Filed 3/1/12 P. v. Schuck CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SEAN SCHUCK, Defendant and Appellant.	B223588 (Los Angeles County Super. Ct. No. NA078839)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark Kim, Judge. Reversed in part, affirmed in part, and remanded.

John A. Colucci, 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 Deputy Attorney General, Lawrence M. Daniels and Joseph P. Lee, Deputy Attorneys General for Plaintiff and Respondent.

Defendant and appellant Sean Schuck appeals from his conviction of murder, robbery, and burglary. Defendant contends that his constitutional right to confrontation was violated by the testimony of a medical examiner who did not perform the autopsy and by certain hearsay statements made by his separately tried codefendant. Defendant also challenges six separate evidentiary rulings, as well as the giving or failing to give several instructions. Defendant contends that the judgment was unsupported by substantial evidence and that cumulative error requires reversal. Finally, defendant asserts sentencing errors. With the exception of the sentencing errors, we either reject defendant's contentions on the merits or find any assumed errors to be harmless. Due to sentencing errors, we vacate the sentence on count 2 and remand for further proceedings with regard to that count. In all other respects, we affirm the judgment.

BACKGROUND

1. Procedural background

Defendant was charged in count 1 of the information with the first degree murder of Dean Modica (Modica), in violation of Penal Code section 187, subdivision (a).[1] In count 2, defendant was charged with first degree residential robbery in violation of section 211, and in count 3, defendant was charged with first degree residential burglary in violation of section 459.

The information specially alleged as to count 1 that defendant personally used a deadly and dangerous weapon, a knife, in the commission of the offense, within the meaning of section 12022, subdivision (b)(1); that defendant committed the murder while engaged in the commission of residential burglary and residential robbery, a special circumstance within the meaning of section 190.2, subdivision (a)(17).

As to all three counts, the information alleged that defendant had suffered two prior serious or violent felony convictions within the meaning of the "Three Strikes"

---

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

law,[2] three prior convictions within the meaning of section 667.5, subdivision (b) and two felony convictions were alleged pursuant to section 667.5, subdivision (a)(1), and section 1203, subdivision (e)(4).

A jury found defendant guilty of first degree murder, and found true the robbery and burglary special circumstance allegations, but found the deadly weapon allegation not true. The jury also found defendant guilty of first degree robbery and first degree residential burglary. Defendant waived his right to a jury trial on the allegations of prior convictions, and they were tried to the court. The trial court found true two of the prior convictions alleged pursuant to the Three Strikes law and section 667, subdivision (a)(1), as well as two of the three prior convictions alleged pursuant to section 667.5, subdivision (b).

On March 4, 2010, the trial court sentenced defendant to a total term of life without the possibility of parole on the murder count, plus a consecutive term of 37 years to life on count 2. The trial court stayed the term as to count 3. Defendant filed a timely notice of appeal.

2. The murder

David Pickett (Pickett) testified that on May 19, 2008, Kevin Bergman (Bergman) said that he wanted to "tax" Modica. Pickett explained that to tax meant to rob someone with the belief that the victim owed the robber something. Pickett understood that Bergman had some "preexisting beef" with Modica. Bergman was upset and asked Pickett to come along for backup, which Pickett understood meant that he would provide additional force or intimidation to take something from Modica. Pickett agreed to go because he thought he could obtain marijuana there.

Pickett and a friend met Bergman at Modica's home at approximately 4:00 p.m. Bergman's girlfriend, Celeste Cravey (Cravey) testified that she drove Bergman there in her car at his request, and that she was in the habit of acceding to Bergman's demands without question, because otherwise he would become angry and break her property.

---

[2] See section 667, subdivisions (b) through (i), and section 1170.12, subdivisions (a) through (d).

Pickett and Bergman met with Modica in his garage office while the others waited outside. Bergman told Modica he was broke and asked him to "help a brother out" by giving Bergman something to sell. Modica agreed to give marijuana to Bergman to sell. He then took out a bag containing marijuana, Hydrocodone and other pills, set them on the desk, and gave Bergman the marijuana. Pickett and Modica shook hands, they left, and Bergman gave some of the marijuana to Pickett. Pickett testified that in retrospect, he realized that they were there to "case" Modica's home, but he did not know it at the time.

Cravey and Bergman later picked up defendant and Bergman's friend Trevor Cooper (Cooper),[3] and Cravey drove the three men to Modica's house. Bergman told Cooper to wait 5 or 10 minutes and then come inside if he had not come out in that time. Cooper and Cravey waited in the car while Bergman and defendant spoke to Modica in the driveway and then watched the men enter through the front door of the house. Cooper testified that he could not hear what the men said, but did not see signs of animosity, hostility, or argument.

After a few minutes Cooper approached the open front door and heard shuffling noises, like people wrestling. He testified that he entered and saw Bergman face to face with Modica, whose back was against the wall in a far corner of the living room. Modica was struggling against Bergman, who had him pinned against the wall with his hands. Defendant then entered from the kitchen, threw a telescope in Cooper's direction as he ran by him, came up behind Bergman, lunged over Bergman's back toward Modica, and twice made a stabbing motion with his right arm and shoulder. Cooper denied that he saw a knife, but told the police he may have seen a glimmer of something shiny.[4] Cooper ran back to the car, jumped in and honked the horn.

---

[3] Cooper regularly socialized with Cravey and Bergman, and knew them well. They drank and took drugs together -- mostly marijuana and methamphetamine. Defendant, whom Cooper and Cravey did not know very well, was not with them on such occasions.

[4] Cooper acknowledged that he did not want to be a "snitch" because he was afraid of what could happen to him in prison.

Cravey testified that when Cooper came out of the house he screamed for her to honk the horn and said, "Dude stabbed him." Cravey testified that she assumed that Cooper must have been referring to defendant, because instead of calling Bergman "dude," he would have used Bergman's first name. Bergman then emerged on a motorcycle through Modica's back gate, held open by defendant. After Bergman gestured Cravey to follow him she complied and drove defendant and Cooper to meet Bergman nearby.

Modica's next door neighbor, Deborah Heniger (Heniger), testified that she heard a loud commotion coming from Modica's backyard shortly after 5:00 p.m., went outside through her front door and saw Bergman backing out of Modica's driveway on a motorcycle, followed on foot by another man. Heniger described the man on foot as white, with a shaved head and no facial hair, shirtless with a T-shirt in his pocket, wearing cargo shorts, and large tennis shoes. The night before the murder, Heniger was awakened by an argument between Bergman and Modica.

3. Defendant and Bergman's post-crime activities

After leaving Modica's residence Cravey left Bergman where they had met, not far from the crime scene, and went with Cooper and defendant to a Unocal gas station in Lakewood. On the way to the gas station Cooper gave Cravey a pair of brass knuckles to throw out the window. The gas station's surveillance video showed defendant wearing khaki cargo shorts, white shirt, white athletic shoes, and what appeared to be a baseball cap. PayPal records showed that Modica's debit card was used there at 5:45 p.m. Approximately one hour later, Cooper and a friend went to an Exxon Mobil station in Lakewood, where defendant purchased gasoline for them. PayPal records show that Modica's credit card was used there at 6:51 p.m.[5] A video of that transaction was also shown to the jury.

