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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. GERARDO ROMERO LOPEZ, Defendant and Appellant.	B263261 (Los Angeles County Super. Ct. No. PA074156)

APPEAL from the judgment of the Superior Court of Los Angeles County. Hayden A. Zacky, Judge. Affirmed.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Colleen M. Tiedemann and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

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In July 2012, Pedro Cadenas was fatally shot in a strip mall parking lot in the city of Arleta. A jury convicted defendant and appellant Gerardo Romero Lopez of the first degree murder and attempted robbery of Mr. Cadenas, as well as possession of a firearm by a felon. The jury also found true the robbery-murder special-circumstance, firearm and gang allegations. Defendant was sentenced to life without the possibility of parole, plus a consecutive term of 31 years to life.

In this appeal, defendant contends the court committed instructional error by failing to sua sponte instruct the jury with CALCRIM No. 707 regarding accomplice testimony in a special-circumstance trial, and there is no substantial evidence the shooting occurred during the commission of an attempted robbery. Defendant further argues the court erred in precluding the testimony of his expert, Dr. Bruce Krell, and that the prosecutor engaged in misconduct by making false statements to the jury about the lack of evidence related to the topic to which Dr. Krell would have testified. Defendant also contends his Sixth Amendment rights were violated by the admission of testimonial hearsay regarding the gang allegation, or alternatively, that his trial counsel provided ineffective assistance by failing to preserve his objection on Sixth Amendment grounds. Finally, defendant claims cumulative error.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by information with first degree murder (Pen. Code, § 187, subd. (a); count 1), attempted robbery (§§ 211, 664, subd. (a); count 2), and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 3). It was further alleged the murder was committed in the course of an attempted robbery

within the meaning of section 190.2, subdivision (a)(17). As to counts 1 and 2, it was alleged defendant personally used and discharged a firearm causing great bodily injury in the commission of the offenses within the meaning of sections 12022.53, subdivisions (b), (c) and (d). As to all counts, it was alleged the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1)(C).) Defendant was alleged to have suffered one prior conviction of a serious or violent felony, and to have served one prior prison term. (§§ 667, subd. (a)(1), 667.5, 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

The testimony and evidence at trial revealed the following material facts.

In July 2012, Sharis H.[1] was defendant's girlfriend, and they lived together at his mother's home. Sharis was addicted to heroin, had a $700 a week habit, and no job. Defendant was a member of a gang known as Latin Times Pacoima and his moniker was "Suspect." Sharis had "Suspect" tattooed on her cheek.

On July 24, 2012, Sharis drove with defendant, in a black Toyota Camry, to a strip mall located on the corner of Van Nuys Boulevard and Arleta Avenue. The mall had several stores, including a cell phone store and a Mexican restaurant called Tacos El Oso.

On the way to the mall, they picked up Gabriel G., a friend of defendant's. Sharis and Gabriel did not know each other. They went to Tacos El Oso to get something to eat. Sharis just

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[1] We refer to the witnesses only by their first names and the initials of their last names to protect their privacy.

sat with them and did not eat because she felt sick from not having any heroin since the night before. Another couple who knew defendant arrived at the restaurant and joined them. After they finished eating, defendant and Gabriel went briefly to the cell phone store and then the three of them left to go back home.

However, they returned to the mall because Sharis needed heroin. She called her drug dealer, Mr. Cadenas, to meet them in the parking lot. When they arrived back at the mall, defendant parked the black Camry fairly close to Tacos El Oso, pulling into a parking spot facing the restaurant. About five minutes later, Mr. Cadenas arrived in a white Toyota Camry and parked nearby, but facing the street. Sharis walked over to Mr. Cadenas's car and got into the front passenger seat. He showed her two different types of heroin she could buy.

While Sharis was looking at the bags of heroin, defendant opened the back passenger door and got into the car. He kneeled between the two front seats and asked what was taking so long. Before Sharis finished telling him that she was trying to decide which heroin to buy, defendant pulled out a gun and pointed it directly at Mr. Cadenas. Defendant demanded that Mr. Cadenas give him his drugs and money. Mr. Cadenas denied having anything, but defendant said that he was selling drugs in "his neighborhood" and that he better give it all to him.

Mr. Cadenas "panick[ed]" and opened his door. He got one foot out of the car and started to turn his upper body to get out when Sharis heard a gunshot. It was extremely loud and Sharis was "shocked." Defendant had fired the gun from right next to her left shoulder, shooting Mr. Cadenas in the upper back, near his shoulder.

Sharis felt defendant tugging on her shirt, so she got out of the car and ran back to defendant's car, still grasping the bags of heroin in her hand. Defendant also ran back to his car and got into the back seat. They quickly left the parking lot and drove up Arleta Avenue. At some point, they pulled over and Gabriel got out. Defendant and Sharis continued home. When they got out of the car at defendant's mother's house, Sharis noticed there was damage to the right side bumper. Both she and defendant took a shower and did not go out for the rest of the night. They both used the heroin she had taken when she fled Mr. Cadenas's car. The next morning, she and defendant were arrested.

Sharis admitted she had prior convictions for burglary, driving a car without the owner's permission, grand theft, possession of narcotics for sale, forgery, and identity theft. She admitted she told the police that another individual named "Trippy" was with them that day, and that he was the one with the gun and who bought the drugs. She said she made up the story about Trippy because she did not want defendant to get in trouble. She was also afraid and did not want her name on "paperwork" that defendant would see and know she had made a statement to the police about what happened. She admitted she wrote numerous letters to defendant saying she loved him, and claiming to not know why he was in jail since he had not done anything wrong. Sharis acknowledged she had been granted immunity for her testimony, but understood she could still be prosecuted for committing perjury. After her arrest, Sharis entered a rehabilitation program and, at the time of trial, had been sober for over two years and was working as a certified drug counselor.

