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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. HACHIK MASKOVIAN et al., Defendants and Appellants.	B278097 (Los Angeles County Super. Ct. No. PA076771)

APPEAL from judgments of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Jennifer L. Peabody, under appointment by Court of Appeal, for Defendant and Appellant Hachik Maskovian.

Lyna A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant Hovanes Maskovian.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Hachik "Kriss" Maskovian and Hovanes "John" Maskovian[1] appeal from their convictions by separate juries for the attempted kidnapping and first degree murder with special circumstances of Joshua West, John's former boyfriend. We affirm the judgments.

FACTUAL BACKGROUND[2]

1. Prosecution Case

a. Events preceding the homicide

Defendants are brothers. A mutual friend described them as "very close." Around 2005, John began dating West. They eventually moved in together. Kriss often spent time with John and West. Kriss said he and West "became good friends; brothers."

In 2009, John and West each purchased life insurance policies from State Farm agent Jodie Boytos with the other designated as the primary beneficiary. John's policy was for $3.5 million, and West's was for $2.5 million. The two policies were consolidated for payment purposes such that one payment covered both premiums. The monthly payment was approximately $534.

John and West broke up just after Thanksgiving 2012. West's friend Angela Elmore testified that West and John

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[1] Because both defendants share a last name, for clarity we will refer to them as "Kriss" and "John," as did the parties at trial.

[2] This summary is limited to the evidence we deem relevant to the issues on appeal, and does not encompass all the evidence presented at trial. Because defendants were tried in a single proceeding with separate juries, we specify when evidence was presented to only one jury.

remained "good friends" and continued living together, although West and Elmore had plans to move elsewhere. West told Elmore that he was unhappy in the relationship with John because it was sexually unsatisfying and he did not like supporting John financially. He told both his father and Elmore that John was still his life insurance beneficiary and he needed to change that. West had no plans to reunite with John, and was actively dating other people in 2013.

On April 22, 2013, two days before he was killed, West told Elmore that his cell phone was broken, and he was going to get a new phone from Kriss. Kriss, who repossessed cars for a living, sometimes had cell phones retained from those repossessions that he provided to West and John.

On April 23, 2013, John called his State Farm insurance agent Veronica Costa and said he had received a cancellation notice for the life insurance policies and wanted to make sure they were still in place. Although John frequently called Costa to pay his insurance premiums by credit card, and in the past had expressed concern about his automobile policies lapsing when he fell behind on payments, to Costa's recollection this was the first time he had asked her about the life insurance policies lapsing. The next morning, April 24, Costa confirmed with the regional office that both policies were in place and informed John.

b. The homicide

On April 24, 2013, around 9:30 p.m., 14-year-old Adriana S. was in her room in her second floor apartment on Vinedale Street in Sun Valley. Kriss lived in the same apartment complex with his parents. Adriana heard a car pull up. She looked out her window and saw a man standing next to a white car talking on his phone. She turned away from the window, but

returned later when she heard talking. A tow truck was now parked next to the white car. The truck "was slanted" and "like halfway in the middle of the street." There were three men in addition to the first one she had seen. They were talking but she could not hear what they were saying. They were talking in normal voices and did not appear to be arguing.

Adriana S. again stepped away from the window. A minute later, she heard someone screaming for help. She looked out the window and saw two of the men beating the first man she had seen. Although Adriana could not identify the men, other evidence indicated the attackers were defendants, and the victim was West. Defendants were hitting West with their fists and a "metal stick." They lifted him into the open passenger doorway of the tow truck and slammed his head with the door. Adriana told the police that "in the beginning half [the victim's] body was inside [the truck] and like his legs were like dangling out." At trial, however, Adriana said it never appeared to her that the assailants were trying to put the victim in the truck, or that any part of the victim's body other than his head was in the truck.

During the attack, the fourth man, identified by other evidence as Nazaret "Nick" Bayamdzhyan, was in front of the truck on the driver's side motioning cars to drive by. Adriana S. testified that the truck door would have blocked the view of the passing cars.

Adriana S. saw a woman in a black car slow down and yell at the assailants to stop. Bayamdzhyan told her to keep moving. During this time, West got away from his attackers. He tried to get the attention of the woman in the black car. Defendants got in the white car and drove after West, hitting him with the car from behind. The white car stopped and the person in the

passenger seat opened the door and grabbed the victim. At this point, Adriana S.'s father turned her away from the window. Adriana heard several gunshots.

Adriana S.'s mother and father also saw two men beating West with their fists and the truck door while a third man waved traffic by. Adriana's father saw the white car strike West, although he testified that only one of the attackers was in the car at the time. Both her mother and father heard gunshots after they had turned away from the window.

The woman in the black car, Cheryl Litchfield, testified that she was driving on Vinedale when she saw a white tow truck parked diagonally with its front facing out into the street such that other cars had to go around it. A white Mercedes was parked very close to the tow truck. The passenger door of the truck was open such that it almost touched the Mercedes and blocked her view of whatever was happening behind it.

As Litchfield passed, she looked under the truck and noticed three pairs of feet. The two feet in the middle were stumbling. In her statement to the police, Litchfield said it appeared that the person in the middle was being moved towards the truck. Bayamdzhyan, sitting in the driver's seat of the tow truck, rolled down the window and motioned her to keep moving. He told her everything was fine and they were just helping with a broken car.

Litchfield rolled her car forward past the truck and saw defendants beating West. One was hitting him with a crowbar, the other was closing the truck door on West's head. West broke away and came towards her car asking for help, saying "they were going to kill him." Litchfield did not let West into her car but told him she was calling the police. The white Mercedes

drove past her and turned around, blocking her car. West had fallen to the ground, although Litchfield did not see the white car hit him. Litchfield heard gunshots and saw a muzzle flash. The Mercedes drove back past her towards the tow truck. Litchfield drove off. On cross-examination, Litchfield said she never saw anyone try to put West in any of the vehicles.

West's body was discovered on another street less than a mile from the site of the attack. It appeared to have been discarded hurriedly. The medical examiner testified that West had suffered blunt and sharp trauma (the latter indicating injury from a sharp object), a fractured fibula and tibia, and had been shot in the chest from a distance between a few inches and three feet. West had also been bitten; a dentist confirmed the bite was human. The gunshot was fatal; the other wounds by themselves were not fatal.

c. John's statements to the police and his friends

John was detained by police and interviewed on April 26, 2013. When the police told John that West had been murdered, John "began to cry" and "acted in disbelief" as if "he had no knowledge of what had happened to" West. John denied being present at the time of West's murder. The police told him witnesses had identified him and his car at the crime scene and that there was video of him at the location.

