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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. KENDAL VERNON JOHNSON, et al. Defendants and Appellants.	B262599 (Los Angeles County Super. Ct. No. TA124347)

APPEALS from judgments of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Affirmed as modified with directions.

H. Russell Halpern for Defendant and Appellant Kendal Vernon Johnson.

John P. Dwyer, under appointment by the Court of Appeal, for Defendant and Appellant Dashawn Combs.

Mark L. Christiansen, under appointment by the Court of Appeal for Defendant and Appellant Keith Jermaine Fuller.

Xavier Becerra and Kamala D. Harris, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie A. Miyoshi and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, Kendal Vernon Johnson, Keith Jermaine Fuller and Dashawn Combs, were convicted after jury trials of: first degree murder with special circumstances (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17));[1] attempted willful, deliberate, premeditated murder (§§ 664, 187, subd. (a)); first degree burglary with a person present (§§ 459, 667.5, subd. (c)(21)); and home invasion robbery (§ 211). Mr. Fuller and Mr. Combs were jointly tried before separate juries. Mr. Johnson was separately tried. The juries also found true gang and firearm use enhancement allegations. (§§ 186.22, subd. (b)(1)(C), 12022.53.) Mr. Johnson was sentenced to life without the possibility of parole plus 80 years to life. Mr. Fuller was sentenced to life without the possibility of parole plus 50 years to life plus 18 years. Mr. Combs was sentenced to life without the possibility of parole plus 15 years to life plus 10 years. We modify the judgments and affirm as modified with directions.

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[1] Further statutory references are to the Penal Code unless otherwise noted. Different judges presided over some pretrial proceedings and the trial. Some pretrial proceedings and the trial were held before the Honorable Laura R. Walton. For clarity's purposes, we will refer to her as the trial court.

II. THE EVIDENCE

A. The Crimes

On July 25, 2009, defendants murdered Willie Adams, Jr., for selling drugs in their gang's territory. A housing development inhabited by gang members was two blocks north of the crime scene. Gang members had previously warned Mr. Adams not to sell drugs from his apartment.

Two witnesses to the murder were present in Mr. Adams's second-floor apartment, Glenda Adkins, and Malcolm Wilson. Ms. Adkins "worked the door" for Mr. Adams. She was in charge of letting his customers in and out of the apartment. Ms. Adkins was 62 years old at the time of trial. Mr. Adams had left the apartment earlier in the evening. Upon his return, defendants assaulted him and escorted him to his apartment door.

Ms. Adkins heard Mr. Adams's voice at the door telling her to open it. When she did so, Mr. Combs shoved Mr. Adams into the apartment at gunpoint. Mr. Johnson and Mr. Fuller followed Mr. Combs through the door. They closed the wrought-iron door and locked it. One of the assailants referenced their gang. Mr. Adams had been shot and was bleeding. (The first officer to arrive on the scene followed a trail of blood from the sidewalk up the stairs to Mr. Adams's apartment.) All three defendants were armed with guns. They ordered Ms. Adkins and Mr. Wilson to lie on the floor and keep their heads down. Mr. Fuller struck Ms. Adkins in the face with his gun when she looked up; he said, "Get back down, bitch." Defendants ransacked the apartment looking for drugs. Mr. Johnson took cocaine from a plate in the kitchen. Mr. Johnson's fingerprints were later found on that plate. Just

before he left the apartment, Mr. Combs shot and killed Mr. Adams. Mr. Combs also shot Mr. Wilson, who survived. Ms. Adkins saw the three men running in the direction of the housing project. The incident lasted about seven minutes.

B. The Investigation

On July 27, 2009, shortly after Mr. Adams was killed, Ms. Adkins reluctantly spoke with Detectives Gerardo Pantoja and Natalie Placencia. Her first recorded words were as follows: "Detective Pantoja: . . . Let me sit down right here. We can talk. How are you? [¶] [Ms.] Adkins: I'm - - I'm not worth a damn. [¶] Detective Placencia: What's that? [¶] [Ms.] Adkins: I'm not worth a damn. [¶] Detective Placencia: You're not worth a damn you said? [¶] [Ms.] Adkins: Yeah, I was here. Okay. [¶] Detective Pantoja: They were here? [¶] [Ms.] Adkins: I was here. [¶] Detective Pantoja: Who? [¶] [Ms.] Adkins: Talking about (Inaudible) with these gangbangers."

Ms. Adkins told the detectives she did not know any of the assailants and she had never seen them before. She was not sure she would recognize them if she saw them again. Ms. Adkins described the assailants as three Black men in their 20s. The person who fired the shots was short, about five feet, five inches tall, and stout, with a light complexion. He had short, curly hair. The other two men were similar looking. They were tall, six feet one or two inches, and skinny, with dark complexions. Both had French braids in their hair. (There was evidence that in 2008, Mr. Fuller had braids in his hair.) Throughout the investigation, Ms. Adkins described the perpetrators as two tall, dark men and one shorter, lighter man. Mr. Combs was about 5 feet 9 to 10

inches tall. Mr. Johnson was about six feet one inch tall. Mr. Fuller was approximately six feet two inches tall. On May 19, 2010, Detective Pantoja showed Ms. Adkins a series of photographic lineups that included Mr. Johnson's photograph. Ms. Adkins did not identify Mr. Johnson.

Ms. Adkins tended to confuse Mr. Johnson and Mr. Fuller. During Mr. Johnson's trial, for example, she confused the two defendants. She misidentified Mr. Johnson as Mr. Fuller who, prior to his arrest, had been present in the courtroom audience during pretrial proceedings. At the preliminary hearing, Ms. Adkins testified Mr. Johnson hit her in the face with his gun. At trial, however, she identified Mr. Fuller was the person who struck her. She told Mr. Combs's and Mr. Fuller's juries that if she had previously identified Mr. Johnson as the person who struck her, it was because, "[T]hey were still looking alike, and I still don't know their names until now." Also during Mr. Combs's and Mr. Fuller's trial, Ms. Adkins was asked whether the person she had seen during pretrial hearings (Mr. Fuller) was present in the courtroom. She testified: "You know what? Imma tell you the truth. I really not sure because they both were dark. They both were dark. He was lighter than he was when it happened. They had black hoodies on, but I do – I thought they was twins."

On November 3, 2009, Detective Pantoja spoke with Mr. Adams's downstairs neighbor, Donna Joubert. Detective Pantoja showed Ms. Joubert a photographic lineup. Ms. Joubert identified Mr. Fuller. She said she had seen him walking by Mr. Adams's apartment around 5:30 or 6:00 p.m. the evening of the murder. Mr. Fuller was looking up at Mr. Adams's apartment. She wrote, "Walking by looking up at [Mr. Adams's] house 5:30 or 6:00." Ms. Joubert spoke to Detective Mario Aguilar. She related

that in the weeks prior to the murder, gang members had threatened Mr. Adams because of his drug dealing. Detective Nathan Kouri spoke with Ms. Joubert on July 25, 2012. She acknowledged she had identified Mr. Fuller as walking past Mr. Adams's apartment on the evening of the murder. In December 2014, Ms. Joubert told Detective Kouri she had been threatened with injury a year earlier by Mr. Combs's brother. Mr. Combs's brother said to her, "It would be best for your safety if you didn't go and testify." At trial, Ms. Joubert denied having identified Mr. Fuller. She did not recall circling his photograph. She had never seen him before.

No charges were filed for more than two years of the murder. In April 2012, Detective Kouri began reviewing the case. He spoke with Ms. Adkins on April 17, 2012, and multiple times thereafter. He recorded all of their conversations.

On April 17, 2012, Ms. Adkins told Detective Kouri, "The two tall [B]lack ones didn't do the shooting." She said she had "see[n] them in the projects" "a lot of times," but she never bought drugs from them because, "I have certain people I buy my drugs from." Before the three juries, however, Ms. Adkins gave conflicting testimony on the subject of drug purchases from defendants. For example, Ms. Adkins testified before Mr. Combs's and Mr. Fuller's juries. There, she testified she had purchased drugs from Mr. Fuller and Mr. Johnson on more than five occasions prior to but not after the shooting. Ms. Adkins further testified that when Mr. Fuller entered the apartment, she recognized him as someone she bought "dope" from. Ms. Adkins was asked, "Do you remember, prior to this shooting, . . . when was the last time you bought rock from either or both [Mr. Fuller or Mr. Johnson]?" Ms. Adkins responded: "It's been awhile

because I didn't get along with them really. They had bad attitudes." Ms. Adkins also testified during Mr. Johnson's separate trial. On this occasion, however, Ms. Adkins said she had never purchased drugs from Mr. Johnson or Mr. Fuller.

Ms. Adkins described the person who fired the shots: "It's a stubby light skinned. I have never seen him." Ms. Adkins said she still remembered the perpetrators' faces. She told the detective: "I've - - ain't going to forget that shooting. But they was never in none of the books they brought." Detective Kouri showed Ms. Adkins a photographic lineup that included Mr. Johnson's picture. The photograph had been taken on April 19, 2009, three months prior to the murder. Ms. Adkins did not identify Mr. Johnson.

One day later, on April 18, 2012, Ms. Adkins said the two taller perpetrators had French braids. She saw the braids when their "hoodie[s] came up." She said she was positive about that. The hair on the person who fired the shots was short and curly. Also on April 18, 2012, Ms. Adkins viewed 43 individual photographs. The photographs were all of people who were associated in some way with the housing project. Defendants were not included in the photographs. Ms. Adkins picked out two photographs. She said one could possibly be one of the taller ones. Ms. Adkins told Detective Kouri: "He looks like - - he de[finitely] looks like the one that had braids; one of the tall [B]lack ones. But it's another one, the same color." Another "favor[ed] the shooter a whole lot" in her words. He had similar hair. He did not have braids. He was wearing a gray hoodie, but it was not on his head. She was "almost positive" about the man who looked like the person who fired the shots. At one point, referring to the two photographs she had picked out, Ms. Adkins

mentioned a lineup. She said, "I go to a line up on him and that dude right there." Detective Kouri never showed Ms. Adkins an in-person lineup.

On July 31, 2012, Detective Kouri presented Ms. Adkins with three photographic lineups that included Mr. Combs in one, and Mr. Fuller in another. Ms. Adkins did not identify Mr. Combs or Mr. Fuller. But she said a person other than Mr. Fuller in the same photographic lineup looked like the person who fired the shots. Ms. Adkins said she was not sure but was 70 percent certain. The person Ms. Adkins identified had short, curly hair. He also had a mustache and a goatee.