Carlos R. testified that he owned the cell phone store in the shopping mall. On July 24, he arrived at his store around 7:30 p.m. Shortly thereafter, he heard two gunshots. Carlos told his customers not to go outside. He went to the front window and saw a car, on the opposite side of a parked van, starting to drive away. As it pulled out of the parking space, the car hit the van. The driver of the car and the front passenger then switched seats, and the car sped out of the lot. Carlos provided copies of the surveillance footage from the video cameras in his store to the police following the incident.

Oscar R. was working at the cell phone store that evening. Sometime before 7:30 p.m., he assisted a customer who had the word "Pacoima" tattooed above his mouth and the initial "P" on the top of his head, just like defendant's tattoos.

Mauricio J. was shopping with his brother at the cell phone store. His brother's van was parked outside. He saw defendant come in, walk around the store a bit, and then walk out. Defendant had the initial "P" tattooed on the top of his head and was wearing a long-sleeved gray shirt. Shortly after defendant left the store, Mauricio heard two gunshots. He ran over to the window and looked out. His brother's van appeared to move or shake, like it may have been struck. He saw there was a dark-colored four-door car idling near the van. A young man got out of the front passenger seat, ran around the car and pushed the young woman who was at the steering wheel over to the front passenger seat. Mauricio saw defendant walking "fast" toward the waiting car. Defendant got into the rear passenger seat. As he did so, Mauricio noticed defendant was holding a gun in his left hand, close to his leg. Defendant said "let's go, let's go" as he got into the car. When interviewed by the police that evening,

Mauricio provided a partial license plate number for the car that fled the scene. On cross-examination, Mauricio conceded he did not originally tell the police he saw a gun in defendant's hand because he was scared to say so.

O.R. testified that he and a co-worker arrived at the mall around 7:45 p.m. O.R. pulled into the lot and backed his pickup truck into one of the parking spaces near Tacos El Oso. A white Camry was parked a couple of spaces over to his left. The sound of two men arguing from inside the car caught his attention. However, he did not keep looking at the car because he wanted to get the tools out of the back of his truck and lock them up in the cab.

Because of the yelling coming from the white car, O.R. continued to glance over. He saw a "skinny, light-skinned" girl get out of the front passenger seat. A man in the back seat remained in the car, continued to argue with the driver, and then "leaned forward" towards the driver. At that point, O.R. heard a gunshot and saw the man in the driver's seat slump forward and to the side. He never saw a gun. The girl who had gotten out of the front passenger seat then jumped into the driver's seat of a dark-colored car parked nearby. She started to quickly back the car out of the parking space but hit the van that was parked in the next space. Another man from inside that car jumped out and switched seats with her. The man who had been in the back seat of the white car then ran over and got into the back of the dark-colored car, which sped out of the parking lot.

O.R. gave a recorded statement to the police on the night of the incident which was played for the jury. In the statement, O.R. described arriving at the shopping mall and while he was parking his truck, he immediately noticed a "commotion" in a

white car parked about 30 or 40 feet away. He heard "arguing" between a man in the back seat and the male driver. A "skinny" girl got out of the car and then there was a gunshot. The man in the back seat got out of the car and he and the girl jumped into a black car and sped out of the lot, hitting a parked van on the way out. To O.R., it looked like "they tried to rob" the driver of the white car.

Ryan Verna, a homicide detective with the Los Angeles Police Department, was assigned to investigate the shooting of Mr. Cadenas. When he arrived on the scene, he saw the victim's white Camry in the parking lot. There was also a van parked nearby with damage to the bumper and scrape marks along the side. A spent .40-caliber shell casing was recovered from the driver's seat of the Camry, and a cell phone, later determined to belong to defendant, was found on the back seat. The .40-caliber shell casing was manufactured by Tula Armor Factory. A fingerprint lifted from the inside rear passenger door of the victim's car was later determined to be defendant's. A pouch filled with narcotics (heroin, methamphetamine, cocaine) and narcotics-related paraphernalia were found in the Camry. Over $1,100 in cash was located in one of Mr. Cadenas's pants pockets.

Detective Verna obtained videotape from the surveillance cameras at the cell phone store. The tape was played for the jury, showing at different points, a dark-colored car entering the parking lot, and two males and a female, walking between the parking lot, the cell phone store and Tacos El Oso.

Detective Verna interviewed Gabriel in September 2012. He told Detective Verna he was a member of the Knock Knock Boys and his moniker was "Crazy Cartoon." He said that on July 24, 2012, he went to Tacos El Oso with defendant and a girl

he did not know, and then to the cell phone store in the same mall. He initially said he had not been at the mall when the shooting occurred, but later admitted he had been there. Gabriel said they briefly left the mall and when they returned, the girl got out of the car first, and then defendant got out a few minutes later. When they both returned to the car, defendant said "let's go." Gabriel said he struck another parked car as he tried to pull out of the lot. After driving a short distance, Gabriel said he pulled over and got out of the car and then defendant left in the car with the girl.

A search was conducted at Gabriel's home and a .40-caliber live round, manufactured by Tula Armor, was found in his bedroom and booked as evidence. Detective Verna was not familiar with Tula Armor as an ammunitions manufacturer.