The remainder of the interview was recorded and presented to John's jury only. John said that Kriss had killed West. John said he and West had met with Kriss to get a new cell phone. Kriss and West chatted, and suddenly Kriss started hitting West. Another man was there as well; he and Kriss tried to put West in the tow truck as John tried to stop them. West broke away and ran. John got into his car. The car had a spare tire and John

could not control it. He hit West by mistake. John heard gunshots, then saw Kriss dragging West's body. Later, Kriss asked John if there had been a life insurance policy for West. John said no, and Kriss accused him of lying.

The police at that time considered John a witness, not a suspect, and let him go. Kriss was arrested on April 27, 2013. Kriss denied being present at the murder.

The police interviewed John again on April 29, 2013. The recorded interview was presented to John's jury only. Again, John said that he and West met with Kriss near their parents' apartment so that Kriss could provide a phone. John began to cry while describing the meeting and the police stopped the interview.

John's jury heard testimony from his friends Catherine Nownes-Whitaker and Kimbra McNeal, who spoke with him after West was killed. John separately told both of them that he and West met with Kriss so Kriss could provide a new phone. Kriss attacked and beat West, then shot him. Later, John told McNeal that Kriss had forced him to bring West over because Kriss wanted the insurance. McNeal stated that John had changed his story to her several times; this was the third version.

John's jury also heard testimony from Elmore that when Elmore asked him why Kriss would want to kill West, "the only thing [John] could think of was that Kriss was able to get electronics and [West's] phone was broken."

d. John makes a claim on West's life insurance

John's friend Jessica Counts was in his apartment with him on May 1, 2013. He was looking for West's life insurance policy. Counts suggested he focus on mourning West rather than looking for the policy, but John did not acknowledge her. He said

he had no money to pay his bills, and wanted to make sure he was still listed as West's beneficiary.

Also on May 1, John called State Farm agent Costa and made a credit card payment on the phone for the life insurance policies. After doing so, he cried and informed her that West had died.

e. John's additional police interviews and arrest

John's jury heard two more recorded interviews between John and the police. In the first, dated June 14, 2013, John was interviewed on video at the crime scene on Vinedale. John again said that the reason he and West went there was to get a cell phone from Kriss. He described Kriss and his companion "Nazo" hitting West as John tried to stop them. Kriss tried to drag West inside the truck. West broke away and ran. John got in his car and floored the accelerator; it skidded, he heard a "thump," and West fell. John drove away. He heard gunshots.

The second interview took place at John's apartment on July 12, 2013. John said he had not seen Kriss shoot West and that it was Nazo who hit West with a tire iron. John said Kriss had never discussed a life insurance policy with him.

John was arrested on July 25, 2013. A search of his apartment revealed numerous unpaid bills. Phone records indicated calls from collection agencies.

f. Evidence of prior insurance fraud

Before trial, the prosecution moved to introduce evidence of two prior insurance claims by John, one for damage to a home at Sunset Plaza Drive in Los Angeles in 2010, and one for personal injuries from an automobile accident in 2011. The prosecution argued this evidence was admissible to prove intent, motive, and knowledge as to the charged murder, which the prosecution

theorized was committed because of West's life insurance policy. The court ruled that evidence of the 2010 home insurance claim was admissible to show intent and motive, but disallowed it to prove knowledge. The court excluded the evidence of the 2011 auto insurance claim under Evidence Code section 352.[3]

The prosecution also sought to introduce evidence regarding John's lease arrangement for the Sunset Plaza Drive home, his failure to pay rent, and a "series of deed transactions" concerning the home that the owner purportedly was not involved in. The court found the evidence relevant and admissible.

Based on these rulings, the prosecution introduced the following evidence at trial. In 2006, Wen Jie Huang started working as a real estate agent for a woman named Jasmine. Huang wanted to purchase an investment property, and Jasmine helped him find one on Sunset Plaza Drive in the Hollywood Hills. The house cost $1.5 million, and while Huang had sufficient credit to obtain the loan, he did not have enough income to afford the monthly payment. Jasmine said he could use an "investor" to assist, and introduced him to John as such an investor.

Huang and John entered into an oral agreement whereby John would rent the house for $10,000 per month. John was to deposit the money into a bank account jointly owned by Huang and John. The monthly mortgage payment would then be

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[3] Evidence Code section 352 states, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

deducted from the joint account. John made an initial deposit of $10,000, but never made any further deposits. Huang found out in March or April 2007 that the account was frozen because of a negative balance; when he contacted John, John claimed he had deposited money and the bank had made a mistake. When the loan went into default, John said he could borrow money to pay the default and would work to repair Huang's credit. John did not do so.

During this entire period, John and West were living in the house with at least two friends, none of whom paid Huang any rent (although at least one friend paid John rent). Other than the initial $10,000, Huang never received any money from John.

In January 2008, John said he had an idea to help Huang sell the house. He found a real estate agent and asked Huang to transfer title to her, which Huang did via a grant deed. At the same time, John had Huang sign a blank grant deed, claiming that if there were any problems with the deed transferring title to the real estate agent the blank deed could be used to make revisions. Unbeknownst to Huang, Kriss's name later was added to the blank deed and Kriss signed it. However, the house apparently was not sold as a result of Huang's signing the two deeds; another deed signed by a Maggie Williams, of which Huang was unaware, ultimately transferred title back to him in April 2008. The record does not establish the purpose of these transfers or their effect, if any.

In May 2008, John purchased a home insurance policy for the Sunset Plaza Drive house from State Farm agent Boytos (who later would provide John's and West's life insurance policies). The policy was in Huang's name. John told Boytos that Huang was his business partner. Boytos never met Huang. At some

point, John's name was added to the policy as well. Huang did not know about this insurance; he had purchased a year's worth of insurance when he bought the house in 2006, but had not bought additional insurance after it lapsed.

In May 2010, Huang asked John to make the house available to show to prospective purchasers. John refused, saying "Fuck you. I'm not leaving." Around this time, John had his friend Nownes-Whitaker call Huang to stall him by claiming John had found a potential buyer. Up until that point, Nownes-Whitaker had believed John was the owner of the house.

