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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. REYES GONZALES, JR. et al., Defendants and Appellants.	2d Crim. No. B264384 (Super. Ct. No. 1434089) (Santa Barbara County)

Ramon David Maldonado, Jr. (Ray); Jason Michael Castillo; Reyes Gonzales, Jr.; Santos Manuel Sauceda; and David Murillo Maldonado, Jr. (David) appeal judgment after conviction by jury of first degree murder of Anthony Ibarra with the special circumstance of kidnapping. (Pen. Code,[1] §§ 187, 189, 190.2, subd. (a)(17)(B).) As to Ray only, the jury also found true the special circumstance of torture. (§ 190.2, subd. (a)(18).) The jury was unable to reach verdicts on: the special circumstance of

[1] Further unspecified statutory references are to the Penal Code.

torture as to the other defendants; the special circumstances of lying in wait and furthering the activities of a gang as to any defendant; and charges that Ray dissuaded two witnesses, Angel Escobar and Marissa Escobar.[2] The court dismissed these counts and allegations on the prosecutor's motion.

The prosecutor did not seek the death penalty. In a bifurcated proceeding the trial court found true allegations that four of these appellants served prior prison terms (Gonzales, David, Ray, and Sauceda). (§ 667.5, subd. (b).) It sentenced each appellant to life without the possibility of parole for the special circumstance murder. For the prior prison terms, it added four years to Gonzales's term, two years to David's term, three years to Ray's term, and two years to Sauceda's term. It imposed a $10,000 restitution fine against each appellant pursuant to section 1202.4, subdivision (b), and direct victim restitution in the amount $7,517.05.

We conclude the record supports the jury's finding that the movement of Ibarra no more than 40 feet within a residence was substantial for purposes of kidnapping because it increased the risk of harm to him, decreased the likelihood of detection, and increased the opportunity for appellants to commit further crimes. Substantial evidence also supports the jury's finding that the kidnapping special-circumstance allegations were true because each appellant was a major participant in the kidnapping that led to the victim's murder and each demonstrated reckless disregard for human life. We correct all the abstracts of judgment to strike an unauthorized additional

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[2] For ease of identification, we refer to the Escobars by first name.

sentence of "25 years to life." We reject various other contentions and otherwise affirm.

FACTUAL AND PROCEDURAL HISTORY

Sauceda supplied drugs to Ibarra, Ray, and Robert Sosa. He collected taxes on the sales for the Sureños gang. A few months before Ibarra was killed, Ibarra took a large quantity of drugs from Sauceda, and sold them without gang permission. He also "burn[ed]" Ray for drugs. As a result, Ibarra was "greenlit." Sosa testified this means "whenever someone sees you, to inflict pain on you in any possible way." That "Ibarra was in trouble," was "spread all over town." Sauceda looked for Ibarra, who avoided him. Sauceda told a woman he wanted to "check" or "beat up" Ibarra. He wrote in a letter that, "[Ibarra] and his bro are out there burning people. The outcome doesn't look good for them."

Marissa sold drugs from her house in Santa Maria. She was friends with Ibarra, and she previously let Ibarra hide in the house. She knew Ibarra owed Ray money and Ibarra was afraid of Ray.

Around 12:30 p.m. one March afternoon, appellants arrived at Marissa's house. Marissa was home with her brother, Angel, and her boyfriend, Sosa.

"[A] line of guys" wearing gloves came in the front door. Ray led, followed by his 14-year-old son (Little Ray), Castillo, and Gonzales.[3] Sauceda arrived a short time later through the back door, also wearing gloves. David[4] then arrived

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[3] Sosa testified Castillo was not wearing gloves.

[4] David, Ray, and Little Ray are grandfather, father, and son, respectively.

through the front door with Anthony Solis[5] and a woman, Verenisa Aviles.[6]

Marissa was not expecting the men and did not know most of them. Gonzales is her boyfriend's older brother. The men told Marissa and Angel to put their cell phones on the table.

Ray told Marissa to call Ibarra and persuade him to come to the house. Gonzales dialed Ibarra's number on Marissa's phone and handed it to her. She "froze up" and Aviles took over the call, pretending to be Marissa. Aviles said she needed methamphetamine. Ibarra said he would be there in 10 minutes.

While they waited, Sauceda had Marissa show him a back bedroom. He looked around, moved a dresser out of the middle of the room, placed chairs in a circle, and then returned to the living room with Marissa. At some point, a shower curtain was placed on the carpeted floor of the back bedroom.

Ray told Sosa to take Little Ray away. Sosa and the boy left together out the back door.

Still waiting for Ibarra, Ray and Sauceda took Solis into a side bedroom and "checked him" over his own drug debt. The four men returned to the living room when they heard someone say, "[Ibarra's] coming."

When Ibarra arrived at 1:49 p.m., he called Marissa's phone from outside and asked if anyone else was in the house.

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[5] Solis was tried with appellants, but the jury was unable to reach a verdict on the charges against him. He later pled guilty to kidnapping.

[6] Before trial, Aviles pled guilty to kidnapping, false imprisonment, and assault with deadly force in exchange for a sentence of nine years eight months.

She said she was alone and he should come in. Ray, Castillo, Gonzales, Sauceda, David (the five appellants), and Solis went to the back of the house. Gonzales put Marissa in her son's bedroom.

When Ibarra walked into the living room, Angel was alone in the room. Angel said his sister would be right out, and went into his bedroom where he watched through a doorway.

Ray, Castillo, Gonzales, Sauceda, David, and Solis rushed to the entryway from the back of the house and surrounded Ibarra. "All of them" hit and kicked Ibarra in the face, chest, and back. Ray stabbed Ibarra in the chest with a knife or scissors. Castillo struck Ibarra with a machete across the back.

Angel testified that the whole group moved as a "mob" to the back bedroom, still hitting and surrounding Ibarra. Solis testified that only Angel, Sauceda, and Ibarra fought by the front door, and that Ibarra walked to the back bedroom "[o]n his own." Solis said he and David planned to "sneak" out the back of the house, but they went into the back bedroom because Sauceda said to Solis, "Come here." Solis complied because he owed Sauceda money. Solis thought he was going to be beaten with Ibarra, and thought the beating would be worse if he ran. Solis had asked David not to leave the house without him, and David followed him into the back bedroom.

After the group moved in to the back bedroom, Angel heard Ray say something about Ibarra sleeping with his girlfriend, and then, "Take all your clothes off," "You have a little dick," and "You're going to suck my dick."[7] Marissa heard much

[7] Angel was in a witness protection program when he testified at trial.

the same from her bedroom. Ray said, "Sing your ABC's in Spanish." Angel heard Ibarra say his ABC's. Angel and Marissa heard the sound of hitting continue, with Ibarra begging for the men to stop. Angel heard Ray say, "He's leaking," and "Everybody get a piece of that."

