Filed 3/15/17 P. v. Nunez-Sharp CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DIEGO NUNEZ-SHARP et al.,	B264843 (Los Angeles County Super. Ct. No. BA397214)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant Diego Nunez-Sharp.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant Jonathan Lopez-Jaime.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Michael R.

Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

Following a joint trial before separate juries, defendants Diego Nunez-Sharp and Jonathan Lopez-Jaime were each convicted of first degree felony murder. The jury also found true a special circumstance allegation that the murder was committed during the commission of a robbery. (Pen. Code, §§ 187, subd. (a), 189, 190.2, subd. (a)(17).)[1] The death penalty was not sought, and the trial court sentenced each defendant to state prison for a term of life without the possibility of parole. Defendants appealed from the judgment of conviction, raising issues that include insufficient evidence, instructional error, and translation error. We do not agree with their contentions.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, Nolberto Gutierrez, lived in a studio apartment in Hollywood. At about 9 p.m. on Sunday, November 1, 2009, Gutierrez's neighbor, Arthur Coleman, heard voices outside his apartment. About 40 minutes later, Coleman heard what sounded like a body being thrust into the wall and some moaning. After that, the radio in Gutierrez's apartment was turned on and left on for two days. Coleman complained about the radio to the apartment manager the next morning and evening. On Tuesday, November 3, 2009, a maintenance employee, John Lembke, went to check on Gutierrez. The door to the apartment was not locked, the radio was on, and Gutierrez was lying on the floor, face down

---

[1] All further undesignated statutory references are to the Penal Code.

and naked. A ligature (a pillow case) was knotted around Gutierrez's neck, and his hands were tied behind his back with the cord from an iron.

Los Angeles Police Detective Thomas Small examined the body and found no facial or head injuries, obvious trauma, or defensive wounds. The pillow case on the victim's neck matched the pillowcase on the bed. An electrical cord from an iron was wrapped twice around both wrists and then in a figure-eight pattern between the wrists.

There were no signs of forced entry to the apartment. Corona Light beer bottles, soda cans, and Lays Limon Flavor potato chips were scattered on the floor. Candles were askew in the wall sconce. The receiver for a land-line telephone was off the hook. Gutierrez's cell phone was missing; his wallet contained credit cards but no cash; and no jewelry was visible in the apartment or on the victim's neck. Advertisement cards from gay bars, including Club Tempo, were found in the apartment.

The apartment and its contents were dusted for fingerprints and swabbed for DNA evidence. An autopsy showed the cause of death was "[a]sphyxia due to ligature strangulation."

On November 5, 2009, Detective Sue Brandsetter obtained a surveillance video from a liquor store near Gutierrez's apartment. The video showed Gutierrez and two unidentified men (later identified as Lopez-Jaime and Nunez-Sharp) inside the store at 18:15 on Sunday, November 1, 2009. It showed Gutierrez purchasing Lays Limon Flavor Potato Chips and two 6-packs of Corona beer. Gutierrez was wearing a watch, necklace, and bracelet in the video; the watch and bracelet were found in the apartment, but the necklace was not.

The two men depicted with Gutierrez in the surveillance video remained unidentified for the next two years. In January 2012, Detective Dave Vinton examined the murder book and reviewed Gutierrez's cell phone records. Vinton went through the calls that were made on the victim's cell phone after his death. One was made to a used car dealership on November 10, 2009. Detective Rolondo Rodriguez obtained the car dealership's sales records for the relevant time period, and found documents for the sale of a vehicle to Nunez-Sharp and Jaime-Lopez on November 10, 2009. The documents from the car dealership included defendants' cell phone numbers and photographs.

The detectives compared the photographs from the car dealership with the photographs from the surveillance video and concluded that defendants resembled the men in the video. Vinton examined Gutierrez's cell phone records and found that calls had been made between the victim's cell phone and Nunez-Sharp's cell phone at 2:54 p.m., 4:15 p.m., 4:27 p.m., and 5:04 p.m. on November 1, 2009, and on November 10, 2009.

Nunez-Sharp's Interview

Nunez-Sharp was interviewed by Detectives Rodriguez and Vinton on May 2, 2012.[2] Rodriguez conducted the interview in Spanish.[3] Without mentioning a murder investigation,

---

[2] The video of his police interview was played for the Nunez-Sharp jury during the prosecution's case in chief. Later, after Nunez-Sharp elected to testify in his own defense, the video of Nunez-Sharp's interview was shown to both juries.

[3] During the interview, Nunez-Sharp stated that he attended Bassett High School but was one English test short of earning a degree. He then attended Mount San Antonio College and studied to become a personal trainer.

Rodriguez inquired if Nunez-Sharp had purchased a car in 2009. He answered no. Rodriguez showed Nunez-Sharp the sales documents for the November 10, 2009 vehicle purchase, which included his photograph and copy of his passport. Nunez-Sharp denied buying a vehicle. Rodriguez told Nunez-Sharp not to lie, because a copy of his passport was made when he purchased the vehicle. Nunez-Sharp said that someone else bought the vehicle. Rodriguez told him the papers indicated that he "bought a Mitsubishi Montero, a truck for one or two days but you brought it back." Nunez-Sharp replied, "Uh-huh." When asked whether he remembered doing that, Nunez-Sharp answered no. Eventually, Nunez-Sharp stated that the papers were wrong, and he simply acted as a reference for the person who bought the car, Lopez-Jaime. The car was a beige Montero. He did not know how long Lopez-Jaime kept the car.

Nunez-Sharp stated that he met Lopez-Jaime for the first time in 2008 or 2009 at MacArthur Park. They met when Lopez-Jaime asked to use his cell phone. They remained acquaintances for about six months. After Nunez-Sharp "stopped seeing him," Lopez-Jaime left California, possibly in 2010, and moved to a place near Washington, D.C., and then to Texas. Nunez-Sharp stated several times that he did not have Lopez-Jaime's telephone number. After Rodriguez asked whether the number was in his cell phone, Nunez-Sharp admitted that he "did have Jonathan's telephone number," but was not sure if the number was correct. He last spoke to Lopez-Jaime more than a year before, when Lopez-Jaime was in Texas. When asked if Lopez-Jaime ever sent him pictures, Nunez-Sharp stated that he once

received a nude photograph of Lopez-Jaime, who is gay, but they were never boyfriends.

Rodriguez asked what the sales person at the car dealership looked like. Nunez-Sharp said he was "chubby." When asked where the car dealership was located, Nunez-Sharp answered, "It's close. Here on Washington and Vermont, close to here." Nunez-Sharp stated that after receiving a call from Lopez-Jaime about wanting to buy a car and needing a "recommendation," he met Lopez-Jaime at the car dealership, but Lopez-Jaime was missing a "receipt" or something from where he lived.

Rodriguez showed Nunez-Sharp photocopies from the car dealership's records of his passport and Lopez-Jaime's "card from the consulate of Mexico." Nunez-Sharp identified his passport and Lopez-Jaime's photograph.

Rodriguez then showed Nunez-Sharp a photograph of a man (Gutierrez) and asked whether Nunez-Sharp knew the man or had ever seen him. He replied no. Rodriguez asked whether Nunez-Sharp had ever been to the man's house at 1733 Cherokee in Hollywood. He again answered no. When asked whether he had the man's telephone number, Nunez-Sharp said he did not.

Rodriguez encouraged Nunez-Sharp to please let him know if Nunez-Sharp suddenly remembered something, like going to the man's house one time, but if not, "that's fine." After Nunez-Sharp said he did not know the man, Rodriguez stated that he was asking these questions for a reason, and had shown Nunez-Sharp the photographs because he believed Nunez-Sharp knew the man.

Rodriguez then showed Nunez-Sharp photographs from the November 1, 2009 liquor store surveillance video, which was time

stamped "18:17:37 hours or 6:17," and asked, "Do you know him?" Nunez-Sharp said he did not.

Rodriguez asked whether Nunez-Sharp recognized the other men in the surveillance video. After Nunez-Sharp said he did not know who they were, Rodriguez said, "Look again. You know who they are. You, correct? That's you and Jonathan, correct?" Nunez-Sharp replied yes. He identified himself as the person in blue and Lopez-Jaime as the person in the black shirt.

Nunez-Sharp stated that he did not recognize the other man (Gutierrez) in the surveillance video and had never seen him before. Rodriguez showed Nunez-Sharp a series of still photographs from the surveillance video that showed the three men inside the store; as to each photograph, Nunez-Sharp identified himself and Lopez-Jaime but denied meeting the other man or going to his house. After going through all the photographs, Rodriguez told Nunez-Sharp not to lie to him, and that if "you're going to lie, you're going to have problems. You have to tell me the truth" because "I know that you know this guy." "[I]f you lie to me, . . . I already know. I'm asking you these questions because I already know that you know him."

Eventually, Nunez-Sharp identified the man (Gutierrez) in the photographs as a friend of Lopez-Jaime.