Also in May 2010, John called Boytos and asked that Huang be removed from the home insurance policy, leaving John as the sole insured. John explained that Huang no longer had title to the home. Huang, still not aware the insurance had been purchased in the first place, was also not aware of this change.

A day or two later, State Farm received a claim from John for water damage to the home stemming from one of the toilets. The damage was extensive, rendering the home unlivable. State Farm investigated and found no fraud. State Restoration, Inc., a restoration contractor, estimated the repairs would cost $133,963.40. John received checks from State Farm that he endorsed and signed over to State Restoration for the repairs. John later decided not to have State Restoration do the work and the contractor returned the money in a check payable to John.

On July 12, 2010, Kriss added John as a joint owner of his credit union account. That same day, there was a deposit of $129,280.92 into the account. Over a six-month period, all but $6,000 was withdrawn.

Nownes-Whitaker testified that more than a year later John and West told her they had deliberately broken some pipes

in the house to create the flood, and a portion of the insurance money was intended for Kriss. John said of the flood, "You know, that was all me. That was me and Kriss."

The prosecution also introduced evidence that John declared bankruptcy on June 23, 2010, and West declared bankruptcy on August 18, 2010.

2. Defense Case

Kriss testified that John had called him about getting a new cell phone for West and they had agreed to meet at Kriss's apartment on April 24, 2013. John and West were already there when Kriss and Bayamdzhyan arrived. Kriss left his truck running. Although there was one street light closer to the apartment building, the area they were standing in was darker. Kriss showed West several phones, and West became angry because Kriss did not have a particular model John had said Kriss would have. Bayamdzhyan told West to calm down, and West responded with an anti-Armenian slur. West and Bayamdzhyan exchanged further insults while Kriss attempted to intervene. Then West swore at Kriss, who began punching West. Bayamdzhyan joined the attack wielding a jack handle. Kriss slammed West's head with the truck door several times; someone else did as well, although it was unclear if it was John or Bayamdzhyan. At some point, Bayamdzhyan went around the truck to direct traffic while Kriss and West struggled. Kriss never saw John hit West.

West escaped and ran. Kriss told John they had to get West back, and the brothers got into John's Mercedes with John driving. The car had a spare tire equipped. When John pressed the accelerator, the car spun on the gravel and hit West. John kept driving. Kriss told him to go back so they could take West to

the hospital. Kriss heard gunshots. John turned the car around and drove back, and Kriss saw West lying on the ground. Kriss and Bayamdzhyan put West into the truck and drove off.

Kriss said he knew his brother had a life insurance policy, but did not know West had one. He remembered in the past that John and West told him they quit smoking temporarily "for the insurance" but they never specified life insurance.

As to the Sunset Plaza Drive house, Kriss testified that he signed the grant deed because John and West told him it would boost his credit. He added John to his bank account following the flood and allowed John to deposit the insurance money there because John was in bankruptcy proceedings and did not want the money taken from him. Kriss denied having anything to do with the flood or knowing that it was faked.

Kriss testified that "most times" he paid the rent for the apartment John and West shared before West's death, and he also cosigned the lease with West.

John did not testify.

PROCEDURE

Defendants were charged in an information with murder (Pen. Code, § 187, subd. (a)) and attempted kidnapping (§§ 207, subd. (a), 664). As to the murder, the information alleged three special circumstances that, if found true, would subject defendants to the death penalty or life imprisonment without the possibility of parole under section 190.2, specifically: the murder was committed during an attempted kidnapping (§ 190.2, subd. (a)(17)); the murder was carried out for financial gain (*id.*, subd. (a)(1)); and defendants intentionally killed the victim by means of lying in wait (*id.*, subd. (a)(15)). As to Kriss, the information alleged firearms enhancements under section 12022.53.

Defendants were tried in a single proceeding with separate juries. At the close of the prosecution's case, defendants moved under Penal Code section 1118.1 for a judgment of acquittal on all counts and special circumstances. The court denied the motion.

Both defendants were found guilty of first degree murder and attempted kidnapping, with all three special circumstances found true. The firearms allegations were found not true.

For the murder, defendants were sentenced to life imprisonment without the possibility of parole. For the attempted kidnapping, they were sentenced to two years six months, which the court stayed under Penal Code section 654. The court imposed fines and awarded credits.

Defendants timely appealed.

DISCUSSION

Defendants (1) challenge the sufficiency of the evidence supporting their convictions, (2) argue the trial court erroneously instructed the juries on special circumstances and accomplice testimony, and (3) claim the court improperly admitted evidence of prior acts, John's indebtedness, and the victim's state of mind. We discuss these arguments in turn.

1. Sufficiency of the Evidence

Defendants argue the evidence was insufficient to support their convictions for attempted kidnapping and first degree murder and the true findings on the special circumstances. We disagree.

In considering a challenge to the sufficiency of the evidence to support a conviction or a special circumstance, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is,

evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66; see *People v. Brooks* (2017) 3 Cal.5th 1, 57 (*Brooks*) [standard of review for determining sufficiency of evidence is identical for convictions and special circumstances].) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).) The "testimony of a single witness is sufficient to support a conviction" "unless the testimony is physically impossible or inherently improbable." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

a. Attempted kidnapping

Defendants claim the evidence presented by the prosecution was insufficient to support their convictions for attempted kidnapping and the true findings on the special circumstance based on attempted kidnapping. Thus, defendants argue, the court erred in not granting their motion for a judgment of acquittal on those allegations. We disagree.

When ruling on a motion under Penal Code section 1118.1, a trial court applies the same sufficiency-of-evidence standard applied by appellate courts in reviewing convictions. On appeal from a denial of such a motion, we independently review the sufficiency of the evidence at the point the motion was made. (*People v. Maciel* (2013) 57 Cal.4th 482, 522.)

Penal Code section 207, subdivision (a) states that "[e]very person who forcibly, or by any other means of instilling fear,

steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." " 'An attempt to commit a crime consists of . . . a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.' " (*People v. Johnson* (2013) 57 Cal.4th 250, 258, quoting Pen. Code, § 21a.) Unlike a completed kidnapping, attempted kidnapping does not require proof that the victim was actually moved. (*People v. Cole* (1985) 165 Cal.App.3d 41, 50 ["[A]sportation simply is not an element" of attempted kidnapping.].) Courts have found the requisite intent shown by "a forcible attempt to move the victim into a motor vehicle" absent indication the "defendant contemplated no more than a trivial movement of his victim." (*People v. Fields* (1976) 56 Cal.App.3d 954, 956-957 (*Fields*) [evidence of attempted kidnapping sufficient when the defendant seized girl and ordered her into his car with the motor running]; see *People v. Loignon* (1958) 160 Cal.App.2d 412, 421 (*Loignon*) [evidence of attempted kidnapping sufficient when the defendant pulled child into his car, quieted him, and started the motor].)