Sosa returned with Little Ray. Sosa put on gloves and went into the back bedroom. There, he saw Ibarra, naked on the shower curtain on the floor, on his hands and knees.[8] He was bleeding from his nose and mouth. A belt was around his neck. Solis held it like a leash.

Ibarra was surrounded by Ray, Castillo, Sauceda, David, and Solis. Sosa saw "[a]ll of" the men striking Ibarra. Ray was poking Ibarra in the back hard with scissors repeatedly. Castillo grabbed the belt from Solis, yanked Ibarra to the ground, yelled at him, and waved the machete at him. Sauceda was "standing there" "look[ing] intimidated." David held Ibarra's clothes and looked down. According to Solis, Sosa asked, "What the fuck are we going to do with him? Are we going to kill him?" and Ray responded, "Naw, nothing like that." Ray pushed Sosa out of the room, and followed him to the living room.

Angel, Marissa, and Gonzales had returned to the living room. Angel testified that Ray came out of the bedroom "all pumped up and laughing," wearing gloves and no shirt, and "dripping in sweat."

Ray told Angel and Marissa they "did it because . . . they were real motherfucking gangsters," and "because [Ibarra] was a piece of shit, and we did this for our neighborhood." Ray

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[8] Sosa testified for the prosecution after he pled guilty to kidnapping for the benefit of a gang in exchange for a 15-year prison term.

thanked Marissa and Angel for the use of the house. He told Marissa they would replace her carpet and pay her rent. Ray told Angel that if anything "leak[ed]" out about this there would be "repercussions."

Solis came out of the back room carrying clothes. Solis got a garbage bag from the kitchen, put the clothes and his bloody shoes in it, and gave it to Angel. Ray told Angel to "barbeque" it. Angel went outside to a pit used for burning, but Castillo came out and took the bag from Angel so he could check Ibarra's clothes for "dope." Sosa told Angel to act normally. Angel stayed outside and did yard work. Ray gave Sosa the machete and told him to get rid of it.

Ray, Sauceda, and Aviles left in Sauceda's car at about 3:00 p.m. David, Sosa, Solis, and Little Ray left in David's van. Castillo, Gonzales, Marissa, and Angel remained at the house. Castillo stayed in the back bedroom with Ibarra.

Angel heard Ibarra crying and moaning in the bathroom that adjoined to the back bedroom. The shower was running. Gonzales "danc[ed] around mopping" the floor to music, "having a good time." Angel testified that Castillo came out of the back bedroom, grabbed a kitchen knife, and returned to the back bedroom.

Sosa returned after he hid the machete. He also heard the shower running. He went to the back bedroom and saw Castillo sitting on a chair. Sosa went through to the adjoining bathroom and found Ibarra in the shower. He was bruised, swollen, and bleeding. The water was tinted red. There was a big gash on Ibarra's back which Sosa described as, "Meat. White on the inside. Just, you know, like a bad injury." Ibarra asked Sosa to take him to a hospital.

Sosa asked Castillo if he could get help for Ibarra and Castillo said, "no." Castillo told Sosa to talk to Ray, and not to do anything unless Ray told him to. It was about 4:30 p.m.

Sosa found Ray at another house. David was parked in the driveway in his van. Sosa went inside and whispered to Ray that Ibarra was badly hurt and they needed to help him. Ray led Sosa to the van for a private conversation. Inside the van, with David in the driver's seat, Sosa told Ray that Ibarra was "really hurt . . . I think he might die . . . . Let's take him to the hospital." Ray said, "no." He said Ibarra was "a piece of shit," and "that he had to die."

Sosa went back to Marissa's house. He went into the back bedroom and told Castillo that Ray wanted Ibarra to die. Sosa said he wanted to take Ibarra to the hospital anyway. Castillo would not agree. Sosa checked on Ibarra, who was sitting bent over on the toilet, looking pale, having difficulty breathing, and asking for help.

Angel, Marissa, and Sosa walked to a donut store. Sosa told Angel to get beer and cigarettes, take them back to Castillo and Gonzales, and stay at the house to make sure no one came inside. Angel did as he was told. Sosa and Marissa returned briefly to the house, saw Gonzales and Castillo cleaning, and left again.

Angel came back and gave Gonzales a beer. Castillo came out of the back bedroom and said Ibarra felt he was going to pass out. Gonzales told Castillo to put Ibarra in the shower, and told Angel to help. Angel refused. Castillo returned to the back bedroom.

Angel heard Ibarra yell and then there was silence. Castillo came out covered with blood and said, "It's done."

Ibarra died from "multiple stab, puncture, incised and blunt-force injuries of the head, chest, abdomen, back and extremities." A cluster of puncture wounds to his right jugular vein matched a Phillips-head screwdriver that was found in the back bedroom, and would have been "fatal regardless." His back had been hit repeatedly with great force by the buckle of a belt that was found in the back bedroom, broken into pieces. The belt also hit the back of Ibarra's scalp under which large areas of hemorrhage were found.

Castillo, Gonzales, and Angel left the house and went in different directions. Gonzales rode away on a bike. Castillo gave Angel a garbage bag which Angel threw into some bushes.

Later, Ray sent Sosa back to check Marissa's house. He returned with Little Ray and found Ibarra's body on the carpet in the back bedroom. Two days later, Ibarra's body was found in the back of a U-Haul truck parked in a nearby town.

A gang expert testified that Ray, Gonzales, Sauceda, and Sosa were active members of a Sureño gang, David was a retired member, and Castillo was an associate. But the jury found not true allegations that the crimes were committed for the benefit of a street gang.

DISCUSSION

Substantial Evidence of Asportation to Support First Degree Felony Murder and Kidnapping Special Circumstance

Appellants contend there is not sufficient evidence (1) to support the convictions for first degree murder based on the felony-murder-kidnapping theory or (2) to support the kidnapping special-circumstance findings, because Ibarra was moved no more than 40 feet within a residence and the movement was merely incidental to an associated assault.

(*People v. Martinez* (1999) 20 Cal.4th 225, 237 (*Martinez*).) We disagree.

We review the record in the light most favorable to the judgment and determine that it includes substantial evidence to support the verdicts. (*People v. Morgan* (2007) 42 Cal.4th 593, 613-614.)