---

[5] A PayPal fraud investigator testified that Modica's card was declined in numerous transactions later that evening in Lakewood.

In the meantime, Cravey, upset and knowing something bad had happened, asked Bergman, "Did you stab Dean?" He replied, "I didn't have the knife. I had the gun." Bergman also denied killing Modica.

Later, when Bergman retrieved the motorcycle from where he had hidden it in Cooper's garage, defendant was found there asleep on a couch. Bergman then instructed Cravey to follow him to Cerritos in her car. Cravey followed Bergman until he left the freeway, continuing on to a Best Western hotel in Los Alamitos. She stayed there for about 30 minutes before calling her ex-husband, Tim Adle (Adle) to pick her up and take her home.

Cravey thought Bergman would not go to her home, but when Cravey arrived, Bergman was there, standing outside with Timothy Doby (Doby). After some time at her residence, Bergman, Cravey, Cooper, and Cooper's girlfriend, Andrea, went to Cravey's room at the Best Western, where they remained until just before dawn. Then Cravey and Bergman went to his father's home in Downey or Paramount. She left him on the pretext that she was going to report her car stolen, as Bergman and Cooper had earlier directed her. Instead, Cravey did not report her car stolen, but went back to the hotel, parked her car there, and without telling Bergman where she was, went to stay with a friend.

Over the next few days (May 20, 21 and 22), Cravey received many text messages from Bergman. Some of the text messages were affectionate such as, "I love you, please call me. How can you be like this?" In others he called her a liar, accused her of speaking to the police, and suggested that he knew where she was staying. Cravey felt threatened by the messages. On May 20, 2008, Cravey returned to the hotel for her car and found the tires slashed. She soon received the following text message from Bergman: "Bet you think I popped your tire." The next day, another text message read, "Don't thank me yet, I'm not done. I saved the best for last." Cravey viewed this as a threat because of the damage to her car and the message about the tires.

Adrienne Kennedy (Kennedy), Bergman's former girlfriend, testified that she had gone with defendant and Bergman in her car to the Best Western on May 21, 2008. Kennedy went into the hotel office and confirmed that Cravey had checked out. The

three then went to a nearby gas station where defendant purchased gasoline which he did not add to her car. They left and returned to the area near the Best Western. Bergman parked behind a wall next to the hotel grounds, while defendant went to the parking area where Cravey's car was still parked. When defendant returned to her car Kennedy saw smoke billowing from the parking area. The jury was shown videos which captured some of the activity at the hotel and the gas station. Kennedy identified Bergman and defendant in the videos.

Doby testified that on the evening of May 19, 2008, he was told that the brother of someone who had died had come from out of state to liquidate his deceased brother's property and wanted to sell a Harley Davidson motorcycle for $450. Knowing the motorcycle must be worth $10,000 or more Doby purchased it from Bergman while Bergman was in the company of two other men. When Doby learned the next day that a man had been killed and his black Harley Davidson motorcycle had been taken, he abandoned the motorcycle at a Long Beach police substation. Doby could not identify the two men with Bergman, but acknowledged that he had previously identified a photograph of defendant as the "scary looking dude" with Bergman. Doby thought that defendant looked different at trial.[6]

4. The crime scene

Long Beach Police Detective Bryan McMahon testified to finding Modica's body on the living room floor, identified photographs of the crime scene and explained the significance of the blood evidence. There was blood in Modica's living room and kitchen, especially on the refrigerator, where the blood ran down the door. The blood pattern on the refrigerator indicated that the blood was pumped out while the victim was alive and fighting. There was blood on the insides of Modica's pockets, which had been pulled out. There was blood on a bedroom pillow and on the telephone.

A significant amount of blood was found on the door from the kitchen to a bedroom, and a hole which had been punched in that door had a hair stuck to the edge of

---

6 Detective McMahon testified that since his arrest, defendant had gained weight, shaved his head, grown a goatee, and had obtained two new tattoos on his face.

it. Bloody items found about the house included a live Winchester nine-millimeter bullet in the bedroom, which appeared to have been ransacked, with drawers removed and clothing dumped everywhere. Other photographs showed a significant amount of blood on the rear door leading to the driveway, as well as in the driveway, garage, the laundry area, and on the postal boxes Modica used for his Bonsai shipping business. McMahon concluded from the blood evidence and the broken door that a struggle occurred both inside and outside of the house.

5. The autopsy

Dr. Vadims Poukens testified that he was a deputy medical examiner and board certified physician in pathology and forensic pathology, with a completed fellowship in forensic pathology. Prior to his testimony he had performed over 2,000 autopsies for the Los Angeles County Department of Coroner. Dr. Poukens gave his opinions and observations based upon his review of the autopsy report and photographs relating to Modica.

In the photographs, Dr. Poukens observed injuries to the body that appeared to be scrapes, two stab wounds, and several cuts. He observed defensive wound scrapes on Modica's right hand and right arm, as well as on the right lower leg, as though caused by an attempt to use his legs to block an attack while lying down. Dr. Poukens also observed two stab wounds, one on either side of the back, a superficial slash on the back, and several cuts and multiple scrapes on the right and left shoulder. Both stab wounds went through the ribs and into the right and left chest cavities, penetrating the lung and causing internal bleeding that would have been fatal.

The report included a toxicology screen which was positive for marijuana and methamphetamine. In Dr. Poukens's opinion, the amounts found would not have contributed to Modica's death.

6. Jailhouse statements and defendant's arrest

Detective McMahon arrested defendant on May 25, 2008, at a motel in Riverside. Prior to the arrest Detective McMahon telephoned the motel room and told defendant he wanted to talk to him about something that had happened in Long Beach; defendant

replied that they should just shoot him and get it over with. Defendant came out after 5 or 10 minutes and was taken into custody.

On a recording made from a monitored jail telephone conversation after defendant's arrest, Detective McMahon identified Pickett's voice, speaking to an unknown female. Pickett said: "He went back with Kev-Dog to finish what Kev-Dog and I started." In his testimony given before the recording was played for the jury, Pickett confirmed that Bergman told Pickett that Bergman had gone to finish what he had started. Pickett did not construe the statement as an intent to collect for drugs, but rather to steal more of Modica's property.

Pickett also had a conversation with defendant in jail. They discussed Modica's surveillance system and speculated about whether there was tape in the video recorder.

In another recording played for the jury, defendant is heard on the telephone telling someone that he wanted to go where his father was. Detective McMahon testified that defendant's father was incarcerated at Patton State Hospital.

7. Defense evidence

Defendant did not testify. Detective Patrick O'Dowd testified that he interviewed Cravey who at first said she thought it was Bergman who had burned her car, but could not remember much. Cravey said that she had been drinking that day however, her memory improved as time passed.

DISCUSSION

I. No *Crawford/Melendez-Diaz* error

Defendant contends that the testimony of Dr. Poukens violated the confrontation clause of the Sixth Amendment of the United States Constitution, under the reasoning of *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527], and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), as well as the recently decided *Bullcoming v. New Mexico* (2011) __ U.S.__ [131 S.Ct. 2705] (*Bullcoming*). A failure to object on this ground forfeits this claim on appeal. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 290 (*D'Arcy*).) Defendant acknowledges that he did not raise the issue in the trial court, but contends that he has not forfeited it on appeal because any objection would have been

futile, as the trial court would have overruled the objection in light of *People v. Geier* (2007) 41 Cal.4th 555. Regardless, we find no merit to defendant's contention.