Here, the evidence was similar to that in *Fields* and *Loignon*. Multiple witnesses testified that defendants pulled West towards the truck door. The juries heard witness Adriana S.'s statement to the police that "in the beginning half [the victim's] body was inside [the truck] and like his legs were like dangling out," from which the juries could infer defendants were trying to put West into the truck, and not simply position him to slam his head with the door. Witnesses noted the truck was parked at an odd angle sticking out into the street,

suggesting Kriss had positioned it so he could depart quickly.[4] This was sufficient to support a conclusion that defendants intended but failed to kidnap West.

John's jury heard additional evidence supporting this conclusion, namely John's statements to the police that Kriss tried to drag West into the truck. Although John denied any involvement, the jury was free to reject that aspect of his testimony while otherwise accepting his description of the attack. (*People v. Fuiava* (2012) 53 Cal.4th 622, 715, fn. 34 [" ' "the jury properly may reject part of the testimony of a witness . . . and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected available material" ' "].)

Defendants point out that at trial Adriana S. testified that it never appeared to her that any part of West was within the truck other than his head being hit with the door. But Adriana did not deny that her statement to the police was accurate, and the jurors were entitled to accept her earlier statement as more credible than her testimony several years later.[5]

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[4] Kriss testified that he left the motor running, but this fact was not before the trial court at the time of the motion for a judgment of acquittal.

[5] In Adriana S.'s statement to the police, which was read in part at trial, she drew a diagram of what she saw and indicated where West was. A detective said, "So he is now more in the door, kind of the doorjamb?" Adriana said, "Yeah. Like half his body was, like—in the beginning half his body was inside and like his legs were like dangling out. And then by then they got to a point where they were just beating him with the door." The detective said, "Okay. So you see there is two people that are beating him with a door?" Adriana said, "Yeah."

The court did not err in denying the motion for a judgment of acquittal on the attempted kidnapping charge and special circumstance.[6]

b. First degree murder

The juries were instructed on three theories that would support a finding of first degree murder: a willful, deliberate, and premeditated killing with malice aforethought; a murder committed by lying in wait; and an unlawful killing during the commission of an attempted kidnapping. Defendants argue the evidence was insufficient to support any of these theories. We reject this argument.

i. Premeditation

"A 'willful, deliberate, and premeditated killing' is murder in the first degree. [Citation.] ' "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance.' " (*Brooks,*

Immediately after the statement was read at trial, Adriana S. testified, "Yeah, because they were trying to pull him—pull him up so that he could—they could hit him with the door." The prosecutor said, "Okay. Was that accurate, though, that at some point part of his body was actually in the truck?" Adriana answered, "Yeah, when they were trying to pull him up."

[6] As to the special circumstance, it is unclear if the juries found that one or both defendants actually killed West or aided and abetted the murder. Assuming the latter, to find the attempted-kidnapping special circumstance true the juries would have to find that defendants acted "with reckless indifference to human life." (Pen. Code, § 190.2, subd. (d).) Defendants do not challenge the sufficiency of the evidence in support of this element. Regardless, their indifference was well established by the brutality of the attack.

supra, 3 Cal.5th at p. 58.) Our Supreme Court has "identified three categories of evidence relevant" to the question of whether a killing was deliberate and premeditated: (1) evidence of planning activity; (2) evidence of the defendant's prior relationship to the victim from which a motive to kill can be inferred; and (3) evidence of the manner of killing suggesting a preconceived design. (*Id.* at pp. 58-59.) These categories are intended as "an 'aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' " (*Id.* at p. 59.)

Here, there was evidence in all three categories. To begin with, the jury could infer a motive to kill from defendants' prior relationship with West, namely the fact that John was the beneficiary of West's $2.5 million life insurance policy, a circumstance in jeopardy now that John and West had broken up. While Kriss argues there was no evidence that he knew of the policy or that his brother was the beneficiary, there was evidence of the close relationship between defendants, the comingling of their finances at various points in their lives, and testimony that defendants had previously cooperated in staging a flood with the intent and motive of collecting insurance proceeds (after which Kriss allowed John to deposit the proceeds in his bank account to conceal it from the bankruptcy court). Based on this evidence, the jury could fairly infer that Kriss did not spontaneously join John in attacking West, but did so because he knew of the insurance policy.

There was also evidence of planning. In advance of the murder, John took steps to ensure West's life insurance was in place. The evidence showed that despite John and West having

broken up months earlier, and John having unpaid bills and calls from collection agencies, John was continuing to pay the premium to maintain West's policy. The day before the murder John called his insurance agent to confirm the policy was still valid, something the agent did not recall John ever having done before. The agent assured John the policy was valid the morning of the murder. John's focus on the insurance policy immediately before the killing belies the notion that the attack on West was impulsive and unplanned, and further supports the inference that the insurance was the motive behind the attack.

The circumstances of the killing also suggest a preconceived design even if, as defendants argue, there was no direct evidence that defendants communicated about the killing beforehand. Defendants arranged a meeting at night with West in an area Kriss described as "darker." The tow truck was parked at an angle close to the Mercedes such that any activity was concealed from the street. Although the meeting ostensibly was to provide a cell phone to West, at least one of the assailants brought a gun. The evidence also showed that both defendants and Bayamdzhyan joined in the attack, with Bayamdzhyan stepping away from time to time to wave traffic by and further conceal the attack. Jurors could reasonably infer from this that defendants and Bayamdzhyan had arranged in advance to attack West in a manner that would minimize risk of discovery, rather than attacking him spontaneously during an otherwise innocent meeting.

We acknowledge there was evidence, notably Kriss's testimony, from which the jurors arguably could infer a killing induced by sudden rage rather than a premeditated murder. Kriss also points out that there are possible innocent

explanations for, among other things, the choice of meeting location and the manner in which the car and truck were parked. But on appeal, we must defer to the jury's weighing of the evidence, and cannot reverse "simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Albillar, supra*, 51 Cal.4th at p. 60.)

ii. Lying in wait

"All murder which is perpetrated by means of . . . lying in wait . . . is murder of the first degree." (Pen. Code, § 189.) Defendants contend that the evidence was insufficient to support first degree murder under a theory of lying in wait, nor did it support a true finding on the lying-in-wait special circumstance. " ' "We focus on the special circumstance because it contains the more stringent requirements. [Citation.] If, as we find, the evidence supports the special circumstance, it necessarily supports the theory of first degree murder." ' " (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1073 (*Mendoza*).)