Proof of kidnapping is required both to support first degree murder based on kidnapping felony murder and to support the kidnapping special-circumstance findings. Murder committed in the perpetration of a kidnapping is murder of the first degree. (§ 189.) And first degree murder that is committed while the defendant is engaged in a kidnapping is punishable by death or life in prison without the possibility of parole. (§ 190.2, subd. (a)(17)(B).)

Kidnapping requires proof that (1) the victim was moved by means of force or fear, (2) without consent, (3) for a substantial distance. (§ 207, subd. (a); *People v. Bell* (2009) 179 Cal.App.4th 428, 435.) A substantial distance does not require proof of a specific number of feet. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1155.) Instead, the jury considers the totality of the circumstances to decide whether the movement was substantial. (*Martinez*, *supra*, 20 Cal.4th at p. 237.) These contextual factors may include whether the movement increased the risk of harm, decreased the likelihood of detection, increased the danger inherent in a victim's foreseeable attempts to escape, or enhanced the attacker's opportunity to commit additional crimes. (*Ibid.*; CALCRIM No. 1215.) No single contextual factor is essential to finding that the distance is substantial. (*Martinez*, at p. 237.) But if the movement is "only a very short distance," contextual factors will not suffice. (*Ibid.*)

Substantial evidence supports a finding that appellants forcibly moved Ibarra from the front door to the back bedroom, increasing the risk of harm to him, decreasing the likelihood of detection, and increasing their opportunity to commit additional crimes. Appellants contend the distance was very short and did not increase the risk of harm to Ibarra because he was already surrounded by six men at the doorway. The distance was between 15 to 42 feet, but "measured distance is not alone determinative." (*People v. Corcoran* (2006) 143 Cal.App.4th 272, 280.) The back bedroom had been prepared for additional crimes. Furniture was cleared from the center and a shower curtain was placed on the carpet. In the back bedroom, appellants could more easily surround and control Ibarra, and later Castillo alone could maintain control of him for hours while people came and went from the house. Where, "a defendant moves a victim from a public area to a place out of public view, the risk of harm is increased even if the distance is short." (*People v. Shadden* (2001) 93 Cal.App.4th 164, 169 (*Shadden*); *People v. Arias* (2011) 193 Cal.App.4th 1428, 1435 [movement of a victim 15 feet from outside to inside his apartment, to facilitate a search for gang members to shoot, was substantial]; *Corcoran*, at p. 279 [movement 10 feet from public area to back office was substantial and not incidental to robbery].)

The "critical factor" is that "the defendant either secluded or confined the victim." (*Shadden*, *supra*, 93 Cal.App.4th at p. 170 [movement nine feet from the front of a video store to a back room was substantial because the seclusion of the victim increased the risk of harm].) Castillo correctly observes that in *Shadden* the front of the store was public, while here the entryway was not. But the movement resulted in

equivalent seclusion. This case is like *People v. Delacerda* (2015) 236 Cal.App.4th 282, 295, in which movement 22 to 40 feet within a house, into a closet, was substantial because of the opportunity for further crimes and reduced opportunity for escape.

Appellants argue the movement did not increase the risk of harm because they attacked Ibarra before they moved him. But the subsequent torture session that led to his death was facilitated by moving Ibarra to the back bedroom, where they could isolate and control him, where a shower curtain protected the carpet from bodily fluid evidence, where Marissa and Angel could not see who participated in the attack, and where Ibarra could not see Marissa or Angel and beg them to intervene.

This case is unlike *People v. Perkins* (2016) 5 Cal.App.5th 454. In *Perkins*, movement from one room to another in a residence was not substantial because it was not likely the victim could have escaped from either room and the defendant's opportunities were the same in both. (*Id.* at p. 470.) The change from the entryway to the back bedroom eliminated both Ibarra's easiest means of escape and best likelihood of detection by visitors. Photographs introduced at trial showed the back bedroom did not have an exterior door and curtains covered the windows.

Appellants point out that the movement must be more than incidental to the commission of an associated crime, and contend that here it was incidental to assault. An "associated crime," "is any criminal act the defendant intends to commit where, in the course of its commission, the defendant also moves a victim by force or fear against his or her will." (*People v. Bell*, *supra*, 179 Cal.App.4th at pp. 438-439, italics omitted.)

Appellants did assault Ibarra while they moved him, but the movement was not incidental to the assault. Its purpose was to get Ibarra to the back bedroom which had been carefully prepared for additional crimes. The evidence supports the jury's conclusion that the movement was substantial.

Felony-murder Instruction—Movement Incidental to an Intended Assault (CALCRIM No. 1215)

The trial court instructed the jury pursuant to CALCRIM No. 1215 to consider "whether the distance the other person was moved was beyond that merely incidental to the commission of *kidnapping*." (Italics added.) Appellants contend the court should have identified associated crimes, such as assault or false imprisonment, in place of the word "kidnapping." We conclude this error was harmless.

"'In a case involving an associated crime, the jury should be instructed to consider whether the distance a victim was moved was incidental to the commission of that crime in determining the movement's substantiality.'" (*People v. Williams* (2017) 7 Cal.App.5th 644, 671 (*Williams*).) Thus, the instruction should have referred to an associated crime. But under any reasonable interpretation of this record, the movement was not incidental to an associated crime because appellants forced Ibarra into the back bedroom in order to evade detection, control his movements, decrease his opportunity to escape, and to perform extensive and prolonged violent assaults that would have been more difficult to perform in the entryway.

This case is unlike *Williams*, in which movement was incidental to a robbery when the defendants asked a cashier in an AT&T store, "Where's the stuff?" When the cashier pointed to the vault, the defendants ordered him to use the code to open it,

pushed him inside, ordered him to open the safe that was in the vault, and stole iPhones from it. (*Williams*, *supra*, 7 Cal.App.5th at p. 661.) They could not have completed the robbery without the movement. In contrast, appellants could (and did) assault Ibarra at the front door, without moving him to the back bedroom. Movement to the back bedroom gave them an opportunity to commit additional violent crimes, undetected.

Substantial Evidence of Intent to Kill, Reckless Disregard for Human Life, and Major Participation to Support Special-circumstance Findings

Appellants contend that even if they moved Ibarra a substantial distance, we should reverse the kidnapping special-circumstance findings because there is no substantial evidence they (1) intended to kill Ibarra or had reckless disregard for his life, and (2) were major participants in the kidnapping. (§ 190.2, subds. (a)(17)(B), (c) & (d).)[9]

A person who is not the actual killer may be subject to life without the possibility of parole for a kidnapping special-circumstance murder only if he either (1) intends to kill (§ 190.2, subd. (c)); or (1) acts with "reckless indifference to human life" and (2) "as a major participant," aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of the kidnapping (§ 190.2, subd. (d); *People v. Banks* (2015) 61 Cal.4th 788, 797-798 (*Banks*)).

