SUPREME COURT NO. 234377

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	Court of Appeal No. B255375
v.	
01) JORGE GONZALEZ, **02) ERICA MICHELLE ESTRADA,** **03) ALFONSO GARCIA,**	Superior Court No. YA076269
Defendants and Appellants.	

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
Honorable Scott T. Millington, Judge

3rd

APPELLANT ALFONSO GARCIA'S PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, SECOND DISTRICT, DIVISION FOUR, AFFIRMING THE JUDGMENT OF CONVICTION WITH DIRECTIONS

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant Alfonso Garcia respectfully petitions for review pursuant to California Rules of Court, rule 8.500. The Court of Appeal, Second

Appellate District, Division Four, filed its opinion on March 30, 2016, affirming with directions the judgment of the Los Angeles County Superior Court. A copy of the opinion is attached. By order dated April 28, 2016, the opinion was modified without change in the judgment and petitions for rehearing filed by appellants Garcia and Estrada were denied. A copy of that order is also attached.

ISSUES PRESENTED FOR REVIEW

1. When the jury finds a defendant guilty of felony murder and a robbery-murder special circumstance allegation to be true, is the trial court's failure to instruct on lesser included offenses to first degree murder ever prejudicial? (On this issue, the Court of Appeal's opinion expressly disagrees with *People v. Campbell* (2015) 233 Cal.App.4th 148.)

2. In a case like this one in which the information charged malice murder but the prosecution elected to proceed exclusively on a felony murder theory of the case, does the trial court have a duty to instruct the jury on lesser included offenses to first degree murder?

3. When a special circumstance allegation is predicated on the commission of a separate offense, does Penal Code section 1111 require corroboration of accomplice testimony specific to that offense?

4. Was the evidence in this case sufficient to sustain the special circumstance true finding, which required the jury to find that appellant Garcia was a major participant in the crime and acted with reckless indifference to human life, in light of this Court's recent decision in *People v. Banks* (2015) 61 Cal.4th 788?

NECESSITY FOR REVIEW

Pursuant to California Rules of Court, rule 8.500(b)(1), these issues merit review in order to secure uniformity of decision and to settle important questions of law.

At the close of evidence in this case, the prosecution elected to proceed exclusively on a felony-murder theory as to all three defendants. The trial court instructed the jury on first degree felony-murder but not on any lesser included offenses to first degree murder. The Court of Appeal's opinion held that any failure to instruct on lesser included offenses was not prejudicial since the jury's return of guilty verdicts on felony murder

charges and true findings on the robbery special circumstance allegations necessarily resolved factual issues related to lesser included offenses of malice murder against appellants. In so holding, the Court of Appeal's opinion expressly disagreed with the recent decision issued by Division Two of the Fourth District Court of Appeal in *People v. Campbell* (2015) 233 Cal.App.4th 148, which held that the failure to instruct the jury on lesser included offenses in a case like this one was prejudicial because it confronted the jury with an unwarranted all-or-nothing choice between the charged offense and acquittal. The Court of Appeal's disagreement with *Campbell* was outcome determinative, since the Court would presumably have reversed appellants' convictions had it followed *Campbell*. Review should therefore be granted to resolve this conflict in the published case law and secure uniformity of decision in this important area of the law.

The prosecution's case depended on Anthony Kalac, who testified that appellant Garcia and his co-defendants had set out to rob the victim when he was killed. Kalac established, through his own admissions during his trial testimony, that he was an accomplice as a matter of law whose testimony required corroboration pursuant to Penal Code section 1111. Because the non-accomplice evidence at trial provided no corroboration of

Kalac's testimony regarding the alleged plan to rob the victim, Garcia's robbery-murder special circumstance true finding was barred by Penal Code section 1111 as a matter of law. Moreover, because the elements of the felony-murder charge coincided with the elements of the special circumstance allegation insofar as both required the jury to find that defendants were attempting to rob the victim when he was killed, Garcia's conviction was also barred by Penal Code section 1111 as a matter of law.

The Court of Appeal's opinion held to the contrary that Kalac's testimony was sufficiently corroborated. Appellant Garcia's entire argument was premised on the rule first announced by this Court in *People v. Hamilton* (1989) 48 Cal.3d 1142 and subsequently reaffirmed in *People v. Davis* (2005) 36 Cal.4th 510 that, when a special circumstance allegation requires proof of some other crime, that crime cannot be proved by the uncorroborated testimony of an accomplice. The Court of Appeal's opinion, however, never mentioned or even cited either *Hamilton* or *Davis* and analyzed the evidence without regard to whether it specifically corroborated Kalac's claim that appellants were planning to rob the victim. Review should therefore be granted to clarify whether Penal Code section 1111, as interpreted by this Court in *Hamilton* and *Davis*, requires specific

corroboration of the commission of a separate offense included in a special circumstance allegation.

Review should also be granted to determine whether the evidence in this case was sufficient to sustain the special circumstance true finding, which required the jury to find that appellant Garcia was a major participant in the crime and acted with reckless indifference to human life, in light of this Court's recent decision in *People v. Banks* (2015) 61 Cal.4th 788.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

For the purpose of this Petition for Review, appellant Garcia adopts the factual and procedural history set forth in the opinion of the Court of Appeal (Slip opn. at pp. 3-14), as modified by order dated April 28, 2016, denying the petitions for rehearing. Additional facts relevant to this petition are incorporated herein.

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO RESOLVE A SPLIT IN PUBLISHED AUTHORITY AS TO WHETHER, WHEN THE JURY FINDS A DEFENDANT GUILTY OF FELONY MURDER AND A ROBBERY-MURDER SPECIAL CIRCUMSTANCE ALLEGATION TO BE TRUE, THE TRIAL COURT'S FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSES TO FIRST DEGREE MURDER IS EVER PREJUDICIAL

At the close of evidence in this case, the prosecution elected to proceed exclusively on a felony-murder theory as to all three defendants. The trial court instructed the jury on first degree felony-murder, but it did not instruct on any lesser included offenses to murder. Here, under the accusatory pleading test, the allegation of murder charged in count one, which alleged not merely that Garcia killed in the course of a robbery but that he did so maliciously, on its face gave rise to possible lesser included offenses of second degree murder and manslaughter. While the prosecution was free to try the case on a theory of felony murder, Garcia and his co-defendants were nonetheless legally entitled under the accusatory pleading test to jury instructions on these lesser included offenses, provided there was substantial evidence to support the commission of the lesser offenses but not the greater.

Evidence was presented that Garcia and his co-defendants arranged to meet the victim, Rosales, for the purpose of obtaining drugs. Whether defendants intended to pay for the drugs or to try to steal them was disputed at trial. Substantial evidence supported three possible findings: (1) that defendants intended to purchase the drugs, (2) that they intended to steal the drugs from Rosales without resorting to force or fear (*i.e.*, grand theft from the person), or (3) that they intended to rob Rosales.

Neither of the first two possibilities involved offense conduct inherently dangerous enough to be a predicate for either first or second degree felony-murder. Substantial evidence thus warranted instructions on second degree implied malice murder and involuntary manslaughter, and the superior court's failure to instruct the jury on these lesser included offenses was, therefore, error and violated Garcia's state and federal constitutional rights to have the jury determine every material issue of fact presented by the evidence.

Given the prosecution's decision to proceed exclusively on a first degree felony-murder theory, an accurate determination of whether defendants specifically intended robbery or some lesser offense was critical to the jury's verdict. Although the prosecution's key witness, Anthony

Kalac, testified that defendants planned to "rob" the victim, his use of the word "rob" turned out to include conduct that did not involve the use of force or fear and therefore would not satisfy the elements of robbery. In addition, there was no evidence that any of the defendants were armed, and the jury's rejection of the gun-related charge and allegations show that the jury believed that the victim was shot with his own gun, further casting into doubt the prosecution's claim that defendants intended to use force or fear.

The Court of Appeal's opinion held that the trial court's failure to instruct the jury on lesser included offenses to first degree murder was not prejudicial since the jury's return of guilty verdicts on felony murder charges and true findings on the robbery special circumstance allegations necessarily resolved factual issues related to lesser included offenses of malice murder against appellants. In so holding, the Court of Appeal's opinion expressly disagreed with *People v. Campbell, supra,* 233 Cal.App.4th 148, which held that the failure to instruct the jury on lesser included offenses in a case like this one was prejudicial because it confronted the jury with an unwarranted all-or-nothing choice between the charged offense and acquittal.

The Court of Appeal's disagreement with *Campbell* was outcome

determinative, since the Court would presumably have reversed appellants' convictions had it followed *Campbell*. Review should therefore be granted to resolve this conflict in the published case law and secure uniformity of decision in this important area of the law.

A. The Trial Court's Sua Sponte Duty To Instruct the Jury On Lesser Included Offenses Under the Accusatory Pleading Test When Such Instructions Are Warranted By Substantial Evidence

As this Court recently observed: "'California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any lesser offense "necessarily included" in the charged offense, if there is substantial evidence that only the lesser crime was committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence.' [Citation.] '[T]he rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither "harsher [n]or more lenient than the evidence merits."'" (*People v. Smith* (2013) 57 Cal.4th 232, 239-

240.)

Courts "have applied two tests in determining whether an uncharged offense is necessarily included within a charged offense: the 'elements' test and the 'accusatory pleading' test. Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.)

When applying the accusatory pleading test, "[t]he trial court need only examine the accusatory pleading." (*Smith, supra*, 57 Cal.4th at p. 244.) "[S]o long as the prosecution has chosen to allege a way of committing the greater offense that necessarily subsumes a lesser offense, and so long as there is substantial evidence that the defendant committed the lesser offense without also committing the greater, the trial court must instruct on the lesser included offense." (*Ibid.*)

B. Substantial Evidence Warranted Instructions On Second Degree Murder and Involuntary Manslaughter

Although, at the close of evidence, the prosecution elected to proceed exclusively on a felony-murder theory as to all three defendants (8R.T. 5766), count one of the second amended information charged appellant Garcia with murder "with malice aforethought" pursuant to Penal Code section 187, subdivision (a). (3C.T. 457.) "While the prosecutor was free to try the case on a theory of felony murder, defendants were nonetheless legally entitled under the accusatory pleading test to jury instructions on lesser included offenses of first degree malice murder, provided there is substantial evidence to support the commission of the lesser offenses but not the greater." (*People v. Campbell, supra,* 233 Cal.App.4th at p. 160; see *People v. Banks* (2014) 59 Cal.4th 1113, 1160.)

Here, under the accusatory pleading test, the allegation of murder charged in count one, which alleged not merely that Garcia killed in the course of a robbery but that he did so maliciously, on its face gave rise to possible lesser included offenses of second degree murder and manslaughter. (See *People v. Taylor* (2010) 48 Cal.4th 574, 623 [second degree murder is a lesser included offense of first degree murder]; *People v. Thomas* (2012) 53 Cal.4th 771, 813 ["Voluntary and involuntary

manslaughter are lesser included offenses of murder"].) Accordingly, the superior court was required to instruct the jury on second degree murder and manslaughter so long as substantial evidence would have supported either finding. (See *Banks, supra,* 59 Cal.4th at p. 1160.)

Evidence was presented that Garcia and his co-defendants arranged to meet the victim, Rosales, for the purpose of obtaining drugs. Whether defendants intended to pay for the drugs or to try to steal them was disputed at trial. Gonzalez testified that he intended to pay for the drugs and robbery was never even discussed. (8R.T. 5472, 5475-5477, 5486-5487, 5711.) Kalac, on the other hand, testified that defendants planned to "come up" on Rosales. (6R.T. 4261-4262, 4264-4268, 4270-4273.)

The prosecution's felony-murder theory hinged on defendants' alleged use of this expression. Although Kalac testified that "to come up on" meant "to rob" (6R.T. 4262-4263), he also testified that he himself had "robbed" drug dealers in the past by snatching the drugs out of their hand and running (7R.T. 4872-4875), which showed that his own personal definition of "robbery" included theft without the use of force or fear (7R.T. 4872-4873.) Where the element of force or fear is absent, a taking from the person is grand theft rather than robbery. (*People v. Morales* (1975) 49

Cal.App.3d 134, 139.) More specifically, what Kalac described in his testimony regarding his own previous misdeeds amounted to larceny by trick, not robbery. (See *People v. Traster* (2003) 111 Cal.App.4th 1377, 1387; *People v. Ashley* (1952) 42 Cal.2d 246, 258; Pen. Code, § 484.)

