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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. NICOLAS OLVERA CORDOBA et al., Defendants and Appellants.	B261619 (Los Angeles County Super. Ct. No. MA039342)

APPEALS from judgments of the Superior Court of Los Angeles County, Larry P. Fidler, Judge. Affirmed with directions.

Robert D. Bacon, under appointment by the Court of Appeal, for Defendant and Appellant Nicolas Olvera Cordoba.

Judith Kahn, under appointment by the Court of Appeal, for Defendant and Appellant Antonio Martinez.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Arturo Rosales Verdin.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

Following a joint trial, a jury convicted Nicolas Olvera Cordoba of one count of first degree murder and Antonio Martinez of two counts of first degree murder and found true as to each of them specially alleged firearm enhancements and multiple special circumstances. In a separate trial following the court's severance order, a jury convicted Arturo Rosales Verdin of two counts of first degree murder and found true a specially alleged firearm enhancement and multiple special circumstances. At a joint sentencing hearing, Cordoba, Martinez and Verdin were each sentenced to life in prison without the possibility of parole.

On appeal Cordoba and Martinez contend the trial court erred in denying Cordoba's motion to sever their trials and their joint trial resulted in the admission of cross-incriminating statements that deprived them of their Sixth Amendment right to confrontation. Martinez also contends the court erred in denying his request for a pinpoint jury instruction on voluntary intoxication. Verdin contends the court prejudicially erred in denying his motion to suppress his confession, which he argues was obtained in violation of the protections established by *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*) and subsequent cases to safeguard a suspect's Fifth Amendment privilege against self-incrimination. We affirm each of the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

Cordoba, Martinez and Verdin knew each other and sometimes spent time together shooting guns at the ranch where Cordoba worked. All three men were charged with the murders of Dr. Esfandiar Kadivar, the owner of the ranch, and Efrain Soto, who worked on the ranch with Cordoba.

1. *The Amended Informations*

An amended information filed June 9, 2014 charged Cordoba and Martinez with the murders of Soto and Dr. Kadivar (Pen. Code, § 187, subd. (a)).[1] The information specially alleged both murders were committed with premeditation and deliberation (§ 189) by means of lying in wait (§ 190.2, subd. (a)(15)) and for financial gain (§ 190.2, subd. (a)(1)) and both offenses together qualified as a multiple murder special circumstance (§ 190.2, subd. (a)(3)). It was also specially alleged as to both defendants and offenses that a principal was armed with a firearm (§ 12022, subd. (a)(1)). In addition, it was specially alleged as to Martinez that he personally used and intentionally discharged a firearm causing Dr. Kadivar's death. (§ 12022.53, subds. (b), (c) & (d).)

Verdin was initially charged together with Cordoba and Martinez. However, after the court granted Verdin's unopposed severance motion, an amended information was filed on September 15, 2014 separately charging Verdin with two counts of murder in connection with the Soto and Kadivar homicides. The amended information included the same special allegations

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[1] Statutory references are to this code unless otherwise stated.

and special circumstances that were alleged against Cordoba in the June 9, 2014 amended information.

2. *The Evidence at Cordoba and Martinez's Joint Trial*

a. *Dr. Kadivar's murder*

Dr. Kadivar, a retired plastic surgeon, owned and operated the Kadivar Ranch, a 200-acre ranch in Lancaster. Cordoba worked as a ranch hand, assisting Dr. Kadivar in farming and maintaining the property. In early 2005 Cordoba told a friend, Thomas Camacho, that Dr. Kadivar was a rich man who kept a safe filled with cash in his residence. Cordoba proposed to Camacho that they kill Dr. Kadivar and take his money. Camacho did not believe Cordoba was serious but attempted to dissuade him just in case.

On July 5, 2006 Dr. Kadivar was found dead on his ranch, shot multiple times with a high-powered rifle and at least once with a handgun. His safe, containing $40,000 in cash, as well as jewelry and Iranian coins, was missing from his residence. After calling law enforcement to report finding Dr. Kadivar's body, Cordoba immediately burned some papers and tried to destroy his cell phone. He denied to sheriff's deputies that he had any involvement in the killing and said he did not know who could be responsible. A few days after Dr. Kadivar's body was found, a local merchant who knew Cordoba asked him if he had killed Dr. Kadivar. Cordoba smiled, shrugged his shoulders and said, "yes and no."

b. *Cordoba's agreement with Soto to run the ranch together and split the proceeds*

In December 2006 Dr. Kadivar's widow, Parvaneh Kadivar, agreed to lease the ranch to Cordoba for one year for $20,000 and

payment of 80 percent of the ranch's electricity bill. In exchange, Cordoba would be entitled to all ranch profits for the year. To raise the money for the lease, Cordoba asked his friend, Efrain Soto, to be his business partner. They agreed they would work the land together and share evenly in the ranch's proceeds. Soto gave Cordoba close to $20,000 in furtherance of their partnership. Soto also entered into a separate agreement with his adult son, Juan Soto, to work together and split evenly between them Soto's 50 percent share of the ranch profits.