A person acts with reckless indifference to human life when he appreciates that his conduct involves a grave risk to

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[9] Castillo does not raise this issue in his briefs. He demonstrated reckless disregard for human life when he refused to take Ibarra to the hospital and when he drove a screwdriver into his neck.

human life. (*People v. Estrada* (1995) 11 Cal.4th 568, 580 (*Estrada*).) Factors to consider include knowledge of the presence of weapons, use and number of weapons, presence at the crime and opportunities to restrain or aid the victim, duration of the felony, knowledge of a coparticipant's likelihood of killing, and efforts to minimize the risks of violence during the felony. (*People v. Clark* (2016) 63 Cal.4th 522, 618-623 (*Clark*).)

Factors to consider when deciding if one is a "major participant" include the person's role in planning the enterprise that led to death; their role in supplying lethal weapons; their awareness of dangers posed by the nature of the crime, weapons used, or experience or conduct of other participants; their presence at the scene and position to facilitate or prevent the murder; whether their action or inaction played a role in the death; and what they did after lethal force was used. (*Banks*, *supra*, 61 Cal.4th at p. 803.)

Each appellant assisted in a violent and ultimately lethal attack of long duration during which any available deadly object was used to inflict severe, and ultimately lethal, injuries on Ibarra. Although Ray and Castillo inflicted most of the wounds, none of the participants acted to restrain them or to help Ibarra. They were each in a position to do so. They saw firsthand, or were told of, the severity of Ibarra's injuries. They left Ibarra without medical help. He suffered for hours, begging for help, before he died. The record supports the necessary findings as to each.

Ray organized and directed the lethal incident, inflicted violent injuries on Ibarra, and made the decision that Ibarra could not have medical care although Sosa told him Ibarra might die. Ray demonstrated intent to kill when he refused

Sosa's request to take Ibarra to the hospital and said "he [is] a piece of shit" and "he ha[s] to die."[10] Ray contends Sosa was an unreliable accomplice witness and points to evidence that Ray told participants not to kill Ibarra, that he told Marissa the "check" of Ibarra was over, and that he said Ibarra was not going to die. He points out that Sosa could have called 911 at any time and may have fabricated testimony to assuage his own guilt. But Sosa's testimony is not inherently improbable, and we defer to the jury on the weight of this contrary evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181 (*Young*).) The record amply supports their finding that Ray intended to kill Ibarra.

Gonzales was in the front of the house much of the time, but he was a major participant and acted with reckless disregard for Ibarra's life. He dialed the phone for Marissa to call Ibarra, he put Marissa in a side room and acted as a look-out watching her and her brother. He was part of the group that forced Ibarra down the hallway, and Marissa testified he was in the back bedroom for 20 minutes. His fingerprints were found on a piece of glass in the back bedroom that could have caused cuts on Ibarra's back. While Ibarra bled in the shower and moaned for help, Gonzales ignored him and mopped the floor, dancing and drinking beer.

Sauceda was not present when Castillo stabbed Ibarra in the neck, but he was a major participant in the kidnapping and acted with reckless disregard for Ibarra's life. Months before the killing, Sauceda wrote that the outlook "doesn't" look good for Ibarra because of his drug debts. Sauceda was part of the group that forced Ibarra into the back bedroom

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[10] The true finding of the torture special circumstance as to Ray required proof of intent to kill. (§ 190.2, subd. (a)(18).)

and he was present while Ray tortured Ibarra. He did not intervene or attempt to restrain anyone. Witnesses testified he was instrumental in disposing of the body. Although Sauceda contends he only thought they would "check" Ibarra, the jury rejected this interpretation of the evidence. The jury could reasonably conclude "'a law-abiding person [in Sauceda's position] would observe'" that Ibarra's life was in danger when he was forced into the back bedroom, a belt was put around his neck like a leash, and he was attacked with a machete, scissors and a belt. (*Clark*, *supra*, 63 Cal.4th at p. 617.)

David did not use any weapons and was not there when Castillo stabbed Ibarra, but he was there when the group lured Ibarra to the house, he helped force Ibarra into the back bedroom, he stayed in the room while Ray tortured Ibarra, he helped dispose of the bloody machete, and he was in the van when Sosa told Ray that Ibarra needed to go to a hospital and might die. He did nothing to restrain the violence or to help Ibarra.

The record supports a finding that each appellant demonstrated the requisite culpability for imposition of life without the possibility of parole. "[S]ome nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies," for example. (*Tison v. Arizona* (1987) 481 U.S. 137, 157.) "This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.'" (*Ibid.*) Thus, "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a

capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." (*Id.* at pp. 157-158.)

Instruction on Kidnapping Special Circumstance—"Reckless Indifference" and "Major Participation" (CALCRIM No. 703)

Appellants contend the trial court erred because it did not define the terms "reckless indifference" and "major participation" in the standard instruction on the kidnapping special circumstance. It is settled that these terms are not unconstitutionally vague, and the court does not have a sua sponte duty to define them for the jury. (*Estrada*, *supra*, 11 Cal.4th at p. 578; *People v. Price* (2017) 8 Cal.App.5th 409, 451.)

Lesser Included Instructions—Involuntary Manslaughter Based on Death During Commission of Felony False Imprisonment

Appellants contend the court had a sua sponte duty to instruct the jury on involuntary manslaughter because the jury could have concluded Ibarra's death occurred during the commission of false imprisonment, a felony that is not inherently dangerous in the abstract and does not support a conviction for second degree murder. (*People v. Burney* (2009) 47 Cal.4th 203, 252 (*Burney*).) We are not persuaded.

The trial court must instruct on a lesser included offense if there is evidence that, if accepted by the trier of fact as true, would absolve the defendant of the greater but not the lesser crime. (*Burney*, *supra*, 47 Cal.4th at p. 250.) When a person commits an unlawful killing but does not intend to kill or act with conscious disregard for human life, the crime is involuntary manslaughter. (§ 192, subd. (b).) It may be proved by evidence that the defendant committed a crime that is not inherently dangerous to human life, with criminal negligence,

causing death. (See CALCRIM No. 580.) False imprisonment is not inherently dangerous in the abstract. (*People v. Henderson* (1977) 19 Cal.3d 86, 93, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484, 490.)

