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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMAL KELLY,

Defendant and Appellant.

A129688

(Solano County
Super. Ct. No. FCR261329)

INTRODUCTION

Defendant Jamal Kelly, 17 years old at the time of the events, was convicted by jury verdict of first degree felony murder (Pen. Code, §§ 187, 189),¹ for which he was sentenced to 25 years to life in prison. On appeal he raises several instructional issues and a challenge to the sentence as cruel and/or unusual punishment; he also claims the restitution order must be modified to make it joint and several. We affirm.

FACTS

On November 2, 2008, Deshawn Malone of Fairfield made a phone call to find some Ecstasy pills for himself and defendant. Seventeen-year-old Kendrick Lewis of Vallejo received a call from someone seeking to buy \$200 worth of Ecstasy, and along with three friends drove to Fairfield to deliver the drug. Lewis's girlfriend, Karlee Swafford, was in the front passenger seat, Trung Nguyen was in the rear seat behind the driver, and Willie "Tony" Muir was in the rear passenger seat. Lewis was driving.

¹ Statutory references are to the Penal Code unless otherwise specified.

As they approached Mockingbird Lane, where Lewis and Malone had agreed to meet, Lewis pulled over to the curb but left the engine running. Defendant and Malone approached the car, defendant near the driver's door and Malone near the rear driver's side door. Malone had a gun and defendant knew that. He also knew that Malone intended to rob the occupants of the car.

Defendant put his hands on the lower edge of Lewis's rolled-down window, leaning into the car. Lewis's attention was focused on defendant.

As Lewis and defendant discussed the drug transaction, Malone became involved in an interchange with the back seat passengers. Nguyen had partially rolled down the rear driver's side window to get a better look at Malone, who he thought was behaving suspiciously. According to Nguyen, Malone was offended by this and asked Lewis, "Why is your friend looking at me all funny, bro?"

According to defendant's testimony, though, Muir was wearing a Halloween mask referred to as a "Jason mask,"² and Malone did not like it. Malone told Muir to remove the mask but he refused. Other witnesses testified that no one in the car was wearing the Jason mask, although such a mask was in the car.

Lewis offered to sell defendant some blue Ecstasy pills, but defendant told him he wanted some green pills, which are stronger. Lewis allowed defendant to touch the bag of pills but would not allow him to grasp onto it because defendant had shown him no money. Someone handed Lewis some green pills from the back seat. Lewis also became aware that Malone was involved in some sort of confrontation with his rear seat passengers. He told Malone not to worry about them.

When Lewis placed the green pills in his lap, defendant stepped back from the car, turned to Malone and said, "Do you want these?" Malone then pulled a gun and stuck it into the rear driver's side window, waved it around inside the car, and said, "I want those

² This was evidently a mask of Jason Voorhees from the Friday the 13th movies. (Friday the 13th (Paramount Pictures, 1980).)

and those,” referring to the two quantities of Ecstasy pills.³ According to Nguyen, Malone demanded, “I want everything. Give us everything you all got.” He also ordered the occupants of the car, “Don’t move, don’t go off, don’t drive off, or I’ll shoot you.”

Lewis began to pull the car forward and Malone shot him once in the back. Lewis remarked that he could not feel his feet, then lost control of the car. The car swerved and crashed into a light pole across the street. Officers responded quickly to a 911 call from Lewis’s friends, but Lewis already showed no sign of life and bled to death despite efforts to save him.

A single shell casing was found in the rear passenger compartment of Lewis’s car. Some blue pills resembling Ecstasy were found in the car on the driver’s seat and floorboard, and a baggie with similar pills was found in the grassy area outside the car. A Jason mask was recovered from the scene near the car.

Malone and defendant ran off after the shooting. According to a bystander they were laughing. Defendant was arrested about a month later. Identity was not an issue at trial.⁴

Testifying in his own defense, defendant claimed he intended only to buy drugs with Malone and had no intention of robbing anyone. He and Malone had decided to buy some Ecstasy, and as they were walking to get it, Malone pulled up his shirt and showed defendant a gun tucked into his waistband. Malone said he was going to “pull a lick,” meaning commit a robbery. Defendant went along with Malone only because he did not want to look like a “bitch” and lose respect in his neighborhood and because he was afraid of Malone. He did not intend to help Malone in the robbery or to share in its proceeds. He admitted, however, that Malone did not threaten or coerce him into going

³ Defendant admitted stepping away from the car but claimed it was *after* Malone produced the gun in order to avoid being shot; Swafford testified defendant stepped back *before* the weapon came out.

⁴ It appears a breakthrough in the investigation may have come when Nguyen realized several days after the shooting that he recognized defendant from having previously lived in the same neighborhood.

along. When asked by a detective what his “mindset” was at the time of the offense, defendant said he was there to “try to rob the dude of everything” but the “[d]ude wasn’t giving it up.” He testified at trial that he had money to purchase the drugs, but he told police during their investigation that he had no money with him.

Defendant testified he never intended for Lewis to be killed. He said he backed away from the car when Malone produced the gun and began to run away when he saw the shot fired. He read about the shooting in the newspaper but did not know Lewis had been killed until the police told him during their investigation. Defendant denied laughing as he ran off. He did not report Malone to the police because he did not want to be a “snitch.”