" ' "The lying-in-wait special circumstance requires 'an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. . . .' " ' " (*Mendoza, supra*, 52 Cal.4th at p. 1073.)

The first element does not require that the defendant literally be concealed from view, just that his " ' " ' " 'true intent and purpose [be] concealed by his actions or conduct.' " ' " ' " (*Mendoza, supra*, 52 Cal.4th at p. 1073.) The "watching and waiting" requirement serves " 'to distinguish those cases in which a defendant acts insidiously from those in which he acts out of

rash impulse.' " (*Ibid.*) Even a few minutes can suffice so long as they indicate " ' " 'a state of mind equivalent to premeditation or deliberation.' " ' " (*Ibid.*) Evidence that a defendant "ambushes the victim after luring him or her to a secluded spot on a pretext" supports a finding that a killing was accomplished by lying in wait. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1310.)

The evidence, viewed in the light most favorable to the judgment, was sufficient to support the juries' finding. The evidence showed that West met with defendants because he was told Kriss would provide him with a new phone. Given the circumstances of the meeting and the attack that followed, the juries could reasonably conclude this was a pretext. The meeting, which was arranged by defendants, was scheduled for late in the evening in a dark area of the street. Defendants parked their cars such that their activities were concealed from the street. Kriss brought a third compatriot, Bayamdzhyan; three attackers against a single unaware victim in a dark, concealed area certainly constituted a position of advantage. There was also evidence of watching and waiting; witness Adriana S. testified she first heard the group talking in normal voices, with no indication of argument; this supports an inference that defendants chose their moment to launch their attack and weighs against Kriss's contention that the attack followed a heated exchange of insults.

The juries could also reasonably conclude defendants had the intent to kill. As discussed above, there was evidence the motive for the attack was West's life insurance policy; defendants could only realize the benefits of that policy if they killed West. Moreover, the brutality of the attack, which included repeatedly slamming West's head in a truck door, clubbing him with a tire

iron, and running him down with a car, evidenced an intent to kill regardless of who ultimately shot him.

Kriss argues there was no evidence he "maneuver[ed] an unsuspecting victim into a situation of vulnerability and attack[ed] him by surprise. Rather, this entire incident occurred outside [Kriss's] apartment complex in full view of occupants of the apartment complex and those passing by in vehicles." Similarly, John argues he "did nothing to lure West from a place of safety to a less secure place" and did not "isolate West from others for purposes of attacking him," given that the attack took place "on a public street, in broad daylight in front of [John's] own parents'[] abode."

These arguments ignore the evidence that the attack took place at night, in an area Kriss himself described as dark, behind cars positioned such that passing motorists could not easily see what was happening. The juries could reasonably conclude that these circumstances were inconsistent with a friendly meeting to provide a cell phone, and the attack that followed was a planned ambush in a concealed area. The evidence was sufficient to support both a first degree murder conviction based on lying in wait and a lying-in-wait special circumstance.

iii. Attempted kidnapping

"All murder . . . which is committed in the perpetration of, or attempt to perpetrate . . . kidnapping . . . is murder of the first degree." (Pen. Code, § 189.) As discussed, the evidence was sufficient to support the conviction for attempted kidnapping. Therefore, it was also sufficient to support a first degree murder conviction based on that theory.

c. Special circumstances

As discussed above, the evidence was sufficient to support the special circumstances of lying in wait and attempted kidnapping. It was also sufficient to support the special circumstance based on financial gain.

A defendant convicted of first degree murder may be sentenced to life without the possibility of parole if "[t]he murder was intentional and carried out for financial gain." (Pen. Code, § 190.2, subd. (a)(1).) This special circumstance applies " 'only when the victim's death is the consideration for, or an essential prerequisite to, the financial gain sought by the defendant.' [Citation.] Obtaining life insurance benefits falls within this description, because the death of the insured is an essential prerequisite for the financial gain." (*People v. Michaels* (2002) 28 Cal.4th 486, 519.)

As discussed above, there was sufficient evidence defendants murdered West to collect his life insurance proceeds: John prioritized premium payments over other unpaid bills even though he and West had broken up, and John confirmed the validity of the policy the day before the murder, something he had never done before. There was also evidence that after the murder John was focused on finding the insurance policy rather than grieving, and in fact paid the premium immediately before breaking down in tears and telling his insurance agent that West had died. Finally, the juries heard evidence that defendants had previously cooperated in unlawful acts (the house flood) with the intent and motive of collecting insurance money, supporting an inference that they committed West's murder for the same reason.

Kriss again argues there was no evidence that he was aware of West's life insurance policy, but again, given defendants' relationship and past history, including cooperating in insurance fraud,[7] it was a fair inference that Kriss joined in the killing because John had told him about the policy. Although Kriss offers other possible motives for the killing, such as the anti-Armenian slur, the juries were entitled to draw their own conclusions based on the evidence.

This evidence also supports the conclusion that defendants intended to kill West, as West's death was the only means to acquire the insurance proceeds.

2. Jury Instructions

a. Special circumstances

Defendants argue that the jury instructions were erroneous because they permitted the juries to find the financial gain and lying-in-wait special circumstances true even if defendants did not have an intent to kill. But even assuming the instruction was in error, " '[a]n erroneous instruction on the intent to kill element of a special circumstance . . . "does not require reversal if a reviewing court concludes that the error is harmless beyond a

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[7] Kriss argues that witness Nownes-Whitaker testified that John and West, not John and Kriss, created the flood. In fact, Nownes-Whitaker said both. She first testified that John and West told her they had created the flood with the intention of sharing the money with Kriss, but she later quoted John as saying, "You know, that was all me. That was me and Kriss." It is not our task on appeal to "resolve credibility issues or evidentiary conflicts." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.) We presume the jurors believed the second account over the first, or, alternatively, inferred from the first account that Kriss was involved since some of the proceeds were intended for him.

reasonable doubt." ' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 928.) We conclude any error here was harmless beyond a reasonable doubt and reversal is not warranted.

