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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. JOSEPH CAMERON COOK, Defendant and Appellant.	B270542 (Los Angeles County Super. Ct. No. TA137535)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ricardo O. Ocampo, Judge. Affirmed.

Emry J. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Yun K. Lee, Deputy Attorney General, Douglas L. Wilson, Deputy Attorney General, for Plaintiff and Respondent.

The jury convicted defendant and appellant Joseph Cameron Cook of the following offenses: counts 1 and 2—attempted robbery (Pen. Code, §§ 211, 664)[1]: count 3—first degree murder (§ 187, subd. (a)) with a special circumstance of murder committed while defendant was engaged in attempted robbery (§ 190.2, subd. (a)(17)(A)); count 4—attempted murder (§§ 187, 664); and count 5—possession of a firearm by a felon (§ 29800, subd. (a)(1)). The jury also found true firearm use allegations under section 12022.53, subdivision (b), in counts 1 and 2, section 12022.53, subdivision (d), in count 3, and section 12022.53, subdivision (c), in count 4.

The trial court sentenced defendant in count 3 to life in prison without parole, enhanced by 25 years to life for the use of a firearm. In count 4, defendant was sentenced to life in prison, plus 20 years for the gun use enhancement (§ 12022.53, subd. (c)). The trial court imposed a consecutive

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

term of eight months for possession of a firearm by a felon in count 5. Sentences were imposed and stayed in counts 1 and 2 pursuant to section 654.

Defendant contends: (1) the prosecution's chief witness's testimony was coerced; (2) testimony regarding defendant's gang membership was prejudicial; (3) the evidence was insufficient as to counts 3–5 and the special circumstance finding; (4) the prosecutor committed misconduct; (5) the trial court committed instructional error; (6) trial counsel provided ineffective assistance; (7) the trial court erred in failing to sua sponte strike the special circumstance; and (8) the sentence imposed was unconstitutional.

We affirm the judgment.

FACTS[2]

The Crimes

On January 10, 2015, defendant and his girlfriend, Leslie Mojica, were involved in a traffic accident with the murder victim, Darrell Daniels, and his partner, Cynthia Clegg. Mojica was driving her red Mini Cooper with a white top when the accident occurred. Defendant got out of Mojica's car, saw that it had been damaged, and demanded $500 from Daniels. Defendant said that he wanted Daniels to give him the money "now." Daniels explained that his car

[2] Defendant did not offer evidence in his defense.

skidded because the road was wet. He said that he had his insurance information in the glove compartment. Defendant lifted his shirt to show Daniels a gun he had tucked in his waistband. He put his hand on the gun as if to pull it out. Daniels made a U-turn and began driving home. Defendant got into Mojica's car and told her to follow him.

Daniels and Clegg were about to turn into the driveway of their house when Mojica skidded her car to a stop and blocked the entrance. Mojica got out and stood by the car. Defendant went to the passenger side of Daniels's vehicle and tried to open Clegg's door, but she held it shut. Daniels said something to defendant, and defendant moved to the driver's side door. Daniels told Clegg to go inside and call the police. Defendant began screaming at Daniels, demanding money multiple times.

Clegg went inside and told Daniels's mother to call the police. She then went back outside, accompanied by her adult son, who was intellectually disabled.[3] Defendant was still demanding money. Daniels told him that Clegg was undergoing dialysis and their son was "mentally retarded."

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[3] "At trial, all parties used the term 'mentally retarded,' but in accordance with current law and usage, this opinion uses the term 'intellectually disabled' except when quoting. (See Stats.[]2012, chs. 448 [the Shriver 'R–Word' Act, which revised various statutes to replace references to 'mental retardation' with the term 'intellectual disability'], and 457 [similarly replacing references to 'mental retardation'].)" (*People v. Townsel* (2016) 63 Cal.4th 25, 33, fn. 1.)

Mojica apologized to Clegg and took Daniels's insurance information. Defendant asked Clegg if she had any money. Clegg told Daniels that the police had been called. Mojica urged defendant to leave before the police arrived. They drove away. The police arrived soon afterward and took Daniels's statement.

Defendant and Mojica drove to defendant's house. He was still angry. He and Mojica smoked marijuana. Defendant said he wanted to return to Daniels's house to get the money. He felt disrespected because Daniels was Black.[4]

Defendant called his sister's boyfriend, Dontae Johnson. A short time later, defendant went outside to speak with Johnson. When defendant returned, he asked Mojica for her car keys so that he could put a gun in her car. Mojica gave him her keys.

Defendant told Mojica they were going back to Daniels's house. He told Mojica to drive over to him if he signaled her so he could get the gun. Mojica and defendant went outside, where Johnson was waiting for them in his champagne-colored SUV. Defendant got into the front passenger side of the SUV. They drove to Daniels's house, with Mojica following behind in her car.

Approximately 45 minutes to an hour after the incident with defendant, Daniels decided to move his SUV into the garage, in case defendant returned. His stepfather, Ruthel Patton, had his car parked in the garage, so they went outside to switch places. Patton backed his car out of the

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[4] Defendant is also Black.

garage and across the street to allow Daniels to move his SUV inside.

Mojica parked two or three houses away from Daniels's house on the same side of the street. Johnson parked his SUV across the street. Defendant got out of the SUV and headed toward Daniels's house. Two or three minutes later, he signaled to Mojica, who drove over to him. Defendant opened the passenger side door and pulled a black western-style gun out from under the seat. Defendant walked back toward Daniels's house, and Mojica drove away. She heard four or five gunshots as she was driving.

Clegg was in the kitchen, which had a doorway into the garage. She heard a scuffle and people screaming. As Clegg entered the garage to investigate, she heard Daniels yell, "Go call the police." She went back inside and told Daniels's mother to call the police. Clegg then heard three gunshots.

Around the same time, Patton drove his car back into the driveway. A Black man approached from the right side of the driveway and stood several feet from Patton's car. The man pointed a gun at Patton and fired a shot. The bullet passed through the windshield, hit the dashboard, and tore into the chest area of Patton's jacket. Patton was unable to see the shooter's face and did not see where he went. Patton turned off the engine and got out of the car. He went into the garage and saw Daniels sitting in the SUV. He shook Daniels and said his name, but Daniels did not respond.

As Clegg was running back to the garage, Patton came inside and said, "They shot him." Clegg found Daniels

slumped over in his SUV. She saw a white van driving away.

Mojica drove back to defendant's house. Defendant and Johnson arrived approximately 10 to 15 minutes later. Defendant told Mojica, "[H]e shot, but he don't know if he hit him." He was still angry that he had not gotten the $500.

The Investigation

Evidence at the Scene

Sheriff's homicide Detective Daniel Morris and his partner, Detective Richard Tomlin, responded to Daniels's residence around 8:30 p.m. Daniels was deceased when they arrived. His body was partially inside a Ford Explorer SUV, with his feet outside of the driver's side door.

