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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD KING,

Defendant and Appellant.

B260307

(Los Angeles County
Super. Ct. No. SA083124)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathryn A. Solorzano, Judge. Affirmed in part as modified and reversed in part.

Daniel G. Koryn, 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, Senior Assistant Attorney General, and Paul M. Roadarmel, Jr. and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Ronald King appeals from his judgment of conviction of one count of first degree murder with special circumstance findings (Pen. Code,¹ §§ 187, subd. (a), 190.2, subd. (a)(17)), two counts of first degree robbery (§ 211), one count of identity theft (§ 530.5), one count of second degree burglary (§ 459), and one count of first degree burglary (§ 459). Among other arguments, King asserts that (1) the evidence was insufficient to support the felony-murder special circumstance findings, (2) the trial court erred in admitting evidence of gang involvement in the crimes, and (3) the consecutive sentences imposed on the identity theft and second degree burglary counts violated section 654. We reverse in part and otherwise affirm the judgment as modified.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Charges

In an information filed by the Los Angeles County District Attorney, King was charged with two counts of first degree residential robbery (§ 211) [counts 1 and 7], one count of identity theft (§ 530.5, subd. (a)) [count 2], one count of second degree commercial burglary (§ 459) [count 4], one count of first degree residential burglary (§ 459) [count 6], and one count of murder (§ 187) [count 8].² It was alleged that the murder was committed while King was engaged in a robbery and a burglary within the meaning of section 190.2, subdivision (a)(17).

¹ Unless otherwise stated, all further statutory references are to the Penal Code.

² The information did not include a count 3 or 5.

II. The Prosecution Evidence

Anthony Perini, the victim in this case, lived alone in a one-bedroom apartment in Venice. The apartment complex had a security system with an intercom for allowing in visitors. On January 23, 2013, Perini was found dead in his apartment by the manager of the complex. The manager was checking on Perini at the request of Perini's brother, who had not heard from Perini for several days. Upon entering the unit, the manager found Perini's body on the floor in the living room, and immediately called the police.

When officers arrived at the scene, they observed that Perini's body was in a kneeling position on the floor of the living room with his face against the couch. His mouth was stuffed with a small towel and his hands were tied behind his back with the cord from a cell phone charger. The cord was pulled tightly and tied in multiple knots around Perini's hands. Several items were found underneath Perini's body, including a steak knife with a handle wrapped in black tape, a baseball hat, a black glove, and sunglasses. There were no signs of forced entry into the apartment, but there was evidence that the living room and bedroom had been ransacked. All the drawers had been pulled out, and Perini's belongings were strewn around the apartment. During a search of the apartment, the police discovered plastic baggies and 10 paper bindles containing a white substance that resembled cocaine; however, no other drug sales paraphernalia such as scales or pay ledgers were found. Several messages had been left on Perini's answering machine, including one from Bank of America advising Perini that fraudulent activity was suspected on his debit card.

Los Angeles Police Detectives Terrence Keyzer and Armando Acero were the lead investigators on the case. After contacting the bank, the detectives learned that the suspicious debt card activity occurred on January 19, 2013 at a liquor store and a CVS drug store in the Venice Beach area. The detectives obtained surveillance video from both stores. The video from CVS showed King carrying blue bag and buying a cell phone and a carton of cigarettes with a debit card. The liquor store video showed King attempting a transaction, but the card was declined. King's face was visible in both videos. The detectives also obtained a receipt from CVS which confirmed that Perini's debit card was used to purchase a cell phone and cigarettes on the afternoon of January 19, 2013. The detectives then began looking for King; they located him on the afternoon of January 25, 2013 near the CVS store and took him into custody.

At the police station, Detectives Keyzer and Acero conducted an initial audio recorded interview with King. When the detectives showed King images from the CVS and liquor store videos, he admitted that he had used a debit card at those stores. King initially claimed someone had given him the debit card to purchase a cell phone at CVS. He denied taking the card from Perini's apartment or having any knowledge about his death. After the detectives falsely told King that they had surveillance video that showed him entering the apartment, King admitted that he visited Perini on the afternoon of January 19 because Perini had offered him \$100 in exchange for oral sex. King stated that, after they engaged in a sex act, Perini refused to pay him so King took Perini's wallet and debit card from a desk drawer in the living room and then left. King used the debit card later that day and removed \$20 from the wallet before discarding it. When

the detectives confronted King with the fact that Perini was found with his hands tied behind his back, King admitted to tying up Perini with a cord from a cell phone charger, but claimed that he did so because Perini wanted “kinky sex.” King stated that, after tying up Perini, he changed his mind about agreeing to oral sex and decided to leave. King pushed Perini onto the couch, and then pulled out a desk drawer and took his wallet. King also looked through the bedroom before leaving. He believed Perini could breathe while face down on the couch because he kept yelling at King to stop searching through his belongings. King denied that anyone else was present in the apartment. At the end of the initial interview, King was booked into custody and placed in a holding cell.

