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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

AGUSTIN R. FERNANDEZ,

Defendant and Appellant.

B276798

(Los Angeles County
Super. Ct. No. PA082271)

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

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Agustin Fernandez appeals from a judgment which sentences him to state prison for the murder of Abdullah Alkadi. Fernandez contends the trial court erred by admitting his confession, and by failing to instruct the jury on an element of the crime. He also claims the prosecutor committed misconduct. We find no such errors and affirm the judgment. However, the People agree, as do we, that the abstract of judgment must be modified to delete the imposition of a \$10,000 parole revocation fine. Accordingly, we order the abstract modified.

FACTS

Fernandez began dating Maria Molina in 2013 and moved into her Long Beach apartment with her and her children shortly thereafter. Maria became pregnant with Fernandez's child in 2014. After they began dating, Fernandez learned that Maria kept approximately \$27,000 in cash in the apartment, which was what remained of a settlement she received in 2011 from a work-related injury. Maria also expected a large settlement from her divorce. Fernandez had \$8,000 in cash from a tax return.

Maria wanted to pool their money to buy a home, but Fernandez was more interested in buying a car because his was seriously damaged in an accident in March 2014. Although Maria had two cars, Fernandez had to share them with her, her brother, and her children. Fernandez often looked at cars for sale online and sometimes test drove cars. He did not have Maria's permission to use her money to buy a car.

Alkadi listed an Audi A5 convertible on Craigslist. He purchased the Audi with the intention of turning around and selling it for \$36,000. He was also trying to sell his roommate's sister's Honda Accord. Alkadi told his brother he met with an

interested buyer, who looked like a “scary” “truck driver,” at the Century City mall on September 15.

On September 17, 2014, Fernandez and Maria’s brother, Jose, dropped Maria off at work in the afternoon and then drove to the San Fernando Valley so that Fernandez could meet with Alkadi and take a second look at the Audi. Fernandez called his cousin, Arturo Araiza, that afternoon to tell him he bought an Audi.

At approximately 6:15 p.m., Fernandez called Arturo again and admitted “he had done something bad.” He confessed he killed someone, but then said it was a joke. According to Arturo, neither Fernandez nor Arturo laughed.

Fernandez called Maria’s adult daughter, Nyleen Curiel, at around 7:00 p.m. that evening. He asked who was home and she replied that only she and her brothers were home. He asked her to bring a gallon of water out to the alley behind their apartment complex. She complied, and observed Fernandez to be covered with “blood everywhere” because he was bleeding from his hand. Fernandez told her he cut his hand working with his cousin, Arturo. Nyleen called Maria, who asked her to come pick her up from work; Nyleen did so.

When Maria arrived, she attempted to convince Fernandez to have the cut treated. At Fernandez’s request, Maria and Nyleen followed Fernandez’s Audi in her Armada SUV; she believed they were travelling to Tijuana for medical treatment. Instead, Fernandez drove to Indio. Along the way, Maria could not keep up with Fernandez. He called and texted Nyleen with directions. He instructed them to wait for him at a truck rest stop in Indio. They did so and after Fernandez arrived at the truck stop, they drove to Arturo’s house in Santa Ana.

They arrived at Arturo's house after midnight. Fernandez showed Arturo the car and Arturo saw blood on the passenger seat, the doors, the stick shift, the dashboard, and the windshield. Fernandez asked him for windex and rags to clean the blood. Arturo watched Fernandez clean the car. Fernandez confessed to Arturo that he did not buy the car. He also said he killed someone "Arabic" and did not know what to do. Fernandez later asked Arturo to provide him with an alibi and tell anyone who asked that he had cut his hand working with him.

While they were at Arturo's, Maria called Fernandez's mother in an effort to convince him to seek medical treatment. Fernandez drove to the hospital with his mother, Maria, and Nyleen and received stitches on three fingers. Fernandez, his mother, Maria, and Nyleen picked up the Audi from Arturo's house the next morning. They took both the Armada and the Audi to a car wash that morning. Nyleen believed they spent about \$100 to wash the Audi and considerably less on the SUV.