There was blood on the floorboard, center console, and passenger seat. There were two bullet holes in the water heater located near the front driver's side door of the SUV. Another bullet hole was found in the rear portion of the SUV below the window. No weapon was found in the SUV. After Daniels's body was removed, an expended bullet was found on the floorboard near the driver's seat. There was a bullet hole through the windshield of Patton's car and a bullet strike on the backrest of the driver's seat. An expended bullet was recovered from the center console. No shell casings were found at the scene. An autopsy showed that

Daniels died from a single gunshot wound in the middle of his back on the right side.

Detective Morris spoke to Clegg about what had happened earlier in the day. She said they had been involved in an accident with a couple in a small red Mini Cooper car with a white top. The driver was a Hispanic female and the passenger was a Black male. Clegg subsequently identified defendant and Mojica in separate six-pack photographic lineups.

The recovered bullets were consistent with bullets fired from a .38 special or a .357 magnum caliber revolver. The conclusion that a revolver was used was explained by the absence of any shell casing at the scene that would have been ejected from a semiautomatic firearm.

Defendant and Mojica's Arrests

On January 13, 2015, Deputy Adam Kirste stopped Mojica while she was driving with defendant in the car. They were placed under arrest. Mojica was taken into custody and interviewed by Detective Morris and his partner. At first, Mojica lied to the detectives about what had occurred because she was afraid. She eventually told the police what really happened and provided them with defendant's cell phone number. Mojica was allowed to leave after the interview, but she was required to check in daily with police.

Mojica's Second Arrest

Mojica was rearrested on February 4, 2015. The detectives interviewed her again. She was charged with murder, and a special circumstance was alleged.

In May 2015, Mojica gave a video recorded statement (referred to as a "proffer") to the District Attorney's Office and detectives. On June 30, 2015, Mojica entered into a plea agreement to receive a lesser sentence if she testified truthfully in court.

Cell Phone Records

Pursuant to a search warrant, Detective Morris obtained records relating to the cell phone number Mojica identified as belonging to defendant. The number was assigned to Linder Lester, defendant's mother. On January 10, 2015, at 5:47 p.m., before the murder, an outgoing call from defendant's cell phone was placed to Johnson's cell phone. Johnson was later arrested, and the detective searched his cell phone. Defendant's cell phone number was in the contacts on Johnson's phone.

Defendant's Prior Felony

At trial, the parties stipulated that defendant suffered a prior felony conviction on December 2, 2014, in the Los Angeles County Superior Court.

DISCUSSION

Coerced Witness Testimony

Defendant contends he was convicted on the basis of Mojica's coerced testimony, in violation of his right to due process and a fair trial. He argues that Mojica's plea agreement impermissibly required her to testify consistently with her proffer to the District Attorney, which was itself the product of coercive police interrogation tactics.

Defendant's contentions were not preserved for appeal, because he failed to object to Mojica's testimony in the trial court. (*People v. Riel* (2000) 22 Cal.4th 1153, 1178–1179.) Recognizing this, defendant argues that trial counsel was ineffective, in an attempt to avoid forfeiture. "To establish this claim, defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that he was prejudiced, i.e., that it is reasonably probable the result would have been more favorable had counsel acted competently." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 489 (*Hillhouse*).) "If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) Here, defendant has shown no basis for excluding Mojica's testimony as coerced, or for concluding trial counsel was not competent.

Plea Agreement

The use of coerced testimony results in "a denial of the fundamental right to a fair trial in violation of federal constitutional principles." (*People v. Medina* (1974) 41 Cal.App.3d 438, 456 (*Medina*).) "[Due process is implicated] only when the agreement requires the witness to testify to prior statements 'regardless of their truth,' but not when the truthfulness of those statements is the mutually shared understanding of the witness and the prosecution as the basis for the plea bargain. (*People v. Boyer* [(2006)] 38 Cal.4th [412,] 456 [(*Boyer*)].)" (*People v. Homick* (2012) 55 Cal.4th 816, 863 (*Homick*).) To offend due process, "'the bargain [must be] expressly contingent on the witness sticking to a particular version [of her story].'" (*People v. Reyes* (2008) 165 Cal.App.4th 426, 434 (*Reyes*), quoting *People v. Garrison* (1989) 47 Cal.3d 746, 771 (*Garrison*).) A witness who testifies pursuant to an immunity agreement does not give coerced testimony if the agreement requires only that the witness testify truthfully and completely and does not require that the witness testify in a particular fashion. (*Medina*, *supra*, at pp. 454–456; *People v. Pinholster* (1992) 1 Cal.4th 865, 939, overruled on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) "[A]lthough there is a certain degree of compulsion inherent in any plea agreement or grant of immunity, it is clear that an agreement requiring only that the witness testify fully and truthfully is [constitutional]." (*People v. Allen* (1986) 42 Cal.3d 1222, 1252 (*Allen*).) We independently review the

record in its entirety to determine whether a third party's plea agreement was coercive, thus depriving defendant of a fair trial. (*People v. Badgett* (1995) 10 Cal.4th 330, 350 (*Badgett*).)

Testimony[5]

Mojica testified that she was initially charged with special circumstance murder, but later agreed to plead guilty to a lesser charge and a reduced sentence of six years eight months, in exchange for her truthful testimony. In May 2015, prior to entering into the plea agreement, Mojica made a "proffer" to the District Attorney and detectives. Mojica consulted with her attorney before making the proffer. The District Attorney had not promised her anything in exchange for her truthful statement. Mojica entered into the plea agreement in June 2015. She understood that her reduced sentence was predicated on the truthfulness of her testimony at trial, as determined by the judge, not the District Attorney or jury. She also understood that the determination of her truthfulness was not dependent upon the outcome of the trial.

On cross-examination, Mojica agreed with defense counsel's statement that she had been charged with special circumstance murder, which could "theoretically" be punished by death, and "certainly" be punished by life in

[5] Neither the plea agreement nor the proffer is contained in the record on appeal.

prison without the possibility of parole. She also agreed that she had been "hoping" for a plea agreement in exchange for her proffer. She was aware that if she was able to make a deal with the District Attorney she would have to testify honestly. Relevant here, defense counsel elicited the following testimony regarding the proffer and plea agreement:

"[Defense counsel]: So you gave a statement to the [Deputy District Attorney] here, along with detectives, right?

"[Mojica]: Right.

"[Defense counsel]: And it was videotaped?

"[Mojica]: Right.

"[Defense counsel]: And then a month later or so, they came to you and they said, okay, if you testified along the way you made the statement, you have a deal, right?

"[Mojica]: Right."

On re-direct examination, Mojica testified that the proffer she signed on May 28, 2015, required "complete truthfulness and candor" and that if the People should conclude that she had not been completely truthful and candid, the statements in the proffer could be used against her. The plea bargain she signed on June 30, 2015, required her truthful testimony, and stated that her truthfulness at trial would be determined by a neutral magistrate or judge. Mojica understood that a judge would determine her truthfulness before she made the decision to enter into the plea agreement.