Nunez-Sharp gave the following account of the events on November 1, 2009: He met Lopez-Jaime at the corner of Wilshire and Alvarado. Lopez-Jaime told Nunez-Sharp that they were going to MacArthur Park to meet a guy (Gutierrez) who lives in Hollywood and that the guy "wanted us to go to the house." After being told this, Nunez-Sharp went with Lopez-Jaime to MacArthur Park.

They met Gutierrez at MacArthur Park. Nunez-Sharp asked to borrow Gutierrez's phone to make a call. After Nunez-Sharp made the call, Lopez-Jaime told Nunez-Sharp "Oh, let's go with him, look." Lopez-Jaime said he was going to have sex with Gutierrez.

All three men took the Metro train to the Hollywood station, bought some beer, and walked to Gutierrez's apartment. After they arrived at the apartment, Lopez-Jaime and Nunez-Sharp were sitting down together when Lopez-Jaime said, "let's rob him." Lopez-Jaime also told Nunez-Sharp that Gutierrez wanted to have sex with both of them. At first, Nunez-Sharp said no. Lopez-Jaime said, "just touch him like this," and take off his clothes. Lopez-Jaime told him that Gutierrez would pay them each $500. "Oh, good, I say. [S]o then we started and that's how it was." "So, yes. I started as well."

Lopez-Jaime gave Nunez-Sharp a "signal" to hit Gutierrez and rob him. Lopez-Jaime hit Gutierrez and told Nunez-Sharp to put his hands behind his back. Nunez-Sharp held Gutierrez from behind while Lopez-Jaime was hitting him. Lopez-Jaime put a pillow on Gutierrez's face and hit him.

Rodriguez inquired who hit the victim first. Nunez-Sharp replied that Lopez-Jaime hit the victim first in the face. The detective asked what happened next. Lopez-Jaime answered, "I hit him also," "[right] here," in the body. Rodriquez repeated the question: " Okay. You hit him as well?" Nunez-Sharp replied, "Yes." Rodriguez asked, "Did he fall or did he stay—" and Nunez-Sharp answered, "No. He just stayed like this." When asked what happened after that, Nunez-Sharp stated that Lopez-Jaime "put the pillow on him. 'No, man, leave him alone.' I say, 'Leave him alone.'" The detective asked: "So when Jonathan gets the

pillow, how did he – did he put him on the floor with the pillow?" Nunez-Sharp replied, "No. In the bed like this." "So then I told him, 'Leave him alone' and he took it off."

The detective asked whether the "pillow was after you tied him up or before?" Nunez-Sharp stated: "The pillow was first." "Then I tied him up on the ground." "But when he got up—I picked him up. 'Leave him alone,' I said. And Jonathan continued hitting him." Rodriguez asked, "Was he already tied up or no?" Nunez-Sharp replied that he was holding the victim from behind his back but he was not tied up yet.

Nunez-Sharp tied the victim's hands behind his back after he "finally fell to the ground." Once the victim was down on the ground, Lopez-Jaime "grabbed his things." Lopez-Jaime took some jewelry from the closet and under the bed, and also took the victim's cell phone. Nunez-Sharp took a chain, which he later sold "in the street."

After Lopez-Jaime grabbed the victim's jewelry and cell phone, Lopez-Jaime continued hitting the victim.

Rodriguez inquired whether Nunez-Sharp knew Gutierrez was dead. Nunez-Sharp replied, "No." Nunez-Sharp stated that Guitierrez was alive when Nunez-Sharp left the apartment. Nunez-Sharp said he left before Lopez-Jaime did and "couldn't say" whether Gutierrez was alive when Lopez-Jaime left the apartment, but Lopez-Jaime "left right away."

Rodriguez informed Nunez-Sharp that Gutierrez was dead, but did not disclose how he died. Rodriguez asked, "who was it that killed the guy, the man?" Nunez-Sharp replied, "Well, he hit him. He was the one who was hitting him." When Rodriguez inquired who used the pillow, Nunez-Sharp stated they both used the pillow. First, Lopez-Jaime put the pillow on the man's face,

but Nunez-Sharp told him to leave the man alone and removed the pillow. Nunez-Sharp told Lopez-Jaime, "'I'm leaving.' So, I was already at the door to leave and he continued hitting him like this." Rodriguez asked how the victim was killed. Nunez-Sharp replied, "I don't know. I just tied him up like this."

The detective asked whether the pillow that he used was covered. Nunez-Sharp stated that it was covered. In response to the questions about the removal of the pillow case from the pillow, Nunez-Sharp stated that he removed the pillow case from the pillow in order to tie the victim's hands but "I couldn't tie him up." He then used "the iron."

Rodriguez told Nunez-Sharp that the victim was choked, and asked how the pillow case was placed on the victim's neck. Nunez-Sharp said, "I don't remember that." Rodriguez asked who choked the victim. Nunez-Sharp replied, "I didn't choke him." "Everything happened fast" but "[i]t wasn't me." Eventually Nunez-Sharp said, "Well, it was Jonathan" (Lopez-Jaime), but "I didn't see him" do it. Rodriguez informed Nunez-Sharp that police had collected DNA and fingerprints that matched his. Nunez-Sharp denied choking the victim and denied seeing Lopez-Jaime choking the victim.

Rodriguez inquired where they went after leaving the apartment. Nunez-Sharp replied, "Well, I—the truth, well, I don't want to live because of that." Rodriguez said, "Okay. I understand." Nunez-Sharp stated, "I want to die. I never—I never wanted—" "I never knew about that. I never—" Rodriguez asked, "You never knew about what?" Nunez-Sharp replied, "About my brother. To know that, you know, to be an accomplice of something; to know that someone is going to kill

someone." "They killed my brother, and I'm not even capable of killing the person that did that."[4]

Rodriguez told Nunez-Sharp: "I don't think that you were the person who killed him. I—I don't think that. I—I think that you did something that's not right. When the guy tells you, that, 'We're going to rob him,' why didn't you say no—why didn't you say no? The guy's telephone, where is it?" Nunez-Sharp replied that he did not know, but that Lopez-Jaime had grabbed the phone and let him borrow it to call his mother in Honduras. When asked whether he used Gutierrez's phone to call his house in Puente, Nunez-Sharp replied "No," "I don't remember," and "Maybe."

Nunez-Sharp was left alone in the interview room, and during that time he prayed aloud for forgiveness: "Forgive me, Father. I'm an accomplice in a murder, Father. I'm an accomplice. Forgive me, Father. Father, forgive me. Forgive me. . . ." "Give me an opportunity. Father, give me an opportunity. I didn't want to do it. I never did it. (Inaudible) My mother. I want to die. I don't want to live in jail, Father. Give me an opportunity, Sir. Give me an opportunity, Sir. (Inaudible) Father (Inaudible) done that. Father (Inaudible) forgive me. (Inaudible) [H]elp me with your blood. Father. (Inaudible) Help me with your blood. Father, I'm not a murderer. (Inaudible) accomplice. Father you know what you have to do. I put my life in your hands. (Inaudible) Father, help me, Sir. (Inaudible) Forgive me. You are always with me. (Inaudible) Forgive me. (Inaudible)"

---

[4] Earlier, Nunez-Sharp stated that he came to the United States after his brother had been killed in Honduras.

Nunez-Sharp's Pretext Telephone Call to Lopez-Jaime

At the end of the interview, Detective Rodriquez instructed Nunez-Sharp to make a pretext telephone call to Lopez-Jaime. Nunez-Sharp was directed to ask Lopez-Jaime about what happened in Hollywood, what to do if police come after him, and where Lopez-Jaime was living.[5]

During the pretext telephone call, Nunez-Sharp told Lopez-Jaime he was worried police were after him for the "thing we did with . . . that man from Hollywood." Lopez-Jaime replied, "Well, move to another city, fool. I told you already." When asked where he was living, Lopez-Jaime replied, "I can't tell you for the same reason; I can't trust you, you understand?" Lopez-Jaime told Nunez-Sharp to move because "that's highly punishable, loco, you know that."

Nunez-Sharp asked, "You didn't kill him or anything, nor did you continue hitting him, or – or did you?" Lopez-Jaime responded, "You did that shit, fool, not me." (This answer was redacted from the version played for Nunez-Sharp's jury.) Nunez-Sharp asked whether Lopez-Jaime kept hitting the man after he was on the ground. Lopez-Jaime answered, "No, fool. Why? What happened?" Nunez-Sharp said he was just trying to find out if it was true police were looking for him. Lopez-Jaime stated that if the man had "died, it would have come out on the news in L.A. on Univision. . . . And it didn't come out. It didn't come out, but, well, the (Inaudible) I regret that shit, you understand me? I know, well, we overdid it with that, you

---

[5] The recording of the pretext telephone call was played for Lopez-Jaime's jury.

A redacted version of the pretext telephone call was played for Nunez-Sharp's jury.

know?" When Nunez-Sharp asked if the man died when Lopez-Jaime "put the sheet on his neck." Lopez-Jaime replied, "No, he didn't die."

Upon being asked about his job, Lopez-Jaime said, "[t]hey have you detained right now, don't they?" Nunez-Sharp replied, "Detained? How are they going to have me detained? I want to go to Washington like you say. It's better for me to move, so they won't catch me."