In contrast to robbery, which is one of the predicate offenses for first degree felony-murder listed in Penal Code section 189, grand theft from the person has long been held to be a felony not inherently dangerous to life and therefore does not rise to the level of a predicate offense for either first or second degree felony-murder. (*Morales, supra,* 49 Cal.App.3d at p. 143; *People v. Phillips* (1966) 64 Cal.2d 574, 580-583.)

At a minimum, then, substantial evidence warranted instructions on second degree implied malice murder. Based on the evidence, a reasonable jury could have found that, in accompanying Gonzalez to the meeting with Rosales for the purpose of either buying or stealing drugs, Garcia was performing an activity whose natural consequences were dangerous to life, that he was aware of the danger, and that he acted with conscious disregard for life. Substantial evidence also warranted instructions on involuntary manslaughter. There was substantial evidence that the shooting occurred during an attempted drug possession or an attempted grand theft from the

person --offenses that are, at worst, non-inherently-dangerous felonies. A reasonable jury could have found that Garcia, in going along with the plan, was acting with criminal negligence but without implied malice.

The trial court's sua sponte duty to instruct the jury on lesser included offenses is based on the defendant's state and federal constitutional rights to have the jury determine every material issue of fact presented by the evidence. (*People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547; Cal. Const., art. I, § 15.) Although the United States Supreme Court has acknowledged a right to jury instructions on lesser included offenses in state capital proceedings (*Beck v. Alabama* (1980) 447 U.S. 625, 638 [100 S.Ct. 2382, 65 L.Ed 392]), it has not clearly extended that right in other contexts. (*People v. Birks* (1998) 19 Cal.4th 108, 120-121.) Hence, the law is not yet settled regarding constitutional mandates for such an instruction. (See *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 818-819, overruled on another ground in *Tolbert v. Page* (9th Cir. 1999) (*en banc*) 182 F.3d 677, 685.)

Regardless, the Sixth Amendment to the federal constitution guarantees a defendant the right to have a jury determine, beyond a reasonable doubt, his or her guilt of every element of a charged offense.

(*United States v. Gaudin* (1995) 515 U.S. 506, 522-523 [115 S.Ct. 2310, 132 L.Ed.2d 444].) In order to make those findings, the jury must be fully and adequately instructed on the elements of the crime. Instructions that omit or inadequately describe an element of the offense violate the federal constitution. (*Rose v. Clark* (1986) 478 U.S. 570, 579-581 [106 S.Ct. 3101, 92 L.Ed.2d 460]; *Carella v. California* (1989) 491 U.S. 263, 265 [109 S.Ct. 2419, 105 L.Ed.2d 218].)

C. Consistent With the Reasoning and Holding of the Fourth District Court of Appeal's Recent Decision in People v. Campbell, *the Superior Court's Error Was Prejudicial*

The superior court's failure to instruct the jury on the lesser included offenses warranted by substantial evidence was prejudicial. To be sure, the verdicts suggest that the jury believed that defendants were perpetrating a crime when the victim was killed, which explains why all three were found guilty of felony-murder despite the jury's rejection of the gun-related charge and allegations. But given the prosecution's decision to proceed exclusively on a first degree felony-murder theory, an accurate determination of whether defendants specifically intended robbery or some lesser offense was critical to the jury's verdict, and the superior court's failure to instruct the jury on lesser included offenses prevented the jury

from undertaking an informed evaluation of Kalac's claim that defendants set out to "rob" the victim.

At a minimum, Kalac's misleading use of the word "robbery" and the lack of weaponry gave rise to a reasonable doubt as to whether Garcia and his co-defendants harbored the specific intent to use force or fear to obtain the drugs from Rosales. In view of the evidence, the jury should have been given the option of finding that Garcia and his co-defendants specifically intended grand theft from the person, which would have required the jury to acquit Garcia of felony-murder but empowered it to find him guilty of involuntary manslaughter.[1] Had it been properly instructed and given the option, it seems reasonably likely that the jury would have found Garcia guilty --at most-- of the lesser included offense of involuntary manslaughter and acquitted him of first degree felony-murder.

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[1] In addition, had the jury been given the option of considering the lesser included offenses supported by substantial evidence, it could also properly have considered potential defenses of accident and self-defense not available against a charge of felony-murder. (See Pen. Code, § 195; CALCRIM No. 510 [Excusable Homicide: Accident]; CALCRIM No. 3404 [Accident (Pen. Code, § 195)]; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 54 [homicide is excusable when committed by accident while defendant was lawfully acting in self-defense without any unlawful intent]; Pen. Code, § 197; CALCRIM No. 505 [Justifiable Homicide: Self-Defense or Defense of Another]; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1081 [homicide is justified when committed in self-defense].)

The superior court's failure to instruct the jury on involuntary manslaughter foreclosed that option, however, and put the jury in an agonizing position. As the United States Supreme Court has observed: "True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction --in this context or any other-- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." (*Keeble v. United States* (1973) 412 U.S. 205, 212-13 [93 S.Ct. 1993, 1997-98, 36 L.Ed.2d 844]; accord, *People v. Eid* (2014) 59 Cal.4th 650, 657 ["A jury instructed on only the charged offense might be tempted to convict the defendant '"of a greater offense than that established by the evidence"' rather than acquit the defendant altogether"]; *People v. Campbell, supra,* 233 Cal.App.4th at p. 168, fn. 12 ["Although the law ordinarily presumes that jurors follow the court's instructions, the law requiring instructions on lesser included offenses is based, in part, on the

possibility that they will not; that is, when faced with an unwarranted all-or-nothing choice between the charged offense and acquittal, jurors may convict a defendant of the charged offense even though they harbor 'reasonable doubt of guilt of the charged offense . . . solely because the jury is unwilling to acquit where it is satisfied that the defendant has been guilty of wrongful conduct constituting a necessarily included offense.'"].)

Having chosen the only option available other than outright acquittal, the jury was left with little choice when it came to the special circumstance allegation. Since the elements of the special circumstance allegation were substantially similar to the elements of the underlying murder charge insofar as both required the jury to find that defendants were attempting to rob the victim when he was killed, the jury faced the same dilemma it confronted in being forced to choose between conviction of the only available option or outright acquittal. The jury could hardly be expected to find defendants guilty of felony-murder based on the predicate offense of robbery only to find that the special circumstance allegation that the murder was committed while defendants were perpetrating a robbery was *not true*.

As the *Campbell* court explained in analogous circumstances: "[W]hen, as here, the jurors are not given the choice of convicting the defendant of premeditated murder, and are erroneously given only the choice of felony murder or acquittal, the decision to convict the defendant of murder essentially compels them, even if they harbor doubt as to guilt of the underlying felony, to further find the special circumstance allegation true. In this situation, the special circumstance finding may indicate nothing more than that the jury did not want to acquit the defendant of murder, not that they found the killing was first degree felony murder." (*Campbell, supra*, 233 Cal.App.4th at p. 168.)

As the *Campbell* court went on to explain: "[B]ecause the jury was instructed on felony murder only, the jury was faced with an all-or-nothing proposition: felony murder or acquittal. As instructed, jurors who doubted that [defendant] aided or abetted a robbery would still understand that convicting [defendant] of murder meant that they would have to also find him guilty of the underlying felony, robbery. Otherwise, the juror would be left in the seemingly untenable position of voting not guilty as to robbery and allowing an individual who shot and killed another person to walk free. Thus, without the option of convicting [defendant] of either a lesser offense

or of premeditated first degree murder, the jury, if it was to convict [defendant] at all for the killing of [the victim], was, in essence, compelled to further convict [defendant] of robbery and find the robbery-murder special circumstance true. Thus, given the facts and instructions presented here, it cannot be said that the jury's true finding on the special circumstance allegation necessarily means that the jury would have found defendant guilty of felony murder if it had been instructed on lesser offenses." (*Id.* at pp. 172-173.)

Here, in contrast with *Campbell*, defendants were not charged with a separate count of robbery. Hence, any claim that the special circumstance true finding shows that the jury would have found defendants guilty of first degree felony murder even if properly instructed on lesser included offenses is even weaker than the analogous claim made by respondent in *Campbell*.

D. The Contrary View of the Court of Appeal's Opinion in this Case and the Need for Uniformity of Decision in this Important Area of the Law

The Court of Appeal's opinion held that any instructional error in failing to instruct on malice murder, lesser included offenses of murder, and defenses to murder was not prejudicial. (Slip opn. at pp. 25-29.) As the

Court explained: "[T]he jury's return of guilty verdicts on felony murder charges and true findings on the robbery special circumstance allegations necessarily resolved factual issues related to lesser included offenses of malice murder against appellants. In determining whether appellants were guilty of murder under the felony-murder theory, the jury was required to determine first whether appellants committed or attempted to commit robbery, and only thereafter whether a death occurred during the commission of the robbery or attempted robbery. Thus, it is not reasonably probable that appellants would have obtained a more favorable outcome had the jury been instructed on the lesser included offenses of murder. [Citations.] [¶] To the extent *Campbell, supra,* 233 Cal.App.4th 148, suggests that the jury's guilty verdicts on felony murder and its true findings on a robbery special circumstance allegation do not render the failure to instruct on lesser included offenses of malice murder harmless under *Watson,* we respectfully disagree." (Slip opn. at pp. 28-29.)

The Court of Appeal's opinion did not address the problem, discussed in section C, above, and recognized by this Court and the U.S. Supreme Court, that arises when the jury confronts an unwarranted all-or-nothing choice between the charged offense and acquittal. (See *Keeble,*

supra, 412 U.S. at pp. 212-213; *Eid, supra*, 59 Cal.4th at p. 657; *Campbell, supra*, 233 Cal.App.4th at p. 168, fn. 12.) The Court of Appeal's opinion also fails to explain how the Court knows that the felony murder conviction in this case stemmed from the jury's considered judgment that the victim's death occurred during a robbery rather than the jurors' desire to avoid letting the defendants go despite the fact that they may have been left with a reasonable doubt that defendants were guilty of the greater offense.[2]

The Court of Appeal's disagreement with *Campbell* was outcome determinative, since the Court would presumably have reversed appellants' convictions had it followed *Campbell*.

Accordingly, review should be granted to resolve this conflict in the published case law and secure uniformity of decision in this important area of the law.

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[2] Furthermore, if the Court of Appeal's opinion is correct, and a first degree felony murder conviction in a case like this one is never the result of the lack of lesser included offense instructions, then what is the rationale for requiring such instructions in the first place? The law does not require trial judges to give pointless instructions, but under the rationale of the Court of Appeal's opinion, judges are bound to instruct juries on lesser included offenses to first degree murder even when the availability of those options could play no possible role in their deliberations.

II. REVIEW SHOULD BE GRANTED TO CLARIFY WHETHER, WHEN A SPECIAL CIRCUMSTANCE ALLEGATION IS PREDICATED ON THE COMMISSION OF A SEPARATE OFFENSE, PENAL CODE SECTION 1111 REQUIRES CORROBORATION OF ACCOMPLICE TESTIMONY SPECIFIC TO THAT OFFENSE

At trial, the prosecution elected to proceed exclusively on a felony-murder theory as to all three defendants. The prosecution's case depended on Anthony Kalac, who testified that appellant Garcia and his co-defendants had set out to rob the victim when he was killed. Through his own admissions during his trial testimony, Kalac established as a matter of law that he was an accomplice whose testimony required corroboration pursuant to Penal Code section 1111.[3]

Because the non-accomplice evidence presented at trial provided no corroboration of Kalac's testimony that Garcia and his co-defendants set out to rob the victim, Garcia's robbery-murder special circumstance true finding was barred by Penal Code section 1111 as a matter of law. Moreover, because the elements of the felony-murder charge coincided with the elements of the special circumstance allegation insofar as both required the

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[3] It should be noted, however, that the Court of Appeal's opinion also rejected appellant Garcia's argument that Kalac was an accomplice as a matter of law. (Slip opn. at pp. 20-22.)

jury to find that defendants were attempting to rob the victim when he was killed, Garcia's conviction was also barred by Penal Code section 1111 as a matter of law.

The Court of Appeal's opinion held to the contrary that Kalac's testimony was sufficiently corroborated. (Slip opn. at pp. 22-24.) Appellant Garcia's entire argument was premised on the rule first announced by this Court in *People v. Hamilton* (1989) 48 Cal.3d 1142 and subsequently reaffirmed in *People v. Davis* (2005) 36 Cal.4th 510 that, when a special circumstance allegation requires proof of some other crime, that crime cannot be proved by the uncorroborated testimony of an accomplice. The Court of Appeal's opinion never mentioned or even cited either of these cases, however, and analyzed the evidence at trial without regard to whether it specifically corroborated Kalac's claim that appellants were planning to rob the victim.