Defendant argues that the trial court should not have permitted Dr. Poukens to testify about matters in the autopsy report because defendant had not been afforded an opportunity to cross-examine the medical examiner who conducted the autopsy and prepared the report. Defendant also argues that Dr. Poukens should not have been permitted to give his opinion regarding the cause of death or that certain wounds were defensive in character.

Dr. Poukens gave expert opinions based upon the contents of an autopsy report that was not admitted into evidence, and he made expert observations from photographs that were admitted into evidence without objection by defendant. Nothing in any of the cited Supreme Court cases extends the confrontation clause to independent expert opinions based upon hearsay materials. (See generally, Evid. Code, §§ 801-805.)

Defendant suggests that in *Bullcoming*, the Supreme Court rejected an effort to make an expert's testimony "admissible under the rubric of expert opinion." We disagree. In *Bullcoming*, although the witness qualified as an expert, he did not give an independent opinion, but instead certified the facts contained in another analyst's report. (*Bullcoming*, *supra*, 131 S.Ct. at pp. 2715-2716.) As Justice Sotomayor noted in her concurring opinion in *Bullcoming*, the majority opinion does not preclude the testimony of an expert witness who gives an independent opinion based upon hearsay forensic reports not admitted into evidence. (*Id*. at p. 2705 (conc. opn. of Sotomayor, J.).)[7]

---

[7] Numerous cases raising the issue of whether the results of a forensic report by an expert who did not conduct the testing violate the right to confrontation are now pending before the California Supreme Court. (*People v. Benitez* (2010) 182 Cal.App.4th 194, review granted May 12, 2010, S181137; *People v. Bowman* (2010) 182 Cal.App.4th 1616, 1618, review granted June 9, 2010, S182172; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted Dec. 2, 2009, S177046; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886; *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213.)

We conclude that the confrontation clause had no application to the testimony of Dr. Poukens. Moreover, we agree with respondent that any error in this regard would be harmless beyond a reasonable doubt under the test of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). Cooper's observations, the amount of blood in many rooms of the house, and the photographs of stab wounds left no doubt that Modica was stabbed to death. Dr. Poukens's opinion that some of the scrapes were defensive was unnecessary to establish that Modica was attacked. Regardless of whether any wounds could be characterized as defensive, it is apparent that Modica was pursued through several rooms and wounded more than once before reaching the living room where Cooper saw defendant holding him against the wall while defendant attacked him. Having reviewed the entire record, we conclude that the alleged error "did not contribute to the verdict obtained." (*Chapman*, at p. 24.)

II. Extrajudicial statements

A. Aranda/Bruton/Crawford

Defendant challenges the admission certain testimony by Pickett and Cravey, a portion of a jailhouse telephone conversation, and Bergman's text messages to Cravey. Defendant contends that the admission of such evidence violated the *Aranda*/*Bruton* rule, resulting in a violation of his Sixth Amendment right to confrontation and a denial of due process. (See *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*); *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*).) As respondent notes, the *Aranda*/*Bruton* rule applies only to statements of jointly tried codefendants. (*People v. Brown* (2003) 31 Cal.4th 518, 537.) It has no application here, as codefendant Bergman was separately tried.[8]

Defendant also contends that the admission of the evidence violated his confrontation rights under *Crawford*. As defendant did not object on this ground in the trial court, he has not preserved the issue for appeal. (*D'Arcy*, *supra*, 48 Cal.4th at p. 290.) Defendant asks that we nevertheless review the issue in order to forestall a claim of ineffective assistance of counsel. In the alternative, he contends that we consider whether

---

8 Bergman's first degree murder conviction was affirmed by this court in *People v. Bergman* (Feb. 23, 2011, B219309 [nonpub. opn.].)

he received ineffective assistance of counsel. Although defendant states that counsel could have had no tactical reason to fail to raise a *Crawford* issue, his argument goes no further. A defendant claiming ineffective assistance must show not only that counsel's assistance was deficient but also that it resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-694.) As defendant has made no effort to show either element, we reject his claim of ineffective assistance of counsel. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

In any event, were we to reach the *Crawford* claim, we would find it meritless, as defendant has conceded that the statements cited as erroneously admitted were nontestimonial. The confrontation clause applies only to testimonial statements. (*Davis v. Washington* (2006) 547 U.S. 813, 823-826; *People v. Loy* (2011) 52 Cal.4th 46, 66.)

B. Pickett's testimony regarding Bergman's intentions

1. Testimony admitted without objection

Defendant contends that hearsay and speculative testimony was erroneously admitted over his objection on several occasions during the trial. We observe that defendant's claim that he objected to all of the testimony challenged here is inaccurate. We found no objection to the challenged testimony of Pickett that Bergman said that they went back to finish what they started, or that Bergman had a "preexisting beef" with Modica, wanted "to tax" Modica, or wanted "'backup' to take whatever Bergman wanted."[9] Without a specific and timely objection, defendant has forfeited his challenge to the admission of such evidence. (Evid. Code, § 353; see *People v. Partida* (2005) 37 Cal.4th 428, 433-436.)[10]

---

[9] Defendant refers to pages 732 to 735 of the trial transcript for the last statement. Pickett did not make the statement quite as defendant describes it, but at page 735, he answered, "Right," to the prosecutor's question whether "for you, that backup meant in order to go in and have sufficient force or intimidation to get what he wanted?" There was no objection.

[10] As respondent notes, defendant made a motion in limine objecting to all of Pickett's testimony based on Evidence Code section 352. Defendant does not assign error to the trial court's denial of that motion.

2. Testimony admitted over objection

Defendant objected to the remainder of Pickett's testimony challenged here on the grounds of hearsay or speculation. Defendant refers to testimony that: "[Bergman] felt he was owed something"; Bergman told Modica that he was broke and asked whether he had anything he could sell; Bergman "felt he was going to take something from this guy and he needed help, I guess"; the purpose of the second visit was to take what was not taken on the first visit; and Pickett knew "in retrospect" that they were "casing the place."

Defendant states, without argument or citation to authority, and without individual discussion of each item of testimony, that all of Bergman's statements were hearsay with no exceptions. "Hearsay . . . is evidence of an out-of-court statement offered by its proponent to prove what it states. (Evid. Code, § 1200, subd. (a).)" (*People v. Alvarez* (1996) 14 Cal.4th 155, 185.) Of the challenged testimony, the only out-of-court statement was Bergman's that he was broke and wanted to sell drugs on behalf of Modica. However, that statement is not hearsay under the definition of Evidence Code section 1200, as the prosecution did not offer it for its truth. Rather it was offered to show the jury that the statement was made in order to prompt Modica to reveal his inventory. This is not hearsay. (See Evid. Code, § 1250, subd. (a).)