Discussion

In his opening brief, defendant concedes that "the letter of the plea agreement herein called for Mojica to testify 'truthfully' as determined by a 'judge,'" but argues that its "practical effect . . . required [Mojica] to testify consistent [*sic*] with the 'proffer' she had given to the District Attorney, to the satisfaction of the District Attorney, the entity empowered to charge her with capital murder for any perceived noncompliance with the plea agreement." He asserts the trial judge was "no more than a rubber stamp for the District Attorney," and "would have had no basis for making this determination other than reliance on the District Attorney." Defendant's claims are without merit.

Mojica's plea agreement is not contained in the record, but the parties agree that its terms required only that she testify truthfully, as determined by a neutral magistrate or other judge. This alone is sufficient to defeat defendant's contention. (See *Allen*, *supra*, 42 Cal.3d at p. 1252 [plea agreement requiring testimony to be truthful does not violate due process]; see also *Garrison*, *supra*, 47 Cal.3d at p. 771 [plea agreement offends due process only if it expressly requires that the witness testify consistently with a prior statement].)

Defendant argues that, regardless of the agreement's terms, Mojica understood it to require her to testify consistently with her proffer.[6] Even if we were to accept the

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[6] Defendant relies on *Medina*, *supra*, 41 Cal.App.3d at pages 452–454, which in turn cites to *People v. Green* (1951)

premise that Mojica's subjective understanding of the terms could invalidate the agreement, defendant's argument would fail. Defendant points to a singular portion of Mojica's testimony in which she summarily agreed with defense counsel's statement that the District Attorney offered her a deal if she "testified along the way" of her proffer. There is no coercion "when the truthfulness of those statements is the mutually shared understanding of the witness and the prosecution as the basis for the plea bargain," as was the case here. (*Homick*, *supra*, 55 Cal.4th at p. 863.) Although the District Attorney had not promised her anything at the time, Mojica testified that she made her proffer in the hope that it would lead to a plea agreement. When she made the proffer, Mojica knew that a future plea agreement would require her to testify truthfully at trial. Having already certified to the truthfulness of the proffer, she would have anticipated that the District Attorney would expect her to

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102 Cal.App.2d 831, 834, 837–838 (*Green*), in support of his argument that Mojica's subjective state of mind was determinative of whether her testimony was coerced. Neither case addressed the question of whether an accomplice's subjective understanding of a plea agreement could render the accomplice's testimony coerced. (*Medina*, *supra*, at pp. 450, 456 [immunity under section 1324 order could not require accomplice to testify consistently with prior recorded statement]; *Green*, *supra*, at pp. 834–835 [promise of accomplice's immunity could not be conditioned upon preliminary hearing testimony resulting in defendant being held to answer].)

testify to a substantially similar version of events at trial. "'It is a rare case indeed in which the prosecutor does not discuss the witness's testimony with [her] beforehand and is assured that it is the truth. However, unless the bargain is expressly contingent on the witness sticking to a particular version, the principles of *Medina* . . . are not violated.' (*Garrison*, *supra*, 47 Cal.3d at p. 771.)" (*Reyes*, *supra*, 165 Cal.App.4th at p. 435.)

Mojica's testimony at trial, both before and after her brief assent to the defense's characterization of the negotiation of the plea agreement, demonstrated that she knew she was required to testify truthfully regardless of whether her testimony was consistent with her proffer. She stated multiple times that she was obligated to tell the truth under the terms of the plea bargain. That Mojica agreed with defense counsel's vaguely-worded question does not undermine our conclusion that she correctly understood the terms of the plea agreement. "'[E]ven if we were to view her testimony as inconsistent, the inconsistency arises not from her own words, but from her failure to dispute leading questions as put by [defense] counsel . . . .' ([*People v. Fields* (1983)] 35 Cal.3d [329,] 360[] [(*Fields*)].)" (*Allen*, *supra*, 42 Cal.3d at p. 1252, fn. 6.)

Finally, the parties agree that the plea agreement entrusted the determination of Mojica's veracity with the trial court and not the District Attorney, a point that Mojica's testimony also demonstrates she understood. We reject out of hand the demeaning argument that the court

was merely a "rubber stamp." As the Attorney General points out, the trial court was in a position to independently evaluate Mojica's veracity through her demeanor, her testimony, and the testimony of other witnesses. There is no reason to believe that the court would abdicate its responsibility to the prosecutor had an objection been made.

Interrogation

A defendant "must allege a violation of [his] *own* rights in order to have standing to argue that testimony of a third party should be excluded because it is coerced." (*Badgett*, *supra*, 10 Cal.4th at p. 343.) "[T]he basis of the claim must be that coercion has affected the third party's trial testimony." (*Id.* at p. 344.) "[O]nly when the evidence produced *at trial* is subject to coercion are defendant's due process rights implicated and the exclusionary rule . . . applied. When a defendant seeks to exclude evidence on this ground, the defendant must allege that the trial testimony is coerced [citation], and that its admission will deprive him of a fair trial [citation]." (*Ibid.*) "On appeal, we independently review the entire record to determine whether a witness's testimony was coerced, so as to render the defendant's trial unfair." (*Boyer*, *supra*, 38 Cal.4th at p. 444.)

Testimony[7]

[7] The transcripts of Mojica's interviews with police are not contained in the record.

Mojica spoke with police officers on three occasions, once on January 13, 2015, and twice on February 4, 2015. Following the February 4 interviews, she was charged with special circumstance murder.

Mojica admitted that her statements to police were internally inconsistent and inconsistent with her preliminary hearing and trial testimony in some respects. The detectives encouraged her to be honest, but she sometimes lied and withheld information. She lied because she did not want to be implicated and was afraid of what would happen to her if she "snitch[ed]." Mojica changed her story throughout the interviews because, as they progressed, she believed telling police more would benefit her. At the end of her January interview with police, Mojica was released after she told the officers that defendant told her he fired a shot, but was not sure whether he hit anyone. In her February interviews, Mojica again stated that defendant had fired a shot but did not know if it hit anyone. She testified consistently in this regard at the preliminary hearing and at trial. Mojica implicated herself at the end of the February interviews, admitting that the gun was in her car and that she drove over to defendant on his signal.

Discussion

Defendant argues that police used coercive interrogation tactics to secure Mojica's statements implicating him, in violation of his right to due process. We discern nothing in the record to indicate Mojica's statements to police were coerced, nor would any coercion have affected the reliability of her testimony at trial in light of the plea agreement's condition that she testify truthfully. There are no transcripts of the police interrogations in the record, but even relying on Mojica's testimony alone, there is no evidence she was coerced. The detectives told Mojica she was facing a special circumstance murder charge. They accused her of lying and repeatedly told her to tell the truth and to protect herself. In January, they released Mojica after she implicated defendant in the shooting. None of these actions are coercive. "[E]xhortation[s] to tell the truth," telling the suspect that she will "'feel better' or would be 'helping [her]self by cooperating,'" "'commonplace' statements of possible legal consequences" (*People v. Flores* (1983) 144 Cal.App.3d 459, 469), and offers of release from custody (*Badgett*, *supra*, 10 Cal.4th at p. 355), are all permissible tactics that police may use in questioning.