Later that day, King asked to speak to the detectives again about another person being involved in Perini’s death. Detectives Keyzer and Acero then conducted a second audio recorded interview with King. During that interview, King volunteered that two other individuals, Daniel Llacuna and Romen Damico, were involved. According to King, he told Llacuna and Damico that Perini had offered him money for sex, and that Llacuna came up with a plan for the three of them to rob Perini. When the men arrived at Perini’s apartment complex, King went inside the apartment by himself while Llacuna stood outside the door and Damico waited downstairs in a van. Once inside, King got Perini to agree to having his hands tied behind his back under the guise of wanting to have “kinky sex.” King then opened the door for Llacuna, who was armed with a knife. Llacuna pulled out the knife as he approached Perini, and Perini began to yell. Llacuna placed Perini in a chokehold and proceeded to choke him while King rummaged through his belongings. King saw Llacuna

choking Perini, and then saw Perini unconscious on the couch. King and Llacuna took Perini's wallet, cell phone, credit cards, and \$100 in cash. They also took marijuana and other drugs that they found in the apartment. King told the detectives that he did not know Llacuna was going to choke Perini when they went to rob him. King also said that he had lied in the first interview because he was scared.

Shelby P. was Llacuna's girlfriend at the time of the crimes. She was a 14-year-old runaway who stayed on Venice Beach, and she regularly used and sold drugs. On January 18, 2013, the day before the crimes, Shelby met with King, Llacuna, and Damico. King told Shelby that Perini had offered him money for a sex act, but he did not want to do it. King also stated that he and the other men were planning to go to Perini's home when Perini was not there and take marijuana and other items. The specific plan was for King and Llacuna to go inside the home and take the items while Damico waited outside in the van. King was the one who formulated the plan, and Llacuna and Damico agreed to help him. Shelby did not assist the group with their planning, but she did loan them her backpack because she was not using it. She also gave Llacuna \$20 because the group kept talking about needing to buy "beanies" and other items to carry out their plan.

The following day, King, Llacuna, and Damico again met with Shelby. The group went to a secluded location near Santa Monica and talked about what had happened at Perini's home. Llacuna told Shelby that he thought he had killed a man. Llacuna recounted that Perini was home when they went inside so Llacuna jumped on Perini and strangled him while King ran through the home and grabbed the items that they wanted. King added that, before they left the home, he punched Perini in the

face to make sure Perini was unconscious and could not identify them. King was carrying the backpack that Shelby had loaned the group, and he opened it to show her the contents. Inside the backpack were two large bags of marijuana, two bags of a white substance that resembled cocaine, multiple credit cards, and a roll of cash. King also pulled out a knife from his pocket that he claimed he had taken from Perini's home. After hearing the details of the crimes and seeing the items in the backpack, Shelby became angry at the group and felt guilty about what she had learned. A week later, Shelby was arrested for a probation violation. At that time, she told the police what she knew about Perini's death, and identified King, Llacuna, and Damico as the three men who were involved.

The medical examiner determined that the cause of Perini's death was asphyxia. According to the medical examiner, Perini was a morbidly obese man who had an enlarged heart and other medical issues, but there was no evidence that he had suffered a heart attack. Perini also had a trace amount of cocaine in his system at the time of his death, but it was not enough to cause a fatal overdose. Although there were no signs of bruising or injury to Perini's neck, the medical examiner could not rule out that Perini had been placed in a chokehold because Perini's large size could have protected his neck bone from being fractured or bruised. Perini's death also could have been caused by positional asphyxia because he was found face down on the couch with his hands tied behind him and a towel in his mouth. If Perini had lost consciousness during a chokehold, he may have been unable to get adequate oxygen due to his size and face-down position on the couch.

III. Defense Evidence

King testified on his own behalf at trial. According to his testimony, he lived in Arizona prior to coming to California in January 2013. His plan was to stay in Venice for a few weeks and then proceed to northern California to find work. Upon his arrival by bus, King's suitcase and \$700 in cash were stolen. While in the Venice Beach area, King met Damico, Llacuna, and Shelby, who were all homeless. He later met Perini along the boardwalk. On that occasion, Perini approached King and offered to pay him \$50 for oral sex. King, who had never worked as a prostitute, was offended and declined. Perini later propositioned King a second time and increased his offer to \$100, which King again refused. King told Llacuna and Shelby about these offers, and Llacuna stated that he knew of Perini.