In response to a question about his family, Lopez-Jaime answered, "Yeah. I'm just here. I'm fine. I'm fine. Everything's calm." Nunez-Sharp remarked that Lopez-Jaime always stays with people. Lopez-Jaime replied: "No, no, no, no. Not anymore—I don't mess with that gay stuff anymore, man. I already have my job, it's chill. I work—I have my little car calmly. I'm renting a room on my own—everything's chill. I don't want to know nothing about fag stuff, you understand me, none of that."

When Nunez-Sharp brought up the "car that you rented, do you remember?" Lopez-Jaime replied, "Which one?" "That Stratus?" Nunez-Sharp said, "No. The one you got from the dealer over there—there on Washington and Vermont, I think. I don't know." Lopez-Jaime replied, "Yes. The Stratus. But we took it back, didn't we?" Nunez-Sharp responded, "Well, I don't remember. I didn't go with you, but it was over there on Washington and Vermont, I believe, right?" Lopez-Jaime replied, "Yeah, yep. Listen, I'll call you back, loco." When Nunez-Sharp tried to continue the conversation, Lopez-Jaime hung up the phone.

Lopez-Jaime's Interview

Several days after the pretext telephone call, Lopez-Jaime was arrested in Charlotte, North Carolina. Detectives Rodriguez and Vinton interviewed him there.[6]

During the interview, Lopez-Jaime was shown the November 10, 2009 vehicle purchase documents. At first, he denied buying a car. He then said the papers were wrong; the car he bought was a Stratus; and he did not pay $2,000.

Lopez-Jaime gave the following account of the events on November 1, 2009: "I unfortunately met . . . Diego" (Nunez-Sharp) and took a "wrong path." Lopez-Jaime met Nunez-Sharp outside MacArthur Park. Nunez-Sharp "had changed a lot." Nunez-Sharp was "very neat," well-dressed and worked as a dancer at a gay nightclub, Club Tempo. When Nunez-Sharp saw that Lopez-Jaime was "doing very . . . bad," he offered to help him. Nunez-Sharp said, "'No, don't be sad.' . . . 'I'm going to help you.' . . . Let's go with a friend[.]'"

Nunez-Sharp invited Lopez-Jaime to go with him to a friend's home. They went to meet the friend, Gutierrez, at MacArthur Park. After Gutierrez came to the park, they decided to go to Gutierrez's apartment for drinks. They took the Metro to the Hollywood Station and walked to Gutierrez's apartment. Later, at 9:00 p.m., they walked to a liquor store and bought some beer and potato chips. They returned to the apartment and had some drinks.

While Gutierrez was in the bathroom, Nunez-Sharp told Lopez-Jaime that Gutierrez had a lot of gold jewelry. Lopez-

---

[6] Lopez-Jaime's police interview was played only for his jury.

Jaime related their conversation as follows: "'But, what are you going to do?' I asked him. 'Well, let's take them from him,' he says. 'We're going to take them.' 'Why don't you get real work,' I told him. 'Yeah, but,' he said, 'but he has a lot of jewelry,' he said. . . . 'And we have to take advantage. This is the moment' he tells me."

Before Gutierrez came back from the bathroom, Nunez-Sharp told Lopez-Jaime that he (Nunez-Sharp) "was going to grab [Gutierrez] and that [Nunez-Sharp] should go to the bedroom to see if there was any jewelry." When Nunez-Sharp told him this plan, Lopez-Jaime thought about leaving because Nunez-Sharp sounded "really serious." While Lopez-Jaime was considering whether to leave, Gutierrez came back to the living room and sat down. Suddenly, Nunez-Sharp got up and hit Gutierrez, placed Gutierrez down on the floor, and held him there. Gutierrez screamed. Lopez-Jaime felt "anxious" and started to leave the apartment. But Nunez-Sharp "was just staring" at Lopez-Jaime, like "you understand?" Lopez-Jaime stood still for a moment without saying anything. Nunez-Sharp said, "'Hey, where are you going?' . . . 'Go to—go to—go search the room,' he says."

Lopez-Jaime then searched the room and took some jewelry that he found in a closet. By the time Lopez-Jaime brought the jewelry to the living room area, Gutierrez, who was naked, was "already unconscious," "as if he had fainted out of shock." Lopez-Jaime did not know if Gutierrez was alive. "I thought he was unconscious. I never knew. Well, I saw he had passed out and that's it."

Nunez-Sharp did not trust Lopez-Jaime and went to look around the apartment for more jewelry. When Nunez-Sharp

finished looking, he handed some jewelry to Lopez-Jaime and told him to "[p]ut that in your pocket." Nunez-Sharp and Lopez-Jaime left the apartment together at 11:30 p.m. When they left, Gutierrez was lying face down with his hands behind his back. Lopez-Jaime never touched Gutierrez or tied his hands. Although Gutierrez was his friend, Nunez-Sharp took Gutierrez's cell phone. Lopez-Jaime never used Gutierrez's cell phone.

Lopez-Jaime and Nunez-Sharp took the Metro train to downtown Los Angeles and waited for jewelry stores to open. Nunez-Sharp kept Gutierrez's cell phone but sold his jewelry—"three chains, four bracelets, rings"—for $1,800, which he split with Lopez-Jaime.

Lopez-Jaime "wanted to leave, but [Nunez-Sharp] told [him] . . . it wasn't going to happen again and that we were going to work the right way." Nunez-Sharp invited Lopez-Jaime to Club Tempo, but Lopez-Jaime had to wait outside because he was under age. After a while, Lopez-Jaime began to realize Nunez-Sharp did not work at the club anymore and was just going there "to take the money from—the gays." Nunez-Sharp did not want Lopez-Jaime to leave and told him "not to worry. That we were going to look for a job, the right kind[.]" But when Nunez-Sharp started touching him, Lopez-Jaime "didn't like it."

Nine or ten days after the November 1, 2009 incident, Nunez-Sharp and Lopez-Jaime each contributed $400 to buy a car. But they returned the car the next day because Lopez-Jaime wanted to leave and "didn't want to have anything to do with it anymore."

Lopez-Jaime went to stay at a youth center. Several months later, he left California.

After Lopez-Jaime provided these statements, he was asked a number of questions. Rodriguez asked him how the man was hit. Lopez-Jaime answered, "Well, I was also very scared. The truth is, it was so fast. It was so fast that—he [Nunez-Sharp] hit him and he knocked him down to the floor." When Gutierrez got up to "grab a beer . . . Diego hit him." "[I]t was so fast. Diego hit him and knocked him down to the ground. I got scared. And the first thing I did was to walk to the door."

The detective asked who removed the man's clothing. Lopez-Jaime answered that Gutierrez removed his own clothes, and Gutierrez and Nunez-Sharp were fondling each other before the hitting began. Lopez-Jaime denied removing Gutierrez's clothes or hitting him.

Rodriguez asked whether Lopez-Jaime was aware DNA can be transferred by hitting or touching someone, and whether his DNA would be found on the victim. Lopez-Jaime answered, "No, I never hit him." Rodriquez inquired whether he touched the victim or removed his chain. Lopez-Jaime replied, "I think I did take his chain off." Lopez-Jaime admitting removing the chain from the victim's neck while he was on the ground.

When asked about the pillow case, Lopez-Jaime stated that Nunez-Sharp placed it on the man's neck while he was on the ground moaning, complaining, and screaming.

The Charges and Prosecution's Evidence at Trial

Nunez-Sharp and Lopez-Jaime each were charged with one count of murder with malice aforethought (§ 187, subd. (a)), with a special circumstance allegation that the murder was committed during the commission of a robbery (§ 190.2, subd. (a)(17)). Before trial, the prosecution announced it would not seek the

death penalty. Nunez-Sharp and Lopez-Jaime were jointly tried before separate juries.

Gutierrez's neighbor, Coleman, testified that he heard sounds of a struggle from Gutierrez's apartment on November 1, 2009, and complained about the radio to the building manager the next day. The building's maintenance man, John Lembke, stated that he discovered the body on November 3, 2009, and police were called. Detectives Small, Brandstetter, Vinton, and Rodriguez described the murder investigation that led to the arrests of Nunez-Sharp and Lopez-Jaime.

Forensic experts testified that Nunez-Sharp's fingerprints were found inside Gutierrez's apartment, and that DNA from both defendants was found on beer bottles and soda cans inside the apartment. The jury was informed there was no DNA from either defendant on Gutierrez's body or the ligatures on his wrist and neck, and the sperm on the victim's body was his own.

The coroner, James Ribe, M.D., testified that the cause of death was "asphyxia due to ligature, or ligature strangulation." He explained that a ligature that is tightly wrapped around the neck will stop blood from flowing to the brain, resulting in death in two to four minutes. Dr. Ribe stated that if a person is punched several times, bruising may occur even if the person dies shortly after being hit. Dr. Ribe believed that if bruising occurred in this case, it was not visible due to the decomposition of the body.