When Alkadi failed to return home on September 17, Alkadi's brother logged into their joint mobile phone account and used a feature on the website to locate Alkadi's phone. The website indicated the phone was near a city called Beaumont, which is west of Indio. Alkadi's brother reported him missing in the early morning of September 18. He accessed Alkadi's recent calls and found Fernandez's number. He left a message for Fernandez and spoke with him in the afternoon on September 18. Fernandez said he paid Alkadi \$35,000 in cash for the Audi, but he was having trouble with it. Fernandez said he had also been trying to contact Alkadi.

Long Beach Police Department officers visited Fernandez on September 18 to verify Fernandez purchased the Audi from Alkadi.

On September 23, Fernandez and Maria were interviewed by Los Angeles Police Department (LAPD) detectives. Fernandez denied any involvement in Alkadi's disappearance. Fernandez and Maria showed the detectives a pink-slip for the Audi and allowed them to search it. Blood was found in several areas of the Audi, with DNA profiles matching those belonging to Alkadi and Fernandez. Both the Audi and Fernandez's phone were confiscated.

On October 16, LAPD officers interrogated Maria, Nyleen, Arturo, and Jose. Fernandez had previously agreed to a further interview with the LAPD that day. When the officers talked to Fernandez, he initially continued to deny any knowledge of Alkadi's whereabouts after he purchased the Audi from him. The detectives confronted Fernandez with evidence which contradicted his story, including the blood found in the Audi and phone records which showed Alkadi's phone "pinged" off of the same towers as Fernandez's phone, demonstrating the two phones were traveling together the day Alkadi disappeared. The detectives also informed Fernandez that his family, including his mother, Maria, Nyleen, Arturo, and Jose, were implicated in Alkadi's disappearance. After he spoke on the phone with his mother and Maria, who urged him to tell the truth, Fernandez admitted he killed Alkadi in order to keep the car and the money.

Fernandez agreed to show the detectives where he disposed of the body if they allowed him one last chance to see Maria. He directed them to a spot just off the freeway in Indio, where the body was found behind a few bushes. The cause of Alkadi's

death was found to be the result of multiple sharp force injuries to the chest, consistent with being stabbed with a knife four times. There were also cuts on the right forehead and left cheek as well. The detectives never found the \$35,000 or the murder weapon.

Fernandez was charged with one count of first degree murder with the special circumstance allegations that the murder was committed during the commission of a robbery or carjacking. (Pen. Code, §§ 187, subd. (a); 190.2, subd. (a)(17).)¹ It was further alleged he used a deadly weapon, a knife, in the commission of the crime. (§ 1192.7, subd. (c)(23).)

At trial, Maria, Jose, Nyleen, and Arturo testified to the above events under a grant of immunity.

Fernandez testified on his own behalf. He admitted he killed Alkadi, but claimed it was in self-defense because Alkadi brandished a knife and began kicking him during the transaction. Specifically, Fernandez testified that he met Alkadi on September 15 to test drive the Audi, which was listed for \$36,500. When he asked Alkadi for a discount, Alkadi refused. He later believed Alkadi would accept a lower price, because Alkadi called him after the test drive to ask if he wanted the car. On September 17, Jose drove him to Alkadi's house, where he gave Alkadi an envelope with \$35,000 in it, consisting of Maria's \$27,000 and his own \$8,000. Alkadi accepted the money.

Fernandez testified he asked Alkadi for a receipt, but Alkadi said he did not have one. Fernandez suggested they deposit the \$35,000 in the nearby bank and the deposit slip would serve as a receipt. Alkadi agreed, but discovered he did not have

¹ All further section references are to the Penal Code unless otherwise specified.

his bank card when they arrived at the bank. Fernandez drove Alkadi back to his house and waited in the Audi while Alkadi went inside.

Fernandez admitted that when Alkadi came back out, he did not have the envelope of cash or anything else in his hand, such as a knife. When Fernandez drove to the bank a second time, Alkadi offered the Honda Accord to Fernandez. Fernandez drove with Alkadi to inspect the Accord, but he rejected it because it had no battery. According to Fernandez, while driving back to Alkadi's house, Alkadi directed him to stop in a parking lot and demanded an extra \$1,500 for the Audi. Fernandez pretended to call Maria for the extra \$1,500, and then told Alkadi he only had \$35,000. When it appeared to Fernandez that Alkadi accepted the deal, he called Jose to tell him the deal was done and he would meet Jose back at Alkadi's house so they could drive home together.