The following week, Llacuna approached King and showed him some credit cards. Llacuna gave King one of the cards and asked him to purchase a cell phone and cigarettes from a CVS store. After making the purchase, King gave items and the credit card to Llacuna. King then overheard a conversation between Llacuna and Shelby about Perini. Llacuna told Shelby that he "choked out" Perini and took drugs and credit cards from him. Llacuna also described tying up Perini with a cell phone charger cord and searching through Perini's drawers. King saw Llacuna give Shelby a large quantity of cocaine that he believed came from Perini's apartment.

Later that month, King was arrested near the CVS store. The police told him that he was being arrested for identity theft and investigated for murder. The police also stated that they had a videotape of King in Perini's apartment. King testified that he decided to falsely tell the police that he had tied up Perini and

participated in the robbery because he was scared. King believed that if he gave the police reliable information about the crimes and admitted to committing a robbery but not a murder, they would let him go. King testified that he based the information that he provided to the police solely on the conversation he had overheard between Llacuna and Shelby. King further testified that he had no direct knowledge of the crimes because he was never inside Perini's apartment.

King's sister, Kelly Ann, testified as a character witness for him. She believed that King was not a violent person. She based her belief on his actions when they were growing up together, and recounted that King was never involved in any fights and would help others who were bullied.

IV. Verdict and Sentencing

The jury found King guilty as charged on all counts. The jury found the murder to be a first degree felony murder, and also found that the murder was committed while King was engaged in the commission of a robbery and a burglary within the meaning of section 190.2, subdivision (a)(17). In addition, the jury made true findings that the robbery and burglary of Perini were committed in an inhabited dwelling house, that a person was present in the house during the commission of the burglary, and that King acted in concert with two or more other people during the commission of the robbery.

At the sentencing hearing, the trial court imposed two sentences of life in prison without the possibility of parole, plus an additional 25 years to life for the murder in count 8. The court also imposed a determinate term of 10 years and four months, which consisted of nine years for the residential robbery in count

7, plus consecutive terms of eight months for the identity theft in count 2 and the commercial burglary in count 4. The court stayed the punishment for the robbery in count 1 and the burglary in count 6 pursuant to section 654. King appealed.

DISCUSSION

I. The Felony-Murder Special Circumstance Findings

King challenges the sufficiency of evidence supporting the jury's true findings on the special circumstance allegations under section 190.2, subdivision (a)(17). He contends that the evidence was insufficient to support a finding that he acted with reckless indifference to human life when he engaged in the commission of a burglary and a robbery that resulted in Perini's death.

A. Relevant Law

In assessing a claim of insufficient evidence, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict - i.e., evidence that is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts

upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) “The same standard applies to special circumstance allegations. [Citation.]” (*People v. Tully* (2012) 54 Cal.4th 952, 1007.)

Section 190.2 provides, in relevant part: “[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true. . . . (§ 190.2, subd. (d).) The special circumstance set forth in subdivision (a)(17) of the statute applies if “[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of” certain enumerated felonies, including robbery and burglary. (§ 190.2, subd. (a)(17)(A),(G).)

Accordingly, “[t]he felony-based special circumstances do not require that the defendant intend to kill. It is sufficient if the defendant is the actual killer or either intends to kill or ‘with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission’ of the felony. [Citation.]” (*People v.*

Rountree (2013) 56 Cal.4th 823, 854.) ““[R]eckless indifference to human life” is commonly understood to mean that the defendant was subjectively aware that his or her participation in the felony involved a grave risk of death.’ [Citations.]” (*People v. Williams* (2015) 61 Cal.4th 1244, 1281; see *People v. Mil* (2012) 53 Cal.4th 400, 417 [“[t]he culpable mental state of “reckless indifference to life” is one in which the defendant “knowingly engag[es] in criminal activities known to carry a grave risk of death””].)

Among the factors that may be considered in assessing whether a defendant acted with reckless indifference to human life are the defendant’s awareness of the presence of weapons to be used in the felony, physical presence at the crime scene and opportunity to aid the victim, knowledge of the cohort’s likelihood of killing, and efforts to minimize the risks of violence during the felony. (*People v. Clark* (2016) 63 Cal.4th 522, 619-622.) “[N]o one of these considerations is necessary, nor is any one of them necessarily sufficient.” (*Id.* at p. 618.) Additionally, “although the presence of some degree of defendant’s subjective awareness of taking a risk is required, it is the jury’s objective determination that ultimately determines recklessness. Therefore, . . . a defendant’s good faith but unreasonable belief that he or she was not posing a risk to human life in pursuing the felony does not suffice to foreclose a determination of reckless indifference to human life. . . .” (*Id.* at p. 622.)