Review should therefore be granted to clarify whether Penal Code section 1111, as interpreted by this Court in *Hamilton* and *Davis*, requires specific corroboration of the commission of a separate offense included in a special circumstance allegation.

A. Penal Code Section 1111's Corroboration Requirement In Relation To a Special Circumstance Allegation

Penal Code section 1111 provides: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as 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." (Pen. Code, § 1111.) To corroborate the testimony of an accomplice, "'the prosecution must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.)

"When the special circumstance requires proof of some other crime, that crime cannot be proved by the uncorroborated testimony of an accomplice." (*People v. Hamilton, supra,* 48 Cal.3d 1142, 1176; *People v. Davis, supra,* 36 Cal.4th 510, 544, fn. 11, 546.)

B. Appellant Garcia's Special Circumstance True Finding and His Underlying Conviction Were Not Supported By Sufficient Non-Accomplice Evidence

Kalac's testimony that appellant Garcia and his co-defendants planned and executed a robbery or attempted robbery of the victim finds no

corroboration whatsoever in any of the non-accomplice evidence presented at trial. In his statements to the police, Alejandro Ruiz described, not a robbery, but an outright assassination. Ruiz told police that Rosales had asked him to drive Rosales to meet Estrada for lunch. (3R.T. 2788, 2792.) According to Ruiz, when they arrived at the laundromat, Estrada and two Hispanic men emerged from behind some palm trees and approached the car, and Estrada pointed at Rosales. One of the men walked up to the passenger side of the car and shot Rosales from a distance of approximately three feet. The same man then walked around to the driver's side and attempted to pull Ruiz out of the car. Fearing for his life, Ruiz hastily accelerated and drove away. (3R.T. 2793; 4R.T. 3030.)

Ruiz said nothing to the police about any attempt to rob the victim. Hence, while Ruiz's statements may constitute evidence linking Garcia and his co-defendants to Rosales' killing, they provide no corroboration for Kalac's (and the prosecution's) claim that Garcia and his co-defendants were attempting to rob of the victim.

The prosecution also presented evidence that Garcia was in contact by cell phone with Rosales and Estrada during the approximately fifteen-minute period before Rosales was shot and that his cell phone --and

therefore, presumably, Garcia himself-- was in the vicinity of 112th Street and Prairie Avenue when those calls occurred. (4R.T. 3357, 3364-3371, 3378-3380; 5R.T. 3928; 7R.T. 4931-4940, 5102-5105; 4C.T. 540-541.) While this evidence ties Garcia to the victim and the scene of the crime, it provides no corroboration of Kalac's testimony that Garcia was participating in a robbery.

Nor did the circumstances of defendants' respective arrests (4R.T. 3018; 5R.T. 3912-3913, 3992, 3996) provide any such corroboration. While Gonzalez's gunshot residue test results (3R.T. 2800; 5R.T. 3626) may show that he fired a gun on the day Rosales was shot, nothing in those test results points to a robbery as the context of the shooting. Similarly, to whatever extent that evidence of Garcia's attempt to flee from the police at the time of his arrest showed "consciousness of guilt" (see CALCRIM No. 372 ("Defendant's Flight")), such evidence in no way pointed to robbery as the particular crime of which Garcia was conscious he was guilty.

As this Court has made clear: "When the special circumstance requires proof of some other crime, that crime cannot be proved by the uncorroborated testimony of an accomplice." (*Hamilton, supra,* 48 Cal.3d at p. 1176; *Davis, supra,* 36 Cal.4th at pp. 544, fn. 11, 546.) Hence,

evidence that merely corroborated other aspects of Kalac's testimony without in any way corroborating his testimony that Garcia and his co-defendants planned and attempted a robbery is not sufficient to sustain the special circumstance allegation as to Garcia. (See *People v. Pedroza* (2014) 231 Cal.App.4th 635, 653 [conviction reversed per Penal Code section 1111: "Although it is well established that the evidence needed to corroborate an accomplice's testimony need be only 'slight,' and may be circumstantial and entitled to little consideration when considered alone," corroborating evidence did not meet "even that low standard"].) Accordingly, the special circumstance true finding as to Garcia was barred by Penal Code section 1111 as a matter of law.

The same is true of his underlying conviction. At the close of evidence, the prosecution advised the superior court and defendants that it would be proceeding exclusively on a felony-murder theory of liability for murder as to all three defendants. (8R.T. 5766.) The jury was instructed accordingly. (4C.T. 614-616 [felony-murder instructions]; 645 [Garcia verdict form]; 8R.T. 5793-5796.) As a result, the elements of the underlying murder charge were substantially the same as the elements of the special circumstance allegation, at least insofar as both required the jury

to find that defendants were attempting to rob the victim when he was killed. (See *People v. Elliot* (2005) 37 Cal.4th 453, 475-476 [where defendant was charged with robbery-based felony-murder and robbery-murder special circumstance, "the elements of felony murder and the special circumstance coincide"].)

Just as the non-accomplice evidence was insufficient to sustain the special circumstance allegation, that evidence was also insufficient to sustain Garcia's felony-murder conviction. (See *Rodrigues, supra,* 8 Cal.4th at pp. 1129-1130; *People v. Reingold* (1948) 87 Cal.App.2d 382, 403-405 [circumstances must tend to connect the accused with the *specific offense* for which he is on trial].) Garcia's conviction was therefore similarly barred by Penal Code section 1111 as a matter of law.

A State violates a criminal defendant's due process right to fundamental fairness if it arbitrarily deprives the defendant of a state law entitlement. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175].) As the Ninth Circuit has recognized, Penal Code section 1111 "prevent[s] convictions based on only uncorroborated accomplice testimony." (*Laboa v. Calderon* (9th Cir. 2000) 224 F.3d 972, 979.) Because Garcia's conviction and special circumstance true finding

were barred by Penal Code section 1111 as a matter of law, they amount to an arbitrary denial of a state-created entitlement and therefore violate Garcia's federal constitutional due process right to fundamental fairness at trial. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73 [112 S.Ct. 475, 116 L.Ed.2d 385].) For the same reason, Garcia's conviction and special circumstance true finding violate his due process rights under the California Constitution. (See *People v. Rowland* (1992) 4 Cal.4th 238, 269 ["In our view, a California conviction without adequate support separately and independently offends, and falls under, the due process clause of article I, section 15"].)

C. The Court of Appeal's Opinion and the Need for Clarification as to Whether Penal Code Section 1111 Requires Specific Corroboration of the Commission of Any Separate Offense Included in a Special Circumstance Allegation

The Court of Appeal's opinion held that Kalac's testimony was sufficiently corroborated. (Slip opn. at pp. 22-24.) Appellant Garcia's entire argument was premised on the rule first announced by this Court in *Hamilton, supra,* 48 Cal.3d 1142, and subsequently reaffirmed in *Davis, supra,* 36 Cal.4th 510. The Court of Appeal's opinion never mentioned or even cited either of these cases, however, and analyzed the evidence at trial

without regard to whether it specifically corroborated Kalac's claim that appellants were planning to rob the victim. Review should therefore be granted to clarify whether Penal Code section 1111, as interpreted by this Court in *Hamilton* and *Davis*, requires specific corroboration of the commission of a separate offense included in a special circumstance allegation.

III. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE SPECIAL CIRCUMSTANCE TRUE FINDING, WHICH REQUIRED THE JURY TO FIND THAT APPELLANT GARCIA WAS A MAJOR PARTICIPANT IN THE CRIME AND ACTED WITH RECKLESS INDIFFERENCE TO HUMAN LIFE, IN LIGHT OF THIS COURT'S RECENT DECISION IN *PEOPLE v. BANKS* (2015) 61 CAL.4TH 788

In order to find a robbery-murder special circumstance allegation to be true as to a defendant who is an accomplice rather than the actual killer, the prosecution must prove that the defendant either intended to kill or acted with reckless indifference to human life and was a major participant in the underlying robbery. Here, appellant Garcia was not the actual killer. Nor was there any evidence that he intended to kill Rosales. Hence, the prosecution was required to prove beyond a reasonable doubt that Garcia both (1) was a major participant in the alleged robbery and (2) acted with reckless indifference to human life.

Neither prong was supported by sufficient evidence in this case. Garcia's role in planning and executing the alleged robbery was peripheral. He neither proposed the idea of "coming up on" Rosales nor played any part in setting the plan in motion, and there was no evidence that he contributed anything of significance to the plan. Although he accompanied Gonzalez to the meeting with Rosales, there was no evidence that he played

any part in the interaction between Gonzalez and Rosales, the struggle for the gun, or the shooting. With respect to the claim that he offered to be a lookout, the setting of the meeting with Rosales --on the street near a major intersection, with Gonzalez and Garcia arriving on foot and Rosales and Ruiz arriving by car-- rendered the value of a lookout marginal at best. Furthermore, there was no evidence that he was armed or supplied anyone else with a weapon. Thus, the jury's true finding that Garcia was a "major participant" in the alleged robbery is not supported by sufficient evidence.

Nor was there sufficient evidence that Garcia acted with reckless indifference to human life. There was no evidence that he was aware that Gonzalez was bringing a gun or other weapon to the meeting with Rosales. And although Garcia did not come to the victim's aid, he had no opportunity to do so because the victim was driven away immediately after the shooting.

This issue seems to have been resolved in appellant Garcia's favor by this Court's recent decision in *People v. Banks* (2015) 61 Cal.4th 788. In *Banks*, this court held that, as a matter of law, co-defendant Matthews's role as getaway driver in a robbery during which a victim was shot dead did not rise to the level of 'major participation' (*id.* at p. 805) and that no rational

trier of fact could have found that Matthews acted with reckless indifference to human life (*id.* at p. 807). Because Garcia's role in the planned robbery in this case was even less significant than Matthews's role as getaway driver, *Banks*' holding that Matthews was not a major participant as a matter of law mandates the same conclusion as to Garcia. The *Banks* court's analysis of the minimum evidence necessary to show 'reckless indifference to human life' also support's appellant Garcia's claim.

A conviction that is not supported by substantial evidence violates due process under the Fifth and Fourteenth Amendments to the United States Constitution and under Article I, Sections 7 and 15 of the California Constitution. (*Jackson v. Virginia* (1979) 443 U.S. 307, 313-324 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Rowland, supra,* 4 Cal.4th at pp. 269-270.) Because appellant Garcia's special circumstance true finding is not supported by sufficient evidence, it also violates his protection against cruel or unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and under Article I, Section 17 of the California Constitution. (See *Tison v. Arizona* (1987) 481 U.S. 137, 158 [107 S.Ct. 1676, 95 L.Ed.2d 127]; *Enmund v. Florida* (1982) 458 U.S. 782, 801 [102 S.Ct. 3368, 73 L.Ed.2d 1140]; *In re Rodriguez* (1975) 14 Cal.3d 639, 643.)

The Court of Appeal's opinion nevertheless held that there was sufficient evidence that appellant Garcia was a major participant and acted with reckless indifference to human life: "Garcia was present when Estrada proposed robbing Rosales and described his violent nature. There was evidence he participated in the planning of the robbery with Estrada and Gonzalez and volunteered to assist as a lookout. His phone records showed calls to Rosales shortly before the murder. Garcia was present at the scene, 'in a position to facilitate or prevent the actual murder.' (*Banks*, *supra*, 61 Cal.4th at p. 803.) He made no attempt to prevent the shooting or to notify authorities after Rosales was shot. . . . Garcia chose to flee with the shooter, rather than come to Rosales's aid or summon help. He also accompanied Gonzalez when he disposed of the murder weapon." (Slip opn. as modified by the Court of Appeal's order dated April 28, 2016, at p. 9.)

Review should therefore be granted to determine whether the evidence in this case was sufficient to sustain the jury's finding that appellant Garcia was a major participant in the crime and acted with reckless indifference to human life.

CONCLUSION

For the reasons set forth above, appellant Garcia respectfully requests that this court grant review.

Respectfully Submitted,

Dated: May 9, 2016

JONATHAN E. DEMSON
Attorney for Appellant Alfonso Garcia

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Court of Appeal No. B255375
v.	)	
01) JORGE GONZALEZ, **02) ERICA MICHELLE ESTRADA,** **03) ALFONSO GARCIA,**	)	Superior Court No. YA076269
Defendants and Appellants.	)	

CERTIFICATE OF WORD COUNT

Pursuant to rule 8.360(b)(1) of the California Rules of Court, appellant Garcia certifies that his Petition for Review filed in connection with the above-captioned matter consists of approximately 6,871 words, as determined by using the "word count" feature of the Microsoft Word program used in drafting the brief.