c. *Soto's murder*

In February 2007 Verdin invited his friend Marcos Garcia to the ranch to discuss a job. At this meeting, with Martinez, Cordoba and Verdin present, Cordoba offered Garcia $5,000 to kill a person Cordoba had described as "stealing income" from the ranch by taking the harvested crops. Garcia declined. The following month Cordoba renewed his murder-for-hire offer to Garcia and identified Soto as the man he wanted killed. Cordoba later offered an additional $5,000 if Garcia would also kill Soto's adult sons, whom Cordoba described as "getting in the way." Garcia refused to kill Soto's children, but agreed to murder Soto for $5,000. Cordoba instructed Garcia to carry out the murder on a specific day when Cordoba would be away from the ranch and to make sure that Soto's body "disappear[ed]." Martinez also discussed the murder-for-hire with Garcia.

On April 28, 2007 Garcia, Verdin and Martinez drank beer for several hours while waiting for Soto. When Soto arrived at the ranch, he greeted them, then returned to his truck to load alfalfa for a scheduled delivery. Martinez handed Garcia a loaded rifle and told him the best time to kill Soto was while he was loading his truck. Garcia took the rifle and shot Soto

multiple times, killing him. Garcia then returned to where Verdin and Martinez were waiting. Martinez asked, "Did you do it?" Garcia said "yes" and gave the rifle back to Martinez. At Martinez's direction, Garcia drove Soto's truck to a remote location and left the truck there with Soto's body in the truck bed. Martinez and Verdin accompanied him in separate cars to dispose of Soto's body. Afterward, the three men went to Martinez's house where Cordoba had been waiting for them. Cordoba asked Garcia whether he had completed the job, and Garcia responded he had. Cordoba paid Garcia part of the money he owed him and promised to pay him the rest later. Cordoba also told him not to worry, the evidence, which Garcia understood to mean the rifle, would disappear.[2]

After his arrest Garcia cooperated with law enforcement: He recorded telephone calls he made, and meetings he had, with Cordoba and Martinez asking each of them for the rest of his money for killing Soto. Over objection, those unredacted recordings were played for the jury.

d. *Martinez's and Cordoba's custodial statements*

i. *Martinez's statements*

Deputies obtained a search warrant for Martinez's home and found one of Dr. Kadivar's guns and an Iranian coin. They also found hidden beneath a shed on the property the

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[2] Garcia pleaded guilty to first degree murder with special circumstances for Soto's murder. Under the terms of the plea agreement, Garcia was to be sentenced to a term of 25 years to life in prison provided he testified truthfully at trial. The terms of the agreement were described during Garcia's direct examination, and the written agreement was introduced into evidence.

semiautomatic firearm used to kill Soto. Pursuant to a separate search warrant, deputies found Dr. Kadivar's safe buried on property occupied by Martinez's wife. The safe's door had been pried open, and some small items of little value that had belonged to Dr. Kadivar were found in, or buried near, the safe.

Martinez initially denied any involvement in the deaths of Dr. Kadivar and Soto. However, during a custodial interview on August 18, 2007 Martinez confessed to shooting Dr. Kadivar. He conducted a walk-through of the ranch with Detective Gary Sica of the Los Angeles County Sheriff's Department and described how he had committed the murder. The walk-through was recorded on video, and portions of the recording were played for the jury and described by Detective Sica at trial. During this interview Martinez explained he and Verdin had gone to the ranch with a plan to kill Dr. Kadivar. When they saw the doctor, Martinez shot him several times with a rifle. Verdin got out of the car to make sure Dr. Kadivar was dead. Martinez heard another shot, and then Verdin returned to the truck and said, "He's dead now." The two men then drove to a nearby aqueduct where Martinez threw the rifle into the water. After the murder Martinez and Verdin went to Las Vegas with their families. Martinez said he and Verdin had taken Dr. Kadivar's safe but opened it only after they returned from Las Vegas. They found nothing of value inside.

During a second custodial interview on August 19, 2007, Martinez admitted he had also been present when Soto was shot. He knew Garcia had come to kill Soto but did not really think he would go through with it.

ii. *Cordoba's statements*

Cordoba was interviewed several times by law enforcement. In a March 14, 2007 interview, before Soto was killed, Cordoba stated he was "100 percent" certain Soto had killed Dr. Kadivar. Cordoba asserted Soto owned guns, appeared to have disposable income and had discussed on more than one occasion killing Dr. Kadivar for his money. Cordoba explained he had attempted to destroy his cell phone after finding Dr. Kadivar's body because Soto's telephone number was on it and he did not want to be connected to Soto. In April 2007, after Soto had gone missing, but before his body had been found, Cordoba also told Soto's son, Juan Soto, that Soto had been murdered and he "knew someone" who could help Juan Soto avenge his father's death.