B. Substantial Evidence Supported the Felony-Murder Special Circumstance Findings

Viewing the evidence in the light most favorable to the verdict, we conclude that the jury's true findings on the felony-murder special circumstance allegations were supported by substantial evidence. Based on the totality of evidence presented, including King's statements to the police, the jury reasonably could have concluded that King was a major participant in the robbery and burglary that resulted in Perini's death, and that King acted with a reckless indifference to human life when he committed those felony offenses.

The evidence showed that King actively participated in the planning and execution of the robbery and burglary. During his interview with the police, King admitted that he and his two accomplices, Llacuna and Damico, went to Perini's apartment with the intent to rob him. While King claimed that Llacuna first proposed robbing Perini, Llacuna's girlfriend, Shelby, testified that King came up with the plan and the others agreed to it. King also admitted to the police that he gained entry into the apartment under the guise of agreeing to engage in a sex act with Perini in exchange for money. King then used a ruse to restrain Perini by convincing him to let King tie his hands behind his back as part of the purported sex act. Once Perini was restrained and unable to defend himself, King brought Llacuna into the apartment so that they could carry out their plan to rob him. (See *People v. Mora* (1995) 39 Cal.App.4th 607, 617 [substantial evidence supported felony-murder special circumstance finding where the defendant helped to plan a home invasion robbery and arranged for his armed accomplice to gain entry into the home].)

The evidence also showed that King was present during the sequence of events that led to Perini's death, but did not take any action to intervene. King told the police that, as soon as he let Llacuna into the apartment, Llacuna pulled out a knife and went "straight to" Perini, who began to yell in protest. Llacuna then grabbed Perini from behind and choked him to the point of unconsciousness, while King ransacked the apartment looking for items to steal. King admitted to the police that he saw Llacuna choking Perini, and then saw Perini face down on the couch. King never took any action, however, to restrain Llacuna from carrying out his violent attack, or to aid Perini once he was rendered unconscious. Instead, King continued to rummage through Perini's belongings with the intent to complete the planned robbery. King and Llacuna then fled the scene with the various items they had stolen, including Perini's cell phone, wallet, credit cards, cash, drugs, and a bottle of whiskey. When King fled the apartment, he knew Perini was still unconscious with his face down on the couch and his arms tied behind his back. Rather than render aid, King chose to leave Perini in that dangerous condition. From such evidence, the jury reasonably could have concluded that King was subjectively aware of the grave risk of death posed by his participation in the crimes and nevertheless acted with a reckless indifference to Perini's life. (See *People v. Smith* (2005) 135 Cal.App.4th 914, 927 [defendant acted with a reckless indifference where he served as a lookout while his cohort beat and stabbed the victim and then "chose to flee rather than going to [the victim's] aid or summoning help"].)

King argues that the evidence was insufficient to support the jury's special circumstance findings because there was no evidence that King knew Llacuna had a knife or that the knife

played a role in Perini's death. In his interview with the police, however, King admitted that he knew Lacuna was armed with a knife when they went to Perini's apartment to rob him. King also admitted that, once inside the apartment, he saw Lacuna pull out the knife as he approached Perini. A knife similar to the one described by King was later found underneath Perini's body. The fact that, whether by choice or circumstance, Lacuna choked Perini instead of stabbing him does not foreclose a finding that King was subjectively aware of the grave risk of death posed by his participation in the crimes. Additionally, while a defendant's knowledge of the presence of a weapon is not, in itself, sufficient to support a felony-murder special circumstance finding, it is one factor the jury may consider in deciding whether the defendant exhibited a reckless indifference to human life. (*People v. Clark, supra*, 63 Cal.4th at p. 618.) Here, King was not merely aware that Lacuna was armed, but he also personally witnessed Lacuna's fatal attack on Perini and did nothing to intervene.