DISCUSSION

I. Failure to instruct on logical nexus between homicidal act and underlying felony

Defendant argues first that the felony murder instruction given by the court was faulty because it omitted a part of the instruction relating to the requirement of a causal nexus between the felony and the death. The court must instruct on the “general principles of law governing the case,” which are “those principles of law commonly or closely and openly connected with the facts of the case before the court.” (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530, italics omitted.) The court is not required, however, to instruct on specific points developed at trial or issues not fairly raised by the evidence. (*Ibid.*)

Defendant relies largely on *People v. Cavitt* (2004) 33 Cal.4th 187 (*Cavitt*) in advancing this claim. In *Cavitt*, two young males were convicted of the felony murder of the stepmother of one defendant’s girlfriend. (*Id.* at p. 193.) The girlfriend plotted with defendants to burglarize the stepmother’s house. The evidence amply supported the theory that the defendants were the direct perpetrators of the homicide as they had tied up the stepmother during the burglary with a sheet wrapped around her head, and she died of asphyxiation. Defendants argued the evidence supported the theory that the girlfriend suffocated the stepmother due to a preexisting animus toward her, independent of the

burglary, after both defendants left the scene. It was possible under the evidence either that the victim suffocated from the binding technique or that the girlfriend independently suffocated her after the two boys left the house. (*Ibid.*)

Because there was substantial evidence that the girlfriend was the killer, the Supreme Court granted review to clarify a nonkiller's liability for a killing " 'committed in the perpetration' " of an inherently dangerous felony under section 189's felony-murder rule. (*Cavitt, supra*, 33 Cal.4th at p. 193.) The court concluded that "in such circumstances, the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid.*)

In addressing the liability issue, the court rejected the defendant's argument that the killing must "advance or facilitate" the underlying felony for a nonkiller to be guilty of murder. (*Cavitt, supra*, 33 Cal.4th at pp. 196, 198-199.) It also rejected the Attorney General's contention that no causal nexus was necessary. It formulated its conclusion as follows: "the felony-murder rule does not apply to nonkillers where the act resulting in death is completely unrelated to the underlying felony other than occurring at the same time and place. Under California law, there must be a logical nexus—i.e., more than mere coincidence of time and place—between the felony and the act resulting in death before the felony-murder rule may be applied to a nonkiller. Evidence that the killing facilitated or aided the underlying felony is relevant but is not essential." (*Id.* at p. 196.) It further held "the requisite temporal relationship between the felony and the homicidal act exists even if the nonkiller is not physically present at the time of the homicide, as long as the felony that the nonkiller committed or attempted to commit and the homicidal act are part of one continuous transaction." (*Ibid.*)

In assessing the adequacy of the jury instructions, *Cavitt* analyzed the version of CALJIC No. 8.27 given at trial,⁵ concluding, “The instructions adequately apprised the jury of the need for a logical nexus between the felonies and the homicide in this case. To convict, the jury necessarily found that “ ‘the killing occurred *during* the commission or attempted commission of robbery or burglary’ by ‘one of several persons *engaged in the commission*’ of those crimes. The first of these described a temporal connection between the crimes; the second described the logical nexus.” (*Ibid.*)

The court in the case before us instructed the jury as follows, using CALCRIM No. 540B: “The defendant is charged in Count 1 with murder, under a theory of felony murder.

“The defendant may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the perpetrator.

“To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

“1. The defendant attempted to commit or aided and abetted a robbery;

“2. The defendant intended to commit or intended to aid and abet the perpetrator in committing robbery;

“3. If the defendant did not personally commit or attempt to commit robbery, then a perpetrator, whom the defendant was aiding and abetting, personally committed or attempted to commit robbery;

“AND

⁵ That instruction read: “ ‘If a human being is killed by one of several persons engaged in the commission of the crimes of robbery or burglary, all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging or facilitating the commission of the offense, aid, promote, encourage or instigate by act or advice its commission, are guilty of murder in the first degree, whether the killing is intentional, unintentional or accidental.’ ” (*Cavitt, supra*, 33 Cal.4th at p. 203.)

“4. While committing or attempting to commit robbery, the perpetrator caused the death of another person.

“A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

“To decide whether the defendant and the perpetrator committed or attempted to commit robbery, please refer to the separate instructions that I will give you on that crime. To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I will give you on aiding and abetting. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.”

In addition to the four elements specified above, CALCRIM No. 540B includes a fifth paragraph which may or may not be given depending on the circumstances:

“5. There was a logical connection between the cause of death and the robbery or attempted robbery. The connection between the cause of death and the robbery or attempted robbery must involve more than just their occurrence at the same time and place.” The CALCRIM instructions tell the court to include this element if it “concludes it must instruct on causal relationship between felony and death.”

The CALRCIM Bench Notes give the following advice as to when the fifth paragraph should be included: “Bracketed element 5 is based on *People v. Cavitt* [, *supra*,] 33 Cal.4th 187, 193. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a cofelon commits a killing. The court held that ‘the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act causing the death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction.’ (*Ibid.*) The majority

concluded that the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203-204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212-213.) Give bracketed element 5 if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element 5.”

Here the attempted robbery and shooting occurred within a very brief time span, unlike the killing in *Cavitt*. Indeed, defendant does not challenge the temporal relationship of the robbery and the killing but challenges the causal nexus, claiming the evidence is susceptible of the interpretation that Malone shot Lewis because of his argument with Nguyen and Muir over the Jason mask, and not as part of the robbery.

The Attorney General correctly argues the issue has been forfeited because defense counsel neither objected to the instruction as given nor requested the fifth bracketed clarifying instruction. As the Bench Notes indicate, the majority in *Cavitt*, *supra*, 33 Cal.App.4th at pp. 203-204 concluded there was no sua sponte duty to give the fifth paragraph of the instruction. “[I]f the requisite nexus between the felony and the homicidal act is not at issue and the trial court has otherwise adequately explained the general principles of law requiring a determination whether the killing was committed in the perpetration of the felony, ‘it is the defendant’s obligation to request any clarifying or amplifying instructions on the subject.’ [Citation.]” (*Id.* at p. 204.) Defendant’s argument fails for this reason alone.

The argument is without merit also because:

In the present case the jury was instructed both that the defendant must have intentionally aided and abetted the robbery and that the perpetrator must have “caused the

death” “while” committing the robbery. This satisfied both the causal and temporal aspects of the felony-murder rule in the circumstances of this case.

Although there was some testimony about Malone’s having quarreled with Nguyen and Muir about the Jason mask or Nguyen’s suspicious attitude shortly before the shooting, this did not constitute substantial evidence that the shooting was “completely unrelated” to the robbery attempt, as discussed in *Cavitt, supra*, 33 Cal.4th at pp. 196, 200. Nor did it reasonably create a defense theory that Malone’s shooting was the result of an independent animus he harbored toward Nguyen or Muir. Such a theory was not argued at trial, except for a brief reference to some “bickering” involving Malone.