In June 2007 Parvaneh Kadivar told Cordoba she would pay a $50,000 reward in connection with finding Dr. Kadivar's killer. Soon after being advised of the reward, Cordoba told Parvaneh that he had received a strange telephone call from an unidentified person a week before Dr. Kadivar's murder asking whether there was a septic tank on the ranch that could be used to dispose of a body. Parvaneh testified to this conversation at trial.

On August 16, 2007 Detective Sica asked Cordoba about the septic tank telephone call. Cordoba reiterated his claim that a drunken man had called him on his cell phone a week or two before Dr. Kadivar was killed. The caller stated he intended to put Dr. Kadivar's body inside the septic tank and make it disappear. Cordoba did not answer the caller's question and hung up. He had not told sheriff's deputies about the call earlier because he did not want to be involved. Cordoba denied knowing anything about Dr. Kadivar's or Soto's deaths.

Cordoba was arrested after his August 16, 2007 interview. On August 19, 2007 Cordoba told sheriff's deputies he had given Garcia money for installing a roof, not for killing Soto. He also stated he did not believe a person could be legally or morally responsible for shooting and killing someone if that person did not pull the trigger.

e. *The prosecution and defense theories*

The People's theory of the case was that Cordoba had been the mastermind behind both murders: He had enlisted Martinez to kill Dr. Kadivar so that they could acquire his money and Cordoba could take over the ranch. Then, when Cordoba realized he was not going to make the money he had envisioned from the ranch, especially in light of his agreement to share the ranch's proceeds with Soto, he hired Garcia, again with Martinez's help, to kill Soto.

Cordoba and Martinez did not testify, and neither man presented any evidence in his defense.

f. *Verdicts and sentences*

The jury convicted Cordoba of Soto's murder. It could not reach a verdict as to Cordoba on Dr. Kadivar's murder, and the court declared a mistrial on that count. The jury found true each of the special allegations and two of the special circumstances against Cordoba—that the murder was committed by means of lying in wait and for financial gain. Cordoba was sentenced to a term of life in prison without the possibility of parole plus an additional one-year term for the firearm enhancement.[3]

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[3] Although the court's minute order correctly reflects the sentence imposed, the abstract of judgment incorrectly states

The jury convicted Martinez on both murder counts and found true each of the special allegations and special circumstances. Martinez was sentenced to two consecutive terms of life without the possibility of parole, plus 25 years to life for the firearm enhancement for Dr. Kadivar's murder and an additional one-year term for the firearm enhancement relating to Soto's murder.

3. *Verdin's Trial*

Verdin was tried separately on the theory he had aided and abetted both murders. Among other evidence introduced at trial, the jury heard incriminating statements Verdin had made about his involvement in Dr. Kadivar's killing. (The trial court in a pretrial ruling denied Verdin's motion to suppress that evidence.) The jury convicted Verdin on both counts of first degree murder with true findings on all the special allegations and enhancements. Verdin was sentenced to two consecutive terms of life in prison without the possibility of parole, plus an additional one-year term for the firearm enhancement.

DISCUSSION

1. *The Court Did Not Err in Denying Cordoba's Severance Motion*; *Cordoba and Martinez Have Forfeited Their Sixth Amendment Claims by Failing To Object at Trial*

a. *Relevant proceedings*

Early in the case Cordoba moved to sever his trial from his codefendants. In his written motion he cited incriminating statements each defendant had made about the others and

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that Cordoba was sentenced to life in prison with the possibility of parole.

argued a joint trial could not proceed without violating his Sixth Amendment right to confrontation and cross-examination under the *Aranda/Bruton* rule.[4] Cordoba asserted there was no effective way to redact the incriminating statements made by each of the four defendants.[5] As to Martinez, the only defendant with whom Cordoba was ultimately tried, Cordoba cited his statements to sheriff's deputies that Cordoba had instructed him to kill Kadivar and had hired Garcia to kill Soto.

At the hearing on Cordoba's motion the prosecutor stated he intended to take a very conservative approach to the cross-incriminating statements to eliminate the *Aranda/Bruton* issue. To that end, he acknowledged Verdin needed to be tried separately. As for Cordoba and Martinez, however, he told the court he had spoken with defense counsel and believed he could redact and/or eliminate from his evidentiary presentation the

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[4] The *Aranda/Bruton* rule refers to *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476]. Both cases, which predate the United States Supreme Court's decision in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], recognize that a defendant is deprived of his or her Sixth Amendment right to confront witnesses when a facially incriminating statement of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the statement only against the declarant. Under those circumstances, the trial court must grant separate trials, exclude the statement or excise all references to the nondeclarant defendant. (*Aranda,* at pp. 530-531; see *People v. Mitcham* (1992) 1 Cal.4th 1027, 1045.)