King further asserts that there was insufficient evidence to support the jury's special circumstance findings because there was no evidence that he was aware that Lacuna's act of choking Perini had resulted in Perini's death. King notes that, during his interview with the police, he maintained that he did not know Perini had died and that he thought Lacuna merely had put Perini to sleep by placing him a chokehold. However, the jury reasonably could have disbelieved King's self-serving statement that he thought Perini was merely sleeping, given that King saw Perini lying face down on the couch after being choked by Lacuna. Moreover, a finding of reckless indifference to human life does not require that the defendant have actual knowledge that the victim has died at the hands of his accomplice. Where,

as here, the evidence shows that the defendant took no action to aid the victim or to determine if the victim was alive, the jury may consider such evidence in finding that the defendant acted with the requisite degree of reckless indifference. (*People v. Proby* (1998) 60 Cal.App.4th 922, 929 [defendant acted with reckless indifference where he “made no attempt to assist or determine if the victim was still alive” and instead “went to the [victim’s] safe, took the money and left”]; *People v. Mora, supra*, 39 Cal.App.4th at p. 617 [defendant acted with reckless indifference where he “did not attempt to aid the victim but instead carried through with the original plan to steal the victim’s drugs” and then “left the victim there to die”].) Accordingly, based on the totality of evidence showing the extent of King’s involvement in the robbery and burglary, the jury reasonably could have concluded that King was a major participant in the underlying felonies and was recklessly indifferent to the value of the Perini’s life.

II. The Admission of Evidence of Gang Involvement

King argues that the trial court abused its discretion and violated his constitutional right to due process when it admitted into evidence Shelby P.’s testimony that she believed there was gang involvement in the charged crimes. King asserts that the evidence should have been excluded because it was not relevant to any issue being tried and was unduly prejudicial.

A. Relevant Background

At trial, Shelby testified that, following her arrest for a probation violation, she decided to approach the police with the information she had about Perini’s death. When asked by the

prosecutor why she felt she needed to tell the police what she knew, Shelby stated: “Well, honestly, I don’t feel that it’s right and just that innocent people should be treated the way that they do these days because of what people are doing; and I didn’t feel that that man deserved what he got, kicked in, and I didn’t think it was right, so I didn’t think they should get away with it because he was an innocent man. I understand, like, okay, it’s L.A. and I know it’s gang involvement and there’s a lot of it, but I understand that because you’re committing to a gang and you’re committing yourself to crime, but when you’re doing it to an innocent person, I don’t think that’s right.”

Defense counsel objected on grounds of relevance and lack of foundation, and moved to strike the reference to gangs. In response, the trial court stated: “Okay. Ladies and gentlemen, the reference to gangs, obviously, in this case there is no gang allegation. This is not a gang case, per [se], in the sense that you have to resolve anything with regard to a gang allegation. She’s just given her reason, her explanation for why she acted in a particular way. Okay? It’s up to you to decide the weight to be accorded that. Reference to a gang, however, again, I’m going to tell you that the decision that you make in this case must be made based on the evidence in this case, not on issues of public policy, concerns about crime in the community, et cetera. I will give you another admonition a little bit further down the line, but for now, understand that the reference to gangs in this case is not evidence of guilt in this case. It’s her explanation as to her state of mind. Anybody have a question? If you do, please raise your hand? Okay. I don’t see any hands.”

B. Relevant Law

“Only relevant evidence is admissible at trial. [Citation.] Under Evidence Code section 210, relevant evidence is evidence ‘having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.’ . . . [T]he court has broad discretion under Evidence Code section 352 to exclude even relevant evidence if it determines the probative value of the evidence is substantially outweighed by its possible prejudicial effects.” (*People v. Merriman* (2014) 60 Cal.4th 1, 74.) Evidence is unduly prejudicial if it ““uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.”” (*People v. Carter* (2005) 36 Cal.4th 1114, 1168.) “[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question. . . .’ [Citation.]” (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.) “We will not reverse a court’s ruling on such matters unless it is shown “the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” [Citation.] [Citation.]” (*People v. Merriman, supra*, at p. 74.)

Application of the ordinary rules of evidence generally does not impermissibly infringe on a defendant’s constitutional rights. (*People v. Lindberg* (2008) 45 Cal.4th 1, 26.) To prove a violation of due process, the defendant “must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. ‘Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must “be of such

quality as necessarily prevents a fair trial.” [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.’ [Citation.]” (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229.)

In cases not involving a gang enhancement allegation, it generally has been held that “evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal.” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Gang evidence is not admissible, for instance, where its sole relevance is to show that a defendant has a criminal disposition or bad character and is thus guilty of the charged offenses. (*People v. Albarran, supra*, 149 Cal.App.4th at p. 223; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) On the other hand, gang evidence is admissible if it is logically relevant to a material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194; *People v. Albarran, supra*, at p. 223; *People v. Avita, supra*, at p. 192.) Due to the potential for prejudice, the trial court must carefully scrutinize gang evidence before admitting it. (*People v. Carter, supra*, at p. 1194.)