Defendant also states without further argument that all the conclusions drawn by Pickett about Bergman's intentions were speculative. Defendant's true contention, however, does not appear to be related to hearsay or speculative testimony at all, since he complains of the "conclusions" drawn by Pickett about Bergman's intentions. When a witness draws conclusions based upon his perception of the events, he is giving an opinion. (See 1 Witkin, Cal. Evidence (4th ed. 2000) Opinion, § 4, p. 531, citing *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 7.) Lay opinions are admissible in the trial court's discretion when they are helpful to a clear understanding of the witness's testimony. (Evid. Code, § 800, subd. (b); see *People v. Hinton* (2006) 37 Cal.4th 839, 889 [difficulty in putting observed interactions into words justified opinion that defendant appeared to be directing operation].) An abuse of discretion is not presumed, but must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Defendant did not object to Pickett's conclusions as improper opinion, and defendant's terse, conclusory argument falls short of demonstrating an abuse of the trial court's discretion in admitting such testimony. In fact, other than a thorough discussion on the *Aranda*/*Bruton* and *Crawford* rules, defendant's contentions are supported by no legal argument or citation to relevant authority.[11] We decline to address issues that are unsupported by argument or citation to relevant authority. (See *People v. Hardy* (1992) 2 Cal.4th 86, 150.)

C. Jailhouse telephone conversation

Defendant contends that the trial court erred in admitting Pickett's recorded telephone conversation in which he said, "He went back with Kev-Dog to finish what Kev-Dog and I started." Although defendant states that the trial court admitted the conversation as Pickett's prior inconsistent statement, he does not argue that the court's ruling was error. Instead, defendant states: "The [trial] court's ruling begs the question of whether the initial inconsistent statement should ever have been admitted." Defendant refers to section III.D.a.1 of his opening brief to show that the prior inconsistent statement should not have been admitted in the first place. Section III.D.a.1 does not exist. In his reply brief, defendant refers to section II.C.1 of his reply brief, in which he does not discuss the jailhouse telephone conversation or the court's ruling that it was admissible as a prior inconsistent statement.

We assume defendant means to incorporate his arguments regarding Pickett's testimony in which Pickett confirmed, albeit equivocally, that the jailhouse recording essentially contained a statement that Bergman went back to finish what he and Pickett had started. When the prosecutor asked whether the phrase, "they went back to finish

---

11 Defendant submitted a four-sentence argument: the first sentence stated that there was no foundation for Pickett's conclusion; the second sentence concluded that his objections based upon speculation should have been sustained; the third sentence consists of defendant's bare conclusion that the evidence violated the hearsay rule and there were no exceptions; the fourth sentence states that because Bergman was a severed codefendant, the admission of his hearsay statements violated defendant's rights to confrontation and cross-examination under the *Aranda*/*Bruton* rule, which we previously rejected.

what we started," was used in the recorded telephone conversation, Pickett denied he had heard the recording but replied, "I'm saying they could have been, I mean, I guess."

Respondent argues that Pickett's equivocation provided a reasonable basis to find that Pickett was evasive, justifying the admission of the recording as a prior inconsistent statement. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.) Regardless, the recorded statement was merely cumulative of properly admitted evidence, as defendant did not object to the earlier testimony regarding the recorded statement.[12] Defendant's later objection did not preserve his challenge to the testimony admitted earlier without objection. (See *People v. Farnam* (2002) 28 Cal.4th 107, 153.)

D. Cravey's testimony

1. Bergman's partially exculpatory statements

Defendant contends that the court erred in admitting Bergman's statement in response to Cravey's question, "Did you stab Dean?" Defendant's hearsay objection was overruled, and Cravey testified that Bergman replied, "I didn't have the knife. I had the gun." Defendant argues that Bergman's response was not admissible under Evidence Code section 1230 as a declaration against penal interest because it shifted the blame for the stabbing onto defendant. The statement was "'part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) . . . .' [Citations.]" (*People v. Duarte* (2000) 24 Cal.4th 603, 612.) Such a statement is not admissible as a declaration against penal interest. (*Ibid*.)

However, any error in admitting Bergman's statement was harmless. We apply the harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*People v. Loy*, *supra*, 52 Cal.4th at p. 66.) Under *Watson*, error is harmless unless defendant establishes a reasonable probability that he would have achieved a more favorable result absent the error. (*Watson*, *supra*, at pp. 836-837.) Defendant has not met

---

12 At the time of the earlier testimony, defendant objected to the question following Bergman's statement, which called for Pickett's explanation of Bergman's words and Pickett's reply, "Kevin felt he was owed something."

his burden.[13] As respondent observes, the jury did not find true the allegation that defendant personally used a knife in committing the crime and thus did not suffer additional punishment under section 12022, subdivision (b)(1). Respondent also points out that even without evidence that defendant wielded the knife the evidence established that defendant participated in the crime. Indeed, the evidence was overwhelming that either Bergman or defendant stabbed Modica to death, and that they each intentionally encouraged or facilitated the crime as an aider and abettor. (See *People v. Beeman* (1984) 35 Cal.3d 547, 560-561; § 31.) Cooper testified that he observed part of the struggle during which Bergman held Modica against the wall and defendant made stabbing motions toward Modica with something shiny in his hand, prompting him to run out of the house yelling, "Dude stabbed him."

Defendant counters that the error was not harmless because the evidence may have led some of the jurors to believe that he was a direct perpetrator, rather than an aider and abettor. However, defendant acknowledges that the jurors did not have to agree unanimously as to whether he was a direct perpetrator or an aider and abettor to find him guilty of the crime (see *People v. Beardslee* (1991) 53 Cal.3d 68, 93) and he fails to explain how the result might have been different had the jurors not unanimously agreed on this point. In fact, the result would have been no different. Defendant would still have been equally culpable for the crime. (See *People v. Canizalez* (2011) 197 Cal.App.4th 832, 849-851.) Defendant has thus failed to establish a reasonable probability that excluding Bergman's responses would have produced a more favorable result. (*Watson*, *supra*, 46 Cal.2d at pp. 836-837.)

---

13 Defendant makes no argument of prejudice, merely stating that respondent cannot show beyond a reasonable doubt that the error was harmless, under the test of *Chapman*, applicable to federal constitutional error, which we previously rejected.

2. Text messages

Defendant contends that the text messages Bergman sent to Cravey after the murder were inadmissible hearsay. Defendant also contends that the evidence was inadmissible because Bergman was not available and the evidence was prejudicial.[14]

The messages consisted of insults, demands to know Cravey's location, declarations of love, as well as suggestions that Bergman knew where Cravey was, that she had spoken to the police, and that she suspected him of causing her flat tire. On the day Cravey's car was set on fire, Bergman texted, "Don't thank me yet, I'm not done. I saved the best for last."

The prosecutor did not offer the messages for the truth of what was stated in them, but to show Cravey's state of mind -- that she felt threatened by the messages. As respondent notes, evidence that a witness feels threatened is relevant to her credibility, regardless of who made the threat as it bears on her giving testimony. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.)

Citing *People v. Hannon* (1977) 19 Cal.3d 588, 596-600, and *People v. Weiss* (1958) 50 Cal.2d 535, 551-554, defendant argues that the messages were inadmissible to prove a consciousness of guilt because there was no evidence to connect them with defendant. The messages were not offered to prove consciousness of guilt, and defendant does not suggest that the prosecution argued that they did prove consciousness of guilt.