[5] At the time Cordoba made his motion, Garcia was still a codefendant, along with Martinez and Verdin.

cross-incriminating statements that could raise an *Aranda/Bruton* concern: "We have been trying to pare these issues down without the court's intervention. I think for the most part we're going to be able to successfully eliminate, in other words, forgo some of those statements and proceed on the pure admissions that we have, and the others we would be able to redact in a way that will not incriminate, at least facially, any other defendant." The prosecutor also identified Garcia's recorded conversations with Martinez and Cordoba as statements by coconspirators that he believed would not be subject to *Aranda/Bruton*. The prosecutor stated he would provide redacted versions of the custodial statements of the defendants, and Cordoba's attorney reserved the right to object to the admissibility of all statements, as well as any redacted version of custodial interrogations, in an Evidence Code section 402 hearing if necessary.[6] The court denied Cordoba's severance motion without prejudice, stating that, if *Aranda/Bruton* issues remained that could not be resolved through redaction, it would reconsider severance.[7]

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[6] Cordoba's attorney stated, "It sounds like we're all in agreement that [the prosecutor] is going to omit several of the *Aranda/Bruton* statements and there won't be an issue, but it also sounds like he's going to have a list of statements that he believes will be admissible and are an exception. I guess we are going to have to 402 those matters before the jury comes in on certain days." The court replied, "Of course." And, Cordoba's attorney responded, "Okay. If that's how we are going to handle it."

[7] The court stated, "[The prosecutor] says there are going to be areas of contention, so I will have to work those out, and that's

Cordoba did not renew his severance motion, nor did his counsel object to any of the redacted transcripts of Martinez's custodial statements after the prosecutor provided them. In fact, Cordoba's counsel expressly stated he had no objection to the introduction of the custodial statements as edited, which eliminated, among numerous other things, the two statements by Martinez that Cordoba had cited in his severance motion.

b. *Governing law and standard of review*

There is a statutory preference for joint trials of jointly charged defendants. (§ 1098 ["[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials"]; *People v. Montes* (2014) 58 Cal.4th 809, 834 ["[s]ection 1098 expresses a legislative preference for joint trials"]; *People v. Alvarez* (1996) 14 Cal.4th 155, 190 [same].) Joint trials are favored because they promote efficiency and avoid the potential for inconsistent verdicts. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 378–379; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 150.) The ""classic" case for joint trial is presented when defendants are charged with common crimes involving common events and victims."" (*People v. Cleveland* (2004) 32 Cal.4th 704, 725.)

Separate trials may be necessary when, for example, one codefendant has made an incriminating confession implicating another. (*People v. Cleveland*, *supra*, 32 Cal.4th at p. 726.) In that case, receipt into evidence of the statement by the declarant

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why I will even hold out the possibility of a second jury or even-well, we are not going to do three juries. So you know, if we have to sever, we have to sever."

defendant may deprive the incriminated nondeclarant codefendant of the right of confrontation and cross-examination. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1045.) However, if cross-incriminating statements can be edited or redacted to eliminate references to the nondeclarant defendant without prejudice to the declarant or his or her codefendant, severance is unnecessary. (*People v. Gamache* (2010) 48 Cal.4th 347, 378-379; *People v. Aranda* (1965) 63 Cal.2d 518*,* 530-531; see *Richardson v. Marsh* (1987) 481 U.S. 200, 208 [107 S.Ct. 1702, 95 L.Ed.2d 176] [redaction of the facially incriminating portion of a statement, coupled with a limiting instruction to the jury to consider the evidence solely against the declarant, complies with Sixth Amendment and preserves the right to a fair trial]; *Mitcham*, at p. 1045 [if direct and indirect incriminating references to the nondeclarant defendant are deleted, the extrajudicial statement may be admitted against the declarant without violating *Aranda/Bruton*].)

We review the trial court's denial of a severance motion for abuse of discretion based on the facts known to the court at the time the ruling was made. (*People v. Montes*, *supra*, 58 Cal.4th at p. 834; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40-41.) If the ruling was correct when made, we will reverse it only if a defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process. (*Montes*, at p. 835; *People v. Avila* (2006) 38 Cal.4th 491, 575.)

c. *Cordoba's challenge to the joint trial*

Cordoba contends, in general terms, that the court erred in denying his severance motion. However, he does not explain how the court's initial ruling, made in reliance on the prosecution and defense counsel's announced agreement to cooperate to eliminate

Aranda/Bruton issues, was erroneous at the time it was made. Moreover, Cordoba did not thereafter renew his severance motion or otherwise object to the redactions provided. (Cf. *People v. Gamache*, *supra*, 48 Cal.4th at p. 380 [trial court should review both redacted and unredacted versions at time of severance motion to determine whether redaction would violate the rights of the declarant codefendant by exaggerating his culpability]; see generally *id.* at pp. 378-379 [redaction of cross-incriminating statements, provided redaction does not cause prejudice, is proper remedy for *Aranda/Bruton* issue]; *Richardson v. Marsh, supra,* 481 U.S. at p. 208 [same].)