Ms. Adkins mistakenly believed, however, that she *had* identified defendants. Before Mr. Fuller's and Mr. Combs's juries, Ms. Adkins testified she had identified "the shooter," and the other two from photographs. During Mr. Johnson's trial, Ms. Adkins was asked whether she had identified Mr. Johnson in photographs. Ms. Adkins testified, "I identified him and the other two, too." She further testified, "I identified them in photographs and for sure in person." Ms. Adkins also testified: "Every time I was in court I identified them two. But when they got to bringing the pictures to me on the street, I'm trying to flip flop like he did, I got confused. But I'm sure these three are involved." Ms. Adkins also told Mr. Combs's and Mr. Fuller's juries: "I identified the shooter, that's all. And the other two, they hard because they both dark, but I picked them."

On August 13, 2012 charges were filed against Mr. Combs and Mr. Johnson. Mr. Fuller had also been arrested, but the prosecution declined to file charges against him. The prosecution then subpoenaed Mr. Fuller as a witness. He was required to attend court hearings. Ms. Adkins was in court on several

occasions when Mr. Johnson and Mr. Combs were present in custody and Mr. Fuller was in the audience.

On February 14, 2013, during a pretrial hearing, Mr. Johnson and Mr. Combs entered the courtroom in custody. Ms. Adkins "hollered out," in reference to Mr. Combs, "Oh, that's him." The judge ordered her to leave. As she exited the courtroom, Ms. Adkins excitedly told Detective Kouri that Mr. Combs was the individual who fired the shots and Mr. Johnson was also involved. She said, "That short one is the shooter." With respect to Mr. Johnson, she said: "Okay but by them being in jail so long, that dark one I'm not sure because he was darker (inaudible) on the street. And uh, there was two of them looked like they could have been brothers. They hit me with a pistol."

On April 26, 2013, following another court hearing, Detective Kouri and Deputy District Attorney Steven R. Belis spoke with Mr. Fuller in the courthouse hallway. Ms. Adkins was standing about 20 feet away. At the conclusion of their conversation with Mr. Fuller, Ms. Adkins then asked to speak with them. Ms. Adkins told Detective Kouri that Mr. Fuller was one of the perpetrators. She asked: "Why isn't he in jail? He was there that night as well." She said, "He had a black hoodie on . . . and the little one had a red one. [¶] . . . [¶] . . . [H]e was up in that apartment. [¶] . . . [¶] . . . That's why I keep asking . . . what is he doing out here. [¶] . . . [¶] . . . I just can't understand how this niggas out. . . . [¶] . . . [¶] . . . I pointed him out in the book. [¶] . . . [¶] . . . He – he been here ever since that's what I can't understand." Ms. Adkins again identified Mr. Combs as the person who brought Mr. Adams into the apartment at gunpoint and later fired the shots. She also said Mr. Combs

shot Mr. Adams. Ms. Adkins said her story had not changed and it was not going to change.

Ms. Adkins complained on at least two occasions that while in the courtroom in custody, Mr. Combs and Mr. Johnson were threatening her nonverbally. On February 14, 2013, Detective Kouri asked Ms. Adkins about the threats: "[Detective Kouri]: Ok, and um, you said, you were saying something about [Mr. Combs] making threats, what do you mean? [¶] [Ms. Adkins]: Yeah, he was doing like this. [¶] [Detective Kouri]: Um, oh just going like that? [¶] [Ms. Adkins]: Yeah, yeah." On April 26, 2013, Ms. Adkins noted that Mr. Combs and Mr. Johnson had continued to make gestures at her and "eyeball[]" her. She told Detective Kouri: "[T]hey do that all the time they come up. [¶] . . . [¶] . . . So I try to keep my eyes from being towards them."

C. Mr. Combs

On July 10 and 11, 2012, Detective Kouri interviewed Mr. Combs's fellow gang member, Joey Mills. Mr. Mills was in custody. The conversation was recorded. Mr. Mills spoke to Mr. Combs several days after Mr. Adams was murdered. Mr. Combs admitted shooting Mr. Adams. Mr. Mills was called to testify and denied: that he was a gang member; knowing Mr. Combs; or ever speaking to Detective Kouri. When presented with the recorded interview, he denied that it was his voice.

Seven days after the interview with Mr. Mills, on July 18, 2012, Detective Kouri interviewed Mr. Combs. Mr. Combs said he had heard about the murder. He heard, "[T]he nigga was serving in the 'hood, and the homies didn't like that." Mr. Combs was told there was deoxyribonucleic acid evidence placing Mr.

Combs at the murder scene. Mr. Combs continued to deny he was present. During a subsequent interview, however, on July 24, 2012, Mr. Combs admitted he was present during the robbery. Mr. Combs claimed to have left before Mr. Adams was killed. A fellow gang member had recruited Mr. Combs to deal with some "[n]iggas serving in the" neighborhood. Mr. Combs, Mr. Fuller, Mr. Johnson, and Cleofus Grant went to Mr. Adams's apartment. The purpose of the meeting was to "negotiate" with Mr. Adams. Mr. Fuller and Mr. Grant were armed with guns, but Mr. Johnson and Mr. Combs were unarmed. Mr. Combs admitted being in Mr. Adams's apartment and "touch[ing] the shit," but said: "[M]y intention's not to have nobody killed. I'm just gonna take everything . . . ." Mr. Combs described "dope on a plate," and said, "Probably, could found [Mr.] Johnson's fingerprints on the plate." According to Mr. Combs, Mr. Adams, pulled out a gun. Mr. Fuller took the gun away from the "young nigga," in Mr. Combs's words. Mr. Combs and Mr. Johnson left the apartment. Mr. Combs said they were walking down the stairs when he heard gunshots.

D. Mr. Fuller

Mr. Fuller's jury heard evidence concerning his interviews on February 14, 2013, and again in May 2013. Detective Kouri conducted the interviews. At that time, Mr. Fuller was a subpoenaed witness for the prosecution. The February 14, 2013 conversation took place in a prosecutor's office in the Compton courthouse. Mr. Fuller said he was walking down the street. It was at this point Mr. Fuller encountered Mr. Grant. Mr. Fuller was asked to walk with Mr. Grant. As Mr. Fuller continued

walking, Mr. Johnson, Mr. Combs and Mr. Adams were walking up the stairs to an apartment. They were walking to Mr. Adams's apartment. Mr. Fuller went up the stairs behind them. Mr. Adams told someone to open the door. Mr. Fuller heard a voice coming from the apartment saying, "Get down." At the apartment threshold, Mr. Fuller saw Mr. Johnson breaking dishes. Mr. Fuller saw two people on the ground, two males he thought. Mr. Fuller ran away.

In his defense, Mr. Fuller presented evidence he was at work until about 5:00 p.m. on July 24, 2009. Mr. Adams was murdered in the early morning hours of July 25. Mr. Johnson's girlfriend, Janee Pacheco, testified in Mr. Fuller's defense. Ms. Pacheco had attended court hearings and had seen Mr. Fuller in the courtroom. Ms. Pacheco had also seen Ms. Adkins in the courtroom. Around February 14, 2013, prior to Mr. Fuller's arrest, Ms. Pacheco heard Ms. Adkins talking to a deputy district attorney named Davis. Mr. Davis asked Ms. Adkins: "Isn't that Keith Fuller over there? Isn't he one of the suspects in the case?" Ms. Adkins responded: "Yeah. I don't know why y'all got him as a witness and he a suspect." The conversation took place while court was in session.

III. DISCUSSION

A. Constitutionality of the Felony Murder Special Circumstance Statute

Mr. Combs and Mr. Fuller challenge the felony-murder special circumstance statute, section 190.2, subdivision (a)(17). They argue it violates the Eighth and Fourteenth Amendments to

the United States Constitution. Defendants argue the statute does not narrow the class of defendants eligible for special circumstance treatment. Defendants did not raise this issue in the trial court. And, they are not subject to the death penalty. But assuming the issue is properly before us, our Supreme Court has repeatedly held California's death penalty law does not violate the Eighth and Fourteenth Amendments. Our Supreme Court has held California's death penalty law adequately narrows the class of murders subject to it. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1091; *People v. Trinh* (2014) 59 Cal.4th 216, 254; *People v. Brown* (2014) 59 Cal.4th 86, 119; *People v. Duff* (2014) 58 Cal.4th 527, 568; *People v. Williams* (2013) 56 Cal.4th 165, 201; *People v. Homick* (2012) 55 Cal.4th 816, 903; *People v. Tully* (2012) 54 Cal.4th 952, 1067; *People v. Lightsey* (2012) 54 Cal.4th 668, 731; *People v. McDowell* (2012) 54 Cal.4th 395, 443.) As defendants acknowledge, we are bound by those decisions. (*People v. Johnson* (2012) 53 Cal.4th 519, 528; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

B. Mr. Johnson's Ineffective Assistance Claim

At trial, Mr. Johnson was represented by Randy Short. Mr. Johnson argues Mr. Short was ineffective because no testimony was presented as to factors affecting eyewitness identification reliability. Mr. Johnson notes that Ms. Adkins was an alcohol and drug user. She failed to identify him when shown his photograph. Further, she had been in court with Mr. Johnson present in custody several times before she first identified him. And she subsequently confused Mr. Johnson with Mr. Fuller.

To establish constitutionally ineffective assistance of counsel, a defendant must show both deficient performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Williams* (2013) 56 Cal.4th 630, 690; *People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) In *Strickland,* the United States Supreme Court explained: "[T]he defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." (*Strickland v. Washington, supra,* 466 U.S. at p. 687; see *Williams v. Taylor* (2001) 529 U.S. 362, 390.) Further, as our Supreme Court has held: "If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268.)" (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069; accord, *People v. Huggins* (2006) 38 Cal.4th 175, 206.) "'A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. (*Strickland v. Washington, supra,* [466 U.S.] at p. 687; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.)'" (*People v. Gamache* (2010) 48 Cal.4th 347, 391; accord, *People v. Brown* (2014) 59 Cal.4th 86, 109.)