Respectfully Submitted,

Dated: May 9, 2016

JONATHAN E. DEMSON
Attorney for Appellant Alfonso Garcia

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE GONZALEZ et al.,

Defendants and Appellants.

B255375

(Los Angeles County Super. Ct. No. YA076269)

ORDER MODIFYING OPINION AND DENYING PETITIONS FOR REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT*

It is ordered that the published opinion filed March 30, 2016, be modified as follows:

1. On page 5, the ninth sentence in the first full paragraph beginning with "Kalac did not want to give . . . ." is deleted. The remainder of the paragraph is deleted and the following two sentences are inserted in its place as follows:

> He gave Estrada $30, but did so unwillingly. He did not intend to assist or facilitate the robbery.

2. On page 9, the first two sentences under section 4 beginning with "Inglewood Police Officer Fernando Vasquez . . . ." are deleted. The following sentence is inserted in their place as follows:

> Inglewood Police Officer Fernando Vasquez responded to a 2:36 p.m. 911 call, arriving with his partner at Rosales's house at 2:40 pm.

3. On page 10, the third sentence in the first paragraph, beginning with "Ahir also provided . . . ." is deleted. The following sentence is inserted in its place:

> Ahir also provided police with video surveillance footage for October 6.

4. On page 10, the fifth sentence in the first paragraph, beginning with "At 2:17 p.m., the video . . . ." is deleted. The following is inserted in its place:

> At 2:17 p.m., the video shows multiple individuals entering a black Cadillac and at 2:21 p.m., it shows them driving away from the hotel. Inglewood Police Detective Kevin Lane, who conducted two test drives, testified it took between three minutes, 44 seconds and five minutes, five seconds to drive from the Crystal Inn to the American Inn, due to traffic and signal lights.

5. On page 10, after the second sentence beginning with "The registration form . . . ." in the second paragraph, the following sentence is added:

> Based on his test drive, Detective Lane testified it took approximately 30 seconds to drive from the American Inn to the laundromat, or two to three minutes to walk to the location.

6. On page 11, after the fifth sentence beginning with "When asked if she had used . . . ." in the first full paragraph, the following sentence is inserted:

In another call with Davalos, Estrada stated that Ruiz had misdescribed her clothing, as she had been wearing pajamas.

7. On page 14, the heading for section A is deleted and the following heading is inserted:

The Trial Court did not Err in Admitting Ruiz's Out-Of-Court Statements.

8. On page 16, the second sentence beginning with "Ruiz was shot between ...." in the first full paragraph is deleted and the following sentence and footnote number 2 inserted in its place:

Rosales was shot between 2:28 p.m. -- the last time his cell phone was used -- and 2:36 p.m. -- the time of the 911 call.[insert footnote 2]

[Footnote 2] Estrada contends that Rosales might have been killed earlier, arguing that Ruiz could have used Rosales's cell phone to call Jennifer's cell phone after Rosales was killed. No evidence supports this contention.

9. On page 16, the third sentence beginning with "Officer Vasquez . . . ." in the first full paragraph is deleted and the following sentence is inserted in its place:

Officer Vasquez arrived at Rosales's house four minutes later, and promptly spoke with Ruiz.

10. On page 30, the entire section F is deleted and the following section F is inserted in its place:

The jury was instructed that in order to return true findings on the robbery special circumstance allegation for a defendant who was not the actual killer, the prosecution was required to prove: (1) that the defendant's participation in the crime began before or during the killing; (2) that the defendant was a major participant in the crime; and (3) that when the defendant participated in the crime, he or she acted with reckless indifference to human life. The jury returned true findings on the special circumstance as to all appellants.

Appellants Estrada and Garcia contend there was insufficient evidence to support the jury's true findings on the robbery special circumstance. On this issue, we draw guidance from *Banks*, *supra*, 61 Cal.4th 788.[5] *Banks* involved a defendant, Matthews, who was found guilty of first degree murder under a felony-murder theory, based on evidence that he was the getaway driver following an armed robbery. (*Id.* at p. 794.) As Matthews was not the actual killer, the court addressed whether he was liable for life imprisonment without the possibility of parole under section 190.2, subdivision (d). The section provides: "[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4." (§ 190.2, subd. (d).) "The statute thus imposes both a special actus reus requirement, major participation in the crime, and a specific mens rea requirement, reckless indifference to human life." (*Banks*, *supra*, 61 Cal.4th at p. 798, fn. omitted.) These two requirements -- being a major participant and having a reckless disregard for human life -- will often overlap. (*Tison v. Arizona* (1987) 481 U.S. 137, 158 & fn. 12.)[6]

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[5] *Banks* was published after appellants filed their opening briefs, and its holding was first addressed in appellants' reply brief. We requested and received supplemental letter briefs on the applicability of *Banks* to the facts of this case.

[6] As Gonzalez was the actual killer, he is not entitled to the analysis set forth in *Banks*. Instead, under section 190.2, subdivision (b), he is statutorily eligible for life imprisonment without the possibility of parole. (See § 190.2, subd. (b) ["[A]n

After stating that "Matthews's culpability for first degree felony murder is not in dispute" (*Banks, supra*, 61 Cal.4th at p. 794), the court set forth nonexclusive factors relevant to determining whether an accomplice was statutorily eligible for life imprisonment without the possibility of parole under section 190.2, subdivision (d). These factors include: "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?" (*Banks*, at p. 803, fn. omitted.) The court reiterated that "[n]o one of these considerations is necessary, nor is any one of them necessarily sufficient." (*Ibid.*)

Applying those factors to the case, the court found that while there was substantial evidence Matthews acted as the getaway driver, "[n]o evidence was introduced establishing Matthews's role, if any, in planning the robbery. No evidence was introduced establishing Matthews's role, if any, in procuring weapons." (*Banks, supra*, 61 Cal.4th at p. 805, fn. omitted.) "During the robbery and murder, Matthews was absent from the scene, sitting in a car and waiting. There was no evidence he saw or heard the shooting, that he could have seen or heard the shooting, or that he had any immediate role in instigating it or could have prevented it." (*Ibid.*) The court concluded that on this record, "Matthews was, in

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actual killer, as to whom the special circumstance has been found to be true under Section 190.4, need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole."].)

short, no more than a getaway driver" and "cannot qualify as a major participant under section 190.2(d)." (*Id.* at pp. 805 & 807.) As to mens rea, the court noted that although there was evidence Matthews knew he was participating in an armed robbery, nothing suggested he knew his actions would involve a grave risk of death. "Because nothing in the record reflects that Matthews knew there would be a likelihood of resistance and the need to meet that resistance with lethal force," the evidence failed to show Matthews acted with reckless indifference to human life. (*Id.* at pp. 807, 811.)

We also find instructive cases involving accomplices who were not mere getaway drivers. In *People v. Smith* (2005) 135 Cal.App.4th 914, three men (Smith, Taffolla, & Felix) planned to rob a woman. After going to the victim's hotel room, Taffolla stayed outside to act as a lookout, while Smith went inside and Felix left to prepare the getaway vehicle. An altercation occurred in the room, during which the victim was stabbed multiple times, beaten in the face with a steam iron, and slammed into the wall. After Smith exited the room covered in blood, he and Taffolla ran to a nearby street, where Felix picked them up. (*Id.* at pp. 919-920 & 927.) The appellate court held the evidence supported the jury's finding that Taffolla was a major participant, as he was one of only three perpetrators and served as the only lookout to a "violent attempted robbery-turned-murder." (*Id.* at p. 928.) The court concluded the evidence also supported the finding that Taffolla acted with reckless indifference to human life, as he would have heard the victim being assaulted, and after seeing Smith leave the room covered in blood, he chose to flee with the assailant rather than come to the victim's aid or summon help. (*Id.* at pp. 927-928.)

In *People v. Lopez* (2011) 198 Cal.App.4th 1106 (*Lopez*), overruled in part by *Banks, supra*, 61 Cal.4th at page 809, footnote 8, appellant Brousseau, a prostitute, along with several codefendants, planned to rob ("com[e] up on") some

of her prospective customers. (*Lopez*, at pp. 1110 & 1112.) During the encounter, the victim was shot and killed by codefendant Lopez. Brousseau did not challenge the jury's finding that she was a major participant, but argued there was insufficient evidence to prove she acted with reckless indifference to human life. The appellate court disagreed. It found that "Brousseau's act of luring the victim into the secluded alley was critical to the robbery's success. After hearing what she knew was a gunshot, she failed to help the victim or call 911." Instead, she spent the night with her codefendants and had sex with Lopez. The appellate court found Brousseau's actions reflected an "utter indifference to the victim's life." (*Id.* at p. 1117.)[7]

Following *Banks*, in *People v. Medina* (2016) 245 Cal.App.4th 778, the appellate court found there was sufficient evidence to show an accomplice (Whitehead) who acted as armed backup for a robbery was a major participant and acted with reckless indifference to human life. Although Whitehead was not involved in planning the robbery, when he learned of the plan, he asked to go and participated fully. Whitehead left before the victim was shot, in order to drive the shooter's girlfriend away from the scene. When he heard the shooting, he returned to aid the shooter while making no effort to determine if anyone was injured or to offer aid. (*Id.* at pp. 792-793.)

Here, there was substantial evidence that Estrada and Garcia were major participants and acted with reckless indifference to human life. (See *Banks*, *supra*, 61 Cal.4th at p. 804 [in reviewing sufficiency of evidence supporting special circumstance allegation, appellate court considers the record in light most

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[7] Although in *Banks*, the court held that Brousseau's knowledge that Lopez was armed, standing alone, was insufficient to establish reckless indifference to human life, it declined to overrule *Lopez*. (*Banks*, *supra*, 61 Cal.4th at p. 809, fn. 8.)

favorable to the judgment].) Estrada was identified as the person who first proposed robbing Rosales. When she did so, she informed Gonzalez and Garcia that Rosales was a drug dealer who had been physically violent in the past. Thus, unlike in *Banks*, there was a substantial probability the robbery would result in resistance and the need to meet that resistance with deadly force. Estrada then set up the robbery by calling Rosales and asking him to meet her at the laundromat. Her act of luring Rosales to the laundromat was "critical to the robbery's success." (*Lopez, supra*, 198 Cal.App.4th at p. 1117.) Estrada also was identified as being at the scene, and pointing Rosales out to the shooter.[8] After a shot was fired, she neither called 911 to assist the victim, nor called the police to report the shooting.[9] Rather, like Brousseau in *Lopez*, Estrada spent the afternoon with the shooter. She took Gonzalez to her home to introduce him to her son, and was arrested with him later that evening. On this record, there was sufficient evidence for the jury to find that Estrada was a major participant and acted with reckless indifference to human life.

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[8] Contrary to her contention, it was not physically impossible for Estrada to have been present at the shooting. She left the Crystal Inn at 2:21 p.m., and drove to the American Inn, which took approximately four minutes. After checking into the hotel, she received a phone call from Rosales at 2:28 p.m. and left shortly thereafter. As it took only 30 seconds to drive to the location, Estrada could have been present when Rosales was shot. In her recorded call with her aunt, Estrada said Ruiz had inaccurately described her clothing, but did not deny being at the scene.

[9] Although the jury found not true the allegation that a principal was armed with a firearm, we may consider Ruiz's account of Gonzalez's use of a gun to support an enhancement. (See *People v. Medina, supra*, 245 Cal.App.4th at p. 791, fn. 4 [for purposes of finding special circumstance under section 190.2, subdivision (d), "jury could consider evidence that Medina was armed and used his gun even though the jury acquitted Medina of the personal use of a firearm enhancement"].)

Likewise, Garcia was present when Estrada proposed robbing Rosales and described his violent nature. There was evidence he participated in the planning of the robbery with Estrada and Gonzalez and volunteered to assist as a lookout. His phone records showed calls to Rosales shortly before the murder. Garcia was present at the scene, "in a position to facilitate or prevent the actual murder." (*Banks*, *supra*, 61 Cal.4th at p. 803.) He made no attempt to prevent the shooting or to notify authorities after Rosales was shot. Like Taffolla in *Smith*, Garcia chose to flee with the shooter, rather than come to Rosales's aid or summon help. He also accompanied Gonzalez when he disposed of the murder weapon. On this record, we find sufficient evidence to support the jury's findings that Garcia was a major participant and acted with reckless indifference to human life.

The petitions for rehearing is denied. The modification does not change the judgment.

*EPSTEIN, P. J. WILLHITE, J. MANELLA, J.

Filed 3/30/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JORGE GONZALEZ et al., Defendants and Appellants.	B255375 (Los Angeles County Super. Ct. No. YA076269)

APPEAL from judgments of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Affirmed with directions.