C. Any Alleged Error in Admitting Shelby’s Statement About Gangs Was Harmless

The trial court admitted Shelby’s testimony concerning gang involvement in the crimes as evidence of her state of mind to explain why she decided to tell the police what she knew about Perini’s death. On appeal, King argues that Shelby’s reference to gangs should have been stricken because there was no evidence that the crimes were gang-related, and any minimal probative value that the statement may have had was substantially

outweighed by the risk of undue prejudice. We need not decide, however, whether the trial court erred in allowing Shelby's remark about gangs to remain in evidence. Even assuming that the statement should have been excluded, any error in admitting it was harmless.

The record reflects that Shelby's statement about gang involvement in the crimes was isolated and fleeting in nature. The prosecution did not ask Shelby any follow-up questions about her statement, did not ask any other witnesses about potential gang involvement, and did not make any reference to Shelby's statement or to gangs in general during closing argument. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 163 [witness testimony that defendant made gang reference during crime was "fleeting and minor" and "therefore did not result in gross unfairness so as to amount to a denial of defendant's constitutional right to due process"].) The record also shows that the trial court instructed the jury that there was no gang allegation in this case, and that the jury could only consider Shelby's statement for the limited purpose of evaluating her "state of mind," and not as "evidence of guilt." We presume that the jury understood and followed the trial court's instruction. (*People v. Scott* (2015) 61 Cal.4th 363, 399; *People v. Lindberg, supra*, 45 Cal.4th at p. 26.)

Moreover, there was overwhelming evidence of King's guilt on the charged offenses and the special circumstance allegations. King admitted to the police that he, Llacuna and Damico went to Perini's apartment with the intent to rob him, that King gained entry into the apartment under the guise of being a prostitute, and that, once inside the apartment, Llacuna choked Perini while King searched for items to steal. King also admitted to the police that he and Llacuna took a number of items with them when they

left, including Perini's debit card, and that King later used the debit card at a liquor store and CVS drug store. While King testified at trial that he falsely had confessed to being involved in the crimes because he was scared, his statement to the police included details about the crimes that only a person who had been present at the scene would possess. These details included the layout of Perini's apartment and the specific areas that were searched, the position of Perini's body at the time of his death, and certain items that were inadvertently left behind by the perpetrators. In addition, the record shows that Shelby's trial testimony was largely consistent with King's prior confession. Shelby confirmed that King, Llacuna and Damico decided to rob Perini after Perini offered King money for sex, and that the men returned from the robbery with a backpack full of drugs, cash, and credit cards. Shelby also testified that, in King's presence, Llacuna recounted how he had choked Perini while King ran through the apartment gathering the items they wanted to take.

Considering the totality of the evidence presented at trial, we are convinced beyond a reasonable doubt that the jury would have reached the same verdict on each of the counts and special circumstance allegations had Shelby's reference to gangs been excluded. Accordingly, under any standard, any alleged error in admitting the evidence was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [state law error is harmless if it is not reasonably probable that a result more favorable to defendant would have occurred absent the error]; *Chapman v. California* (1967) 386 U.S. 18, 24 [reversal for constitutional error not required if error is harmless beyond a reasonable doubt].)

III. Multiple Punishment for the Identity Theft and Commercial Burglary Counts

King challenges the trial court's imposition of consecutive terms of eight months on the identity theft conviction in count 2 and the commercial burglary conviction in count 4. He contends that the trial court should have stayed the sentence on one of the counts under section 654 because he acted with a single criminal intent in committing both offenses.

A. Relevant Law

Section 530.5, which defines the crime of identity theft, provides, in relevant part, that “[e]very person who willfully obtains personal identifying information . . . of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense. . . .” (§ 530.5, subd. (a).) Section 459, which defines the crime of burglary, states, in pertinent part, that “[e]very person who enters any house, room, apartment, tenement, shop, warehouse, [or] store . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.” (§ 459.)

Section 654 provides that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a).) The statute therefore “bars multiple punishment for separate offenses arising out of a single occurrence when all of the offenses were incident to one objective.” (*People v. Cowan* (2010) 50 Cal.4th 401, 498.) “Whether a course of criminal

conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ [Citation.]” (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507, italics omitted.)