Cordoba argues more specifically that, even if the court's severance ruling was proper when made, three extrajudicial, cross-incriminating statements were ultimately admitted into evidence notwithstanding the parties' and the court's best efforts to eliminate them: (1) Detective John Corina testified Martinez had stated in his interview he sometimes helped Cordoba at the ranch "feed the animals, maybe, or maybe move some hay." (2) During the same interview Martinez told Detective Corina that Garcia had gone to the ranch the day before Soto was killed "looking for [Cordoba], but [Cordoba] wasn't there, so he left." (3) Martinez stated in his August 18, 2007 interview that, after he committed the murder and left the ranch, he passed Cordoba's ex-wife on the road as she was driving to the ranch.

Cordoba did not object to any of these statements at trial. He has thus forfeited his *Aranda/Bruton* challenge to each of them. (See *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1044 ["[a]bsent a timely and specific objection on the [*Aranda/Bruton*] ground defendant now asserts on appeal, his contention is

deemed waived"].)[8] Because Cordoba's claim that the joint trial violated his right to due process is based entirely on his assertion of *Aranda/Bruton* error, that claim necessarily falls as well.

Cordoba's *Aranda/Bruton* argument is also without merit. None of the statements Cordoba cites is facially incriminating; and the court immediately instructed the jury after Detective Corina's testimony and after the Martinez's recording was played to consider Martinez's statements against Martinez only. (See *Richardson v. Marsh, supra,* 481 U.S. at p. 208 [when statement is incriminating to codefendant on its face, limiting instruction is ineffective to preserve nondeclarant's Sixth Amendment rights;

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[8] Although Cordoba suggests his counsel did object on *Aranda/Bruton* grounds, the record shows the objection cited was directed to the prosecutor's attempt to introduce unedited recordings and unredacted transcripts of telephone calls between Garcia, on the one hand, and Cordoba or Martinez, on the other hand. The court admitted the unedited telephone recordings of those telephone calls as statements by coconspirators in furtherance of a conspiracy. (*People v. Roberts* (1992) 2 Cal.4th 271, 304 [*Aranda/Bruton* does not apply to coconspirator's statements in furtherance of a conspiracy, provided there is independent proof of the conspiracy].) Neither Cordoba nor Martinez challenges that evidence or the court's ruling on appeal.

Cordoba (and Martinez) also objected to the prosecutor's request to include an unedited videotape of Martinez's custodial walk-through for the same reason. The court sustained that objection, ruling the conspiracy had ended by the time of the walk-through, rendering the cross-incriminating statements made during that episode inadmissible under *Aranda/Bruton.* Neither Cordoba nor Martinez objected to the edited version of the walk-through recording or transcript that was introduced at trial.

however, when statement is incriminating only when linked with other evidenced adduced at trial, no *Aranda/Bruton* issue is implicated; and jury is presumed to follow instruction to consider statement solely against declarant]; see generally *People v. Fletcher* (1996) 13 Cal.4th 451, 465, 466.)[9]

d. *Martinez has forfeited his objections to the joint trial*

Martinez also challenges the court's denial of Cordoba's severance motion and claims the cross-incriminating statements adduced at trial—particularly Cordoba's statement concerning an unidentified caller asking about a septic tank to dispose of Dr. Kadivar's body—deprived him of a fair trial notwithstanding the court's numerous limiting instructions to consider that statement against Cordoba alone. However, Martinez did not move for severance or join Cordoba's severance motion, and his counsel did not object to any of the statements Martinez broadly identifies on appeal as being improperly admitted in violation of *Aranda/Bruton*. Martinez has thus forfeited those contentions. (*People v. Mitcham, supra,* 1 Cal.4th at p. 1044.)[10]

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[9] In his opening brief, Cordoba also identified a fourth statement—one made by Detective Sica in which he falsely told Martinez that Cordoba had said shell casings had been buried to hide the evidence. Detective Sica was subject to cross-examination at trial. His statement thus does not fall within the purview of *Aranda/Bruton*.

[10] Like Cordoba, Martinez asserts his counsel objected to cross-incriminating statements at trial and cites the page in the reporter's transcript reflecting that his counsel stated, "I join on behalf of Mr. Martinez and ask that any reference of Mr. Martinez by Mr. Cordoba not be heard by the jury." In fact,

2. *Martinez Did Not Request, and the Court Had No Duty To Give, a Pinpoint Jury Instruction on Voluntary Intoxication in Connection with the Soto Murder*

Evidence of voluntary intoxication, while inadmissible for most purposes (§ 29.4, subd. (a)), is admissible on the question whether the defendant actually formed the requisite specific intent when a specific intent crime has been charged. (§ 29.4, subd. (b); see *People v. Williams* (1997) 16 Cal.4th 635, 677; see generally *People v. Williams* (2001) 26 Cal.4th 779, 790 [evidence of voluntary intoxication is admissible solely on the question of specific intent, not general criminal intent]; *People v. Atkins* (2001) 25 Cal.4th 76, 81 [same].)