After Fernandez finished his call with Jose, Alkadi asked for the pink slip back, which he had previously signed and given to Fernandez. When Fernandez gave it to him, Alkadi put it in his lap and then brandished a knife. Fernandez attempted to get the knife away from Alkadi. During the struggle, Alkadi dropped the knife at his feet on the passenger side of the car. Fernandez picked it up from the floorboard. Alkadi began to kick Fernandez from his seat and Fernandez stabbed him at least three times. Fernandez testified he injured his hand during the fight.

After the stabbing, Alkadi stopped responding. Fernandez drove back to Long Beach to think about what to do. Alkadi was still in the car. Fernandez called Nyleen and asked her to bring him fresh clothing and water to clean the cut. He then directed Maria and Nyleen to drive to Indio. He arrived before they did

and left the body near the freeway. While they were in Indio, Fernandez realized Alkadi's cell phone was still in the Audi. He threw it out of the window. At his cousin's house, he cleaned the interior of the car. He then threw the knife and the rags used to clean the car in a trashcan by his cousin's house.

The defense presented an expert cognitive psychologist to testify about the reliability of confessions. She testified police interrogation tactics may produce false confessions. She explained, for example, that the longer an interrogation takes, the longer an individual is placed in a highly stressful and confrontational circumstance. In her opinion, this may lead to a false confession because the person being interrogated wants to leave.

The jury found Fernandez guilty of first degree murder and found both special circumstance allegations and the deadly weapon allegations to be true. Fernandez was sentenced to life without the possibility of parole plus one year for the deadly weapon enhancement.

Fernandez timely appealed.

DISCUSSION

I. Fernandez's Confession Was Properly Admitted

Fernandez first claims the detectives coerced him to confess by repeatedly threatening his family with prison terms. Fernandez asserts the Fourteenth Amendment's due process clause prohibits the admission of his confession. We find his confession was voluntary and admissible.

A. The October 16 Interview

On October 16, LAPD officers interrogated Maria, Nyleen, Arturo, and Jose. The same day, Fernandez met with LAPD

detectives and agreed to waive his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. The interrogation was audio-taped.

At the time of the interview, the detectives believed Fernandez was involved in Alkadi's disappearance because of the blood found in the Audi and the phone records. Detective Flores testified their plan was to drive Fernandez to Indio, where the cell phones were last tracked, "[i]n the hopes that he would cooperate and help us find the victim's body or describe to us what had happened to the victim."

Fernandez was initially very cooperative and spoke freely to the detectives. He was afforded bathroom breaks and food and water throughout the day. During the first seven or eight hours, the detectives drove Fernandez to Indio and interviewed him there. They reminded him of his family's involvement in the matter and confronted him with evidence tending to prove his guilt, such as the blood in the Audi and the phone records. He continued to deny any involvement in Alkadi's disappearance.

The detectives then allowed Fernandez to speak to his mother and to Maria over the phone. Maria, who had been arrested, implored him to tell the truth and reminded him of all she had done for him. Fernandez repeatedly told her he loved her and assured her, "Right now I'm going to see what I can do for you." He then agreed to tell the truth and take the detectives to the body if he could see Maria one last time. The detective arranged for Maria to meet them in Indio.

Fernandez told the detectives he met with Alkadi about purchasing the Audi. However, he began to contemplate keeping the car and the money because he would otherwise not have any money if he bought the car. He intended to give the car to Maria and keep the money, spending it a little at a time.

Fernandez said he found a six-inch knife in the trunk of the Audi as he inspected the car. Fernandez told the detectives he elbowed Alkadi in the face, which dazed him. He then pulled out the knife and began stabbing Alkadi, who pleaded for his life and said he would give Fernandez anything he wanted. He admitted stabbing Alkadi approximately three times.

Fernandez stated Alkadi was still in the car when he drove back to Long Beach and parked near his apartment while he considered what to do. He said he then called Nyleen for water to wash the blood and his description of the ensuing events largely followed those testified to by Nyleen, Maria, Jose, and Arturo. He denied any of them were involved in Alkadi's murder.