On cross-examination, Detective Verna said Sharis's version of what happened appeared to be largely consistent with what the other witnesses from the cell phone store reported. He admitted she did change her version of how the shooting occurred, saying shortly after her initial interview that there was a fourth person named Trippy with them that day. Detective Verna explained he obtained additional surveillance footage from a tire store located across the street which appeared to support Sharis's original account, as well as the other witnesses, of just three individuals being involved. The surveillance tape from the tire store was played for the jury, showing a black car entering the lot and parking around 7:40 p.m., and a white car entering the lot and parking nearby a couple of minutes later, and only two individuals walking back and forth between the two cars. O.R.'s truck is also depicted in the tape, being parked a short distance from Mr. Cadenas's white car. Detective Verna checked

the police department database to determine if there was a Trippy that had been identified as a Latin Times Pacoima gang member and there was no one known by that moniker. After further discussions with the police, Sharis did return to her original account.

Dr. Martina Kennedy of the Los Angeles County Coroner's Office performed the autopsy on Mr. Cadenas. She testified that Mr. Cadenas died from a fatal gunshot wound that damaged his aorta and heart. The bullet entered his back on the upper right side, and exited, slightly lower, from his left chest, travelling through his body from right to left. Dr. Kennedy said she could not give an opinion about where the shooter was located inside the car based on the wound path. Mr. Cadenas had a second gunshot wound on the inside of his left thigh from which a bullet was recovered. Dr. Kennedy said it was possible that one bullet made both wounds. The bullet recovered from Mr. Cadenas's leg was later determined to be a .40-caliber bullet consistent with the shell casing found in the victim's car.

Criminalist Daniel Rubin, a firearms analyst for the Los Angeles Police Department, attested to the fact that most semi-automatic handguns discharge the shell casing or cartridge to the right, assuming the firearm is held straight when fired. He said he could not determine the exact location of a firearm at the time it was fired simply from where a shell casing was located. Generally, a bullet travels in a straight line for short distances until gravity affects its trajectory. Mr. Rubin said that he did not regularly encounter ammunition manufactured by Tula Armor Factory, a Russian company. In his experience, it was not a commonly used ammunition.

Gabriel testified that in July 2012 he was 15 years old. He admitted he is a member of the Knock Knock Boys gang and that defendant was a friend from the neighborhood he had known for years, but claimed not to recall defendant's name or anything about what happened on July 24, 2012. After responding to numerous questions by saying he did "not recall," Gabriel acknowledged that he was the person dressed in black shown in the surveillance video from the cell phone store with another male dressed in a gray shirt, and that he knew defendant by the moniker Suspect. He admitted there is a "code" among gang members that they do not tell on each other, and that he follows that code.

After being impeached with his pretrial statement to Detective Verna, Gabriel admitted he went with defendant and a girl he did not know to the shopping mall on the evening of July 24, 2012. He said they went first to eat, and then to the cell phone store to look at phones. They left briefly but returned. On the return trip, Gabriel was driving defendant's black Camry even though he was not yet licensed to drive. Once they had parked in the lot, the girl got out and then defendant got out. After a few minutes they returned to the car and defendant said "let's go." Gabriel denied knowing about any robbery or shooting and denied hearing any gunshots. He said he was not aware of anyone being shot that night until after he was arrested.

Officer Michael Lieve testified as the prosecution's gang expert. In July 2012, Officer Lieve was assigned to the Foothill Division gang enforcement detail of the Los Angeles Police Department. Two of the gangs he was assigned to monitor were Latin Times Pacoima and the Knock Knock Boys. He explained the two Hispanic gangs have formed an alliance and cooperate

with one another in the neighborhood; an alliance that is depicted in graffiti, some members' tattoos, and acknowledged by many members from both gangs.

Officer Lieve explained he had training in gang culture while at the police academy, regularly attended gang-related law enforcement conferences, and worked and shared information with other specialized gang units. He interacts on a daily basis with gang members, both in consensual encounters and during the investigation of crimes. He also regularly speaks with other gang officers about gang activities and related matters. Officer Lieve has nine years of experience working with gangs.

Officer Lieve described the general area in Pacoima, and some of the surrounding neighborhoods, claimed by Latin Times Pacoima and said they had approximately 160 documented members. The intersection at Van Nuys Boulevard and Arleta Avenue where the shooting occurred is within the gang's claimed territory. He described their hand signals, that they go by the initials "LTP" and have adopted the jerseys and letter "P" of the Pittsburgh Pirates and Pittsburgh Steelers sports organizations.

Officer Lieve testified the gang's primary activities were robberies, narcotics sales, and guns. Latin Times Pacoima also collected "taxes" on other criminal activities being conducted in their territory. Taxes are a common form of "protection" in which the gang is provided a portion of the benefits from illegal activity, such as narcotics sales, in return for the gang allowing the activity to take place in their territory. It is undertaken by Hispanic gangs like Latin Times Pacoima on behalf of the Mexican Mafia. Taxes are also "extort[ed]" from lawful businesses that exist within the gang's claimed territory. The gang enforces the collection of taxes through verbal threats and

intimidation, and individuals that do not comply may be "seriously hurt or killed."

Officer Lieve authenticated minute orders referencing the convictions of two Latin Times Pacoima members on various firearm and narcotics charges. He also attested to an encounter with defendant in May 2012 in which defendant admitted his membership in Latin Times Pacoima since the age of 15.

Officer Lieve, in response to a hypothetical question based on the facts of the shooting, opined that the crime, seeking to enforce taxes against a drug dealer operating in gang territory, was for the benefit of and in association with a criminal street gang. The violent murder, committed in a public place, helped to maintain fear and respect for the gang in the community.