Having concluded that neither the plea agreement nor the detectives' questioning was coercive, it necessarily follows that Mojica's testimony was properly admitted, and that counsel did not render ineffective assistance. (See *People v. Anderson* (2001) 25 Cal.4th 543, 587 [rejecting ineffective assistance claim because "[c]ounsel is not required to proffer futile objections"].)

Gang Membership Testimony

Defendant argues that he was prejudiced by Mojica's testimony that she feared "snitching" on him because he was a gang member. He specifically contends: (1) the prosecutor committed misconduct in questioning Mojica; (2) the trial court's admission of the evidence violated his right to due process; and (3) the court's denial of his motion for mistrial was an abuse of discretion.

Testimony

Prior to trial, the court ordered that there be no mention of defendant's gang membership. The prosecutor agreed to admonish the witnesses regarding the court's order.

At trial, the prosecutor questioned Mojica as follows:

"[Prosecutor]: Why were you worried [about talking to defendant about the shooting]?

"[Mojica]: Because I was telling.

"[Prosecutor]: What do you mean telling? Snitching?

"[Mojica]: Yes.

"[Prosecutor]: Why is that a problem?

"[Mojica]: Because he's a gang member, and I--"

Defense counsel immediately objected and moved to strike the testimony. The court ordered the testimony stricken. At a sidebar discussion, defense counsel moved for

mistrial on the basis that the court's ruling excluding gang evidence had been explicit, and the testimony was unduly prejudicial. The prosecutor insisted she had admonished Mojica not to mention defendant's gang membership. Defense counsel did not dispute that Mojica had been properly admonished.

The court reiterated that it had stricken the testimony and that the jury was not to consider it, although the testimony *could* be admissible as proof of Mojica's state of mind, regardless of its truth, as her mental state was relevant to her credibility. The court denied the motion for mistrial and again ordered the testimony stricken. The prosecutor requested that the testimony be admitted for the purpose of bolstering Mojica's credibility. She suggested utilizing a limiting instruction to prevent potential prejudice. The court then excused the jury and heard argument from the parties on the matter.

Defense counsel argued that the court had ruled on the matter pre-trial and determined there would be no gang-related testimony. Because counsel had not questioned the jury regarding potential gang bias during voir dire, defendant would be prejudiced by the admission of gang testimony at this point in the trial. The prosecutor again argued that Mojica's statement was relevant to her state of mind and credibility.

The court ruled that the testimony would remain stricken and the jury would be instructed not to consider stricken testimony. It reasoned that although the testimony

was relevant, defendant had not been given the opportunity to question the jurors regarding any biases relating to gangs. The court stated it would admonish Mojica. The prosecutor could elicit that Mojica was afraid to testify, but could not elicit testimony regarding defendant's gang membership.

Discussion

Defendant's argument that the prosecutor committed misconduct is forfeited because he failed to object on that basis below. (*People v. Foster* (2010) 50 Cal.4th 1301, 1350–1351.) Even if the issue had been preserved for appeal, it is plain from the record that the prosecutor's line of questioning was proper. The prosecutor was entitled to rehabilitate Mojica's credibility by eliciting that her fear of harm had prevented her from being honest with the detectives initially. The prosecutor had admonished Mojica not to testify regarding defendant's gang membership, and did not question her in a way that would lead her to disregard that admonishment. Because "the prosecutor did not intentionally solicit, and could not have anticipated [the improper testimony]," there was no misconduct. (*People v. Valdez* (2004) 32 Cal.4th 73, 125.)

The record also demonstrates that the trial court did not admit Mojica's testimony, and therefore could not have violated defendant's right to due process on that basis.[8]

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[8] Defendant's arguments on this point are confusing, as he challenges the trial court's "ruling permitting the

We further conclude that any prejudice arising from Mojica's single statement that defendant belonged to a gang was cured by the trial court's order striking the testimony from the record. Absent prejudice, defendant's claim that the trial court abused its discretion in denying the motion for mistrial is unsupported.

"California courts have long recognized the potentially prejudicial effect of gang membership." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) However, "'[w]hether 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. [Citation.]' [Citations.]" (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1428.) "'Juries often hear unsolicited and inadmissible comments and in order for trials to proceed without constant mistrial, it is axiomatic the prejudicial effect of these comments may be corrected by judicial admonishment; absent evidence to the contrary the error is deemed cured. [Citations.]' [Citation.]" (*Id.* at pp. 1428–1429.) "'It is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions." [Citation.]' [Citation.]" (*Id.* at p. 1429.)

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presentation of such evidence," yet inconsistently states that the trial court struck the testimony. He also refers to "the playing of the PTSD reference for the jury," although there was no PTSD evidence of any kind presented in this case.

Here, it is highly unlikely that the trial court's actions were unable to cure any potential prejudice to defendant. Mojica made a single, brief statement that the trial court immediately struck from the record. No other witness made reference to defendant's gang membership. The court admonished the jury both before the presentation of evidence and following trial that it was not to consider stricken evidence for any purpose. (CALCRIM No. 222.) "'A jury is presumed to have followed an admonition to disregard improper evidence . . . . [Citations.]' [Citation.]" (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.) We have no reason to believe that the jury did not do so here.

Moreover, there was overwhelming evidence of defendant's guilt in this case. Evidence was presented that defendant became very angry after Daniels rear-ended Mojica's car—yelling and making repeated demands for money—despite the fact that Daniels and Clegg attempted to resolve the matter by giving him their insurance information. Defendant lifted up his shirt to show Daniels a gun in his waistband. When Daniels and Clegg fled in their car, defendant told Mojica to pursue them, and they followed the couple to their home. Once they arrived, defendant continued to demand money in an aggressive manner even after the couple explained that they had no money because Clegg was undergoing dialysis, and her adult son—who was standing next to her in defendant's view—was "mentally retarded." Defendant left only after Clegg stated the police had been called. He and Mojica then returned to his

apartment where he continued to rant about getting the money. Defendant told Mojica to give him her car keys so that he could put a gun in her car. He enlisted the help of his sister's boyfriend, who drove him to Daniels's house. Mojica drove over to the house separately, with the gun in her car. Defendant instructed her to drive over to him if he signaled her so that he could retrieve his gun. He signaled her soon after arriving and took the gun—which Mojica described as looking like a revolver—and walked toward Daniels's house. From inside the house, Clegg heard two or three shots. Mojica, who was driving away, heard four or five shots. Defendant later admitted to Mojica that he fired a shot, although he did not know if anyone was hit. Daniels's and Patton's wounds were determined to have been inflicted by bullets shot from a revolver. In light of the overwhelming evidence against defendant, any error was harmless.