Appellants contend that if the jury found the movement was not substantial, they could have found appellants guilty of false imprisonment but not kidnapping, thus supporting convictions for involuntary manslaughter. But the court only has a duty to instruct on involuntary manslaughter if it is supported by the evidence. The evidence was overwhelming that each appellant acted with conscious disregard for human life, as discussed above. And even if they were entitled to the instruction, the error would be harmless in view of the jury's express findings that the kidnapping special-circumstance allegations were true as to each appellant.

Instruction That Jury Did "Not All Need to Agree on the Same Theory" of Murder (CALCRIM No. 548)

Appellants contend the trial court erroneously stated the law when it instructed the jury that it did "not all need to agree to the same theory" of murder, because this suggested the jurors did not all need to agree on the degree of murder. (*People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1019, 1025; *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1278 (*Johnson*).) We reject the contention because the instructions as a whole explicitly required unanimity on the degree of murder.

A jury verdict must be unanimous on the degree of murder; but, it need not be unanimous on theories of guilt going to the same degree of murder. (*People v. Sanchez*, *supra*, 221 Cal.App.4th at p. 1025; *Johnson*, *supra*, 243 Cal.App.4th at p. 1278.) The current version of CALCRIM No. 548 responds to

Sanchez and *Johnson* with the following bracketed language: "You do not all need to agree on the same theory[, but you must unanimously agree whether the murder is in the first or second degree]." (CALCRIM No. 548 (Fall ed. 2016).) The court did not use the bracketed language, which would have provided greater clarification, but its omission in the context of this case did not result in an erroneous statement of the law.

The challenged instruction told the jury that "defendants have been prosecuted for murder under two theories: (1) malice aforethought, and (2) felony murder. [¶] Each theory of murder has different requirement, and I have instructed you on both. [¶] You may not find a defendant guilty of murder unless all of you agree that the People have proved that the defendant committed murder under at least one of these theories. You do not all need to agree on the same theory."

Appellants were prosecuted under four theories of first degree murder, but the more specific instruction on first degree murder made this clear. And the instructions as a whole made it clear that the jury must unanimously agree on the degree of murder, although it need not agree on the theory. The court's specific instruction on first degree murder stated that "defendants have been prosecuted for first degree murder under several theories: (1) Premeditated, Willful and Deliberate, (2) Lying in Wait, (3) Torture, (4) Felony-murder Kidnap or Torture." It instructed them that they need not "agree on the same theory," but also said they could only return a verdict of first degree murder if "all of you agree that the People have proved beyond a reasonable doubt that [the] defendant is guilty of first degree murder."

The court instructed the jury on one theory of second degree murder: implied malice. It instructed them they could only return a verdict of second degree murder "[i]f all of you agree that [the] defendant is not guilty of first degree murder but also agree that [the] defendant is guilty of second degree murder." It told the jury that "[i]f you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined [in other instructions]." It also instructed the jury, "Your verdict on each count and any special findings must be unanimous . . . [a]ll of you must agree to it."

This case is unlike *Sanchez*, in which jurors were misled by an instruction that they need not all agree on the theory of murder. In that case, the theories pertained to different degrees. The *Sanchez* jury was presented with one theory of first degree murder (felony murder) and one theory of second degree murder (malice aforethought). (*People v. Sanchez*, *supra*, 221 Cal.App.4th at pp. 1026-1027.) Similarly, in *Johnson*, the jury was presented with "one theory of first degree murder, namely, first degree felony murder, and one theory of second degree murder, namely, malice murder." (*Johnson*, *supra,* 243 Cal.App.4th at p. 1279.) In contrast here, the instruction was appropriate because the jury could disagree on which of four theories of first degree murder applied while being unanimous on the degree.

Appellants have not met their burden of demonstrating a reasonable likelihood the jury misunderstood CALCRIM No. 548 or applied it in an improper manner. (*People v. Solomon* (2010) 49 Cal.4th 792, 822.) When read with all the other instructions, including those explicitly requiring unanimity

as to the degree, the need for unanimity on degree of murder was clear.

Instruction Not to Consider Sosa's Uncorroborated Testimony (CALCRIM Nos. 301 & 335)

David and Sauceda contend the court erred when it instructed the jury not to consider Sosa's uncorroborated testimony because he was an accomplice. (CALCRIM No. 301.) They did not object, but contend the instruction incorrectly stated the law and the court should have explained that exculpatory testimony needs no corroboration. We conclude the instruction read in context did not mislead the jury to ignore uncorroborated exculpatory testimony.

Exculpatory testimony of an accomplice need not be corroborated. (*People v. Smith* (2017) 12 Cal.App.5th 766, 780 (*Smith*).) Sosa provided incriminating testimony about what happened in the back bedroom, but he also provided somewhat exculpatory testimony when he said he saw Sauceda standing back from the group and looking intimidated, that David was "just standing there" looking at the ground, that Ray and Sauceda were invited to the house that day for a reason unrelated to Ibarra, that Marissa and Angel expected them, and that Sauceda was not in the room when Marissa called Ibarra. Sauceda's counsel argued that he did not have intent to kill based on Sosa's testimony.

But the challenged instruction, read together with CALCRIM No. 335, correctly stated that only incriminating testimony requires corroboration. The court instructed the jury that, "Except for the testimony of [Sosa,] and if you determine that [three other witnesses are accomplices], which requires supporting evidence . . . , the testimony of only one witness can

prove any fact." (CALCRIM No. 301.) With regard to that supporting evidence, it instructed the jury, "You may not *convict* the defendant . . . based on the statement or testimony of an accomplice alone. . . ." (CALCRIM No. 335, italics added.) We must read the instruction as a whole. (*Young*, *supra*, 34 Cal.4th at p. 1202.) The instructions did not prohibit the jury from acquitting a defendant based on Sosa's uncorroborated exculpatory testimony.

In *Smith*, *supra*, 12 Cal.App.5th 766, the absence of an instruction that the jury could consider uncorroborated accomplice exculpatory testimony required reversal notwithstanding another instruction similar to CALCRIM No. 335. But the record in *Smith* demonstrated that the jury was actually confused about whether an accomplice's exculpatory testimony required corroboration. It was the point of intense disagreement with a lone hold-out juror, that juror was excused after refusing to ignore uncorroborated exculpatory evidence, and the testimony "*did* exculpate" the defendant. (*Id*. at pp. 781, 784.) Here, there is no evidence of juror confusion. Sosa's testimony did not completely exonerate Sauceda, and our review of the entire record demonstrates that the result would not have been more favorable to him if the court had expressly stated Sosa's exculpatory testimony required no corroboration. (*People v. Watson* (1956) 46 Cal.2d 818.)