The challenged instruction read in relevant part: "If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of attempted kidnapping which resulted in the death of a human being." Defendants contend that this instruction would allow the juries to find true the special circumstances of lying in wait and financial gain if defendants, though lacking an intent to kill, aided and abetted an attempted kidnapping with reckless indifference to human life. This would be in contravention of Penal Code section 190.2, subdivision (c), which extends those two special circumstances to aiders and abettors only if they have "the intent to kill."

Assuming for the sake of argument that the juries did not find that either defendant was the actual killer, it is implausible beyond a reasonable doubt that any juror found the special circumstances true without also finding that both defendants had an intent to kill. Here, the instruction for the lying-in-wait special circumstance received by the juries required a finding that "[t]he defendant intentionally killed the victim." To the

extent there was any ambiguity in the instruction defendants are challenging, this additional instruction made clear that the defendant himself must have intended to kill, and not merely participated in an attack in which another defendant intentionally killed West. (See *People v. Bolin* (1998) 18 Cal.4th 297, 328 [" ' "The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." ' "].)

Defendants argue that the juries were instructed that the term "defendant" applied to each defendant unless stated otherwise, and therefore the juries might assume that the "defendant" referred to in the lying-in-wait instructions could be the codefendant or even Bayamdzhyan. This is at best a strained reading of the instruction and not one the jurors were likely to adopt. Regardless, to the extent there was any confusion, the verdict forms made clear whose intent the jurors were deciding. (See *People v. Majors* (1998) 18 Cal.4th 385, 410 [finding instructional error harmless in part based on text of verdict form].) Kriss's verdict form states that West's murder "was committed by defendant, HACHIK MASKOVIAN and that the defendant intentionally killed the victim by means of lying in wait . . . ." John's verdict form is identical with his name substituted for Kriss's. This establishes that the juries properly ascribed the intent to kill to the defendant whose guilt they were deciding, and not his codefendant.

Similarly, Kriss's verdict form states that West's murder "was intentional and was carried out by the defendant, HACHIK MASKOVIAN for financial gain," with John's form again identical with his name substituted for Kriss's. This establishes that each jury found that the defendant whose guilt they were

considering, and not solely the codefendant, carried out the crime for financial gain. The only financial gain suggested in this case was the collection of West's life insurance; thus, the true finding of the financial-gain circumstance necessarily required a finding of intent to kill, as West's death was the only means by which defendants could collect the insurance.

Thus, defendants have failed to show any prejudice from the purported ambiguity in the jury instructions, and reversal on that ground is not warranted.

b. Accomplice testimony

John argues that the trial court erred in not instructing the jury that the testimony of Kriss, as an accomplice, should be distrusted, and that John's counsel was ineffective for not requesting such an instruction. We hold that any error was harmless.

When an accomplice to a crime is called as a witness, the court must instruct the jury sua sponte that any testimony tending to incriminate the defendant should be viewed with caution. (*People v. Box* (2000) 23 Cal.4th 1153, 1208 (*Box*), disapproved of on another ground by *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.) John contends that when an accomplice is a codefendant and testifies on his own behalf, the instruction must be given at the request of the other codefendant.[8] Because

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[8] Contrary to John's contention, there is authority suggesting that even when a codefendant testifies on his own behalf the court should give the instruction sua sponte. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [stating that when two codefendants who were accomplices each testified, "the court was *required to instruct* the jury that an accomplice-defendant's testimony should be viewed with distrust to the extent it tended

John's attorney did not request such an instruction, John claims he was denied effective assistance of counsel.

John cannot show that any error was prejudicial. Courts are required to instruct juries that an accomplice's testimony should be viewed with caution because such testimony is " 'subject to the taint of an improper motive, i.e., that of promoting his . . . own self interest by inculpating the defendant.' " (*Box, supra*, 23 Cal.4th at p. 1209.) But here, Kriss's testimony did not inculpate John. Kriss expressly said that he never saw John join in the attack on West. He disclaimed any knowledge of West's life insurance policy, undercutting the theory that the murder was for financial gain. At no point did Kriss seek to shift blame from himself to John or otherwise promote his own interests at John's expense. Indeed, Kriss's testimony portrayed himself as the primary bad actor, with John only peripherally involved.

It is true that Kriss's testimony put John at the scene of the crime and confirmed that the meeting had been set up by John to obtain a phone for West. But this evidence was corroborated by John's own statements to the police. (See *People v. Avila* (2006) 38 Cal.4th 491, 562 ["A trial court's failure to instruct on accomplice liability . . . is harmless if there is 'sufficient corroborating evidence in the record.' "].) The same is true for Kriss's testimony that John hit West with his car as a result of the spare tire. Kriss's testimony that he got into the car with

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to incriminate the codefendant" (italics added)].) But because we find any error harmless, whether it be the court's error in not giving the instruction or defense counsel's error in not requesting the instruction, we need not resolve the question.

John, although in conflict with John's statements, was corroborated by witness Adriana S.

John points to other testimony by Kriss he claims implicated him, but it is unavailing. He argues that Kriss's testimony that he told John to go back after John had struck West with his car "portrayed [Kriss] as caring without the intent to kill and [John] as the opposite." He claims that Kriss "minimized his participation" by testifying that he released West when Litchfield told him to stop. Kriss testified to John's "insolvency" and poor financial situation and that John exaggerated stories, which John claims branded him as a liar. And Kriss provided a motive for the crime by testifying that West had been verbally abusive to John.

Again, none of this evidence incriminates John in the sense of directly implicating him in the crime, especially given Kriss's testimony firmly taking the blame for the attack. To the extent the evidence reflects poorly on John, any prejudice would be minimal relative to the other evidence introduced in this case from sources other than Kriss, including testimony from multiple witnesses that John fully participated in the brutal attack on West. Thus, "it is not reasonably probable that the jury would have reached a result more favorable to defendant had it been instructed to view [Kriss's testimony] with care and caution." (*Box, supra*, 23 Cal.4th at p. 1209.)

Because any error was harmless, we need not address the claim of ineffective assistance of counsel. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1003 [to prevail on ineffective assistance claim, defendant must show "that there is a reasonable probability that defendant would have obtained a

more favorable result absent counsel's [purported] shortcomings"].)