Significantly, Malone shouted into the car, at the same time he demanded the drugs and “everything you all got” and not to “drive off” or he would shoot. When Lewis began to pull forward in the car, Malone did just that. He did not shoot at Nguyen or Muir in the back seat, with whom he had the confrontation. Rather he shot Lewis, who disobeyed his order not to drive away. Because Malone aimed at Lewis rather than Nguyen or Muir, the shooting appears to have been a reaction to Lewis’s disobedience or an attempt to keep the robbery victims in place, not the product of his verbal jousting with the back seat passengers. Moreover, the felonious demand for “everything you all got” intervened between the argument and the shooting, suggesting the shooting was an immediate reaction to the failing robbery attempt, not to an antecedent quarrel.

We see no reasonable construction of the evidence that would have disconnected the shooting from the attempted robbery so as to require the jury to consider whether Malone harbored a separate motive for the shooting. Defendant attempts to stretch the evidence far beyond a reasonable interpretation and to make compulsory an instruction that the Supreme Court has left in the hands of defense counsel.

Indeed, even in *Cavitt, supra*, 33 Cal.4th at p. 204, the court concluded that “one could not say that the homicide was completely unrelated, other than the mere coincidence of time and place, to the burglary-robbery.” It noted that cases requiring a clarification of the logical nexus requirement would be “ ‘few indeed,’ ” and affirmed the

defendants' convictions, cautioning that the girlfriend's personal animus toward her stepmother did not "absolve the other participants of their responsibility for the victim's death." (*Id.* at pp. 204-205 & fn. 5.) Indeed, the Supreme Court found it "difficult to imagine how such an issue could ever arise when the target of the felony was intentionally murdered by one of the perpetrators of the felony." (*Id.* at p. 204, fn. 5.) The present case is not the rare exception the Supreme Court had difficulty imagining.

Finally, although defendant argues the purported instructional error was prejudicial under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), we conclude the correct standard of prejudice is that set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). Defendant does not raise an issue of an omitted element of an offense. "The existence of a logical nexus between the felony and the murder in the felony-murder context . . . is not a separate element of the charged crime but, rather, a clarification of the scope of an element." (*Cavitt, supra*, 33 Cal.4th at p. 203; compare *People v. Breverman* (1998) 19 Cal.4th 142, 178 (*Breverman*) [failure to instruct on lesser included offense] with *People v. Flood* (1998) 18 Cal.4th 470, 502-503 [instructional error omitting element of charged offense reviewed under *Chapman* standard].)

Under the test enunciated in *Watson, supra*, 46 Cal.2d at p. 836, any possible error was harmless. There was only passing evidence that Malone had a brief confrontation with Nguyen and Muir, and no evidence or argument that Malone shot Lewis because of that confrontation. In light of the strong evidence of guilt of felony murder, any error in omitting the bracketed clarifying instruction was harmless.

II. Failure to instruct on second degree implied malice murder

First degree felony murder is defined by statute as a homicide "committed in the perpetration of, or attempt to perpetrate" certain enumerated felonies, including robbery. (§ 189.) Defendant contends that because the enumerated felonies are inherently dangerous to life or pose a significant prospect of violence, a defendant necessarily engages in a deliberate act, the natural consequences of which are dangerous to life, with knowledge of that risk and a conscious disregard for life, which is one description of

second degree murder. (See CALJIC No. 8.31.) He therefore claims the court erred in failing to instruct sua sponte on second degree implied malice murder.

Even absent a request, and over any party's objection, a trial court must instruct sua sponte on necessarily included lesser offenses that find substantial support in the evidence. (*Breverman, supra*, 19 Cal.4th at p. 162.) Such instructions are required when there is evidence that would “ ‘absolve the defendant of guilt of the greater offense but not of the lesser.’ ” (*People v. Burney* (2009) 47 Cal.4th 203, 250; *People v. Barton* (1995) 12 Cal.4th 186, 194-195 [court must instruct sua sponte on lesser included offenses “ ‘when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged’ ”]) We review the correctness of the instructions independently. (*People v. Cole* (2004) 33 Cal.4th 1158, 1218; *People v. Waidla* (2000) 22 Cal.4th 690, 733.)

A particular offense is considered a necessarily included lesser offense, and therefore subject to the duty to instruct, if it satisfies one of two tests. The “elements” test is satisfied if the statutory elements of the greater offense include all the elements of the lesser, so that the greater cannot be committed without committing the lesser; the “accusatory pleading” test is satisfied if the facts actually alleged in the accusatory pleading include all the elements of the lesser offense, such that the greater offense charged cannot be committed without committing the lesser offense. (*People v. Anderson* (2006) 141 Cal.App.4th 430, 442-443.)

The evidence to support a lesser included offense instruction must be “substantial” before the duty of sua sponte instruction arises; that is, evidence “ ‘from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist.’ ” (*People v. Burney, supra*, 47 Cal.4th at p. 250; *People v. Barton, supra*, 12 Cal.4th at pp. 195, fn. 4 & 201, fn. 8 [evidence “substantial enough to merit consideration by the jury,” that is, evidence that a “reasonable jury could find persuasive”]; *Anderson, supra*, 141 Cal.App.4th at p. 446.)