"'[A]n instruction on the significance of voluntary intoxication [on specific intent] is a "pinpoint" instruction that the trial court is not required to give unless requested by the defendant.'" (*People v. Verdugo* (2010) 50 Cal.4th 263, 295; accord, *People v. Myles* (2012) 53 Cal.4th 1181, 1217 ["absent a defense request, the trial court ha[s] no duty to instruct" on "how voluntary intoxication may have affected his ability to form the [requisite] specific intent"].) Even when requested, the court is obligated to instruct on voluntary intoxication "'only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's "actual formation of specific intent."'" (*Verdugo,* at p. 295; accord, *People v. Williams*, *supra*, 16 Cal.4th at p. 677.) Evidence that the defendant

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what Martinez's counsel joined was Cordoba's objection to unredacted recordings of telephone calls Garcia had made, which the prosecutor sought to introduce as an exception to *Aranda/Bruton*; he did not object to the redacted versions of the custodial statements he now challenges on appeal.

consumed alcohol or other intoxicating substances, without more, is not sufficient to warrant the instruction; there must be some evidence from which a reasonable jury can infer that the consumption of the substance affected the defendant's actual formation of specific intent. (*Verdugo*, at p. 296; *Williams,* at pp. 677-678; *People v. Horton* (1995) 11 Cal.4th 1068, 1119.)

"In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.'" (*People v. Salas* (2006) 37 Cal.4th 967, 982.) We review the record de novo and independently determine whether it contains substantial evidence supporting the requested instruction. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Sisuphan* (2010) 181 Cal.App.4th 800, 806.)

Citing Garcia's testimony that he, Martinez and Verdin had been drinking alcohol for several hours before Garcia shot Soto and that Garcia estimated he had consumed 18 to 20 beers before the shooting, Martinez, who was tried on a theory that he aided and abetted Soto's murder, contends the court erred in denying his request for a pinpoint instruction on voluntary intoxication in connection with that homicide. (See *People v. Mendoza* (1998) 18 Cal.4th 1114, 1126 [voluntary intoxication relevant to aider and abettor's specific knowledge of perpetrator's purpose and intent to assist in carrying it out]; *People v. McNally* (2015) 236 Cal.App.4th 1419, 1431 [voluntary intoxication relevant to mental state of premeditation and deliberation].)

Contrary to Martinez's contention, his counsel did not request a voluntary intoxication instruction in connection with Martinez's culpability for Soto's death; his counsel requested it

with reference to Dr. Kadivar's killing.[11] As discussed, absent such a request, the court had no duty to give the instruction as to that count.

Even if Martinez's counsel's request could reasonably be interpreted to encompass Soto's homicide,[12] the trial court did not err in declining to give the instruction. As the court correctly observed, there was no evidence as to how much alcohol Martinez had consumed during the several hours he waited for Soto to arrive, let alone that the alcohol he consumed affected his mental state. (See *People v. Marshall* (1996) 13 Cal.4th 799, 848 [no error in failing to give voluntary intoxication instruction; "[a]lthough the offenses were committed . . . after [the defendant] had drunk an unspecified number of alcoholic drinks over a period of some hours, evidence of the *effect* of defendant's alcohol consumption on his state of mind was lacking"]; *People v. Williams*, *supra*, 16 Cal.4th at p. 677 [court not required to give defendant's requested pinpoint instruction on voluntary intoxication despite evidence defendant was "'doped up'" and "'probably spaced out'"; "[a]ssuming this scant evidence of defendant's voluntary intoxication would qualify as 'substantial,'

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[11] Martinez's counsel stated, "[A]t the time of the shooting of the doctor there is testimony that there was lots of beer consumed, and also my client made reference to the fact that he was dizzy during the time of the shooting or after, right after the shooting."

[12] When his counsel requested the instruction in connection with Dr. Kadivar's murder, he appears to have conflated evidence relating to the circumstances surrounding Soto's homicide with evidence relating to Dr. Kadivar's.

there was no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent"].)

3. *The Trial Court Did Not Err in Denying Verdin's Suppression Motion*

a. *The suppression hearing*

Prior to trial Verdin moved to suppress statements he had made during his August 18, 2007 custodial interrogation by Detectives Sica and Margarita Barron on the ground they were obtained after he had invoked, and the detectives refused to honor, his constitutional right to remain silent. Both Detectives Sica and Barron testified at the suppression hearing and a transcript and audio recording of that custodial interrogation were introduced into evidence at the hearing.