3. Evidentiary Challenges

a. Evidence of prior insurance fraud

Defendants argue that the evidence of John not paying rent on the Sunset Plaza Drive house and deliberately flooding it to make an insurance claim, which the court admitted for the purpose of proving intent and motive, was improper character evidence. Defendants also argue that the probative value of the evidence was outweighed by its potential prejudicial effect. We disagree.

i. Applicable law

"Character evidence, sometimes described as evidence of propensity or disposition to engage in a specific conduct, is generally inadmissible to prove a person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) Evidence that a person committed a crime, civil wrong, or other act may be admitted, however, not to prove a person's predisposition to commit such an act, but rather to prove some other material fact, such as that person's intent or identity. (*Id.*, § 1101, subd. (b).)" (*People v. Harris* (2013) 57 Cal.4th 804, 841.) Evidence of prior acts may also be admitted to prove motive. (Evid. Code, § 1101, subd. (b).) Evidence of past acts "must be relevant to prove a fact at issue (Evid. Code, § 210), and its admission must not be unduly prejudicial, confusing, or time consuming (Evid. Code, § 352)." (*People v. Leon* (2015) 61 Cal.4th 569, 597-598 (*Leon*).) "We review the trial court's decision whether to admit evidence,

including evidence of the commission of other crimes, for abuse of discretion." (*Harris, supra*, at p. 841.)[9]

For evidence of other acts to be admissible to prove intent, " 'the uncharged misconduct must be sufficiently similar [to the current charges] to support the inference that the defendant " 'probably harbor[ed] the same intent in each instance.' " ' " (*Leon, supra*, 61 Cal.4th at p. 598.) Our Supreme Court has articulated a similar standard for evidence of motive: "There must be sufficient evidence for the jury to find defendant committed both sets of acts, and sufficient similarities to demonstrate that in each instance the perpetrator acted with the same intent or motive." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1097.) The similarities need not be great: " 'The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent,' " whereas greater degrees of similarity are required to prove the identity of the defendant or that he acted pursuant to a "common design or plan." (*Leon, supra*, at p. 598.)

Even acts that are "not particularly similar" to the charged offense may be admissible to prove intent when there is "one crucial point of similarity." (*People v. Jones* (2011) 51 Cal.4th 346, 371 (*Jones*).) In *Jones*, for example, the Supreme Court approved of the admission of evidence of a 1985 robbery on a public street to prove that a defendant accused of a 1993 home invasion and murder had the same "intent to steal from victims

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[9] We decline Kriss's invitation to apply an "independent-review standard." The case Kriss cites for that standard, *People v. Seijas* (2005) 36 Cal.4th 291, applied it not to an evidentiary ruling, but to a court's determination that a witness could assert the privilege against self-incrimination. (*Id.* at pp. 303-304.)

whom defendant selected. Evidence that defendant intended to rob the . . . victims [in 1985] tended to show that he intended to rob when he participated in the [home invasion]." (*Ibid.*)

ii. Analysis

While West's murder and the earlier flooding incident are unquestionably dissimilar in many respects, they share at least two "crucial point[s] of similarity." (*Jones, supra*, 51 Cal.4th at p. 371.) First, both crimes involved unlawful acts resulting in actual or potential insurance payments from State Farm to John. Second, both crimes involved defendants working together towards the same unlawful goal. (See *People v. Thompson* (2016) 1 Cal.5th 1043, 1115-1116 [evidence that accomplice in charged crime had assisted the defendant in past crimes was "additional link" justifying admission of evidence of those past crimes].) These similarities were sufficient to create an inference that defendants in murdering West had the same intent and motive as when they flooded the house, namely to recover insurance proceeds from State Farm. The differences between the past crimes and current offenses did not render those past crimes irrelevant; instead, "the differences went to the weight, if any, the jury assigned to the evidence." (*People v. McCurdy*, *supra,* 59 Cal.4th at p. 1098.)

The court also properly admitted the evidence that John had failed to pay rent and had engaged in questionable deed transactions of which the homeowner was unaware, as this evidence was relevant to establish that the insurance claim was fraudulent. It showed that John had no legal claim to the home, and therefore had little reason to obtain insurance to protect it. This in turn created an inference that John obtained the

insurance for another reason, namely to make a fraudulent claim and flee with the proceeds rather than repair the home.

Given that intent and motive were very much at issue in this case—not least because of the alleged financial gain special circumstance that defendants denied below and continue to challenge on appeal—the evidence of the past insurance fraud was sufficiently probative to outweigh the prejudicial effect of its admission. This is especially so given that the past crimes were far "less inflammatory than the evidence about the charged offenses." (*People v. McCurdy, supra*, 59 Cal.4th at p. 1099; see *Leon, supra*, 61 Cal.4th at p. 599 [evidence of past robberies "not particularly inflammatory" relative to charged murders].) Defendants suggest that because they were never criminally charged or held civilly liable for the earlier fraud and other misconduct, the juries might have been improperly motivated to punish them for those acts rather than the charged conduct. But it is highly improbable that the juries were motivated to convict based on those past financial crimes rather than the strong evidence that defendants intentionally killed John's ex-boyfriend to collect life insurance proceeds. To the extent there was some risk of the juries misusing or being confused by the evidence, the trial court mitigated this by instructing the juries to consider the evidence of past crimes only for the limited purpose of determining intent or motive, and prohibiting them from considering the evidence "to prove that defendant is a person of bad character or that he has a disposition to commit crimes." (See *Leon, supra*, at p. 600, fn. 11.)

Kriss argues there was no evidence he was involved in the earlier flood and insurance claim, and therefore evidence concerning those past crimes was irrelevant and prejudicial as to

him. But as previously discussed, witness Nownes-Whitaker testified that John had told her Kriss had created the flood with him. Moreover, it was undisputed that the proceeds from the insurance from that flood were placed in Kriss's bank account. This was sufficient to link Kriss to the flood and insurance fraud, and the trial court did not abuse its discretion in finding evidence of those crimes admissible and relevant to Kriss as well as John.

Kriss further argues that the evidence was insufficient to establish the insurance fraud in the first place, given that State Farm investigated the flood, found no fraud, and paid the claim. This evidence certainly tends to show that the claim was valid, in contrast to some of the other evidence discussed above. Nevertheless, it was for the juries to weigh the evidence and make their own determinations, and we will not reverse the juries' conclusion because some evidence supports a contrary conclusion. (See *Albillar, supra*, 51 Cal.4th at p. 60.)