Sufficiency of the Evidence

Defendant argues that Mojica's testimony was unreliable and uncorroborated, and that in the absence of her testimony, there was insufficient evidence to support the convictions in counts 3, 4, and 5. He also argues that even if the remaining evidence is considered in conjunction with Mojica's testimony, it is insufficient to support the attempted robbery special circumstance and the prosecution's theory of first degree felony murder. Finally, defendant challenges

the trial court's denial of his motion for acquittal on the grounds that Mojica's testimony was uncorroborated. These arguments lack merit.[9]

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on the ground of insufficiency of the evidence is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Propensity to Lie (Counts 3, 4, and 5)

Defendant's first argument—that Mojica's testimony was unreliable—is based on his contention that her testimony was coerced coupled with her "inherent propensity to lie" to promote her own interests. We have held that Mojica's testimony was not coerced. It follows that it cannot be deemed unreliable on that basis. With respect to Mojica's

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[9] Defendant does not contest that the entirety of the evidence, including Mojica's testimony if properly corroborated and admitted, is sufficient to support counts 4 and 5. Because we conclude that Mojica's testimony was both corroborated and properly admitted, it is unnecessary for us to further address whether substantial evidence supports the verdicts in those counts.

incentive to lie, Mojica herself testified to the significantly reduced prison sentence she received in exchange for testifying truthfully. She also admitted that she gave the District Attorney her proffer in the hopes that she would be granted leniency. Because the jury was made fully aware of the circumstances surrounding her testimony, her testimony was not so unreliable as to make the trial fundamentally unfair. (See *People v. Lyons* (1958) 50 Cal.2d 245, 265 (*Lyons*), overruled on another ground in *People v. Green* (1980) 27 Cal.3d 1.) Mojica's incentive to testify and her prior lies and omissions "go to the credibility, not the competency, of [her] testimony." (*Ibid*.) The defense presented the numerous inconsistencies in her interviews with police to the jury at length. Mojica readily admitted that she repeatedly lied to detectives while insisting to them that she was being truthful, and that she withheld information until she believed it would benefit her to be honest. The jury was in a position to make an informed decision as to whether Mojica's testimony should be credited.

Corroboration (Counts 3 and 4)

Defendant next argues that Mojica's testimony was uncorroborated with respect to counts 3 and 4. This is incorrect.

A conviction cannot be based only on accomplice testimony. (§ 1111.) There must be sufficient corroborating evidence that "shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (*Ibid.*) "[C]orroborative evidence is sufficient even though slight and entitled to little consideration when standing alone [citation]." (*People v. Wood* (1961) 192 Cal.App.2d 393, 396; *People v. Frye* (1998) 18 Cal.4th 894, 966 (*Frye*) ["Corroboration need only be slight"], overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390.) "Only a portion of the accomplice's testimony need be corroborated, and the corroborative evidence need not establish every element of the offense charged. [Citation.] All that is required is that the evidence """connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the [accomplice] is telling the truth."""" [Citation.]" (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 25.) In determining the sufficiency of corroborative evidence, we must view the evidence in the light most favorable to the verdict and uphold the trial court's disposition if, on the evidentiary record, the jury's determination is reasonable. (*Garrison*, *supra*, 47 Cal.3d at p. 774.)

Here, ample evidence corroborates Mojica's testimony. Clegg testified that, after the traffic accident, defendant approached her and Daniels and angrily demanded $500 several times. Defendant then lifted his shirt to reveal the butt of a gun, which he had tucked in his waistband. When Daniels and Clegg fled the scene, defendant and Mojica followed them to their house, and defendant again angrily demanded money. He left the scene only after Clegg informed him that the police were coming. Clegg's testimony established that defendant had a motive for shooting Daniels and knew where to find him. The murder took place approximately 45 minutes after the initial encounter. The murder weapon was determined to be a revolver, consistent with Mojica's description of the firearm defendant had in his possession. "'When as in the present record it is discovered that there is testimony aside from that of the accomplice which tends to connect the defendant with the commission of the crime, the function of the appellate court is performed. Questions of the weight of the evidence and the credibility of the witnesses are for the trial court, and since the circumstances reasonably justify the finding of guilt, an opposing view that they also may be reconciled with innocence will not warrant interference with the judgment on appeal.'" (*Lyons*, *supra*, 50 Cal.2d at p. 259, quoting *People v. Henderson* (1949) 34 Cal.2d 340, 346–347.)

Evidence of Uncharged Attempted Robbery

Defendant was charged in counts 1 and 2 with attempted robbery of Daniels and Clegg at the accident scene and at their home immediately afterward. The commission of those attempted robberies ended when defendant and Mojica left Daniels's home and returned to defendant's apartment. The prosecution theory at trial was that a third uncharged attempted robbery occurred when defendant returned to Daniels's home, killed Daniels, and attempted to kill Patton. The uncharged attempted robbery was the basis for the prosecution's theory of felony murder and the special circumstance.

Defendant contends insufficient evidence supports the finding that he intended to commit robbery when he murdered Daniels and attempted to murder Patton. He asserts Mojica's testimony that he said he was returning to get money from Daniels was the only evidence of the third attempted robbery. Defendant argues that because she was an accomplice, Mojica's testimony in this regard was insufficient absent corroboration. Defendant is mistaken.

"Robbery is the taking of personal property in the possession of another from his person or immediate presence, against his will, accomplished by means of force or fear. (§ 211.)" (*People v. Bonner* (2000) 80 Cal.App.4th 759, 763 (*Bonner*).) "The crime of attempt occurs when there is a specific intent to commit a crime and a direct but ineffectual act done towards its commission. (§ 21a.) '"An attempt connotes the intent to accomplish its object, both in law . . . and in ordinary language." [Citation.]' [Citation.] The act

required must be more than mere preparation, it must show that the perpetrator is putting his or her plan into action. That act need not, however, be the last proximate or ultimate step toward commission of the crime. [Citation.] Where the intent to commit the crime is clearly shown, an act done toward the commission of the crime may be sufficient for an attempt even though that same act would be insufficient if the intent is not as clearly shown. [Citation.]" (*Bonner*, *supra*, 80 Cal.App.4th at p. 764.)

We have concluded that Mojica's testimony was corroborated. Contrary to defendant's argument, corroborating evidence is not required to establish elements of the crime to be sufficient. "'It is only required that the evidence '"'"tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the [accomplice] is telling the truth."'"'" [Citation.]" (*People v. Sanders* (1995) 11 Cal.4th 475, 535.) Clegg testified that defendant demanded money at the scene of the car accident, and that he followed them home and again demanded money. The murder occurred only 45 minutes later. That defendant attempted to rob Daniels and Clegg shortly before the murder is circumstantial evidence of defendant's later intent. This is sufficient to corroborate Mojica's testimony.

Moreover, the combination of Clegg and Mojica's testimonies constitutes substantial evidence supporting the uncharged attempted robbery for purposes of the murder conviction and the attempted robbery special circumstances

finding. Mojica's testimony further demonstrates that defendant intended to rob Daniels—he said that he was going to Daniels's home to get the money from him—and that he took a direct step towards doing so—he returned to Daniels's home with a gun, accompanied by Johnson.