B. Applicable Law

When an interview is audio-recorded, as it was here, we conduct an independent review of the trial court's determination of voluntariness, because the facts surrounding the statement are undisputed. (*People v. McWhorter* (2009) 47 Cal.4th 318, 346–347 (*McWhorter*).)

“The use in a criminal prosecution of involuntary confessions constitutes a denial of due process of law under both the federal and state Constitutions.” (*People v. Haydel* (1974) 12 Cal.3d 190, 197.) A defendant's confession may be introduced into evidence only if the People can prove it was voluntary, that is, it was the product of “a rational intellect and a free will.” (*Mincey v. Arizona* (1978) 437 U.S. 385, 398; *People v. Vasila* (1995) 38 Cal.App.4th 865, 873.) A confession may be found involuntary if it is coerced by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. (*People v. Benson* (1990) 52 Cal.3d 754, 778; *People v.*

Boyde (1988) 46 Cal.3d 212, 238, overruled on another ground by *People v. Johnson* (2016) 62 Cal.4th 600, 648.)

“ ‘ “The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were ‘such as to overbear petitioner’s will to resist and bring about confessions not freely self-determined.’ [Citation.]” [Citation.] In determining whether or not an accused’s will was overborne, “an examination must be made of ‘all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.’ [Citation.]” [Citation.]’ ” (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

Thus, threats by police to arrest or punish a close relative, or a promise to free the relative in exchange for a confession, may render an admission invalid. (See, e.g., *People v. Trout* (1960) 54 Cal.2d 576, 584-585.) However, where no express or implied promise or threat is made by the police, a suspect’s belief that his cooperation will benefit a relative will not invalidate an admission. (*McWhorter, supra*, 47 Cal.4th at p. 346; *People v. Montano* (1960) 184 Cal.App.2d 199, 210.) Interrogations may properly include “ ‘exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between police and suspect.’ ” (*People v. Holloway* (2004) 33 Cal.4th 96, 115.)

In *McWhorter, supra*, for example, the defendant confessed he killed his neighbor for money. He claimed his confession was involuntary because the police threatened to charge his wife as an accessory after the fact and threatened to call his mother as a witness. (*McWhorter, supra*, 47 Cal.4th at p. 348.) The California Supreme Court found the defendant’s general

admission of guilt to be admissible. The officer's statement that his mother was a potential witness was true; the defendant claimed he borrowed the money from her. (*Id.* at p. 353.) Moreover, there was sufficient evidence for the police to suspect his wife was an accessory after the fact because he gave her the money and she remained silent when he lied to the police about it. Thus, these comments about his wife and mother did not render his confession involuntary or coerced. (*Id.* at p. 356.) The trial court found the latter part of the defendant's confession to be involuntary only when the officer promised to let his wife go free in exchange for details of the crime beyond his general admission of guilt. (*Id.* at p. 348.)

In reaching its decision, the *McWhorter* court cited with approval to two cases, *People v. Jackson* (1971) 19 Cal.App.3d 95 (*Jackson*) and *People v. Abbott* (1958) 156 Cal.App.2d 601 (*Abbott*). In each, the defendant's spouse was suspected of participating in the crime. The police made it clear the spouse would not be prosecuted if their investigation revealed she was not complicit. *Jackson* and *Abbott* both held the defendants' confessions were not coerced simply because the defendant felt pressured to confess and exonerate his spouse. (*Jackson, supra*, at pp. 99-100; *Abbott, supra*, at p. 605.) There was no threat or inducement in either *Jackson* or *Abbott*.

The *McWhorter* court distinguished its facts, along with *Jackson's* and *Abbott's*, from those in *People v. Trout, supra*, 54 Cal.2d at pages 583-584, where there was no reason to detain defendant's wife and her release was an obvious inducement to the defendant's confession.

C. Analysis

According to Fernandez, the detectives promised leniency for his family members if he confessed and threatened to send them to prison if he did not. Fernandez, however, fails to show any threats or promises of leniency which render his confession involuntary. Instead, as in *McWhorter*, the record shows the detectives had reason to detain and interrogate Maria, Nyleen, Arturo, and Jose, because the investigation revealed they each could have been involved in Alkadi's disappearance.