Robert Franklin Howell, under appointment by the Court of Appeal, for Defendant and Appellant Jorge Gonzalez.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant Erica Michelle Estrada.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant Alfonso Garcia.

Kamala D. Harris, Attorney General, Gerard A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D.

Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellants Jorge Gonzalez, Erica Michelle Estrada, and Alfonso Garcia appeal from judgments and sentences following their convictions for the murder of Victor Rosales under a felony-murder theory. Appellants challenge the trial court's evidentiary rulings, its jury instructions and their sentences. They contend the trial court erred in admitting the statements of an unavailable percipient witness under the spontaneous statement exception to the hearsay rule. They also contend the court erred in instructing the jury to determine whether a prosecution witness was an accomplice, and argue that the purported accomplice's testimony was not sufficiently corroborated. Appellants further argue that because the information charged them with malice murder, they were entitled to instructions on malice murder, its lesser included offenses and the defenses of accident and self-defense. Estrada and Garcia contend they were improperly sentenced to life imprisonment without the possibility of parole because the jury's true findings on the robbery special circumstance enhancement were not supported by sufficient evidence. Finally, they contend the abstracts of judgment improperly reflect imposition of a parole revocation restitution fine.

With the exception of the claim regarding the parole revocation fines, we reject appellants' contentions. The record supports the trial court's admission of the percipient witness's remarks as spontaneous statements, as they were made shortly after the shooting of Rosales, while the witness was under the influence of that startling event, and were not testimonial. As to the alleged accomplice, we

conclude that he was not an accomplice as a matter of law, and that the trial court properly instructed the jury to determine the issue. Moreover, any error was harmless, as the alleged accomplice's testimony was sufficiently corroborated.

With respect to the trial court's failure to instruct, sua sponte, on malice murder, its lesser included offenses and defenses, we conclude that in light of the jury's guilty verdicts on felony murder and its true findings on the robbery special circumstance allegations, any error was harmless. To the extent *People v. Campbell* (2015) 233 Cal.App.4th 148 (*Campbell*) suggests a different analysis, we respectfully disagree. Finally, we conclude that under *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*), there was sufficient evidence to support the jury's true findings as to all appellants on the robbery special circumstance allegation. Thus, appellants were statutorily eligible to be sentenced to life imprisonment without the possibility of parole. Accordingly, we affirm the convictions and modify the abstracts of judgment to delete the parole revocation fines. As amended, the judgments are affirmed.

PROCEDURAL HISTORY

Appellants were charged in a second amended information with the malice murder of Rosales (Pen. Code, §187, subd. (a); count 1).[1] As to all appellants, it was alleged that a principal was armed with a firearm (§ 122022, subd. (a)(1)), and that the murder occurred during the commission of a robbery (§ 190.2, subd. (a)(17)). Gonzalez was also charged with shooting at an occupied vehicle. (§ 246; count 2.) As to both counts, it was alleged that Gonzalez personally and intentionally discharged a firearm which caused great bodily injury and death to Rosales (§ 12022.53, subds. (b), (c) & (d)).

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

A jury found appellants guilty on count 1, found true the robbery special-circumstance allegation, and found not true the firearm allegations. The jury acquitted Gonzalez of count 2. The trial court sentenced each appellant to life imprisonment without the possibility of parole.

Appellants filed timely notices of appeal.

FACTUAL BACKGROUND

A. *The Prosecution Case*

1. *Anthony Stephen Kalac's Testimony*

After asserting his Fifth Amendment right against self-incrimination at trial, Anthony Stephen Kalac was granted use immunity.[2] He testified that on October 6, 2009, he went to Garcia's house to get high. He had known Garcia for several years. At the house, Garcia introduced Kalac to his girlfriend, Jennifer. Kalac, who already had taken 10 "hits" of heroin, began smoking several more.

Garcia announced they were going to a hotel down the street to celebrate "somebody's girlfriend's birthday." Kalac left his heroin stash at Garcia's house. Garcia, Kalac and Jennifer then walked to the Crystal Inn, which was nearby on Prairie and 112th Street.

At the Crystal Inn, Garcia knocked on a door of a second floor room. Gonzalez opened the door. Garcia introduced Kalac to Gonzalez and to the other occupant -- Gonzalez's girlfriend, Estrada. Kalac entered and sat on a couch while the other occupants began speaking among themselves. Garcia told Gonzalez, "Let's pack a bolt," which referred to putting methamphetamine into a pipe to smoke. Gonzalez replied that there were no drugs in the room. Garcia, Gonzalez,

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[2] Use immunity precludes prosecutors from using a witness's testimony in a later proceeding. A witness granted use immunity may still be prosecuted based on other evidence obtained independently.

and Estrada then discussed where they could obtain drugs. Kalac left the hotel to meet his heroin dealer at a nearby location. When the dealer did not show up, Kalac returned to the hotel room. Garcia, Gonzalez, Estrada and Jennifer were still present.

Estrada told Garcia and Gonzalez that she had someone they could "come up on." Kalac understood "come up on" to mean "rob." Estrada said the proposed robbery victim was a drug dealer. She also mentioned he was an ex-boyfriend who had been "physical" with her. At this point, Gonzalez became "agitated." Estrada, Garcia, and Gonzalez began talking about robbing the person Estrada had mentioned. Because no one in the room had money, Erica asked Kalac for money to pay for a room at a hotel next door. She stated she would give Kalac heroin from the robbery in return for the money. Kalac did not want to give Estrada the money because he already had heroin stashed at Garcia's house. He gave Estrada $30, but did so unwillingly. He also denied intending to assist or facilitate the robbery.

Estrada then told everyone to be quiet so she could call the drug dealer. She told the dealer to meet at the laundromat across the street in 30 minutes. After the conversation, Garcia and Gonzalez left for the laundromat. Garcia said he would act as a lookout. Kalac never saw a gun or heard guns discussed.

Estrada called the drug dealer again to find out when he would arrive at the laundromat. After this call, Estrada began packing to move out of the hotel. Kalac and Jennifer helped Estrada load the bags into her car, a black Cadillac. They drove to the American Inn, just south of the Crystal Inn. Responding to a phone call, Estrada said she would "be there in two minutes," and left shortly thereafter with Jennifer, leaving Kalac in the hotel room.

After several minutes, Kalac decided to go home. He was walking south on Prairie Street when he saw Garcia and Gonzalez on the other side of the street. Garcia crossed the street and told Kalac that "shit went bad." Kalac and Garcia then walked to the American Inn. Garcia changed his clothes, and the two men walked to Garcia's house, where Kalac retrieved his heroin and left for home. He denied seeing or handling the gun used to shoot Rosales. In February or March 2010, Kalac encountered Jennifer. She told him the drug dealer had died.

2. *Other Evidence Concerning Kalac*

Inglewood Police Officer Michael Han testified that on February 1, 2010, an informant who requested anonymity came to the police station, stating she had information about a murder. Officer Han spoke with the informant and later sent out a group e-mail to all homicide detectives. The email stated: "'For your information, on Monday, February 1, 2010, I met with an anonymous informant at the IPD Lobby. The informant said he/she heard the following story from a male white subject by the name of Anthony Kalac. The informant relayed that recently he/she heard Anthony Kalac talk about a robbery to a drug dealer. Anthony Kalac said a male subject by the name of "Ralph" or "Alf" was the mastermind in the robbery. On or about October, 2009, "Ralph," Anthony Kalac, and two other subjects (one male and one female) executed the robbery. Anthony Kalac said "Ralph" shot and killed the drug dealer, who was in the car, in the area of 113th Street and Prairie Avenue. After the murder "Ralph" gave the gun to Anthony Kalac to get rid of it.'"

The informant was later identified as Stefanie San Angelo. She testified she was dating Kalac in 2009. A few days before she talked with Detective Han, she had received information that Kalac might have been involved in a shooting. She could not recall whom she heard it from. She provided that information to the

detective. After talking with the police, she spoke with Kalac. Kalac said he had gone to buy some drugs with "Alf and there was another guy and female there. They intended to jack somebody. It was either the girl's boyfriend, ex-boyfriend. . . . They contacted him. He came out. They went down to meet with him. [Kalac] stayed in the room. . . . He [the victim] wasn't giving it up. He either tried to run away or drive away. They shot at him, hit him, and that was it." San Angelo was not sure how Kalac learned of the shooting. She had asked him, "Did you walk past a dead body and not say anything?" Kalac had responded, "Yeah, I didn't care about it. I cared about my dope." San Angelo also identified Garcia as "Alf."

3. *Testimony of the Victim's Family Members*

Liliana Rosales, the victim's sister, testified that in October 2009, she was living in a house with her brother, sister, and mother. Liliana testified that her brother had been in a relationship with Estrada. On October 6, 2009, her brother told her he was going out, but would be "right back." Shortly thereafter, Liliana was walking out to her car when another vehicle pulled up to the house. Alejandro Ruiz was driving the vehicle. He got out, looking nervous, and told Lilliana in a "broken" voice that her brother had been shot. Liliana ran to the passenger side of the vehicle and saw her brother. He was not moving and looked asleep. She asked Ruiz "who had done that" to her brother. Ruiz said, "Erica, Erica." Some neighbors came over, and Liliana told them to call 911. She ran inside the house and got her mother. The neighbors, her mother, and Liliana pulled Rosales from the vehicle. Liliana noticed a bullet wound in Rosales's stomach. Her mother performed CPR on Rosales until the ambulance arrived. Rosales was taken to the hospital where he was pronounced dead.

Maria Murillo, the victim's mother, testified that on October 6, 2009, at around 2:10 p.m., she was coming home when she saw her son in their driveway. Rosales told her he was going to eat lunch with a friend. Murillo entered the house and began cooking. About 10 minutes later, her daughter Liliana entered and told her Rosales had been hurt. Murillo ran outside, and saw Rosales in the passenger side of a car. She also observed Rosales's friend, Alejandro Ruiz, looking "frightened" and "in despair." Ruiz was running around, saying, "the girlfriend, the girlfriend" in Spanish. Some neighbors then helped her pull Rosales out of the vehicle. She performed CPR until the ambulance arrived. Murillo was later interviewed, and told the detective that Rosales had said that Estrada would call him for drugs.

Mayra Gomez, the victim's other sister, testified that she was very close to her brother. About three to four months before he died, she observed her brother with Estrada on multiple occasions, both at their house and at Estrada's house. Rosales told Gomez that "he was fooling around with [Estrada], but it was nothing serious." Gomez also stated that Rosales was "fooling around" with other people during that time. On October 6, at around 2:00 p.m., Rosales told Gomez he had to go "do something real quick and then I'm going to come back." About an hour later, Gomez heard Liliana run into the house screaming Rosales's name. Gomez ran outside and saw Ruiz standing next to a white vehicle. He looked scared and frightened, and he was stuttering. Gomez ran to the passenger side of the vehicle and saw her brother: his eyes were rolled back and there was a bloodstain on his stomach. Gomez heard Ruiz say, "It was Erica" in Spanish. When the police arrived, a detective asked Gomez if she knew "Erica." Gomez said she did, and guided police officers to Estrada's house. Gomez testified that her brother used crystal methamphetamine, and that she suspected he was a drug dealer.

4. *Testimony of Officer Fernando Vasquez*

Inglewood Police Officer Fernando Vasquez responded to the 911 call. He and his partner arrived at Rosales's house at 2:40 p.m. Vasquez saw that Rosales had a single gunshot wound to his chest. When paramedics arrived and took over treatment, Vasquez noticed Ruiz, who appeared to be in shock and looked afraid. Ruiz was pacing back and forth, his eyes were wide open, and he spoke very rapidly in broken sentences with a high-pitched voice. The officer did not believe Ruiz was under the influence of any drug.

When asked about the shooting, Ruiz stated he had received a call from Rosales around 1:00 p.m., asking Ruiz for a ride. Ruiz picked up Rosales at approximately 2:16 p.m. While in the car, Rosales told Ruiz he had received a call from his girlfriend, Erica. Erica wanted to meet Rosales for lunch, and had asked him to meet her at a laundromat on Prairie and 112th Street. When Ruiz and Rosales arrived at the laundromat, Ruiz parked his vehicle at the curb. As he was parking, another vehicle arrived and parked in front of him. While parking, this vehicle lightly collided with Ruiz's vehicle. Ruiz was shocked by the accident. He recognized Erica, accompanied by two male Hispanics, walking out from behind two palm trees. Erica pointed at Rosales, and one of the males walked up to the passenger side door, produced a small handgun, and fired a single shot at Rosales. The shooter then walked around the car to the driver's side, and attempted to pull Ruiz out of the vehicle. Ruiz, fearing for his life, hit the accelerator and drove away from the scene.