Hearsay Evidence Relayed by Gang Expert that David Actively Participated in the Sureño Gang

David contends he was prejudiced when a gang expert offered inadmissible hearsay testimony that he actively participated in the Sureño gang. (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*); *People v. Sanchez* (2016) 63 Cal.4th 665

(*Sanchez*).) We agree the testimony was improper but conclude there was no prejudice.

The gang expert testified that he reviewed jail classification interviews in which David said he was a retired Northwest gang member. He also testified that people in photographs with David were gang members, and that he knew this from "coordinating with some of the prison investigators." Based on this and "the witness testimony we've heard over the last seven weeks," he opined that David was an associate of the Sureño gang and actively participated in the gang.

The jail classification statement was inadmissible absent a *Miranda* waiver. (*People v. Elizalde* (2015) 61 Cal.4th 523, 540 (*Elizalde*) [gang affiliation questions not within booking exception].) And both categories of testimony impermissibly related case-specific facts not shown by other competent evidence. (*Sanchez*, *supra*, 63 Cal.4th at pp. 683-686.)

David did not forfeit the claim when he did not specifically object to the testimony on the grounds he now asserts during the gang expert's testimony. (Evid. Code, § 353, subd. (a) [specific grounds for objection required]; *People v. Redd* (2010) 48 Cal.4th 691, 730 [forfeiture where 6th Amendment grounds not stated].) *Sanchez* and *Elizalde* had not been decided and David and his codefendants preserved the issue when Castillo moved in limine to prevent the expert from relying on extrajudicial statements, when David asked at trial that "somebody from the jail" be brought in to testify to classification, and when counsel alerted the court that the California Supreme Court had granted review of the issue in *Sanchez*, after the expert testified.

But David was not prejudiced. The jury did not find the gang enhancement allegations to be true. David argues that

the evidence of gang association may have contributed to the murder conviction because it was the only evidence of his motive to facilitate the crime. But his father-son relationship with Ray provided equally strong evidence of motive, and gang tattoos on his body provided strong evidence of his gang association. We are satisfied beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Denial of Batson/Wheeler Motion as to Two African-American Potential Jurors

Appellants contend the prosecutor impermissibly discriminated when she exercised two peremptory challenges against African-American jurors. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).) We reject the contention because appellants did not establish a prima facie case of purposeful discrimination. Nondiscriminatory grounds upon which the prosecutor might have challenged the jurors in question are apparent from, and clearly established in, the record. (*People v. Hoyos* (2007) 41 Cal.4th 872, 900; *People v. Scott* (2015) 61 Cal.4th 363, 384 (*Scott*).) Moreover, the prosecutor stated race neutral and credible reasons for her challenges because one of the potential jurors was a nurse who was not paying attention and the other potential juror was young. She excused other non-African-American potential jurors for the same reasons.

There were three African-Americans in the venire. The parties stipulated to excuse one. The prosecutor used peremptory challenges to excuse the remaining two. Counsel objected after the second challenge based on *Batson*/*Wheeler*. The

trial court invited the prosecutor to offer reasons. (*Scott*, *supra*, 61 Cal.4th at p. 391.)

The prosecutor explained that she excused the first juror because he was young, and in her view young jurors "have little stake in the community," and "little to no life experience." She excused the second because she was not paying attention and because she was a nurse. She explained her view that nurses "second-guess medical testimony," and are "extremely liberal." The trial court also observed the juror was not "terribly engaged." The prosecutor excused another nurse and two other mental health professionals and a teacher for the same reason. And she excused three other potential jurors because they were young.

The trial court found appellants did not make a prima facie case, and even if they had, the prosecutor justified the challenges for "reasons that have nothing to do with their being African-American."

The state and federal constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias. (*People v. Guerra* (2006) 37 Cal.4th 1076, 1100, overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 114.) Subject to rebuttal, we presume a peremptory challenge is properly exercised. (*People v. Salcido* (2008) 44 Cal.4th 93, 136.) The *Batson*/*Wheeler* inquiry consists of three steps: (1) did the defendant make out a prima facie showing that the totality of the relevant facts gives rise to a reasonable inference of discriminatory intent; (2) if so, did the prosecutor explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications; and (3) if so, has the defendant proved purposeful discrimination. (*Sanchez*,

supra, 63 Cal.4th at pp. 433-434; *Scott*, *supra*, 61 Cal.4th at p. 383.) Appellants did not meet the prima facie threshold.

We independently review the record to decide whether the totality of the relevant facts gives rise to an inference of discriminatory purpose. (*People v. Howard* (2008) 42 Cal.4th 1000, 1018; *People v. Bonilla* (2007) 41 Cal.4th 313, 342.) We consider the entire record of voir dire as of the time the motion was made, but certain evidence may be especially relevant: whether the prosecution struck all or most of a group or used a disproportionate number of challenges against them, whether the jurors in question share only their membership in the group and no other characteristics, whether the prosecution engaged members of the group in only desultory voir dire, and whether the defendant is a member of the excluded group or the victim is a member of the group that largely remains. (*Ibid.*) We do not consider explanations offered by the prosecutor, but we do consider nondiscriminatory reasons that are apparent from and "clearly established" in the record that "necessarily dispel any inference of bias." (*Scott*, *supra*, 61 Cal.4th at p. 384.)

The prosecutor struck the only remaining African-American jurors, but there were only two. The "small absolute size of [the] sample makes drawing an inference of discrimination from this fact alone impossible." (*People v. Bell* (2007) 40 Cal.4th 582, 598, disapproved on other grounds as stated in *Sanchez*, *supra*, 63 Cal.4th at p. 686.) There was no other evidence of discrimination in the record, and the prosecutor struck non-African-American potential jurors for the same reasons, including other young jurors and others in the medical or mental health professions. And the one juror's inattentiveness is established by

the trial court's observations in the record. The trial court did not err when it denied the *Batson/Wheeler* motion.

Juror Removal—Removal of Deliberating Juror Without a Hearing

Gonzales contends the trial court abused its discretion when it excused Juror No. 7 for good cause without a hearing. (§ 1089; *People v. Beeler* (1995) 9 Cal.4th 953, 989 (*Beeler*) [review for abuse of discretion].) We disagree.

On the third day of deliberations, a Friday afternoon after counsel and the jury were excused for the day, Juror No. 7 notified the bailiff that he needed to travel to Arizona because his terminally ill grandmother was being discharged from a hospital into hospice care. He wished to say goodbye to her. He asked to be excused. The bailiff called the judge and relayed the request.