As the detectives reminded Fernandez, the phone records showed Fernandez contacted Nyleen and Arturo the day Alkadi disappeared. It also showed Nyleen texting with Fernandez as they discussed traveling to Indio, where the police believed Alkadi's body to be. Further, Fernandez's phone, Alkadi's phone, and Nyleen's phone appeared to travel along the same path to Indio later that night. The cameras in the apartment building showed Maria, Nyleen, and Fernandez together that night. In addition, it was primarily Maria's money which Fernandez used to buy the Audi. Also, Fernandez implicated Arturo by telling the detectives he hurt his hand while helping Arturo and that Arturo helped him clean up the blood in the Audi. Given this evidence, it was reasonable for the detectives to suspect Fernandez's family was involved in the murder and to discuss the consequences resulting therefrom.

Fernandez contends the detectives threatened his family by making the following statements: "We can get a bench warrant for you, for Maria, for Nyleen, for your mother-in-law, for Arturito, for everybody." "[T]hey can also go to jail for murder." "Everybody is going to jail. Everybody. Because we have evidence that you all played a role." The detectives repeated,

everybody was going to court “together.” These statements cannot be considered threats, however, because they instead reflect the detectives’ understanding of the evidence at that point in time, which implicated all of Fernandez’s family.

The same reasoning applies to Fernandez’s contention that the detectives used his love for Maria to extract a confession. In particular, he challenges their statements indicating Maria was also going to be in jail and would “get the same punishment.” As discussed above, the detectives reasonably believed Maria may have been involved in Alkadi’s disappearance. These statements were not threats to prosecute her if he did not confess. Similarly we do not find coercive the detectives’ statement that “[Maria] was trying to help you and she got herself in a mess and she’s going to have to answer. And also, there’s no evidence on her behalf, so she’s going to have to answer.” These statements made by the detectives about Fernandez’s family, and Maria in particular, during the interrogation were not threats against his family under the holding in *McWhorter*.

Nevertheless, Fernandez contends his phone call with Maria increased the pressure to confess. We find Fernandez’s desire to aid Maria by confessing was self-motivated. This is particularly true since Maria implored him to tell the truth and reminded him of all that she had done for him. That Fernandez felt pressured to confess and exonerate his family did not render his confession involuntary. (*Jackson, supra*, 19 Cal.App.3d at pp. 99-100; *Abbott, supra*, 156 Cal.App.2d at p. 605.)

Fernandez asserts other statements about his family demonstrate coercion, such as: “We don’t want to bring in other people who are involved in this. For her to end up involved—Nyleen, you know.” “I don’t want this stuff to fall on Maria,

Nyleen, Arturo, and the others.” “[Y]our life will change. Maria’s life will change Nyleen’s life. Jose, Arturo . . . the life of any person involved in that will change.” These vague statements provide no basis to conclude the police threatened Fernandez’s family with prosecution to coerce him to confess.

Fernandez next argues the detectives impliedly promised leniency for the family in exchange for a confession. In particular, they indicated Maria and Nyleen were involved and it would be “very different” for them if Fernandez explained how they were not involved. Fernandez asserts the detective offered him the opportunity to help his family and stated, “If you’re telling the truth, if we can go and find the body, it can change . . . for her, and for her, you know, her daughter, and all the others.”

This was not an improper inducement to confess in exchange for leniency toward his family. As in *Jackson* and *Abbott*, the detectives here merely advised Fernandez that his family would not be prosecuted if their investigation revealed they were not complicit in Alkadi’s disappearance. (*Jackson*, *supra*, 19 Cal.App.3d at pp. 99-100; *Abbott*, *supra*, 156 Cal.App.2d at p. 605.) Thus, this benefit—that his family would not be prosecuted—is something which “flows naturally from a truthful and honest course of conduct.” (*People v. Hill* (1967) 66 Cal.2d 536, 549.)