Detective Verna was recalled to the stand and provided additional testimony regarding gang culture generally. He explained his training and experience working as a gang officer since 2000, and as a detective since 2009. He said that Hispanic gangs in southern California are controlled in large part by the Mexican Mafia. Detective Verna attested that those gangs generally collect "taxes" from drug dealers operating in their territory and from other criminal activities; money which is then funneled to the Mexican Mafia. Individuals who do not comply face consequences ranging from verbal threats to being assaulted or killed, if necessary.

After the close of the prosecution's case, the court held a hearing pursuant to Evidence Code section 402 regarding the expert testimony of Dr. Bruce Krell proffered by defendant. We reserve our recitation of the pertinent facts regarding the section 402 hearing to part 4 below.

Defendant exercised his right not to testify. He called Dr. Barry Silverman, an expert in forensic pathology. Dr. Silverman estimated he had performed at least 5,000 autopsies in his career, and approximately 15 to 20 percent involved gunshot wounds. Dr. Silverman reviewed the autopsy report and confirmed that the bullet made a straight path through the victim's body, travelling from "right to left, back to front, and downward." In order to travel on that path, the bullet had to come from the right of the entry wound in his opinion.

The jury found defendant guilty as charged and found the robbery-murder special-circumstance, firearm, and gang allegations true. In a separate proceeding, defendant admitted his prior conviction. The court sentenced defendant to state prison for life without the possibility of parole on count 1, plus a consecutive term of 31 years to life.

This appeal followed.

DISCUSSION

1. CALCRIM No. 707

Defendant contends the court had a sua sponte duty to instruct with CALCRIM No. 707 regarding accomplice testimony in a special-circumstance trial. He argues the court's failure to instruct with CALCRIM No. 707 allowed the prosecution to secure a true finding on the special-circumstance allegation without the required corroboration of Sharis's testimony that the shooting occurred during an attempted robbery.

We review claims of instructional error de novo. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

Respondent argues defendant forfeited his claimed instructional error by failing to object to the court's proposed

instructions, failing to seek an appropriate clarifying instruction, and by expressly opposing the giving of CALCRIM No. 334.

When the court proposed giving CALCRIM No. 334 regarding accomplice testimony on the charged offenses, defense counsel objected to an accomplice instruction being given at all. The court allowed counsel to consider the propriety of an accomplice instruction overnight. The following day, defense counsel said he did not think it was appropriate to give an accomplice instruction. The prosecutor countered that the use notes for CALCRIM No. 334 state the court has a sua sponte duty to give the instruction when accomplice testimony is at issue. The trial court concluded CALCRIM No. 334 should be given. Defendant made no request for instruction with CALCRIM No. 707 which is largely identical to No. 334, except that it expressly refers to special-circumstance allegations. Defendant also did not request any modification of CALCRIM No. 334.

" 'A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citations.]" (*People v. Grimes* (2016) 1 Cal.5th 698, 724; accord, *People v. Guiuan* (1998) 18 Cal.4th 558, 570.)

Defendant contends the use notes for CALCRIM No. 707 state the court has a sua sponte duty to give the instruction so his lack of a request for the instruction, or for a clarifying instruction, and his express opposition to CALCRIM No. 334 does not preclude his ability to raise the contention here. We conclude the court discharged its sua sponte duty to instruct on accomplice testimony by giving CALCRIM No. 334. Thus, defendant's failure to request a modification of the instruction to include an

express reference to the special-circumstance allegation precludes his ability to raise the claimed instructional error.

In any event, were we to resolve the issue on the merits, we would reject defendant's argument. The court instructed with CALCRIM No. 334 as follows:

"Before you may consider the statement or testimony of Gabriel [G.] and/or Sharis [H.] as evidence against the defendant, you must decide whether Gabriel [G.] and/or Sharis [H.] was an accomplice. A person is an accomplice if he or she is subject to prosecution if: [¶] 1. He or she personally committed the crime; [¶] OR [¶] 2. He or she knew of the criminal purpose of the person who committed the crime; [¶] AND [¶] 3. He or she intended to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime.

"The burden is on the defendant to prove that it is more likely than not that Gabriel [G.] and/or Sharis [H.] was an accomplice.

"An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime will be committed or is being committed and does nothing to stop it.

"A person may be an accomplice even if he or she is not actually prosecuted for the crime.

"If you decide that a declarant or witness was not an accomplice, then supporting evidence is not required and you should evaluate his or her statement or testimony as you would that of any other witness.

"If you decide that a declarant or witness was an accomplice, then you may not convict the defendant of Murder or

Attempted Robbery based on his or her statement or testimony alone. You may use the statement or testimony of an accomplice to convict the defendant only if: [¶] 1. The accomplice's statement or testimony is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice's statement or testimony; [¶] AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crimes.

"Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crimes, and it does not need to support every fact mentioned by the accomplice in the statement or about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

"The evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice.

"Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

The court also gave CALCRIM No. 540A: "The defendant is charged in Count 1 with murder, under a theory of felony murder. [¶] To prove that the defendant is guilty of first degree murder under this theory, the People must prove that: [¶]

1. The defendant committed Attempted Robbery; [¶] 2. The defendant intended to commit Robbery; [¶] AND [¶] 3. While committing the Attempted Robbery, the defendant caused the death of another person. [¶] A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent. [¶] To decide whether the defendant committed Attempted Robbery, please refer to the separate instructions that I will give you on that crime. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder. [¶] The defendant must have intended to commit the felony of Attempted Robbery before or at the time that he caused the death."