According to the People's evidence, Verdin was advised of his *Miranda* rights at the start of the questioning—his third interview in custody in connection with this case—and waived them. Detective Sica informed Verdin that Martinez had confessed to killing Dr. Kadivar and urged Verdin to be "a man of character" like Martinez and do the right thing. Verdin, a native Spanish speaker who understood some English, responded to Detective Sica in Spanish, insisting he was innocent of killing Dr. Kadivar. Detective Sica did not speak Spanish. Detective Barron, who spoke Spanish, acted as translator during the interview.[13]

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[13] The transcript of the interview contains both Detective Barron's English and Spanish translations to Detective Sica and Verdin, as well as an independent translation of all Spanish spoken during the interview. For example, the transcript reads:

"Verdin: 'Yo te digo que yo no se nada.'"

Detective Sica asked whether Verdin had been present when the doctor was killed. Detective Barron translated the statement into Spanish. When Verdin hesitated, Detective Barron commanded, "Conteste," using the formal, imperative form of the verb meaning "answer" in Spanish. Verdin responded to Barron in Spanish, "No le voy a contester nada ya," which, according to the translation in the transcript, means "I'm not gonna answer you anything anymore." Detective Barron translated Verdin's statement for Detective Sica slightly differently, telling him Verdin had said, "I'm not gonna answer anything anymore," omitting the direct object "you" from her translation. Detective Sica responded, "Okay. Very good. That's it." Detective Sica then said, "That's a . . ." and before he could finish his sentence with the word, "mistake," Verdin interjected that he wanted to talk with Martinez first and then he would talk with Sica.[14] Detective Sica asked why he wanted to speak with Martinez and why Verdin believed his request should be honored. Questioning continued, and Verdin made incriminating statements about his participation in Dr. Kadivar's murder.

"Trans[lation]: 'I tell you that I don't know anything.'"

"Barron: 'I told you I don't know anything.'"

[14] The transcript and audio recording diverge slightly as to the timing of these statements. According to the transcript, after Detective Barron translated Verdin's statement to Detective Sica as, "I'm not gonna answer anything anymore," Detective Sica said, "That's it," then added, "That's a mistake," after which Verdin replied "I want to talk more with [Martinez] . . . and we can talk later." The audio recording, however, reveals that, as described in the text, part of that exchange occurred simultaneously.

Detective Barron testified at the suppression hearing that she believed Verdin's statement "I don't want to talk with you anymore" was directed to her. She explained Verdin was still angry about comments she had made to him during an interrogation two months earlier in which she had insulted his masculinity. As soon as Verdin saw her again, he became hostile and refused to look at her. Detective Sica had to ask him to "be respectful."

Detective Sica testified that, when Detective Barron translated the statement "I am not gonna answer anything anymore," he began collecting his things, believing "for a very split second" that Verdin had intended to end the interview. But in the next "split second" Verdin "looked at me, again a split second, and then he created an ambiguous environment where I didn't know what he was wanting, that he said I want to talk to Antonio [Martinez] and then I will talk to you later." Believing that Verdin had not unambiguously invoked his right to remain silent, Detective Sica continued with his interrogation, promising Verdin that Detective Barron would, from then on, act only as a translator and not an interrogator and would translate his words accurately. He also promised Verdin he could speak to Martinez after the interview.

After considering all the evidence, the trial court ruled Verdin had not unambiguously invoked his right to remain silent, finding Verdin's statement he was not going to answer "you" could reasonably be interpreted as an expression of frustration toward Detective Barron, to whom he addressed the remark, and not an unambiguous assertion of his right to remain silent. Alternatively, the court ruled, even if Verdin's statement constituted an unambiguous invocation of his privilege against

self-incrimination, he immediately and impliedly waived his right to remain silent when he volunteered that he would speak with Detective Sica after consulting with Martinez. Crediting the timing of the conversation reflected in the audio recording, the court found Verdin's waiver occurred before or, at the very least simultaneously with, Detective Sica's statement "That's a mistake," not in response to it. Thus, even if Detective Sica's statement "that was a mistake" amounted to interrogation, Verdin's waiver had preceded it.

b. *Governing law and standard of review*

"As a prophylactic safeguard to protect a suspect's Fifth Amendment privilege against self-incrimination, the United States Supreme Court, in *Miranda*, required law enforcement agencies to advise a suspect, before any custodial law enforcement questioning, that 'he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" (*People v. Martinez* (2010) 47 Cal.4th 911, 947 (*Martinez*), quoting *Miranda*, *supra*, 384 U.S. at p. 479.)