Nunez-Sharp's interview and a redacted version of the pretext telephone call were played for Nunez-Sharp's jury. Nunez-Sharp's jury did not hear Lopez-Jaime's response to the question, "You didn't kill him or anything, nor did you continue hitting him, or—or did you?"

Lopez-Jaime's interview and the pretext telephone call were played for Lopez-Jaime's jury. Lopez-Jaime's response to Nunez-Sharp's question was played for Lopez-Jaime's jury: "You did that shit, fool, not me."

Motion to Dismiss

The prosecution rested its case in chief. Lopez-Jaime elected not to testify or present any evidence.

Nunez-Sharp moved to dismiss based on insufficiency of the evidence. (§ 1118.) His counsel, Vernon Patterson, argued the People failed establish that the items were taken while the victim was alive, and therefore the evidence was insufficient to show that a robbery had occurred. The trial court denied the motion to dismiss, stating appellants' interview statements and pretext telephone call were sufficient to support a factual finding that the victim was still alive when the robbery occurred. In addition, according to Nunez-Sharp's interview statements, he believed the victim was alive during the robbery.

Fernanda Barreto, the prosecutor, commented that because the intent to commit a robbery was formed before any force was used, it was not necessary to prove that the victim was still alive when the items were taken. The trial court concurred, stating, "all of the conversations indicate that prior to getting to the apartment, or at least while at the apartment, they discussed robbing this guy, and they formed the intent to rob him, and that was way before he was killed."

Proposed Jury Instructions

Before Nunez-Sharp presented his defense, the trial court discussed proposed jury instructions with counsel. At this hearing, Barreto notified the trial court and defense counsel that she was planning to argue that adoptive admissions were made

by Nunez-Sharp during his police interview and by Lopez-Jaime during the pretext telephone call. The court found there was sufficient evidence to make those arguments. With regard to Lopez-Jaime, the court noted that during the pretext telephone call, when Lopez-Jaime was asked about placing the sheet on the victim's neck, Lopez-Jaime did not say, "'What are you talking about? What, are you crazy? I mean, I didn't have anything to do with some sheet.'"

Barreto requested instructions on adoptive admissions (CALJIC No. 2.71.5) and confessions (CALJIC No. 2.70). Over a defense objection, the court gave both instructions, finding the evidence was sufficient for the jury to decide whether pretrial admissions were made by appellants regarding their planning or involvement in a robbery, and whether to treat those admissions, if any, as a confession.

The prosecution also requested an instruction on plan, motive, or design (CALJIC No. 2.71.7). In granting this request, the following passages from Nunez-Sharp's interview (which at that point had been played only for Nunez-Sharp's jury but later was played for both juries) were identified by the trial court as relevant to the issue of planning activity:

- "MR. PATTERSON [attorney for Nunez-Sharp]: Well—So the question by the detective is (reading): 'So, when was that that Jonathan [Lopez-Jaime] said, "Hey, let's rob him"? When did that happen? When? When was that?' [¶] And Mr. Nunez-Sharp says: 'When—when?' [¶] The detective says: 'In the park? In the store or where?' [¶] And Nunez-Sharp says: 'No, when I let him borrow my phone.'"

- "THE COURT: Here's my portion of the conversation, it says (reading): Rodriguez says: 'At the park, he told you at the park, "Let's rob him," or how—when was it that he told you that?' [¶] "Answer by Nunez-Sharp: 'No, that was when we were sitting down. Like this.' [¶] 'Sitting where?' [¶] 'At the man's house.'"

When the discussion turned to the proposed instructions for first degree murder based on malice aforethought, which was the only offense charged in count one, Barreto announced that the prosecution would be proceeding solely on a theory of first degree felony murder, with robbery as the underlying felony. In response to the trial court's inquiry whether a lesser included offense instruction on second degree murder would be appropriate, both appellants requested that it be given. The trial court then asked whether there was substantial evidence to acquit appellants of the greater offense of first degree felony murder based on a robbery, but convict them of the lesser offense of second degree murder. Defense counsel suggested that a second degree murder verdict would be appropriate if the jury found there was no underlying felony (robbery). The trial court pointed out that without the underlying felony, there would be no basis for felony murder: "I think once [the prosecutor] tells me she doesn't want the premeditated malice aforethought murder, she's going for all the apples on felony murder, and she either gets it or she doesn't." The trial court denied the request for an instruction on second degree murder as a lesser included offense.

Nunez-Sharp's Defense

Nunez-Sharp called several character witnesses—Robert Rubio, Leoncio Velasquez, and Roger Alvardo—who testified that they did not know him to be violent.

Nunez-Sharp's Direct Testimony

Nunez-Sharp testified before both juries. He gave the following account of the events on November 1, 2009:

Nunez-Sharp met Lopez-Jaime near MacArthur Park on November 1, 2009. Gutierrez, a friend of Lopez-Jaime, joined them at the park. After Gutierrez allowed Nunez-Sharp to use his cell phone to call Nunez-Sharp's mother in Honduras, Gutierrez and Lopez-Jaime offered to pay Nunez-Sharp $500 to dance and have sex at Gutierrez's home. Nunez-Sharp agreed. The three men briefly separated before regrouping at the Metro station. They took the train to Gutierrez's apartment.

After they arrived at the apartment, they walked to a nearby liquor store to purchase some items. Nunez-Sharp identified Gutierrez, Lopez-Jaime, and himself in a photograph from the store's surveillance video.

They returned to the apartment, and Nunez-Sharp thought he was going to be paid $500 to dance and have sex. He went to the bathroom and poured out his beer because he does not drink beer. While in the bathroom, he took a piece of jewelry—a chain—that was on top of the toilet.

When Nunez-Sharp came out of the bathroom, Gutierrez and Lopez-Jaime were standing in the middle of the living room. "Gutierrez had his clothes down to his ankles," his shirt was off,[7]

---

[7] There was a mistranslation of the attorney's question. In English, Nunez-Sharp was asked whether the shirt was on. In Spanish, he was asked whether the shirt was off. His affirmative answer conveyed the erroneous impression (to English speaking listeners) that he was saying the shirt was on. This created a conflict with his pretrial statement that the victim's shirt was off, and he was cross-examined on that point. Later, another interpreter informed the trial court of the error in translation.

and his hands were tied behind his back with a pillow case. Gutierrez and Lopez-Jaime invited Nunez-Sharp to touch Gutierrez. Nunez-Sharp touched Gutierrez on the chest and stomach. Gutierrez had an erection and seemed to be having a good time. When the pillow case came off his wrists, Gutierrez asked to have it put back on. Nunez-Sharp placed the pillow case around Gutierrez's wrists, but did not tie a knot. Lopez-Jaime told Nunez-Sharp to get the iron, and Gutierrez asked Nunez-Sharp to tie him up with the cord from the iron. Nunez-Sharp tied Gutierrez's hands with the cord from the iron, but did not make a knot.

After Gutierrez's hands were tied with the cord from the iron, Lopez-Jaime hit Gutierrez in the side of the ribs, face, and stomach. Nunez-Sharp was unsure whether that was "correct" or what kind of game they were playing. Nunez-Sharp hit Lopez-Jaime, and Lopez-Jaime hit him back. Nunez-Sharp decided to leave because he was confused whether it was "a real thing or an activity, a sexual activity, [or] if they were playing."

When Nunez-Sharp left the apartment, Gutierrez was alive and on the floor. There was nothing around Gutierrez's neck. Nunez-Sharp went to the Metro station. Lopez-Jaime joined him there about 10 minutes later, close to 10:00 p.m.

The trial court informed the jury of the error, and instructed the jury that Nunez-Sharp's testimony was deemed to be that the shirt was off.

Nunez-Sharp's attorney questioned him about several of his interview statements:

- *His interview statement that he was not at the victim's apartment.* Nunez-Sharp testified that he lied about not being at the victim's apartment. He lied not because "something bad" occurred, but because there was "something like violence." He lied because he "was nervous and for what [he] had seen." When Lopez-Jaime was hitting Gutierrez, it "didn't appear that [Gutierrez] was angry at that or he felt pain."
- *His interview statement that he received a signal to hit and rob the victim.* Nunez-Sharp testified that he did not recall making this statement.
- *His interview statement that he tied the victim's hands.* After being shown a photograph of the victim's bound hands, Nunez-Sharp testified that when he "referred to 'tying,' what I did was simply I turned the cord—I did two turns with the cord. And as you see the hands are like that, a person could untie himself."
- *His interview statements that he robbed the victim.* Nunez-Sharp testified that his interview statements about robbing the victim were due to confusion: "I got confused, the same way in which I was ashamed because I took that piece of jewelry from the bathroom, I was confused." He testified that when he saw the things Lopez-Jaime and Gutierrez were doing to each other, he became "confused about

> whether it was a real thing or an activity, a sexual activity, [or] if they were playing. I wasn't sure."

Nunez-Sharp testified that he spent a total of 45 minutes at the apartment. He stated that when he left the apartment, Gutierrez was alive.

