for frontal lobe impairment. Dr. Kalechstein stated that an individual suffering from such impairment is more likely to act without thinking or considering an alternative plan of action and to respond without considering the consequences of his or her actions.

Dr. Kalechstein testified, however, that a person with frontal lobe impairment can still engage in goal-directed behavior. He acknowledged that a decision to commit a crime to obtain money is a goal-directed activity and that a decision to use gloves before committing the crime to avoid detection is evidence of thinking before acting. Similarly, Dr. Kalechstein admitted that bringing bolt cutters demonstrates pre-offense planning in an effort to gain access to a structure. Dr. Kalechstein also noted that a person who commits a crime and who tries to avoid detection is acting rationally to advance his self-interest.

Defendant and Robles burglarized the Shaums' home because Robles needed money to pay her storage fees and avoid the sale of her belongings, and they knew the Shaums had a safe. Defendant and Robles brought bolt cutters to use in committing the crimes, and defendant used gloves to avoid identification of his fingerprints. In addition, defendant admitted to police that he killed Mrs. Shaum after she woke up because she would have identified him, and he did not want to go back to prison. Defendant also admitted that he stabbed Mr. Shaum "a lot of times" because he "wouldn't die." Because both Mr. and Mrs. Shaum knew defendant, the jury could reasonably infer that defendant killed Mr. Shaum for the same reason he killed Mrs. Shaum, i.e., to avoid identification and arrest.

The evidence further established that defendant blamed Mr. Shaum for his father's death. On two occasions, defendant told Mr. Shaum that Felipe Sr. would still be alive if Mr. Shaum had given him a ride, and defendant threatened to kill Mr. Shaum. In addition, the day before the murders defendant asked Mr. Shaum for money, as he had in the past. Mr. Shaum refused to lend defendant any money, and Mrs. Shaum told him that they were not going to give him any more money.

These facts, viewed in the light most favorable to the verdict, constitute substantial evidence supporting the jury's decision to reject defendant's defense of diminished actuality and the jury's determination that defendant intended to commit the crimes. (*People v. Gonzalez, supra*, 54 Cal.4th at p. 653) We reject defendant's challenge to the sufficiency of the evidence.

F. *Cumulative Error*

Defendant contends that reversal is warranted because of the cumulative prejudice generated by multiple errors. We have rejected all but one of defendant's claims of error, and this single evidentiary error was harmless. "Because that is the only potential error identified, defendant cannot show cumulative error." (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1357, petn. for cert. filed Dec. 20, 2012; accord, *People v. Brents* (2012) 53 Cal.4th 599, 619 ["Because the trial court did not make multiple errors, defendant's claim of cumulative prejudice necessarily fails."].)

G. *Parole Revocation Fine*

Defendant contends that, should this court affirm the judgment of conviction, the abstract of judgment must be amended by striking the $10,000 parole revocation fine imposed pursuant to Penal Code section 1202.45. The People concede that defendant is correct.

"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." (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819; accord, *People v. DeFrance* (2008) 167 Cal.App.4th 486, 505; *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.) This is true even if the defendant is convicted of other offenses for which parole may be granted. (*Jenkins*, *supra*, at p. 819; *Oganesyan*, *supra*, at pp. 1183-1186.)

The trial court was well aware of this limitation. At the sentencing hearing held on September 14, 2010, the court stated it would "not impose the parole revocation fund fine as the defendant is ineligible for parole." Consistent with the trial court's oral

pronouncement of judgment, the September 14 minute order states: "The court imposes no parole revocation restitution fund fine pursuant to section 1202.45 Penal Code due to the fact that he has been sentenced to two consecutive sentences of life in prison without the possibility of parole."

The inclusion of a parole revocation fine in the abstract of judgment must have been a clerical error. As California Supreme Court observed in *People v. Jones* (2012) 54 Cal.4th 1, "When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties." (*Id*. at p. 89.) The abstract of judgment therefore must be corrected to conform to the trial court's oral pronouncement of judgment by striking the parole revocation fine. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1183-1184 [judgment modified to strike parole revocation fine improperly assessed].)

H. *Restitution Order*

Finally, defendant contends the abstract of judgment also should be amended to reflect joint and several liability for the restitution orders. We do not agree.

At the beginning of the sentencing hearing, the trial court asked the prosecutor: "[O]n behalf of the People, you have filed a restitution request?" The prosecutor said that there were two requests, that defense counsel had reviewed them, "and I understand has no objection. One is for the burial expenses, the same order that was entered against Miss Robles, and it's in the amount of $8576, and I've been asked to request that the minute order reflect that that be paid to the Victim Compensation, Government Claims Board." The court noted that "[w]ill be so ordered."

The prosecutor then continued: "And the other one is personal expenses that Susan Fisher expended related to the loss of her parents in the amount of $957.01 [for clean up expenses], payable to Susan Fisher." In response to the trial court's inquiry, defense counsel had no objection. The court subsequently signed both direct victim

restitution orders submitted by the People, neither of which is contained in the appellate record.[8]

It is true, as defendant asserts, that the trial court has the authority to order two defendants to pay victim restitution jointly and severally. (See *People v. Neely* (2009) 176 Cal.App.4th 787, 800 [trial court has the authority to make multiple codefendants' obligation to pay restitution joint and several]; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535 [trial court "had the authority to order direct victim restitution paid by both defendants jointly and severally"]; *People v. Madrana* (1997) 55 Cal.App.4th 1044, 1046-1047 & fn. 2, 1049-1051 [court ordered multiple defendants who entered negotiated pleas each to pay victim restitution "jointly and severally"].) In this case, however, defense counsel expressly stated that he had no objection to the victim restitution orders signed by the trial court. Because defendant does not contend that the abstract of judgment fails to properly reflect the agreed upon restitution orders, and because the restitution orders are not in the record on appeal, we have no basis for modifying the abstract of judgment as requested by defendant. Defendant may seek modification in the trial court.

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8 Consistent with the discussion memorialized in the reporter's transcript, the court's minute order states: "Defendant is to make restitution to the victim pursuant to Penal Code section 1202.4[, subd.] (f), in the amounts and victims as follows: $8,576.00 to the Victim Compensation and Government Claims Board for funeral expenses. $957.01 to victims' daughter, Susan Fisher, for cleaning of the victims' residence, and moving fees for the victims' property."

The trial court also imposed a restitution fine of $10,000 pursuant to section 1202.4, subdivision (b).

DISPOSITION

The judgment is affirmed. The superior court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment striking the parole revocation fine imposed pursuant to section 1202.45.

SEGAL, J.*

We concur:

PERLUSS, P. J.

WOODS, J.

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