While second degree murder is a lesser included offense of first degree murder with malice aforethought (*People v. Taylor* (2010) 48 Cal.4th 574, 623), the same rule historically has not been applied in cases tried solely on a felony-murder theory, where malice aforethought plays no role. In such a case, the jury need not consider whether the defendant killed with malice, but only whether the killing occurred in the commission of the predicate felony. (See, e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 116, fn. 19.) “Where the evidence points indisputably to a killing committed in the perpetration of one of the felonies section 189 lists, the *only* guilty verdict a jury may return is first degree murder. [Citations.]” (*People v. Mendoza* (2000) 23 Cal.4th 896, 908.) The trial court is justified in withdrawing the question of degree from the jury and need not instruct on second degree murder. (*Id.* at pp. 908-909; see also, e.g., *People v. Turner* (1984) 37 Cal.3d 302, 327, overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1115; *People v. Mabry* (1969) 71 Cal.2d 430, 437-438; *People v. Rupp* (1953) 41 Cal.2d 371, 382.) *Anderson, supra*, 141 Cal.App.4th 430, upon which defendant chiefly relies, does not hold otherwise but rather cites this rule with approval. In such cases “ ‘the court is justified in advising the jury that the defendant is either innocent or guilty of first degree murder.’ [Citations.]” (*Id.* at p. 448.)

Defendant points out the Supreme Court has more recently expressly left open the question “whether second degree murder is a lesser included offense of first degree murder where, as here, the prosecution proceeds only on a theory of first degree felony murder”—and consequently whether a sua sponte second degree implied malice murder instruction is necessary. (*People v. Taylor, supra*, 48 Cal.4th at p. 623; *People v. Romero* (2008) 44 Cal.4th 386, 402; *People v. Wilson* (2008) 43 Cal.4th 1, 16, fn. 5.) While that is true, defendant’s reasoning would suggest that every felony murder trial would require instruction on second degree implied malice murder. No case has so held. And most recently the Supreme Court has cast doubt on such a theory, pointing out that malice is an element of second degree murder but is not an element of first degree felony murder. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1328-1329.)

Still, defendant argues he was entitled to such an instruction because he was charged under section 187 with murder with malice aforethought.⁶ The prosecutor announced in advance the case would be tried, however, “exclusively” on a theory of first degree felony murder under section 189. This was clear from the beginning, and the defense so understood.

Anderson, supra, 141 Cal.App.4th at pp. 443, 445-446, upon which defendant relies, does not entitle him to a second degree murder instruction, much less does it so entitle every accused tried on a felony-murder theory. In *Anderson*, the female defendant was present in a motel room when a fight broke out between her friend Gonzales and the occupant of the room. The fight was initiated by the victim, who accused Gonzales of selling him poor quality or fake crack. There was only weak evidence to suggest Gonzales had a preexisting intent to rob the victim. (*Id.* at pp. 436-438.) During the fight defendant assisted Gonzales by attempting to take from the victim a broken crack pipe which he had used to cut Gonzales’s face. (*Id.* at p. 437.) As Gonzales got the better of the victim, defendant, at Gonzales’s instruction, removed some cash from the victim’s pants pocket. (*Ibid.*) The victim was pinned to the ground and had stopped struggling before defendant took the cash. (*Id.* at p. 446.)

The case was charged under section 187 as a murder with malice aforethought, but a felony-murder theory emerged at trial. (*Anderson, supra*, 141 Cal.App.4th at p. 435.) And a felony-murder allegation was “added” after the close of evidence. (*Id.* at p. 445.) In these circumstances, Division One of this court judged the necessity of lesser included offense instructions solely on the basis of the charged offense, concluding that a second degree murder instruction should have been given. (*Id.* at p. 445.)

⁶ A felony-murder theory may be pursued even when only murder under section 187 or murder with malice aforethought has been expressly charged (*People v. Taylor, supra*, 48 Cal.4th at pp. 625-626; *People v. Kipp* (2001) 26 Cal.4th 1100, 1131); the prosecutor’s pretrial election to proceed “exclusively” on a felony-murder theory put defendant on notice that theory would be pursued. (*People v. Davis* (1995) 10 Cal.4th 463, 512-513; *People v. Johnson* (1991) 233 Cal.App.3d 425, 453-457.)

In *Anderson, supra*, 141 Cal.App.4th 430, there was substantial evidence the female defendant, a nonkiller participant, may have formed the larcenous intent only after the act causing death had occurred. (*Id.* at pp. 446-447.) She told police the victim was still alive when she took the cash and left the room. (*Id.* at pp. 437, 446.) But the prosecution’s pathologist testified the victim died from asphyxiation due to a collapsed larynx, which would have allowed him to continue living for approximately four to twenty minutes after the death-causing act. (*Id.* at pp. 438, 447.) Thus, the man may have already been mortally wounded at the time defendant removed the cash from his pocket. That testimony opened up the possibility that defendant did not decide to steal the money until after the death-causing strangulation had occurred, in which case she would not have been guilty of felony murder. (*Id.* at p. 447.) No similar question of after-formed intent is involved in this case.

Anderson found on the facts before it that the evidence did not “indisputably” indicate a felony murder, “since substantial evidence supported a finding that defendant formed an intent to take the victim’s money only after Gonzales had fatally crushed [the victim’s] larynx.” (*Anderson, supra*, 141 Cal.App.4th at p. 448.) In addition, because the defendant assisted Gonzales by attempting to disarm and restrain the victim during the affray, there was evidence from which the jury could have concluded that she aided and abetted the killing.⁷ (*Id.* at pp. 447, 450.) In light of this alternative theory of liability—also encompassed by the information—second degree murder was a lesser included offense.

We read *Anderson, supra*, 141 Cal.App.4th 430 as being limited to those cases in which the prosecution proceeds on both a felony-murder theory and a theory of malice aforethought. When only a felony-murder theory is pursued, the rule is different. In fact,

⁷ The evidence would also have supported a finding that Gonzales himself acted in the heat of passion upon a sudden quarrel or in imperfect self-defense. (*Anderson, supra*, 141 Cal.App.4th at p. 447.) Therefore, the court found there was sufficient evidence to require voluntary manslaughter instructions for the female defendant as well. (*Ibid.*)

Anderson itself proceeded on the assumption that second degree murder is *not* a lesser included offense of felony murder. (*Anderson, supra*, 141 Cal.App.4th at p. 444.)

Moreover, *Anderson, supra*, 141 Cal.App.4th 430, was specifically concerned with the question of notice, since the case was charged as a killing with malice aforethought and the felony-murder theory apparently did not surface until trial. (*Id.* at pp. 445-446.) Here, on the other hand, defendant was not surprised by the felony-murder theory, as the prosecutor had made that theory of the case clear from the beginning.