Nunez-Sharp's Police Interview

After Nunez-Sharp concluded his direct testimony, the recording of Nunez-Sharp's police interview was played for both juries. This was the first time Nunez-Sharp's interview was played for Lopez-Jaime's jury. Nunez-Sharp was then cross-examined by Barreto and counsel for Lopez-Jaime.

Nunez-Sharp's Cross-Examination. Nunez-Sharp testified that during his police interview, which lasted about an hour and a half, he never mentioned that "this was some type of sexual exploit." He admitted that some of his statements during the interview were false, including that he did not know Gutierrez and did not know until they got to Gutierrez's apartment that he would be paid for sex. He explained that he lied because he was ashamed that he had prostituted himself several times.

Nunez-Sharp testified that he did not hold the victim's hands behind his back or try to prevent the victim from fighting back. He did not tell the detective that he hit the victim. He did not realize Lopez-Jaime had taken any jewelry until later, when Lopez-Jaime said he was going to sell some jewelry to buy a car.

Error in translation

While the jury was on a break, Barreto, who is fluent in Spanish, informed the trial court of several instances when Nunez-Sharp's court-appointed translator, Irma Garcia, did not

fully or correctly translate her questions.[8] Barreto expressed concern that the errors were confusing to Nunez-Sharp, who kept "asking for the question to be repeated, and it makes him look bad and it looks like he's evasive when I don't really think that is the issue. I made sure this last time. I looked at my Detective and he shook his head." Counsel for Lopez-Jaime, who speaks Spanish, agreed there were some problems with the translation. Counsel for Nunez-Sharp, who does not speak Spanish, indicated he was unable to notice any errors.

The trial court accepted Barreto's statements, noting that Barreto and the investigating officer were fluent in Spanish. The court replaced Garcia with another interpreter, Jane Hudson.

Before Nunez-Sharp resumed his testimony, his counsel, Patterson, informed the court at sidebar that Nunez-Sharp wanted to keep Garcia as his translator. Patterson stated that Nunez-Sharp "likes the way that [Garcia] is interpreting and [says] that his problem is that he didn't understand the question. Now, I know it was said . . . to the court that certain words were not repeated. That I don't know. But my client says he believes that [Garcia] was interpreting for him and has been." The trial court denied the request to retain Garcia, stating that Nunez-

---

[8] When Barreto said, "one hour, two hours, or a few minutes," Garcia mistranslated this as "one hour, two hours, or more." Barreto's statement, "approximately an hour," was mistranslated as "for an hour." And when Barreto said, "After you met with them, you went to the victim's house for 45 minutes before going to the store," Garcia mistranslated this as, "So you were there with the victim and then you went to the store after about 45 minutes." Barreto stated that Garcia missed "the whole thing about the house," which even the defendant appeared to realize.

Sharp was not entitled to a specific interpreter, "he's only entitled to have someone interpret for him. Again, I don't know for a fact that she was misinterpreting. My knowledge of Spanish is not sufficient to make that evaluation. But once that claim is made, I can't allow that interpreter to continue with this individual."

Further Cross-Examination

Barreto then resumed her cross-examination of Nunez-Sharp with Hudson acting as his interpreter.

Nunez-Sharp testified that when he came out of the bathroom, he saw the victim standing with his pants around his ankles and his shirt off. Barreto asked whether he remembered "testifying on Monday when Mr. Patterson asked you: 'Did he have his shirt on?' You said, 'Yes'?" Nunez-Sharp replied that he did not remember this. Barreto then inquired, "So you don't remember that? Or that's not true?" Nunez-Sharp replied, "That's not true." She then asked, "So if you said that on Monday, were you lying?" He replied, "I never said that he had his shirt on."

Barreto moved on to another statement that was made during Nunez-Sharp's interview—that he removed the pillow case from the pillow in order to tie the victim's hands—and inquired whether he actually removed the pillow case from the pillow. Nunez-Sharp stated that he lied about removing the pillow case from the pillow. "[B]oth of us tied him up, that's why I wanted to explain." When he came out of the bathroom, he saw that the victim's hands were tied with the pillow case; when the pillow case came loose, Nunez-Sharp tied the victim's hands but did not make a knot.

Nunez-Sharp testified that he lied when he told detectives about a plan to rob the victim. After admitting he was the one

who introduced the word "robbery" during the interview, he explained that he talked about the plan to rob the victim because he "was ashamed because of what I was really going to do: Selling myself for money." When he told the detectives that he robbed the victim, it was "because—well, because I got the idea—well, because I had taken the chain, I didn't go there intending to rob or to hold him up at all, but because I took the chain it occurred to me to say that."

Barreto played a portion of Nunez-Sharp's interview when he said that Lopez-Jaime hit the victim, took things from under the bed and from the closet, grabbed the jewelry and then "we both left." Barreto then asked about his interview statement, "I hit him also." Nunez-Sharp testified that there was a misunderstanding. The person he hit was Lopez-Jaime. He never hit Gutierrez. Lopez-Jaime was the only one who hit Gutierrez.

Nunez-Sharp briefly worked as a go-go dancer at Club Tempo, but mainly worked at other clubs. He went to Club Tempo about 20 times, but only for pleasure. When he signed the forms at the car dealership, he did not understand what he was signing. Although he signed the vehicle purchase agreement on the line that says "Buyer," he did not read the entire document.

Error in translation

Later that day, Hudson informed the trial court there was an error in translation the previous day. Hudson explained that she intended to mention the error—which had to do with whether the victim had his shirt off or on—but forgot until the issue came up during cross-examination.

The trial court disclosed the error to the jury. The jury was instructed that it must accept the court's controlling

interpretation that when Nunez-Sharp was asked whether the victim had his shirt off, his answer was yes.

Outside the presence of the jury, Nunez-Sharp moved for a mistrial, arguing the interpreter's errors had created an awkward situation by allowing him to be impeached through no fault of his own. The trial court denied the motion, stating there was "no proof or indication or anything in this record that suggests that [Garcia] misinterpreted anything else."

Jury Instructions

As to count 1—first degree murder—both juries were instructed on homicide (CALJIC No. 8.0), murder (No. 8.10), felony-murder/robbery (No. 8.21), unlawful killing occurred during commission of robbery (No. 8.21.1), aiding and abetting felony-murder/robbery (No. 8.27), robbery (No. 9.40), aiding and abetting robbery (No. 9.40.1), specific intent for robbery (No. 9.40.2), element of fear (No. 9.41), degrees of robbery (No. 9.42), and inhabited dwelling house (No. 14.52). As to the special circumstance allegation, both juries were given CALJIC Nos. 8.80.1, 8.81.17, and 8.83.

Instructions on confessions (CALJIC No. 2.70), adoptive admissions (No. 2.71.5), and oral statement of intent, plan, motive, design (No. 2.71.7) were given to both juries. Nunez-Sharp's jury was instructed on consciousness of guilt based on a defendant's willfully false or deliberately misleading pretrial statement (No. 2.03). Lopez-Jaime's jury was instructed on the constitutional right not to be compelled to testify (Nos. 2.60 & 2.61), and the prohibition against convicting a defendant based on uncorroborated testimony by a codefendant (including any out-or-court statement offered for truth of matter asserted) (No.

3.11), and the definition of independent evidence of corroboration (No. 3.12).

Closing Arguments to Nunez-Sharp's Jury

Prosecution's Argument. In her closing arguments to Nunez-Sharp's jury, Barreto argued that Nunez-Sharp repeatedly lied during his police interview when he said he did not know Gutierrez. DNA and fingerprints from both defendants were found inside Gutierrez's apartment.

Nunez-Sharp made numerous conflicting statements. During his interview, after denying he was in the apartment, he admitted being part of a robbery. Then at trial, he switched tactics because he realized that by admitting he was part of a robbery, he would be liable for murder. He therefore testified that he was not part of the robbery, which was another lie, and testified that he left the apartment after only 45 minutes, which also was not true. According to the time stamp on the liquor store's surveillance video, all three men were at the store at 18:18:01; according to the victim's neighbor, Coleman, there were sounds of a struggle at 9:40 p.m.

As aiders and abettors in the robbery, both appellants are equally culpable for the killing that occurred during the commission of that felony. Appellants waited until the victim was naked and at his most vulnerable before hitting him. One of them held the victim's hands behind his back while the other hit him until he fell to the ground. After the ligature was tied around his neck, he died quickly, within four minutes. The special circumstance allegation is proven true if the jury finds either that Nunez-Sharp was the actual killer—he tied the pillow case on the victim's neck—or he acted with reckless indifference

to human life and was a major participant in a robbery in which a death occurred.

Defense Argument. Patterson, defense counsel for Nunez-Sharp, argued that the special circumstance allegation was not proven because there was no evidence that a death occurred during the commission of a robbery. The coroner did not provide an exact time of death. From the time appellants were at the liquor store (about 6:00 or 6:15 p.m. on November 1, 2009) to the time the body was discovered (about 5:00 p.m. on November 3, 2009) there was a 48-hour gap in the evidence. There is only speculation and conjecture that during those 48 hours Gutierrez was dead.