Defendant did not request a limiting instruction, and the trial court had no sua sponte duty to do so. (See *People v. Macias* (1997) 16 Cal.4th 739, 746, fn. 3; Evid. Code, § 355.) He may not now complain that the jury might have considered the evidence for a purpose other than Cravey's state of mind. (*Macias*, *supra*, at p. 746, fn. 3.)

---

14 Defendant does not explain the relevance of availability to his contention or provide authority for this contention; nor does he refer to evidence of Bergman's unavailability.

3. Cravey's opinion that "dude" meant defendant

Referring to Cravey's testimony that as Cooper ran out of Modica's house screaming, he said, "Dude stabbed him," defendant apparently assigns error to the admission of this statement over his hearsay objection. If so, we reject the contention, as the statement was clearly a spontaneous declaration made while Cooper was "under the stress of excitement caused by [his] perception" of the events in the house. (Evid. Code, § 1240, subd. (b); see also, *People v. Alvarez, supra*, 14 Cal.4th at p. 185.)

Defendant also contends that the trial court should have excluded as speculative Cravey's opinion that Cooper must have been referring to defendant, because otherwise he would have said "Kevin," not "dude." We disagree. A lay opinion is proper if based upon the witness's perception of subtle interactions that are difficult to put into words. (*People v. Hinton, supra*, 37 Cal.4th at p. 889.)

Further, as respondent points out, because Cravey's opinion was based upon facts in evidence that would logically lead to the same conclusion any error in admitting it would be harmless. (Cf. *People v. Hernandez* (1977) 70 Cal.App.3d 271, 281 [expert opinion].) Cooper had known Bergman since childhood, but had met defendant just one month before the murder. Cooper, Cravey, and Bergman were friends and socialized together, but they did not socialize with defendant, whom Cravey did not know well.[15] We conclude that because the jury could have come to the same conclusion based upon the evidence, defendant has shown no prejudice.

E. Pickett's opinion regarding defendant's concern

Defendant contends that he was prejudiced by a speculative statement made by Pickett in his testimony given after part of the jailhouse conversation about Modica's surveillance system was played for the jury. After the prosecutor asked Pickett to "bear in mind that the question I'm asking you is concerning the conversation [with defendant] about videotape surveillance," Pickett replied unresponsively, "I guess, if I have to

---

[15] Defendant argues that he and Cooper were roommates, suggesting they were closer acquaintances. However Cooper testified that they both just rented rooms in the same house which belonged to a mutual friend.

guess, that he probably was concerned at that point." The prosecutor then said that he did not want him to speculate, and Pickett replied, "Well, he did not say he was concerned."

Defendant's sole contention is that he was prejudiced because Pickett's speculation was used to establish consciousness of guilt. Defendant has not referred to any page in the 82 pages of prosecution argument or elsewhere in the record where any such use was made. Any prejudice Pickett's nonresponsive comment might have caused was dispelled by the prosecutor's rejection of his speculation and Pickett's reply that defendant did not say he was concerned.

III. Voluntary manslaughter instructions

Defendant contends that the court erred in failing to give jury instructions regarding voluntary manslaughter based upon self-defense, imperfect (or unreasonable) self-defense, defense of others, and imperfect (or unreasonable) defense of others. Defendant also contends that the trial court erred in ruling that the evidence was insufficient to justify a self-defense instruction unless defendant testified.

In a murder trial, the trial court must instruct the jury regarding the lesser included offense of voluntary manslaughter based upon any theory supported by the evidence. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085 (*Koontz*).) In addition, the trial court must instruct on any defense relied on by the defendant or supported by substantial evidence. (*People v. Anderson* (2011) 51 Cal.4th 989, 996.)

We agree that in the abstract, self-defense, defense of others, unreasonable self-defense, and unreasonable defense of others may be established without the defendant's testimony. (See *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1262 [self-defense and unreasonable self-defense].) However, all four theories have a subjective element: the defendant must have had an *actual* belief in the need to defend himself or another. (*People v. Randle* (2005) 35 Cal.4th 987, 994, 997, overruled on a different point in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) Thus when the defendant does not testify, there must be other evidence of his state of mind, such as the defendant's out-of-court statements or the testimony of a witness to events which appeared to frighten the defendant. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 81-82 (*Oropeza*).)

Defendant cites the following facts as justifying voluntary manslaughter, defense of others, and self-defense instructions:

> "The initial meeting of Bergman, Modica and [defendant], outside the Modica residence, was cordial and uneventful. Cooper was told not to enter the residence unless Bergman did not come out in a reasonable time. This supports an inference that Bergman did not intend that there be a violent confrontation, otherwise he would have brought Cooper with him from the outset. At some point inside the residence an altercation broke out between Modica and Bergman. When Cooper entered, he saw Modica and Bergman wrestling and struggling. [Defendant] was not present, but came running from the kitchen and lunged over Bergman toward Modica in what could be interpreted as an effort to defend Bergman from Modica."

As defendant's recitation refers to no evidence of defendant's actual state of mind, and our review of the record revealed no evidence that defendant was fearful, we conclude that the trial court did not err in finding that without defendant's testimony the instruction was unnecessary. (See *Oropeza*, *supra*, 151 Cal.App.4th at p. 82.)

In any event, had the trial court erred, the error would be harmless under any standard. "Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions. [Citations.]" (*Koontz*, *supra*, 27 Cal.4th at pp. 1085-1086.) The trial court correctly and thoroughly instructed the jury with regard to first degree murder based upon malice and felony murder, as well as robbery and burglary. The court also correctly instructed the jury that murder during the commission of robbery or burglary with the specific intent to commit such crime is murder in the first degree. (See § 189.) The jury found defendant guilty of first degree burglary by entering Modica's home with the intent to commit a felony and of first degree robbery inside Modica's home. Under such circumstances, defendant suffered no undue prejudice. (See *Koontz*, *supra*, at pp. 1085-1087.)

IV. No error in excluding expert testimony

Defendant contends that the trial court erred in excluding expert testimony. He argues that the court erred in basing its ruling on the ground that defendant did not testify.

Defendant wanted to present expert testimony to show the effect of methamphetamine on Modica's behavior as support for his self-defense theory. The prosecutor objected that the testimony would be speculative and irrelevant unless defendant laid a foundation. The trial court excluded the expert testimony as both speculative and irrelevant under Evidence Code section 352.

Defendant argues that by excluding expert testimony the trial court prevented him from presenting a defense. Defendant incorporates his argument in section III to support his contention that his own testimony was unnecessary to his self-defense theory. We rejected the contention in section III, and we reject it here for the same reason. Not only did defendant not testify, there was no other evidence of defendant's actual state of mind as required to present a defense based upon self-defense or unreasonable self-defense. (See *Oropeza, supra*, 151 Cal.App.4th at pp. 81-82.) Without evidence to support the subjective element of defendant's self-defense theory, the effect of methamphetamine on Modica would not have been relevant. As respondent points out, the expert testimony was properly excluded because it would have had no "tendency in reason to prove or disprove any disputed fact that [was] of consequence to the determination of the action." (Evid. Code, § 210.)