At around 7:14 that evening, Officer Vasquez participated in the detention and arrest of Estrada and Gonzalez, who were together in a black Cadillac outside Estrada's house. Neither Estrada nor Gonzalez showed signs of injuries.

5. *Additional Evidence*

Ramesh Ahir, the hotel manager at the Crystal Inn, testified that based on hotel records, Estrada registered for room 232 on October 5, 2009. She checked out the following day. Ahir also provided police with video surveillance footage. The video shows that at 2:06 p.m., an adult male walked past the camera towards Prairie, followed a minute later by another male. At 2:17 p.m., the video shows multiple individuals entering a black Cadillac and driving away.

Estrada then registered at the American Inn. The registration form showed $51 of the $58 room charge was paid.

Vadims Poukens, a medical examiner, testified he performed the autopsy on Rosales. A .22-caliber bullet was recovered from his body. Poukens opined that Rosales died from a gunshot wound to the chest. According to Poukens, when a gun is discharged, particles coming off the muzzle may strike the skin and leave small marks, called "stippling." A person would have to be close to the discharging firearm -- around 2 feet -- to show stippling. Poukens observed stippling on Rosales's right hand, in the wrist area. He observed no other signs of injuries, such as defensive wounds to the hands.

The white vehicle Ruiz had driven was impounded. A .22-caliber cartridge case was found in the vehicle. Rosales's cellular phone was recovered between the center console and passenger side seat.

Phone records showed numerous calls between and among appellants and Rosales on October 6, 2009. At 2:12 p.m., a call was made from Garcia's cell phone to Rosales's phone. At 2:19 p.m. and 2:21 p.m., calls were made from Jennifer's cell phone to Garcia's phone. At 2:23 p.m., a call was made from Rosales's phone to Garcia's phone. At 2:23 p.m. and 2:26 p.m., two more calls were made from Jennifer's phone to Garcia's phone. At 2:27 p.m., a call was

made from Garcia's phone to Rosales's phone. At 2:27 p.m. and 2:28 p.m., two more calls were made from Garcia's phone to Jennifer's phone. Finally, at 2:28 p.m., a call was made from Rosales's phone to Jennifer's phone. During this period, Garcia's phone was using cell towers located within one mile of the Crystal Inn.

When Estrada and Gonzalez were arrested, no weapons were found on them. During Gonzalez's booking, he had 25 cents on his person. While Estrada was in jail, she made eight calls to her aunt, Maria Davalos. During one of the recorded conversations, Estrada asked her aunt to get in touch with Jennifer, saying "[Jennifer] must have the cell phone, right[?]" When asked if she had used Jennifer's cell phone to call Rosales, she said, "Yeah, I did but I called private though."

Wayne Moorehead testified he performed gunshot residue tests on swabs taken from Estrada's and Gonzalez's hands. Gunshot residue was present in Gonzales's samples, but not in Estrada's.

Garcia was arrested on December 17, 2009. When police officers tried to serve the arrest warrant, Garcia attempted to run away, but was apprehended.

B. *The Defense Case*

Daren Blount, a private investigator working for Gonzalez's defense, testified he interviewed Liliana Rosales. Liliana told him her brother sold drugs. Liliana also stated her brother had sold drugs to Estrada at a discount, and had even given drugs to Estrada for free.

Gonzalez testified that in 2009, he was living off approximately $46,000 in savings and money earned from a part-time job assisting a paralyzed person named Ernesto Corral. A few days before the incident, Corral had paid him $200. On October 6, 2009, Gonzalez had approximately $165 on his person.

Gonzalez testified that on October 5, 2009, Estrada had surprised him with a birthday party at the Crystal Inn. Jennifer also was present at the party. Gonzales testified he had met Estrada through Jennifer. He had known her for about a month and a half before the incident. Gonzalez stated that although they were intimate, they were never romantic or serious, and he did not consider her his girlfriend. He also knew she was dating Rosales. Gonzalez had met Rosales on two prior occasions. On both occasions, he purchased drugs from Rosales, using Estrada's connection with Rosales.

After the October 5 birthday party, at around 10:00 p.m., Estrada left the hotel, saying she was going to go out with Rosales. Estrada returned to the hotel room around midnight.

The next morning, Garcia and Kalac came to the hotel room. Gonzalez knew Garcia because they went to the same high school. Kalac looked like he was on drugs. He came into the room and sat on the couch. Garcia asked Gonzalez to "pack a bowl," and Gonzalez replied that they had no drugs. Gonzalez then asked Estrada if she wanted to call Rosales to order a "teena" -- a 1/16th of crystal methamphetamine. Kalac then indicated he wanted to purchase $50 worth of heroin, but had only $30. Estrada told Kalac she could get him $50 worth of heroin for $30. She then called Rosales.

Gonzalez denied that anyone spoke about robbing Rosales. He did not have a gun or see any guns, and there were no discussions about guns. Gonzalez also stated they planned to move to another hotel, explaining that the hotel manager had called and said they had to leave because too many people were coming in and out of the room.

After Estrada finished speaking with Rosales, Gonzalez left the hotel to meet Rosales at the laundromat across the street. Gonzalez asked Garcia to come with

him, and Garcia agreed. There was no mention of being a lookout. Gonzalez identified himself in the hotel's video surveillance footage as the first person shown exiting the hotel.

Gonzalez waited outside the laundromat for 20 to 30 minutes. He then began walking toward the corner of Prairie and 112th, where he noticed Rosales sitting in a car with the window down, looking at him. He walked over to Rosales, and said, "What's up, Victor?" Rosales did not respond. Gonzalez repeated his greeting, but Rosales remained silent. Gonzalez then asked, "Do you want me to get Erica?" Rosales responded by raising a handgun in his right hand. In fear for his life, Gonzalez grabbed the gun, and was able to take it from Rosales. Rosales tried to retrieve the gun -- now in Gonzalez's right hand -- and used both hands to grab Gonzalez's right wrist. As Gonzalez pulled away and turned his body, the gun discharged. Gonzalez denied intentionally pulling the trigger or trying to kill Rosales.

Gonzalez ran from the scene and walked into the laundromat. He waited for Rosales's car to drive away. He then left the laundromat and found Garcia standing nearby. Gonzalez testified he was unsure where Garcia was when the incident occurred. Gonzalez and Garcia walked along Prairie, where they encountered Kalac. Kalac said, "We're at the American Inn. We got a room." Gonzalez then gave Kalac the gun because he was scared of retaining possession of it. He did not tell Kalac to dispose of the gun. An acquaintance who happened to be driving by the location picked up Gonzalez but not Garcia, and dropped him off at 105th Street. Gonzalez gave the man $70 and told him to tell Estrada to get another hotel room.

Gonzalez called another acquaintance to give him a ride. While in the car, Gonzalez called the first acquaintance and learned that Estrada was staying at the

Deluxe Inn. He was dropped off there, and joined her in the room. Gonzalez placed his cell phone, remaining money, and other belongings inside a drawer and went to sleep. He awoke at the sound of Estrada leaving the hotel room. She told him she wanted to see her son, and Gonzalez told her he would go with her. Estrada drove Gonzalez to her house, introduced him to her son, and took her son back inside. As Gonzalez and Estrada were driving away, the police arrived and arrested them.

Corral testified that in 2009, he had hired Gonzalez for $200 a month as a caregiver.

Neither Estrada nor Garcia testified.

DISCUSSION

Appellants contend (1) that the trial court erred in admitting Ruiz's out-of-court statements to Officer Vasquez; (2) that the court erred in permitting Kalac to testify to appellants' planning of the robbery; (3) that the court erred in allowing the jury to determine whether Kalac was an accomplice; (4) that the court erred in failing to instruct, sua sponte, on malice murder, the lesser included offenses of murder, and defenses to malice murder; (5) that there was insufficient evidence to support the robbery special circumstance enhancement; and (6) that the imposition of a parole revocation fine was unauthorized. We address each contention in turn.

A. *The Trial Court did not Err in Admitting Alejandro Ruiz's Testimony.*

Ruiz was unavailable for trial. In a pretrial hearing under Evidence Code section 402, the court permitted Officer Vasquez to testify about Ruiz's statements under the spontaneous statement exception to the hearsay rule (Evid. Code, § 1240). The court found that "a murder and a shooting . . . is incredibly startling and frightening." It further found that Ruiz's statements were made before there was time to contrive and misrepresent, noting that Ruiz made his statements soon

after the shooting, and that Ruiz's demeanor and behavior demonstrated he was still overcome with nervous excitement. Additionally, the court determined that Ruiz's statements to the officer were nontestimonial. The court found that Officer Vasquez was not seeking to elicit testimonial evidence for later use at trial, but asking general questions to locate an at-large shooting suspect. Appellants Estrada and Garcia contend the trial court abused its discretion in admitting Ruiz's statements, arguing (1) that the statements were made after Ruiz had sufficient time to contrive and misrepresent, that (2) they went beyond the circumstances of the shooting, and (3) that they were testimonial. We find no error in the trial court's admission of Ruiz's statements.

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." To be admissible under the spontaneous statement exception, "'(1) there must be some occurrence startling enough to produce . . . nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.'" (*People v. Poggi* (1988) 45 Cal.3d 306, 318 (*Poggi*), quoting *Showalter v. Western R.R. Co.* (1940) 16 Cal.2d 460, 468.) "Whether an out-of-court statement meets the statutory requirements for admission as a spontaneous statement is generally a question of fact for the trial court, the determination of which involves an exercise of the court's discretion. [Citation.] We will uphold the trial court's determination of

facts when they are supported by substantial evidence and review for abuse of discretion its decision to admit evidence under the spontaneous statement exception. [Citations.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 65.)

Here, the record supports the trial court's finding that Ruiz's statements to Officer Vasquez were spontaneous. Rosales was shot between 2:28 p.m. -- the last time his cell phone was used -- and 2:40 p.m. -- the time Officer Vasquez arrived at Rosales's house. Officer Vasquez spoke with Ruiz shortly after arriving at the house. Ruiz appeared to be in shock, his eyes were wide open, and he was pacing back and forth. When speaking with the officer, Ruiz spoke very rapidly in broken sentences and with a high-pitched voice. The record thus supports the trial court's determination that Ruiz was still under the influence of startling events when he made his statements to the officer. (See *Poggi, supra*, 45 Cal.3d at pp. 319-320 [declarant's statements spontaneous although she made them 30 minutes after attack, after she had become calm enough to speak coherently, and in response to officer's questions].)

Appellants contend Ruiz's statements went beyond describing the shooting and murder, noting that Ruiz provided an explanation of what caused Rosales to call Ruiz and ask him for a ride. Evidence Code section 1240 permits statements explaining an event. Ruiz's statement that Rosales wanted a ride in order to meet Estrada at a laundromat explained why Ruiz was at the scene of the shooting and why he saw Estrada there. In short, the trial court did not abuse its discretion in admitting Ruiz's statements to Officer Vasquez under Evidence Code section 1240.

Appellants further argue that admission of Ruiz's statements violated their confrontational rights because the statements were testimonial. In *Davis v. Washington* (2006) 547 U.S. 813, the United States Supreme Court explained that

"[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822)

In *People v. Chism* (2014) 58 Cal.4th 1266, the California Supreme Court applied this reasoning to determine that an unavailable percipient witness's statements to an officer about a shooting were nontestimonial. In reaching this conclusion, the court noted: "Officer Romero was the first officer to arrive at the scene, and Miller was the first person he contacted. Miller appeared to be 'very nervous' and 'shaken up.' The circumstances of the encounter, which took place outside a store where a shooting had recently occurred, reveal that Miller and Officer Romero spoke to each other in order to deal with an ongoing emergency. It was objectively reasonable for Officer Romero to believe the suspects, one of whom presumably was still armed with a gun, remained at large and posed an immediate threat to officers responding to the shooting and to the public. We are convinced that Miller's additional statements concerning his observations and descriptions of the suspects were made for the primary purpose of meeting an ongoing emergency and not to produce evidence for use at a later trial." (*Id.* at p. 1289.) Here, as the trial court found, Officer Vasquez questioned Ruiz -- a witness who was still demonstrably shaken and distraught from observing a shooting at close range minutes before -- to deal with an ongoing emergency -- locating and apprehending an at-large shooter. Although Officer Vasquez was not the first officer to arrive at the scene and he spoke with other officers who

identified Ruiz as a possible witness, those facts are not dispositive. The record indicates Officer Vasquez was the first officer to speak with Ruiz about the shooting incident. We conclude that Ruiz's statements were nontestimonial.

B. *The Trial Court did not Err in Admitting Kalac's Testimony Over Hearsay Objections.*

The trial court permitted Kalac to testify that Estrada stated "she had someone that they could come up on" under the adoptive admissions exception to the hearsay rule. In support of its evidentiary ruling, the court stated that any "law-abiding citizen standing there when there's a conversation going on about come up or robbery [or] however you want to phrase it, would leave. [Or say:] 'I'm not participating in that. I'm gone.'" Appellants Gonzalez and Garcia contend the court erred in admitting Estrada's statement, as there was no evidence that they heard or understood "come up on" to mean "rob." We find no abuse of discretion.

Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." "In determining whether a statement is admissible as an adoptive admission, a trial court must first decide whether there is evidence sufficient to sustain a finding that: (a) the defendant heard and understood the statement under circumstances that normally would call for a response; and (b) by words or conduct, the defendant adopted the statement as true." (*People v. Davis* (2005) 36 Cal.4th 510, 535.) "For the adoptive admission exception to the hearsay rule to apply, . . . it is enough that the evidence showed that the defendant participated in a private conversation in which the crime was discussed and the circumstances offered him the opportunity to deny responsibility or otherwise dissociate himself from the crime, but that he did not do so." (*Id.* at

p. 539.) Here, Kalac was cross-examined on the meaning of the term "come up on," and he maintained that it was slang for "rob." The trial court was entitled to credit Kalac's testimony and conclude that Gonzalez and Garcia understood the term and adopted Estrada's plan to rob Rosales. Moreover, were we to find error in admitting that portion of Kalac's testimony, we would deem it harmless, as Kalac testified that the principal subject of all three appellants' conversation was robbing Rosales. Thus, it is not probable that Gonzalez and Garcia would have achieved a more favorable result had Estrada's use of the term "come up on" been excluded. (See *People v. Seumanu* (2015) 61 Cal.4th 1293, 1308 [erroneous admission of hearsay statement reviewed for error under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)].)

C. *Appellants Fail to Demonstrate the Trial Court Prejudicially Erred in Instructing the Jury on Kalac and on Corroboration of his Testimony.*

The trial court instructed the jury to determine whether Kalac was an accomplice, and further instructed that if the jury found Kalac was an accomplice, it could credit his testimony concerning the robbery only if such testimony was supported by independent corroborating evidence. Appellants contend the court erred in not instructing the jury that Kalac was an accomplice as a matter of law. They further contend there was insufficient evidence to corroborate Kalac's testimony. Alternatively, appellants contend that the jury instructions on accomplice testimony were incomplete or inaccurate, as (1) the instructions failed to advise the jury that the statements of one accomplice may not be used to corroborate another accomplice's testimony, and (2) that the instructions permitted the jury to use Kalac's out-of-court statements to corroborate his trial testimony.

1. *The Trial Court did not Err in Failing to Instruct the Jury that Kalac was an Accomplice as a Matter of Law.*

Under section 1111, "[a] conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as 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." "If sufficient evidence is presented at trial to justify the conclusion that a witness is an accomplice, the trial court must so instruct the jury, even in the absence of a request." (*People v. Brown* (2003) 31 Cal.4th 518, 555.) Under section 1111, "[a]n accomplice is . . . defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." "This definition encompasses all principals to the crime [citation], including aiders and abettors and coconspirators. [Citation.]" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90 (*Stankewitz*).) "Whether someone is an accomplice is ordinarily a question of fact for the jury; only if there is no reasonable dispute as to the facts or the inferences to be drawn from the facts may a trial court instruct a jury that a witness is an accomplice as a matter of law." (*People v. Valdez* (2012) 55 Cal.4th 82, 145-146 (*Valdez*).)

Appellants contend that based on Kalac's own testimony, he was an aider and abettor to Rosales's murder, as Kalac understood that appellants were planning to rob Rosales of drugs and gave Estrada money to rent another hotel room. Aider and abettor liability requires proof that the aider and abettor intended to assist the direct perpetrators in achieving their unlawful ends. (*Valdez*, *supra*, 55 Cal.4th at pp. 146-147.) Although "'an act [that] has the effect of giving aid and encouragement, and . . . is done with knowledge of the criminal purpose of the

person aided, *may* indicate that the actor intended to assist in fulfillment of the known criminal purpose,'" "'the act may be done with some other purpose [that] precludes criminal liability.'" (*Id.* at p. 147, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 559.) Thus, where there is no direct evidence that a witness acted with the requisite knowledge and intent, the witness is not an accomplice as a matter of law. (See, e.g., *Valdez, supra*, at pp. 146-147 [witness not accomplice as matter of law despite evidence that he drove perpetrators to crime location after being told by perpetrators that they had to go there "'to take care of something,'" which witness understood to mean assault or kill someone].)

Here, Kalac denied any intent to assist or facilitate the robbery. He also testified he gave Estrada his money unwillingly, and asserted that he was present in the hotel room only because Garcia told him they were going to a birthday party. Thus, although the evidence may have permitted a finding that Kalac was an accomplice, it did not compel that finding as a matter of law. (See, e.g., *People v. Carrasco* (2014) 59 Cal.4th 924, 969 [witness not accomplice as matter of law although he accompanied defendant to crime scene and helped defendant escape after murder, where witness denied knowledge of and intent to assist defendant in committing robbery and claimed defendant forced him to assist in escape]; *People v. Williams* (2008) 43 Cal.4th 584, 637 [witness not accomplice as matter of law where he denied having the intent to further defendant's criminal purpose and claimed to be present with defendant for another reason]; see also *Stankewitz, supra*, 51 Cal.3d at p. 90 [presence at the scene of a crime or failure to prevent its commission insufficient to establish aiding and abetting].) The fact that Kalac asserted his Fifth Amendment right to remain silent and was granted use immunity is not dispositive. (See, e.g., *Stankewitz, supra,* at p. 90 ["The fact that a witness has been charged or held to answer for the same crimes as the defendant and then

has been granted immunity does not necessarily establish that he or she is an accomplice."].) In short, whether Kalac was an accomplice was properly left for the jury to determine.

2. *Kalac's Testimony was Sufficiently Corroborated.*

Appellants' contention that Kalac's testimony was not sufficiently corroborated derives from their contention he was an accomplice as a matter of law. But where the jurors reasonably could have found that a witness was not an accomplice, "we need not . . . decide whether there was sufficient corroborating evidence as to each defendant." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 432, italics omitted; see also *People v. Santo* (1954) 43 Cal.2d 319, 326-327 ["Since it could be inferred that [the witness] was not an accomplice, the question whether he was, was properly left to the jury, and as a reviewing court, we are bound to presume in favor of affirming the judgment that the jury found that he was not an accomplice."].) Nevertheless, we agree with the trial court that Kalac's testimony was sufficiently corroborated.[3] (See *People v. Williams, supra,* 43 Cal.4th at pp. 636-637 [even if trial court erred in refraining from instructing jury that witness was accomplice as a matter of law, error was harmless because there was sufficient corroborating evidence"].) "'Corroborating evidence may be slight [and] may be entirely circumstantial' [citation], and although that evidence must implicate the defendant in the crime and relate to proof of an element of the crime, it need not be sufficient to establish all the elements of the crime. [Citation.]" (*Id.* at p. 638, quoting *People v. Hayes* (1999) 21 Cal.4th 1211, 1271.) Here, forensic evidence and testimony by other witnesses sufficiently corroborated

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[3] We attach no significance to the posttrial remarks of the trial court that it believed Kalac was an accomplice, particularly in light of the fact that the court instructed the jury, without defense objection, to determine whether Kalac was an accomplice.

key aspects of Kalac's testimony and connected appellants to the crime of robbery. Kalac's testimony that appellants decided to rob Rosales because they had no drugs or money was corroborated by the fact that Gonzalez only had 25 cents on his person when he was arrested later that day. Ruiz stated that Rosales was expecting to meet Estrada at the laundromat. When Estrada appeared, however, she was accompanied by two Hispanic males, suggesting that the perpetrators intended to rob Rosales. Had they intended to purchase drugs, only Estrada's presence would have been necessary. Ruiz also stated that after Rosales was killed, the shooter tried to pull Ruiz out of the car, suggesting that the perpetrators wanted to steal any drugs Rosales had brought with him.

Moreover, Kalac's testimony was sufficiently corroborated as to each appellant. Estrada was connected to the crime by Ruiz's statements that she was to blame for Rosales's death. Ruiz identified Estrada as the person who pointed at Rosales before he was shot. In a recorded statement, Estrada admitted using Jennifer's cell phone to call Rosales before he died. (See *People v. Gurule* (2002) 28 Cal.4th 557, 628 [accomplice's testimony may be corroborated by defendant's own statements].) She used a cell phone other than her own, but attempted to hide that fact from Rosales. In addition, Estrada moved from the Crystal Inn to the American Inn just before the murder, suggesting she was looking for a place of safety or a hideout following the robbery. (See *People v. Perry* (1972) 7 Cal.3d 756, 772 ["[A]ttempts of an accused to conceal . . . his whereabouts . . . may warrant an inference of consciousness of guilt and may corroborate an accomplice's testimony."] overruled on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 28.) Finally, she was arrested with Gonzalez outside her house, hours after Rosales's death.

As to Gonzalez, he admitted being the shooter. The fact that he had no money on him when he was arrested suggests that robbery, not a drug purchase, was the goal.

Garcia was connected to the crime by (1) the use of his cellular phone to contact Rosales, (2) video surveillance showing a second male following Gonzalez out of the hotel to the laundromat, and (3) Ruiz's statements that there were two Hispanic males with Estrada. (See *People v. Chism*, *supra*, 58 Cal.4th at p. 1301 [accomplice's testimony partly corroborated where video surveillance showed two African-Americans entering and leaving store at time of robbery and defendant was African-American].) Moreover, when Garcia was arrested, he fled, suggesting a consciousness of guilt. "Flight tends to connect an accused with the commission of an offense and may indicate that an accomplice's testimony is truthful." (*People v. Perry*, *supra*, 7 Cal.3d at p. 771.) In short, Kalac's testimony was sufficiently corroborated.[4]

3. *The Jury Instruction on the Evidence Required to Corroborate an Accomplice's Testimony was not Erroneous.*

Appellants' claim that the jury was improperly instructed on the kind of evidence that could be considered as corroborating evidence is forfeited, as they failed to timely object to the instructions. More important, as the jury reasonably could find Kalac was not an accomplice, no corroborating evidence was necessary, and thus any instructional error was not prejudicial. (*People v. Bryant, Smith and*

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[4] As Kalac's testimony was corroborated, we reject appellants' claim that the trial court erred in denying their motions for acquittal under section 1118.1. We also reject their claim that there was insufficient evidence to support the jury's factual determination that appellants committed or attempted to commit a robbery. Whether there was sufficient evidence to support the jury's true findings on the robbery special circumstance allegation for sentencing under section 190.2, subdivision (d) is addressed in Part F, *infra*.

Wheeler, supra, 60 Cal.4th at p. 432.) Even were we to consider appellants' claim, we would find no prejudicial error. First, it is not reasonably likely that the jury would have used Estrada's statement (that she had someone that they could "come up on") and Garcia's statement ("Shit went bad") -- set forth in Kalac's trial testimony -- to corroborate Kalac's other testimony. The accomplice instruction, as given, clearly stated that the corroborating evidence must be "independent of the accomplice's testimony." Second, it is unlikely the jury believed it could use Kalac's out-of-court statements (to San Angelo) to corroborate his trial testimony, as the accomplice instruction does not distinguish between an accomplice's out-of-court statements and his in-court statements. (See *People v. Andrews* (1989) 49 Cal.3d 200, 214 [trial court had no sua sponte duty to modify accomplice instructions to provide that accomplice corroboration rule applied to out-of-court statements, as "gist of those instructions was that accomplices were to be distrusted, and that their testimony could not furnish the sole basis for a conviction"].)

D. *Any Instructional Error in Failing to Instruct on Malice Murder, Lesser Included Offenses of Murder and Defenses to Murder was not Prejudicial.*

The jury was instructed on first degree felony murder and first degree felony murder as an aider and abettor. Aside from felony murder, the jury was not instructed on any other theory of murder. Appellants contend the trial court erred when it failed to instruct, sua sponte, on malice murder and its lesser included offenses, as well as the true defenses of accident and self-defense.

"'The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' [Citations.] 'That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact,

would absolve the defendant of guilt of the greater offense but not of the lesser.' [Citations.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 866.) "The testimony of a single witness, including the defendant, can constitute substantial evidence requiring the court to instruct on its own initiative." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

As the California Supreme Court has explained, the duty to instruct on lesser included offenses "does not require or depend on an examination of the evidence adduced at trial. The trial court need only examine the accusatory pleading. When the prosecution chooses to allege multiple ways of committing a greater offense in the accusatory pleading, the defendant may be convicted of the greater offense on any theory alleged [citation], including a theory that necessarily subsumes a lesser offense. The prosecution may, of course, choose to file an accusatory pleading that does not allege the commission of a greater offense in a way that necessarily subsumes a lesser offense. But so long as the prosecution has chosen to allege a way of committing the greater offense that necessarily subsumes a lesser offense, and so long as there is substantial evidence that the defendant committed the lesser offense without also committing the greater, the trial court must instruct on the lesser included offense. This allows the jury to consider the full range of possible verdicts supported by the evidence and thereby calibrate a defendant's culpability to the facts proven beyond a reasonable doubt." (*People v. Smith* (2013) 57 Cal.4th 232, 244.)

Here, the prosecution chose not to amend the information to allege solely felony murder; thus, appellants remained charged with malice murder under section 187. Although the failure to specifically allege felony murder in the information did not foreclose the prosecutor from pursuing that theory at trial (see *People v. Morgan* (2007) 42 Cal.4th 593, 616), under the accusatory pleadings test,

appellants were entitled to instructions on malice murder and the lesser included offenses to murder, if warranted by substantial evidence. Appellants contend that Ruiz's statements to Officer Vasquez were sufficient to support an instruction on first degree premeditated and deliberate murder, that Kalac's testimony supported an instruction on the lesser included offense of involuntary manslaughter, and that Gonzalez's testimony was sufficient to support instructions on the lesser included offenses of second degree murder, voluntary manslaughter based on imperfect self-defense and voluntary manslaughter based on provocation, as well as instructions on the defenses of self-defense and accident. We need not address these contentions, as we conclude any error was harmless. (See *People v. Breverman* (1998) 19 Cal.4th 142, 178 [in a noncapital case, error in failing sua sponte to instruct on lesser offenses is reviewed for prejudice exclusively under *Watson*]; see also *People v. Earp* (1999) 20 Cal.4th 826, 886 (*Earp*) [reviewing court need not decide whether substantial evidence supported instructions on lesser included offenses of second degree murder and involuntary manslaughter where any instructional error would necessarily be harmless].)

It is not reasonably probable that appellants would have obtained a more favorable outcome had the jury been instructed on malice murder, its lesser included offenses and the defenses of accident and self-defense. The jury found beyond a reasonable doubt that appellants were guilty of first degree murder for a death that occurred during the perpetration or attempted perpetration of a robbery. Accordingly, the failure to instruct on first degree murder was not prejudicial, as that instruction would merely have provided the jury with another theory on which to convict appellants of first degree murder. Nor was the failure to instruct on accident and self-defense prejudicial, as neither accident nor self-defense is a defense to felony murder. (See *People v. Cavitt* (2004) 33 Cal.4th 187, 197 ["The

purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony"]; *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 ["[O]rdinary self-defense doctrine -- applicable when a defendant *reasonably* believes that his safety is endangered -- may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the *commission of a felony*), has created circumstances under which his adversary's attack or pursuit is justified"] second italics added; cf. *People v. Loustaunau* (1986) 181 Cal.App.3d 163, 170 ["When a burglar kills in the commission of a burglary, he cannot claim self-defense, for this would be fundamentally inconsistent with the very purpose of the felony-murder rule."].)

Additionally, the jury's return of guilty verdicts on felony murder charges and true findings on the robbery special circumstance allegations necessarily resolved factual issues related to lesser included offenses of malice murder against appellants. In determining whether appellants were guilty of murder under the felony-murder theory, the jury was required to determine first whether appellants committed or attempted to commit robbery, and only thereafter whether a death occurred during the commission of the robbery or attempted robbery. Thus, it is not reasonably probable that appellants would have obtained a more favorable outcome had the jury been instructed on the lesser included offenses of murder. (See, e.g., *People v. Elliot* (2005) 37 Cal.4th 453, 476 (*Elliot*) [trial court's failure to instruct on second-degree murder harmless beyond a reasonable doubt because "the true finding as to the attempted-robbery-murder special circumstance establishes here that the jury would have convicted defendant of first degree murder under a felony-murder theory, at a minimum, regardless of whether more

extensive instructions were given on second degree murder"]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087 (*Koontz*) [any error in failing to instruct the jury on the definition of manslaughter and the doctrine of unreasonable self-defense harmless, as jury necessarily rejected the unreasonable self-defense theory in returning a true finding on the robbery special-circumstance allegation]; *Earp, supra*, 20 Cal.4th at p. 886 [any error to instruct on second degree murder and involuntary manslaughter harmless where jury expressly found the existence of two special circumstance allegations. "Given these findings, the jury necessarily determined that the killing of [the victim] was first degree felony murder perpetrated in the commission of rape and lewd conduct and not any lesser form of homicide"]; accord, *People v. Castaneda* (2011) 51 Cal.4th 1292, 1328; *People v. Horning* (2004) 34 Cal.4th 871, 906.)

To the extent *Campbell, supra*, 233 Cal.App.4th 148, suggests that the jury's guilty verdicts on felony murder and its true findings on a robbery special circumstance allegation do not render the failure to instruct on lesser included offenses of malice murder harmless under *Watson*, we respectfully disagree. The appellate court in *Campbell* distinguished *Earp*, *Koontz*, and *Elliott* on the ground that in those cases, the jury was instructed on both felony murder and premeditated and deliberate murder. (See *Campbell*, at p. 167.) As noted, however, an instruction on premeditated and deliberate murder would have done no more than allow the jury to convict appellants under another theory of first degree murder. Accordingly, any instructional error here was harmless.

E. *There was no Cumulative Error.*

Appellants contend that even if harmless individually, the cumulative effect of the claimed trial errors mandates reversal of their convictions. Because we have

rejected appellants' other claims, their claim of cumulative error fails. (See *People v. Sapp* (2003) 31 Cal.4th 240, 316; *People v. Seaton* (2001) 26 Cal.4th 598, 692.)

F. *The Jury's Findings on the Robbery Special Circumstance Allegation were Supported by Sufficient Evidence.*

The jury was instructed that in order to return true findings on the robbery special circumstance allegation for a defendant who was not the actual killer, the prosecution was required to prove: (1) that the defendant's participation in the crime began before or during the killing; (2) that the defendant was a major participant in the crime; and (3) that when the defendant participated in the crime, he or she acted with reckless indifference to human life. The jury returned true findings on the special circumstance as to all appellants. Appellants Estrada and Garcia contend there was insufficient evidence to support the jury's true findings, arguing that they were not major participants in the attempted robbery of Rosales. In determining this issue, we draw guidance from *Banks*, *supra*, 61 Cal.4th 788.[5] *Banks* involved a defendant, Matthews, who was found guilty of first degree murder under a felony-murder theory, based on evidence that he was the getaway driver following an armed robbery. (*Id.* at p. 794.) As Matthews was not the actual killer, the court addressed whether he was liable for life imprisonment without the possibility of parole under section 190.2, subdivision (d). The section provides: "[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and

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[5] *Banks* was published after appellants filed their opening briefs, and its holding was first addressed in appellants' reply brief. We requested and received supplemental letter briefs on the applicability of *Banks* to the facts of this case.

who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4." (§ 190.2, subd. (d).)

After stating that "Matthews's culpability for first degree felony murder is not in dispute" (*Banks, supra*, 61 Cal.4th at p. 794), the court set forth nonexclusive factors for a jury to consider in determining whether an accomplice is a "major participant" as that term is used in section 190.2, subdivision (d). These factors include: "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?" (*Banks*, at p. 803, fn. omitted.) The court reiterated that "[n]o one of these considerations is necessary, nor is any one of them necessarily sufficient." (*Ibid.*)

Applying those factors to the case, the court found that while there was substantial evidence Matthews acted as the getaway driver, "[n]o evidence was introduced establishing Matthews's role, if any, in planning the robbery. No evidence was introduced establishing Matthews's role, if any, in procuring weapons." (*Banks, supra*, 61 Cal.4th at p. 805, fn. omitted.) "During the robbery and murder, Matthews was absent from the scene, sitting in a car and waiting. There was no evidence he saw or heard the shooting, that he could have seen or heard the shooting, or that he had any immediate role in instigating it or could have

prevented it." (*Ibid.*) The court concluded that on this record, "Matthews was, in short, no more than a getaway driver" and "cannot qualify as a major participant under section 190.2(d)." (*Id.* at pp. 805 & 807.)

Here, there was substantial evidence that Estrada and Garcia were major participants in the robbery. (See *Banks, supra*, 61 Cal.4th at p. 804 [in reviewing sufficiency of evidence supporting special circumstance allegation, appellate court considers the record in light most favorable to the judgment].)[6] Estrada was identified as the person who first proposed robbing Rosales. She set up the robbery by calling Rosales and asking him to meet her at the laundromat. Estrada also was identified at being at the scene, and pointing Rosales out to the shooter. After the shooting occurred, she did not call 911 to assist the victim, or call the police to report a killing. Rather, she spent the afternoon with the shooter, Gonzalez, until they were arrested later that evening. On this record, there was sufficient evidence for the jury to find that Estrada was a major participant under section 190.2, subdivision (d).

Garcia was present when Estrada proposed robbing Rosales. There was evidence he participated in the planning of the robbery with Estrada and Gonzalez and offered to assist as a lookout. His phone showed calls to Rosales shortly before the murder. Garcia was present at the scene, "in a position to facilitate or prevent the actual murder." (*Banks, supra*, 61 Cal.4th at p. 803.) He made no attempt to prevent the shooting or to notify authorities after the killing. Instead, he

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[6] As Gonzalez was the actual killer, he is not entitled to the analysis set forth in *Banks*. Instead, under section 190.2, subdivision (b), he is statutorily eligible for life imprisonment without the possibility of parole. (See § 190.2, subd. (b) ["[A]n actual killer, as to whom the special circumstance has been found to be true under Section 190.4, need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole."].)

walked away from the scene with Gonzalez. The evidence was sufficient to support the jury's finding that Garcia was a major participant under section 190.2, subdivision (d).

G. *The Imposition of a Parole Revocation Fine was Erroneous.*

As to each appellant, the abstract of judgment reflects the imposition of a $300 parole revocation fine. However, in its oral pronouncement of judgment, the trial court did not impose a parole revocation fine. Moreover, as appellants were sentenced to life imprisonment without the possibility of parole, parole revocation fines are inapplicable. (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.) We will modify the abstracts of judgment to conform to the trial court's oral sentencing decision. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

DISPOSITION

The abstracts of judgment are modified to delete the $300 parole revocation fines. The clerk of the superior court is directed to prepare amended abstracts of judgment reflecting these changes and to forward certified copies to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

CERTIFIED FOR PUBLICATION.

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.

DECLARATION OF SERVICE

PEOPLE v. ERICA ESTRADA ET AL. Court of Appeal No. B255375

I hereby declare that I am a citizen of the United States, over eighteen years of age, and not a party in the above-entitled action. I reside in the County of Los Angeles and my business address is 1158 26th Street #291, Santa Monica, CA 90403. My electronic service address is: jedlaw@me.com

On May 9, 2016, I served the attached document described as APPELLANT ALFONSO GARCIA'S PETITION FOR REVIEW by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then delivered the envelopes to the U.S. Postal Service in Los Angeles, California, addressed as follows:

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Hon. Scott T. Millington
Superior Court of California
County of Los Angeles
Southwest District, Department O
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On May 9, 2016, I transmitted a PDF version of the document described above by electronic mail to the parties identified below using the e-mail service addresses indicated:

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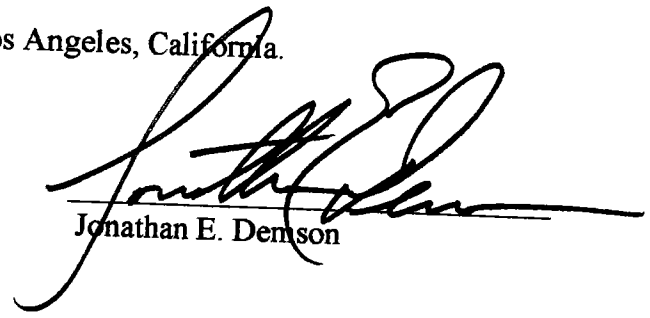
On May 9, 2016, I electronically served the Court of Appeal by uploading a copy of the document described above on the Court's website.

I, Jonathan E. Demson, declare under penalty of perjury that the foregoing is true and correct.

Executed on May 9, 2016, at Los Angeles, California.



Jonathan E. Demson