At most, Nunez-Sharp committed a theft when he took a chain from the bathroom. He did not rob or kill anyone. There were no signs of trauma on the body and no DNA from Nunez-Sharp on the ligatures. Nunez-Sharp left because he did not want to participate in the games or whatever was happening in the apartment

Rebuttal Argument. In rebuttal, Barreto argued that the time of death was established by the fact that the victim was found in the same condition as described by Nunez-Sharp in his interview statements. When Nunez-Sharp told detectives about receiving a signal to hit and rob the victim, he was describing a robbery. The victim's jewelry and cell phone were taken while he was being beaten and choked, which constitutes a robbery, and he died during the commission of the robbery.

Lopez-Jaime hung up the phone during the pretext telephone call because he knew Nunez-Sharp was lying when he said he did not go to the car dealership. When Nunez-Sharp asked about the pillow case on the victim's neck, Lopez-Jaime did

not object or express surprise. If it were true that Nunez-Sharp left the apartment before the ligature was applied to the neck, Lopez-Jaime would have said something like "How did you know about that? You weren't there when that happened." By leaving the "victim naked, tied up, with a pillowcase around his neck so tight with no hope of getting help, [Nunez-Sharp] acted with reckless indifference to human life that ultimately caused his death, and so he's guilty of the special circumstance."

Closing Arguments as to Lopez-Jaime

Prosecution's Argument. Barreto argued to Lopez-Jaime's jury that DNA and fingerprints from both defendants were found inside Gutierrez's apartment. Both appellants were aiders and abettors in a robbery: they intended to take and permanently deprive Gutierrez of his property, and used force and fear—punches, kicks, and a ligature around the neck—to do so. According to the coroner's testimony, death would have occurred within four minutes of when the ligature was tied around the victim's neck. Under the felony-murder rule, an unlawful killing that occurs during a robbery is first degree murder.

According to their interview statements, Nunez-Sharp hit the victim and Lopez-Jaime tied the pillow case around the victim's neck. But regardless which appellant tied the ligature, both are responsible and guilty of felony murder. For purposes of the felony-murder rule, the death by ligature occurred during the robbery regardless whether the victim died before or after appellants left the apartment.

When Lopez-Jaime was asked during the pretext telephone call about hitting the victim—"'Well, do you remember when you were hitting him? You didn't kill him, right, because you kept hitting him, you kept hitting him.'"—he immediately denied

doing this. He said something like, "'What are you talking about? You did the hitting.'" This denial, Barreto argued, was very likely true.

But during the same conversation, when Lopez-Jaime was asked about the pillow case—"When you took that sheet, when you grabbed it, when you put it up to his neck, he didn't die, did he?"—he did not deny doing this. Lopez-Jaime simply said, "'Nope. No, he didn't die.'" These contrasting responses showed that when Lopez-Jaime was asked about the pillow case, he "had every ability to say, 'No, that was not me.' But he didn't." Because he was the one who tied the pillow case on the neck, Lopez-Jaime tried to explain the possible presence of his DNA on the pillow case by saying that he removed the victim's necklace from the victim's neck.

The special circumstance allegation was proven because Lopez-Jaime was a major participant in a robbery and acted with reckless indifference to human life by attacking the victim when he was at his most vulnerable. The victim was left face down on the floor with his hands tied behind his back and a ligature around his neck. The receiver for the land line telephone was taken off the hook so the victim could not get help if anyone happened to call.

Defense Argument. Hall, defense counsel for Lopez-Jaime, argued that her client was not guilty of felony murder because he lacked the specific intent to commit the underlying felony, robbery. His mere presence at the scene of the crime failed to prove he was aiding and abetting a robbery. Nunez-Sharp planned the robbery, but Lopez-Jaime tried to leave because he was anxious and wanted nothing to do with it. Lopez-Jaime did only what Nunez-Sharp ordered him to do. The mere fact that he

followed instructions failed to establish that he harbored a specific intent to commit a robbery.

The victim's cell phone records showed that Nunez-Sharp was the one who set up the meeting with Gutierrez on November 1, 2009. This makes sense because Nunez-Sharp was a go-go dancer at Club Tempo, and there was a Club Tempo brochure in Gutierrez's apartment. Lopez-Jaime, on the other hand, was not even old enough to enter Club Tempo.

Nunez-Sharp's interview statements and trial testimony were full of inconsistencies. Nunez-Sharp hit the victim and was telling the truth when he said that he hit the victim. Nunez-Sharp also tied the pillowcase on the victim's neck. Lopez-Jaime never admitted doing this. When Nunez-Sharp asked Lopez-Jaime about the pillow case, Lopez-Jaime merely said the victim did not die. That does not constitute an admission.

Jury Deliberations and Verdicts

The jury for Nunez-Sharp began deliberating at noon on Thursday, April 2, 2015. At 3:15 that afternoon, it requested a reading of "Mr. Coleman's testimony about [the] radio/T.V. playing in victim's apartment," and a reading of Detective Small's entire testimony. The trial court notified counsel of the jury's requests, and the requested testimony was read back to the jury the following morning, Friday, April 3, 2015. The jury then resumed its deliberations, and, a short while later, announced it had reached a verdict. Nunez-Sharp was found guilty of first degree murder and the special circumstance allegation was found true.

The jury for Lopez-Jaime began deliberating around 9:30 a.m. on Friday, April 3, 2015. It announced that it had reached a

verdict at 1:30 p.m. He also was convicted of first degree murder and the special circumstance allegation was found true.

Motion for New Trial

Nunez-Sharp moved for a new trial based on insufficient evidence and inadequacy of the interpreter. As to the first ground, Nunez-Sharp argued the evidence was insufficient to show that he committed a robbery. He contended the time of the robbery was not established, and there could be no robbery if the victim was not alive when the property was taken.

The trial court denied the motion. The court stated that based on its independent review, there was sufficient evidence to support the jury's finding that the death occurred during the commission of the robbery. The court cited the following evidence: Nunez-Sharp's interview statements expressing his role in the case, the pretext telephone call during which Nunez-Sharp demonstrated his knowledge about the case and the facts of the murder, the surveillance videotape that depicted Nunez-Sharp with the victim and Lopez-Jaime shortly before the murder, the DNA and fingerprint evidence placing Nunez-Sharp at the location where the victim was discovered a short while later, the items missing from the apartment, and Nunez-Sharp's confession to a robbery.

As to the second basis—inadequacy of the interpreter—Nunez-Sharp argued there were at least two known instances when the interpretation fell below acceptable standards. The first occurred when Barreto informed the court that her questions were not being interpreted correctly. This occurred during a pivotal moment in Nunez-Sharp's testimony, and made it seem he was not telling the truth. The second occurred when there was a mistranslation with regard to the shirt. Although the trial

court corrected that error, it is reasonable to assume there were additional errors that went unnoticed.

Barreto argued she never thought the interpreter's lapses were making "it seem that the defendant was not telling the truth. That is not what I said; it's not what I meant, and it's not what I believed." Barreto's concern was that because "not everything was being interpreted, . . . it may make the defendant seem evasive." The error in translation regarding the victim's shirt did not go unnoticed and was brought to the court's attention after the matter came up on cross-examination. Hudson was acting as a second interpreter when the error regarding the shirt was made, and Nunez-Sharp always had two interpreters to assist him. Nunez-Sharp knew at least some English, because at one point he asked to replace an interpreter because he felt the translation was not adequate. When the court replaced Garcia as his interpreter, Nunez-Sharp asked to keep her because he felt that she was interpreting correctly.

The trial court found there was no indication that Nunez-Sharp was prejudiced as a result of one or possibly two lapses in translation by the Spanish interpreter. The court stated that although a defendant is entitled to continuous word-for-word interpretation, occasional lapses will not necessarily violate a defendant's constitutional rights. The court denied the motion for new trial based on its findings that: the one clear error in translation regarding the shirt was corrected, and the jury was properly admonished; there were always three or four interpreters present in the courtroom; the deputy district attorney was fluent in Spanish and brought the first issue to the court's attention, and in light of these circumstances, "any other errors of interpretation would have been discovered in the course

of the business of the courtroom, because of the phalanx of interpreters that we had."

Both defendants filed timely notices of appeal from the judgment of conviction.

DISCUSSION

I

Nunez-Sharp argues that his constitutional rights were violated because of the inadequacy of his appointed interpreter. Lopez-Jaime joins in this contention. We conclude the record does not support the contention.