Once a suspect invokes his right to remain silent, law enforcement must "'scrupulously honor[]'" the invocation and immediately cease questioning him or her. (*Michigan v. Mosley* (1975) 423 U.S. 96, 103 [96 S.Ct. 321, 46 L.Ed.2d 313]; accord, *Berghuis v. Thompkins* (2010) 560 U.S. 370 [130 S.Ct. 2250, 2259, 176 L.Ed.2d 1098].) To be an effective invocation, the suspect's assertion of the right must be plain and unambiguous. (*Martinez, supra,* 47 Cal.4th at pp. 947-948 ["'[i]n order to invoke the Fifth Amendment privilege after it has been waived, and in

order to halt police questioning after it has begun, the suspect "must unambiguously" assert his right to silence'"]; *People v. Stitely* (2005) 35 Cal.4th 514, 535 [same].) The inquiry is an objective one: An assertion of the right to remain silent is ambiguous, and thus not effective, if a "reasonable officer could interpret [the] defendant's statement as" demonstrating an intent other than "terminat[ing] the interrogation." (*People v. Williams* (2010) 49 Cal.4th 405, 434; accord, *Berghuis,* at p. 2250; see also *Stitely,* at p. 535 ["It is not enough for a reasonable police officer to understand that the suspect *might* be invoking his rights. [Citation.] Faced with an ambiguous or equivocal statement, law enforcement officers are not required . . . either to ask clarifying questions or to cease questioning altogether."].)

We independently review a trial court's ruling on a motion to suppress a statement under *Miranda.* (*People v. Waidla* (2000) 22 Cal.4th 690, 730.) In doing so, however, "we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence." (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.)

c. *Verdin did not unambiguously invoke his right to remain silent*

Verdin contends, as he did in the trial court, his statement "I'm not gonna answer you anymore" was an unambiguous assertion of his right to remain silent. However, the court found, and the record amply supports, that the statement was directed to Detective Barron in response to her command to "answer," a directive that Detective Sica did not make himself. The record also shows that, prior to making his statement, Verdin had exhibited a growing hostility toward Detective Barron. In context, Verdin's comment can reasonably be viewed as an

expression of frustration or animosity toward Detective Barron rather than an unambiguous invocation of Verdin's right to remain silent. (See *People v. Williams*, *supra*, 49 Cal.4th at p. 433 ["'[a] defendant has not invoked his or her right to silence when the defendant's statements were merely expressions of passing frustration or animosity toward the [interrogating] officers'"]; *People v. Stitely, supra,* 35 Cal.4th at p. 535 [same]; see also *Williams*, at p. 434 [defendant's statement—"'I don't' want to talk about it'—was an expression of defendant's frustration with [interrogator's] failure to accept defendant's repeated insistence that he was not acquainted with the victim . . . rather than an unambiguous invocation of his right to remain silent"].)

People v. Jennings (1988) 46 Cal.3d 963, 979 is analogous: Jennings was interviewed by two officers, Officer Cromwell and Officer Maich. During the interview Jennings accused Officer Cromwell of misconstruing his statements. Then, in response to Officer Cromwell's persistent attempts to get him to recall details he had already stated he could not remember, Jennings stated, "'You're scaring the living shit out of me. I'm not going to talk. You have got the shit scared out of me.'" And, "'I'm not saying shit to you no more, man. You, nothing personal man, but I don't like you. . . . That's it. I shut up.'" (*Id.* at p. 977.) Viewed in context, the Supreme Court held, the defendant's statements reflected a momentary animosity toward, and refusal "'to talk further with[,] Cromwell whom he did not like or trust, as opposed to Maich'"; it was not an unambiguous invocation of his right against self-incrimination. (*Id.* at p. 979.)

Verdin's statement to Detective Sica that he would continue to speak with him but first wanted 15 minutes to confer with Martinez, made immediately following his refusal to

continue to answer Detective Barron, reinforces that conclusion. Taken together, Verdin's comments are reasonably understood as an attempt to control the course of the interview, rather than an unambiguous assertion of his right to remain silent. (See *Martinez*, *supra*, 47 Cal.4th at p. 951 [defendant's statement "'I don't want to talk anymore right now,'" made during a lengthy interview rather than at the outset, was not an unambiguous invocation of right to remain silent but rather could reasonably be interpreted as attempt to control interview]; *People v. Ashmus* (1991) 54 Cal.3d 932, 970 ["'now I ain't saying no more'" "'no[,] I'm not gonna get accused of somethin'" could reasonably be interpreted as attempt "to alter the course of the questioning" but not terminate the interrogation], overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117; see also *People v. Tully* (2012) 54 Cal.4th 952, 991-991 [defendant's silence, followed by request to speak to his wife after learning she had spoken to police, was not an unambiguous invocation of his right to remain silent].) On this record, we find no error in the court's denial of Verdin's suppression motion.[15]

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[15] In light of our holding that Verdin did not unambiguously invoke his right to remain silent, we do not address the court's alternative ruling that he had impliedly waived that right immediately after invoking it by asking Detective Sica if he could speak to Martinez.

DISPOSITION

The judgments are affirmed. The superior court is directed to prepare a corrected abstract of judgment that reflects Cordoba's sentence of life without the possibility of parole and forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.