V. Instruction regarding voluntary intoxication

Defendant contends that the trial court erred in refusing a jury instruction regarding voluntary intoxication. Evidence of voluntary intoxication is relevant to the requisite specific intent to commit the underlying felony in a first degree murder case based on a felony-murder theory. (*People v. Pensinge*r (1991) 52 Cal.3d 1210, 1242-1243.)

Defendant argues that the court erred by basing its refusal to give the instructions on defendant's decision not to testify, in that defendant had no burden to produce evidence of voluntary intoxication because such evidence negates an element of the crime, and as such is not an affirmative defense. The only authority cited is *People v. Saille* (1991) 54 Cal.3d 1103, in which the California Supreme Court held no such thing, but in fact made clear that it was the defendant's burden to raise the issue, present

evidence to support it, and to request the appropriate instruction. (*Id*. at pp. 1117, 1120.) The court held that although diminished capacity was no longer a defense, voluntary intoxication remained viable as an attempt to raise a doubt on an element of a crime; thus a defendant was "still *free to show* that because of his . . . voluntary intoxication, he did not *in fact* form the [requisite] intent . . . . [Citation.]" (*Id*. at p. 1117, first italics added.)

The duty of a trial court to give requested instructions arises only when there is substantial evidence to support them. (*People v. Flannel* (1979) 25 Cal.3d 668, 684.) Defendant refers to Cravey's testimony that when she and Bergman picked up Cooper and defendant they were all under the influence of methamphetamine, and that they "were all under the influence all the time." However Cravey did not remember whether the others had taken the drug that day or the day before, and was not asked to describe defendant's demeanor. There was no other evidence of defendant's intoxication.[16]

"Normally, merely showing that the defendant had . . . used drugs before the offense, without any showing of their effect on him, is not enough to warrant an instruction on [voluntary intoxication.] [Citations.]" (*People v. Pensinge*r, *supra*, 52 Cal.3d at p. 1241; see also *In re Avena* (1996) 12 Cal.4th 694, 723; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1661.) As there was no evidence here of the effect of any drugs on defendant, the trial court did not err in refusing to instruct as to voluntary intoxication.

VI. Accomplice testimony

A. No direct evidence establishing accomplices as a matter of law

Defendant contends that the trial court erred by failing to instruct, sua sponte, that Cravey, Cooper, and Pickett were accomplices as a matter of law, or in the alternative, to instruct the jury to decide whether they were accomplices, as if so, their testimony should be viewed with caution.

---

16 Defendant claims that Kennedy testified that she, Bergman and defendant were under the influence of methamphetamine two days after the murder, when they burned Cravey's car. In fact, Kennedy testified that *she* was under the influence of methamphetamine at that time.

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (§ 1111.) "Under section 1111, an accomplice is 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given' [and who has] '"guilty knowledge and intent with regard to the commission of the crime."' [Citations.]" (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 302 (*Gonzales*).)

"'[W]hen there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices,' including the need for corroboration. [Citations.]" (*People v. Tobias* (2001) 25 Cal.4th 327, 331.) The defendant bears the burden to prove by a preponderance of the evidence that a witness was an accomplice. (*People v. Fauber* (1992) 2 Cal.4th 792, 834.) If the defendant fails to meet this burden, the jury must be given instructions regarding the sufficiency of the evidence of corroboration, defining accomplice, and viewing accomplice testimony with distrust. (*Gonzales*, *supra*, 52 Cal.4th at p. 302.)

Where there is insufficient evidence that the witnesses had knowledge of the crimes and intended to facilitate them, they are not accomplices as a matter of law. (*Gonzales*, *supra*, 52 Cal.4th at p. 302.) Defendant summarizes evidence from which it may be *inferred* that Cravey, Cooper, and Pickett were accomplices: Cravey drove Pickett and Bergman to Modica's house when Bergman intended to "case" it; Pickett admitted knowing that Bergman intended to take something; Cravey later drove Bergman and Cooper there; Cooper admitted going along as "backup"; Cooper was carrying brass knuckles; Bergman told Cooper to come in if Bergman did not come out within five minutes; Cravey followed Bergman, who was riding Modica's stolen motorcycle, and assisted Cooper in destroying evidence by throwing the brass knuckles out of the car window; Modica's stolen motorcycle was stored in Cooper's garage; Cooper and Cravey

both allowed defendant to use Modica's debit card to by gas; and Bergman told Cravey to report her car stolen.

Defendant has shown only that Cravey, Cooper, and Pickett could have been either accomplices or unwitting participants prior to the crime and accessories afterward.[17] Defendant fails to meet his burden of showing they were accomplices as a matter of law. (See *Gonzales*, *supra*, 52 Cal.4th at p. 302.)

B. Corroborating evidence connected defendant to the crime

Nevertheless, as respondent notes, the witnesses' testimony was corroborated, obviating any need to determine whether the trial court erred in failing to instruct on the principles of accomplice law, as any error in omitting such instructions would be harmless. (See *People v. Boyer* (2006) 38 Cal.4th 412, 466-467 (*Boyer*).)

"'Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense.' [Citation.] The evidence is 'sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' [Citation.]" (*Gonzales*, *supra*, 52 Cal.4th at p. 303.)

The testimony of Modica's next door neighbor Heniger corroborates the testimony of Cravey and Cooper that defendant was inside the house at the time of the murder. Heniger testified that when she saw Bergman ride the motorcycle out of Modica's driveway at approximately 5:00 p.m., Bergman was followed by a shirtless, White man wearing cargo shorts and large tennis shoes, with a T-shirt in his pocket. Defendant's contention that Heniger's description was too generic to provide sufficient corroboration is without merit. Indeed Cooper testified that defendant was wearing shorts and a tank top that day and in the video from the Unocal station, just 45 minutes later, defendant can be seen wearing his khaki cargo shorts, white tank-style T-shirt, prominent white athletic

---

17 See section 32, defining accessory as a "person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony."

shoes, and what appears to be a baseball cap. Heniger's testimony and the video from the Unocal station showing defendant putting gasoline into Cravey's car corroborate Cravey and Cooper's identification of defendant as the man in the Unocal video. In addition, PayPal records established that Modica's debit card was used at the Unocal station at 5:45 p.m., as well as later at the Exxon Mobile station, further connecting defendant to the crime and corroborating Cooper's testimony.

Defendant suggests that the evidence was insufficient to connect him to the crime without corroborative evidence of motive, planning, and intent. We disagree. Corroborating evidence need not establish every element of the offense and is sufficient if it merely relates to an act or fact of an element and tends to implicate the defendant. (*Boyer*, *supra*, 38 Cal.4th at p. 467.) Moreover, corroborating circumstances may be found in "the entire conduct of the parties, their relationship, and their acts during and after the crime." (*People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1305.) As respondent points out, defendant's conduct at the gas station, as well as his continued companionship with Bergman after the murder tends to connect defendant with the crime. Doby testified that defendant was present when he purchased Modica's motorcycle from Bergman the same evening as the murder. At Cravey's residence, defendant was seen brandishing a knife with a four- or five-inch blade. Kennedy identified defendant as being involved with Bergman in setting fire to Cravey's car. All of these facts link defendant to Bergman and the crime itself.