"The California Constitution provides that a criminal defendant who does not understand English 'has a right to an interpreter throughout the proceedings.' (Cal. Const., art I, § 14.)" (*People v. Romero* (2008) 44 Cal.4th 386, 410.) The California Rules of Court provide that "[a]n interpreter must use his or her best skills and judgment to interpret accurately without embellishing, omitting, or editing." (Rule 2.890(b).) "When interpreting for a witness, the interpreter must interpret everything that is said during the witness's testimony." (*Ibid.*) These requirements are consistent with the general standard for interpreters, which requires continuous word-for-word translation. (See *United States v. Long* (9th Cir. 2002) 301 F.3d 1095, 1105.) "[O]ccasional lapses in the standard will not necessarily contravene a defendant's constitutional rights. [Citation.]" (*Ibid.*)

The record shows that Nunez-Sharp was provided with two translators at all times, and the courtroom was staffed with additional interpreters who could help identify errors in translation. In addition, the prosecutor was fluent in Spanish

and was able to raise a concern as to possible lapses in translation. Moreover, Nunez-Sharp—who attended high school and college in California—understood some English and was able to request a different interpreter in one instance and object to the removal of an interpreter—the same interpreter whose possible lapses were brought to the trial court's attention by the prosecutor—in another instance.

As to the error in translation regarding the victim's shirt, the error was noticed by Hudson, who brought it to the court's attention. The trial court notified the jury of the error, corrected the error in the transcript, and issued an instruction requiring the jury to accept the corrected testimony. The presumption on appeal is that the jury followed the trial court's instructions (*People v. Edwards* (2013) 57 Cal.4th 658, 723), and we conclude the steps taken by the trial court were sufficient to cure any conceivable prejudice.

Nunez-Sharp contends that as a result of inadequate translation, he was made to look bad or evasive when he requested to have some questions repeated. We do not agree. The fact that the prosecutor promptly raised the issue in order to avoid any possible prejudice to appellant is not sufficient to establish that he was prejudiced. The issue was thoroughly examined by the trial judge, who took quick and decisive measures to cure any conceivable prejudice. Significantly, Nunez-Sharp sought to retain the very interpreter whose possible lapses in translation are at issue on appeal. We find no support in the record for the contention that appellants were prejudiced as a result of any error in translation.

II

Appellants contend the trial court erred in refusing to instruct on second degree murder as a lesser included offense to felony murder. Respondent acknowledges that under the accusatory pleading test, second degree murder is a lesser included offense of the offense that was charged in count 1, first degree murder with malice aforethought. (*People v. Banks* (2014) 59 Cal.4th 1113, 1160.) Respondent argues, however, that an instruction on a lesser included offense is not required where, as here, there is no substantial evidence that only the lesser offense, but not the greater, was committed. We conclude respondent is correct.

The rule in criminal cases is that "a trial court must instruct on the general principles of law relevant to the issues the evidence raises. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) ""That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]"" (*Ibid.*) '[T]he existence of "any evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.]' (*Id.* at p. 162.)" (*People v. Taylor* (2010) 48 Cal.4th 574, 623, italics omitted.)

Murder is "the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) Malice may be express or implied. (§ 188.) "'Second degree murder is the unlawful killing of a human being with malice, but without the

additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. (§§ 187, subd. (a), 189; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.)'" (*People v. Chun* (2009) 45 Cal.4th 1172, 1181 (*Chun*), citing *People v. Hansen* (1994) 9 Cal.4th 300, 307.) There are two types of second degree murder: one is an intentional killing that is committed without premeditation and deliberation (express malice), the other is a killing that is committed while engaged in life-endangering conduct with a conscious disregard for life (implied malice). (*Chun*, at p. 1181.)

The felony-murder rule "'imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life.' [Citation.]" (*Chun*, *supra*, 45 Cal.4th at p. 1184.) The felony-murder rule "renders irrelevant *conscious-disregard-for-life* malice" by acting "'as a substitute' for conscious-disregard-for-life malice." (*Ibid.*)

Appellants contend that at most, they committed a second degree murder under the conscious-disregard-for-life malice test. They argue that if the jury had been allowed to consider second degree murder as a lesser included offense, it is reasonably probable the jury would have found they did not commit a robbery and acquitted them of the felony murder charge. We do not agree.

There was no evidence, let alone substantial evidence, to support appellants' theory that they did not commit a robbery. Both appellants admitted during their respective interviews that one of them forcibly restrained the victim while the other searched the victim's apartment for jewelry. These actions constituted a robbery. "Robbery is the felonious taking of personal property in the possession of another, from his person or

immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) The aggravating factors that elevate a larceny to a robbery—"the use of force or fear and the taking from the victim's presence" (*People v. Hodges* (2013) 213 Cal.App.4th 531, 540)—were established by substantial evidence as to each appellant.

The evidence also was sufficient to show that the victim died during the commission of the robbery. The coroner's testimony that the victim died within a few minutes of the application of the ligature was not disputed.

Regardless which appellant was the actual killer, because of the strong evidence that each had aided and abetted the other in both the robbery and the killing of the victim during the robbery, it is not reasonably probable the jury would have acquitted them of first degree felony murder and convicted them of second degree murder under a reckless endangerment theory of implied malice. As to Nunez-Sharp, because of the many inconsistencies between his interview statements, pretext telephone call, and trial testimony, it is not reasonably likely a jury would have believed his self-serving testimony over his pretrial admissions. Even were the jury to believe his trial testimony—that he left the apartment before anything bad occurred other than the theft of the chain—the court was not required to instruct on second degree murder because, under that scenario, he could not be held responsible for the victim's death.

Appellants' reliance on *People v. Campbell* (2015) 233 Cal.App.4th 148 (*Campbell*) is misplaced. In *Campbell*, the appellate court reversed defendant Fort's convictions on one count of first degree murder and two counts of robbery based on instructional error. The court concluded that Fort's testimony

was sufficient to allow a jury to determine whether he fired the fatal shot because he feared for his life, which might have led to a second degree murder or manslaughter conviction, or because he was aiding and abetting a robbery, which would have led to a first degree felony murder conviction.

But in this case, neither appellant presented a state of mind defense similar to Fort's, who testified he was present but unaware that a robbery was going to occur and that he fired his weapon during the robbery only because he feared for his life. In contrast, Nunez-Sharp's testimony that he left the apartment before anything bad occurred rendered his mental state irrelevant because he supposedly was not present during the robbery. In any event, even were we to conclude that an instruction on second degree murder as a lesser included offense was required, any conceivable error was rendered harmless by the jury's finding on the special circumstance allegation, which we next discuss.

III

Appellants challenge the sufficiency of the evidence to support the special circumstance finding. (§ 190.2, subd. (a)(17)(A) [robbery-murder special circumstance].)

The special circumstance statute imposes separate requirements for the actual killer and those who aid and abet the commission of first degree murder. For the actual killer, unless an intent to kill is specifically required by statute, once the special circumstance has been found true under section 190.4, there is no need to prove an intent to kill in order to impose a state prison sentence of life without the possibility of parole. (§ 190.2, subd. (b).)

For those who aid and abet in the commission of first degree murder, the statute "imposes both a special actus reus requirement, major participation in the crime, and a specific mens rea requirement, reckless indifference to human life." (*People v. Banks* (2015) 61 Cal.4th 788, 797–798 (*Banks*).) Those requirements are found in subdivision (d) of section 190.2.

In determining whether there is substantial evidence to support a true finding on a special circumstance allegation, the appellate court reviews the evidence in the light most favorable to the prosecution and determines whether a reasonable jury could find that the essential elements of the crime have been proven beyond a reasonable doubt. (*Banks*, *supra*, 61 Cal.4th at p. 798.) This requires an independent examination of the record for ""substantial evidence—that is, evidence which is reasonable, credible, and of solid value"" (*id.* at p. 804.) sufficient to support a finding beyond a reasonable doubt.

Here, there was substantial evidence that both appellants were major participants in the underlying felony—robbery of Gutierrez—and acted with reckless indifference to human life. As to Lopez-Jaime, the evidence showed that he planned the robbery, hit the victim, grabbed his property, and left him bound and unconscious on the floor with a ligature around his neck. These actions satisfied both the "special actus reus requirement, major participation in the crime, and [the] specific mens rea requirement, reckless indifference to human life." (*Banks*, *supra*, 61 Cal.4th at pp.797–798.)

In addition, there was substantial evidence to support a finding that Lopez-Jaime was the actual killer—the person who tied the ligature around the victim's neck—based on his adoptive admission during the pretext telephone call. Assuming the jury

found him to be the actual killer, the special circumstance finding was established regardless of his intent (or lack of intent) to kill at the time of the commission of the offense. (§ 190.2, subd. (b).)

As to Nunez-Sharp, the evidence also was sufficient to establish that he was a major participant in the robbery and that he acted with reckless indifference to human life: He was told before going to the victim's apartment that there was going to be a robbery. While at the apartment, he was told to look for the victim's jewelry while Lopez-Jamie held the victim. When given a signal by Lopez-Jaime, Nunez-Sharp hit the victim. Nunez-Sharp admitted that he tied the victim's hands behind his back. He also admitted that he removed the victim's chain from his neck. When Nunez-Sharp left the apartment, the victim was unconscious, bound, naked, and lying face down on the floor with a ligature around his neck.