Motion for Judgment of Acquittal

Defendant separately challenges the court's denial of his motion for judgment of acquittal as to the special circumstance on the ground that Mojica's testimony was not properly corroborated. We review the denial of a motion for acquittal pursuant to section 1118.1 for substantial evidence. (*People v. Stevens* (2007) 41 Cal.4th 182, 200.) In light of our conclusion that Mojica's testimony was corroborated and properly admitted, we hold that substantial evidence supports the trial court's ruling.

Prosecutorial Misconduct

The parties agree that, for purposes of the special circumstance and the felony murder theory of first degree murder, Daniels's murder must have taken place during the commission of an attempted robbery. (See *People v. Salas* (1972) 7 Cal.3d 812, 822– 823 (*Salas*) [felony-murder]; *Fields*, *supra*, 35 Cal.3d at pp. 364, 367–368 [robbery murder special circumstance].) In both contexts, an attempted robbery ceases when the defendant reaches a place of

temporary safety, as defendant had when he returned to his house after the two charged robbery attempts (counts 1 and 2). (See *Salas*, *supra*, at pp. 822–823 [felony murder]; *Fields*, *supra*, at pp. 367–368 [robbery murder special circumstance].) Under these circumstances only a third, uncharged attempted robbery, in which defendant was engaged at the time of the murder, could form the basis for the special circumstance and murder conviction.

Defendant contends the prosecutor inappropriately argued that the two charged attempted robberies could form the basis for the special circumstance and the murder under a felony murder theory, and that counsel was ineffective for failing to object on this basis at trial. The Attorney General does not disagree with defendant regarding the law as applied to the facts of this case, but argues the argument was forfeited, and that, regardless, it is without merit. We agree with the Attorney General.

Proceedings

When arguing in support of the two attempted robbery counts, the prosecutor discussed the events that took place at the scene of the car accident and at Daniels's house after defendant followed him home. She did not discuss defendant's return to Daniels's house in relation to the counts.

The prosecutor then discussed felony murder based on attempted robbery:

"Let's talk about felony murder. That's the first theory [of first degree murder]. The defendant attempted to commit a robbery.

"Well, we know he had a renewed attempt at the victim's house. The reason I say, 'a renewed attempt' is because -- and I'm sure [defense counsel] will talk about this -- the initial attempts at robbery at the location of the accident when he demands the money, he chases them, gets to the victim's house, demands money again, that is all one incident of attempted robbery.

"Once they leave that location and they get back to his house, he has reached a temporary place of safety; therefore, the attempted robbery has stopped. Okay.

"So when I'm talking about attempted robbery in the -- in discussion of felony murder, I'm talking about a renewed attempt at robbery after the defendant and Ms. Mojica leave the defendant's house, after they go back to the location. Because we know when he left he was saying, 'I'm going to see what's up with my money.' We know it's been his focus. We know that's why he went back there.

"So did he attempt to commit a robbery? Yes. He renewed his attempt at the victim's house.

"Did he intend to commit a robbery? We know his motivation . . . .

"While attempting to commit a robbery, the defendant caused the death of another person. We know that happened. We know he shot and killed Mr. Daniels.

"Now what is the defendant's motivation? How do we know he intended to commit a robbery when he went back to the location?

"His motivation is money. It has been money. Through this whole thing, that's what he wants. He wants money. He demanded money repeatedly. He asked [Clegg], 'Do you have my money?' He felt angry and disrespected by the victim because the victim wouldn't give him money.

"He went back to the victim's house to see what was up with the money. And when he got home, after he shot and killed him, he was still angry because he never got his money. That has been his motivation throughout this whole thing. And that's how we know he is guilty of felony murder."

The prosecutor also discussed the attempted robbery special circumstance, stating:

"And so this evaluation does look very similar [to the felony murder theory of first degree murder]. The defendant attempted to commit the robbery. And we've talked about how we know this was a renewed attempt at the victim's house.

"The defendant intended to commit a robbery. We know his motivation from the beginning has been money. That is his intent. His intent is robbery because he wants the money.

"And defendant did an act that caused the death of another person. He shot him. That's an act that causes the death of another person. There's no two ways about it.

"So it goes to count 3. The defendant went to Mr. Daniels' home to rob him and killed him during the course of that attempt."

Defense counsel also discussed the two attempted robbery charges without any mention of the events that took place after defendant left Daniels's house the first time.

He discussed the attempted robbery special circumstance:

"The fact is that they have not proven the special circumstance allegation to be true, once again, based on Leslie Mojica's testimony and the fact that the special circumstance itself has to be corroborated in some manner that there was an attempted [*sic*] murder and that Mr. Daniels was killed during the course of it, while engaged in it.

"And it doesn't apply to anything that happened around the crash scene or at the house the first time because of the safety rule that [the prosecutor] talked to you about.

"And I'm going to ask you for a finding that that's not true, again, based entirely on the testimony of Ms. Mojica, that he went back for the money. That was her testimony. He says, 'I'm going to go back and see what's up with my money.'"

Defense counsel continued to argue that there was insufficient proof of the special circumstance because there was no evidence at the scene to indicate an attempted robbery. Nothing was taken, and nothing was disheveled in such a way as to indicate defendant was searching for

money. He strongly emphasized that the attempted robbery special circumstance was based only on Mojica's testimony that defendant was concerned with getting money from Daniels when he returned to the house, which was not credible.

Discussion

We agree with the Attorney General that defendant has forfeited his claim by failing to specifically object to the prosecutor's argument in the trial court. (*People v. Riggs* (2008) 44 Cal.4th 248, 298 (*Riggs*).) Because defendant argues trial counsel rendered ineffective assistance in this regard, however, we review the merits. (See *In re Dennis H.* (2001) 88 Cal.App.4th 94, 98.)

"'Under California law, a prosecutor commits reversible misconduct if he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"

[Citations.] [¶] "'[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]'" (*Riggs*[, *supra*,] 44 Cal.4th [at p.] 298.) A defendant who fails to object at trial 'waive[s] any error or misconduct emanating from the prosecutor's argument that could have been cured by a timely admonition.' (*People v. Wrest* (1992) 3 Cal.4th 1088, 1105.)

"'"'[T]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom.'" [Citation.] . . . .' (*People v. Welch* (1999) 20 Cal.4th 701, 752.) 'When we review a claim of prosecutorial remarks constituting misconduct, we examine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief complained of. [Citation.]' (*People v. Osband* (1996) 13 Cal.4th 622, 689.) 'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' [Citation.]" (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1402–1403.)

Defendant asserts the prosecutor's statements that the two charged attempted robberies "stopped," rather than "ended" when defendant returned to his apartment, and her reference to the uncharged attempted robbery as a "renewed" attempt, confused the jury into believing they could rely on evidence supporting the two charged attempted robberies when considering the special circumstance and murder charge.