CALCRIM No. 730 was also given: "The defendant is charged with the special circumstance of Murder committed while engaged in the commission of Attempted Robbery. [¶] To prove that this special circumstance is true, the People must prove that: [¶] 1. The defendant committed Attempted Robbery; [¶] 2. The defendant intended to commit Robbery; [¶] AND [¶] 3. The defendant did an act that caused the death of another person. [¶] To decide whether the defendant committed Attempted Robbery, please refer to the separate instructions that I will give you on that crime. You must apply those instructions when you decide whether the People have proved first degree murder a theory of felony murder. [¶] The defendant must have intended to commit the felony of Attempted Robbery before or at the time of the act causing the death."

The court's instruction with CALCRIM No. 334, along with the balance of the instructions related to the charged offenses and the special circumstance allegation (e.g., CALCRIM Nos. 460, 540A, 700, 704, 705, 730, 1600), thoroughly instructed the jury as

to the relevant and applicable law. CALCRIM No. 334 unequivocally informed the jury that if it concluded a witness was an accomplice it may "not convict the defendant of Murder or Attempted Robbery based on his or her statement or testimony alone." Defendant does not dispute CALCRIM No. 334 accurately states the law regarding accomplice corroboration on the substantive charges.

The instructions given related to felony murder and the special-circumstance allegation unequivocally directed the jury to refer to the instructions on the substantive charges, and admonished that "[y]ou must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder." The jury was properly instructed regarding corroboration of accomplice testimony as it pertained to the robbery–murder special circumstance without the giving of CALCRIM No. 707.

People v. Hamilton (1989) 48 Cal.3d 1142, on which defendant relies, does not support a different conclusion. *Hamilton* held that where a special circumstance requires proof of some other crime, as here, the corroboration requirement set forth in Penal Code section 1111 applies. The court's instructions were in accord with *Hamilton* and properly instructed the jury about the need for corroboration of accomplice testimony.

Defendant argues it is reasonable to assume the jury would follow CALCRIM No. 334 literally and believe corroboration was only necessary for *the substantive charges* and would not incorporate its directives with respect to resolving the special-circumstance allegation. We disagree. The jury found defendant guilty of attempted robbery and guilty of first degree murder. The jury was properly and thoroughly instructed that to do so

there had to be corroboration of accomplice testimony. Further, the special-circumstance instructions clearly instructed the jury to refer to the instructions on the substantive charges, which included CALCRIM No. 334, for determining whether defendant committed a shooting within the course of an attempted robbery. It is not reasonable to assume the jury wholly disregarded the instructions on the substantive charges in resolving the special circumstance allegation. We are confident the jury was properly instructed about the need for corroboration of accomplice testimony with respect to both the substantive charges and the special-circumstance allegation.

Assuming for the sake of argument that the failure to instruct with CALCRIM No. 707 was error, it was harmless by any standard. At best, CALCRIM No. 707 would have been repetitive of the nearly identical CALCRIM No. 334. The only material difference between the two instructions is that CALCRIM No. 707 includes a preamble that refers to the prosecution's burden to show that defendant committed an attempted robbery in order to prove the special circumstance. However, the court instructed the jury on the prosecution's burden in that regard with CALCRIM Nos. 700, 705, 730. The jury was properly instructed and defendant has not shown any prejudice from the fact that CALCRIM No. 707 was not given.

2. Corroboration of the Accomplice Testimony

Defendant argues there was insufficient evidence of an attempted robbery because the only evidence of a robbery was the uncorroborated accomplice testimony of Sharis. Defendant does not challenge the sufficiency of the evidence for murder, only that there was no evidence to support the attempted robbery charge,

the felony-murder theory, and the robbery-murder special-circumstance allegation. We disagree.

Our task is to review " 'the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 988.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331 (*Bolin*); accord, *People v. Manriquez* (2005) 37 Cal.4th 547, 577 (*Manriquez*).) "These same standards apply to challenges to the evidence underlying a true finding on a special circumstance." (*People v. Banks* (2015) 61 Cal.4th 788, 804 (*Banks*).)

"The law on the corroboration of accomplice testimony is well established: ' "The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime." ' [Citation.] ' "The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime." ' [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.]" (*People v. Williams* (2013) 56 Cal.4th 630, 678-679.)

There was ample evidence corroborating an attempted robbery. When interviewed by police on the night of the incident, O.R. said it appeared to him that defendant was attempting to rob Mr. Cadenas, by the manner in which they were arguing inside the white Camry. O.R. testified that defendant, after yelling at Mr. Cadenas for awhile, then leaned forward towards the driver's seat where Mr. Cadenas was seated and shot him. Detective Verna testified that a cache of illegal narcotics and over $1,100 were found on Mr. Cadenas. Detective Verna and Officer Lieve testified about the gang-related motive for the crime, namely that Hispanic gangs like Latin Times Pacoima demand "taxes" or money from dealers selling drugs in their territory.

This evidence is consistent with and substantiates Sharis's testimony that defendant demanded and yelled at Mr. Cadenas to turn over his drugs and money, that he made such demands because Mr. Cadenas was dealing in "his neighborhood," and then he shot Mr. Cadenas when he refused defendant's demands and sought to escape. It was sufficient evidence on which the jury could conclude that Sharis's testimony was credible. " ' "Corroborating evidence is sufficient if it substantiates enough of the accomplice's testimony to establish his [or her] credibility [citation omitted]." ' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128 (*Rodrigues*).)