Generally, “[i]t is [the] defendant’s intent and objective, not temporal proximity of his offenses, which determine whether the transaction is indivisible.’ [Citation.] “‘The defendant’s intent and objective are factual questions for the trial court; . . . there must be evidence to support [the] finding the defendant formed a separate intent and objective for each offense for which he was sentenced.” [Citation.]” (*People v. Capistrano* (2014) 59 Cal.4th 830, 886.) However, “[u]nder section 654, ‘a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]’ [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]” (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) A trial court’s express or implied determination that two crimes are subject to multiple punishment must be upheld on appeal if supported by substantial evidence. (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

B. Substantial Evidence Supported Multiple Punishment for Identity Theft and Burglary

In count 2, King was charged with and convicted of identity theft in violation of 530.5 based on his conduct in willfully

obtaining and using Perini's debit card for an unlawful purpose. In count 4, King was charged with and convicted of commercial burglary in violation of section 459 based on his conduct in entering the CVS drug store with the intent to unlawfully use Perini's debit card to make an unauthorized purchase. The trial court sentenced King to consecutive terms of eight months on counts 2 and 4 and found that section 654 did not apply because the two crimes involved "separate acts" and "separate victims." On appeal, King asserts that section 654 bars multiple punishment for counts 2 and 4 because both crimes were committed on the same occasion and with the same objective, which was to steal items from CVS. We conclude the trial court's finding that counts 2 and 4 were subject to multiple punishment was supported by substantial evidence.

The trial court reasonably could conclude from the evidence presented at trial that the identity theft and commercial burglary counts arose from separate and distinct acts involving separate victims. The identity theft occurred when King took Perini's debit card from the apartment and then used that card for an unlawful purpose without Perini's consent. King's unlawful use of the debit card occurred on two different occasions. The first time was when King used the card to purchase a cell phone and cigarettes from CVS. The second time was when King attempted to use the card to make a purchase from a liquor store, but the card was declined. Each instance constituted a separate act of identity theft even if King's objective on both occasions was the same. (§ 530.5, subd. (a) [the personal identifying information of another person is used for an unlawful purpose when it is used "to obtain, or attempt to obtain . . . goods"]; *People v. Mitchell* (2008) 164 Cal.App.4th 442, 455 ["it is the use of the identifying

information for an unlawful purpose that completes the crime and each separate use constitutes a new crime”].) The burglary, on the other hand, was based solely on King’s act of entering the CVS store with the intent to unlawfully use Perini’s debit card to make an unauthorized purchase, and did not involve King’s subsequent attempt to use the card at the liquor store. In addition to arising from separate acts, the two crimes were committed against separate victims. Whereas the victim of the identity theft was Perini, the victim of the commercial burglary was the CVS store. (*People v. Andra* (2007) 156 Cal.App.4th 638, 641 [where defendant opened a credit card in another person’s name and then used the card to rent a vehicle from a rental car company, the trial court properly imposed multiple punishment on the identity theft and vehicle theft counts because the crimes were committed on separate occasions against separate victims].)

King acknowledges that there was evidence that he used Perini’s debit card for an unlawful purpose on two different occasions. King nevertheless asserts that the identity theft count was based solely on the use of the card at CVS because the prosecutor specifically referred to King’s purchase of a cell phone and cigarettes from that store when arguing to the jury that King was guilty of identity theft. However, the prosecutor never stated in her closing argument that the identity theft count was based solely on the transaction that occurred at CVS, and neither the charging information nor the verdict form limited that count to a single unauthorized transaction involving Perini’s debit card. The uncontroverted evidence at trial established that, after stealing Perini’s debit card from his apartment, King committed two unauthorized uses of the card, which occurred at different times and at different locations. Over the course of these events,

King had the opportunity to reflect and to renew his criminal intent to use the stolen card for an unlawful purpose. (*People v. Andra, supra*, 156 Cal.App.4th at p. 641 [no violation of section 654 where the temporal separation between the crimes showed the defendant had an “opportunity to reflect and then renew her intent before committing the next crime”].) Because the evidence was sufficient to support a conclusion that King committed separate and distinct acts against separate victims, the trial court did not violate section 654 in sentencing King on the identity theft and commercial burglary convictions.

IV. Reversal of the Robbery Conviction in Count 1

King contends, and the Attorney General concedes, that his robbery conviction in count 1 must be reversed because he was convicted twice for the same robbery. In counts 1 and 7, King was charged with first degree residential robbery in violation of section 211. Count 7 added an allegation that the robbery was committed in concert within the meaning of section 213, subdivision (a)(1)(A), which provides for a sentence enhancement of three, six, or nine years. The jury found King guilty on both robbery counts, and also found the enhancement allegation to be true. The trial court sentenced King to a term of nine years for the robbery conviction in count 7, and stayed the sentence for the robbery conviction in count 1. The parties agree, however, that the only robbery committed in this case was the robbery of Perini, and that both counts 1 and 7 are based on that single offense.³

³ The information erroneously identified the victim in count 1 as Perini’s brother, Terri. It is undisputed, however, that the only victim of the robbery was Perini, and the verdict forms correctly identified Perini as the victim in both counts 1 and 7.