Finally, Fernandez claims it was coercive when he asked what would happen to Maria’s children if they arrested her and the detective replied, “the children’s department . . . will take charge of the kids.” Contrary to Fernandez’s contention, the detective did not repeatedly threaten to send Maria’s children to social services and did not imply their father, presumably Maria’s

ex-husband, would be prevented from caring for the children. Instead, the detective indicated they “can” be released to their father once the department is “sure” of where they can be placed.

Fernandez’s case is distinguishable from *Lynum v. Illinois* (1963) 372 U.S. 528, 534 and *United States v. Tingle* (1981) 658 F.2d 1332, 1334. In those cases, the parents’ confessions were found to be a direct result of threats to take away their children. (*Ibid.*) We do not find the brief reference to Maria’s minor children, initiated by Fernandez’s question, to have similarly caused his confession.

Considering the totality of the circumstances, we conclude that defendant’s confession was voluntary and admissible.

D. Any Error Was Harmless

Even were we to find Fernandez’s confession was involuntary and admitted in error, which we do not, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Cahill* (1993) 5 Cal.4th 478, 510.) The *Chapman* test requires the People “to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” (*Chapman, supra*, at p. 24.) That burden is satisfied with overwhelming evidence.

It is undisputed Fernandez was the last person to come into contact with Alkadi. Most importantly, Fernandez twice confessed to Arturo that he killed Alkadi. He first admitted he killed someone, but then said it was a joke without laughing or giving any other indication that it was a joke. Later that night, he confessed he killed someone “Arabic” after he showed Arturo the blood in the car and asked for help cleaning it. He later asked Arturo to provide him with an alibi. Fernandez also

suffered a cut which required stitches on his hand. He claimed he cut his hand helping Arturo, who denied that is what happened.

The LAPD's investigation further showed that the blood found in the Audi contained DNA profiles matching those belonging to Alkadi and Fernandez. Moreover, the records from Alkadi's mobile phone showed it travelled along the same path as Fernandez's phone on the night Alkadi disappeared, long after Fernandez claimed he had last seen Alkadi. Testimony from Maria, Nyleen, Jose, and Arturo showed Fernandez's motive to commit the crime. They confirmed Fernandez desperately wanted a car of his own, but did not have the money to buy an expensive car. Further, the evidence showed he was going to be a father and needed money to help support the family. This evidence overwhelmingly established Fernandez's guilt. Thus, it is beyond a reasonable doubt any error resulting from the admission of his confession did not contribute to the verdict.

II. The Jury Was Properly Instructed on the Special Circumstance Allegations

Fernandez next contends the jury was erroneously instructed on the elements of the special circumstance allegations. We find no error.

A. CALCRIM No. 730

The trial court instructed the jury on CALCRIM No. 730 as follows:

“The defendant is charged with the special circumstance of murder committed while engaged in the commission of Robbery and/or Carjacking.

To prove that this special circumstance is true, the People must prove that:

1. The defendant committed Robbery and/or Carjacking;
2. The defendant intended to commit Robbery and/or Carjacking; AND
3. The defendant did an act that caused the death of another person.

To decide whether the defendant committed Robbery or Carjacking, please refer to the separate instructions that I will give you on those crimes. 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 felonies of Robbery and/or Carjacking before or at the time of the act causing the death.”

The trial court did not include an optional paragraph to CALCRIM No. 730 in its instruction to the jury. It provides: “In addition, in order for this special circumstance to be true, the People must prove that the defendant intended to commit [carjacking or robbery] independent of the killing. If you find that the defendant only intended to commit murder and the commission of [carjacking or robbery] was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved.”

The bench notes for CALCRIM No. 730 direct the trial court to give this optional paragraph “if the evidence supports a reasonable inference that the felony was committed merely to facilitate the murder.” (Bench Notes to CALCRIM No. 730 (rev. 2013).) The bench notes cite to a number of cases to support its direction, including *People v. Green* (1980) 27 Cal.3d 1 (*Green*), overruled on another ground by *People v. Martinez* (1999) 20

Cal.4th 225, 239, and *People v. Navarette* (2003) 30 Cal.4th 458, 505 (*Navarette*) [discussing former CALJIC No. 8.81.17, the predecessor to CALCRIM No. 730].)