Considering the charge to the jury as a whole, there was not substantial evidence of second degree murder. Even viewing the evidence most favorably to defendant, his self-serving testimony—at odds with his prior statement to police and with the other evidence at trial—need not be accepted as substantial evidence warranting a lesser included offense instruction. (See *People v. Cole, supra*, 33 Cal.4th at pp. 1176, 1218-1219.) Defendant’s testimony amounted to a denial of intent to rob, which would have relieved him of liability altogether under the felony-murder rule and the instructions given the jury. The jury was instructed, for instance, that neither mere presence at the scene nor knowledge of Malone’s felonious purpose and failure to prevent it would subject defendant to aider and abettor liability. (Cf. *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14.) The defense theory of the case was fairly presented by the instructions.

But even assuming the court erred in failing to instruct on second degree murder, the state law *Watson* test of prejudice applies. (*Breverman, supra*, 19 Cal.4th at p. 165; *Watson, supra*, 46 Cal.2d at p. 836.) In applying this test, we are instructed to focus “not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.” (*Breverman, supra*, 19 Cal.4th at p. 177.)

We cannot find the hypothesized error prejudicial on this record. Defendant seems to argue he was simply in the wrong place at the wrong time with the wrong person. Yet he never attempted to remove himself from the scene, to persuade Malone not to commit the robbery, to alert the victims of the impending danger, or even to part company with Malone after the shooting. And though defendant testified he had no intent to aid the robbery, his actions say otherwise.

Swafford and Nguyen both testified at trial in a fairly consistent manner about the events of the evening Lewis was killed. By defendant's own testimony he accompanied Malone to Lewis's car, knowing he was armed and intended to use the weapon to rob the drug seller(s). He in fact assisted Malone by engaging Lewis in drug negotiations, which allowed Malone to time the robbery attempt so as to get the weapon out of his waistband and into the car before anyone in the car could react. Defendant's negotiations also induced Lewis to bring out both types of Ecstasy pills and lay them in his lap, theoretically at least making their seizure easier. Indeed, his very presence would have made Malone's threats more intimidating to the car's occupants.

Defendant then arguably gave Malone a cue for the robbery by stepping back from the car and asking, "Do you want these?" to which Malone responded, "I want those and those." Defendant's move was inferably to give Malone access to the car's occupants, as well as to protect himself. Even if defendant stepped back from the car *after* the gun was produced (see fn. 3, *ante*), he continued to stand nearby until after the fatal shot was fired, as he admitted seeing the gun go off.

It is inherently implausible for defendant to say he went to the car to get drugs and yet to say he had no intent to share in the proceeds of the robbery. Drugs were the one sure thing Malone planned to get from the robbery. It is contrary to human experience to think defendant would not have shared in the drugs if the robbery had been successful. And though defendant claims he wanted to buy drugs, he told the police he had no money with him, and he never produced any money during the drug transaction.

In addition, later on the evening of the killing Malone helped defendant move his belongings from his mother's house to a friend's house, as his mother had kicked him out

of the house that day. Defendant's acceptance of this help shows he still allied himself with Malone even after the killing. And, of course, he did not report the crime to the police, not wanting to be a "snitch."

Most significantly, defendant himself contradicted his self-serving version of the crime in his own prior statement that he was there to "rob the dude of everything." He was also asked by police whether he was just "going to rob him" and did not "want [Lewis] to die," and he responded affirmatively. Defendant did tell police "in a way" he did not want to rob the victims but he realized that "at the end of the day, that's what it's going to sound like." He uses this to argue that he denied intent to rob during his police interview. But the detective who interviewed him testified defendant explicitly admitted he was involved in the robbery during the interview. Finally, the most neutral percipient witness heard defendant and Malone laughing as they ran from the scene. Defendant's denial did little to blunt the impact of that testimony. This apparent lie further called into question his credibility.

Defendant also acknowledged to police that he knew about the incident from news reports, yet continued even at trial to say he did not know Lewis had been killed. That is inherently improbable since Lewis died almost immediately. This was not a case in which the victim clung to life after the shooting. The news accounts undoubtedly included the fact of his death.

In short, defendant's credibility was suspect at best. It was hurt further by the fact that he initially told police he had nothing to do with the crime and, even after he began to come clean, minimized his role by saying he stayed in the alley while Malone approached the car and attempted the robbery. The evidence considered in totality powerfully suggests defendant was voluntarily involved in—and intended to assist—the robbery. Defendant's after-the-fact testimony about his state of mind, which was incompatible with the other evidence, would not reasonably have led to a second degree murder conviction.

III. Failure to instruct on involuntary manslaughter

Defendant next argues an involuntary manslaughter instruction was required sua sponte because, according to his own testimony, the killing occurred while he was engaged in attempting to purchase an illicit drug, knowing that his accomplice was armed with a firearm and intended to rob the sellers.

Section 192, subdivision (b) defines involuntary manslaughter as “the unlawful killing of a human being without malice . . . in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.”

Although the statute speaks in terms of a killing during an unlawful act “not amounting to felony,” a “killing in the commission of a felony that is not inherently dangerous to human life . . . has been recognized as involuntary manslaughter, notwithstanding the limited statutory definition of the offense, ‘if that felony is committed without due caution and circumspection.’”⁸ (*People v. Garcia* (2008) 162 Cal.App.4th 18, 29; see also, *People v. Butler* (2010) 187 Cal.App.4th 998, 1007; *People v. Burroughs* (1984) 35 Cal.3d 824, 835, disapproved on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

Involuntary manslaughter is ordinarily a lesser included offense of murder. (*People v. Prettyman* (1996) 14 Cal.4th 248, 274.) However, the Supreme Court has expressed doubt whether the same is true for felony murder where the claimed misdemeanor or nondangerous felony underlying the involuntary manslaughter theory is not a lesser included offense of the felony claimed to support the felony-murder theory. “Under such circumstances, it might be argued, a sua sponte instruction on involuntary manslaughter would violate the defendant’s due process right to notice of the charges against him. [Citation.]” (*People v. Edwards* (1985) 39 Cal.3d 107, 116, fn. 10.)

⁸ Possession of Ecstasy (technically called methylenedioxy methamphetamine or MDMA) is a wobbler. (Health & Saf. Code, §§ 11055, subd. (d) 11377, subd. (a), & 11401, subd. (b); *People v. Becker* (2010) 183 Cal.App. 4th 1151, 1155-1156.)

In the present case, the crime underlying the involuntary manslaughter theory on which defendant claims he was entitled to instruction—attempted possession of Ecstasy—was not a lesser included offense of the robbery underlying the charged homicide. No drug charge was included in the information. Based on the Supreme Court’s analysis in *Edwards, supra*, 39 Cal.3d at p. 116, fn. 10, we conclude that involuntary manslaughter was not a lesser included offense of felony murder in this case. The noninherently dangerous felony here was a legally unrelated drug offense. A lesser offense of drug-purchase manslaughter was not necessarily included in the robbery-murder that the prosecution undertook to prove; a homicide based on this theory would be a lesser related offense upon which instruction would only be required with the parties’ mutual assent. (*People v. Taylor, supra*, 48 Cal.4th at p. 622; *People v. Birks* (1998) 19 Cal.4th 108, 136.)

Defendant relies largely on *People v. Lee* (1999) 20 Cal.4th 47, 60-61, in which a husband shot his wife during a quarrel, after he had consumed a large quantity of alcohol. It was not a felony murder case. The defendant was charged with murder and convicted of voluntary manslaughter. (*Id.* at pp. 54-55.) The instruction on voluntary manslaughter was arguably error, as the marital quarrel did not amount to adequate provocation for that offense. (*Id.* at pp. 59-60.) The question was whether defendant was entitled to a misdemeanor manslaughter instruction, where the parties agreed the evidence was sufficient to support a second degree murder conviction, and instructions had been given on criminally negligent involuntary manslaughter and voluntary intoxication, but a misdemeanor manslaughter instruction had been omitted. (*Id.* at pp. 52, 60-61.) The court held defendant was entitled to an instruction on misdemeanor manslaughter because his brandishing of a weapon was a misdemeanor. (*Id.* at p. 61.) The court concluded that, despite the instructional error, the voluntary manslaughter verdict by the jury was favorable to the defendant, and therefore reversal was not warranted. (*Id.* at pp. 64-65.) The case is significantly distinguishable from the one before us, which was tried strictly on a felony-murder theory.

There was likewise no substantial evidence supporting an involuntary manslaughter instruction based on lawful conduct in a criminally negligent manner. (Cf. *People v. Penny* (1955) 44 Cal.2d 861, 879.) Defendant's conduct was by any interpretation unlawful. No reasonable jury would have convicted defendant solely of involuntary manslaughter on a criminal negligence theory. And, for the reasons stated previously, even if there was error it was not prejudicial. (*Watson, supra*, 46 Cal.2d at p. 836.)

IV. Cumulative prejudice

Defendant argues that even if the alleged defects put forth in his first three arguments were deemed harmless individually, considered cumulatively they deprived him of a fair trial. Having found no instructional error, of course, we also find no prejudice, cumulative or otherwise.

Defendant relies in part on the fact the jury deliberated approximately five and a half hours before reaching a verdict.⁹ (See, e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 907.) Although the length of deliberations may suggest it was not an open-and-shut case (*People v. Woodard* (1979) 23 Cal.3d 329, 341), that factor may also suggest initial sympathy for the young defendant. Or it may show equally that the jury simply appreciated the gravity of its decision and struggled conscientiously with the evidence and the instructions. (Cf. *People v. Taylor* (1990) 52 Cal.3d 719, 732 [ten-hour deliberation not "unduly significant" in death penalty case]; *People v. Houston* (2005) 130 Cal.App.4th 279, 300-301 [deliberations spread over four days not indicative of close case in complicated trial]; *People v. Walker* (1995) 31 Cal.App.4th 432, 439 [6.5 hour deliberation after 2.5 hour trial may have reflected jury's "conscientious performance of its civic duty, rather than its difficulty in reaching a decision"].) Part of the jury's time was spent listening to a readback of defendant's testimony, and that time may fairly be

⁹ This calculation assumes the jury took no lunch break between 9:00 a.m. and 1:30 p.m. on the second day of deliberations.

omitted from consideration in the length of its deliberation. (*People v. Houston, supra*, 130 Cal.App.4th at p. 301; *People v. Walker, supra*, 31 Cal.App.4th at p. 438.)

As we view the record, the evidence against defendant was strong and his defense turned entirely upon his own credibility. Since there were multiple reasons to question his credibility, we cannot find the assumed errors prejudicial either singly or cumulatively.

Defendant received a fair trial. As described above, the evidence, in light of the whole record, fully supported the jury's verdict. We see no reasonable probability or possibility defendant would have been convicted of a lesser offense or acquitted if the proposed instructions had been given. (*Chapman, supra*, 386 U.S. 18; *Watson, supra*, 46 Cal.2d 818.)

V. Cruel and/or unusual punishment

Defendant next claims the sentence in this case violated the cruel and/or unusual punishment prohibition of the federal and state constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) He acknowledges the claim was forfeited by trial counsel's failure to object. He urges us to reach the merits nonetheless " 'to prevent the inevitable ineffectiveness-of-counsel claim.' " (See *People v. Russell* (2010) 187 Cal.App.4th 981, 993; *People v. Norman* (2003) 109 Cal.App.4th 221, 229-230.) Even on its merits, however, the claim must be rejected.

The Eighth Amendment to the United States Constitution prohibits excessive sanctions, including extreme sentences that are "grossly disproportionate" to the crime. (*Ewing v. California* (2003) 538 U.S. 11, 20 (lead opn. of O'Connor, J.)) In applying this proportionality analysis, courts look to three objective criteria: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. (*Id.* at p. 22.) It is ordinarily unnecessary to consider the latter two factors, at least where consideration of the first factor fails to yield an inference of gross disproportionality. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1005 (conc. opn. of Kennedy, J.))

Under the California constitution¹⁰ a sentence will not be allowed to stand if “ ‘it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.’ ” (*People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*)). “[T]he state must exercise its power to prescribe penalties within the limits of civilized standards and must treat its members with respect for their intrinsic worth as human beings[.]” (*Ibid.*) “ ‘Punishment which is so excessive as to transgress those limits and deny that worth cannot be tolerated.’ ” (*Ibid.*)

As under federal law, three techniques may be used to focus the proportionality inquiry: (1) examination of the nature of the offense and offender, with particular regard to the degree of danger both present to society; (2) comparison of the challenged penalty with those imposed in the same jurisdiction for more serious crimes; and (3) comparison of the challenged penalty with those imposed for the same offense in different jurisdictions. (*In re Lynch* (1972) 8 Cal.3d 410, 425-429 (*Lynch*)). The latter two techniques, however, are not required under the state or federal constitutions. (*People v. Howard* (2010) 51 Cal.4th 15, 39-40; *People v. Weddle, supra*, 1 Cal.App.4th at p. 1196.) Any one of *Lynch*’s three factors can be sufficient to demonstrate that a particular punishment is cruel and/or unusual. (*People v. Mendez* (2010) 188 Cal.App.4th 47, 64-65 (*Mendez*)). Defendant bears the burden of establishing the punishment is unconstitutional. (*People v. King* (1993) 16 Cal.App.4th 567, 572.) Because defendant has provided no basis for intra- or inter-jurisdictional comparison, we limit our analysis to the first *Lynch* factor.

A number of considerations come into play in assessing the offender’s culpability, including the facts of the current crime, the seriousness of the offense, whether it

¹⁰ Article I, section 17 of the California Constitution prohibits the infliction of “[c]ruel or unusual punishment.” This provision is “construe[d] . . . separately from its counterpart in the federal Constitution” (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1135-1136) and affords greater protection than the Eighth Amendment. (*People v. Anderson* (1972) 6 Cal.3d 628, 634; see also, *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196, fn. 5 [use of the disjunctive is “purposeful and substantive rather than merely semantical”].)

involved violence or aggravating circumstances, whether the defendant injured another, whether there are rational gradations of culpability that can be made on the basis of the injury to the victim or to society in general, and whether the sentence constitutes “excessive punishment for [an] ‘ordinary offense[.]’ ” (*Lynch, supra*, 8 Cal.3d at pp. 425-426.)

The punishment imposed here was not grossly disproportionate to the crime. A young man lost his life due to the actions of defendant and Malone. The gravity of the offense was therefore great. A sentence of 25 years to life for felony murder is not on its face excessive. And though crimes such as this have become far too “ordinary” in our society, the senseless taking of a life is not an “ordinary” crime in terms of moral disapprobation and outrage. Malone was an adult and clearly the more culpable party, but he also received a more severe sentence: 50 years to life.

Also relevant to the inquiry are the penological purposes of the prescribed punishment. (*In re Foss* (1974) 10 Cal.3d 910, 919-920.) The penological purpose of the sentence was in part to punish defendant and to isolate him from society for an extended period so as to protect the public. But it also was intended to serve as a deterrent to others who might engage in such dangerous behaviors. “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. [Citation.] ‘The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.’ [Citation.]” (*Cavitt, supra*, 33 Cal.4th at p. 197; cf. *People v. Chun* (2009) 45 Cal.4th 1172, 1198 [deterrent purposes of second degree felony-murder rule].)

True, defendant is a young man. That and his less culpable role in Lewis's death are the primary factors that might be considered mitigating in determining whether the sentence was grossly disproportionate. But he is wrong to attempt to liken his case to *Dillon, supra*, 34 Cal.3d 441. Dillon was, like defendant, 17 years old at the time of the offense. (*Id.* at p. 451.) However, Dillon was immature and functioned at the level of a " 'much younger child.' " (*Id.* at p. 483.) No such evidence was introduced with respect to defendant.

Dillon and several friends intended to steal marijuana plants from a grower; they took along some shotguns and a rifle, as well as other weapons and supplies they thought would be of use during the raid. (*Dillon, supra*, 34 Cal.3d at pp. 451-452.) When Dillon became separated from some of his friends, one of the boys in the separate group accidentally fired his shotgun twice. (*Id.* at p. 452.) Hearing at least two shotgun blasts, Dillon believed his friends had been "blown away" by a guard at the marijuana plantation, whom he had seen carrying a shotgun. (*Id.* at p. 482.) He then heard footsteps behind him and saw a man approaching with a shotgun that appeared to be aimed at him. (*Id.* at pp. 482-483.) He panicked and fired several shots in the man's direction, killing him. (*Id.* at p. 483.)

Defendant's crime here was much more serious in that he, by his own admission, embarked upon a drug transaction knowing his companion was armed and intended to use the gun for a robbery. The jury found defendant shared that intent. The crime intended by defendant and Malone was far more violent than the original crime contemplated by Dillon and his companions in that it involved confronting four people with a handgun. Malone's shot was by all indications intentional and at close range with no provocation and no possible claim of self-defense or imperfect self-defense. There was no element of accident, fear or panic. Defendant's crime was vastly different from Dillon's.

Defendant also presents a much greater danger to society than did Dillon, who had no prior criminal record. (*Dillon, supra*, 34 Cal.3d at p. 486.) Defendant in our case, on the other hand, had a prior record as a juvenile that included robbery, battery, theft and

illegal gaming. At age 17 he was already an experienced criminal. We fail to see this as a case comparable to *Dillon*.