Defendant's narrow interpretation of the prosecutor's argument is unreasonable. Viewing the prosecutor's argument as a whole, we conclude there is no "reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." (*Frye*, *supra*, 18 Cal.4th at p. 970.) It was entirely appropriate for the prosecutor to rely on defendant's earlier actions as circumstantial evidence that he harbored the intent to rob Daniels when he returned to his house. (See *People v. Denis* (1990) 224 Cal.App.3d 563, 567–568.) The prosecutor made clear that she was relying on the facts of the prior events solely to show intent. She clearly explained that "in discussion of felony murder, I'm talking about a renewed attempt at robbery after the defendant and Ms. Mojica leave the defendant's house, after they go back to the location." She argued regarding defendant's state of mind when he was returning to Daniels's house: "[W]e know when he left he was saying, 'I'm going to see what's up with my money.' We know it's been his focus. We know that's why he went back there." "He went back to the victim's house to see what was

up with the money." Similarly, in her argument with respect to the special circumstance, she stated that defendant "went to Mr. Daniels' home to rob him and killed him during the course of that attempt." When presented in context, there is no reason to believe the jury would have understood the prosecutor's argument as defendant suggests.

We cannot conclude counsel was ineffective on this record. Counsel's tactical decision not to object to an argument that the jury would not be reasonably likely to misunderstand falls within the range of reasonable professional assistance. (*People v. Weaver* (2001) 26 Cal.4th 876, 925 ["'[r]eviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel'"].)

Nor was there prejudice. When arguing with respect to the charged attempted robberies, neither party referred to evidence that occurred after defendant left the house the first time. There was no confusion as to when the first two attempted robberies ended. Defense counsel specifically stated that "[the special circumstance] doesn't apply to anything that happened around the crash scene or at the house the first time because of the safety rule that [the prosecutor] talked to you about." He repeatedly argued the uncharged attempted robbery was predicated on Mojica's highly questionable testimony that defendant returned to the house to see about the money. Moreover, as we discuss in more detail below, with respect to the special circumstance, the jury was correctly instructed that the

murder must have occurred while defendant was engaged in the commission of an attempted robbery (CALCRIM No. 730), and that an attempted robbery is complete when the perpetrator reaches a place of temporary safety (CALCRIM No. 1600, as modified.) It was also instructed that in order to find defendant guilty of murder under a felony murder theory of liability, the murder must have taken place while defendant was engaged in the commission of an attempted robbery. (CALCRIM No. 540A.) "We presume jurors understand and follow the court's instructions." (*People v. Vasquez* (2015) 239 Cal.App.4th 1512, 1518.) In light of the combination of both parties' discussion of the charged attempted robberies, defense counsel's argument with respect to the special circumstance, and the instructions given, it is not reasonably probable that the outcome of the trial was affected by the prosecutor's argument.

Attempted Robbery Special Circumstance Instruction

Defendant contends that, under the unique facts of this case, the trial court erred in refusing to modify CALCRIM No. 730. He argues the instructions given likely confused the jury as to whether defendant was required to have been engaged in the commission of an attempted robbery when he committed murder in order to find the special circumstance true.

Defendant also argues that "more well may have been called for" on the part of the trial court regarding this issue.

Although he proposes no specific language, he asserts that: "So as to avoid any confusion on the issue, the court should have instructed the jury to the effect that for the special circumstance allegation to be found true, the attempted robbery upon which the special [circumstance] is predicated must have been in progress at the time of the murder; and that as a matter of law, the attempts alleged in [c]ounts 1 and 2 were not in progress at the time of the shooting herein. Thus, as a matter of law, the murder, was *not* committed while the perpetrator was engaged in the commission of the attempted robberies alleged in counts 1 and 2."[10]

Proceedings

Defense counsel objected to the wording of the third element of attempted robbery murder special circumstance in CALCRIM No. 730 (Apr. 2008 rev.). The instruction stated in relevant part:

"The defendant is charged with the special circumstance of *murder committed while engaged in the commission of attempted robbery.*

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

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[10] Defendant also argues that the prosecutor's argument regarding the special circumstance and felony murder even further confused the matter. As we have discussed, the argument was neither confusing nor misleading.

"1. The defendant committed or attempted to commit robbery;

"2. The defendant intended to commit robbery;

"AND

"3. The defendant did an act that caused the death of another person.

"To decide whether the defendant committed or attempted to commit robbery please refer to the separate instructions that I have given you on that crimes [*sic*]. You must apply those instructions when you decide whether the People have proved the special circumstance." (Italics added.)

Defense counsel argued that the third element of CALCRIM No. 730 should be modified to read: "The defendant did an act that caused the death of another person *while engaged in the commission of an attempted robbery*." (Italics added.) Counsel acknowledged that this exact language was included in the first paragraph of the instruction, but argued the court should "[m]ake it explicit. That's a temporal requirement."

The prosecutor responded, "[T]he jury instruction does not give any bracketed language to that effect. It gives a couple of options with element[ ] 3 . . . dealing with whether its [*sic*] an aiding and abetting theory which this one is not." "[T]he last element is the defendant did an act that caused the death of another person, period." She emphasized that the exact language defense counsel requested was already in the first paragraph of the instruction. The prosecutor

believed the instruction was clear, and she did not want any additions made to the instructions that were not bracketed options.

The court refused to modify CALCRIM No. 730, reasoning that the instruction was clear and should be read as a whole "and not isolated only as to the elements specific." The court noted that other legal principles were contained in paragraphs that were separate from the elements, and the jury would understand that it should integrate the law provided.

The parties then discussed the wording of CALCRIM No. 1600, concerning the elements of attempted robbery. Defense counsel requested a modification to the instruction out of concern that the jury might mistakenly believe "the commission of the attempted robbery related to the special circumstance could be traced back to the alleged attempted robbery at the accident scene and then in front of the house when, in fact, all the testimony is that they returned to [defendant's] house, thus a temporary place of safety, and that earlier act cannot form the basis of the special circumstance."

The prosecutor stated that she was comfortable with CALCRIM No. 1600 as written, but had "no great objection."

The court agreed with defense counsel that there could be a possibility for confusion. It determined to modify CALCRIM No. 1600 to include the following language:

"The commission of the crime of attempted robbery continues until the perpetrator reaches a place of temporary safety.

"The perpetrator has reached a place of temporary safety if he or she has successfully escaped from the scene or is no longer being pursued."

The court gave CALCRIM No. 730 without modification, and incorporated the language set forth above in CALCRIM No. 1600.