In *Green*, the court found the evidence insufficient as a matter of law to support the jury's finding of robbery as a special circumstance to a murder. There, the defendant took the victim's clothing, jewelry, and purse so the victim could not be identified. (*Green, supra*, 27 Cal.3d at p. 62.) The court held the crime was not a murder in commission of a robbery but a robbery in the commission of a murder. (*Id.* at pp. 61-62.) The *Green* court explained it was not rational to distinguish between two murderers, one of whom may be subjected to a harsher penalty because he took the victim's clothing to hide her identity while the second, who committed an identical murder, would not suffer the same penalty because he buried the victim fully clothed. (*Ibid.*) However, *Navarette* held, if the defendant has an "independent felonious purpose" (such as carjacking or robbery) and commits the murder to advance that independent purpose, the special circumstance is present. (*Green, supra*, at p. 61.)

B. Analysis

The trial court was not required to give the optional paragraph as part of its standard instruction under CALCRIM No. 730, because the evidence did not support a reasonable inference that the felony was committed merely to facilitate the murder. Unlike in *Green*, the record includes no evidence the crime was a robbery or carjacking in the commission of a murder rather than a murder in the commission of a robbery or carjacking.

Instead, the evidence shows Fernandez killed Alkadi in order to take the car and keep the money. Maria, Jose, and

Nyleen testified Fernandez desperately wanted a car. He did not have a car of his own after his was damaged in an accident in March. Fernandez had 59 photos of cars on his cell phone. The evidence also showed he did not have the money to buy a nice car: he was out of work; he needed to support his family; Maria was pregnant with his child; and she wanted to spend their money on a house instead of a car. Moreover, the \$35,000 was never found in Alkadi's house and it was never deposited into his bank account. This is strong evidence showing the murder was done in the commission of a robbery or carjacking.

In addition, there is no evidence Fernandez wanted to kill Alkadi instead of robbing or carjacking him. Indeed, Fernandez had never even seen Alkadi before he met him to possibly purchase the Audi. Further, Fernandez did not express any animus towards Alkadi in his testimony or his statement to the police.

In an effort to show the primary objective was the murder rather than a robbery or carjacking, Fernandez unconvincingly contends, "Alkadi's introduction of the knife offered an animus to kill that was neither robbery nor carjacking." This argument is merely an attempt to bootstrap his theory of self-defense into a reason to kill Alkadi. It is not a theory that demonstrates Fernandez robbed or carjacked Alkadi in order to kill him. Fernandez has presented no theory, much less evidence, from which a jury may reasonably infer "the felony was committed merely to facilitate the murder." (Bench Notes to CALCRIM No. 730 (rev. 2013).) Under the facts presented to the jury, the optional paragraph was not required to be given.

Fernandez contends the instructional error is demonstrated in the prosecutor's closing argument. Specifically, Fernandez

takes issue with the prosecutor's statement that "[t]he special circumstances in this case are identical to the elements of felony murder. So you probably heard the judge reading the stuff that sounded like he was reading the same thing over and over. It's because the special circumstances are the same as the felony murder. [¶] . . . [¶] So once you find the defendant guilty of felony murder, then the special circumstances would be true." Even taking into account the prosecutor's closing statements regarding this issue, we do not find the optional paragraph was required to be given.

Counsel's arguments " 'generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.' " (*People v. Mendoza* (2007) 42 Cal.4th 686, 703, quoting *Boyde v. California* (1990) 494 U.S. 370, 384.)

Taken in context, in any event, the prosecutor's argument did not mislead the jury. During closing, the prosecutor explained the elements of the special circumstances charge and immediately after, she stated "[t]he special circumstances in this case are identical to the elements of felony murder." In her explanation, she specifically argued that the special circumstances are, among other things, that Fernandez "intended to commit the crime of robbery or carjacking." She then "again" noted "that he had to intend to commit the crimes before he caused the death." The prosecutor's entire argument follows the trial court's CALCRIM No. 730 instruction, which provides intent to commit the underlying felony is an element of the special

circumstances charge and provides that “[t]he defendant must have intended to commit the felonies of Robbery and/or Carjacking before or at the time of the act causing the death.” There simply was no instructional error.