Defendant argues the evidence merely connected defendant to the murder, particularly since defendant did not take any money or drugs from Mr. Cadenas. The evidence connected defendant directly to an attempted robbery that ultimately resulted in a murder. Simply because the evidence also

connected defendant to the murder or because defendant abandoned the attempted robbery in order to flee the scene does not render the evidence inadequate as corroboration. (See, e.g., *Rodrigues*, *supra*, 8 Cal.4th at p. 1129 [rejecting the defendant's argument that while the corroborating evidence adequately connected him to the murder, it was too non-specific to connect him to the robbery, and concluding that the "totality of circumstances" justified the jury's finding that an attempted robbery had occurred]; *People v. Zapien* (1993) 4 Cal.4th 929, 984-986 [finding sufficient circumstantial evidence the defendant attempted a robbery even though he abandoned the attempt after the police were called and fled without any of the money or jewelry]; *People v. Szeto* (1981) 29 Cal.3d 20, 28 [accomplice testimony adequately corroborated in part by testimony from officer about gang-related motive for the murders].)

Because defendant's substantial evidence argument is without merit, so too are his federal due process challenges predicated on that basis.

3. Expert Gang Testimony

Defendant contends the testimony of Detective Verna and Officer Lieve regarding the gang allegation, including the alleged gang-related motive for the crimes, was based on inadmissible testimonial hearsay in violation of his Sixth Amendment right to confront and cross-examine witnesses. We disagree.

Defendant concedes his trial counsel did not object on Sixth Amendment grounds to the testimony of either officer. However, he contends that any objection would have been futile because the law, at the time of trial, allowed gang experts to testify based on hearsay statements. Alternatively, he argues his trial counsel was ineffective for failing to so object and this court should

therefore consider his argument on the merits. He contends that, while this appeal was pending, the Supreme Court issued its decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) which establishes that his Sixth Amendment rights were violated by the admission of the gang evidence.

We conclude defendant forfeited his confrontation clause objection. (*People v. Redd* (2010) 48 Cal.4th 691, 730.) In any event, the contention is without merit.

In *Sanchez*, our Supreme Court concluded that "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. omitted.)

In so holding, the Court explained that "[o]ur decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. Indeed, an expert's background knowledge and experience is what distinguishes him from a lay witness, and, as noted, testimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth. Thus, our decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise. Our conclusion restores the traditional distinction

between an expert's testimony regarding background information and case-specific facts." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.)

Rather, "[w]hat an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.)

Defendant contends that Officer Lieve testified about case-specific facts based on testimonial hearsay regarding the connection between Latin Times Pacoima and the Knock Knock Boys, and the fact that Latin Times Pacoima regularly collected "taxes" on drug dealers operating in its territory. However, these are not case-specific facts, but rather background facts related to gang culture generally about which Officer Lieve and Detective Verna were qualified to testify. *Sanchez* explained that "our decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.)

Indeed, in *Sanchez*, the gang expert there attested to gang culture generally, about general background information related to the defendant's gang, its territory and habits, and also about that gang's history of collecting "taxes" and retaliating against individuals who failed to comply. (*Sanchez*, *supra*, 63 Cal.4th at p. 672.) The Supreme Court concluded such testimony, whether based on testimonial hearsay or not, was "relevant and admissible evidence." (*Id.* at pp. 698-699.) The court did not err in allowing Officer Lieve's and Detective Verna's testimony on those same issues.

Because we conclude there was no error in admitting the testimony, we need not address defendant's alternate contention that his trial counsel was ineffective in failing to object on Sixth Amendment grounds.

4. Dr. Bruce Krell

Defendant contends the court erred in precluding his expert, Dr. Bruce Krell, from testifying about bullet trajectories and shooting incident reconstruction. He argues the preclusion of Dr. Krell's testimony amounted not only to state law evidentiary error, but infringed on his constitutional rights to a fair trial and to present a defense. We are not persuaded.

After the prosecution rested, the court held a lengthy hearing pursuant to Evidence Code section 402 with respect to the proffered testimony of Dr. Krell. Defendant sought to have Dr. Krell give an opinion about bullet trajectories and the likely location of the shooter inside the car. Defendant's theory of the case was that given the entrance and exit wounds on Mr. Cadenas, the fact the only shell casing was found in the front seat, and Sharis's testimony about the position of Mr. Cadenas when he was shot (his back was turned towards her as he tried to get out of the car), the shooter was more likely in the front seat, and not the back seat where defendant was seated.

At the hearing, Dr. Krell testified he is a firearms dealer, a gunsmith, and a firearms instructor. He has a Ph.D in applied mathematics, and has done ballistic science research for 38 years, including shooting reconstructions and firearms tool mark analyses. He taught ballistics for several years as a civilian instructor at the Marine Sniper School at Camp Pendleton. He has taught firearms use, repair and cleaning for over 18 years. He has written a number of computer programs for various

government studies related to ballistics trajectories. In addition to writing the programs, Dr. Krell has been involved in testing the programs. Dr. Krell stated that "part of ballistics is trajectory patterns." He is not a physicist but "math is the language of physics."

Dr. Krell is on the Los Angeles Superior Court panel as a firearms expert. He has been appointed in about 130 cases, and testified in 22, 10 of which included shooting incident reconstruction. He described shooting incident reconstruction as looking at firearms operations (impacts, angles, heights, bullet paths, ejection patterns), ballistics (trajectories), factual information from the participants and the crime scene, and then "working backwards" to reconstruct a sequence of events and a theory of how the shooting unfolded.

Dr. Krell stated that the most commonly relied-on source in the field, Shooting Incident Reconstruction (2d ed. 2011) by Michael Haag and Lucien Haag, states that a shooting reconstruction expert should have knowledge and expertise in 44 different subjects, and that he has written reports related to 38 of those subjects, and has testified as to 32.

On cross-examination, Dr. Krell conceded he had recently been disqualified from testifying on bullet trajectories and shooting incident reconstruction in three separate cases. However, Dr. Krell said he has testified as an expert on shooting incident reconstruction in eight cases.