The trial court granted the juror's request without a hearing. On Monday, the court informed counsel of its decision on the record. There was no objection. The court explained, "I thought he could continue deliberations if given time, but in this type of situation, the person is dying, and when and if that's to happen and he's grieving and all of that, his mind would not be focused on the case, so I certainly felt it was good cause to excuse the person, and therefore I did."

The court replaced Juror No. 7 by randomly selecting an alternate's name. The court denied Gonzales's request to use a remaining peremptory challenge against the seated alternate. Deliberations began anew. The jury reached its verdict a week later. The trial court denied Gonzales's motion for a new trial based on the jurors' removal. The trial court did not abuse its discretion.

Substantial evidence supports the determination that there was good cause for removal. If before final submission of the case to the jury, "a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate." (§ 1089.) The question of good cause is for the trial court's sound discretion. (*People v. Watson* (2008) 43 Cal.4th 652, 696.) Caring for a sick or injured family member may constitute good cause. (*People v. Bell* (1998) 61 Cal.App.4th 282, 289.)

The court was not required to conduct a hearing under the circumstances presented here. Gonzales argues the court should have conducted a hearing to determine whether a delay in deliberations would be appropriate. But the statute does not require a hearing. (§ 1089; *People v. Dell* (1991) 232 Cal.App.3d 248, 256 (*Dell*).) Where the facts do not clearly establish a sufficient basis on which to reach an informed and intelligent decision, the court should conduct a hearing in the presence of the litigants and counsel on the question of the juror's ability to serve. (*In re Mendes* (1979) 23 Cal.3d 847, 852 (*Mendes*).) A hearing is not required if the record is sufficient to support the discharge. (*Beeler*, *supra*, 9 Cal.4th at p. 989.) The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ, including whether to conduct a hearing or detailed inquiry. (*Ibid.*)

The trial court could reasonably have concluded that it would be unreasonable to make the juror wait for a Monday hearing. Keeping Juror No. 7 over the weekend for a hearing could have been "pointless and perhaps callous," as in *Mendes*. (*Mendes*, *supra*, 23 Cal.3d at p. 852.) In *Mendes*, the trial court

did not abuse its discretion when it granted a juror's request to be excused without a hearing before trial began after she reported that her brother had just died. The court was warranted in concluding that grief would interfere with her ability to concentrate and "a hearing would have been pointless and perhaps callous." (*Ibid.*)

It could also be unreasonable to make the other jurors wait indefinitely to complete their deliberations while the juror attended to his grandmother, after they had already served for months on this jury. In *People v. Ashmus* (1991) 54 Cal.3d 932, 987, the trial court did not abuse its discretion when it granted a juror's telephonic request to be excused without a hearing during the penalty phase because his mother had just died. The death of the juror's mother constituted good cause to discharge the juror, "not merely to continue the trial," and the procedure was adequate. (*Ibid.*)

Even if there had been error, Gonzales demonstrates no prejudice. (*People v. Hall* (1979) 95 Cal.App.3d 299, 307 ["where an alternate juror, approved by defendant in voir dire, is allowed to deliberate on the jury panel, the defendant bears a heavy burden to demonstrate that he was somehow harmed thereby"].) Gonzales had ample opportunity to voir dire the alternates and use his peremptory challenges against them. (See *Dell*, *supra*, 232 Cal.App.3d at p. 256.) The alternate juror was subjected to the same voir dire proceedings and challenges and had the same opportunity to observe the proceedings as the other jurors. (See *People v. Collins* (1976) 17 Cal.3d 687, 694, superseded by statute on other grounds as stated in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19.)

Jury Misconduct Based on Juror's Nondisclosure of Facts During Voir Dire (Ray and Sauceda)

The trial court did not err when it denied defense motions for new trial based on juror misconduct. During voir dire, jurors were asked if any family member had been a victim of a crime. Juror No. 10 did not disclose that 24 years earlier a group of young gang members made her son remove his hat and shoes at gunpoint. She testified she did not report it to law enforcement, she had forgotten it until after the verdict, she did not discuss it with other jurors, and it did not impact her ability to be fair and impartial. The trial court found she inadvertently committed misconduct, but she was not actually biased and there was no prejudice. We agree.

We review denial of a motion for new trial for abuse of discretion. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1108.) Whether prejudice arose from misconduct is a mixed question of fact and law which we independently review. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

A juror commits misconduct when they intentionally lie during voir dire. (*People v. Jackson* (1985) 168 Cal.App.3d 700, 704.) Inadvertent concealment does not necessarily constitute misconduct. (*People v. Kelly* (1986) 185 Cal.App.3d 118, 125 [unintentional failure to disclose prior victimhood not misconduct]; *People v. Tuggles* (2009) 179 Cal.App.4th 339, 371 [not every failure to disclose is misconduct]; cf. *People v. Green* (1995) 31 Cal.App.4th 1001, 1020 (dis. opn. of Newsom, J.) [concealment is serious misconduct whether inadvertent or deliberate]; *People v. Thomas* (1990) 218 Cal.App.3d 1477 [silence tantamount to lie].)

But even assuming the nondisclosure was misconduct, appellants were not prejudiced because the record demonstrates Juror No. 10 was not actually biased. Juror misconduct raises a rebuttable presumption of prejudice. (*In re Hamilton* (1999) 20 Cal.4th 273, 295.) The presumption is rebutted if the record demonstrates there is no substantial likelihood that a juror was actually biased. (*Id*. at p. 296.) An honest mistake on voir dire cannot disturb a judgment unless there is evidence that the wrong or incomplete answer hid the juror's actual bias. (*Id*. at p. 300.)

We put aside Juror No. 10's conclusion that the incident did not actually impact her verdict. (Evid. Code, § 1150; *People v. Ryner* (1985) 164 Cal.App.3d 1075, 1082-1083 [jurors' statements as to effect of misconduct on their ability to be fair and impartial could not be considered]; *People v. Phillips* (1981) 122 Cal.App.3d 69, 81 [presumption of prejudice cannot be overcome by juror's denial of same].) But the facts do not suggest she was biased. She declared she did not disclose in voir dire that her "son was assaulted at gunpoint while he was in high school by gang members." But when questioned by the court, she said she had "forgotten about it a long time ago." She did not remember the incident until after the verdict, when a defense investigator asked the jurors why they did not think the crime was gang-related. She told the investigator the case involved "personal issues," and "then [she] remembered this incident, because it wasn't gang-related. It was more personal." The boy with the gun apparently believed her son had been flirting with his girlfriend.

The trial court concluded, "I truly believe this juror is not biased" and it did not "in any way" affect the verdict, based on

the juror's "demeanor, her body language, the tone of her voice." Nothing in the record suggests otherwise.