John argues the earlier acts were insufficiently similar or related to the charged crimes to prove intent and motive. He notes that the insurance fraud took place several years before the murder, and there was evidence that West himself was involved. But *Jones* approved of the admission of evidence of crimes committed eight years before the charged offenses; surely, then, the three-year gap between the insurance fraud and the murders is not too long to render those past acts irrelevant to the question of intent and motive. (See *Jones, supra*, 51 Cal.4th at pp. 351, 369.) And John does not explain, nor can we discern, why West's involvement in the earlier crimes precluded John or Kriss from harboring the same intent or motive when committing a later crime against West himself.

John argues that the previous crimes did not involve violence and therefore "do[] not show [John] had any violent tendencies that would show intent to kill or intent to kidnap." That is true, but the previous crimes did involve unlawful acts for the purpose of obtaining insurance proceeds, and were relevant to show that particular intent and motive.

John argues West's life insurance policy was by itself " 'compelling' evidence of intent" and therefore evidence of the flood was unnecessarily cumulative and prejudicial. He cites *People v. Balcom* (1994) 7 Cal.4th 414, 423 (*Balcom*), but this authority is unavailing. In *Balcom*, the prosecution sought to prove that the defendant had engaged in sexual intercourse with victim Denise against her will by introducing evidence that the defendant had raped another victim several weeks later. (*Id.* at pp. 421-422.) Denise testified that the defendant had put a gun to her head and forced her to engage in sexual intercourse; the Supreme Court held that this evidence, "if believed, constitute[d] compelling evidence of defendant's intent" such that evidence of the defendant's other crimes was "merely cumulative on this issue." (*Id.* at pp. 422-423.) As the court explained, "No reasonable juror considering this evidence could have concluded that defendant committed the acts alleged by the complaining witness, but lacked the requisite intent to commit rape." (*Id.* at p. 422.)

No such "compelling evidence of defendant's intent" exists here. In *Balcom*, the jury could not reasonably conclude that the defendant, who admitted having sex with the victim, had put a gun to her head for some reason other than forcing her to have sex with him. Here, in contrast, the jury could have concluded that defendants attacked West for reasons other than to kill him

to collect his life insurance proceeds. For example, the jury could have believed Kriss's testimony that the attack erupted spontaneously after West insulted him. Thus, the issue of intent (and motive) was not compellingly established by the circumstances of the crime itself such that the evidence of other acts was "merely cumulative on this issue." (*Balcom, supra*, 7 Cal.4th at p. 423.)

We find no abuse of discretion. The evidence of the prior insurance claim was properly admitted.

b. Evidence of John's financial insolvency

John argues that the evidence of his financial insolvency, such as his unpaid bills and calls from collection agencies, was prejudicial and should not have been admitted. John cites *People v. Clark* (2011) 52 Cal.4th 856 (*Clark*), which states, "Ordinarily, '[e]vidence of a defendant's poverty or indebtedness, without more, is inadmissible to establish motive for robbery or theft because it is unfair to make poverty alone a ground of suspicion and the probative value of the evidence is deemed to be outweighed by the risk of prejudice.' " (*Id.* at p. 929.)

John fails to explain how the principle stated in *Clark* applies here, where the charge is murder and attempted kidnapping, not "robbery or theft." (*Clark, supra*, 52 Cal.4th at p. 929.) Even if it were improper to suggest that a person in need of funds is more likely to commit murder for financial gain, an issue we do not decide, here the prosecution sought to admit the evidence for another purpose, that is, to establish that John was prioritizing payment of West's life insurance premiums despite other more pressing financial needs. As discussed above, this fact tended to support the prosecution's theory of motive and the

financial-gain special circumstance. The court did not err in admitting the evidence.

John notes that the court admitted not only evidence of John's financial circumstances at the time of the charged offense, but also evidence of his bankruptcy in 2010. John argues the bankruptcy could not be relevant to a murder that took place three years later. But, again, this evidence showed John's continuing prioritization of the life insurance even in times of extreme financial distress, which the trial court at its discretion could conclude was information relevant to the question of motive. Regardless, given the properly admitted evidence of John's financial circumstances and earlier financial fraud, there is no reasonable probability that admission of evidence that he declared bankruptcy affected the outcome of the trial.

Kriss joins in John's argument and notes that evidence of John's financial circumstances was "wholly irrelevant" to Kriss. We disagree. Given the evidence that Kriss was John's confederate in the murder of West, John's motive was relevant to Kriss as well. Even if the evidence was not relevant to Kriss, he does not explain how the admission of this evidence was prejudicial to him; instead, his prejudice argument focuses on the evidence of the insurance fraud and the questionable deed transactions that we addressed above.

c. Evidence of West's mental state

Defendants argue that admission of West's statements to various witnesses as evidence of his mental state was improper and prejudicial. Specifically, defendants object to the admission of West's statements that John and West had broken up; that West was helping John financially and was frustrated that John was not working; that West had no plans to reunite with John;

that West and John had not been sexually intimate in some time and West was dating other people; that West and Elmore planned to move into an apartment together; that West was sexually dissatisfied; that West was concerned John would pawn a ring West had given him rather than returning it to West; that West wanted to change his life insurance beneficiary; and that West was "sick of [John] screwing our friends over."[10]

We need not decide whether admission of these statements was proper because, even assuming they were admitted in error, defendants have failed to show any prejudice. John suggests that the statements "could only have served to appeal to the jury's sympathy for West and to inflame the jury against [John]." He claims the statements "focused on [John's] bad behavior and character." He asserts that the testimony was prejudicial "with respect to the central disputed issue: [John's] mental state." We cannot agree. The statements are innocuous, especially in relation to the other evidence introduced against defendants, not least of all the brutal killing in which they took part. We do not see how the statements are prejudicial on the issue of John's mental state; to the extent John is implying that the jury might infer from his "bad behavior and character" that he was capable of murder, such capability was illustrated far more compellingly by the evidence of his participation in the murder itself. In light

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[10] In his opening brief, John objects to statements concerning drug use, unprotected sex, and "hanging out with the wrong crowd." But the witness who testified to these statements attributed them to John, not West, as John acknowledges in his reply brief.

of the foregoing, it is inconceivable that any of the challenged statements could have affected the outcome of the trial.[11]

DISPOSITION

The judgments are affirmed.

ROGAN, J.*

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

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[11] Defendants suggest that the "cumulative effect" of the court's evidentiary errors violated their rights to due process. Because most if not all of the evidence challenged by defendants was properly admitted, and any evidence admitted in error was not prejudicial, there is no "cumulative effect" that warrants reversal.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.