With respect to prejudice, a defendant must establish there is a reasonable probability the result would have been more favorable absent defense counsel's failings. (*Strickland v. Washington, supra,* 466 U.S. at p. 694; *In re Welch* (2015) 61 Cal.4th 489, 517; *People v. Williams, supra,* 56 Cal.4th at p. 690.) As the United States Supreme Court explained in *Strickland,* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra,* 466 U.S. at p. 694; accord, *In re Welch, supra,* 61 Cal.4th at p. 517; *People v. Dickey* (2005) 35 Cal.4th 884, 913.) A defendant must show a reasonable probability of a different result as a demonstrable reality. (*People v. Lawley* (2002) 27 Cal.4th 102, 136; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) Moreover, as the United States Supreme Court has held: "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington, supra,* 466 U.S. at p. 697; accord, *People v. Carrasco* (2014) 59 Cal.4th 924, 982; *In re Champion* (2014) 58 Cal.4th 965, 1007.)

Mr. Johnson has not shown ineffectiveness or prejudice. Defendant has not shown Mr. Short failed to consult with a witness concerning eyewitness identification issues. Nor has defendant shown such a witness would have presented favorable opinion testimony. (*People v. Bolin* (1998) 18 Cal.4th 297, 334; *People v. Datt* (2010) 185 Cal.App.4th 942, 951-953.) Moreover, as discussed below, Mr. Short comprehensively cross-examined Ms. Adkins as to the inconsistencies and deficiencies in her

identification of Mr. Johnson. The jury was instructed as to the specific factors and circumstances that arguably rendered Ms. Adkins's eyewitness identification of Mr. Johnson unreliable. Mr. Short highlighted those deficiencies in his argument to the jury. Additionally, Mr. Short could reasonably have concluded, as a matter of trial tactics, that testimony was unnecessary.

The crimes occurred on July 25, 2009. On May 19, 2010, Detective Pantoja showed Ms. Adkins a photographic lineup that included Mr. Johnson's image. Ms. Adkins did not identify Mr. Johnson as one of the assailants. On April 17, 2012, Detective Kouri showed Ms. Adkins a second photographic lineup that included Mr. Johnson's picture. The photograph of Mr. Johnson had been taken on April 19, 2009, three months before Mr. Adams was murdered. Again, Ms. Adkins did not identify Mr. Johnson. On February 14, 2013, however, Ms. Adkins saw Mr. Johnson and Mr. Combs in person in a courtroom. Both men were in custody. As Mr. Johnson and Mr. Combs entered the courtroom, Ms. Adkins shouted out. Ms. Adkins was ordered out of the courtroom. In the courthouse hallway, Ms. Adkins told Detective Kouri that Mr. Combs fired the shots and Mr. Johnson was a co-perpetrator. Another hearing was held on April 26, 2013. Mr. Johnson, who was in custody, Ms. Adkins and Detective Kouri were all present. Ms. Adkins again asserted that Mr. Johnson had participated in the July 25, 2009 crimes.

Mr. Short extensively cross-examined Ms. Adkins regarding her opportunity to observe the perpetrators. Throughout her testimony, including on cross-examination, Ms. Adkins was uncooperative, rude, resistant and impatient. For example, she accused Mr. Short of having altered transcripts of her prior statements: "A. Your typewriter is typing up wrong.

Get another typewriter. [¶] Q. The transcript is wrong, you are saying? [¶] A. You - - you did it. [¶] . . . [¶] A. No, I didn't say nothing like that. That's the way y'all want to type it, do it."

Mr. Short elicited testimony that Ms. Adkins, a functioning alcoholic, had been drinking the day Mr. Adams was murdered. She was also a "big [cocaine] smoker" in her words although she denied that she used cocaine when she was working. Mr. Short further elicited repeated testimony that Ms. Adkins's ability to perceive the three intruders was hampered by the circumstances of the incident. For example, she was ordered to lie on the floor and repeatedly told to keep her head down. When she looked up, Mr. Fuller hit her in the face with his gun. When asked to describe the two taller perpetrators, Ms. Adkins explained that they wore hoodies that came down over their faces. Ms. Adkins demonstrated as described by Mr. Short and the trial court, "For the record, she pulled her hoodie up over her head, I'd say about 3 inches past her forehead area, and then down over the face a little." Ms. Adkins testified the events had happened quickly, she had been afraid and in shock and the lighting in the apartment was dim. Ms. Adkins mistakenly thought she had identified Mr. Johnson's photograph prior to trial. Mr. Short's cross-examination exposed the potential weaknesses in the reliability of Ms. Adkins's identification.

The jury was instructed: "You have heard eyewitnesses['s] testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. [¶] In evaluating identification testimony, consider the following questions: [¶] Did the witness know or have contact with the defendant before the event? [¶] How well could the witness see the perpetrator? [¶] What were the

circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation? [¶] How closely was the witness paying attention? [¶] Was the witness under stress when he or she made the observation? [¶] Did the witness give a description and how does that description compare to the defendant? [¶] How much time passed between the event and the time when the witness identified the defendant? [¶] Was the witness asked to pick the perpetrator out of a group? [¶] Did the witness ever fail to identify the defendant? [¶] Did the witness ever change his or her mind about the identification? [¶] How certain was the witness when he or she made an identification? [¶] Are the witness and the defendant of different races? [¶] Was the witness able to identify other participants in the crime? [¶] Was the witness able to identify the defendant in a photographic or physical lineup? [¶] Were there any other circumstances affecting the witness's ability to make an accurate identification? [¶] The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty." Mr. Johnson does not argue there was a relevant factor that the instruction did not cover.

When arguing to the jury, Mr. Short discussed the deficiencies in Ms. Adkins's identification of Mr. Johnson. He utilized many of the factors set forth in the jury instruction. At the very outset of his closing argument to the jury, Mr. Short addressed how to evaluate eyewitness identifications: "I want to start by talking about factors that the court has instructed you about regarding how to evaluate eyewitness identification and how to evaluate the credibility of witnesses." Mr. Short argued at

length: there were conflicting indications as to whether Ms. Adkins had ever seen Mr. Johnson in the neighborhood; it was questionable how well she could see the perpetrators given the dim lighting in the apartment; that the perpetrators wore hoodies around their faces; the speed at which the events occurred; that she was scared and under extreme stress; whether she was lying in a position that allowed her to see; how well she could see without her glasses; how unlikely it was that Ms. Adkins was looking around; the fact that she had tried to look up once and was punished for it; the generality of her description, tall and dark; her failure to identify Mr. Johnson's photograph; her failure to identify Mr. Johnson prior to 2013; her inability to distinguish between the two taller perpetrators; that she was under the influence when the events occurred; and her inability to consistently recall details.

Moreover, the decision whether to call an eyewitness identification witness is a matter of trial tactics that we may not second-guess. (*People v. Bolin, supra,* 18 Cal.4th at p. 334; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.) A defense attorney need not call an eyewitness identification witness in every case in which the perpetrator's identity is at issue. (*People v. Datt, supra,* 185 Cal.App.4th at p. 952; see *People v. McDonald* (1984) 37 Cal.3d 351, 377, disapproved on another point in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) Mr. Short reasonably could have determined: that calling an identification witness would not further Mr. Fuller's defense; that doing so would not further Mr. Fuller's defense to an extent necessary to justify the expenditure of significant time; that the amount of time needed to examine such a witness would weary the jury and risk prejudicing them against Mr. Fuller; and that such a witness would be subject to

potentially damaging cross-examination and impeachment. Defendant has not shown there could be no reasonable tactical purpose in declining to call a witness on eyewitness identification. Further, Mr. Short could have decided, within reason, that the jury's own common sense and experience would suffice in evaluating the reliability of Ms. Adkins's identification.

People v. McDonald, supra, 37 Cal.3d at page 377, on which defendant relies, does not compel a different result. In *McDonald,* our Supreme Court held that on a proper showing, testimony on eyewitness identifications from a properly qualified witness is admissible. (*Id.* at p. 355.) Our Supreme Court further held it was an abuse of discretion to deny a defense motion to introduce testimony on identification evidence when the eyewitness evidence: was key to the prosecution's case; was uncorroborated; and was necessary to explain relevant psychological factors. (*Id*. at p. 377.) *McDonald* did not hold that such testimony must be presented by defense counsel in every case involving uncorroborated eyewitness identification. (*Ibid.*; *People v. Datt, supra,*185 Cal.App.4th at p. 952.) The facts in *McDonald* were: seven prosecution eyewitnesses identified the defendant as the perpetrator; one prosecution eyewitness testified the defendant was *not* the perpetrator; and six defense alibi witnesses testified the defendant was in another state at the time. (*People v. McDonald, supra*, 37 Cal.3d at p. 355.) No other evidence connected the defendant to the crime. (*Id. a*t p. 360.) And no jury instruction on eyewitness identifications was given. (*Id. a*t p. 372.)

Our case is materially different. Ms. Adkins's testimony was corroborated. Ms. Adkins saw Mr. Johnson take cocaine from a plate in Mr. Adams's apartment. Mr. Johnson's fingerprint was on that plate. Further, Mr. Johnson was a member of the gang that claimed the neighborhood and sought to control the drug trade in the area. This is not a case with uncorroborated eyewitness testimony and thus is materially different from the facts in *McDonald*.

C. Mr. Fuller's Appeal

1. Mr. Fuller's motion to suppress his statements because he was not advised of his rights

a. overview

In a pretrial motion, Mr. Fuller sought to suppress statements made to Detective Kouri and Mr. Belis. Defendant argued the statements violated his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436, 478-479 (*Miranda*).) Before proceeding to a recitation of the relevant facts, it is important to clarify what was before the trial court when it denied the motion to suppress Mr. Fuller's statements. On April 16, 2014, the hearing on the motion to suppress Mr. Fuller's statements commenced. Detective Kouri testified concerning Mr. Fuller's statements. After the conclusion of the testimony, the trial court deferred ruling on the motion to suppress Mr. Fuller's statements until May 8, 2014. On May 8, 2014, the hearing on the motion to suppress was continued until May 20, 2014. On May 20, 2014, the hearing was resumed on Mr. Fuller's motion to suppress his

statements. The trial court clarified it had read the transcripts of Mr. Fuller's recorded statements. The trial court then denied Mr. Fuller's motion to suppress his statements.