Defendant also suggests that even with evidence of corroboration, the absence of an instruction to view accomplice testimony with caution lent undue credibility to Cravey, Cooper, and Pickett. The jury was not without tools to assess the credibility of witnesses. The trial court instructed the jury thoroughly on assessing credibility: CALJIC No. 2.13 (inconsistent statements); CALJIC No. 2.20 (believability of witness); CALJIC No. 2.21.2 (witness willfully false); CALJIC No. 2.22 (weighing conflicting testimony); CALJIC No. 2.23 (believability of a witness convicted of a felony); and CALJIC No. 2.29 (witness in custody/restraints).

Further, cross-examination brought out reasons to distrust the witnesses' characters and their testimony. Cooper was concerned that he would be charged with Modica's murder; Bergman had been Cooper's friend since childhood, but he did not socialize with defendant. Cooper regularly abused drugs and alcohol, carried brass knuckles, had been incarcerated many times in his life, and was in custody at the time of his testimony. Cravey had been romantically involved with Bergman and cared about him, but barely knew defendant; she abused methamphetamine. Pickett, also a drug user, a friend of Bergman's but not defendant's, was willing to assist Bergman in a robbery in exchange for marijuana.

Finally, as respondent observes, defense counsel extensively highlighted in argument the lack of believability of these witnesses due to their characters, apparently with some success: the jury did not find that defendant personally wielded the knife that delivered the fatal wounds.

VII. Substantial evidence of corroboration

Defendant contends that the only evidence of his presence at the crime scene and participation in the crimes came from the testimony of uncorroborated accomplices, and was thus insufficient to support the judgment. As we have rejected defendant's contention that the testimony of alleged accomplices was uncorroborated, we reject this contention for the same reasons.

VIII. The "equally guilty" language of CALJIC No. 3.00

A. CALJIC No. 3.00

The trial court instructed the jury with CALJIC No. 3.00, as follows: "Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty. Principals include: one, those who directly and actively commit the act constituting the crime; or two, those who aid and abet the commission of the crime."

B. Effect of "equally guilty" language on guilty verdict

Relying on *People v. McCoy* (2001) 25 Cal.4th 1111 (*McCoy*), *People v. Nero* (2010) 181 Cal.App.4th 504 (*Nero*), *People v. Samaniego* (2009) 172 Cal.App.4th 1148

(*Samaniego*), and *People v. Woods* (1992) 8 Cal.App.4th 1570 (*Woods*), defendant contends that the "equally guilty" language of CALJIC No. 3.00 is erroneous because it required the jury to find him guilty of the same degree of murder as the perpetrator, whereas it is possible for an aider and abettor to have a mental state different from the perpetrator's.

The "equally guilty" language may be misleading in some cases, and thus subject to modification or clarification upon request. (*Nero*, *supra*, 181 Cal.App.4th at p. 518; *Samaniego*, *supra*, 172 Cal.App.4th at p. 1163.) As defendant failed to make such a request in the trial court, he has forfeited this contention. (*People v. Young* (2005) 34 Cal.4th 1149, 1202.) *Nero* does not, as defendant contends, change the rule of forfeiture in the case of CALJIC No. 3.00; there, the court found no forfeiture under the circumstances of that case, where the jurors sent out several questions regarding the issue. (See *Nero*, *supra*, at pp. 517-518 & fn. 13.) The error reached by the appellate court in *Nero* was the trial court's incorrect answer to the jurors' question whether a defendant could aid and abet a lesser offense then the perpetrator. (*Ibid*.) That is not the issue in this case.

Regardless, defendant's contention has no merit. Unlike the cases on which defendant relies, the prosecution relied on alternative theories of guilt: that defendant was a direct perpetrator, or he was guilty under the natural and probable consequence doctrine. The "equally guilty" language is correct in both cases. (*People v. Canizalez*, *supra*, 197 Cal.App.4th at pp. 850-852.)

Further, as the murder would be in the first degree regardless of the "equally guilty" language in CALJIC No. 3.00, its inclusion was harmless beyond a reasonable doubt, under the test of *Chapman*, and *Neder v. United States* (1999) 527 U.S. 1, 15. (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1165.) The jury found true the special circumstance that defendant was engaged in the commission of a robbery when Modica was murdered, and convicted him of robbery and burglary. The murder was necessarily murder in the first degree, regardless of defendant's mental state regarding the killing.

(§ 189; see *People v. Chun, supra,* 45 Cal.4th at p. 1182 [felony murder]; *People v. Prettyman* (1996) 14 Cal.4th 248, 262 [natural and probable consequences].)

C. Effect of CALJIC No. 3.00 on special circumstance finding

Defendant also contends that CALJIC No. 3.00 made it impossible to determine the theory on which the jury found the special circumstance of section 190.2, subdivisions (c) or (d). He argues that because the jury did not find true the allegation that he personally used the knife, it is likely that the jury found him guilty solely as an aider and abettor and not as the actual killer. If so, the jury was required to find either that he intended to kill or that he acted with reckless indifference to human life and as a major participant in the crime. (§ 190.2, subds. (c), (d).) Defendant argues that Bergman may or may not have had either of these mental states, and by instructing the jury that he could be equally guilty "regardless of the extent or manner of participation," the court relieved the jury of finding either circumstance. Defendant relies on the rule requiring reversal when a verdict could have been based on either a correct theory or an incorrect alternate theory, and the record does not indicate upon which theory the jury based its verdict. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1122.)

Defendant does not say what incorrect alternate theory the jury might have chosen. Further, he does not claim to have requested an instruction clarifying that CALJIC No. 3.00 did not apply to special circumstances, and has thus forfeited this issue. (See *People v. Young, supra,* 34 Cal.4th at p. 1202.)

In any event, CALJIC No. 3.00 could have had no effect on the special circumstance finding, as it was read with other instructions on the determination of guilt, separated and clearly distinguished from the instructions regarding special circumstances. Further, the special circumstances instruction began: "If you find that the defendant in this case is guilty of the murder of first degree, you must determine if one or more of the following special circumstances are true or not true . . . ." Thus, the jury was told to consider the special circumstances only if it had already found defendant guilty of first degree murder.

The trial court went on to instruct the jury to determine whether defendant was engaged in the commission of the crime of residential burglary or residential robbery within the meaning of section 192, subdivision (c)(23), and then, to determine whether one of the alternative circumstances of section 190.2, subdivisions (c) or (d) was true. The court defined the circumstances in the language of each subdivision.

We assume that the jury acted reasonably (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1127), and thus we cannot assume that the jury disregarded the relevant instructions and chose instead to follow an irrelevant instruction. (*People v. Crandell* (1988) 46 Cal.3d 833, 872, disapproved on another point in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

IX. No cumulative effect

Defendant contends that the cumulative effect of all the errors heretofore discussed was to deny him a fair trial. Because "[w]e have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial," we must reject defendant's claim of prejudicial cumulative effect. (See *People v. Sapp* (2003) 31 Cal.4th 240, 316.)