Regardless of which appellant was the actual killer, they each met the requirements of the special circumstance statute. Because their actions far surpassed those of a mere getaway driver, appellants' reliance on *Banks*, *supra*, 61 Cal.4th at pages 807–811 is misplaced. (See *People v. Thompson* (2010) 49 Cal.4th 79, 126 [robbery-murder special circumstance finding supported by evidence defendant helped bring victim to remote area where he was robbed and murdered, and that defendant intended to take victim's property by having him killed]; see *People v. Proby* (1998) 60 Cal.App.4th 922, 927–929 [defendant acted with reckless indifference to human life by participating in armed robbery and providing handgun to person who killed victim, knowing that he had previously engaged in an armed robbery], and cases cited.)

IV

Appellants contend the felony-murder special circumstance instruction was incomplete because optional clarifying language regarding the non-incidental felony requirement was not given. (See CALJIC No. 8.81.17 [special circumstance not proven where robbery is shown to be merely incidental to murder].) They argue that because the evidence of their intent to rob the victim was "clouded,"[9] the clarifying language regarding the non-incidental felony requirement was required in this case.[10] We do not agree.

As the Supreme Court explained in *Valdez*, *supra*, 32 Cal.4th at page 113, the nonincidental felony requirement does not add a new element to the robbery-murder special circumstance. The requirement seeks to limit the application of the robbery-murder special circumstance to those who have killed in order to advance an independent felonious purpose, namely, robbery. The requirement was developed in response to *People v.*

---

[9] Contrary to this assertion, there was substantial evidence of appellants' plan to rob the victim. The fact that Nunez-Sharp testified he was confused when he told detectives about the plan to rob the victim does not mean the evidence of their intent was clouded. His disavowal of his pretrial statements simply placed his credibility at issue, and the jury was fully equipped to determine which of his statements were true.

[10] We note that appellants did not request the clarifying language, and that failure to object to the proposed instruction or request that additional language be included in the instruction constitutes a forfeiture of the issue on appeal. (*People v.Valdez* (2004) 32 Cal.4th 73, 113 (*Valdez*).) We do not treat the claim as forfeited, however, and we address the merits of the instructional issue and reject the accompanying claim of ineffective assistance of counsel.

Green (1980) 27 Cal.3d 1, in which the jury erroneously found the special circumstance allegation true even though the robbery in that case was incidental to the murder. (*Id.* at p. 60; *Valdez*, at p. 113.)

As the Supreme Court explained in *People v. Davis* (2009) 46 Cal.4th 539, 609 (*Davis*), "[f]or a felony-murder special circumstance to apply, the felony cannot be merely 'incidental or ancillary to the murder'; it must demonstrate 'an independent felonious purpose,' not an intent to 'simply to kill.' (*People v. Abilez* (2007) 41 Cal.4th 472, 511; see also *People v. Marshall* (1997) 15 Cal.4th 1, 41 [letter taken by the defendant from the victim as a token of her rape and murder was insufficient to sustain the defendant's robbery-murder special circumstance, because the taking of the letter was merely incidental to the murder].) But even if a defendant harbored the intent to kill at the outset, a concurrent intent to commit an eligible felony will support the special circumstance allegation. (*People v. Raley* (1992) 2 Cal.4th 870, 903; see also *People v. Abilez*, *supra*, 41 Cal.4th 472, 511 [sufficient evidence supported special circumstance allegations of robbery, burglary, and sodomy murder, as the defendant demonstrated independent felonious purposes consisting of an intent to take money and a desire to injure and humiliate the victim through the forced sex act].)"

In this case, the robbery was not incidental to the murder, and the enhanced prison sentence of life without the possibility of parole was not based simply on an intent to kill. Although Nunez-Sharp testified that Lopez-Jaime and the victim were engaged in some sort of rough sexual game, the evidence does not support a conclusion that the robbery was merely incidental to the murder. As required by section 190.2, the evidence supported

a finding that appellants harbored an independent felonious intent to rob the victim. Both appellants stated there was a plan to rob Gutierrez and that they discussed the plan before any violence began.

Davis, *supra*, 46 Cal.4th 539 supports our conclusion that clarifying language regarding the nonincidental felony requirement was not required in this case. In *Davis,* the defendant sought to reverse the robbery-murder special circumstance on the ground that items taken from the victim's home—leggings that were used to gag the victim and a nightgown that may have been used to cover the victim's body—were merely incidental to the murder of the victim. In rejecting this contention, the Supreme Court stated that although the items may have been taken to facilitate the kidnapping and attempted sexual assault of the victim, there was no evidence that the leggings and nightgown were taken to facilitate the subsequent murder of the victim. Accordingly, the robbery-murder special circumstance was upheld. (*Id.* at pp. 609–610.)

Similarly, in this case, there was no evidence that the jewelry and cell phone were taken to facilitate Gutierrez's murder. Because there was nothing that reasonably suggested the robbery was incidental to the murder, this case is distinguishable from *Green*, *supra*, 27 Cal.3d at page 60. Finally, even were we to find that the omission of the clarifying language regarding the non-incidental felony requirement was erroneous, on this record, we conclude the omission was not prejudicial under either *People v. Watson* (1956) 46 Cal.2d 818, 836 or *Chapman v. California* (1967) 386 U.S. 18, 24.

V

Lopez-Jaime, joined by Nunez-Sharp, contends the application of the robbery-murder special circumstance statute to this case violated due process and equal protection. We do not agree.

Appellants rely on Eighth Amendment jurisprudence that a special circumstance must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 876.) As appellants acknowledge, however, the narrowing requirement has been applied only in death penalty cases. (See *Harmelin v. Michigan* (1991) 501 U.S. 957, 995–996 [Supreme Court has "drawn the line of required individualized sentencing at capital cases"].)

Appellants seek to apply the narrowing requirement to the robbery-murder special circumstance statute. They argue that the statute, as applied, violated their right to due process and equal protection by authorizing a mandatory state prison term of life without the possibility of parole,[11] based on conduct identical to that which supports a first degree felony murder conviction—for which the sentencing options include a prison term of 25 years to life—without providing a sentencing hearing to satisfy the narrowing requirement by addressing facts beyond felony murder. Respondent argues that because the robbery-murder special circumstance statute has been judicially construed to

---

[11] We note that the right to parole is "a *state* interest created by California law. There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence." (*Swarthout v. Cooke* (2011) 562 U.S. 216, 220.)

apply only where the murder is incidental to an independent felonious purpose (*Green*, *supra*, 27 Cal.3d at p. 61), thus further narrowing the reach of the statute, appellants' sentences were neither arbitrary nor unconstitutional.

We reject the contention that the robbery-murder special circumstance statute, as applied, is unconstitutional because it violates the narrowing requirement under the Eighth Amendment. Not only is this requirement limited to capital cases, the California Supreme Court has consistently rejected the claim that the felony-murder special circumstance "fails to adequately narrow the class of persons subject to the ultimate penalty as required by the federal Constitution. [Citation.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 663; *People v. Pollock* (2004) 32 Cal.4th 1153, 1195; *People v. Martinez* (2010) 47 Cal.4th 911, 967; *People v. Brown* (2014) 59 Cal.4th 86, 119; see *Brown v. Sanders* (2006) 546 U.S. 212, 223–224 [California's robbery-murder special circumstance satisfies narrowing requirement for death penalty].) We are bound to follow these cases, which are dispositive of appellants' claim. (*Auto Equity Sales*, *Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

VI

Lopez-Jaime, joined by Nunez-Sharp, contends the trial court erred in refusing to instruct on the defense of duress. (§ 26.) The trial court concluded the defense was inapplicable because the statutory requirements to support it were not satisfied. We find no error.

Duress can be a defense to felony murder by negating the underlying felony. (See *People v. Anderson* (2002) 28 Cal.4th 767, 784.) The defense of duress requires "the threat or menace be

accompanied by a direct or implied demand that the defendant commit the criminal act charged." (*People v. Steele* (1988) 206 Cal.App.3d 703, 706.) The threat must be sufficient to show that a defendant had reasonable cause to and did believe that his or her life would be endangered if he or she refused. (§ 26; *Anderson*, at p. 773.) A future threat is insufficient to support the defense. (§ 26.)

The record shows that at most, Lopez-Jaime felt nervous, uncertain and scared during the commission of the robbery. Lopez-Jaime thought about leaving when Nunez-Sharp—who looked and sounded very serious—described how they would hit and rob the victim. However, Lopez-Jaime did not mention any express or implied threat to his life.

Similarly, Nunez-Sharp did not indicate that he was coerced to participate in the robbery. To the contrary, Nunez-Sharp's defense was that he left before the victim was beaten and robbed.

Because the record contains no substantial evidence that either appellant committed the robbery as a result of an imminent threat to his life, the instruction was properly refused.

VII

Finally, appellants contend that even if the errors in this case were individually harmless, their cumulative effect requires a reversal because they were deprived of a fair trial and due process. (See *People v. Abel* (2012) 53 Cal.4th 891, 936.) We do not agree. The doctrine does not apply since there was no error on the issues reviewed, and beyond that, the evidence of appellants' guilt was strong. There is no basis for reversal under

either *People v. Watson*, *supra*, 46 Cal.2d at page 836 or *Chapman v. California*, *supra*, 386 U.S. at page 24.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.