Warnings are required when the person subject to police questioning is in custody. (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 661-663; *People v. Kopatz* (2015) 61 Cal.4th 62, 80.) Warnings are not required simply because the person questioned is a suspect. (*California v. Beheler* (1983) 463 U.S. 1121, 1125; *People v. Stansbury* (1995) 9 Cal.4th 824, 833-834.) The test of "in custody" for *Miranda* purposes is an objective one. (*Yarborough v. Alvarado, supra,* 541 U.S. at pp. 662-663; *People v. Leonard* (2007) 40 Cal.4th 1370, 1400.) The United States Supreme Court has held: "[T]he ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest. ([*Oregon v.*] *Mathiason* [(1977)] 429 U.S. [492,] 495.)" (*California v. Beheler, supra,* 463 U.S. at p. 1125; *People v. Stansbury, supra,* 9 Cal.4th at p. 830.) The United States Supreme Court has recently explained: "As used in our *Miranda* case law, 'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of 'the objective circumstances of the interrogation,' *Stansbury v. California,* 511 U.S. 318, 322–323, 325 (1994) *(per curiam),* a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.' *Thompson v. Keohane,* 516 U.S. 99, 112 (1995). And in order to determine how a suspect would have 'gauge[d]' his 'freedom of movement,' courts must examine 'all of the circumstances surrounding the interrogation.' *Stansbury* [*v.*

California], *supra,* [511 U.S.] at [pp.] 322, 325 (internal quotation marks omitted). Relevant factors include the location of the questioning, see [*Maryland v.*] *Shatzer* [(2010) 559 U.S. 98, 111-114], its duration, see *Berkemer v. McCarty,* 468 U.S. 420, 437–438 (1984), statements made during the interview, see ([*Oregon v.*] *Mathiason, supra,* [429 U.S.] at [p.] 495; *Yarborough v. Alvarado*[, *supra,*] 541 U.S. [at p.] 665 . . . ; *Stansbury* [*v. California*], *supra,* [511 U.S. at p.] 325, the presence or absence of physical restraints during the questioning, see *New York v. Quarles,* 467 U.S. 649, 655 (1984), and the release of the interviewee at the end of the questioning, see *California v. Beheler,* [*supra,*] 463 U.S. [at pp.] 1122–1123. . . ." (*Howes v. Fields* (2012) 565 U.S. __, __ [132 S.Ct. 1181, 1189].)

The trial court's determination is a mixed one of fact and law; first, what were the surrounding circumstances, and second, would a reasonable person have felt at liberty to leave. (*Thompson v. Keohane, supra,* 516 U.S. at p. 112; *People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.) On appeal, we review the trial court's resolution of disputed facts for substantial evidence. (*People v. Kopatz, supra,* 61 Cal.4th at p. 80; *People v. Leonard* (2007) 40 Cal.4th 1370, 1400.) We independently determine whether a reasonable person would have felt he or she was not free to terminate the conversation and leave. (*People v. Leonard, supra,* 40 Cal.4th at p. 1400; *People v. Ochoa, supra,* 19 Cal.4th at p. 402.)

b. Mr. Fuller's August 10, 2012 statement

Mr. Fuller was arrested on August 10, 2012, given *Miranda* warnings and interviewed by Detective Kouri. Mr. Fuller identified Mr. Combs and Mr. Johnson as the perpetrators of the crimes. He denied participating in the crimes. Mr. Fuller denied any knowledge Mr. Combs and Mr. Johnson were going to rob and kill the victim, Mr. Adams.

Deputy District Attorney Ken Lynch reviewed Mr. Fuller's statement. Mr. Lynch declined to charge Mr. Fuller. Mr. Lynch's "Charge Evaluation Worksheet" states: "The crime went unsolved for three years as witnesses were unable to identify the perpetrators. Ultimately suspect Fuller is interviewed by detectives. During the interview suspect Fuller asks to speak to his mother and two aunts. Detectives let them talk amongst themselves and videotape and audio record their conversation. Suspect Fuller, in a hushed voice, says he was asked by others to meet a smoker. Thereafter two others confront, rob and kill the victim while suspect Fuller had no idea what was happening. Suspect Fuller never says he went into the apartment. Suspect Fuller, along with his aunts and mother, cries and they pray. Thereafter, detectives enter the room and suspect Fuller says he wants to talk to them and he wants an attorney present. After asserting his right to counsel, suspect Fuller told detectives the same thing he told his aunts and mother and identified defendant Combs and now co-defendant Johnson as the two who robbed and ultimately killed the victim. Prior to asserting his right to counsel, suspect Fuller's statements to relatives makes it difficult to prove beyond a reasonable doubt he knew there was going to be a robbery. His exculpatory statement would have to be played

to a jury and the jury would have to use other witnesses' description of events to convict suspect Fuller although both of those witnesses were unable to identify suspect Fuller in photographs shown to them. Without being able to prove suspect Fuller entered the apartment, his statement to relatives leaves us unable to prove the charge against him. The statement he gave to detectives after asserting his right to counsel could not be used against him and was exculpatory to him and inculpatory to the two other charged defendants."

The prosecution never sought to admit Mr. Fuller's August 10, 2012 statement into evidence. The parties agree the statement was inadmissible because Mr. Fuller had asserted his right to counsel. We have no record of what Mr. Fuller in fact said. Following the decision not to charge Mr. Fuller, the prosecution considered him a potential witness. Mr. Belis issued a subpoena to Mr. Fuller for the February 14, 2013 hearing. On February 13, 2013, at 5:00 p.m., Detective Kouri served the subpoena on Mr. Fuller. At each subsequent court hearing prior to his second arrest, Mr. Fuller was ordered to return for the next hearing.

c. Mr. Fuller's February 14, 2013 statement

A hearing was held on February 14, 2013. Mr. Fuller was late and missed the hearing. The trial court issued a body attachment for Mr. Fuller. However, as they exited the courtroom, Detective Kouri and Mr. Belis encountered Mr. Fuller. Mr. Fuller, accompanied by his mother, stepped off an elevator into the courthouse hallway. In the courtroom, the bench warrant was then recalled. Back in the hallway, Detective Kouri

asked Mr. Fuller to come to the prosecutor's office on a lower floor so they could talk. Detective Kouri knew Mr. Fuller was nervous about being a witness. Detective Kouri knew Mr. Fuller would not want to be seen talking to an investigator and a prosecutor in the courthouse hallway. Detective Kouri wanted to move the conversation to a more private location. Mr. Fuller agreed. Detective Kouri testified Mr. Fuller was in no way coerced.

Detective Kouri, Mr. Belis, Mr. Fuller and Mr. Fuller's mother met in an empty, "generic" prosecutor's office. Their conversation was recorded, but significant portions of the recording are unintelligible. Detective Kouri testified the participants spoke in normal, conversational tones; further, no threats or promises were made. The factual scenario Mr. Fuller presented at that time was consistent with his August 10, 2012 statement, but was not in as much detail.

The trial court reviewed the transcript of the February 14, 2013 interview. At the outset, Mr. Fuller expressed concern about testifying against Mr. Combs and Mr. Johnson. Detective Kouri told him, "[W]e can relocate you . . . ." Mr. Fuller said he was scared because of some information that had gotten out. Mr. Belis explained there was no way to avoid testifying in person in the courtroom but, "[Y]ou're just saying what you saw." Mr. Fuller asked, "Is there any way all this could come back on me?" Detective Kouri said the prosecutor would grant Mr. Fuller immunity. Mr. Belis clarified, "Well, there's . . . a process . . . before you take the stand." Detective Kouri and Mr. Belis also said it was possible Mr. Fuller could be provided an attorney. Mr. Belis promised to look into granting Mr. Fuller immunity. But Mr. Belis said they could not make any promises.

Detective Kouri then changed the conversation saying, "[W]hat [Mr. Belis] wanted to go through today . . . was just . . . what we had talked about before . . . ." Mr. Fuller told Detective Kouri and Mr. Belis the following. He was standing at the apartment threshold when the crimes began to unfold. He heard, "Get on the floor." He saw a gun. Mr. Johnson and Mr. Combs were looking for something. Mr. Fuller did not know what. Mr. Fuller said he "grabbed a hold" of himself and left. As he walked away, he heard gunshots. This was consistent with his prior (unusable) statement. At one point Mr. Belis asked, "[E]verything you've told Detective Kouri so far was just based on your own conscious and what you saw when you were out there right?" Mr. Fuller responded, "Mm-hmm." Again, Mr. Belis said: "[L]ike I said everything up until now has just been what you've been telling us and based on your own conscious and what you saw. And it's the truth right?" Mr. Fuller said, "Yeah." The conversation returned at Mr. Belis's mention to the possibility of relocating. Mr. Fuller's mother expressed some concerns. Mr. Belis told Mr. Fuller and his mother, if you decide you want to relocate, let Detective Kouri know.

The trial court found: Mr. Fuller was not in custody and his statements were voluntary; this was a conversation, not an interrogation; the participants simply went over Mr. Fuller's August 10, 2012 statement; and although there was some conversation about possible immunity and leniency, the subject was raised by Mr. Fuller, not the detective or the district attorney, and no promises were made.

On appeal, Mr. Fuller argues his statements were inadmissible because he was in custody and should have been advised of his constitutional rights. We hold defendant was not in custody for purposes of *Miranda*. Mr. Fuller voluntarily accompanied Detective Kouri and Mr. Belis to an empty prosecutor's office in the courthouse. Mr. Fuller's mother was with him. Mr. Fuller was not under arrest. He was not physically restrained in any way. The discussion took place in a nonsecure room. There is no evidence the door to the room was closed, much less locked. There is no evidence either Detective Kouri or Mr. Belis was armed or that there were armed personnel in the vicinity. The interaction was not lengthy. The conversation was conducted in normal conversational tones. Defendant repeated what he said on August 10, 2012, after he was arrested. Detective Kouri and Mr. Belis offered their assistance to Mr. Fuller. They responded to questions from both Mr. Fuller and his mother. When the conversation ended, Mr. Fuller and his mother simply left. Under all of these circumstances, we conclude a reasonable person would have felt at liberty to end the discussion and leave. Because there was no custodial interrogation, *Miranda* did not apply.