X. Sentencing errors

A. The prior conviction enhancements

The trial court found that defendant had suffered two prior serious felony convictions that qualified as strikes under the Three Strikes law, and sentenced him accordingly to life with the minimum term of 25 years on count 2. One prior conviction, a violation of section 459/former section 461.1, first degree burglary,[18] arose in April 1994 in Orange County Superior Court case No. C92744 (C92744). The other, a violation of section 459, burglary, was from Riverside County Superior Court case No. CR50575, September 1994 (CR50575). The trial court also found that defendant had a third prior felony conviction in 1997, a violation of section 12021, subdivision (a)(1),

---

[18] See now, section 460, subdivision (a). (*People v. Tafoya* (2007) 42 Cal.4th 147, 154.)

from San Bernardino County Superior Court case No. FSB14520 (FSB14520). The trial court dismissed a fourth felony conviction as unproven.

The trial court found that defendant had been sentenced to prison in two cases, C92744 and CR50575. The court enhanced the count 2 sentence by 10 years, consisting of five years for each of two prior serious felony convictions (C92744 and CR50575) pursuant to section 667, subdivision (a)(1). In addition, the court enhanced count 2 by two years, consisting of one year for each of the two prior prison commitments, pursuant to section 667.5, subdivision (b).

We reach defendant's final assignment of sentencing error first, as our conclusion will require vacating the sentence as to count 2 and remand for further proceedings. We nevertheless discuss the remaining alleged errors.

B. The nature of the prior burglary conviction must be retried

In a second supplemental opening brief, defendant contends that there was insufficient evidence to support the trial court's finding that his prior burglary conviction in CR50575 was a serious felony within the meaning of the Three Strikes law.[19] Respondent agrees, and asks that the matter be remanded for a retrial of the nature of the burglary in CR50575.

To qualify as a strike under the Three Strikes law, a prior conviction must be a serious felony, as defined in section 1192.7, subdivision (c), or a violent felony, as defined in section 667.5, subdivision (c). Any first degree burglary is a serious felony. (§ 1192.7, subd. (c)(18).) First degree burglary is a violent felony if it was alleged and proven that the defendant committed while another person, other than an accomplice, was present in the residence. (§ 667.5, subd. (c)(21).) Second degree burglary does not appear in either definition.

The prosecution must prove the serious or violent nature of the offense beyond a reasonable doubt, and may do so with court documents prepared contemporaneously with

---

19 Defendant does not challenge the other strike, a 1994 conviction of first degree burglary in C92744.

the conviction by a public officer charged with that duty, such as an abstract of judgment. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065-1066 (*Delgado*); *People v. Miles* (2008) 43 Cal.4th 1074, 1082 (*Miles*).) "However, if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the serious felony nature of the prior conviction depends upon the particular conduct that gave rise to the conviction, the record is insufficient to establish that a serious felony conviction occurred." (*Miles, supra*, at p. 1083.) We review the finding for substantial evidence. (*Ibid*.)

The documents admitted to prove the prior burglary conviction in CR50575 consisted of a section 969b packet that included the following: (1) a fingerprint card dated August 1, 1994, describing the charge as "459PC BURGLARY"; (2) an abstract of judgment showing conviction on September 20, 1994, upon a plea of guilty to a felony violation of "PC 459," with a sentence of 36 months of probation and 365 days in county jail, to be served concurrently with the sentence in another case; (3) an abstract of judgment dated October 7, 1997, showing that probation was revoked and a sentence of two years imposed, to be served concurrently with FSB14520; and (4) a fingerprint card, prepared at Centinela State Prison November 14, 1997, describing the charge as "PC 459P*" and "1st deg burglery [*sic*]," and showing a final disposition of "2 years."

Burglary is generally defined in section 459, but the conduct constituting first degree burglary is described in section 460, and formerly in section 461.1, neither of which appears in the two abstracts of judgment. Because the court documents state the conviction only as a violation of section 459, without indicating the degree or the underlying conduct, it must be presumed that the conviction was of second degree burglary. (*Delgado, supra*, 43 Cal.4th at pp. 1068-1069; *Miles*, *supra*, 43 Cal.4th at p. 1083.) Only the Department of Corrections fingerprint card specifies first degree burglary, but as respondent concedes, that document was insufficient as it was not a court

document prepared contemporaneously with the conviction. (*People v. Williams* (1996) 50 Cal.App.4th 1405, 1409, 1412-1413.)

Further, as respondent points out, the degree cannot be determined from the two-year prison term imposed in CR50575. (See, e.g., *People v. Ruiz* (1999) 69 Cal.App.4th 1085, 1091.) The low term prescribed for first degree burglary in 1994 is two years. (§ 461, subd. (a); Stats. 1978, ch. 579, § 24, p. 1985.) Second degree burglary carries a middle term of two years. (§ 461, subd. (b); § 18.) The abstracts do not indicate whether a low term or a middle term was imposed.

We conclude that the third strike sentence as to count 2 must be vacated. The People may retry the allegation that the prior conviction in CR50575 qualified as a strike. (See *People v. Barragan* (2004) 32 Cal.4th 236, 241.)

C. Sentence on count 2 should have been stayed

Defendant contends that the trial court should have stayed the sentence imposed as to count 2. Respondent agrees.[20] As to count 1, the trial court sentenced defendant to life in prison without the possibility of parole for the murder. As to count 2, the court imposed a term of life with a minimum of 25 years, plus enhancements, and ordered the sentence to run consecutively to count 1.

When a defendant commits a murder and a robbery during a single course of conduct with one objective, the sentencing court must impose but stay the lesser sentence. (*People v. Meredith* (1981) 29 Cal.3d 682, 695-696; § 654.) Sentence enhancements imposed on a stayed sentence must also be stayed. (*People v. Guilford* (1984) 151 Cal.App.3d 406, 411.) Thus, upon resentencing defendant on count 2, the trial court should stay execution of the sentence.

D. Sections 667, subdivision (a)(1) and 667.5, subdivision (b) enhancements

---

[20] At sentencing, both counsel agreed that counts 2 and 3 should be stayed pursuant to section 654. The court indicated agreement, as well; thus, the consecutive term for count 2 may have been an oversight.

In a supplemental opening brief, defendant contends that the trial court erred in basing enhancements under section 667, subdivision (a)(1) and 667.5, subdivision (b), on the same prior convictions. Respondent agrees as do we.

Section 667, subdivision (a)(1) provides in relevant part: "[A]ny person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." Section 667.5, subdivision (b) provides in relevant part: "[T]he court shall impose a one-year term for each prior separate prison term served for any felony [unless there has been] a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction."

"[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*People v. Jones* (1993) 5 Cal.4th 1142, 1150.) Under these circumstances, the trial court should have imposed the five-year enhancements of section 667, subdivision (a)(1), not the one-year enhancements of section 667.5, subdivision (b). The two one-year enhancements must be stricken. (*Jones*, *supra*, at p. 1153.)

DISPOSITION

The sentence as to count 2 is vacated, and the case is remanded for retrial solely on the issue of whether the prior conviction in CR50575 qualifies as a strike under the Three Strikes law. After such retrial, the trial court shall impose the appropriate sentence as to count 2. The trial court will then stay execution of the sentence so imposed as to count 2. Upon resentencing defendant, the trial court is directed to prepare a new abstract of judgment and forward it to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST