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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE RODRIGUEZ et al.,

Defendants and Appellants.

A128678

(Alameda County
Super. Ct. Nos. CH46925B,
CH46925A)

I. INTRODUCTION

Appellants Jorge Rodriguez and Shawndra Star Boode (respectively, Rodriguez and Boode) were jointly tried and each was convicted of two counts of first degree murder (Pen. Code, § 187, subd. (a)).¹ The jury also found true two special circumstances (murder committed in the course of a robbery and multiple victims), which elevated both counts to special circumstance murder (§ 190.2, subds. (a)(3); (a)(17)(A)). The jury also found true various special allegations.² Boode was sentenced to 120 years to life without the possibility of parole. Rodriguez was sentenced to serve 52 years to life without the possibility of parole.

¹ All statutory references are to the Penal Code.

² Specifically, with respect to Boode, the jury found that appellant personally used a firearm in the commission of the murders (§ 12022.5, subd. (a)); and personally and intentionally discharged a firearm, and caused great bodily injury on another person (§§ 12022.7, subd. (a), 12022.53, subds. (d), (g)). With respect to Rodriguez, the jury found that appellant was armed with a firearm (§ 12022, subd. (a)(1)).

Rodriguez and Boode each filed a separate appeal, joining in certain issues where appropriate. Jointly, they contend the court erred in refusing to dismiss a sitting juror for bias and in allowing improper impeachment of their expert witness. Appellants also challenge the felony-murder special circumstance finding as overbroad and unconstitutional (§ 190.2, subd. (a)).

Individually, Rodriguez argues the trial court erred by admitting several out-of-court statements by third parties implicating him in the murders. He additionally claims the court erred in denying his postverdict motion for substitution of counsel under *People v. Marsden* (1970) 2 Cal.3d 118, 123-124 (*Marsden*).

Individually, Boode claims the court erred in denying her counsel's motions to continue the trial so that counsel could adequately prepare her defense. She also contends the court made several errors in computing her sentence, and respondent concedes that sentencing error occurred. We accept the concession and will order Boode's abstract of judgment be modified to correct the sentencing errors. In all other respects, the judgments are affirmed.

II. FACTS AND PROCEDURAL HISTORY

The prosecution's theory of the case was that on or about January 17, 2004, appellants shot and killed David and Catherine Brooks (Dave and Cathy), with whom they were acquainted, in order to steal approximately \$380,000 Dave had recently received in settlement for an on-the-job injury. The victims rented out rooms in their Hayward, California home to help with the rent. Boode rented a room from the couple. The victims told many people, including Boode, that they were expecting to receive a large sum of money. Each victim died from a gunshot wound to the head at close range.

Two of the prosecution's chief witnesses, Peter Elisary and Jeffery DeTar, each played a role in the murders and testified under grants of immunity.

Peter Elisary knew Rodriguez growing up and knew that he was one of the leaders of a criminal street gang. Elisary met Boode, who was also gang affiliated, in January 2004 while taking drugs with other people. At one time, he had a sexual relationship with her.

Boode told Elisary that Dave and Cathy were receiving a settlement check and that she planned to rob them. Elisary initially refused Boode's invitation to participate in the robbery, but he eventually relented because he had "feelings for her." Boode also asked Rodriguez to participate in the robbery. It was agreed that Rodriguez would be "the muscle" or the "enforcer, to handle everything."

On the night of the murders, Elisary and appellants ingested methamphetamine and discussed the robbery for about an hour. At about "two, three, four in the morning," appellants, accompanied by Elisary, set out to commit the robbery. Elisary drove a white Camaro, which was borrowed from Rodriguez's sister. Boode was armed with a .357 revolver. Elisary parked the Camaro on a side street, out of sight from Dave and Cathy's residence. Appellants both got out of the Camaro and walked toward the residence while Elisary waited in the car.

Ten to fifteen minutes later, appellants "speedwalk[ed]" back to the Camaro and got into the car. Rodriguez appeared "[n]ervous" and Boode appeared "nervous and scared." Elisary drove the Camaro back to Rodriguez's residence. Boode immediately took a shower and Rodriguez showered next.

Boode described the murder to Elisary. Boode said she demanded money from Dave and then "she shot Dave in the back." She then heard a noise in the kitchen, turned and saw Cathy, chased Cathy into the bedroom, and "just shot her" in the "neck or facial area." Later, Rodriguez recounted his version of events to Elisary. Rodriguez stated he "went behind Dave and was choking Dave" with a string or cord. Rodriguez let Dave go, and Dave tried to attack Rodriguez. In an attempt to "make it look like a murder-suicide," Rodriguez took the .357 revolver, cleaned it, and "put it in Cathy's hand and took a spent casing and put it on her hand."

Jeffery DeTar also had a role in the murders and testified at trial under a grant of immunity. During the relevant timeframe, he rented a room from Dave and Cathy in their residence. DeTar testified that Boode was present when Dave discussed the large disability settlement check he was expecting to receive. When the certified letter addressed to Dave arrived on January 14, 2004, DeTar answered the door and signed for

it. Dave opened the letter and saw two checks. He then put the checks into a desk drawer. The next day, DeTar drove Dave to a liquor store to cash one check for \$15,073. DeTar drove Dave and Cathy to stores to buy clothes, cell phones, and video games.

Boode said she wanted to take the couple's money. DeTar agreed to assist Boode, who he was trying to impress, by alerting her when the couple was home alone. Nonetheless, DeTar warned the couple that Boode and Elisary planned to rob them but they just "blew it off that they wouldn't do it."

On Saturday, January 17, 2004, the couple returned from another shopping spree, and DeTar helped them unload. Thereafter, DeTar called Boode on her cell phone to report that the couple had arrived home and that DeTar planned to leave.

Later, DeTar took a telephone call from Boode, who said, "I got that bitch." DeTar also received four to five text messages from Boode. One text message received from Boode stated "777," referencing a jackpot.

When they were face-to-face, Boode reported to DeTar "[t]hat she had had a wrestling match with Cathy in the hallway and that she had gotten her, that she had got her in the bedroom." Boode said that Dave "had been shot also." She explained "[t]hey didn't want anybody to be able to I.D. anybody." Boode claimed they had found a check for \$500,000.

After speaking with Boode, DeTar went to Dave and Cathy's residence and knocked on the door, but received no response. DeTar looked through the window of Dave and Cathy's bedroom and saw "blood and stuff on the wall" and a body "in between the dresser and the bed." Later, when the police were conducting an investigation, Boode instructed DeTar to tell police that there was a fight between Cathy and Dave, that Dave hit Cathy, and "it looked like a murder-suicide type thing."

At trial, Rodriguez's sister, Ana Rodriguez, claimed not to remember key portions of her out-of-court statement given to police about the murders. Specifically, Ana testified that she did not recall telling Sergeant Mark Stuart, the lead investigator in the case, that: (1) on the night of the murders, appellants and Elisary left in the white Camaro after Ana loaned them the car; (2) she saw Boode with a black gun; (3) she observed

appellants and Elisary return in the white Camaro in the early morning hours of January 17, 2004; (4) after they returned, she observed Boode take her clothes off and put them into a garbage bag; (5) her brother, Rodriguez, told her that he was the lookout, that the victims were awake, that things got out of hand, and that the victims were screaming; (6) Boode showed her a check for over \$200,000; and that (7) Rodriguez tore up the check after Ana told him it was no good and that he should get rid of it.

The prosecution presented physical evidence that when the coroner's office moved Dave's body, they found a white telephone cord under his head and a black wool cap under his body. The knit cap yielded a "mixed DNA profile," which meant that the DNA from multiple contributors was found on the cap. Rodriguez could not be excluded as a possible contributor to the DNA profile from the knit cap.

Neither appellant testified at trial. In appellants' defense, they argued that the prosecution witnesses had made numerous conflicting statements about the events in question, and could not be trusted to give reliable testimony. They characterized the prosecution's chief witnesses as longstanding methamphetamine users, whose testimony should be viewed as unreliable, self-interested, and otherwise untrustworthy. To support that theory, the defense presented the expert testimony of Dr. Stephen Pittel, a forensic psychologist, regarding the effects of methamphetamine abuse on a person's memory, perception, and general reliability. Dr. Pittel testified that long-term users of methamphetamine are "very, very unreliable in their memories because of the effect of the drug." He explained "their attention is wandering all over the place and they're constantly seeing and hearing things that other people aren't seeing and hearing."

The case was argued and submitted to the jury on March 30, 2010. After deliberating for two hours, the jury convicted appellants of all counts, special findings, and special circumstances. These appeals followed.

III. DISCUSSION

A. Denial of Request for Continuance

Boode alleges that the trial court denied her counsel a reasonable opportunity to prepare for trial, and consequently denied her constitutional rights to due process and to a

fair trial under the Fourteenth Amendment. She claims that her “defense counsel—a sole practitioner with a single investigator to assist her, and an inadequate budget for defense experts—had less than four full months to prepare for trial (from October 20, 2009 to February 4, 2010), which time frame included the Thanksgiving, Christmas and New Year’s holiday season.”

The facts pertinent to this claim of error are as follows: On December 3, 2009, counsel Deborah Levy filed a motion to continue trial and submitted a declaration stating, in part, “I was appointed to represent Ms. Boode in the afternoon on October 20, 2009. At that time I knew it was a case with enormous discovery. I agreed to take the case, understanding that [Rodriguez] was not waiving time. In good faith, I told [the judge] that I could be ready for trial on [December 7]. At this point that is just impossible.”

On December 7, 2009, the presiding judge denied the motion for a continuance. Boode’s codefendant, Rodriguez, had invoked his right to a speedy trial under the United States and California Constitutions (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15, cl. 1) and would not waive time. Therefore the case was sent to Department 7 so that the parties could stipulate that trial had commenced, with the expectation that pretrial motions and jury selection would actually commence sometime after January 4, 2010. Both appellants indicated that this was acceptable.

Pretrial motions were litigated on January 19, 21, 25, and 26, 2010. On February 1, 2010, voir dire commenced. The attorneys started to present evidence on February 22, 2010, approximately four months from the time appellant’s counsel received the case.

After the jury returned guilty verdicts, Boode filed a motion for new trial indicating that “[c]ounsel was not able to provide adequate representation due to her inability to have sufficient time to prepare for trial.” In denying Boode’s motion for new trial, the trial court indicated, “[i]n terms of the ineffective assistance of counsel, this case came to this department on December 7th. We did not start taking testimony until February 22nd. And the Court continued to give more time each time each of you asked for time. [¶] I think during the time [the prosecutor’s] dad was sick, you took a two-week

vacation, [Rodriguez’s defense counsel] was sick and also had a burglary in his office. We took time off in between for all of those different things. [¶] And when we started, everyone seemed prepared. You didn’t seem to have any trouble cross-examining the witnesses, and things moved smoothly.”

On appeal, Boode complains that the trial court “refused to grant any outright continuances of trial, despite three separate requests for such continuances; instead, she kept adjusting the calendar for certain deadlines, and thereby parceled out to [defense counsel] in dribs and drabs, a few more days here and there for trial preparation.” She claims “the trial court was overly concerned with keeping this trial on a preconceived schedule, without regard to whether such rigid adherence to judicial economy and expediency obviated appellant’s due process right to a fair trial, or her attorney’s ability to present an effective defense.” (Original boldface.)

In reviewing appellant’s arguments, the relevant legal principles were recently set out by our Supreme Court in *People v. Fuiava* (2012) 53 Cal.4th 622 (*Fuiava*): “ ‘[T]he decision whether or not to grant a continuance of a matter rests within the sound discretion of the trial court. [Citations.] The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked. [Citation.] [¶] Under this state law standard, discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered. [Citations.] . . . [Nevertheless, the] “trial court may not exercise its discretion ‘so as to deprive the defendant or his attorney of a reasonable opportunity to prepare.’ [Citation.]” ’ [Citation.]” (*Id.* at p. 650.)

In reviewing this record, we reach the same conclusion reached by our Supreme Court in *Fuiava*: “The denial of a continuance was not an arbitrary insistence on expeditiousness, but rather a reasoned assessment of the need for delaying the trial in light of the potential problems such delay might cause.” (*Fuiava, supra*, 53 Cal.4th at p. 651.) Because codefendant Rodriguez had not waived his speedy trial rights, the trial court was in a difficult quandary. Boode’s counsel successively asked for continuances to adequately investigate and prepare, often citing the large amount of discovery to be

studied. In ruling on the continuance requests, the trial court was presented with two competing and conflicting constitutional interests. In addition to providing the right to a speedy trial, the Sixth Amendment provides a criminal defendant with the right to assistance of counsel. (U.S. Const., 6th Amend.; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) “It has long been recognized that the right to counsel is the right to the effective assistance of counsel. [Citations.]” (*McMann v. Richardson* (1970) 397 U.S. 759, 771, fn. 14.) The trial court was aware of the nature of these conflicting rights and, although it granted counsel’s continuance requests, it did so with continuances of a shorter duration than counsel sought.³

Moreover, in addition to showing error, Boode must also demonstrate prejudice. Boode does not identify any particular meritorious defense strategies or evidentiary objections that should have been pursued, but were not, as a result of the denial of the continuance. She makes clear that she is “not arguing on direct appeal that appellant’s trial counsel was ‘ineffective.’ This appellate challenge is solely based on court error in refusing to grant that attorney’s requested continuances, which were necessary for her to prepare a defense.” (Boldface omitted.) Consequently, she merely suggests some undefined prejudice should be “presumed,” which is inconsistent with binding precedent requiring that appellant show actual prejudice. (See *People v. Zapien* (1993) 4 Cal.4th 929, 972-973 [finding no prejudice from denial of a continuance where there was no reasonable basis to conclude from the defendant’s showing that the trial court’s ruling led to a less favorable result for the defendant]; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 1039-1040.) For the foregoing reasons, we conclude Boode has failed to establish that the trial court abused its discretion or violated her constitutional rights by denying her motions for a continuance.

³ Boode claims “severing the parties would have solved that problem.” (Fn. omitted.) However, we note that on appeal, appellant does not challenge the trial court’s denial of her motion for severance of trial from her codefendant.

B. Juror Bias

Boode claims that she was deprived of her constitutional rights to a fair trial and an impartial jury because the court refused to dismiss a juror after the juror reported observing Rodriguez conduct himself in the courtroom in what she perceived as a threatening manner. This argument is joined by Rodriguez.

During the trial, the court received a written message from Juror No. 8 saying that she had seen something frightening and that she wanted to talk about it without calling attention to herself. When Juror No. 8 was questioned by the court outside the presence of the jury, the juror said she had observed Rodriguez move his mouth to communicate with Elisary, one of the prosecution witnesses who had been testifying, in what Juror No. 8 perceived to be a threatening and intimidating manner. Juror No. 8 expressed fear from seeing Rodriguez give Elisary a “scary stare” and from “moving his lips and talking, saying something, just barely moving his lips.”⁴ She stated she was “frightened” and the court acknowledged that she was crying. The trial court established that Juror No. 8 had not discussed her observations or fears with any other juror, and the court instructed her not to do so. The trial court moved to allay any fear by stating “we’ll just watch very carefully” and indicating the deputies would be instructed “to make sure that the jurors are protected.”

When asked if she would hold Rodriguez’s actions against him, Juror No. 8 replied, “To be honest, I don’t know.” When questioned whether she still could be fair and impartial, she replied, “I think I could decide the facts, but I would be scared if we convicted him.” When asked if she could vote “not guilty” if the People did not prove their case, she replied, “I think so,” which she then defined as “in between” an affirmative and negative answer to that question. In the end, she nodded her head up and down and said, “I think so” in answer to the court’s question whether she could “keep an

⁴ It is likely that the event described by Juror No. 8 actually occurred because the trial judge indicated that a member of his courtroom staff had also reported that he thought he saw “Mr. Rodriguez mouthing something to Mr. Elisary”

open mind” despite what she had observed. The court denied appellants’ motion to excuse Juror No. 8 for bias.

In Boode’s postconviction motion for a new trial, she claimed that Juror No. 8 should have been replaced with an alternate. In denying appellant’s motion, the court held that “[i]n terms of Juror No. 8 being a fair juror, Juror No. 8 was brought into chambers with everyone present. And the Court and everyone, apparently to the Court, appeared to be satisfied that she could continue to be a fair and impartial juror. I know that you had some concerns about her, but once we spoke with her, the concerns were alleviated.”

“A sitting juror’s involuntary exposure to events outside the trial evidence, even if not ‘misconduct’ in the pejorative sense, may require similar examination for probable prejudice.” (*In re Hamilton* (1999) 20 Cal.4th 273, 294-295.) Section 1089 provides for a juror to be discharged, and replaced by an alternate, if “upon . . . good cause shown to the court [the juror] is found to be unable to perform his or her duty” “Before an appellate court will find error in failing to excuse a seated juror, the juror’s inability to perform a juror’s functions must be shown by the record to be a ‘demonstrable reality.’ The court will not presume bias and will uphold the trial court’s exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence. [Citation.]” (*People v. Holt* (1997) 15 Cal.4th 619, 659; *Fuiava, supra*, 53 Cal.4th at pp. 711-712.)

On appeal, Boode claims the answers provided by Juror No. 8 demonstrate that she was biased and should have been discharged because “not only did Juror [N]o. 8 candidly admit her fear of Rodriguez (and of both defendants); she also admitted facts from which the court should have inferred that this fear actually impaired Juror [N]o. 8’s ability to serve.” We do not agree that Juror No. 8’s inability to serve as a juror was shown as a demonstrable reality. Despite her safety concerns, her responses to the court’s questions reflected that Juror No. 8 intended to do her best to give appellants a fair trial. “[A] juror like this one, who candidly states his preconceptions and expresses concerns about them, but also indicates a determination to be impartial, may be

preferable to one who categorically denies any prejudice but may be disingenuous in doing so. A reviewing court must allow the trial court to make this sort of determination. The trial court is present and able to observe the juror itself. It can judge the person's sincerity and actual state of mind far more reliably than an appellate court reviewing only a cold transcript." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 488-489; *People v. Wilson* (2008) 44 Cal.4th 758, 780 (*Wilson*).)

Boode claims the court's "overall inquiry was inadequate." She first argues that the court should have granted defense counsel's requests to make follow-up inquiries of Juror No. 8 later in the proceedings to determine whether she continued to be fearful and frightened.. However, we note that there is nothing (apart from rank speculation) to indicate that Juror No. 8's impartiality was tainted by her earlier experience, or that she was unable to disregard Rodriguez's courtroom conduct and render a verdict based on the evidence. "One can always argue further questioning might yield different and more favorable results, but that is a matter committed to the discretion of the trial court." (*Wilson, supra*, 44 Cal.4th at p. 780.)

Next, Boode argues the trial court denied her Sixth and Fourteenth Amendment rights by failing to inquire of all sitting jurors whether they had witnessed the same gestures by Rodriguez that caused fear in Juror No. 8, and whether they had been affected by it. First, we emphasize that Juror No. 8 indicated that she had not discussed the matter with any other juror. Examining each juror individually, therefore, would have drawn unnecessary attention to Rodriguez's behavior, and possibly given rise to a claim that such inquiry prejudiced the panel. (*People v. Hines* (1997) 15 Cal.4th 997, 1054 [allegation that court's inquiry to jurors "prejudiced the entire panel"].)

Furthermore, even assuming that other jurors observed Rodriguez making threatening gestures, we cannot assume that they were similarly upset to the extent that they would not be able to perform their duties as jurors. Accordingly, we hold, as the court did in *Fuiava, supra*, 53 Cal.4th at page 702, that "[t]he trial court did not abuse its discretion in the present case by taking a 'wait and see' approach concerning whether any juror other than Juror [No. 8] might have been affected" by Rodriguez's courtroom

behavior. We conclude that the scope of questioning into the possibility of juror bias in this case fell well within the proper exercise of the court’s discretion. No further inquiry was required. (*People v. Clark* (2011) 52 Cal.4th 856, 971 (*Clark*).

C. Error Under *Aranda/Bruton*

Rodriguez contends the trial court erred under *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*) and *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*), when at his joint trial with Boode, the court admitted statements made by Boode to a third party that were incriminating to Rodriguez.⁵

During the prosecutor’s direct examination of Jeffery DeTar, the following exchange took place:

“Q. Now, did you get the keys from Shawndra [Boode] at the gas station?”

“A. Yes.

“Q. Did you talk to Shawndra at the gas station?”

“A. Yes.

“Q. Did you talk to Shawndra about what happened with Dave and Cathy at the gas station?”

“A. Yes.

“Q. What did she say?”

“A. She said—

“[Defense Counsel]: Objection. Calls for hearsay.

“The Court: Overruled.

“The Witness: She said that they—

⁵ In analyzing this issue, we emphasize at the outset that the United States Supreme Court cases, rather than *Aranda*, govern because “[t]he question before this court is one of federal constitutional law. To the extent that [the] decision in [*Aranda*], constitutes a rule governing the admissibility of evidence, and to the extent this rule of evidence requires the exclusion of relevant evidence that need not be excluded under federal constitutional law, it was abrogated in 1982 by the ‘truth-in-evidence’ provision of Proposition 8 (Cal. Const., art. I, § 28, subd. (d)).” (*People v. Fletcher* (1996) 13 Cal.4th 451, 465, fn. omitted (*Fletcher*).

“[Defense Counsel]: I request a limiting instruction, Your Honor.

“The Court: Make sure you just say what Shawndra said to you.

“The Witness: She said that *they* had gotten into the house.

“[The Prosecutor]: Did she say what happened inside the house?

“A. Yes.

“Q. What did she say happened when she got into the house?

“A. That *they* had gotten him, popped him.” (Italics added.)

The court then interjected, “Just say what [Boode] said she did.”

Rodriguez argues that DeTar’s use of the word “they” twice in the challenged passage directly implicated Rodriguez and that the trial court erred in failing to sustain hearsay objections, in failing to give a limiting instruction, and in failing to strike DeTar’s offending testimony.

The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that a criminal defendant has the right to be confronted with the witnesses against him. (U.S. Const., 6th Amend.) The Sixth Amendment right to confrontation includes the right of cross-examination. (*Pointer v. Texas* (1965) 380 U.S. 400, 404; *Fletcher, supra*, 13 Cal.4th at p. 455.)

“A recurring problem in the application of the right of confrontation concerns an out-of-court confession of one defendant that incriminates not only that defendant but another defendant jointly charged. Generally, the confession will be admissible in evidence against the defendant who made it (the declarant). (See Evid. Code, § 1220 [hearsay exception for party admissions].) But, unless the declarant submits to cross-examination by the other defendant (the nondeclarant), admission of the confession against the nondeclarant is generally barred both by the hearsay rule (Evid. Code, § 1200) and by the confrontation clause (U.S. Const., 6th Amend.)” (*Fletcher, supra*, 13 Cal.4th at p. 455, fn. omitted.)

The *Aranda/Bruton* rule addresses the confrontation clause issues raised by the introduction of a defendant’s out-of-court statement in a joint trial with one or more codefendants. In *Aranda*, the California Supreme Court articulated a rule of criminal

procedure prohibiting the introduction of a nontestifying codefendant's extrajudicial statement that directly or inferentially implicates a jointly tried defendant, unless the statement is redacted to eliminate the direct or inferential reference to the defendant. (*Aranda, supra*, 63 Cal.2d at pp. 530.) *Aranda* held the admission of a nontestifying codefendant's out-of-court confession, which inculcates the defendant, is not rendered harmless by a jury instruction that the evidence should not be considered against that defendant. (*Id.* at p. 526.) Instead, if the defendants are tried together, either the statement must be redacted to remove direct and indirect identification of the defendant, or it must be excluded altogether. (*Id.* at pp. 530-531.)

In *Bruton*, the United States Supreme Court held that a defendant's constitutional right to confrontation of the witnesses against him is violated by admitting the confession of a nontestifying codefendant that names and incriminates the defendant. This is so even though the jury is instructed to disregard the confession in determining the nondeclarant defendant's guilt or innocence. (*Bruton, supra*, 391 U.S. at pp. 135-136.)

Bruton's scope was limited in *Richardson v. Marsh* (1987) 481 U.S. 200 (*Richardson*). The court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the [other] defendant's name, but any reference to his or her existence." (*Id.* at p. 211, fn. omitted.) The court reasoned that if a nontestifying defendant's confession becomes incriminating only when linked with other evidence, there is no "overwhelming probability" that the jury will disregard a limiting instruction. Thus, under *Richardson*, only facially incriminating statements violate the confrontation clause. Statements that are incriminating only by connection to other evidence do not. (*Id.* at pp. 208-209.)

In *Gray v. Maryland* (1998) 523 U.S. 185 (*Gray*), the United States Supreme Court considered a redacted confession that fell somewhere between the confessions at issue in *Bruton* and *Richardson*. In *Gray*, "the prosecution . . . redacted the codefendant's confession by substituting for the defendant's name in the confession a blank space or the word 'deleted.'" (*Id.* at p. 188.) The *Gray* court concluded that

simply redacting a confession to replace a defendant's name "with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol," is insufficient under *Bruton* to eliminate the constitutional confrontation problem identified in *Bruton*. (*Id.* at p. 192.)

The *Gray* court explained: "Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements that, in our view, the law must require the same result." (*Gray, supra*, 523 U.S. at p. 192.) The *Gray* court suggested that further redaction, beyond simply using a blank space, the word "delete," or a symbol in place of a proper name, could render a confession admissible in a joint trial. (*Id.* at p. 196.)

In our view, the portions of DeTar's testimony to the effect that Boode had recounted "*they* had gotten into the house" and "*they* had gotten him, popped him," are similar to a proposed redaction that the *Gray* court suggested would have satisfied the rule in *Bruton*. The United States Supreme Court suggested in *Gray* that a redaction that indicated that specific names had been deleted, i.e., "' Answer: Me, deleted, deleted, and a few other guys,' " was insufficient to protect the nondeclarant's confrontation rights, but that those rights would not have been implicated if the court had provided the jury with the statement: "' Answer: Me *and a few other guys.*' " (*Gray, supra*, 523 U.S. at p. 96, italics added.) The statement "[m]e and a few other guys" indicates simply that multiple people may have been involved in the crime, as did DeTar's use of the word "they." To the extent the "they" was linked to Rodriguez through other evidence, no confrontation clause violation arose. (*Richardson, supra*, 481 U.S. at pp. 208-209.)

In any event, even if we assume that the trial court erred in failing to sustain Rodriguez's hearsay objection to that portion of DeTar's testimony in which he used the word "they" to describe the perpetrators of the robbery murder, such error would not require reversal of Rodriguez's convictions, even under the harmless beyond a reasonable doubt standard. (*Chapman v. California* (1967) 386 U.S. 18.) It was clear from all of the evidence that Boode had not acted alone in committing the robbery murder; and it was

Rodriguez's DNA on the knit cap found under Dave's body which provided the proof necessary to establish his presence at the crime scene—not DeTar's use of the word "they" during his testimony. Consequently, we can say with confidence that even if the court had not permitted the jury to hear the portion of DeTar's testimony, the result in this case would have been the same.

D. Admission of Enrique Huapaya's Out-of-Court Statement

Rodriguez claims he was deprived of a fair trial, due process, and his right of confrontation by the court's erroneous admission of a police officer's recitation of an out-of-court declarant's statements during the investigation of the murders that were admitted to explain why the police investigation focused on Rodriguez. Rodriguez argues that the state may not do indirectly, under the guise of asking the police to describe the course of their investigation, what it cannot do directly—place before the jury the presumptively unreliable statement of a nontestifying declarant implicating appellant in the crime.

At trial, the prosecution was granted permission to read the preliminary hearing testimony of witness Enrique Huapaya after he was deemed unavailable, following the prosecution's demonstration of due diligence to locate him. The testimony was read into the record in question-and-answer form. Briefly, Huapaya acknowledged that he had worked out a plea bargain for his cooperation; that Rodriguez had made a number of very specific admissions to him after the murders, including that "she went in there for some money and didn't find nothing, so stuff went off the hook, and she had to do what she had to do," and "some people . . . had to get put down."

In providing the jury background information for introducing Huapaya's preliminary hearing testimony, Sergeant Stuart testified about how Huapaya approached police with information about the murders: "Mr. Huapaya had been arrested for a drug possession, and he had told the officers that arrested him that he had information about the murders." Sergeant Stuart indicated that "Mr. Huapaya was looking to talk to the detective or inspector who was investigating the crime and, in turn, would want some type of consideration for the case which he had been arrested for." Subsequently, Sergeant Stuart testified that during his interview with Huapaya about the information he

had about the murders, Huapaya reported that Rodriguez told him (1) that “he got involved in the murders over dope and money;” and (2) that the victims “were murdered because they could identify who had robbed them.”

Rodriguez’s counsel made an ongoing hearsay objection to Sergeant Stuart’s testimony describing statements made by Huapaya during his police interview that were not under oath and not subject to cross-examination. (Evid. Code, § 1200, subd. (a).) The prosecutor, however, argued that the evidence was admissible on the nonhearsay basis that it explained the subsequent conduct of the police, and the trial court admitted it on that basis. The jury was admonished that the challenged evidence was not being admitted for its truth but to show “what this sergeant did in response to that information,” and it was given a limiting instruction to that effect.

On appeal, Rodriguez asserts that the good faith or reasonableness of the police conduct was not at issue in this case and therefore, the details of Huapaya’s out-of-court statements to Sergeant Stuart were inadmissibly placed before the jury at trial. He claims “the prosecutor piled on additional evidence of appellant’s guilt through [Sergeant] Stuart’s recitation of Huapaya’s extrajudicial incriminating statements that were above and beyond the properly admitted prior testimony of Huapaya.” “The extrajudicial hearsay added the particulars that ‘[Rodriguez] said he got involved in the murders over dope and money,’ and that the [victims] ‘were murdered because they could identify who had robbed them.’ That substantially greater level of detail was both more incriminating and more likely to portray [Rodriguez] to the jury as a calculating and ruthless killer, all to his detriment.”⁶

In the appropriate case, the fact that an officer acted on information received in an out-of-court assertion may be relevant to explain his conduct. However, the fact that an officer acted on information obtained during the investigation may not be used as an

⁶ In considering this appellate argument, we note that Rodriguez’s counsel did not argue Evidence Code section 352 as a basis for excluding the evidence in the trial court, and consequently, the trial court had no reason to explore the relative probative value and prejudice of Huapaya’s out-of-court statements.

indirect method of bringing before the jury the substance of the out-of-court assertions of the defendant's guilt that would otherwise be barred by the hearsay rule. (Compare *People v. Spivak* (1959) 166 Cal.App.2d 796, 812-813 [officer's testimony that he had been told that informant had gone to certain place was admissible to explain why he went to that place] with *People v. Lucero* (1998) 64 Cal.App.4th 1107, 1109-1110 [where police conduct not at issue, an eyewitness's out-of-court statement to police was erroneously admitted for the purpose of explaining police investigation].)

A leading evidentiary treatise has described the problem as follows: "One area where abuse may be a particular problem involves statements by arresting or investigating officers regarding the reason for their presence at the scene of a crime. The officers should not be put in the misleading position of appearing to have happened upon the scene and therefore should be entitled to provide some explanation for their presence and conduct. They should not, however, be allowed to relate historical aspects of the case, such as complaints and reports of others containing inadmissible hearsay. Such statements are sometimes erroneously admitted under the argument that the officers are entitled to give the information upon which they acted. The need for this evidence is slight, and the likelihood of misuse great." (2 McCormick on Evidence (6th ed. 2006) The Hearsay Rule, § 249, p. 136.)

In examining this record, we agree with Rodriguez that there was no true issue in the present case as to the propriety of any action taken by Sergeant Stuart during his investigation of the murders, and the trial court erred in admitting this evidence on this basis. While we believe it was error to admit Sergeant Stuart's testimony recounting Huapaya's out-of-court statements to him, we believe it was manifestly harmless. Other witnesses testified that the murders were motivated by a desire for money and a belief that the victims would have to be killed because they could identify the perpetrators. Consequently, Sergeant Stuart's testimony was cumulative with other properly admitted evidence and therefore was harmless.

E. Unconstitutional Overbreadth of Felony-Murder Special Circumstance

Appellants next jointly argue that the felony-murder special circumstance provisions in section 190.2, subdivision (a)(17),⁷ are not sufficiently different from the felony-murder theory of first-degree murder. Therefore, the felony-murder special circumstance law does not conform to the constitutional requirement that it narrow the class of murders eligible for the death penalty or a sentence of life without the possibility of parole. For this reason, they claim section 190.2, subdivision (a) violates principles established in the cruel and unusual punishment clause of the Eighth Amendment, and the due process clause of the Fourteenth Amendment.

This argument suffers from two fatal flaws. First, the Eighth Amendment’s narrowing requirement has been found not apply to life-without-parole sentences but only to sentences of death. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 995-996.) Because appellants received life-without-parole sentences, the narrowing requirement does not apply to their case.

Second, our Supreme Court “has consistently rejected the claim that the statutory special circumstances . . . do not adequately narrow the class of persons subject to the death penalty. [Citations.]” (*People v. Pollock* (2004) 32 Cal.4th 1153, 1195-1196; see, e.g., *People v. Abilez* (2007) 41 Cal.4th 472, 528; *People v. Catlin* (2001) 26 Cal.4th 81, 158-159; *People v. Marshall* (1990) 50 Cal.3d 907, 945-946 [“the ‘triple use’ of the same facts—i.e., to support (1) the conviction of first degree murder on a theory of felony murder, (2) the finding of the felony-murder special circumstance, and (3) the imposition of the penalty of death” does not violate due process or cruel and unusual punishment

⁷ Section 190.2, subdivision (a), provides in part, “The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.04 to be true: [¶] . . . [¶] (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [¶] (A) Robbery in violation of Section 211 or 212.5.”

clauses of United States Constitution].) Recently in *People v. Gamache* (2010) 48 Cal.4th 347 the court reiterated, “ ‘California homicide law and the special circumstances listed in section 190.2 adequately narrow the class of murderers eligible for the death penalty’ [Citations.] Specifically, the felony-murder special circumstance (§ 190.2, subd. (a)(17)) is not overbroad and adequately narrows the pool of those eligible for death. [Citation.]” (*Id.* at p. 406.)

We are bound by Supreme Court decisions that have rejected appellants’ arguments. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

F. Court’s Evidentiary Rulings with Respect to Expert Witness Testimony on Effects of Methamphetamine Usage

Rodriguez alleges he was denied his Sixth Amendment right to present a complete defense by (1) the trial court “precluding [him] from establishing an adequate foundation for Dr. Pittel’s opinions regarding the unreliability of testimony from methamphetamine abusers”; and (2) in “permitting the prosecution to unfairly impeach Dr. Pittel with irrelevant and prejudicial cross-examination and argument.” Boode joins Rodriguez’s arguments.

The testimony provided by the prosecution witnesses who played a role in the crimes was obviously crucial to the prosecution’s case against appellants. Each of these witnesses, along with appellants and the victims, were methamphetamine users. The use of methamphetamine can, obviously, affect the ability of a witness to perceive, to recall, and to recount the events he or she has observed. (1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 4th ed., 2010 supp.) Credibility of Witnesses, § 29.21, p. 598.1 [“Evidence that a witness was under the influence of alcohol or narcotics at the time of the event about which he or she testifies is admissible to prove an impaired capacity to observe and remember”].) “Evidence of consumption of narcotics” was thus an appropriate subject of inquiry and impeachment “if there is expert testimony substantiating the effects of such use. [Citations.]” (*People v. Rocha* (1971) 3 Cal.3d 893, 901.) Appellants relied on Dr. Pittel to provide such expert testimony, as his area of expertise is establishing that long-term use of methamphetamine affects perception and recall. Dr. Pittel testified, in

his opinion, long-term methamphetamine users are “very, very unreliable in their memories because of the effects of the drug.”

In order to establish a foundation for Dr. Pittel’s opinion, Rodriguez’s trial counsel indicated that if given sufficient funds, she would have “attempt[ed] to get a drug history from these witnesses so that Dr. Pittel can testify with some substance as to the effects of this drug.” When such funds were not forthcoming, counsel requested permission to elicit the drug histories of the prosecution witnesses during their testimony, so that Dr. Pittel could review and incorporate that information into his own testimony. The trial court limited counsel to asking each percipient witness, “what drugs they used and how long they’ve used it, period” and whether they were “under the influence” during the events described in their testimony. In so ruling the court said, “We’re not delving into a whole bunch of stuff, because this does not need to be a mini trial on their drug use within this trial. I think it’s more time consuming than necessary to go all into that, and it would be more prejudicial than probative just to them as human beings. I mean, it’s not really necessary.” The trial proceeded with the defense asking the prosecution witnesses questions about their use of methamphetamine and whether they had been using it during the incidents they were testifying about.

On appeal, appellants argue that they were seriously disadvantaged by the “severe restriction” the trial court placed on questioning the prosecution witnesses about their drug usage which “precluded the defense from establishing an adequate foundation” for Dr. Pittel’s testimony. Because of the court’s ruling, Rodriguez complains that “Dr. Pittel could only provide opinions at a generic level, without any foundation for specifically addressing the likely effects on the individual witnesses, based on their personal and idiosyncratic drug histories.”

Section 352 of the Evidence Code provides as follows: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” “We will not overturn or disturb a trial court’s exercise of its discretion under section 352 in the

absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd. [Citations.]” (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

The state of the law on drug usage as impeaching evidence was summarized in *People v. Hernandez* (1976) 63 Cal.App.3d 393. The court held that “proof of a narcotic addiction, standing alone, is inadmissible to impeach the credibility of a witness and that such evidence is not only collateral thereto but highly prejudicial.” (*Id.* at p. 405.) Such evidence is inadmissible unless there is evidence that “tends to show that the witness was under the influence thereof either (1) while testifying, or (2) when the facts to which he testified occurred, or (3) that his mental faculties were impaired by the use of such narcotics. [Citation.]” (*Ibid.*, cited with approval in *People v. Panah* (2005) 35 Cal.4th 395, 478.)

Consequently, while a witness’s drug use is relevant in showing an impaired ability to observe, recollect or relate pertinent events, a trial judge must deal with more general evidence of a witness’s drug habit with some sensitivity. The possibility that exploration of a witness’s drug addiction will generate unwarranted prejudice and consume undue amounts of time on collateral matters requires the judge to exercise discretion to keep the scope of such examination within proper bounds. Under these circumstances, we find no abuse of discretion in the trial court’s ruling preventing defense counsel from probing further into the full extent of the witness’s history of drug use. The jury was informed of the facts bearing on the weight to be given the testimony of these prosecution witnesses because of their use of methamphetamine; and we see no error—and certainly no error rising to the level of a constitutional deprivation—in the court’s decision to keep the scope of cross-examination within proper bounds.

In his next argument, Rodriguez claims Dr. Pittel was “unfairly demeaned as a witness” when the trial court permitted the prosecutor to cross-examine him about his prior cocaine arrest in 1990 and to exploit that testimony in closing argument.

Toward the end of trial, the prosecutor filed a written motion asking for permission to impeach Dr. Pittel with a 1990 arrest by the Fairfield police for drug use.

Attached to the motion was the police report of the incident. At the time of the arrest, Dr. Pittel was testifying as a defense drug expert in a murder trial. His testimony was interrupted for the noon recess. Dr. Pittel went to his car, which was parked by a crosswalk in front of the Solano County Superior Court courthouse. An off-duty Vallejo police officer walked by and saw Dr. Pittel put something in his nose. The off-duty officer summoned a Fairfield police officer, who arrested Dr. Pittel after finding that he possessed a bundle of cocaine. While being arrested, Dr. Pittel asked the police officer not to arrest him because it would ruin his career. The Superior Court judge presiding over the murder trial was notified, and Dr. Pittel was placed on a no-bail hold for contempt of court.

The prosecutor argued that this incident was a proper subject for impeachment because it was relevant to Dr. Pittel's "character for honesty and his attitude about testifying in court." The prosecutor went on to explain "Dr. Pittel's bad behavior reaches far beyond simple possession of drugs; his choice to testify as a defense drug expert while high on drugs was not merely dishonest; it showed utter contempt and disrespect for the judicial process. . . . Impeachment on this subject is of the highest possible probative value and relevance because of the extreme moral turpitude that it demonstrates." (Fn. omitted.)

After hearing argument, the trial court ruled that "Because this witness is testifying as an expert in this field of drugs, I am going to allow you [the prosecutor] very limited [scope in] asking him has he ever tried drugs, and then he can explain it was 20 years ago or whatever it was, because I think that was egregious conduct. I think the probative value outweighs the prejudicial [and] I think it does go to his credibility"

On direct examination, defense counsel asked Dr. Pittel whether he had used any drugs, and Dr. Pittel stated, that "I've also used cocaine recreationally many, many years ago, but nothing in the last 20 or 25 years." Thereafter, on cross-examination, Dr. Pittel admitted that he had been arrested for using cocaine. Dr. Pittel explained that on December 26, 1990, he drove to Solano County Superior Court in Fairfield to testify in a murder case after a midnight dinner for some close friends. He had to drive to the airport

in the morning because his daughter had to catch a 5:30 a.m. flight, so he was “out pretty much all night.” He was “exhausted from not having slept the night before” and wanted to take a nap in his car when the court recessed for lunch, but he was concerned that if he fell asleep he wouldn’t wake up in time to return to court. Therefore, he took some cocaine that he had “confiscated from a client” to increase his alertness. He was observed and arrested. Dr. Pittel explained that the charges were eventually dropped and he was never tried or convicted. Dr. Pittel described the event as “one of the worse days of my life.” Upon further questioning, Dr. Pittel indicated that he had used cocaine a total of three times: “Once on that occasion, once in a laboratory experiment, and once years before at a party.” He opined that the quantities that he used and the infrequency, “would preclude any adverse effects at all.”

During closing argument, without objection, the prosecutor argued, “Let’s talk about Dr. Pittel, our drug expert, okay, the man who himself decided to do cocaine at the intermission of a murder trial and a trial which he was testifying at as a drug expert. And where did he get that cocaine? He took it from one of his patients. This is the guy that . . . the defense is asking you to rely heavily upon.”

On appeal, Rodriguez claims “Dr. Pittel’s testimony would certainly have played a far more persuasive role in the jury’s deliberations . . . if the prosecution had been precluded from unfairly tarnishing his reputation and testimony”

Our Supreme Court recently explained in *Clark, supra*, 52 Cal.4th 856 that “[a] witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court’s exercise of discretion under Evidence Code section 352.” (*Clark*, at p. 931, fn. omitted.) Nevertheless, where “the proffered impeachment evidence is misconduct other than a prior conviction” courts should consider with “ ‘particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.’ [Citation.]” (*Id.* at pp. 931-932.) And “[b]ecause the court’s discretion to admit or exclude impeachment evidence ‘is as broad as necessary to deal with the great variety of

factual situations in which the issue arises’ [citation], a reviewing court ordinarily will uphold the trial court’s exercise of discretion [citations].” (*Id.* at p. 932.)

We cannot say that the trial court “exceeded the bounds of reason” in allowing Dr. Pittel to be impeached with evidence of his prior drug arrest, even though it was extremely remote in time. (*Clark, supra*, 52 Cal.4th at p. 933.) In determining the credibility of a witness, the jury may consider, among other things, “[t]he existence or nonexistence of a bias, interest, or other motive,” and the witness’s “attitude toward the action in which he testifies or toward the giving of testimony.” (Evid. Code., § 780, subs. (c), (f), (j).) The trial court could reasonably have determined the jury was entitled to know the nature of Dr. Pittel’s prior drug arrest, which showed unprofessional behavior and extreme disrespect for the judicial process, in order to accurately judge his credibility as an expert witness testifying about the effects of drug abuse.

The trial court also weighed the prejudicial impact that admission of the drug arrest might have on the jury’s consideration of Dr. Pittel’s testimony and determined that, given the especially “egregious” nature of his conduct, its potential for prejudice did not outweigh its probative value. Undercutting the prejudicial impact of this evidence was the fact that Dr. Pittel was given an opportunity to explain the extenuating circumstances surrounding his 1990 drug arrest. Therefore, the jury was allowed to consider this evidence in the fuller context of information presented from Dr. Pittel’s point of view. Given the importance of placing before the jury all the facts that they needed in order to weigh Dr. Pittel’s expert testimony, we see no reason to second-guess the judge’s weighing of the prejudice/probative value of this evidence.

Rodriguez additionally claims that the prosecutor, during cross-examination and closing argument, was allowed to stray into collateral matters that went far afield of the court’s original ruling admitting Dr. Pittel’s drug arrest into evidence for impeachment purposes. Among other things, appellant complains that the prosecutor was allowed to ask a series of questions regarding the effect that the cocaine had on Dr. Pittel’s ability to perceive, his memory, and his reliability. However, an objection to this effect during cross-examination was overruled by the trial court. We believe the trial judge is in the

best position to assess whether defense counsel’s questioning violated the ground rules the court established for the admission of this evidence, and we find no error in this regard. Rodriguez additionally complains that the prosecutor “unfairly tarnish[ed]” Dr. Pittel’s “reputation and testimony” during closing argument. However, appellant has waived this argument by not timely objecting to this portion of the argument or requesting a curative admonition. (*People v. Hinton* (2006) 37 Cal.4th 839, 863; *People v. Earp* (1999) 20 Cal.4th 826, 858; *People v. Bell* (1989) 49 Cal.3d 502, 535.)

G. Violation of Right to Testify

Rodriguez contends the trial court violated his right to testify in his own defense. He argues that he asserted the right during a hearing on a *Marsden* motion (*Marsden, supra*, 2 Cal.3d 118) and that, by denying the *Marsden* motion, the trial court also denied him the right to testify.

Following the jury’s guilty verdicts, Rodriguez made an oral *Marsden* motion on May 21, 2010, challenging the effectiveness of his trial counsel’s representation. As required by *Marsden*, the trial court asked Rodriguez to explain the inadequacies in his trial counsel’s representation—that is, his past performance at trial—that made Rodriguez believe that he was entitled to new counsel at future parts of the criminal proceeding, such as a motion for new trial and sentencing. (*Marsden, supra*, 2 Cal.3d at p. 124.) Rodriguez provided numerous grounds upon which he believed his trial counsel had provided ineffective assistance during the trial, including the failure to deliver reporter’s transcripts, investigate school records, produce Rodriguez’s work schedule to prove employment, produce his incarceration records, investigate his pending “workman’s comp” case, put on Huapaya’s family members to impeach Huapaya, and present the testimony of an alibi witness.

When called upon to address these points, counsel asserted that he had explored Rodriguez’s school history and “workers’ comp” with Rodriguez’s sister, Ana Rodriguez. Counsel explained that Rodriguez’s “history of incarceration” would have been irrelevant and would have likely prejudiced the jury. Furthermore, “there’s a box full of transcripts,” and that counsel instead chose to discuss the prior testimony with Rodriguez.

Counsel stated that his investigator obtained school records in anticipation of a possible death penalty case but that the school records did not assist in the guilt phase. Counsel determined that the potential alibi witness was lying and would not assist the defense. With respect to impeaching Huapaya, counsel was fearful of opening up “character for conduct which will allow the district attorney to read in a whole bunch of material that we were able to keep out.”

The trial court found that the various matters raised by Rodriguez were tactical decisions within the purview of the attorney. “And the thing is Mr. Thews is the attorney, and he knows what things go and what things will not go because a lot of things will not help you.” The trial court’s ruling finds support in the case law.

Disagreements over trial tactics, by themselves, do not deprive a defendant of the effective assistance of counsel. (See, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 728 [“A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense”]; *People v. Cole* (2004) 33 Cal.4th 1158, 1192 [“[D]efendant’s complaints regarding [counsel’s] purported inadequate investigation, trial preparation, and trial strategy were essentially tactical disagreements, which do not by themselves constitute an ‘irreconcilable conflict’ ”].) It appears Rodriguez makes no claim of error with respect to these tactical matters.⁸

Instead, Rodriguez argues that he asserted his desire to testify during a portion of the *Marsden* hearing when he was relating his dissatisfaction with his attorney’s defense strategy and tactics. Referring to the evidence that his attorney failed to produce, he stated: “Well, I needed [the information] so I could hit the stand myself.”

Rodriguez claims the “trial court erred in denying the *Marsden* motion without any inquiry whatsoever regarding an apparent violation of appellant’s Fifth Amendment

⁸ Rodriguez concedes the court “appropriately listened to appellant’s complaints regarding counsel’s failure to present various items of evidence to impeach different prosecution witnesses to support his defense.” The trial court “listened, responded to appellant, and asked defense counsel to comment regarding the evidentiary items referred to by appellant.”

federal constitutional right to testify on his own behalf.” (Underscoring omitted.) A criminal defendant has a constitutional right to testify at trial in his or her own defense. (*Harris v. New York* (1971) 401 U.S. 222, 225; *People v. Carter* (2005) 36 Cal.4th 1114, 1198.) If a defendant’s decision to testify conflicts with contrary advice of counsel, the defendant’s decision prevails. (*People v. Robles* (1970) 2 Cal.3d 205, 215.)

However, while the defendant has the right to testify over his attorney’s objection, such right is subject to a significant condition: The defendant must timely and adequately assert his right to testify. (*People v. Alcalá* (1992) 4 Cal.4th 742, 805-806.) Here, Rodriguez’s purported invocation of his right to testify on his own behalf was made *after* the jury returned its guilty verdict. As such, it cannot possibly be considered timely. (*Ibid.*)

More importantly, the record does not contain a clear, unequivocal expression by Rodriguez of his desire to testify at trial. Rodriguez had no hesitancy in providing the court with a list of complaints about his counsel’s representation. Rodriguez’s desire to testify at trial was not listed among his complaints. Furthermore, there is nothing in the record that indicates that there was a dispute between appellant and his counsel over whether he would testify on his own behalf. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1332-1333 [a trial court must advise a defendant of his right to testify only when the court is made aware of an express conflict between defendant and counsel over that issue].) Therefore, we find no basis for concluding the trial court failed to conduct a proper *Marsden* inquiry on this point.

H. Sentencing Errors

Boode contends, and respondent concedes, that the court erred in two respects in sentencing Boode. First, the court erroneously imposed an aggregate base term of “50 years to life on counts 1 and 2 without the possibility of parole.” (Italics added, capitalization omitted.) The relevant special circumstance finding requires a modification of the abstract of judgment to simply be consecutive sentences of life without possibility of parole for counts one and two. Secondly, the court erroneously imposed consecutive 10-year section 12022.5, subdivision (a) enhancements for gun use

because she had already been punished by the imposition of two 25-years-to-life terms under the section 12022.53, subdivision (d) enhancements. Accordingly, the section 12022.5, subdivision (a) enhancements must be stayed.

IV. DISPOSITION

Boode's abstract of judgment should be amended to reflect the proper sentence for each count: life without possibility of parole for special circumstance murder, plus 25 years to life for the personal, intentional discharge of a firearm (§ 12022.53, subd. (d)). The trial court is directed to prepare an amended abstract of judgment reflecting these modifications and to forward a certified copy of the amended abstract to the Department of Corrections. In all other respects, the judgments are affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.