Mr. Fuller contends the violation of his rights on August 10, 2012, carried over to the interview on February 14, 2013, and had not been dissipated. He relies on *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485. *Edwards* held that once a suspect requests counsel, interrogation must stop until counsel is provided. (*Ibid.*) *Edwards* is not violated here, however, because there was a six-month break in custody. (See *Maryland v. Shatzer, supra,* 559 U.S. at pp. 110-111 [14 days]; *People v. Storm*

(2002) 28 Cal.4th 1007, 1024). More to the point, Mr. Fuller was not in custody on February 14, 2013.

d. Mr. Fuller's April 26, 2013 statement

There was also evidence that on April 26, 2013, Mr. Fuller, Mr. Belis and Detective Kouri had a conversation in the courthouse hallway. Mr. Fuller repeatedly stated that he wanted an attorney. The issue of whether Mr. Fuller was entitled to the appointment of counsel was raised in the conversation in the hallway. Detective Kouri testified as follows concerning the hallway discussion of the appointment of counsel issue: "Q. And Mr. Fuller kept saying that he wanted an attorney; right? [¶] A. Correct. Yes. [¶] Q. And you said, 'Well, you are not charged. You don't need an attorney.' Right? [¶] A. I believe the prosecutor did. Q. Okay. Mr. Belis said that; right? [¶] A. Right." Mr. Fuller raises no issue concerning any statement made on April 26, 2013.

e. Mr. Fuller's May 21, 2013 statement

Mr. Fuller was arrested on May 21, 2013. This was 11 days after Ms. Adkins told Detective Kouri that Mr. Fuller had participated in the killing. Mr. Fuller was advised of his *Miranda* rights and interviewed that same day. Detective Kouri testified he read the rights to Mr. Fuller from a card. Detective Kouri denied threatening Mr. Fuller. They spoke in normal conversational tones. Detective Kouri explained why Mr. Fuller had been arrested. Mr. Fuller then repeated his account of the events as previously related on August 10, 2012, and on February

14, 2013. Detective Kouri described Mr. Fuller's statements, "It was just more him going over the facts of his account of what occurred." According to Detective Kouri, Mr. Fuller never said "'I don't want to talk' or 'I don't want to do this[.]'" Mr. Fuller never experienced any reluctance to speak to Detective Kouri. Mr. Fuller willingly answered Detective Kouri's questions. The trial court found Mr. Fuller impliedly waived his *Miranda* rights.

Mr. Fuller argues his May 21, 2013 statements should have been excluded because his previous request for counsel, on August 14, 2012, had been ignored. Further he argues, during his second interview, he was misled to understand he would not be prosecuted and he would be offered immunity. For the reasons discussed above, neither of those arguments compels a conclusion Mr. Fuller did not impliedly waive his *Miranda* rights in May 2013. We agree with the trial court's conclusion that Mr. Fuller impliedly waived his *Miranda* rights. (*People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 218-219; *People v. Medina* (1995) 11 Cal.4th 694, 752; *People v. Sully* (1991) 53 Cal.3d 1195, 1233.)

Mr. Fuller cites to the preliminary hearing transcript for evidence it was Detective Kouri's usual practice to ignore requests for an attorney. Detective Kouri testified in connection with Mr. Combs's motion to suppress the July 24, 2012 statements. Detective Kouri testified Mr. Combs made some mention of an attorney but then continued to speak about the case. Mr. Combs said: "You know what I mean? I would just - - before I even put things out there, you know what I mean? I will - - I would like an attorney to be here representing what I say so nothing wouldn't be twisted up. I know you tried to get a murder case solved, but I know for a fact I didn't kill the dude. Do you

know what I mean?" After Mr. Combs made that statement, Detective Kouri continued the questioning. Detective Kouri did not provide Mr. Combs with any opportunity to get an attorney. Detective Kouri further testified it was his normal pattern and practice that when someone requests an attorney, he continues the questioning. None of this testimony presented to the preliminary hearing magistrate was called to the attention of the trial court at the hearing on the motion to suppress Mr. Fuller's statements. Nonetheless, the preliminary hearing testimony is not controlling. What is controlling is what occurred on May 21, 2013.

2. Mr. Fuller's coerced statement argument

Mr. Fuller further asserts his February 14, 2013 statement was coerced by assurances of immunity and protection. As noted, this statement was made to Detective Kouri and Mr. Belis. Mr. Fuller contends he was specifically promised immunity and protection in exchange for his statement and those assurances led him to repeat his earlier (unusable) statement.

As a matter of due process, under both the state and federal constitutions, a criminal conviction may not rest upon an involuntary confession. (*Lego v. Twomey* (1972) 404 U.S. 477, 483; *People v. Winbush* (2017) 2 Cal.5th 402, 452.) A statement is involuntary when a person in authority makes an express or clearly implied promise of leniency for or advantage to an accused. And the statement is involuntary if it motivates the person to speak. (*People v. Tully* (2012) 54 Cal.4th 952, 985; *People v. Clark* (1993) 5 Cal.4th 950, 988, disapproved on another

point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1250.)

A statement is not involuntary unless it is casually linked to the inducement. (*Colorado v. Connelly* (1986) 479 U.S. 157, 164 & fn. 2; *People v. Cunningham* (2015) 61 Cal.4th 609, 643; *People v. Tully, supra,* 54 Cal.4th at pp. 985-986.) As our Supreme Court explained in *Tully*: "'A confession is "obtained" by a promise within the proscription of both the federal and state due process
guaranties if and only if inducement and statement are linked, as it were, by "proximate" causation . . . . The requisite causal connection between promise and confession must be more than "but for": causation-in-fact is insufficient.' (*People v. Benson* (1990) 52 Cal.3d 754, 778.) 'This rule raises two separate questions: was a promise of leniency either expressly made or implied, and if so, did that promise motivate the subject to speak?' (*People v. Vasila* (1995) 38 Cal.App.4th 865, 873.)" (*People v. Tully, supra,* 54 Cal.4th at pp. 985-986.)

The burden is on the prosecution to establish by a preponderance of the evidence that a defendant's statement was voluntary. (*People v. Winbush, supra,* 2 Cal.5th at p. 452; *People v. Tully, supra,* 54 Cal.4th at p. 993.) And, as our Supreme Court has explained: "In determining whether a confession was voluntary, '"[t]he question is whether defendant's choice to confess was not 'essentially free' because his [or her] will was overborne."' [Citation.] Whether the confession was voluntary depends upon the totality of the circumstances. [Citations.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 169; accord, *People v. Winbush, supra,* 2 Cal.5th at p. 452.) Factors to be considered in evaluating a statement's voluntariness include: police coercion;

the length and location of the interrogation; and the defendant's maturity, education, physical condition and mental health (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694; *People v. Cunningham, supra,* 61 Cal.4th at pp. 642-643; *People v. Williams* (1997) 16 Cal.4th 635, 660.)

On appeal, the trial court's factual findings as to the circumstances surrounding the statement are generally reviewed for substantial evidence. (*People v. Linton* (2013) 56 Cal.4th 1146, 1176; *People v. Carrington, supra,* 47 Cal.4th at p. 169.) However, when, as here, the defendant's statements have been recorded, the reflected facts are undisputed and the reviewing court independently determines whether the confession was involuntary. (*People v. Duff* (2014) 58 Cal.4th 527, 551; *People v. McWhorter* (2009) 47 Cal.4th 318, 346.) The trial court's conclusion as to the voluntariness of the statement is subject our de novo review. (*People v. Linton, supra,* 56 Cal.4th at pp. 1176-1177; *People v. Williams, supra,* 49 Cal.4th at p. 436.)

We have reviewed the recording and transcript of the February 14, 2013 conversation. Large portions of that conversation are unintelligible. Nevertheless, we conclude under the totality of the circumstances, no express or implied promise induced Mr. Fuller's statements. As noted above, the February 14, 2013 conversation took place in an empty prosecutor's office in the courthouse. Mr. Fuller's mother was present. Mr. Fuller was not under arrest and was not physically restrained in any way. There is no evidence the door to the room was closed. There is no evidence Detective Kouri or Mr. Belis was armed or that there were armed personnel in the vicinity. In short, nothing about the location or physical surroundings impaired Mr. Fuller's ability to respond voluntarily. The discussion was

relatively brief. And, as the trial court observed, Mr. Fuller previously had received *Miranda* warnings, in August 2012. In addition, Mr. Fuller had prior experience with the criminal justice system. And, Mr. Fuller: spoke about his own maturity; he no longer did the "wild" things he had done when he was young; he was not "in the streets" anymore; and he had children that he loved.

As also noted above, at the outset of the conversation, Mr. Fuller expressed concern that he had been seen by people in the courtroom, including Mr. Combs and Mr. Johnson. Detective Kouri advised, "[W]e can relocate you . . . ." Mr. Fuller said, "They told [my auntie] (Inaudible) for six months (Inaudible)." Detective Kouri responded: "The bottom line is . . . you're not going to live under the state for the rest of your life. I'm . . . not going to . . . sit here and bullshit you . . . . They get you up and out of the way, relocate you, and get you on your feet. That's . . . on the state." It appears there had been some talk in the neighborhood about Mr. Fuller being a witness, about the fact he was arrested but not charged, but the details are unclear. Mr. Fuller said he was scared, "Because that got out." Detective Kouri noted it was the district attorney's decision not to charge Mr. Fuller. Detective Kouri explained, "They have a murder case that they need to put on against those guys." Following some unintelligible discussion, Mr. Belis said: "[W]hat Detective Kouri is telling you, is there are some things that can be done, as he's explaining to you, to try to help you out. But it's not like - - I can't put you behind a screen [when you testify]."

Mr. Fuller asked, "Is there any way all this could come back on me?" Detective Kouri and Mr. Belis responded as follows: "Detective Kouri: What do you mean? [¶] [Mr.] Fuller: (Inaudible) [¶] Detective Kouri: They'll grant you immunity. The D.A.'s office grants you immunity for - - for that part. They recognize that. And the judge wouldn't even allow it. It's the - - actually, I believe it's the judge that actually allows - - [¶] Mr. Belis: "Well, there's - - there's a (Inaudible) process that (Inaudible) you know, would be (Inaudible) before you would take the stand. [¶] Detective Kouri: But I think you - - correct me if I'm wrong - - you may even get your own attorney. The judge will give you your own attorney. [¶] Mr. Belis: That's a possibility. I mean, *I don't want to necessarily say that's exactly what's going to happen*. But what I can't - - there's a whole process that's involved in granting you immunity. And it hasn't been done yet, but we are going to be looking into that. [¶] That's one of the reasons we did not object to the case being continued until next month so that our office can explore looking into that (Inaudible) Detective Kouri you told (Inaudible) just based on what you saw. Okay. And I'm not picking on you. . . . . [¶] . . . Well, everything you've told Detective Kouri so far was just based on your own conscience and what you saw when you were out there. Right? Okay. So, I mean, I'm . . . not trying to put down what you're feeling. [¶] . . . [¶] . . . It's a serious thing. But like . . . Detective Kouri said, . . . this is - - it's a serious case, and this is what we need to do to go forward. And I'm not going to bullshit you. I'm not going to try to give you a fairytale and say, 'Oh, yeah. Don't worry. We're going to put you behind a screen.' [¶] You know? But there are things that can be done. Detective Kouri is the first person you should talk to, to try to get some of

that stuff going. And he's already offered. He says he'll - - he'll look into it. And again, . . . *we can't automatically say this is exactly what's going to happen*, but he'll start the process (Inaudible) you want. [¶] Detective Kouri: You're not the . . . first person to have . . . these issues, considerations. . . . [¶] . . . And relocating, I'm very familiar with it. It's not an issue. And again, it's . . . the state that does that (Inaudible)." (Italics added.)