Therefore, the robbery conviction in count 1 must be reversed, and the sentence imposed on that count must be vacated. (*People v. Coyle* (2009) 178 Cal.App.4th 209, 218 [where single offense is charged in multiple counts, the defendant may only be convicted of one count and remaining counts must be reversed]; *People v. Muhammad* (2007) 157 Cal.App.4th 484, 494 [same].)

V. Sentencing Errors Related to the Robbery Conviction in Count 7

King asserts that there are two errors in his sentence for the robbery conviction in count 7. The Attorney General agrees the judgment must be modified to correct each of these errors.

A. The Sentence for the Robbery Conviction in Count 7 Must Be Stayed

In count 8, King was convicted of first degree felony murder with a special circumstance finding that the murder was committed while King was engaged in the felonies of burglary and robbery. The trial court sentenced King to life without the possibility of parole plus 25 years to life on count 8. King also was convicted of the underlying burglary in count 6 and the underlying robbery in count 7. The trial court stayed the sentence on the burglary conviction in count 6 under section 654, but imposed a consecutive term of nine years on the robbery conviction in count 7. The parties agree that the trial court also should have stayed the sentence on count 7 because felony murder was the sole theory of murder under which the case was prosecuted, and the robbery was one of the predicate offenses that formed the basis for King's first degree felony-murder conviction. Section 654 precludes separate punishment for the

robbery under these circumstances. (*People v. Hensley* (2014) 59 Cal.4th 788, 828 [sentence for felony underlying first degree felony-murder conviction must be stayed under section 654]; *People v. Montes* (2014) 58 Cal.4th 809, 898 [same].) Accordingly, the sentence on the robbery conviction in count 7 must be stayed.

B. The Enhancement for the Robbery Conviction in Count 7 Must Be Stricken

As discussed, at the sentencing hearing, the trial court imposed a consecutive term of nine years on count 7 based on the jury's true finding that the robbery was committed in concert within the meaning of section 213, subdivision (a)(1)(A). In the clerk's minute order and the abstract of judgment, however, the sentence on count 7 consists of both the nine-year term imposed by the court, plus an additional term of one year and four months as an enhancement under section 213, subdivision (a). This additional enhancement is contrary to the trial court's oral pronouncement of the sentence and is not authorized by section 213, subdivision (a)(1)(A), which provides for an enhanced sentence of three, six, or nine years. The judgment thus must be modified to strike the enhancement of one year and four months from the sentence imposed on count 7. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185-187 [where there is a discrepancy between the oral pronouncement of the judgment and the minute order or the abstract of judgment, the oral pronouncement controls].)

VI. Sentencing Error Related to the Murder Conviction in Count 8

Although not addressed by either party, there is an additional sentencing error that must be corrected on appeal. (*People v. Smith* (2001) 24 Cal.4th 849, 852 [unauthorized sentence may be corrected at any time regardless of whether an objection was raised in the trial court or reviewing court].) On the murder conviction in count 8, the trial court imposed two sentences of life imprisonment without the possibility of parole based on the two felony-murder special circumstance findings made under section 190.2, subdivision (a)(17), plus a consecutive term of 25 years to life based on the first degree felony murder conviction. Section 190.2, subdivision (a) provides, however, that, if any of the enumerated special circumstances are found to be true, “[t]he penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole.” (§ 190.2, subd. (a).) The statute does not authorize the imposition of two separate terms of life without the possibility of parole based on the same murder, nor does it allow for an additional sentence of 25 years to life for the underlying murder conviction. Instead, the proper sentence for the murder conviction in count 8 is a single term of life imprisonment without the possibility of parole. The judgment therefore must be modified to strike from the sentence imposed on count 8 one of the terms of life without the possibility of parole and the consecutive term of 25 years to life.

DISPOSITION

The conviction for robbery in count 1 is reversed and the sentence imposed thereon is vacated. The judgment is further modified to stay the sentence imposed on the robbery conviction in count 7, to strike the section 213, subdivision (a)(1) enhancement of one year and four months from the robbery conviction in count 7, to strike one of the two terms of life imprisonment without the possibility of parole from the murder conviction in count 8, and to strike the term of 25 years to life from the murder conviction in count 8. As modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.