Dr. Krell said he read the autopsy report but apparently had not spoken to the medical examiner about Mr. Cadenas's wounds in forming his opinions. He explained that the Haag and Haag book only recommends, but does not require, that be done. He could not recall reviewing any material or being aware of any

witnesses, besides Sharis, who stated that the shooter had been in the back seat of the car. He did not recall there being any other witnesses to the shooting.

Dr. Krell only looked at evidence surrounding the discharge of the gun because his analysis "is strictly based on the physics of trajectories, the potential positions of the body and the ejection pattern of the firearm in general." He said he did not need to review evidence unrelated to that specific focus.

Dr. Krell admitted his work as an instructor at Camp Pendleton was related to sniper-training and long-distance trajectories, but explained that a shooting in a confined space like a car is much simpler to analyze as it pertains only to "straight line trajectories" because of the short distances involved. He conceded he has not taken any classes or received instruction in the "trajectory of bullets," explaining that his knowledge is "all on the job experience." Dr. Krell said he is self-taught and has not had his work peer-reviewed. However, any work he did for the government, including creating any reports, had to be reviewed before it could be submitted and finalized. He conceded his government work was related to missiles and not handguns, but said the underlying physics issues are the same. Dr. Krell has not taken any classes or had any training in criminology or crime scene reconstruction.

Dr. Krell conceded that in the slide presentation he created to support his opinions he used a 2010 Toyota Corolla, instead of a 1999 Toyota Camry like the victim's car, because the cabin dimensions of the two cars are "pretty close." He also used a nine-milimeter handgun, whereas the bullet recovered from the victim had been a .40-caliber bullet. Dr. Krell explained that basically all handguns have a straight-line trajectory out to

25 yards, so the specific gun and caliber of bullet was not determinative of his analysis.

The court entertained argument from counsel and took the matter under submission. The following morning, the court noted it had done further research on the relevant law and had read the additional points and authorities submitted by defendant. The court ruled that Dr. Krell did not qualify as an expert in ballistics or bullet trajectories within the meaning of Evidence Code section 720 and therefore excluded his testimony. The court detailed the bases for its conclusion, including that Dr. Krell admitted to very little education in the specific topic of bullet trajectories and in fact, admitted being self-taught. The court also noted that Dr. Krell had no training in forensic science or shooting reconstructions, and had used a different car and different gun and caliber of bullet in creating his simulation. The court stated that Dr. Krell "may be an excellent mathematician" and "a great marksman" but did not qualify on the specific topic for which the defense sought to have him testify.

Evidence Code section 720, subdivision (a) provides in relevant part that "[a] person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." A trial court's determination of whether a witness qualifies as an expert under section 720 "is a matter of discretion and will not be disturbed absent a showing of manifest abuse." (*Bolin, supra,* 18 Cal.4th at pp. 321-322.)

Of particular relevance here, "an expert's qualifications 'must be related to the particular subject upon which he is giving expert testimony. *Qualifications on related subject matter are insufficient*. [Citations.]' [Citation.]" (*People v. Chavez* (1985) 39

Cal.3d 823, 828, italics added.) " ' "The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement." ' [Citation.]" (*People v. Watson* (2008) 43 Cal.4th 652, 692.) "In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited." (*People v. King* (1968) 266 Cal.App.2d 437, 445.) "It is not unusual that a person may be qualified as an expert on one subject and yet be unqualified to render an opinion on matters beyond the scope of that subject." (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1334.) Moreover, " 'the expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors . . . ." [Citation.]' " (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1336.)

Dr. Krell admitted he was self-taught and his knowledge of bullet trajectories was from experience with firearms and his knowledge of math. He conceded he had no formal education about bullet trajectories, criminology or shooting incident reconstruction. Rather, he read one of the leading treaties by Haag and Haag on shooting incident reconstruction. His government-related work that involved trajectory analysis pertained to missiles and not handguns. Dr. Krell said he was not aware of the testimony of witnesses, such as O.R., who had told police the shooter was seated in the back of the white car and therefore did not factor that into his analysis. He also admitted he used a different car and different type of gun and caliber of bullet to create his simulation that demonstrated his opinions because the differences were not determinative of his analysis. Dr. Krell had testified about shooting incident reconstruction in eight cases, but conceded he had recently been found not

qualified on that subject in three other cases. The trial court was well within its discretion to conclude Dr. Krell was not qualified to render an opinion on the specific topic on which he was offered.

Defendant contends the court abused its discretion because any concerns about Dr. Krell's training and knowledge of the subject matter were relevant to the weight of this proffered testimony, but not its admissibility, and were therefore a matter for the jury to resolve.

Assuming for the sake of argument the exclusion of Dr. Krell's testimony was error, we conclude it was harmless by any standard. O.R. testified that the man in the back seat of the victim's car leaned forward towards the driver and that was when he heard the gunshot. He said Sharis was already out of the car at the time. Mr. Jacobs testified he saw defendant holding a gun near his leg as he got back into the black Camry and fled the scene. No one testified to seeing Sharis with a gun. Detective Verna and Officer Lieve testified about the gang-related motive for the crime consistent with Sharis's testimony that defendant threatened Mr. Cadenas before shooting him for selling drugs in "his neighborhood." Sharis, who attested to a severe heroin addiction at the time, had no motive for killing her regular drug dealer.

Sharis testified that when defendant got into the back seat of Mr. Cadenas's car while she was trying to decide which heroin to buy, he leaned between the front seats. Mr. Rubin testified that most handguns discharge shell casings to the right. A reasonable inference from such testimony is that defendant was leaning forward into the front seat when he fired, resulting in the shell casing discharging into the front seat. Dr. Kennedy testified that because a shooting is a fluid situation with the

victim and the shooter in motion, she could not give an opinion based solely on the wound path as to the location of the shooter in the car. Defendant has not shown any prejudice from the preclusion of Dr. Krell's proposed opinions about a front seat shooter given the great weight of the evidence demonstrating defendant was the shooter.