Following this discussion, Detective Kouri told Mr. Fuller, "[W]hat [Mr. Belis] wanted to go through today . . . was just basically . . . what we had talked about before . . . ." Mr. Belis began to ask Mr. Fuller about his relationship with Mr. Johnson and Mr. Combs and what happened on the night in question. Mr. Fuller responded without expressing any hesitation. Mr. Fuller repeated his earlier claim, essentially that he had been briefly present, but did not participate in the crimes. Neither Detective Kouri nor Mr. Belis asked Mr. Fuller to give further details.

The foregoing demonstrates that, contrary to Mr. Fuller's assertions, Detective Kouri and Mr. Belis raised the possibility of relocation and an immunity grant. Mr. Belis made it clear immunity was something the district attorney's office would have to look into. And relocation was a possibility if Mr. Fuller was interested. But neither Detective Kouri nor Mr. Belis expressly or impliedly promised that Mr. Fuller would be granted immunity or relocated. Mr. Belis expressly said he could not promise Mr. Fuller would be offered immunity or that he would be relocated. Mr. Fuller expressed no immediate interest in relocation. Moreover, neither Detective Kouri nor Mr. Belis in any way suggested the availability of immunity or relocation was premised on Mr. Fuller's willingness to tell them what they

wanted to know. They did not offer immunity or relocation *only if* Mr. Fuller discussed his involvement. The immunity or relocation discussion was in response to Mr. Fuller's *expressed* concern about having been seen by people in the courtroom and testifying against Mr. Johnson and Mr. Combs. It did not relate specifically to Mr. Fuller's willingness to speak to Detective Kouri and Mr. Belis at that moment. Moreover, the discussion did not induce Mr. Fuller to repeat his earlier story. When Mr. Belis began to ask about the events of the night in question, Mr. Fuller willingly responded. Mr. Fuller's February 14, 2013 statements were properly admitted and did not violate his federal or state constitutional due process rights.

3. Mistrial motion

a. background

Detective Kouri testified before Mr. Fuller's jury. While doing so Deputy District Attorney Keith Duckett played a recorded excerpt from Mr. Fuller's February 14, 2013 conversation. This conversation was with Detective Kouri and the prosecutor, Mr. Belis. Large portions of that recording were unintelligible. Over defense counsel's objection, the jury received a transcript that Mr. Duckett represented had been prepared by a company called Ubiqus. An earlier transcript had been prepared, apparently with the aid of earphones, by Lynden J. and Associates, Inc. The two transcripts were significantly different. Mr. Fuller's trial counsel, Mr. Clark, took exception to one portion in particular. The Lynden J. and Associates, Inc. transcript read: "Keith Fuller: You know? But once you – once you go through

the process of (Inaudible) when you have kids, it's a lot different. Like (Inaudible) you know, I love my kids (Inaudible) that's my life. That's my life. That's why I'm not in the streets or none of that. You know what I mean?" The Ubiqus transcript read: "You don't – you don't (unintelligible) shoot – don't shoot, go through this process of (unintelligible). But, uh, (unintelligible) did not hit – it's like, they were, like, (unintelligible). *You know they're about to hit this place.* That's what I'm (unintelligible). That's what (unintelligible) – that's why I'm out in the streets. I know that." (Italics added.)

Mr. Clark sought a mistrial on the basis of the italicized sentence. According to Mr. Clark, Mr. Fuller denied making the statement. The trial court listened to the recording once again and commented: ". . . I heard, 'You know I love my kids. That's my life. That's my life,' from the audible version. So how do we get from that to - - [¶] Mr. Clark: You are about to hit this place. That's my question too. [¶] . . . [¶] The Court: It's not even close to what he says." The trial court denied defendant's mistrial motion.

The trial court ordered that the full recording of the February 14, 2013 conversation be marked as Court's exhibit F. The recording quality is extremely poor. Defendant's comments at 16:00-16:50 of exhibit F seem to be consistent with the trial court's conclusion. The trial court instructed the jury to disregarded the inaccurate portion of the transcript: "On Friday, you were played statements or a recording from February 14th, 2013, which was an excerpt from the recording of Mr. Fuller. It was brought to the court's attention this morning that the transcript - - a portion of the transcript was incorrect, and this is why the court says that it's the actual recording that is the

evidence and not the transcript. [¶] If you hear something differently on the recording, you must go by the actual recording, and you are not to go by the transcript because it's the actual recording that is the evidence in this case and is what you must decide. [¶] With that being said, the court - - it has been brought to the court's attention that a portion of the transcript that was played a page 3 of the transcript, starting at line 7 - - let me know. Is everybody there? [¶] Okay. The transcripts read - - with the letter F, for Fuller: [Transcript read.] [¶] In a different transcript of the same recording that was brought to the court's attention this morning, and the court listened to, although you determine what the facts are, but it appears that it says more so of: [¶] [Transcript read.] [¶] And although the court could not hear entirely what was said, it appears to be closer to what the court has read to you than what has been transcribed. [¶] Does everyone understand that? [¶] [Deputy District Attorney] Mr. Duckett, for the record, who had an opportunity to listen to the transcript in court this morning with the court, do you stipulate that the Lynden version that the court has just read to the jurors seems to be more accurate than the transcription of that portion of the recording that was given to the jurors on Friday? [¶] Mr. Duckett: Yes, your honor, the People will so stipulate. [¶] The Court: So with that - - that portion of the transcript is to be completely, completely disregarded. [¶] Does everyone understand that? [¶] (The jurors responded in the affirmative.) [¶] The Court: Christina, please collect those transcripts."

Immediately thereafter, Detective Kouri testified: "Q. [By Mr. Duckett] Detective, just so it's perfectly clear, on that February interview with defendant Fuller, in his story to you, did he always maintain that he just ended up . . . at the doorway? [¶]

A. Correct. [¶] Q. Okay. He did not say that he knew what was going on or anything like that; right? [¶] A. Never. No. [¶] Q. His statement was, essentially, woke up. Someone said follow him, and then he saw Johnson and then Combs going up toward the door and he went up? [¶] A. That's correct. He never - - never said he knew what was going on." On cross-examination by Mr. Clark, Detective Kouri testified: "Q. On Friday . . . you had that transcript and you were reading along when that tape was being played late afternoon; is that right? [¶] A. Yes. [¶] Q. When you read that transcript, you read that part, didn't you, where it said something about, 'I knew they were gonna hit the house, and that's why I was on the streets.' Right? You saw that? [¶] A. They never said that they were - - I did not interpret it that way. [¶] Q. You didn't read that, what was said? [¶] A. That's right - - I did. I did. [¶] Q. Okay. [¶] A. I didn't interpret it the same way that you did. [¶] Q. Well, you are the one that . . . did this interview. And you audio-taped it; right? [¶] Didn't you see that that was wrong? [¶] A. . . . I glossed right over it. I did not interpret that he had any prior knowledge of this, I don't think -- [¶] . . . [[¶] [Detective Kouri]: I never represented that he had prior knowledge, and he never said that in the audio. [¶] . . . [¶] A. As I said, I glossed it over. In my mind, I know what he said because I lived it. He never said that he had prior knowledge of what the other guys were doing."

b. discussion

Mr. Fuller argues the jury's exposure to the inaccurate transcript that included an inculpatory statement was incurably prejudicial. Our Supreme Court has set forth the applicable standard of review for a mistrial motion: "We review the denial of a motion for mistrial under the deferential abuse of discretion standard. (*People v. Cunningham* (2001) 25 Cal.4th 926, 984; *People v. Price* (1991) 1 Cal.4th 324, 428 . . . .) 'A motion for mistrial is directed to the sound discretion of the trial court. We have explained that "[a] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854 . . . .)" (*People v. Cox* (2003) 30 Cal.4th 916, 953, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; accord, *People v. Montes* (2014) 58 Cal.4th 809, 884.)

We find no abuse of discretion. The quality of the audio recording of Mr. Fuller's February 14, 2013 conversation with Detective Kouri and Mr. Belis was very poor. It is not likely to have surprised the jury that the two transcriptions of the recording differed. The trial court instructed the jury to accept the Lynden J. and Associates, Inc. transcript as the more accurate one and to disregard the other. We presume the jury followed that instruction and based its verdicts on appropriate evidence. (*People v. Charles* (2015) 61 Cal.4th 308, 324, fn. 8; *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 447.)

The transcript was not admitted in evidence; in other words, the jury did not take the transcript into the jury room. Additionally, in his subsequent testimony, Detective Kouri emphasized that during the February 14, 2013 discussion, Mr. Fuller never admitted having prior knowledge of Mr. Combs's and Mr. Johnson's plans. The prosecution never argued otherwise.

Moreover, viewed in the light of Ms. Adkins's testimony, the prejudicial power of the inaccurately transcribed statement was de minimus. Ms. Adkins's testimony was corroborated by Ms. Joubert's statement placing Mr. Fuller in the vicinity of and showing an interest in Mr. Adams's apartment earlier in the evening. And finally, this case turned on the question of whether Mr. Fuller simply stood on the threshold and then departed or whether he fully participated in the crimes. Both Ms. Adkins and Mr. Wilson testified there were three perpetrators inside the apartment. Ms. Adkins said the perpetrators closed and locked the apartment's wrought-iron door after they entered. She did not see anyone standing at the doorway and not coming in.

4. Motion to exclude eyewitness identification evidence

a. background

Mr. Fuller sought pretrial to exclude Ms. Adkins's eyewitness identification testimony as unreliable. In support of Mr. Fuller's motion, Ms. Pacheco testified Ms. Adkins and Mr. Fuller had been in the courtroom at the same time on "many" occasions. These occasions began in August 2012. They even rode in the elevator together. Ms. Pacheco overheard Mr. Belis (misidentified as Mr. Davis) discussing Mr. Fuller with Ms.