III. The Prosecutor Did Not Commit Misconduct

Fernandez next contends a single unfinished and unanswered question posed by the prosecutor during his cross-examination warranted a mistrial. We disagree.

A. Proceedings Below

During cross-examination, Fernandez testified that Alkadi signed the pink slip for the Audi. The prosecutor then asked, “Are you aware of the fact that the detectives had the handwriting on the pink slip analyzed to see --.” Defense counsel objected before the question was finished and the trial court instructed the prosecutor to rephrase the question. A brief conference at sidebar ensued, which was not reported, and the prosecutor moved onto another topic.

After the jury was excused for the day, the trial court put their previous conversation on the record, explaining the People had obtained a handwriting expert who opined the signature on the pink slip was not Alkadi’s. Defense counsel indicated to the court that the prosecutor told her she did not intend to call the handwriting expert. Given that assurance, defense counsel did not obtain a handwriting expert of her own. Defense counsel appeared satisfied by the prosecutor’s assurance she did not intend to pursue that line of questioning.

The next day, however, defense counsel moved for a mistrial on the ground of prosecutorial misconduct. Among other things, defense counsel informed the court that the police reports indicated that a handwriting expert employed by the LAPD

opined the signature on the pink slip was forged because Alkadi is Arab and Arabic writing is from right to left rather than left to right. Defense counsel consulted with a handwriting expert, who advised her to get exemplars of Alkadi's signature. The exemplars she was able to obtain showed he wrote from left to right. As a result, she believed the prosecutor's question called for multiple levels of hearsay because it asked about the conclusions of the handwriting expert through the detective's comments to Fernandez. The prosecutor assured the trial court she did not intend to ask any further questions on that topic. The trial court denied the motion for mistrial, finding Fernandez's right to a fair trial had not been irreparably damaged because it had instructed the jury at the beginning of trial that questions are not evidence and the People had not elicited an answer from Fernandez.

B. Analysis

Fernandez's contention that the trial court should have declared a mistrial on the basis of this one unanswered question is entirely without merit. A trial court may declare a mistrial when it is "apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*Ibid.*; *People v. Ledesma* (2006) 39 Cal.4th 641, 683.)

Here, the People had not completed the question before Fernandez's objection, which was sustained. Fernandez did not answer; the trial court had previously admonished the jury that attorney's questions were not evidence. It is presumed the jury followed this instruction. (*Shannon v. United States* (1994) 512

U.S. 573, 585; *People v. Wilson* (2008) 44 Cal.4th 758, 803.) Moreover, this was one question in a multi-day cross-examination of the defendant. The People did not pursue this topic beyond this one question and continued the cross-examination shortly after the objection was sustained. Given this record, the trial court did not abuse its discretion in denying the motion for a mistrial.

We are not persuaded by the cases cited by Fernandez. In each of those cases, the prosecutor asked multiple questions to elicit inadmissible evidence or to insinuate facts of which he had no good faith belief were true. (*People v. Wagner* (1975) 13 Cal.3d 612, 619; *People v. Bonin* (1998) 46 Cal.3d 659, 689, overruled on another ground by *People v. Hill* (1998) 17 Cal.4th 800, 822-823; *People v. Warren* (1988) 45 Cal.3d 471, 480-481; *People v. Perez* (1962) 58 Cal.2d 229, 241; *People v. Evans* (1952) 39 Cal.2d 242, 251.) The People's sole question in this case does not rise to the level of prejudice shown in *Wagner* or the other cases. Unlike in those cases, the question was not repeated and the topic was dropped.

IV. Fines

The abstract of judgment reflects a parole revocation fine of \$10,000, which the trial court did not impose and which is not applicable when, as here, there is no possibility of parole. (*People v. Oganessian* (1999) 70 Cal.App.4th 1178, 1183 ["[w]hen there is no parole eligibility, the fine is clearly not applicable".]) Fernandez contends, and the People concede, the abstract of judgment must be corrected. We agree this was a clerical error and order the \$10,000 parole revocation fine to be stricken from the abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 183.)

DISPOSITION

The matter is remanded for the trial court to strike the \$10,000 parole revocation fine from the abstract of judgment. The judgment is otherwise affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.