Defendant also cites *Mendez, supra*, 188 Cal.App.4th at pp. 62-68 and *Graham v. Florida* (2010) 560 U.S. ___, 130 S.Ct. 2011 (*Graham*). Those cases held unconstitutional extreme punishments inflicted on defendants who were juveniles when they committed their offenses where such sentences condemned the individual to life in prison with no possibility of redemption for good conduct. *Graham* held unconstitutional a sentence of life without possibility of parole for armed burglary with assault and attempted robbery by a 16 year old. The state “must” give a juvenile “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” in cases that did not involve a homicide. (*Graham, supra*, 560 U.S. at p. ___, 130 S.Ct. at p. 2030.)

Mendez held that *Graham* did not technically control the outcome in a case involving a sentence of 84 years to life for carjacking, assault with a firearm, and robbery. It nevertheless found *Graham*’s reasoning persuasive in finding the sentence was a de facto sentence of life without parole for a defendant who was 16 at the time of the offense. (*Mendez, supra*, 188 Cal.App.4th at pp. 63-64.) The court reasoned that the defendant would not be eligible for parole until he was 88 years old, whereas his life expectancy was only 76 years. (*Id.* at p. 63.) In the circumstances, such a lengthy term was cruel and unusual. (*Id.* at p. 68.) Notably, however, *Mendez* did not find cruel or unusual a sentence of 48 years for a 15-year-old codefendant. (*Id.* at pp. 50, 68.)

Most recently, in *People v. Caballero* (Aug. 16, 2012, S190647) __ Cal.4th __ [2012 Cal.LEXIS 7664], the California Supreme Court struck down a sentence of 110 years to life in a juvenile case involving three gang-related attempted murders.

The sentence imposed here was substantially less severe than the sentences in *Graham, Mendez* and *Caballero* in that the minimum term was 25 years, not a sentence that would inevitably keep defendant in prison until he dies or nears the end of his life. Defendant was older than those defendants when he committed his crime, and yet he will be eligible for parole at a much younger age. The sentence imposed here continues to give defendant something to strive for and a substantial life expectancy after completing

his prison term. It was not tantamount to a sentence of life in prison without possibility of parole and was not grossly disproportionate to the offense.

Finally, and significantly, in *Graham, Mendez* and *Caballero*, no homicide was committed. The Supreme Court in *Graham* specified that the holding applied only to cases in which the juvenile neither killed nor intended to kill during his offense. (*Graham, supra*, 130 S.Ct. at p. 2027.) Here there was a loss of life. And though he did not pull the trigger, California law holds defendant accountable. Thus, the claim of a grossly disproportionate sentence is far weaker in defendant's case. True, *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455], applied *Graham's* reasoning to homicide cases. *Miller* held states may not impose a mandatory life without parole sentence on a juvenile even in a homicide case. In so doing, however, it emphasized *Graham's* "categorical bar" to life without parole sentences applied "only to nonhomicide offenses." (*Id.* at p. __ [132 S.Ct. at p. 2465].) Defendant's punishment was not unconstitutionally cruel or unusual.

VI. Joint and several restitution order

Section 1202.4, subdivision (f), states in relevant part, "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order." Defendant claims the order for restitution in his case should have been made joint and several with the order in Malone's case to avoid overcompensation to Lewis's family and the city (for the light pole). Defendant claims the trial court should have made its discretionary sentencing choice in a manner that avoids multiple reimbursement for a single expense.

Such a claim was forfeited by failure to object in the trial court. (*People v. O'Neal* (2004) 122 Cal.App.4th 817, 820; see *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468.) "[A]ll 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' raised for the first time on appeal are not subject to review. [Citations.]" (*People v. Smith* (2001) 24 Cal.4th 849, 852.) Defendant claims there could be no waiver because the sentence was unauthorized, citing *People v.*

Blackburn (1999) 72 Cal.App.4th 1520, 1535 (*Blackburn*). Although *Blackburn* decided the restitution issue, it did not discuss forfeiture by failure to object and cannot stand for a proposition not discussed. (*People v. Taylor, supra*, 48 Cal.4th at p. 626.) Moreover, the unauthorized sentence exception is very narrow, applying to sentences which could not lawfully be imposed in any circumstance, where factual findings of the trial court need not be reviewed, and where a remand is not necessary. (*People v. Smith, supra*, 24 Cal.4th at p. 852; *People v. Brach* (2002) 95 Cal.App.4th 571, 578.) It is not applicable here.

In any event the claim is unmeritorious. The court in *Blackburn, supra*, 72 Cal.App.4th 1520 held a trial court has “the authority to order direct victim restitution paid by both defendants jointly and severally.” (*Id.* at p. 1535.) *Blackburn* interpreted the trial court’s order as implicitly preventing excess recovery, noting “[o]f course, each defendant is entitled to a credit for any actual payments by the other.” *Blackburn*, without discussing forfeiture, did modify the judgment to provide for joint and several liability “out of an excess of caution.” (*Ibid.*) Neither *Blackburn* nor the other cases cited by defendant state that the court *must* order joint and several liability. (*People v. Madrana* (1997) 55 Cal.App.4th 1044, 1049-1052; *People v. Arnold* (1994) 27 Cal.App.4th 1096, 1098-1100 (*Arnold*); *People v. Zito* (1992) 8 Cal.App.4th 736, 745.)

Section 1202.4, subdivision (j) provides that restitution paid “shall be credited to any other judgments for the same losses against the defendant arising out of the crime for which defendant was convicted.” “The court in *People v. Zito, supra*, [at p. 745] construed the term ‘defendant’ to include ‘codefendants.’ [Citation.] Thus if the combined payments made by multiple defendants exceed the victim’s loss, each defendant would be entitled to a pro rata refund of any overpayment.” (*Arnold, supra*, 27 Cal.App.4th at p. 1100.) Though *Arnold* discussed a predecessor statute (Gov. Code, §13967, subd. (c)), the language of the earlier and current versions of the law is similar. (*People v. Madrana, supra*, 55 Cal.App.4th at pp. 1050-1051.) Thus, the law protects

defendant against an overpayment to the victims. There was no error meriting a remedy on appeal.

DISPOSITION

The judgment is affirmed.

Richman, J.

We concur:

Kline, P.J.

Lambden, J.