Adkins. Mr. Belis asked: "Isn't that Keith Fuller over there? Isn't he one of the suspects?" Ms. Adkins replied: "Yeah, that's him. I don't know why you guys have him as a witness when he was a suspect."

Detective Kouri testified for the prosecution. He agreed Ms. Adkins and Mr. Fuller had both been present in the courtroom more than twice prior to the February 14, 2013 hearing. It was at the February 14, 2013 hearing that Ms. Adkins identified Mr. Fuller as one of the assailants. According to Detective Kouri, however, Ms. Adkins and Mr. Fuller sat on opposite sides of the courtroom. Further, Ms. Adkins had told Detective Kouri, "I keep . . . seeing them. I've seen him here." But it was not until April 26, 2013 that she explained in detail Mr. Fuller's involvement the night Mr. Adams was murdered. Detective Kouri said Ms. Adkins was "very sure" about her identification of Mr. Fuller. Detective Kouri denied either he or Mr. Belis had ever directed Ms. Adkins's attention to Mr. Fuller while in court. The parties stipulated that if called to testify, Mr. Belis would say the purported conversation with Ms. Adkins, as testified to by Ms. Pacheco, never occurred.

b. discussion

The trial court engaged in a two-part analysis. First, the trial court analyzed whether the identification procedure was unduly suggestive. Second, if so, the trial court evaluated whether the identification was nevertheless reliable under the totality of the circumstances. The trial court noted no formal identification procedure was employed. The trial court found it "highly, highly improbable" that Mr. Belis had coached Ms.

Adkins to identify Mr. Fuller: in open court; while the judge was on the bench; and in a voice loud enough for Ms. Pacheco to have overheard him. The trial court acknowledged Ms. Adkins was not an ideal prosecution witness. She had been "extremely inconsistent." But Mr. Fuller had admitted he was present in the doorway when the crimes began to unfold. Hence, Ms. Adkins's prior statements that she had seen Mr. Fuller there were consistent with his admission. And because Mr. Fuller had placed himself at the scene, it was not his identity that was in question. Rather, the issue was whether he had participated in the crimes. Further, Ms. Adkins's subsequent disclosure about Mr. Fuller's participation was not coerced, encouraged or solicited.

On appeal, Mr. Fuller argues Ms. Adkins was repeatedly exposed to Mr. Fuller's photograph. She then repeatedly encountered Mr. Fuller in the courtroom due to the prosecution's decision to subpoena him. Ms. Adkins was present when Mr. Fuller was ordered back on multiple occasions. This included when Mr. Fuller was ordered to appear for the preliminary hearing. Mr. Fuller suggests it was unnecessary for the prosecution to have him repeatedly appear and be ordered back. According to Mr. Fuller, this was a ruse designed to induce Ms. Adkins's identification of him.

Our Supreme Court has held: "[F]or a witness identification procedure to violate the due process clauses, the state must, at the threshold, improperly suggest something to the witness—i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure. . . . 'A procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police.' [(*People v. Slutts* (1968) 259

Cal.App.2d 866,] 891.)" (*People v. Ochoa* (1998) 19 Cal.4th 353, 413; accord, *People v. Virgil* (2011) 51 Cal.4th 1210, 1250-1251.) Our review is governed by the following: "'In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.' (*People v. Cunningham* [(2001)] 25 Cal.4th [926], 989.) It is the defendant's burden to demonstrate the existence of an unreliable identification procedure. (*Ibid.*) 'We review deferentially the trial court's findings of historical fact, especially those that turn on credibility determinations, but we independently review the trial court's ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive.' (*People v. Gonzalez* (2006) 38 Cal.4th 932, 943.)" (*People v. Lucas* (2014) 60 Cal.4th 153, 235, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19; accord, *People v. Clark* (2016) 63 Cal.4th 522, 556-557.)

We agree with the trial court's conclusion that there was no unduly suggestive or unnecessary identification procedure. Moreover, in terms of any due process issues, Ms. Adkins's identification of Mr. Fuller was reliable under the totality of the circumstances. Ms. Adkins was familiar with Mr. Fuller. Prior to Mr. Adams's murder, she had seen Mr. Fuller in the neighborhood. She may even have purchased drugs from him. She saw him enter the apartment. And although ordered to lie on the floor, she looked up to see what was happening. She saw Mr. Fuller when he struck her with his gun. Ms. Adkins told Detective Kouri she would never forget the perpetrators' faces. Ms. Adkins consistently described Mr. Fuller as tall (he was approximately six feet two inches tall) with French braids (he had braided hair in 2008). She was not repeatedly exposed to Mr. Fuller's photograph. She saw Mr. Fuller's photograph in a lineup once, on July 31, 2012. She may have seen that same lineup several years earlier, in 2009. And Ms. Adkins did not identify any defendant from a photograph; she identified each of them only after she saw them in person. She *was* present in the courtroom at the same time as Mr. Fuller on several occasions prior to April 26, 2013. But, according to Detective Kouri who was also present, they sat on opposite sides of the courtroom. And, as the trial court found, Ms. Adkins's identification of Mr. Fuller was not sudden. It was apparent from her comments that Ms. Adkins previously had told or attempted to tell Detective Kouri she recognized Mr. Fuller. Ms. Adkins did not suddenly recognize Mr. Fuller as a participant. She merely neglected to make clear to the detective the level of Mr. Fuller's participation. Nor was Mr. Fuller's presence in the courtroom and his being ordered back as a witness suggestive. The prosecution had

reason to subpoena Mr. Fuller, a reluctant witness, and to ensure his continued presence at all proceedings. There is no evidence this was done as a ruse to compel Ms. Adkins to identify him. Mr. Fuller's argument to the contrary is a surmise. And the trial court rejected Mr. Fuller's claim Ms. Adkins had been coached, in open court, to identify him. Defendant has not shown there were any unduly suggestive identification procedures. Under the totality of the circumstances, Ms. Adkins's identification of Mr. Fuller was reliable.

5. Cumulative error

Mr. Fuller contends he is entitled to reversal because of cumulative error. We find no prejudicial legal error. Therefore, we reject Mr. Fuller's argument the cumulative effect of all the errors requires reversal. (*People v. Jones* (2013) 57 Cal.4th 899, 981; *People v. Edwards* (2013) 57 Cal.4th 658, 746.)

D. Sentencing Error

1. Count 1: first degree murder

As to each defendant, the trial court imposed life without parole sentences on count 1, first degree murder. Because Mr. Johnson and Mr. Fuller were sentenced under sections 667, subdivisions (b) through (i), and 1170.12, the trial court should have imposed two consecutive life without parole sentences. (*People v. Hardy* (1999) 73 Cal.App.4th 1429, 1434; contra, *People v. Mason* (2014) 232 Cal.App.4th 355, 368; *People v. Smithson* (2000) 79 Cal.App.4th 480, 503-504.)

2. Count 2: attempted willful, deliberate, premeditated murder

The juries convicted defendants of attempted willful, deliberate, premeditated murder committed for the benefit of a criminal street gang as alleged in count 2. (§§ 186.22, subd. (b)(1)(C), 187, subd. (a), 664, subd. (a).) Defendants were properly sentenced to life with the possibility of parole (§ 664, subd. (a)) with a minimum parole eligibility term of 15 years. (§ 186.22, subd. (b)(5).) However, defendants were sentenced under section 186.22, subdivision (b)(5)—which increased the minimum parole eligibility term from 7 to 15 years. Thus, they were not subject to an additional 10-year term under section 186.22, subdivision (b)(1)(C). (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004; *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1404-1405; see *People v. Elizalde* (2015) 61 Cal.4th 523, 539, fn. 10.) The stayed 10-year terms under section 186.22, subdivision (b)(1)(C) must be stricken. As to Mr. Combs, his abstract of judgment must be amended to omit the stayed enhancement because the trial court never orally imposed it.

3. Counts 4 and 5: home invasion robbery

Section 211 states, "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." Section 212.5 governs whether a robbery is of the first or second degree: "(a) . . . [E]very robbery which is perpetrated in an *inhabited dwelling house* . . . is robbery of the first degree. [¶] (b) Every robbery of any person while using an automated teller machine . . . is robbery of the first degree. [¶]

(c) All kinds of robbery other than those listed in subdivisions (a) and (b) are of the second degree." (Italics added.) Section 213 prescribes the punishment for robbery: "(a) Robbery is punishable as follows: [¶] (1) Robbery of the first degree is punishable as follows: [¶] (A) If the defendant, *voluntarily acting in concert with two or more other persons, commits the robbery within an inhabited dwelling house* . . . by imprisonment in the state prison for three, six, or nine years. [¶] (B) In all cases other than that specified in subparagraph (A), by imprisonment in the state prison for three, four, or six years. [¶] (2) Robbery of the second degree is punishable by imprisonment in the state prison for two, three, or five years." [¶] . . . ." (Italics added.) However, pursuant to section 186.22, subdivision (b)(4)(B), when the home invasion robbery is found to have been committed for the benefit of a criminal street gang, the punishment is 15 years to life. Section 186.22, subdivision (b)(4)(B) states: "(4) Any person who is convicted of a felony enumerated in this paragraph [including "unlawful homicide" (§ 186.22, subd. (e)(3))] committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to *an indeterminate term of life imprisonment* with a minimum term of the indeterminate sentence calculated as the greater of: [¶] . . . [¶] (B) Imprisonment in the state prison for *15 years*, if the felony is a *home invasion robbery*, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213 . . . ." (Italics added.)

The jury found all three defendants guilty of home invasion robbery as alleged in count 4. (§ 211.) The jury found Mr. Johnson and Mr. Fuller, but not Mr. Combs, guilty of home invasion robbery as alleged in count 5. The jury further found gang enhancement allegations true as to each of those counts. (§ 186.22, subd. (b)(1)(C).) The trial court orally imposed (and stayed) the 15-year sentences, doubled as to Mr. Johnson and Mr. Fuller. The trial court also imposed (and stayed) 10-year terms under section 186.22, subdivision (b)(1)(C). The correct sentence was 15-years-to-life, doubled as to Mr. Johnson and Mr. Fuller. (§ 186.22, subd. (b)(4)(B).) The oral pronouncement of judgment must be modified to so provide. The stayed enhancements under section 186.22, subdivision (b)(1)(C) must be stricken. (*People v. Sok* (2010) 181 Cal.App.4th 88, 96; see *People v. Lopez, supra,* 34 Cal.4th at pp. 1004, 1011.)