Because the exclusion of Dr. Krell's testimony was not error, defendant's claims of federal constitutional error are also unfounded. " 'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense.' [Citation.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) "It follows, for the most part, that the mere erroneous exercise of discretion under such 'normal' rules does not implicate the federal Constitution." (*Ibid.*)

5. Prosecutorial Misconduct

Defendant argues the prosecutor compounded the trial court's prejudicial evidentiary ruling regarding Dr. Krell by making false and unfair arguments about the lack of evidence to which Dr. Krell could have testified. Defendant contends the prosecutor capitalized on the court's exclusion of Dr. Krell's testimony by arguing facts (namely that there was no scientific basis for determining the location of the shooter) that he knew to be untrue. Defendant contends the misconduct reasonably misled the jury and resulted in a trial that was fundamentally unfair.

" ' " ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally

unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " ' [Citation.] We review the trial court's rulings on prosecutorial misconduct for abuse of discretion." (*People v. Peoples* (2016) 62 Cal.4th 718, 792-793.) We find no such abuse.

During closing argument, defense counsel argued that Sharis testified that Mr. Cadenas was shot when his back was to her, as he turned to try to get out of the car. Counsel argued: "The bullet passed through and across Pedro Cadenas' body from right to left. [¶] This is important. From right to left with his body turned towards the passenger seat, his shoulder angled towards the driver's wheel and the windshield, right to left means from the front of the car towards the rear of the car." Counsel then showed the jury some hand-drawn diagrams purporting to demonstrate that testimony and the likely path of the bullet.

On rebuttal, the prosecutor argued that the defense theory of a front seat shooter was unreasonable because Sharis lacked any motive to kill her drug dealer. "It's unreasonable as the entire presentation; and what [counsel] relies on are those diagrams that aren't to scale, that aren't science. In fact, they're insulting. [¶] If I could have found an expert, whether it's a firearms expert, a coroner that could come in here and tell you--"

At that point, defense counsel objected. The court said, "Hold on. I haven't heard his argument." The prosecutor completed his argument as follows: "—conclusively that [the] gun must have been fired from the back seat and nowhere else." The court admonished the jury: "You've heard the evidence in

the case. Statements of counsel, that is not evidence. Evidence is what you heard from the witness stand."

The prosecutor then continued. "Now I know that's what [defense counsel] tried to do with Dr. Silverman, but he couldn't do it either. [¶] The truth is as Dr. Kennedy said, a body is dynamic and this murder didn't just happen with Mr. Cadenas sitting still pointing to his back and saying 'please shoot me.' [¶] He's got somebody behind him with a gun who is saying 'give me your money. Give me your drugs. Give me everything you have. You shouldn't be here;' and he's trying to flee and he's leaning forward he's trying to get out of the car, and during the course of that motion it's not static. It's dynamic."

After arguments were concluded and the jury was instructed, defense counsel asserted the issue of prosecutorial misconduct with the court. Counsel explained that he believed "the misconduct is in making the argument that I didn't bring an appropriate expert to explain the ballistics when counsel had fought successfully to keep such an expert out, and I think that is misconduct by definition, and I'd ask the court to make a curative instruction to the jury."

The court indicated that it believed the essence of the prosecutor's argument was that it could not be stated with scientific certainty "where a moving body was at the time the shot was fired." The court said it did not find that such argument impaired defendant's right to a fair trial or amounted to outrageous government conduct. The court denied defendant's request for a further curative instruction, explaining that it had already informed the jury when defendant made the objection that the statements of counsel are not evidence.

Defendant's claim of prosecutorial misconduct rests on a strained characterization of the record. The focus of the prosecutor's argument was that, based on the evidence, including the testimony of Dr. Kennedy, it was not possible to say with scientific certainty where the shooter was seated, front seat or back seat, and defense counsel's diagrams fell far short of scientific reliability. Because the defense objection interrupted the prosecutor, the argument about finding an expert was never completed. Even when the court allowed the prosecutor to complete his sentence in order to rule on defendant's objection, the argument remained incomplete. It appears that the prosecutor was implying that if he could have found an expert to state definitively that the shooter had been in the back seat, he would have done so but, because it had been a "dynamic," fluid situation, no expert could offer such testimony. He went on to argue that the balance of the evidence nevertheless supported defendant being the shooter, including the testimony of O.R. and the other witnesses. The prosecutor's argument was fair comment on the evidentiary record. (*People v. Martinez* (2010) 47 Cal.4th 911, 957 [prosecutors "are allowed 'a wide range of descriptive comment' " and " ' " 'argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom' " ' "].)

Defendant has not shown that the prosecutor relayed or implied any falsehood in an attempt to mislead the jury or otherwise engaged in reprehensible conduct. In assessing a claim of alleged prosecutorial misconduct, "we ' "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]'

[Citation.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 657.) Assuming for the sake of argument there was anything "damaging" at all to be construed from the prosecutor's argument, it did not mislead the jury or result in an unfair trial.

6. Cumulative Error

Defendant urges us to find cumulative error. "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' [Citation.]" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) Whether viewing his claimed errors individually or cumulatively, defendant has failed to show he was deprived of a fair trial. At most, defendant has shown his trial was " ' " 'not perfect—few are.' " ' " (*People v. Farley*, *supra*, 46 Cal.4th at p. 1124.)

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.