Law

"'In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case.' [Citation.]" (*People v. Anderson* (2011) 51 Cal.4th 989, 996.) Included in this duty is the obligation to instruct on each element of the offense. (*People v. Miller* (1999) 69 Cal.App.4th 190, 207, fn. 9.) Moreover, "the trial court may modify any proposed instruction to meet the needs of a specific trial, so long as the instruction given properly states the law and does not create confusion." (*People v. Beltran* (2013) 56 Cal.4th 935, 943, fn. 6.) Conversely, the court "may properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation]." (*People v. Moon* (2005) 37 Cal.4th 1, 30

(*Moon*).) A defendant is entitled to a pinpoint instruction only upon request when there is evidence supportive of the defendant's theory, "'but they are not required to be given sua sponte.' [Citations.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824 (*Gutierrez*).)

"We determine whether a jury instruction correctly states the law under the independent or de novo standard of review. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' (*People v. Partlow* (1978) 84 Cal.App.3d 540, 558 [(*Partlow*)].) "'In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.) 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.)" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088 (*Ramos*).)

Discussion

We reject defendant's argument that the court erred in denying his proposed modification to CALCRIM No. 730.

The trial court also properly instructed the jury in light of the specific facts of this case.[11] The exact language defendant proposed was already contained in the first paragraph of the instruction, so the jury was properly advised that defendant was required to have been engaged in the commission of an attempted robbery at the time he committed the murder. The court did not err in refusing a modification that was duplicative. (*Moon*, *supra*, 37 Cal.4th at p. 30.)

Read as a whole, the instructions precluded the use of the charged attempted robberies as the basis for the special circumstance. CALCRIM No. 1600, as modified, instructed that a robbery ends when the defendant reaches a place of temporary safety. We conclude that the court "'fully and fairly instructed on the applicable law.'" (*Ramos*, *supra*, 163 Cal.App.4th at p. 1088, quoting *Partlow*, *supra*, 84 Cal.App.3d at p. 558.)

We likewise reject defendant's argument that the trial court was required to instruct sua sponte regarding the issue. The instruction defendant proposes "relate[s] particular facts to a legal issue in the case." (*People v. Saille* (1991) 54 Cal.3d 1108, 1119.) The court has no sua sponte duty to give such pinpoint instructions absent request. (*Ibid.*; *Gutierrez*, *supra*, 45 Cal.4th at p. 824.) Defendant did not request a clarifying or amplifying instruction apart from requesting modifications to CALCRIM Nos. 730 and 1600,

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[11] Defendant only challenges CALCRIM No. 730 as applied to the facts.

and therefore forfeited his argument that the trial court should have further instructed the jury on appeal. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 669.)

Unanimity Instruction

Defendant contends that as a result of the errors alleged, the jury was given a choice between the charged attempted robberies and the uncharged attempted robbery as factual predicates for the special circumstance allegation. He claims that under these circumstances, the jury was required to unanimously agree with respect to which of the attempted robberies served as the predicate for the special circumstance. He argues the trial court had a sua sponte duty to give either CALJIC No. 17.01 or CALCRIM No. 3500 with respect to the unanimity requirement. We disagree.

"'[T]he jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act.' (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 877–878.) With respect to special circumstances, a unanimity instruction is required if different felonies are alleged as the basis of the special circumstance and "'the potential defenses to the two acts of robbery were *entirely different*.' [Citations.]" (*Id.* at p. 879.)

Here, there was no basis to give a unanimity instruction. Only the single, uncharged attempted robbery could legally serve as the basis for the special circumstance. The jury was fully and fairly instructed in this regard, and the prosecutor and defense counsel both emphatically stressed the fact that neither of the charged attempted robberies could serve as predicates because they were completed when defendant left Daniels's home the first time. A unanimity instruction could only confuse the jury by causing it to believe that more than one of the attempted robberies was a viable basis for the special circumstance. Moreover, as the Attorney General argues, in light of the facts in this case, giving a unanimity instruction would be contrary to law. The trial court did not err.

Ineffective Assistance of Counsel

Defendant argues that trial counsel was ineffective for failing to move for a new trial on the basis of the special circumstance contentions raised above. Having found no merit in any of the special circumstance arguments, we reject the contention. (See *Hillhouse*, *supra*, 27 Cal.4th at p. 489 [finding of ineffective assistance of counsel requires a showing of prejudice].)

Sua Sponte Duty to Strike Special Circumstance

Defendant also contends the trial court was required to strike the special circumstances finding on its own motion in light of his arguments above. We likewise reject this argument. (*People v. Hardy* (1992) 2 Cal.4th 86, 199 [where no error was found there is no basis for the court to strike a special circumstance].)

Cruel and Unusual Punishment/Equal Protection

Defendant contends that his sentence of life in prison without the possibility of parole (LWOP) is a violation of the state and federal constitutions' prohibition on cruel and unusual punishment and requirement of equal protection under the laws.

Defendant first claims that his LWOP sentence constitutes cruel and unusual punishment, given his relative youth. He argues that *Miller v. Alabama* (2012) ___ U.S. ___ [132 S.Ct. 2455], *Graham v. Florida* (2010) 560 U.S. 48, and *Roper v. Simmons* (2005) 543 U.S. 551, are applicable to his case. In those cases, the United States Supreme Court "'establish[ed] that children are constitutionally different from adults for purposes of sentencing'" for several reasons, including immaturity, a lack of appreciation of the consequences of their actions, and a greater ability to reform. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1375.) Defense counsel urged the court to consider defendant's age when it

imposed sentence, arguing that defendant's actions were "childish" and amounted to a "tantrum." The sentencing court rejected this argument, as do we. As the court properly concluded, these Supreme Court authorities are not applicable to defendant, who was not a minor at the time of the murder. (*People v. Perez* (2016) 3 Cal.App.5th 612, 618; *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482 (*Argeta*); *People v. Abundio* (2013) 221 Cal.App.4th 1211, 1220–1221.)

We likewise reject defendant's argument that the fact that similarly situated youths are not subject to LWOP violates equal protection principles. Defendant is not similarly situated to children under the age of 18. "[W]hile '[d]rawing the line at 18 years of age is subject . . . to the objections always raised against categorical rules . . . [, it] is the point where society draws the line for many purposes between childhood and adulthood.' (*Roper v. Simmons*[, *supra*,] 543 U.S. [at p.] 554; see *Graham* [*v. Florida*], *supra*, 560 U.S. at p. ___ [130 S.Ct. at p. 2016].) . . . Such arguments would have no logical end, and so a line must be drawn at some point. We respect the line our society has drawn and which the United States Supreme Court has relied on for sentencing purposes . . . ." (*Argeta*, *supra*, 210 Cal.App.4th at p. 1482.)

Defendant also contends that he was denied equal protection because he was unfairly singled out with respect to the special circumstances allegation. Defendant offers no support for this argument beyond defense counsel's anecdotal observation at sentencing that he rarely saw

special circumstances allegations, despite the high number of potentially qualifying robbery/murders charged. We reject this contention as well.

Due Process Challenge to Sentencing

Finally, defendant contends that his due process rights were violated because he was wrongly found subject to the special circumstances finding and was therefore sentenced based on an assumption that was untrue. Because we have concluded that the jury's special circumstance finding is valid, this claim necessarily fails.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P.J. KIN, J.*

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