Mr. Fuller argues the sentences imposed on counts 4 and 5 were in error. Mr. Fuller reasons that the verdict form does not reflect a finding that he "act[ed] in concert with two or more other persons" as required by section 213, subdivision (a)(1)(A). Mr. Fuller has not shown he objected to the verdict form. But even assuming the issue is properly before us, we find no prejudicial error. The verdict forms read as follows: "We, the Jury, in the above entitled action, find the defendant . . . GUILTY of the crime of HOME INVASION ROBBERY, who did unlawfully and by means of force and fear take personal property from the person, possession and immediate presence of [the victim], and said offense was perpetrated in an inhabited dwelling house, trailer coach and inhabited portion of a building, in violation of Penal Code section 211, a Felony . . . ." The verdict forms contain no specific finding defendants acted in concert with two or more

other persons. Nevertheless, defendants were charged with acting in concert within the meaning of section 213, subdivision (a)(1)(A). In an amended information filed on July 8, 2014, defendants were charged in counts 4 and 5 with "home invasion robbery" in violation of section 211. The charged robbery, according to the amended information "was perpetrated in an inhabited dwelling house," and which "pursuant to . . . section 213 (a)(1)(A) . . . was committed by the defendant[s] who voluntarily acted in concert . . . ." Therefore, defendants were on notice they were subject to sentencing under section 213, subdivision (a)(1)(A). Further, the jury was instructed that in order to return a robbery in concert verdict it had to find, among other things, that "the defendant voluntarily acted with two or more other people who also committed or aided and abetted the commission of the robbery." Moreover, aside from Mr. Fuller's claim he merely stood in the doorway, all the remaining evidence indicated that three perpetrators acted together. Under these circumstances, any error in omitting a specific in concert finding on the verdict forms was harmless under any standard. (*People v. Johnson* (2015) 61 Cal.4th 734, 785; *People v. Bolin* (1998) 18 Cal.4th 297, 330-331; *People v. Radil* (1977) 76 Cal.App.3d 702, 709-710.)

4. Court facilities and operations assessments

As to Mr. Fuller, the trial court orally imposed a $120 court facilities assessment ($30 per count) (Gov. Code, § 70373, subd. (a)) and a $160 court operations assessment ($40 per count). (§ 1465.8, subd. (a)(1)). Because Mr. Fuller was convicted of five counts, the trial court should have imposed a $150 court facilities

assessment and a $200 court operations assessment. The oral pronouncement of judgment is modified to so reflect. The abstract of judgment is correct in this regard.

5. Restitution fines (§ 1202.4, subdivision (b))

The trial court imposed restitution fines (§ 1202.4, subd. (b)(1)) on Mr. Fuller at a rate of $300 per count. The trial court found the total was $1,200. However, because Mr. Fuller was convicted of five counts, at a rate of $300 per count the total would be $1,500. Mr. Fuller notes that in 2009, when the crimes were committed, the minimum restitution fine was $200 per count. Further Mr. Fuller argues, to impose a $300 minimum would violate the prohibition against ex post facto laws. We presume, however, that the trial court intended to impose more than the minimum per count amount authorized by section 1202.4, subdivision (b)(1), at the time the crimes were committed. The judgment must be modified and the abstract of judgment amended to reflect a $1,500 restitution fine under section 1202.4, subdivision (b)(1).

The trial court imposed a $1,500 restitution fine (§ 1202.4, subd. (b)(1)) on Mr. Johnson. His abstract of judgment erroneously reflects a $300 restitution fine. Mr. Johnson's amended abstract of judgment must reflect the $1,500 restitution fine.

The trial court imposed a $1,200 restitution fine (§ 1202.4, subd. (b) (1)) on Mr. Combs. His abstract of judgment erroneously reflects a $300 such fine. His amended abstract of judgment must reflect the correct amount.

6. Parole revocation restitution fines (§ 1202.45)

No parole revocation restitution fine applies when the only sentence imposed is life without the possibility of parole. (*People v. McWhorter* (2009) 47 Cal.4th 318, 380 [death sentence]; *People v. Cardona* (2016) 246 Cal.App.4th 608, 612, fn. 3; *People v. Battle* (2011) 198 Cal.App.4th 50, 63; *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.) But a parole revocation restitution fine does apply when a defendant is sentenced to both indeterminate and determinate terms. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075 [determinate terms imposed in addition to death sentence]; see *People v. Battle, supra,* 198 Cal.App.4th at p. 63.)

The trial court did not orally impose a parole revocation restitution fine on Mr. Fuller, although the abstract of judgment records a $300 such fine. Mr. Fuller's sentence included an unstayed determinate 18-year term for attempted murder as charged in count 2. Because a determinate term was imposed, it was error to fail to impose the parole revocation restitution fine. (*People v. Brasure, supra,* 42 Cal.4th at p. 1075; see *People v. Carr* (2010) 190 Cal.App.4th 475, 482.) The judgment must be modified and the abstract of judgment amended to reflect a $1,500 parole revocation restitution fine. Mr. Johnson's abstract of judgment also does not reflect the section 12022.53, subdivisions (b) and (e)(1) firearm enhancement imposed (and stayed) on count 5. It must be amended in this respect as well.

The trial court imposed a $1,200 parole revocation restitution fine on Mr. Combs. Mr. Combs was sentenced to a stayed determinate six-year term on count 3, first degree burglary. Restitution fines are a form of punishment. (*People v.*

Hanson (2000) 23 Cal.4th 355, 361; *People v. Carlson* (2011) 200 Cal.App.4th 695, 710). And a stayed count cannot be used to impose punishment. (*People v. Pearson* (1986) 42 Cal.3d 351, 361.) Thus, Mr. Combs is not subject to a parole revocation restitution fine. (*People v. Sencion* (2012) 211 Cal.App.4th 480, 483; *People v. Carlson* (2011) 200 Cal.App.4th 695, 710; *People v. Le* (2006) 136 Cal.App.4th 925, 932-934.) The judgment must be modified and the abstract of judgment amended to omit the parole revocation restitution fine imposed on Mr. Combs.

The trial court did not impose a parole revocation restitution fine on Mr. Johnson. However, Mr. Johnson's abstract of judgment erroneously reflects a $300 such fine. Mr. Johnson's amended abstract of judgment must omit that fine.

7. Presentence custody and conduct credit

The trial court awarded conduct credit to each defendant. Pursuant to section 2933.2, subdivision (a), however, a defendant convicted of murder is not entitled to conduct credit. (*People v. Chism* (2014) 58 Cal.4th 1266, 1336.) Accordingly, the judgments must be modified and the abstracts of judgment amended to omit the conduct credit awards.

We asked the parties to brief the question whether defendants' presentence custody credit awards were correct. Having considered defendants' responses, we conclude the record before us is insufficient to make that determination. The parties are free to litigate any credit issue, if they so choose, in the trial court. (*People v. Kennedy* (2012) 209 Cal.App.4th 385, 394; *People v. Fares* (1993) 16 Cal.App.4th 954, 958; *People v. Hyde* (1975) 49 Cal.App.3d 97, 102; see § 1237.1.)

IV. DISPOSITION

The judgments are modified as follows. Mr. Johnson's count 1 sentence is modified to reflect two consecutive life without the possibility of parole terms. The stayed 10-year term imposed on count 2 under Penal Code section 186.22, subdivision (b)(1)(C) is stricken. Mr. Johnson is sentenced to stayed sentences of 30 years to life on counts 4 and 5. The stayed 10-year terms imposed on counts 4 and 5 under Penal Code section 186.22, subdivision (b)(1)(C) are stricken. Mr. Johnson's amended abstract of judgment must: include the orally imposed Penal Code section 12022.53, subdivisions (b) and (e)(1) firearm enhancement (stayed) on count 5; include a $1,500 restitution fine (Pen. Code, § 1202.4, subd. (b)); and omit any parole revocation restitution fine.

Mr. Fuller's count 1 sentence is modified to reflect two consecutive life without the possibility of parole terms. The stayed 10-year term imposed on count 2 under Penal Code section 186.22, subdivision (b)(1)(C) is stricken. Mr. Fuller is sentenced to stayed sentences of 30 years to life on counts 4 and 5. The stayed 10-year terms imposed on counts 4 and 5 under Penal Code section 186.22, subdivision (b)(1)(C) are stricken. Mr. Fuller's sentence is further modified to reflect a: $150 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)); $200 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)); $1,500 restitution fine (Pen. Code, § 1202.4, subd. (b)); and $1,500 parole revocation restitution fine. (Pen. Code, § 1202.45.) Mr. Fuller's amended abstract of judgment must include the Penal Code section 12022.53, subdivision (b) and (e)(1) firearm enhancement imposed on count 5. And the amended abstract must omit the 10-

year terms under Penal Code section 186.22, subdivision (b)(1)(C) on counts 4 and 5.

Mr. Comb's count 4 sentence is modified to 15 years to life (stayed). The stayed 10-year term imposed under Penal Code section 186.22, subdivision (b)(1)(C) is stricken. Mr. Combs's sentence is further modified to omit the $1,200 parole revocation restitution fine. (Pen. Code, § 1202.45.) Mr. Combs's amended abstract of judgment must include a $1,200 restitution fine (Pen. Code, § 1202.4, subd. (b)(1)), omit any parole revocation restitution fine (Pen. Code, § 1202.45) and omit the stayed Penal Code section 186.22, subdivision (b)(1)(C) enhancement on count 2.

The judgments are affirmed in all other respects. Upon remittitur issuance, the clerk of the superior court clerk is to prepare amended abstracts of judgment and deliver copies to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

I concur:

KRIEGLER, J.

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B262599

BAKER, J., Concurring in Part and Dissenting in Part

I concur in the judgment that defendants' convictions should be affirmed for lack of prejudicial error. I likewise concur in the corrections the majority opinion orders to the sentences imposed by the trial court, with the exception of the opinion's holding that the trial court should have imposed two consecutive life without possibility of parole sentences as to each defendant. In my view, the trial court correctly declined to double the life without parole sentences. (*People v. Mason* (2014) 232 Cal.App.4th 355, 367-369; *People v. Smithson* (2000) 79 Cal.App.4th 480, 503-504.)

BAKER, J.