Restitution—Ability to Pay

Gonzales, Ray, David, and Castillo contend the trial court erred by imposing the maximum statutory restitution fines of $10,000 upon them without considering their ability to pay based on their impending incarcerations and facts set forth in their presentence reports. (§ 1202.4, subd. (c).) They objected to the fines in the trial court.

The court must impose a restitution fine from $300 to $10,000 whenever a defendant is convicted of a felony, absent a compelling and extraordinary reason. (§ 1202.4, subd. (b)(1).) Inability to pay is not a compelling and extraordinary reason, but the trial court considers it among other factors when setting the amount of the fine. (§ 1202.4, subd. (c).) A defendant's ability to pay is presumed. (*People v. DeFrance* (2008) 167 Cal.App.4th 486, 505 (*DeFrance*).) He or she has the burden to demonstrate inability. (§ 1202.4, subd. (d); *People v. Gamache* (2010) 48 Cal.4th 347, 409 (*Gamache*).) Other factors the court considers are "the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered losses as a result of the crime, and the number of victims involved in the crime." (§ 1202.4, subd. (d).) While inability to pay may weigh against the maximum fine, other factors may weigh strongly in favor. (*People v. Sweeney* (2014) 228 Cal.App.4th 142, 155.) Consideration of these factors and determination of the amount is a matter for the sentencing court's discretion. (§ 1202.4, subd. (b)(1).)

The bare fact of impending incarceration does not compel a finding of inability to pay. (*Gamache*, *supra*, 48 Cal.4th at p. 409.) For example, in *DeFrance*, *supra*, 167 Cal.App.4th 486, 505, the court did not abuse its discretion when it imposed the maximum restitution fine because the crime was serious and grave and the defendant did not demonstrate "absolute inability" to pay, although he presented evidence that it would take 27 to 126 years for him to pay the fine using prison wages. Here too, defendants did not demonstrate absolute inability to pay and the gravity and circumstances of the offense warranted imposition of the maximum fine.

Appellants contend the trial court was unaware of its statutory duty to consider inability to pay because when Ray raised the issue the court asked, "Can he not take that up with the Department of Corrections?" and "How can I make that determination at this time?" It also ordered the fines to be paid, "[a]s directed by the Department of Corrections." A court does not exercise informed discretion when it does not understand the scope of its discretionary powers. (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1247.)

But the record demonstrates this court did consider ability to pay. Ray's counsel advised the court that it was required by statute to consider ability to pay, and when he summarized the information about Ray's financial situation from the presentence report the court responded, "They get wages in prison." The court was not required to expressly find ability to pay. (§ 1202.4, subd. (d) ["Express findings by the court as to the factors bearing on the amount of the fine shall not be required"]; *Gamache*, *supra*, 48 Cal.4th at p. 409.)

Castillo cites *In re Enrique Z.* (1994) 30 Cal.App.4th 464, as requiring an express finding of ability to pay before a court may impose more than the statutory minimum. But *Enrique Z.* did not apply section 1202.4 because it was a juvenile case. (*Id*. at p. 469 ["We also recognize that [section 1202.4] is not applicable in the instant case, and that there is no analogous statute in the juvenile-offender context . . ."].)

The presentence reports do not establish absolute inability to pay. They do not address "ability to pay for probation services," because of the impending incarceration, and contain few facts about the defendants' finances. The report for Ray states he was 39 years old, a high school graduate with carpentry, plastering and framing skills and was previously employed as a cook. The report for Castillo states he was 31 years old. It includes no information about his employment or education. The report for Gonzales states he was 44 years old, did not complete high school, and previously worked as a landscaper. While awaiting trial he obtained a high school equivalency certificate. The report for Sauceda states he was 35 years old, had graduated from high school, and attended a semester of college in 1999. He was unemployed and living with his mother before he was incarcerated. The report for David states that he was 57 years old, living with his parents, and "maintained steady employment on space launch gentries at Vandenburg Air Force Base" as a "high steel painter." He had been sentenced to state prison twice for selling methamphetamine. The court did not abuse its discretion when it set the maximum fines.

Restitution—Joint and Several Liability

The court ordered each defendant to pay $7,517.05 in direct victim restitution. This was the full amount of Ibarra's funeral and burial expenses. (§ 1202.4, subd (f).) Although appellants did not object, we will grant their request to modify the judgment to clarify that their liability for direct victim restitution is joint and several.

When multiple defendants convicted of the same crime cause a victim to suffer economic loss, the court may impose liability on each defendant to pay the full amount of the loss, as long as the victim does not obtain multiple recoveries. (*People v. Leon* (2004) 124 Cal.App.4th 620, 622.) The statute does not require that the order expressly state that liability is joint and several. (See *People v. Arnold* (1994) 27 Cal.App.4th 1096, 1099.) But it may. (*People v. Madrana* (1997) 55 Cal.App.4th 1044, 1051.) And as a practical matter, liability here is joint and several: "[I]f the combined payments made by multiple defendants exceed the victim's loss, each defendant would be entitled to a pro rata refund of any overpayment." (*Arnold*, at p. 1100; § 1202.4, subd. (j).)

To ensure that appellants are credited for any payments by their codefendants without unnecessary judicial proceedings, we will modify the abstract to clarify that liability is joint and several. (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535.)

Abstract of Judgment

The abstracts of judgment incorrectly state that each appellant received sentences of both 25 years to life and life without the possibility of parole for the murder convictions. The sentences of 25 years to life are unauthorized and should be

stricken, as the Attorney General concedes. (§ 190.2, subd. (a) [The penalty for a defendant found guilty of murder in the first degree is death or imprisonment for life without the possibility of parole if one or more special circumstance is found true]; *In re Sheena K.* (2007) 40 Cal.4th 875, 886 [we may correct an unauthorized sentence].)

DISPOSITION

The abstracts of judgment are corrected to clarify that defendants' liability for direct victim restitution in the amount of $7,517.05 is joint and several and to strike the sentences of 25 years to life. The clerk of the trial court is ordered to prepare amended abstracts of judgment and send certified copies to the Department of Corrections and Rehabilitation. Judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Rick S. Brown, Judge

Superior Court County of Santa Barbara

Madeline McDowell, under appointment by the Court of Appeal, for Defendant and Appellant Reyes Gonzales, Jr.

David Andreasen, under appointment by the Court of Appeal, for Defendant and Appellant David Murillo Maldonado, Jr.

Jennifer M. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant Santos Manuel Sauceda.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Jason Michael Castillo.

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